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### Misjudging the History at the ICTY: Transitional and Post-Transitional Narratives About Genocide in Bosnia and Herzegovina

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**DOI**

[10.15166/2499-8249/431](https://doi.org/10.15166/2499-8249/431)

**Publication date**

2020

**Document Version**

Final published version

**Published in**

European Papers

**License**

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[Link to publication](#)

**Citation for published version (APA):**

Tromp, N. (2020). Misjudging the History at the ICTY: Transitional and Post-Transitional Narratives About Genocide in Bosnia and Herzegovina. *European Papers*, 5(3), 1191-1223. <https://doi.org/10.15166/2499-8249/431>

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## ARTICLES

### HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW – SECOND PART

edited by Grażyna Baranowska and León Castellanos-Jankiewicz

## MISJUDGING THE HISTORY AT THE ICTY: TRANSITIONAL AND POST-TRANSITIONAL NARRATIVES ABOUT GENOCIDE IN BOSNIA AND HERZEGOVINA

NEVENKA TROMP\*

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ABSTRACT: This *Article* explores the transitional, post-transitional and strategic narratives about the wars in the former Yugoslavia, more specifically in Bosnia and Herzegovina. The criminal justice narrative created by the International Criminal Tribunal for the former Yugoslavia (ICTY) dominates the transitional narratives about the Yugoslav wars. It is not uncommon that both sides – the victims and the perpetrators – express dissatisfaction with the justice outcome depending on the verdict. Transitional narratives based on the criminal trials are expected to provide clarity on the distinction between "bad" and "good" guys; between perpetrators and victims; between the criminality of the perpetrating side and the response of the victim's side. With the passage of time, all transitional narratives will be challenged by post-transitional narratives, launched by various societal and political actors for different reasons with specific objectives behind them. For example, the ruling post-conflict elites can decide to create a post-transitional narrative in which they will try to re-interpret or counter the existing transitional narratives with the goal to exonerate the policies of the predecessor regime that led to the violence by reintroducing the "politics of the past" into the "politics of the present" in the perusal of the still to be achieved political objectives of the predecessor regime. Using the example of the ICTY genocide judgments, this *Article* will explore how its transitional narrative of genocide

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has been undermined by the post-transitional narratives launched by the Serbian post-conflict elites in the perusal of the unfulfilled strategic goals of the predecessor regimes.

KEYWORDS: disintegration of Yugoslavia – ICTY – genocide – Bosnia-Herzegovina – Srebrenica – transitional justice.

## I. INTRODUCTION

In August 2018, the *Republika Srpska* Assembly revoked the “Report of the Commission about the events in Srebrenica in 1995”, a document adopted in 2004. The *Republika Srpska* (RS) is a territorial entity of the sovereign State of Bosnia-Herzegovina (BiH), as stipulated in the Dayton Peace Agreement of 1995.<sup>1</sup> The gravity of the crimes in Srebrenica had been confirmed in several judgments rendered at the International Tribunal for Former Yugoslavia (ICTY), an *ad hoc* court established in 1993 by the UN Security Council. The first ICTY judgment for the Srebrenica genocide was rendered in 2001 in the case against Radislav Krstić, a general in the RS Army (the VRS – *Vojska Republika Srpske*). Ultimately, the Srebrenica genocide became a symbol of the tragic and destructive nature of the war in BiH that lasted from 1992 to 1995. It also underlined the narrative of collective suffering of the Bosnian Muslims as the principal victims of genocide; and the Serb side as the principal perpetrator of genocide.<sup>2</sup> Krstić’s 2001 judgment was confirmed in the appeals’ judgment of 2004, the same year in which the RS parliament adopted the Report of the Commission about the events in Srebrenica. The Report prompted the then President of RS – Dragan Čavić – to issue a public apology, stating that the massacre of thousands of Bosnian Muslims at Srebrenica was “a black page in the history of the Serb people”.<sup>3</sup>

The announcement of the Report’s revocation 14 years later by the same Assembly was followed by the formation of two international commissions with the official man-

<sup>1</sup> *Serb leader’s Srebrenica regret*, in *BBC News*, 11 July 2004, news.bbc.co.uk, summarised the main points of the Report as follows: “According to the report: Bosnian Serb forces planned a three-stage operation: the attack on the town, the separation of women and children and the execution of the men; military and police units, as well as special units of the interior ministry, took part in the murders; four new graves are original sites while the other 28 are sites where bodies were reburied to hide traces of the massacre; the commission has data on 7,779 people missing in Srebrenica and has so far identified 1,332 of them”; T. TOPIĆ, *Otvaranje najmračnije stranice*, in *VREME*, 1 July 2004, www.vreme.com. On the withdrawal of the Report see D. KOVAČEVIĆ, *Bosnian Serb MPs Annual Report Acknowledging Srebrenica*, in *The Balkan Insight*, 14 August 2018, balkaninsight.com; A. SORGUĆ, *Bosnian Serbs’ War Commissions: Fact-Seeking or Truth-Distortion?*, in *The Balkan Insight*, 25 February 2019, balkaninsight.com.

<sup>2</sup> See, e.g., the ICTY press release of 2 August 2001, *Prosecutor v. Radoslav Krstić*, www.icty.org;

<sup>3</sup> ICTY judgment summaries: of 10 June 2010, *Prosecutor v. Popović et al.*, www.icty.org; of 26 March 2016, *Prosecutor v. Radovan Karadžić*, www.icty.org; of 22 November 2017, *Prosecutor v. Ratko Mladić*, www.icty.org; of 12 December 2012, *Prosecutor v. Zdravko Tolimir*, www.icty.org. See e.g. *Serb leader’s Srebrenica regret*, cit.

date to contextualise the crimes committed in the Sarajevo and the Srebrenica areas.<sup>4</sup> The appointment of the commissions to re-investigate these two particular crime sites was telling: the Sarajevo siege and the Srebrenica genocide gained global notoriety, as sites of unimaginable brutality of the Serb forces. These crimes occurred in front of the global audience from the first day of the war in 1992, carving the Serb side as the principal wrongdoer into the world's collective memory.<sup>5</sup> Sarajevo and Srebrenica became symbols of senseless suffering of the Bosnian Muslim civilian population for what were perceived as the cynical geostrategic ambitions of Serbia<sup>6</sup> under the leadership of Slobodan Milošević and in concert with the Bosnian Serb leadership.<sup>7</sup>

The Sarajevo commission consists of seven members who were asked to investigate the suffering of Serbs in Sarajevo from 1991 to 1995.<sup>8</sup> The Srebrenica commission consists of nine members who were asked to investigate suffering of all peoples in the Srebrenica region from 1992 to 1995.<sup>9</sup> Gideon Greif, its chairman, opened the first meeting in February 2019 stating that the aim of the commission was to establish the truth, of which there could be only one. He affirmed the commission's moral obligation to be true to the facts and to the victims.<sup>10</sup>

Russia's and Serbia's governments lauded the initiative as being long overdue after the anti-Serb bias that had been ongoing since the 1990s.<sup>11</sup> International diplomats reacted with apprehension, warning of the possible negative impact of this initiative in the

<sup>4</sup> The official names of the commissions are: "The Independent International Commission for investigation of the suffering of Serbs in Sarajevo from 1991 to 1995" and "The International Independent Commission for investigation of suffering of all peoples in the Srebrenica region from 1992 to 1995".

<sup>5</sup> See e.g. S. TANNER, *The Mass Crimes in the Former Yugoslavia: Participation, Punishment and Prevention?*, in *The International Review of the Red Cross*, 2008, p. 273 et seq.

<sup>6</sup> Serbia is a successor State of the Federal Republic of Yugoslavia (FRY) that existed between 1992 and 2003. It continued to exist as Serbia-Montenegro from 2003 to 2006. In 2006, Montenegro declared independence, leaving Serbia as the only legal successor of FRY.

<sup>7</sup> See e.g. I. TRAYNOR, *Srebrenica genocide: worst massacre in Europe since the Nazis*, in *The Guardian*, 10 June 2010, [www.theguardian.com](http://www.theguardian.com); C. LESLIE, *Sarajevo: A Portrait of the City 20 years after the Bosnian war*, in *The Guardian*, 14 December 2015, [www.theguardian.com](http://www.theguardian.com); I. SCARAMUZZI, *Pope Francis: Sarajevo, from a symbol of war to a place of unity between faiths*, in *Abouna.org*, 7 June 2015, [en.abouna.org](http://en.abouna.org); S. BROCKLEHURST, *Peter Howson returns to "hell" of Bosnian war with new painting*, in *BBC News*, 9 December 2019, [www.bbc.com](http://www.bbc.com).

<sup>8</sup> Rafael Isreali (chairman), Walter Manoschek (Austria); Darko Tanasković (Serbia); Laurence Armand French (US); Giuseppe Zaccaria (Italy); Viktor Bezruchenko (Russian Federation); Patrick Barriot (France).

<sup>9</sup> Gideon Greif (chairman), Adenrele Shinaba (Nigeria); Juki Osa (Japan); Roger Bayard (Australia); Cheng Ji (China); Giuseppe Zaccaria (Italy); Marcus Goldbach (Germany); Laurens Armand French (USA); and Marija Đurić (Serbia). Greif is a professor of Jewish and Israeli History at the University of Texas and a leading researcher at the Israeli Holocaust Institute, Shem Olam.

<sup>10</sup> See the interview with *Gideon Grajf: Cilj međunarodne komisije je doći do istine o Srebrenici koja je samo jedna*, in *Srpskainfo*, 7 February 2019, [srpskainfo.com](http://srpskainfo.com).

<sup>11</sup> See *Rusija pozdravila formiranje komisije o istraživanju zločina u Srebrenici i stradanju Srba u Sarajevu*, in *Klix*, 4 April 2019, [www.klix.ba](http://www.klix.ba).

reconciliation processes of the still fragile Bosnian society. At the same time, Bosnian media expressed scepticism about the sincerity of the expressed mandate of these commissions, suggesting that they had been created in order to produce a “more convenient truth” or “truth on demand” to serve Serbia and the RS’s geopolitical interests.

The human rights activists and other long-time observers of the Yugoslav conflicts see the commissions’ emphasis on the Serb victims as a carefully conceived plan aimed at the “equalisation” of criminal responsibility for the atrocities of all sides, and an attempt to “relativise” the Serb responsibility for the criminal plan that led to the commission of crimes against non-Serbs in BiH.<sup>12</sup> The effect of the initiative to reassess the crimes is to send a message to the outside world that the Bosnian Muslims were not just victims; they were also perpetrators of the crimes against the Serbs in Sarajevo and Srebrenica. This “relativisation” of the crimes would recast the Serb side from “principal wrongdoer” to “warring party” in the BiH war – alongside the Bosnian Croats and the Bosnian Muslims.<sup>13</sup>

Could there be a legitimate reason for the existence of the commissions? For example, are there new authoritative sources that were unavailable during the ICTY’s trials that need to be scrutinised? If persuasive enough evidence had existed during the ICTY trial to counter the genocide and other criminal charges, why did the defence lawyers in the Sarajevo and Srebrenica trials not use it to counter the prosecution’s case? Have these commissions simply been created to give a new interpretation of the already existing and well-known facts in order to produce yet another version of the Bosnian war narrative?

In a recent study on genocide denial, Monica Hanson Green made an inventory of the genocide denial narratives. She listed the following issues as relevant: contestation of the numbers of the victims; reversal of the “perpetrator-victim” role by stressing the need of their own group to “self-defence” from the “other group” that they cast as “rebels” or “terrorists”.<sup>14</sup>

Will these new interpretations be weaved into the tapestry of the already existing historical and legal narratives of the past events in order to create more confusion with the purpose of strengthening the already existing denial narrative?<sup>15</sup>

Transitional justice periods produce multiple narratives of what happened, how and by whom and the question is how the competition between multiple truths will reflect

<sup>12</sup> For the reactions by human rights and transitional justice experts and activists, see: D. TORCHE, *Prvi sastanak spornih komisija za Srebrenicu i Sarajevo krajem marta 2019*, in *Oslobodjenje*, 25 March 2019, [www.oslobodjenje.ba](http://www.oslobodjenje.ba).

<sup>13</sup> *Ibid.*

<sup>14</sup> L. NETTELFIELD, S. WAGNER, *Srebrenica in the Aftermath of Genocide*, Cambridge: Cambridge University Press, 2013; see also M. HANSON GREEN, *Srebrenica Genocide Denial Report 2020*, Potočari: Srebrenica Memorial, 2020, p. 31.

<sup>15</sup> K. BART, M. ZUVELA, *Bosnian Serb Leader: Srebrenica was 20th century’s “Greatest Deceptio”*, in *Reuters*, 25 June 2015, [www.reuters.com](http://www.reuters.com). See for example of genocide denial: Z. RAHIM, *Srebrenica Genocide is “Fabricated Myth”*, *Bosnian Serb Leader Says*, in *The Independent*, 14 April 2019, [www.independent.co.uk](http://www.independent.co.uk).

on the ways in which facts will be memorialised. The post-transitional justice period will often create a narrative in reaction to the transitional narratives for the purpose of correcting and adapting them to the concrete political agenda of the post-conflict societies and state elites. For example, the post-conflict state elites might decide to (re)introduce the “politics from the past” into the “politics of the present”.<sup>16</sup>

This *Article* will place the discourse of genocide in the framework of transitional and post-transitional justice dynamics. We shall argue that by attempts to re-evaluate the transitional narrative of the genocide in BiH – of which the creation of the two commissions in 2018 has been an example, the post-conflict state elites in Serbia and the RS aim to: 1) undermine the transitional narrative of genocide as produced at the ICTY; 2) relativise the criminal responsibility of the Serb side in the 1990s war by stressing the suffering of the Serb victims in the war in BiH; and 3) legitimise the reintroduction of “the politics of the past” to “the politics of the present” by returning to the geopolitical designs of the war time regime, which included the expansion of the post-Yugoslav Serbian State in the territory of the RS.

To investigate these propositions this *Article* shall first explore the conceptual framework of the transitional justice concepts of “the transitional narrative”, “post-transitional narrative,” and “the strategic narrative”. Second, it will analyse the transitional narrative of genocide as produced by the ICTY trial judgments and their impact. Finally, the *Article* will investigate the post-transitional narrative by exploring when, how and why did post-conflict Serb elites decide to engage in revisionism by introducing the “politics of the past” in the “politics of the present”.

### 1.1. THEORETICAL FRAMING OF TRANSITIONAL, POST-TRANSITIONAL JUSTICE AND STRATEGIC NARRATIVES

Transitional narratives based on international criminal trials for mass atrocities deal with individual criminal responsibility and as such memorise past events by addressing the questions: what exactly happened; why and how it happened; and who is responsible for it. It is a narrative about the criminality of the political plan; about the individual responsibility for the planning and execution of the mass atrocities to achieve concrete (geo)political objectives. These narratives are expected to distinguish victims from wrongdoers and to record convictions as well as acquittals.

Analysing the role played by the law in “periods of radical political transformation”, Transitional justice scholar Ruti Teitel argues that transitional legal proceedings create “transitional narratives”, which she describes as processes of “collective memory”. Tran-

<sup>16</sup> For discussion on post-transitional justice see C. COLLINS, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador*, University Park: Pennsylvania University Press, 2010; F.A. RAIMUNDO, *Post-Transitional Justice?: Spain, Poland and Portugal Compared*, doctoral thesis, European University Institute, 2012.

sitional narratives are likely to be challenged and replaced in the future.<sup>17</sup> The transitional justice field of research has expanded rapidly since the 1990s due to the establishment of the legal regime where the breaches of human rights and the commission of mass atrocities were prosecuted and tried at the international and national criminal tribunals in the post-Cold War world. Transitional justice narratives emerging from the Yugoslav wars have overwhelmingly relied on the ICTY trials. Yet, the transitional justice narrative is broader than the texts contained in the judgments and the verdicts: it includes *inter alia*: the indictments – who is indicted and why – and who has not been indicted and why not; the trial evidence made public during the proceedings; and, finally, the texts of judgments and verdicts that convict or acquit. Transitional justice narratives will impact the collective memory and historiography of the violent break-up of Yugoslavia in regard to a number of important topics, such as: which side started the violence; which side is responsible for mass atrocities; which side is the victim side? All sides in the conflict will try to influence the transitional narrative in the post-conflict period. This *Article* will address the issue of when, why and how did the post-conflict elites in Serbia and *Republika Srpska* challenge the transitional justice narrative of genocide.<sup>18</sup> In order to address this question, the theoretical approach of the transitional justice narrative will be expanded with the post-transitional justice approach. The post-transitional justice researchers deal with the questions of how, why, when and by which actors the transitional narrative can – or inevitably will be – challenged.

Post-transitional justice scholars argue that a post-transitional justice period can produce a narrative of unity, consensus, forgiveness and reconciliation, but that it can also lead to attempts to reshape the memory of the conflict as articulated by the transitional narratives. When societal or political actors on all sides of the spectrum – perpetrating and victimised side – express dissatisfaction with the way the crimes, injustices and harms of the past have been depicted in the transitional narrative – they will try to correct, distort, or upend it.

One of the pioneers in the field of the post-transitional justice is Cath Collins, a scholar who studied the transitional justice processes in El Salvador and Chile who introduces the term “post-transitional justice” as a concept that evaluates “the comprehensiveness and sufficiency of transitional accounts of a conflict”.<sup>19</sup> Collins sees post-transitional justice as being rooted in transitional justice, while at the same time trying

<sup>17</sup> See for the discussion R. TEITEL, *Transitional Justice*, New York: Oxford University Press, 2000, pp. 4, 20, 70-117, 115.

<sup>18</sup> The term “post-conflict elites” will be applied to: 1) the state actors with access to political decision-making and with institutional support for the implementation of the decisions; 2) the public and private media outlets with shared or overlapping ideologies or political and societal interests; 3) the national and international intellectuals and professionals who promote the image of Serbia as a victim of globalisation, with the ICTY as the instrument of the globalisation.

<sup>19</sup> C. COLLINS, *Post-Transitional Justice*, cit., p. 22.

to depart from it.<sup>20</sup> Collins identified six ways in which post-transitional justice differs from transitional justice: 1) post-transitional justice is interested in “questions of the quality, reach, and perfectibility” of post-conflict or post-dictatorship democratic orders, while transitional justice focuses on the “minimum institutional requirements” for the establishment of such a democracy; 2) post-transitional justice questions “the comprehensiveness and sufficiency” of transitional justice; 3) post-transitional justice is mainly advocated and influenced by private actors working from “above” and “below” the State; 4) post-transitional justice is “multi-sited, multi-actor and multi-referential”; 5) different actors attribute different goals and meanings to the term; 6) post-transitional justice is likely to be more internationalised than transitional justice.<sup>21</sup>

For the present *Article*, the concepts developed by Filipa Raimundo, a scholar who studied post-transitional justice in Spain, Portugal, and Poland, are more applicable. Raimundo defines the concept of “post-transitional justice” as “the re-emergence of the issues of the authoritarian past onto the political agenda after the democratic consolidation”.<sup>22</sup> Raimundo links the success of transitional period mechanisms to political willingness and institutional capacity and concludes that on a longer run the institutional capacity will be decisive for a transitional narrative’s success.<sup>23</sup> When exploring the link between the “politics of the past” and the “politics of the present” Raimundo argues that “the past returns to the political agenda because parties aim to change the dominant narrative of the past, but also the narrative of the transition and of the transitional justice process”.<sup>24</sup>

The post-conflict elites can decide to re-interpret the already existing transitional narratives or to create new ones in order to put forward a more convenient truth. For that purpose, the strategic narratives will be created according to which political actors attempt to “create a shared understanding of the world, of other political actors, and of policy [...]”.<sup>25</sup> A strategic narrative will be used by the post-conflict elites to produce strong counternarratives, to strengthen the legitimacy of their rule and to reaffirm its power position.<sup>26</sup> The strategic narrative will use the language with the aim to – for example –rehabilitate the wrongdoers, discredit political rivals, and undermine the victims’ narrative in order to affirm and continue implementing unfulfilled political goals as legitimate and justified.

<sup>20</sup> *Ibid.*, pp. 22-24.

<sup>21</sup> *Ibid.*

<sup>22</sup> F.A. RAIMUNDO, *Post-Transitional Justice?*, cit., pp. xv, 10, 23.

<sup>23</sup> *Ibid.*, pp. 10, 42-44.

<sup>24</sup> *Ibid.*, pp. xv, 23, 95, 176.

<sup>25</sup> A. MISKIMMON, B. O’LOUGHLIN, L. ROSELLE, *Introduction*, in A. MISKIMMON, B. O’LOUGHLIN, L. ROSELLE (eds), *Forging the World: Strategic Narratives and International Relations*, Ann Arbor: University of Michigan Press, 2017, p. 1.

<sup>26</sup> *Ibid.*

This *Article* argues that the process of the disintegration of Yugoslavia has not finished for Serbia, because the country's state elites do not accept the current borders of Serbia as final and permanent. In doing so, the *Article* will show the post-transitional narratives which are being put forward to legitimise the return to the geopolitical designs of the predecessor regime that were not achieved during the wars of the 1990s.

By investigating the transitional and post-transitional justice processes in Serbia, we shall consider the period between 2008 and 2012 as a turning point for the state elites to shift from a transitional to a post-transitional justice agenda. This shift was marked by the Socialist Party of Serbia's (SPS) return to power as one of the parties in a coalition government of Serbia, after eight years of being in the opposition. This is the party formed by Serbia's war time President Slobodan Milošević in 1990, the political reactivation of which led to the return to irredentist politics, and to the reintroduction in 2011 of an official governmental "strategy for preserving and strengthening the relations between the home country and the diaspora and the home country and Serbs in the region".<sup>27</sup>

Since the formation of a populist government in 2012, consisting of a coalition with the two nationalist parties – the Serbian Progressive Party (SNS – *Srpska napredna stranka*) and the SPS – the borders of the post-Yugoslav Serbia have become an open political question. Serbia's geopolitical goals in BiH aim at the expansion of the post-Yugoslav Serbian State with the territory of the RS; Serbia still has territorial claims in the north of Kosovo; in Montenegro the attempts by Serbia to regain political control in the area by mobilising its ethnic Serb population through the Serbian Orthodox Church against the Montenegrin pro-Western government led to a narrow victory of the pro-Serbia coalition at the August 2020 parliamentary elections with a pro-Serbia government for the first time since the independence of Montenegro as of 2006.<sup>28</sup> This has been considered as a victory for Serbia's nationalist agenda according to which the territory of Montenegro belongs to "Serbia's world".<sup>29</sup>

## II. TRANSITIONAL NARRATIVE OF GENOCIDE IN BOSNIA AND HERZEGOVINA

Given the efforts of Serbia's and RS's political elites to re-address the responsibility for genocide we shall first investigate the transitional narrative of genocide. The main fea-

<sup>27</sup> Ministry of the Religion and Diaspora of Republic of Serbia, *Strategija očuvanja i jačanja odnosa matične države i dijasporne i matične države i Srba u regionu*, Belgrade, 2011, dijaspora.gov.rs. In translation: "The Strategy for preserving and strengthening the relations between the home country and the diaspora and the home country and Serbs in the region", pursuant to Art. 12 of the Law on Diaspora and Serbs in the Region and Art. 45, para. 1, of the Government Law.

<sup>28</sup> M. Jovičević, *Bugajski: Vučić uz podršku Kremlja pokušava da ostvari Miloševićev projekt*, in *POBJEDA*, 24 September 2020, www.pobjeda.me.

<sup>29</sup> See the TV Interview with President of Montenegro Milo Đukanović, *Đukanović šokira: Idemo u šumu i oružjem ako treba braniti Crnu Goru! Rat u CG je rat u regionu!*, in *FACE TV*, 18 September 2020, www.youtube.com.

tures of this narrative in Bosnia and Herzegovina shall be investigated by looking into the temporal and spatial scope of the genocide charges in the ICTY indictments and what has been proved in the related judgments; and by looking into the perpetrators and co-perpetrators from Serbia and the RS, who were named as members of the joint criminal enterprise (JCE) networks in the genocide indictments and whose ties have been proved in the related judgments.

## II.1. THE GENOCIDE CHARGES FOR FACTS OCCURRING IN 1992

The ICTY indictments for the 1992 genocide covered seventeen municipalities in the northern part and two in the eastern part of Bosnia. Seven ICTY indictees were charged for crimes of genocide committed in 1992 (Table 1); eleven have been charged with the crime of genocide in Srebrenica in 1995 (Table 2). Slobodan Milošević, Radovan Karadžić, and general Ratko Mladić were the only indictees who were charged with genocides for acts committed in both 1992 and 1995. Because of the temporal scope of genocide charges in their respective indictments, as well as because of the JCE doctrine – of found guilty of genocide – these three trials constitute the crux of the general understanding of the genocidal plan though the links between Serbia and RS.

Table 1 shows seven individuals were indicted for genocide in 19 municipalities in northern and eastern Bosnia in 1992. Radislav Brđanin was charged with genocide in 12 municipalities, followed by Radovan Karadžić in ten and Slobodan Milošević in seven municipalities. Most municipalities featured in six genocide indictments.

<b>INDICTEE →</b> <b>1992 MUNICIPALITY ↓</b>	Goran Jelisić	Radislav Brđanin	Momčilo Krajišnik	Biljana Plavšić	Slobodan Milošević	Radovan Karadžić	Ratko Mladić	<b>Number of indictees per municipality</b>
1. Banja Luka		+						1
2. Bijeljina					+			1
3. Bosanska Krupa		+						1
4. Bosanski Novi		+	+	+	+			4
5. Bosanski Petrovac		+						1
6. Bratunac						+		1
7. Brčko	+		+	+	+	(+)		5
8. Foča						+	+	2
9. Donji Vakuf		+						1
10. Ključ		+	+	+	+	+	+	6

11. Kotor Varoš		+	+	+	+	(+)	+	6
12. Prijedor		+	+	+	+	+	+	6
13. Prnjavor		+						1
14. Sanski Most		+	+	+	+	+	+	6
15. Teslić		+						1
16. Šipovo		+						1
17. Višegrad <sup>30</sup>						(+)		1
18. Vlasenica						+	+	2
19. Zvornik						+		1
<b>Number of municipalities per indictee</b>	1	12	6	6	7	10	6	<b>48</b>

TABLE 1. 1992 genocide charges in the ICTY indictments per indictee and per municipality.

Table 2 shows that none of the seven indictees were found guilty of genocide for 1992. It also shows that five of seven indictees were politicians; one was a high-level military; and one was a low-level policeman.

<b>JCE links between the indictees from Serbia and RS for 1992 genocide charges ⇒</b>				
<b>Indictees ↓</b>	Indicted for genocide as a RS official	JCE links between individuals from Serbia and RS charged in the indictment	Politician	Bosnian Croats, included in the indictment as the protected group
Slobodan Milošević	-	+	+	+
Radovan Karadžić	+	+	+	+
Ratko Mladić	+	+	-	+
Momčilo Krajišnik	+	-	+	-
Biljana Plavšić	+	-	+	-
Goran Jelisić	+	-	-	-
Radoslav Brđanin	+	-	+	+

TABLE 2. 1992 Genocide Indictments. The JCE Links with Serbia; Protected groups.

<sup>30</sup> Three municipalities – Brčko, Kotor Varoš and Višegrad – were mentioned in the third amended indictment of Radovan Karadžić but then crossed out in the prosecution's marked-up indictment. See ICTY, third amended indictment of 27 February 2009, IT-95-5/18-PT, *Prosecutor v. Radovan Karadžić*, para. 38.

In four of seven 1992 genocide indictments, the prosecution did not link the accused from the *Republika Srpska* – Biljana Plavšić, Momčilo Krajišnik, Radoslav Brđanin and Goran Jelisić - with the co-perpetrators from Serbia. In three other indictments - Milošević's, Karadžić's and Mladić's - there was a list of the alleged co-perpetrators, *i.e.* the named members of the JCE, of which not all named co-perpetrators were indicted; and from the named co-perpetrators who were indicted not all were indicted for the crime of genocide.<sup>31</sup>

## II.2. BOSNIAN MUSLIMS AND BOSNIAN CROATS: TWO PROTECTED GROUPS TARGETED BY THE SERB FORCES IN GENOCIDAL CRIMES IN 1992

The genocide indictments for 1992 covered the area where Bosnian Muslims and Bosnian Croats lived along with their Serb neighbours in the ethnically mixed municipalities that were claimed by Serbs as a part of the six strategic objectives identified in May 1992 by the RS Assembly: the northwest of BiH was identified as Posavina Corridor.<sup>32</sup> The ICTY genocide charges for 1992 extended to Bosnian Croats as a protected group alongside the Bosnian Muslims. When the first ICTY genocide indictments were filed in July 1995 against Radovan Karadžić and Ratko Mladić for crimes that took place in 1992, the Bosnian Croats were also identified as a protected group targeted in the genocidal campaign conducted by the Serb forces.<sup>33</sup> (see Table 2) In the 1999 amended indictments against Radoslav Brđanin, the wartime President of the Autonomous Republic of Krajina (ARK, a region in northwest Bosnia that was a part of the RS) was charged with genocide for crimes committed from May to June 1992 in 12 municipalities. Just like in Milošević's, Karadžić's and Mladić's indictments, the prosecution charged Brđanin for the commission of genocide in 1992 against Bosnian Muslims and the Bosnian Croats.<sup>34</sup>

<sup>31</sup> E.g., the named JCE members in Karadžić indicted for genocide were: Momčilo Krajišnik, Ratko Mladić, Slobodan Milošević, Biljana Plavšić, Nikola Koljević, Mićo Stanišić, Momčilo Mandić, Jovica Stanišić, Franko Simatović, Željko Ražnatović "Arkan", and Vojislav Šešelj. Only Krajišnik, Mladić, Plavšić and Milošević were indicted for genocide. Koljević has never been indicted at all and the rest were indicted for crimes other than genocide. *Prosecutor v. Radovan Karadžić*, cit., para. 11.

<sup>32</sup> The Six Strategic Goals has been one of the crucial documents that was originated by a political institution in which the Serb claimed territories have been identified at the very beginning of the war in BiH. It made the Serbian military campaigns in the named areas in BiH premediated and criminal because it was aimed against non-Serb population. The Serb forces engaged in ethnic separation, ethnic cleansing and ethnic homogenization that led to mass atrocities against non-Serbs, including the crime of genocide.

<sup>33</sup> E.g., ICTY: indictment of 24 July 1995, IT-95-5-I, *Prosecutor v. Radovan Karadžić and Ratko Mladić*, para. 14, 18, 19 and 20; indictment of 14 March 1999, IT-99-36-T, *Prosecutor v. Radislav Brđanin*, paras 27-29.

<sup>34</sup> *Ibid.*, paras 18, 19, 20.

### II.3. RELEVANCE OF THE ICTY JUDGMENTS ON SERBIA'S INVOLVEMENT IN THE INTERNATIONAL ARMED CONFLICT IN BOSNIA AND HERZEGOVINA

The very first ICTY judgment, the one rendered in the trial of Duško Tadić, a camp commander who was tried for crimes in the Prijedor area committed between 23 May and 31 December 1992, determined that Serbia was involved in the international armed conflict in BiH until 19 May 1992, the date when the former Yugoslav army – the JNA – formally withdrew from BiH. After the disintegration of Yugoslavia, the JNA split into three Serb armies: the VJ – the official army of the Federal Republic of Yugoslavia (FRY) – the newly formed Yugoslav federation consisting of Serbia and Montenegro; the VRS – the Bosnian Serb Army; and the SVK – the Croatian Serb army. The judges wrote that the question whether after 19 May 1992 the Bosnian conflict continued to be international or became instead exclusively internal was an issue of determining “whether Bosnian Serb forces – in whose hands the Bosnian victims in this case found themselves – could be considered as *de iure* or *de facto* organs of a foreign Power, namely the FRY”.<sup>35</sup> No other ICTY judgment determined that the FRY, *i.e.* Serbia, was involved in the international armed conflict in BiH from 19 May 1992 onwards. This stands in contrast to the political reality, given that the UN Security Council imposed sanctions against the FRY as of 24 May 1992 because of its involvement in the war in BiH, which were partially lifted once the war in BiH was over in 1995, but continued in the form of the “outer wall” sanction until October 2000, when the FRY became a UN Member State.<sup>36</sup>

### II.4. TRANSITIONAL NARRATIVE OF THE SREBRENICA GENOCIDE

The ICTY genocide judgments for Srebrenica and Žepa determined that the genocide was planned and committed in eastern Bosnia during the period between March and the end of July 1995. The ICTY judgments determined that the genocidal intent was first expressed in the Supreme Command Directive 7, issued by RS President Radovan Karadžić in March 1995. This document shows that Karadžić ordered the VRS to create “an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa”.<sup>37</sup> Ratko Mladić, the commander of the VRS, was in charge of the implementations of Directive 7 and the VRS Drina Corps were the major force on the ground tasked with the military operations in Srebrenica and Žepa. In the genocide judgments against the Drina Corps perpetrators – the *Popović* case – the ICTY judges found that genocidal intent was conceived in the morning of 12 July, when the VRS leadership ordered the separation of the Bosnian Muslim men in the UN compound in Potočari and executed them. The judgment states that on that same day the

<sup>35</sup> ICTY, judgment of 15 July 1999, IT-94-1-I, *Prosecutor v. Duško Tadić*, para. 89.

<sup>36</sup> See e.g. E. HASANI, *The “Outer Wall” of Sanctions and the Kosovo Issue*, in *Perceptions: Journal of International Affairs*, 1998, sam.gov.tr.

<sup>37</sup> See ICTY, judgment of 15 October 1999, IT-05-88-T, *Prosecutor v. Vujadin Popović et al.*, para. 199.

VRS sent some 50 buses to Potočari where members of the Bosnian Serb Forces, the VRS Forces, police forces from the Ministry of the Interior in Republika Srpska (MUP), boarded all men aged 15 to 65 on the buses.<sup>38</sup>

The criminal plan at issue aimed at driving the Bosnian Muslims from the Srebrenica and Žepa enclaves. The judgment goes on to state that on 13 July “there were several random killings of Bosnian Muslims by members of the Serb forces”.<sup>39</sup> On the evening of 13 July, about thirty thousand Bosnian Muslims had been transferred on buses to Bosnian Muslim territory: no Bosnian Muslims were left in Potočari or Srebrenica. On 12 and 13 July, the VRS units attacked the column of Bosnian Muslims who were moving from Srebrenica to Tuzla, the town that was under the control of the BiH Army.

The judges found that “the murder plan originally directed at the men in Potočari was extended to Bosnian Muslim men who were captured or surrendered from the column”.<sup>40</sup> By 13 July, Bosnian Serb Forces had detained approximately six thousand Bosnian Muslim prisoners in the Bratunac area.<sup>41</sup> Some 7,826 persons died or went missing after the fall of Srebrenica.<sup>42</sup> The ICTY indictments did not connect in a consistent way the RS indictees with the network of co-perpetrators from Serbia, which was also reflected in the ICTY judgments according to which the genocide in Srebrenica and Žepa were incidents that happened in the heat of the combat for which the individuals from the RS political and military institutions bear all the responsibility.

Contrary to the expectation that the RS leaders were linked in evidence with their counterparts from Serbia, the ICTY judgments have not determined that the evidence presented by the prosecution was sufficient to prove the JCE links between the individuals from RS who were found guilty of genocide with the JCE members from Serbia who were named in the indictments. For that purpose, the JCE links with Slobodan Milošević would be the most effective given that he was the only person from Serbia indicted for the crime of genocide. Following the ICTY indictment, only Radovan Karadžić and Ratko Mladić were indicted for genocide in 1992 and 1995; in their indictments there was a JCE network of the named co-perpetrators, among whom Slobodan Milošević also appeared. However, in the ICTY judgments for Karadžić and Mladić, both defendants were acquitted for the genocide charges in 1992; the judges also determined that the prosecution did not prove Milošević’s participation in the planning and executing of the crime of genocide in 1995 during Karadžić or Mladić trials.

Table 3 shows the indicted tried for the crime of genocide in Srebrenica in July 1995.

<sup>38</sup> See judgment summary Prosecutor v. Popović et. al., cit.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<b>JCE links between the indictees from Serbia and RS →</b>					
<b>Indictees ↓</b>	Indicted as a RS soldier/official	JCE links with Serbia/RS charged in the indictment	JCE links with Serbia/RS proved in the judgments	Genocide conviction	Sentence
S. Milošević died in 2006	-	+	-	-	No judgment
R. Karadžić	+	+	-	+	Life*
R. Mladić	+	+	-	+	Life – appeals judgment pending
R. Krstić	+			+	35 years
Z. Tolimir	+	-		+	Life
V. Popović	+	-		+	Life
Lj. Borovčanin	+	-		-	17 years for other crimes
V. Pandurović	+	-		-	13 years for other crimes
Lj. Beara	+	-		+	Life
D. Nikolić, died in 2011	+	-		+	35 years
V. Blagojević	+	-		-	15 years for other crimes
<b>Summary</b>	<b>10</b>	<b>3</b>	<b>0</b>	<b>7</b>	<b>615 years</b>

TABLE 3. The list of indictees and the convictions for the 1995 genocide crimes and the JCE links between the RS and Serbia. \*The life sentence counts for 100 years in prison.

## II.5. IMPORTANCE OF THE GENOCIDE CHARGES IN SLOBODAN MILOŠEVIĆ'S TRIAL

Slobodan Milošević, who was the President of Serbia from 1990 to 1998 and of the Federal Republic Yugoslavia from 1998 to 2000, was indicted for the crime of genocide. Milošević was put on trial in 2002, charged for crimes committed in Croatia, BiH and Kosovo in the period between 1990 to 1999. The Milošević trial was also of great importance for the post-conflict elites in Serbia. If found guilty of genocide, the findings in the judgment would have been used by the State of BiH in the genocide lawsuit filed at the International Court of Justice (ICJ) against the State of Serbia in 1993.

His trial never led to a final judgment because Milošević died before its completion. Although unfinished, Milošević's trial serves as an important legal archive for the issues concerning the evidence and legal procedures. At the core of the Milošević trial were the genocide charges in eight municipalities on the territory of northern and eastern Bosnia in 1992 and 1995.

Milošević was charged as President of Serbia for the genocide in BiH in 1992 and 1995. The evidence on the genocidal intent in his case was linked to the history of the Serbian State Ideology, also known as “Greater Serbia”, which had its origins in the 19<sup>th</sup> century.<sup>43</sup> This ideology initially propagated the creation of a Serbian State in its historical and ethnic borders. It was reinvented during the Milošević’s regime as the solution for a post-Yugoslav Serbia conceptualised in one simple sentence: “All Serbs in a Single State”.<sup>44</sup>

Milošević was the only official from Serbia indicted and tried for the crime of genocide in BiH. He was indicted for the genocide charges in seven municipalities in 1992: Brčko, Prijedor, Sanski Most, Bijeljina, Ključ, and Bosanski Novi; and for the genocide in Srebrenica in 1995.<sup>45</sup> In his Bosnian indictment, Bosnian Muslims and Bosnian Croats were recognised as the protected groups targeted by genocide in 1992. However, in the pre-trial brief, the prosecution decided to pursue the genocide charges only against the Bosnian Muslims.

In the Milošević case the ICTY prosecution put together a genocide case: Milošević’s alleged responsibility for the genocide in BiH was to be proved via the JCE links with the co-perpetrators from the RS institutions. The Bosnia indictment alleged that Milošević had participated in a JCE from at least 1 August 1991 to 31 December 1995, the purpose of which was to forcibly remove non-Serbs from large areas of BiH. The indictment also alleged that Milošević in concert with others had “planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation and execution of the destruction” of thousands of Bosnian Muslims beginning on or around 1 March 1992. In some places, the JCE was said to have specifically targeted “educated and leading members”<sup>46</sup> of the Bosnian Muslim community for extermination. Further, it was alleged that thousands more had been detained in the most inhumane conditions, “calculated to bring about [their] partial physical destruction”,<sup>47</sup> and had been tortured, raped, and starved as part of the genocidal process. Milošević was said to have effectively controlled other members of the JCE as well as various armed forces – including paramilitary groups – and was therefore responsible for the murder and forced transfer of non-Serbs in Bosnia, as well as for the intentional destruction of large numbers of cultural and religious institutions, historical monuments, and sacred sites.<sup>48</sup>

<sup>43</sup> See: N. TROMP, *Prosecuting Slobodan Milošević*, London: Routledge, 2016, pp. 60-75.

<sup>44</sup> *Ibid.*, pp. 74-75.

<sup>45</sup> ICTY, decision of 22 November 2001, IT-01-51-I, *Prosecutor v. Slobodan Milošević*, para. 32.

<sup>46</sup> *Ibid.*, para. 32 a.

<sup>47</sup> *Ibid.*, para. 32 d.

<sup>48</sup> *Ibid.*, para. 35 j.

## II.6. MILOŠEVIĆ, MENS REA AND CRIMINALITY OF THE PLAN

The prosecution argued that Milošević's political plans derived from his attempt to create a State that would incorporate all Serbs, also known as the Greater Serbia ideology, which is associated with territorial expansionism. The ICTY prosecution argued that the history of efforts to achieve this enlargement has been marked with mass atrocities against non-Serb populations. To establish that Milošević's state of mind was a criminal one, the prosecution presented evidence of his adoption of this ideology. Milošević promoted the Greater Serbia ideology without using the term, but his rhetoric in the late 1980s and the platform of his party in 1990 identified the protection of Serbs living outside of Serbia as a priority and espoused "the right of the Serb people to self-determination". Arguing that self-determination for Serbs would indeed expand the territory of a Serb State, the prosecution introduced the term "*de facto* Greater Serbia" to describe the variant of this ideology espoused by Milošević. In its prosecution of Slobodan Milošević, the ICTY dealt with Serbia's role in planning and committing the crime of genocide in BiH in the most thorough way. It was in the Milošević trial that the prosecution reconstructed the criminal plan and dealt with the evidence of premeditated planning by Serbia's leadership to create a Serb ethnic State on the Croatian and Bosnian territories.<sup>49</sup> The Serb leadership first carved out the claimed territories in the process called "ethnic separation"; subsequently the claimed territories were "ethnically homogenised". These policies led to the commission of crimes against the non-Serb population and the creation of the *Republika Srpska Krajina* (RSK) in Croatia and the *Republika Srpska* (RS) in BiH. The goal for creating the Serb territories in Croatia and BiH was to join these territories with Serbia. The prosecution argued that Milošević and his collaborators were aware that their plan to carve out the Serb territories in Croatia and BiH based on the ethnic separation and homogenisation in Croatia and BiH could be achieved only by violence and the commission of crimes against the non-Serbs living on

<sup>49</sup> See e.g. N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 119-121. The prosecution's evidence and arguments about the criminality of the plan have been summarised at the end of the prosecution case in the Slobodan Milošević's trial. See the Prosecution Response of 24 March 2004 to *Amici Curiae* Motion for Judgment of Acquittal Pursuant to Rule 98 bis, quoted in ICTY, decision on motion for judgment of acquittal of 16 June 2004, IT-02-54-T, *Prosecutor v. Slobodan Milošević*, also known as "half-judgment", para. 4. In para. 144 of the decision, the prosecution's position has been stated as: "According to the Prosecution, the evidence supports a finding that there was a systematic pattern according to which municipalities in Bosnia and Herzegovina targeted for inclusion in the Serbian state were taken over by the Bosnian Serbs and that a systematic pattern developed according to which Serb forces set the framework for the commission of and committed genocidal and persecutory crimes". Two documents detail the premeditated way the ethnic separation was planned and executed. The first document was "Instructions issued by the SDS for the Organization and Activity of the Organs of the Serbian people in Bosnia and Herzegovina in Extraordinary Circumstances" of 19 December 1991 Exhibit P434.3a. The second document is "The Six Strategic Objectives" of May 1992. See *ibid.*, paras 146, 147.

the territories claimed by Serbia.<sup>50</sup> The prosecution argued that the worst crime - including the crime of genocide - was committed in BiH in those municipalities which the Serbs claimed for geostrategic reasons of territorial congruity, but where they did not constitute the majority of the population.<sup>51</sup>

## II.7. GENOCIDE IN THE HALF-JUDGMENT OF THE MILOŠEVIĆ TRIAL

When Slobodan Milošević died in 2006, some three weeks before the end of his trial, the decision on motion of acquittal (hereinafter the Half-Time Judgment) of June 2004 was the only official document that assessed the genocide charges against Milošević.<sup>52</sup> The Half-Time Judgment is a decision by the judges on the evaluation of the evidence tendered by the prosecution to prove the concrete counts in the indictment.<sup>53</sup> Namely, after the prosecution concluded its part of the trial, the defence filed a motion for acquittal arguing that the charges for the 1992 and 1995 genocide should be dropped from the case. The prosecution replied with counterarguments and the judges determined that: "A Trial Chamber could be satisfied beyond reasonable doubt that there existed a joint criminal enterprise, which included members of the Bosnian Serb leadership, whose aim and intention was to destroy a part of the Bosnian Muslim population, and that genocide was in fact committed in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi". The judges wrote that: "The scale and pattern of the attacks, their intensity, the substantial number of Muslims killed in the seven municipalities, the detention of Muslims, their brutal treatment in detention centres and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group are all factors that point to genocide".<sup>54</sup> The judges reserved their position to deliver a different judgment at the end of the case: the test of proof in the Half-Time Judgment was based on the standard of whether there was "a case to answer"; the trial judgment needs to satisfy the standard of proving "beyond reasonable doubt" the charges in the indictment. The judges concluded that their decision "does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge; that is so because the standard for determining sufficiency is not evidence on which a tribunal should convict, but evidence on which it could convict".<sup>55</sup>

<sup>50</sup> N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 141, 152, 155, 157, 161, 167. See also IT-02-54-T, *Prosecutor v. Slobodan Milošević*, cit., paras 249-253.

<sup>51</sup> N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 32, 141.

<sup>52</sup> See also IT-02-54-T, *Prosecutor v. Slobodan Milošević*, cit.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, para. 424. At the end of the prosecution case in 2004, the Trial Chamber considered there to be evidence sufficient to require a defense from Milošević for genocide in the following eight territories: Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kotor Varoš, Ključ, and Bosanski Novi, "the specified territories", see IT-02-54-T, *Prosecutor v. Slobodan Milošević*, cit., para. 138.

<sup>55</sup> *Ibid.*

During the defence's presentation of its case, which lasted from September 2004 to March 2006, Milošević – who represented himself in the court – did not even start presenting evidence for the Bosnian part of the indictment. At the time of his death, he had finished his defence for the Kosovo indictment and had just started to deal with the Croatian part of the indictment. During the presentation of the defence evidence, Milošević called as witnesses some of his most loyal collaborators, who were cross-examined by the prosecution, which procured additional important evidence of the genocide. The telling and memorable cross-examinations about the genocidal crimes in Srebrenica unfolded when the prosecution cross-examined Vladislav Jovanović, the former Foreign Minister of Serbia and the FRY, who was the *chef de charge* at the FRY's diplomatic mission at the UN at the time that the Srebrenica genocide took place. When the prosecution confronted Jovanović with the text of the letter that Serbia prepared for the UN Security Council in which it was stated that the Bosnian Muslim leadership killed its own people in Srebrenica in order to trigger military intervention against the Serb forces, Jovanović answered that the content of the letter was based on the information provided by the RS leadership. The Jovanović testimony in 2005 demonstrated that Serbia, thus Milošević, could not offer a convincing defence for the genocide that the Serb forces had committed in Srebrenica.<sup>56</sup>

#### II.8. SERBIA, SREBRENICA AND CRIMES AGAINST HUMANITY

The qualification of crimes in an indictment is of essential importance. Practitioners as well as academics stress a high threshold for proving the criminal intent – *dolus specialis* – to “destroy in whole or in part” a protected group, which is needed to prove the crime of genocide. To secure a conviction for the same criminal acts, if qualified as crimes against humanity, the prosecution needs to show the “widespread and systematic” nature of the crimes, which is generally considered easier to prove in court. This is one of the reasons why the prosecution often includes both genocide and crimes against humanity in its indictments for the same factual complex. Another, more realistic, reason is because the criminal intent varies from perpetrator to perpetrator, depending on their *de jure* or *de facto* power or position of authority: some perpetrators were actively involved in planning and executing the crime of genocide – others were not. Accordingly, not every crime in Srebrenica was qualified as genocide by the ICTY:<sup>57</sup> nine indictees were charged for crimes against humanity; war crimes; and/or violations of the laws and customs of war.

Table 4 shows the ICTY indictees who were charged for the crimes in Srebrenica under the qualification of war crimes and crimes against humanity.

<sup>56</sup> ICTY, letter signed by Vladislav Jovanović to the UNSC of 18 December 1995, trial transcript T36363, IT-02-54, *Prosecutor v. Slobodan Milošević*.

<sup>57</sup> It concerns indictments where the following crimes have been charged: crimes against humanity; breaches of the Geneva Conventions; and violations of the laws and customs of war.

Indictee ↓	Indicted as RS officials	Indicted as Serbia officials	JCE links charged in the indictment	JCE links proved in the judgment	Sentenced
D. Erdemović	+		-	-	5 years
D. Jokić	+		-	-	9 years
R. Miletić	+		-	-	18 years
M. Gvero, died in 2013	+		-	-	5 years
D. Obrenović*	+		-	-	17 years
M. Nikolić*	+		-	-	20 years
F. Simatović		+	+	-	Acquitted; re-trial pending
J. Stanišić		+	+	-	Acquitted; re-trial pending
M. Perišić		+	-	-	Acquitted

TABLE 4. Srebrenica judgments for crimes other than genocide.

Among the individuals who were charged for crimes against humanity in Srebrenica were three high-level state officials from Serbia – Jovica Stanišić, Franko Simatović and General Momčilo Perišić. Stanišić and Simatović were senior officials at the Serbian Ministry of Foreign Affairs and as such in charge of its Unit for Special Operations (JSO – *Jedinica za specijalne operacije*), also known as the Red Berets. In their indictment, there is a JCE that includes Serb and RS officials.<sup>58</sup> The fact that they were acquitted of all charges at the ICTY in 2013 made the JCE links as charged in the indictment irrelevant. Stanišić and Simatović were also named as members of the JCE in the indictments against Milošević, Karadžić and Mladić, but Milošević's trial did not produce a judgment: in Karadžić's or Mladić's judgments the judges did not find that the prosecution proved that they were members of the JCE that planned and executed crimes in BiH.<sup>59</sup> The Stanišić and Simatović's cases were called for a re-trial by the ICTY appeals judgment of 2015 on all counts of the initial ICTY indictment that was filed in 2003. The retrial started at the International Residual Mechanism for Criminal Tribunals (MICT), the successor

<sup>58</sup> ICTY, Prosecution notice of filing of Third Amended Indictment of 10 July 2008, *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-PT, para. 11. The JCE members named are: Slobodan Milošević, Veljko Kadijević, Blagoje Adžić, Ratko Mladić, Radmilo Bogdanović, Radovan Stojičić, also known as "Badža"; Mihalj Kertes, Milan Martić, Goran Hadžić; Milan Babić, Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić, Mičo Stanišić, Željko Ražnatović also known as "Arkan", Vojislav Šešelj.

<sup>59</sup> *Ibid.*

institution of the ICTY. This sequence of trials will make the Stanišić and Simatović trial the longest trial in the history of the ICTY and the MICT: 17 years have passed since the two accused were indicted in 2003; 11 years have passed since the beginning of their ICTY trial in 2009; three years have passed since the beginning of the retrial at the MICT in 2017.<sup>60</sup> Regardless of the judgment of the retrial – conviction or acquittal – the importance of the MICT judgment will be in its evaluation of the evidence by the judges, namely whether the prosecution can prove the charges related to the JCE between the accused with the named co-perpetrators representing the state initiations of Serbia and the RS. If JCE is affirmed in the judgment, there will be no consequence for the legal and historical narrative of genocide, given the fact that Stanišić and Simatović were not charged with genocide for the crimes committed in Srebrenica. Instead, they were charged with committing crimes against humanity. If the JCE with the RS officials is established, that will be the first ICTY or MICT judgment that would implicate Serbia in the war in BiH in the period after 19 May 1992.

In the indictment of General Momčilo Perišić, who was Chief of Staff of the VJ from 1993 to 1998, the JCE doctrine was not mentioned at all. Moreover, his name was not included in the JCE of any of the related indictments of Milošević, Karadžić or Mladić. Due to his function as Chief of Staff of the VJ, Perišić was a superior to all indictees who were officers in the VRS, who at the same time were members of the 30th Personnel Centre of the VJ. In November 1993, General Perišić signed an order to create the 30th and 40th personnel centres, which in fact were the administrative names for the armies of the Bosnian Serbs (the VRS) and the army of the Croatian Serbs (the SVK). The VRS officers who were found guilty of genocide – Ratko Mladić, Radislav Krstić, Vujadin Popović, Milan Gvero, Drago Nikolić and Zdravko Tolimir – were all members of the 30th Personnel Centre of the VJ. Ratko Mladić was also administrated as the commander of the 30th Personnel Centre. If the prosecution had made this connection by explaining the functions of these individuals within the VJ, the 30th Personnel Centre, and the VRS, this could have led to a very different judgment that might have explained the *de jure* and *de facto* links between Serbia and the RS leaderships.<sup>61</sup>

### III. POST-TRANSITIONAL AND STRATEGIC NARRATIVE OF GENOCIDE IN BOSNIA AND HERZEGOVINA

There is a growing scholarly literature on the interplay between the legal, political and historical impact of mass atrocity trials that offers some of the answers concerning

<sup>60</sup> ICTY, indictment of 1 May 2003, IT-03-69, *Prosecutor v. Jovica Stanišić and Franko Simatović*.

<sup>61</sup> See e.g.: N. TROMP, *The Unfinished Trial of Slobodan Milošević: Justice Lost, History Told*, doctoral thesis, University of Amsterdam, 18 September 2015, pp. 251-259; A. GÜNAL, *Strategic Europeanization of Serbia and the EU Impact: The Case of Cooperation with International Criminal Tribunal for the Former Yugoslavia*, in *EGE Strategic Research Journal*, 2016, p. 20 *et seq.*

when and why the post-conflict elites will adopt the policy of avoiding to determine the criminal, political and historical responsibilities of its predecessor regime. To understand why States behave the way they do, and, in particular, to apprehend why Serbia cooperated with the ICTY, rational choice institutionalism theory (RCI)<sup>62</sup> can offer some answers. According to RCI, political actors apply instrumental and strategic logic in achieving their pre-determined policy targets, such as membership to an international institution. In the political cost/benefit analysis, political actors – a State, for example – will accept the conditions imposed on them by delivering what is formally requested from them but at the same time they will try to maximise their interests.<sup>63</sup> The signatories of the Dayton Peace Agreement – the presidents of Serbia, Croatia and BiH – committed their States to cooperate with the ICTY in which evaluation of that cooperation became one of the conditions for the accession process to the European Union. In the case of post-Milošević Serbia, the EU conditionality approach – also known as “carrot and stick” strategy – obscured the clarity between genuine compliance and conditionality-driven compliance.<sup>64</sup> In the case of a conditionality-driven compliance, the States such as Serbia will not always cooperate with the purpose to contribute to the justice and truth-finding processes. Serbia’s governing elite seemed not to be interested in meeting a State’s obligation to cooperate with the ICTY for the purpose of contributing to the transitional justice narrative. Instead, the obligation to cooperate with the ICTY to achieve a variety of political, historical, and legal goals.<sup>65</sup> We shall turn now to Serbia’s effort to influence the transitional narrative of the genocide, the crime charged only for the crimes against the non-Serb population on the territory of BiH.

Genocide trials are always of great interest to a State whose officials have been charged with the crime of genocide. A State will be motivated to use all mechanisms at its disposal to prevent the legal confirmation of genocide in a judgment, regardless of whether it is a criminal trial against an individual or a genocide claim against the respective State for at least three reasons. First, a court’s finding that genocide has been

<sup>62</sup> See e.g. I. KATZNELSON, B. WEINGAST, *Intersections Between Historical and Rational Choice Institutionalism*, and J. ELSTER, *Preference Formation in Transitional Justice*, in I. KATZNELSON, B. WEINGAST (eds), *Preferences and Situations: Points of Intersection Between Historical and Rational Choice Institutionalism*, New York: Russell Sage Foundation, 2005, p. 1 et seq. and pp. 247-279.

<sup>63</sup> See: A. GÜNAL, *Strategic Europeanization of Serbia And the EU Impact*, cit.

<sup>64</sup> M. DOBBELS, *Serbia and the ICTY: How effective Is EU Conditionality?*, in *EU Diplomacy Papers*, 2009, p. 4 et seq.; B. STAHL, *Another “Strategic Accession”? The EU and Serbia (2000-2010)*, in *Nationalities Papers*, 2013, p. 447 et seq.; S. ECONOMIDES, J. KER-LINDSAY, *Pre-Accession Europeanization: The Case of Serbia and Kosovo*, in *Journal of Common Market Studies*, 2015, p. 1027 et seq.; A. ZHELJAZKOVA, I. DAMJANOVSKI, Z. NECHEV, F. SCHIMMELFENNIG, *European Union Conditionality in the Western Balkans: External Incentives and Europeanisation*, in J. ĐANKIĆ, K. SOEREN M. KMEZIĆ (eds), *The Europeanisation of the Western Balkans. A Failure of EU Conditionality?*, Basingstoke: Palgrave Macmillan, 2018, p. 15 et seq.

<sup>65</sup> See e.g. J. SUBOTIĆ, *Hijacked Justice: Dealing with the Past in the Balkans*, Ithaca: Cornell University Press, 2009; K. BACHMAN, A. FATIĆ (eds), *The UN International Criminal Tribunals: Transition without Justice?*, London: Routledge, 2015.

committed becomes a permanent historical record, which will forever tarnish that State's national history. Second, any evidence of genocide that implicates a state official might be used against the State in question before the ICJ, and if found responsible for the genocide, the State will likely be ordered to pay substantial reparations to the damaged parties. Third, refusal to admit mass atrocities committed by a former regime – and in particular the crime of genocide – frees the successors' regime to pursue the "unfinished" geopolitical objectives that its predecessor failed to achieve despite the commission of mass atrocities.<sup>66</sup>

In the next section we shall investigate how the genocide charges against the individuals at the ICTY and the genocide lawsuit that BiH filed against the State of Serbia at the ICJ have influenced Serbia's cooperation with the ICTY.

### III.1. FROM TRANSITIONAL TO POST-TRANSITIONAL JUSTICE NARRATIVE, 2000-2020

In this section, we shall argue that post-conflict Serbia engaged in a conditionality driven cooperation with the ICTY: on the one hand, Serbia started handing over the evidence from its state archives, while on the other hand Serbia was very concerned with protecting its own national and vital state interests. The dynamic of the cooperation with the ICTY in the period from 2000 to 2020 have been determined by a variety of internal and external political circumstances. The year 2007 has been depicted as the starting point because it represents the end of the Milošević rule in Serbia. The year 2020 is the closing year despite the fact that the ICTY closed its doors in December 2017: the work of the ICTY has been continued by the MICT; and also because the shift from transitional justice to post-transitional justice agenda has been a slow process that started in 2008 and has been gaining political importance since 2011; in 2020 the most visible result of the post-transitional political agenda has been the victory of the pro-Serb coalition at the elections in Montenegro. This victory has been a part of a political campaign of the populist nationalist government coalition in Serbia that introduced its own version of Greater Serbian ideology articulated "Serbian world", an effort to use the Serbian Orthodox Church, *i.e.* the soft power of religion in order to rally Serbs in the neighbouring post-Yugoslav States where Serbia still has territorial ambitions to expand its current borders.

We shall now look into the development of Serbia's post-conflict political agenda in order to detect when and by whom the "politics of the past" was introduced into "the politics of present". For that purpose, we shall identify five stages, in which we shall be searching for the turning points that represent the change in the Serbia's state elite transitional justice agenda. The five stages are: *a)* transitional justice interlude, 2000-2003; *b)* damage control of the transitional justice narrative of genocide, 2003-2007; *c)* closure of the transi-

<sup>66</sup> G. NICE, N. TROMP, *International Criminal Tribunals and Cooperation with States: Serbia and the Provision of Evidence for the Slobodan Milošević Trial at the ICTY*, in M. DE GUZMAN, D. AMANN (eds), *Arcs of Global Justice; Essays in Honor of William A. Schabas*, Oxford: Oxford University Press, 2017, p. 445 *et seq.*, p. 463.

tional justice period, 2008-2011; *d*) defining the post-transitional justice agenda, 2012-2017; *e*) Serbia's post-transitional strategy: return to geo-politics, 2018-ongoing.

*a*) Transitional justice interlude, 2002-2003.

The first stage covered the period of the first post-conflict government in Serbia under Prime Minister Zoran Đinđić. During this short period of two and a half years, Đinđić's government engaged in a balancing act between what was needed and what was possible in Serbia during the first years after the fall of Milošević's regime. Đinđić's political realism was based on his understanding that democratic consolidation in Serbia had to be linked to pro-Western policies. Serbia's political, economic, and financial recovery depended very much on its re-integration into the international economic and financial processes from which Serbia was cut out since UN sanctions were imposed on the FR Yugoslavia in May 1992. One of the conditions for reintegration into the international community was cooperation with the ICTY. The international obligation of Serbia to cooperate with the ICTY was based on the Dayton Peace Agreement, which was signed by then President Slobodan Milošević.<sup>67</sup> Paradoxically, the first concrete demonstrations of the Serbian government's cooperation were the transfer of Slobodan Milošević to the ICTY in June 2001. This was a bold political deed that triggered a domestic outcry against Đinđić's policies and antagonised many of the still active individuals loyal to the former regime, who feared for their own position. The real challenge for the government began after the transfer of Milošević to The Hague when the prosecution started sending requests for assistance to Belgrade requesting the documentary, audio, video, and electronic evidence from the state archives needed for Milošević's trial. Moreover, when the ICTY investigators started to uncover the severity of the involvement of Serbia's Ministry of Internal Affairs in the wars in Croatia, BiH and Kosovo, the members of the special units got nervous and they turned against Đinđić's policy of cooperation, fearing that they could be indicted and tried at the ICTY.<sup>68</sup> Once the ICTY investigators started calling also on retired and active members of Serbia's Ministry of Internal Affairs for interrogation, the security situation in Serbia deteriorated rapidly. In March 2003, Đinđić was assassinated. His assassins were apprehended, put on trial and convicted. They were all members of the JSO (Unit for Special Operations), a para-state unit of the Serbian Internal Affairs whose members were deployed in the territories of Croatia, BiH and Kosovo to fight alongside the local Serb forces. It turned out that the assassins and the network of co-conspirators were concerned with Đinđić's policy of cooperation with

<sup>67</sup> Art. 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter the Dayton Peace Agreement).

<sup>68</sup> See e.g. M. VASIĆ, *Sponzori i teoretičari zavere*, in *VREME*, 10 April 2003, [www.vreme.com](http://www.vreme.com); see also the parts of Zvezdan Jovanović's testimony in the Court published under the title "Likvidirao sam ga zbog Haga", in *Blic*, 26 December 2003, [www.blic.rs](http://www.blic.rs).

the ICTY and they organised under the code name “Stop The Hague” with the goal to stop Serbia’s Prime Minister from cooperating with the ICTY.<sup>69</sup>

b) Control of the transitional justice narrative of genocide, 2003-2007.

The second stage, between 2003 and 2007, covers the period between the assassination of Đinđić and the death of Milošević. In that period of time, Đinđić’s successors imposed a state of emergency in which his assassins were apprehended, but in which they also uncovered more crimes committed by the same veteran JSO members.<sup>70</sup> It seemed that the assassins achieved the opposite of what they originally had planned: in the aftermath of the assassination and the investigation into the members of the JSO, many of them were indicted, tried and convicted for the past crimes, which were previously unresolved.

When it comes to cooperation with the ICTY, the assassination of Đinđić was a turning point in which his successors redefined the nature of this cooperation.<sup>71</sup> The primacy of the national interests and vital state interests was articulated in terms of protecting the evidence from the state archives that could expose the role of the individuals and state institutions in committing mass atrocities and genocide in BiH before the ICJ. In the aftermath of Milošević’s transfer to The Hague in 2001, the prosecution team requested a large number of documents in order to prove the charges of the genocide against Milošević that – once public – could also be used by BiH in the ICJ genocide lawsuit against Serbia that was pending since 1993. Belgrade did continue to cooperate for pragmatic political reasons, while at the same time trying to withhold and control the evidence that could expose Serbia’s involvement in the genocide in BiH.

After Đinđić’s assassination, Serbia’s cooperation agenda with the ICTY changed. It was directed to shielding the documents requested from the ICTY’s Office of the Prosecutor (OTP) from the public view. The correspondence between the ICTY’s Chief Prosecutor and Serbia’s Minister of Foreign Affairs of May 2003 documents an agreement whereby the OTP will respect the requests made by Serbia to redact the pages and sentences from the documents that were equally important to prove Milošević’s criminal responsibility for genocide, but that could have been also used in the genocide lawsuit at the ICJ to prove the responsibility of Serbia as a State for the crime of genocide. By engaging in the negotiation process about the terms of handing over the documents

<sup>69</sup> N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 130-133.

<sup>70</sup> See e.g. S. BISERKO (ed.), *Human Rights and Accountability: Serbia 2003*, Belgrade: Helsinki Committee for Human Rights Serbia, 2004, pp. 49-54 and 87-90. The same assassins who conspired to kill the Prime Minister Đinđić turned out to be involved in the assassination of Ivan Stambolić, a former political mentor of Milošević who later on became a political rival. Stambolić was assassinated by Milorad Luković Legija, a member of the notorious para-state unit, officially known as JSO (Unit for Special Operations) that was unofficially referred to as Red Berets. See: N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 132-133.

<sup>71</sup> See e.g. S. BISERKO (ed.) *Human Rights and Collective Identity: Serbia 2004*, Belgrade: Helsinki Committee for Human Rights Serbia, 2004, pp. 146-154.

with the OTP management, Serbia successfully protected thousands of pages of relevant documents from the public and from the other courts. The immediate reason for requesting the protection were the stenographic notes of the Supreme Defence Council (SDC), the highest political body of the FRY, a federation between Serbia and Montenegro that existed from 1992 to 2003. The SDC was a collective presidency consisting of three voting members: the president of Serbia, the president of Montenegro and the President of the FRY. Slobodan Milošević was, as president of Serbia, its voting member from 1992 to 1998. Any evidence coming from the SDC that would be used to prove his individual criminal responsibility for genocide in the period between 1992 and 1995 would implicate Serbia as well.<sup>72</sup> The Serbian leadership was very much aware of this and the 2003 agreement concluded between Serbia and the OTP allowed Serbia to redact all potentially damaging pages from the SDC so that the potentially damaging parts of the SDC could not be used against Serbia at the ICJ. The OTP extended in 2005 the request of Serbia to protect all other documents coming from its state archives to all other ICTY cases. This was an important breakthrough for Serbia.

From 2003, Serbia was engaged in the pursuit of EU membership and this process was conditional on cooperation with the ICTY. By controlling the production of evidence at the ICTY, Serbia also was able to exercise significant influence on the genocide narrative at both international courts – the ICTY and the ICJ. The fact that Milošević died before the end of his trial with no judgment on genocide charges rendered, and the fact that the ICJ judgment of February 2007 did not find Serbia directly responsible for planning and executing genocide in BiH, were the results of the dedicated policy of Serbia to protect its national and vital state interest.<sup>73</sup>

Milošević died in March 2006, and in February 2007 the ICJ judges issued the judgment which found that Serbia was not responsible for genocide.<sup>74</sup> The outcome of both trials constituted an important turning point for Serbia's leadership: both trials dealt with Serbia's responsibility for the crime of genocide and both ended without legal consequences for Serbia. What followed was a political change, which constituted a return to the politics of the past: at the elections of 2008 the Milošević political party returned back in the government after eight years of absence.

c) Closure of the transitional justice period: introduction of the "politics of the past" into the "politics of the present," 2008-2011.

The third transitional stage began with the installation of the nationalist populist government in 2008. After eight years of exclusion from power – the Socialist Party of Serbia (the SPS, was formed by Milošević in 1990) returned to government. While still engaged in

<sup>72</sup> G. NICE, N. TROMP, *International Criminal Tribunals and Cooperation with States*, cit.

<sup>73</sup> *Ibid.*

<sup>74</sup> S. BISERKO (ed.), *Human Rights: Hostage to the State's Regression*, Belgrade: Helsinki Committee for Human Rights Serbia, 2006, pp. 100-116.

the process of the accession to the EU, Serbia's state elites engaged in the process of complying with the EU conditions by apprehending and transferring the remaining fugitives while at the same time controlling the transitional narrative of genocide. With Milošević's trial ending without a judgment, the pressure from the ICTY was directed to the apprehension and transfer to The Hague of the remaining ICTY fugitives,<sup>75</sup> and of Radovan Karadžić and Ratko Mladić in particular.<sup>76</sup> In 2008, Karadžić was apprehended in Belgrade and transferred to The Hague; in 2010 Mladić was also apprehended on the territory of Serbia and transferred to The Hague. This allowed Serbia to close the chapter of cooperation with the ICTY. After the trials of Radovan Karadžić and Ratko Mladić started, Serbia's state elite remained concerned about the judgments: would these trials produce a judgment that would confirm the 1992 genocide charges; and would their judgments link the Srebrenica genocide to the individuals from Serbia who were named as members of the JCE? If these judgments would confirm that in 1992 the genocide occurred in the north of Bosnia and that the individuals from Serbia were linked to the genocide in Srebrenica, these adjudicated facts could have been used by the State of BiH to file a request for revision of the 2007 ICJ judgment: the deadline for the revision was within the ten-year period and was set to expire in February 2017.<sup>77</sup>

In 2011, Serbia's intellectuals close to the Serbian Academy of Science and Arts (SANU), published an unofficial document dubbed SANU Memorandum II, as an analogy to the SANU Memorandum of 1986 that has been deemed to be the blueprint of the rise of Slobodan Milošević to power and the wars that followed in the 1990s. The SANU Memorandum was written by a number of prominent Serb academics and their diagnosis of the political, economic and cultural crisis of communist Yugoslavia concentrated on the position of the Serbs in Yugoslavia. The recommendations of these prominent Serb academics on how to deal with the crisis became an unofficial programme for Milošević's politics in the late 1980s.<sup>78</sup> Milošević's proclaimed objective was "to rescue" the Serbs living in Kosovo, Croatia and BiH from "yet another genocide". This was to be achieved by changing Serbia's Constitution to "restore" the territorial integrity of Serbia by revoking the status of its autonomous provinces – Vojvodina and Kosovo. Milošević's crusade as "savior" of the Serb people across the Yugoslav republics was in retrospect an excuse for a more cynical political agenda that was directed to the centralization of the Yugoslav federation with Serbia emerging as the dominant political force.<sup>79</sup> This pol-

<sup>75</sup> *Ibid.* Three remaining fugitives were: Goran Hadžić (the war time Croatian Serb leader), Radovan Karadžić and Ratko Mladić.

<sup>76</sup> S. BISERKO (ed.), *Human Rights, Democracy and Violence*, Belgrade: Helsinki Committee for Human Rights Serbia, 2008, pp. 40-54, 90-110.

<sup>77</sup> S. BISERKO (ed.), *European Option Obstructed*, Belgrade: Helsinki Committee for Human Rights Serbia, 2011, pp. 33-57, 85-121, 639-656.

<sup>78</sup> See e.g. N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 70-80.

<sup>79</sup> *Ibid.*

icy failed and it triggered the disintegration of the Yugoslav State. The authors of the SANU Memorandum II declared that Serbia's military defeats in the 1990s wars should not be considered as being final: according to which the battles lost in war should be won in peace. Twenty-five years after the SANU Memorandum appeared in public and eleven years after the end of the war hostilities, the post-conflict Serbian political elites revived the issue of the Serbian diaspora.

The disclosure about the existence of this document came from Europa magazine, published by the Bosnian diaspora in the USA. The Europa magazine also states that the SANU Memorandum II was created by the same group of the Serbian intellectuals who authored the original SANU Memorandum with the goal "of saving Serbia after all the Balkan defeats and putting it on an equal footing with all the countries it attacked". In the description of the document, it was stated that "several chapters set out the basic directions and goals of how Serbia should and can be saved in international court proceedings. Also, how to reduce Serbia's responsibility for committed crimes and destruction."<sup>80</sup> The document sets out the strategy of how to use the dissatisfaction and unrest in the neighbouring States in order to "weaken the blade of accusations against Serbia".<sup>81</sup> The text of this document has appeared in several publications, including a facsimile of the entire document that was published in 2013 in a Bosnian magazine.<sup>82</sup>

When it comes to the introduction of "politics of the past" into the "politics of the present", 2008 and 2012 are the crucial years for post-conflict Serbia. Kosovo's declaration of independence in February 2008 and the formation of the new Serbian government in July 2008 as a coalition government with the participation of Milošević's SPS party returned the topic of borders of the post-Yugoslav State to the political agenda of Serbia. In 2011, the Assembly of Serbia adopted the Strategy for preserving and strengthening the relations between the home country and the diaspora and the home country and Serbs in the region. The Strategy announced the return to the political agenda from Milošević's era that concerned itself with the Serbs living outside of the borders of Serbia. In 2011, the Government of Serbia also adopted a strategy which stated that about four million Serbs, or one third of the Serbian population, lived outside the borders of the Republic of Serbia.<sup>83</sup>

The term "Serbs in the region" was used in the document for the Serbian people living in the Republic of Slovenia, the Republic of Croatia, BiH, Montenegro, North Macedonia, Romania, Albania, and Hungary, whereas the most telling paragraphs refer to the

<sup>80</sup> See E. SUBAŠIĆ, *Drugi Memorandum SANU-a: Upute za udar na BiH*, in *Aljazeera Balkans*, 3 March 2019, balkans.aljazeera.net.

<sup>81</sup> *Ibid.*

<sup>82</sup> See M. DEDIĆ, *Memorandum 2 predviđa ujedinjenje Republike Srpske i Srbije za jednu deceniju*, in *Slobodna Bosna*, 21 March 2013, www.helsinki.org.rs.

<sup>83</sup> See *Strategija za očuvanja i jačanja odnosa matične države i dijaspore i matične države i Srba u region*, cit., pp. 5-6.

Serbs living in the BiH, Croatia and Montenegro. Kosovo was not mentioned at all in the document. The Serbs living in BiH received plenty of attention. *Republika Srpska* has been described as the most important area of interest for Serbia given that almost half of the Serbs from the diaspora live in the RS territory. A whole range of the concrete measures for cooperation between the relevant institutions has been proposed: the Ministry of Economy and Regional Development of Serbia has been stimulated to encourage investment in areas of *Republika Srpska*; the Ministry of Education of Serbia should work on integrating their education systems. The document assigns a special role to the Ministry of Religion and the Orthodox faith clergy in the RS to work on the preservation of the national identity of the Serbs.<sup>84</sup>

d) Defining the post-transitional justice agenda, 2012-2017.

In the period between 2012 and 2017, the political changes in Serbia announced the return of the Serb nationalist parties to power. In 2012, the Serbian Progressive Party (SNS – *Srpska napredna stranka*) led by Aleksandar Vučić won the general election and subsequently formed a populist nationalist government in coalition with the SPS led by Ivica Dačić, the party's leader known for his unwavering support of Slobodan Milošević and his political legacy.

In 2013 General Momčilo Perišić as well as Jovica Stanišić and Franko Simatović were acquitted by the ICTY. General Perišić stated upon arrival in Belgrade that it was not just his personal exoneration but also that the State of Serbia was exonerated as well. Stanišić and Simatović have returned to court to face re-trial at the MICT but whichever way the judgment goes, given the limited indictment charges, it will have no capacity to sustain the change that already existed in the transitional narrative about Serbia's involvement in the BiH war. In 2018, Vojislav Šešelj, the ultra-nationalist politician from Serbia was acquitted of all charges for the crimes on the territory of Croatia and BiH, and was found guilty of the crimes of expulsion of Croats from the territory of Serbia in 1991. The trials of Karadžić and Mladić ended with judgments that were very favourable to Serbia. In both Karadžić's judgments – the 2016 Trial Chamber judgment and in his 2019 Appeals Chamber judgment – the judges found that Milošević was not part of the JCE that was responsible for the common plan for BiH. Karadžić judgment of 2016 was described by the Serbia's politicians as exoneration of Milošević and Serbia from any involvement in the war of BiH.<sup>85</sup> The subsequent Appeals Chamber decision confirmed in 2019 the genocide judgment for Srebrenica but it added that there was no evidence to find that any of the named individuals from Serbia were members of the JCE.<sup>86</sup> Similarly, the Mladić first instance judgment of November 2017 did not find evidence that Milošević was a member of

<sup>84</sup> *Ibid.*

<sup>85</sup> See e.g. Ivica Dačić claimed that the Karadžić's judgment means that Serbia is not guilty of committing war crimes. *Dačić: Presuda Karadžiću je dokaz da je Srbija nije kriva za ratne zločine*, in *Telegraph.rs*, 7 September 2016, [www.telegraf.rs](http://www.telegraf.rs).

<sup>86</sup> See ICTY, IT-95-5/18-PT, *Prosecutor v. Radovan Karadžić*, cit., para. 3460.

the JCE.<sup>87</sup> The State of BiH, or rather its Bosnian Muslim representative in the BiH Presidency, failed to file the request for revision of the genocide ICJ judgment by February 2017, which allowed Serbia to finish the proceedings at both international courts – the ICJ and the ICTY – without a legal finding of state responsibility for genocide.

e) Serbia's post-transitional strategy: return to the geo-politics, 2018-ongoing.

Concern for the cultural, economic, and human rights of the Serb nationals living in the neighbouring States could be seen as the legitimate concern of a nation state interested in the well-being and prosperity of its people living in the neighbouring States. However, when put in the historical and political context of the recent wars and the mass atrocities that the Serb forces committed against non-Serbs when they engaged in the creation of the RS, this renewed interest from Belgrade was met with due caution. It displayed an overwhelming concern for the cultural, economic and other human rights of the Serbs in BiH, with no concern for other national groups nor for the victims of the Serb violence in BiH. The Strategy could be seen as the introduction of a "soft power" approach, *i.e.* a de-politicised way of keeping the ideology of "endangerment of Serbdom" alive in the territories to which Serbia still aspires and use the cultural and religious networks to mobilise the Serbs when necessary from the point of view of Belgrade.<sup>88</sup> This has been recently demonstrated in the mass protests organised by the Serbs in Montenegro that started in 2019 as a reaction to the Law on Religious Communities that directly affected the property of the Serbian Orthodox Church.<sup>89</sup> Soon, the demonstrations turned against the President Milo Đukanović and his Euro-Atlantic policy, threatening to undermine the Montenegrin political institutions.<sup>90</sup>

### III.2. "BORDER CORRECTION" INITIATIVE: HOW LARGE WILL THE POST-YUGOSLAV SERBIA BE?

Serbia's post-conflict narrative can be fully understood when analysed through the prism of still existing geopolitical ambitions to extend the state borders of post-Yugoslav Serbia. As of recently, it has also become clear that Serbia aspires to regain control of Montenegro, despite the fact that Montenegro has been an independent State since 2006 and a NATO Member State since 2017.

Since Kosovo proclaimed its independence in 2008, Serbia has been insisting on the territorial autonomy of the northern Kosovo municipalities by supporting the creation of the Assembly of the Serb Municipalities, which became in 2013 Community of Serb

<sup>87</sup> See ICTY, judgment of 22 November 2017, IT-09-92-T, *Prosecutor v. Ratko Mladić*, para. 4238.

<sup>88</sup> N. GRABEŽ, *Preformulisana regionalne aspiracije*, in *Radio Free Europe*, 19 March 2011, [www.slobodnaevropa.org](http://www.slobodnaevropa.org).

<sup>89</sup> See e.g. *Ecclesiastical Dispute: Yet Another Point of Clash between Serbia and Montenegro*, in *Helsinki Bulletin*, 2019, [www.ceeol.com](http://www.ceeol.com).

<sup>90</sup> See e.g. *The Elections in Montenegro from Belgrade's Perspective*, in *Helsinki Bulletin*, 2020, [helsinki.org.rs](http://helsinki.org.rs).

Municipalities. The constitution of the community of these municipalities resembles the formula applied by Serbia for carving out the Serb designated territories in BiH – the RS. The Community of Serb Municipalities in the north of Kosovo is now exactly the territory that Serbia aspires to include in its state borders.

“Border Correction” or *korekcija granica* is an administrative term that has been introduced by the international community in order to stress its “consensual” nature. The term “border correction” has been first used in public during the negotiations between Serbia and Kosovo in 2018. The politicians, commentators, human rights activists, and academics have been using it. However, there is no policy paper made public that delineates the principles of the re supposed to be agreed by the parties involved. In 2019, the “territorial swap” deal between Kosovo and Serbia was leaked to the press. The deal has been supported by the Trump administration and the EU: Serbia was willing to swap the territory of the Preševo valley with two towns containing an overwhelming Kosovo Albanian majority – Preševo and Bujanovac – in exchange for the territory of the Community of Serb Municipalities, situated in the north of Kosovo.<sup>91</sup>

The US and the EU have been supporting Serbia’s geopolitical designs, but Kosovo’s political institutions have been fiercely divided on the issue of the territorial swap. Kosovo’s President Hashim Thaci was a proponent of this solution because it could oblige Serbia to recognise Kosovo as an independent State, which in turn could lead to UN membership for Kosovo in a foreseeable future.<sup>92</sup> According to this calculation, Kosovo would not lose on the size of its territory or its population – only the shape of the state borders would change. The opposing position comes from the Kosovo political opposition led by Albin Kurti and his party *Vetëvendosje* (Self-determination).<sup>93</sup>

Despite the willingness of Kosovo’s President Thaci to work on the “border corrections” with Serbia, the swap of the territories has not taken place yet. Not least for the reason that the “border corrections” initiative has also divided the international community, diplomats, human rights activists, scholars and other Balkan watchers. The proponents of this strategy saw this initiative as a way forward to end a political standoff between Belgrade and Prishtina and the only way for Kosovo to become a UN member.<sup>94</sup> The opponents of the initiative saw this as a dangerous precedent that will inevitably open the

<sup>91</sup> See for discussion: S. BISERKO, *Ima li plana za Kosovo*, in *Pobjeda Daily*, 13 April 2020, pobjeda.me; F. BYTYCI, I. SEKULARAC, *Kosovo, Serbia consider a land swap, an idea that divides the Balkans*, in *Reuters-UK*, 6 September 2018, uk.reuters.com.

<sup>92</sup> S. DRAGOJLO, X. BAMI, *Land Swap Idea Resurfaces to Haunt Serbia-Kosovo Talks*, in *Balkan Insight*, 16 June 2020, balkaninsight.com.

<sup>93</sup> *Kurti denounces land-swap proposal in phone calls with the regional leaders*, in *European Western Balkans*, 27 May 2020, europeanwesternbalkans.com.

<sup>94</sup> See e.g. T. LESS, *The Next Balkan War*, in *New Statesman*, 6 June 2016, www.newstatesman.com; T. LESS, *Dysfunction in the Balkans: Can the Post-Yugoslav Settlement Survive?*, in *Foreign Affairs*, 20 December 2016, www.foreignaffairs.com; S. BISERKO (ed.), *Serbian Community in Kosovo – Frozen Life in a Frozen Conflict*, Belgrade: Helsinki Committee for Human Rights Serbia, 2019, pp. 7-21.

question of the state borders of BiH and encourage the leadership of the RS to demand the secession of the RS to join Serbia.<sup>95</sup> Even if the “border correction” strategy had worked out for Serbia and Kosovo, it could not be treated as an isolated territorial issue: it could have opened the geopolitical issue of the border between Serbia and BiH.

Indeed, the RS political leadership with Milorad Dodik in the lead has been openly and persistently promoting the unification of the RS and Serbia.<sup>96</sup> Belgrade has been leaving the initiative to the RS leadership on how to justify its secession. Serbia’s interest in the RS territory has survived many challenges. In fact, already in 2013, Serbia’s then Prime Minister Dačić publicly reiterated the importance of Serbia for ensuring preservation of the Republika Srpska, calling it even more important for Serbia than Kosovo.<sup>97</sup> The continuity of the policy of the Serbia’s government in relation to the Republika Srpska has been underlined in the Strategy for the National Security for Republic of Serbia, a document adopted in December 2019, according to which one of its national interests has been identified as preservation of the existence and protection “of Republika Srpska as an entity within Bosnia and Herzegovina in accordance with the Dayton Agreement”.<sup>98</sup>

#### IV. CONCLUSIONS

The case study of Serbia, as discussed in this *Article*, demonstrates that despite the robust effort that the UN and the international community invested in determining criminal responsibility for the crimes committed in the wars fought on the territory of Yugoslavia, the outcome of the transitional justice will be contested by one or more parties.

The transitional justice narrative of genocide that took place on the territory of BiH encapsulates all inherent shortcomings of such narratives: the legal narrative of genocide will remain narrower than political and historical narratives; despite its limits the transitional justice narrative of genocide will last for a limited period of time; it will be contested by post-transitional narratives as produced by one or more interested parties.

The transitional narrative of genocide as produced by the ICTY confirmed that genocide took place in BiH. The finding that the crime of genocide took place on the territory of BiH was also confirmed in the 2007 ICJ genocide judgment. The authority of these two UN courts carved the genocide narrative into the collective memory of the world with the

<sup>95</sup> See e.g. US House of Representatives, *Engel & Menendez Express Concern about Trump Administration Approach to Serbia & Kosovo*, Committee on Foreign Affairs Press Releases, 13 April 2020, [foreignaffairs.house.gov](https://foreignaffairs.house.gov).

<sup>96</sup> See e.g. M. EDWARDS, *The President Who Wants to Break Up His Own Country*, in *The Atlantic*, 2 January 2019, [www.theatlantic.com](https://www.theatlantic.com).

<sup>97</sup> Dačić: *Opstanak Republike Srpske mnogo važniji državni interes nego opstanak Kosova u okviru Srbije*, in *Blic*, 26 April 2013, [blic.rs](https://www.blic.rs).

<sup>98</sup> *Strategija nacionalne bezbednosti Republike Srbije*, 27 December 2019, [www.pravno-informacioni-sistem.rs](https://www.pravno-informacioni-sistem.rs), para. 3 (Nacionalni interesi).

Bosnian Muslims as the victims and the Serbs as perpetrators. However, the transitional narrative has determined that the genocide was planned and executed at the RS level, whereas individuals from Serbia do not feature in the genocide narrative. Slobodan Milošević was the only Serbian official who was indicted for genocide and his trial did not reach completion. All other ICTY genocide indictments concerned individuals who held official positions at the level of the RS. The fact that all the VRS officers who were indicted for genocide were also the officers of the Army of Yugoslavia (the VJ) and were paid salaries and pensions by Serbia, did not feature in their indictments, in the evidence during their trial; and it thus never made it to the text of their respective judgments.

The genocide convictions were limited in time to July 1995 and in space to Eastern Bosnia, *i.e.* to Srebrenica and Žepa. The ICTY genocide convictions for Srebrenica and Žepa were rendered for the individuals who were charged and convicted as officials of the RS with no JCE links proved with the individuals from Serbia. With Milošević dying before the end of his trial, no other indictee from Serbia was indicted on genocide charges: four other ICTY indictees from Serbia who were charged for the crimes committed in Srebrenica as crimes against humanity or any other crime committed in Srebrenica or in BiH – have been acquitted. In several ICTY genocide indictments for 1992, there three municipalities where the genocide was charged against the Bosnian Muslims and Bosnian Croats; with no convictions for 1992, the Serb side has also been exonerated for the genocide against the Bosnian Croats.

According to the ICTY judgments, Serbia has been involved in an international armed conflict in BiH from 6 April to 19 May 1992. With no genocide convictions handed down at any court for crimes occurring in 1992, Serbia as a State was not found responsible for the crime of genocide. Moreover, with ICTY convictions for genocide handed down for the crimes occurring in Srebrenica and Žepa in the summer of 1995 – even if any of the individuals would have been connected via JCE to Belgrade – Serbia would have had a strong defence on its side by citing the determination by the ICTY judges that Serbia was not involved in an international armed conflict beyond the date of 19 May 1992.

Political, diplomatic, and legal efforts of a sovereign State be concerned about the historical, political and legal responsibility for the crime of genocide can be explained in the light of the obligations of all UN States to comply with the UN Convention on Prevention and Punishment of the Crime of Genocide of 1948. If States fail to fulfil that obligation, there will be consequences: no State will be willing to admit to the crime of genocide without facing the legal scrutiny. The formation of the Sarajevo and Srebrenica commissions by the RS Assembly will inevitably offer the new narrative with counter arguments that will serve the already active deniers and apologists of the genocide.

The post-transitional justice period has already been inaugurated across the region: the already incomplete transitional justice narrative of genocide in BiH has been challenged with a strategic purpose in mind, such as the return to the geo-political objectives that had led to the genocidal crimes in the 1990s – but which despite the commis-

sion of genocidal crimes had not been achieved. Serbia's current geo-political aspirations – when analysed from the perspective of transitional and post-transitional justice narratives – show the determination to continue the interrupted process of carving out the borders of the post-Yugoslav Serbia. The incorporation of the territory of the *Republika Srpska* remains an important goal.

