

# TRANSITIONAL JUSTICE MECHANISMS AND DEALING WITH PAST IN SERBIA AND CROATIA

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## **Abstract**

Conflicts in Bosnia and Croatia from 1991 to 1995 have left huge impact on political and economical systems of successor countries of the former Yugoslavia. At present, almost 15 years after the end of war, society is still intensively trying to deal with the past.

Societies in transition from war ravaged reality to democracy are using various mechanisms of transitional justice, such as war crimes trial, truth commissions, lustration and reparation.

In 1993, by the UNSC Resolution was founded International Criminal Tribunal for the former Yugoslavia. Dayton peace agreement obliged all post-Yugoslav states to collaborate and extradite alleged criminals of war.

Transfer of cases to domestic Special Courts for war crimes started with completion and back referral strategy. Regional cooperation on some cases highly influenced success of the later.

Still, no broader strategy in which war crimes prosecution links up with other key elements of transitional justice such as truth-seeking, reparations, institutional reform is developed. Various activities have been launched in the countries of former Yugoslavia on different levels, but as yet many preconditions for "Dealing with the Past" are still not in place.

Since the end of 2005, representatives of the civil society for ex-Yugoslav region, guided by Humanitarian Law Centre from Belgrade, Documenta from Zagreb and Research and Documentation Centre from Sarajevo, are working on a

regional approach for establishing the truth. Regional approach and cooperation (RECOM) should give more chance to deal with the past than the national level perspective.

The problem of reconciliation as one of the most important in post-conflict societies, is possible only by systematic, persistent, long-lasting confrontation with past in order to create a democratic environment. If we don't face the past, if the perpetrators of war crimes are not brought before the justice, there's a great probability that the past happens to us once again.

key words: *transitional justice, war crimes trials, ICTY, truth seeking, truth commission*

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Economic decay started in the 1980s, political illegitimacy of the communist system and a failure to create a common historical narrative led to the outbreak of wars in Croatia and Bosnia. Almost a decade of war and violence devastated the economic and political systems of countries of former Yugoslavia and had a huge impact on the social fabric.

Mutually excluding "truths" about these wars dynamics and the atrocities committed quickly developed, and were used in creation of new national identities, reinforcing at the same time the fragmentation of post-war societies.

The clash between "us" and "them" was strongly underlined, and each group had a tendency to see one's

own country or nation or group as the victim of a conspiracy organized by other nation or group. Gellner argued that the national sentiment that relies on the relation and the comparison with the others would be politically more effective if nationalists had as fine a sensibility to the wrongs committed by their nation as they have to those committed against it<sup>1</sup>.

One of the most difficult questions to be answered by a country in transition from past conflicts to a democracy based on the rule of the law is how the society shall deal with the atrocities and injustices of the past. Both legal and political developments of measures concerning human rights gave as result notion of transitional justice.

In the UN report "The rule of law in conflict and post-conflict societies" transitional justice is described as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"<sup>2</sup>.

Transitional justice may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions. Its mechanisms consist of criminal law types of policies such as trials for war crimes or lack of trials as well as civil and administrative types of policies. The former consist of remissions, amnesties and pardons, while the later contain institutional and capacity building, reparation, lustration and vetting and truth commissions.

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<sup>1</sup> Ernest Gellner, *Nations and Nationalism*, Cornell University Press, 1983

<sup>2</sup> Report of the Secretary General Kofi Annan, *The rule of law in conflict and post-conflict societies*, United Nations Security Council, 2004

Milestone document that defines state obligations in case of great breaches of human rights is the judgment in *Velásquez Rodríguez vs Honduras* case brought before the Inter-American Court of Human Rights. It clearly defines the objectives of transition justice asserting that “the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.

In case of successor states of the former Yugoslavia traumatic legacies of the past have to be dealt with in order to build a stable future; that special attention should go to the needs and rights of people including in particular victims; and that only a comprehensive approach will rebuild trust among citizens and between citizens and the state.

So far, the focus has been on prosecution of war crimes. Transition towards stable democracy and strengthening of the rule of law in all post-Yugoslav states was not possible without justice and accountability for the committed crimes.

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by United Nations Security Council resolution 827<sup>3</sup>. This resolution was passed on 25 May 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations.

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<sup>3</sup> Full text of UNSC Resolution 827:

<http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>

Among the aims of the ICTY, as reported in its Statute, appear statements such as:

- Bringing a sense of justice to war-torn places;
- Re-establishing the rule of law;
- Providing a sound foundation for lasting peace;
- Bringing response to victims and providing an outlet to end cycles of violence and revenge;
- Demonstration that culpability is individual and not the responsibility of entire groups; and
- In a didactic mode, explanations about what caused the violations, and illustrate particular patterns of violation<sup>4</sup>.

The task of the ICTY is to understand the development of international criminal justice within a context of politics and not to detach justice from politics. The fact is that there can never be a complete separation between law and policy. No matter what theory of law or political philosophy is professed, the inextricable bounds linking law and politics must be recognised. Transitional justice, although situated at the niche of human rights, represents its political development in many of its manifestations.

The ICTY is an International Tribunal and cannot be expected to elevate itself above the world of politics into some Platonic realm of ideal justice. In the case of ICTY, the link between the law and the politics is unusually close and transparent. Its *raison d'être* is expressly political, because the United Nations Security Council "designated" it as a tool towards the advancement of peace and security in the region.

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<sup>4</sup> Statute of the ICTY: <http://www.un.org/icty/legal/doc-e/index-t.htm>

It was only in 1995 that the States created after the dissolution of Yugoslavia had an obligation to accept cooperation with the ICTY. Article IX of the “General framework agreement” (also known as Dayton agreement) requires full cooperation with all organizations involved in implementation of the peace settlement, including the ICTY<sup>5</sup>.

Consequently, the EU made this an important condition of its accession policy vis-à-vis the Western Balkan countries concerned, making the start of negotiations depending on full cooperation with the ICTY.

For the ICTY to fulfil its broader mandate of contributing to peace and reconciliation it had to ensure that its “investigative and judicial work ... [is] known and understood by the people in the region.”<sup>6</sup> Unfortunately, during the first six years of the ICTY’s functioning the lack of resonance within the affected communities due to non existence of an outreach section resulted in broad misconceptions and understanding of it. The fact that the Outreach programme is still not part of the main budget of the Tribunal shows that some people in the UN Headquarters in New York apparently still do not realize the importance of its task.

The legal professionals took public relations either for granted or as not being their concern; they were also mainly interested in the development of International Humanitarian Law; that is in “the rules of the game” instead of “the actual content of the game”. Even ten years after creation of ICTY over 60% of the population in former Yugoslav Republics did not know what laws govern war crimes and 66% had not

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<sup>5</sup> Full text of Dayton Peace Agreement:

<http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>

<sup>6</sup> Judge McDonald, *Outreach Symposium Marks the First Successful Step in Campaign for Better Understanding of the ICTY in the Former Yugoslavia*, 20 October 1998

received any information about the kind of crimes for which one can be indicted<sup>7</sup>.

One of the main tasks of the media is to attempt to paint comprehensive narratives about the past atrocities, to tell stories that include everybody, regardless of his or her ethnicity or current residency. It is obvious that print media, radio and television may either aid the process of truth seeking and reconciliation, or be a major obstacle on that path.

In the Balkan's region there are multiple truth versions that build new narrative traditions of those nations. The detainees' "shows and performances" in courtrooms are creating postmodern myths in ex-Yugoslav society. Those myths have been created together with the myths of rebirth of nationalism and their impact is huge although their appearance on the political scene is quite recent<sup>8</sup>.

It may seem a paradox, although one that can easily be explained, that in the times of Milosevic and Tudjman, the Tribunal had more support in Serbia and Croatia than it has now<sup>9</sup>. This had nothing to do with the opposition parties accepting the necessity of facing the bloody past and assigning personal responsibility in order to avoid being saddled with collective guilt, but because the Tribunal was seen exclusively as an instrument of political pressure which could be wielded to overthrow the regime.

Nevertheless, criminal justice intervention had, as former ICTY Chief Prosecutor Louise Arbour stated, "a weapon in the

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<sup>7</sup> Cibelli, Kristen and Guberek, *Justice Unknown, Justice Unsatisfied? Bosnian NGOs Speak about the International criminal Tribunal of the Former Yugoslavia*, 2000

<sup>8</sup> Sabrina P. Ramet, *The Dissolution of Yugoslavia: Competing Narratives of Resentment and Blame*, 2007

<sup>9</sup> Report by SENSE News Agency, 21 April 2002

arsenal of peace"<sup>10</sup>. They realized it only after they had exhausted all other weapons in the traditional peace building armoury: diplomacy, conflict management, bilateral and multilateral negotiations and pressure, political and economical sanctions and more or less credible threats.

Social reactions to past war crimes and human rights abuses are today becoming more oriented towards establishing truth and punishing perpetrators. At present, almost 15 years after the end of the war there is very little consensus among the former republics on official narratives about what actually happened. In the successor states of Yugoslavia national identities came to be defined dialectically, in relation to one another. In terms of responsibility of war crimes, issue raised was the existence of double standards for "ours" and "theirs". Accused compatriots though still enjoy the status of public heroes. It is necessary to outline that failing to raise a voice about the committed crime is as if the crime never happened. Therefore, the work of Tribunal is to be legal, political and moral catalyst.

One of the frequently stated goals of prosecuting individuals for violations of international humanitarian law through the ICTY is to lift the burden of collective guilt from the nations in whose names violations were carried out, by tying the violations to specific individuals who bear criminal responsibility. Still, clear distinction between collective responsibility and collective guilt should be made. Every nation in conflict is bearing collective responsibility for the acts its individuals committed in helping or not preventing them of doing it, while no nation can be named criminal nation<sup>11</sup>. All

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<sup>10</sup> Mirko Klarin, *Tribunal Update*, No. 141, September 1999

<sup>11</sup> "Zločinačkih naroda i nikada, baš nikada, ne može cijeli jedan narod biti odgovoran i kriv za ono što su počinili pojedini njegovi pripadnici, ili organizirane skupine – ma kako velike i brojne bile. Postoje individualni zločinci, postoje i zločinačke skupine i



the criminals are individuals or are taking part of the criminal group or organization.

This raises two important political questions. Firstly, do legal institutions in general offer an appropriate arena for the resolution of issues relating to national identity and guilt? Secondly, is the way in which the ICTY functions effectively decoupling national identities from the notion of collective responsibility?

The reply to this question may be searched by looking towards another International Tribunal. At the International Court of Justice (ICJ), a permanent court of United Nations, only States are eligible to appear before the latter in contentious cases. The issues of sentences between ex-Yugoslav republics, seems though not to contribute to the sense of collective responsibility. The case of *Bosnia and Herzegovina against Federal Republic of Yugoslavia* represented for the first time that a court had adjudicated whether a sovereign state could be held responsible for genocide in almost sixty years since the convention on the prevention and punishment of the crime of genocide was unanimously approved by the General Assembly of the UN. The widely commented sentence that basically acquitted Serbia in committing genocide turned the attention back to a group of individuals, mostly members of paramilitary units.

Apart from preventing war leaders from perpetuating their political careers, the ICTY trials play a crucial role in establishing truth. They are essential for initiating the process of truth-telling and acknowledgment by rendering denial impossible. In that sense, the ICTY does represent an important source for writing history and for collective remembering. The

truth established by the ICTY in its verdicts against indicted individuals is a court-established truth, which is not questionable by some other court, or challengeable by historical, political or moral tests.

In addition to the ICTY trials, domestic trials are a very important step towards the rehabilitation of renegade states, which can thus prove their willingness to establish the rule of law. In this context all states on the territory of former Yugoslavia have demonstrated the willingness to try war crimes. So called “completion strategy” or the transfer of intermediate or lower rank indicted persons from the ICTY to competent national jurisdictions, is where the international community expects the former warring parties to demonstrate their membership of the group of democratic countries and their “capability” of acceding to the EU<sup>12</sup>. In order for the ICTY to refer proceedings it must be sufficiently assured of the domestic judiciary’s capability of conducting the proceedings fairly and adhere to internationally accepted standards.

In general, national courts have a greater impact on the society and its values and benefits than international tribunals. Through national proceedings, societies more directly face their own problems and mistakes and learn from them. It has been argued that for example, national proceedings had a much stronger psychological and moral impact on population and contributed more to the denazification of the Germany than Nuremberg and other international trials<sup>13</sup>.

At present, the ICTY is applying the back referral which is aimed at enhancing “the essential involvement of national governments in bringing reconciliation, justice and the rule of

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<sup>12</sup> Louis Aucoin and Eileen Babbitt, *Transitional justice: Assessment Survey of conditions in the former Yugoslavia*, June 2006

<sup>13</sup> Ivan Šimonović, *Dealing with the Legacy of Past War Crimes and Human Rights Abuses*, 2004

law in the region"<sup>14</sup>. Domestic institutions are assuming the restoration of the rule of law in the region, since UN Security Council resolutions 1503 and 1534 project the end of Tribunal's investigations in 2004, the closing-down of trials in 2008/2009, and the completion of the appeal processes by 2010.

According to Rule 11bis of the ICTY *Rules of Procedure and Evidence*<sup>15</sup>, so far 8 cases has been transferred to domestic courts, for a total of 13 accused. *Ovčara* trial was the first case that ICTY referred to Serbian justice system.

War Crime Council of the Special Department of the District Court in Belgrade was created on 1<sup>st</sup> October 2003. It has jurisdiction over crimes against humanity and international law established in Criminal code of Republic of Serbia, as well as for grave breaches of international humanitarian law, committed on the territory of the former Yugoslavia from 1991. If ICTY refers the case to Serbian Special Court for War Crimes, the prosecutor applies domestic law during the criminal proceeding.

As opposed to the Office of the War Crimes Prosecutor which acts as a governmental institution, and not as a part of the judicial system, the War Crimes Trial Chamber of the Belgrade District Court performs its judicial duty in war crimes trials professionally and impartially. However, as provided by the law, judges are unable to amend and correct the indictments, which constitute a serious danger that some of

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<sup>14</sup> *Assessment and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004)*, UN Doc. S/2005/343, 25 May 2005, para. 12.

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[http://test1.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev43\\_en.pdf](http://test1.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf)

the court's rulings, as may happen in the *Scorpions* case, will be contradictory to already established truth in the cases tried before the ICTY.

In Croatia, no special chamber has been established and war crimes trials are mainly held before district courts. Four investigative units are formed within district courts of Zagreb, Rijeka, Osijek and Split that are specialized for prosecution of alleged criminals of war. During the last few years, legislation related to war crimes trials as well as procedures and trial proceedings has improved, mainly due to the EU accession process. Still, ethnically biased prosecutions and convictions *in absentia* are prevalent. Those proceedings involved approximately 75 percent Serbs, many of them returnees, and 17 percent Croats<sup>16</sup>. The trial of General Mirko Norac before the Regional Court in Rijeka for war crimes against Serbian civilians in Gospić and the renewed trial of officers of the military police for the war crime against prisoners of war at the military prison *Lora* indicate a break with the practice prevailing in Croatia to exclusively indict and try Serbs. In the course of the trial, Serbian victims testified for the first time. This has contributed to recognition of this trial by the victims. This participation by Serbian victims resulted from cooperation of the Public Prosecutor's Offices from Croatia and Serbia.

One of the main obstacles for the beginning of trials is certainly the prohibition of Serbian and Croatian Constitution to extradite their citizens. This limitation was not relevant for transfer of the accused to the ICTY in The Hague, but creates problems if the trials are held in the country where the crime had been committed. In general, trials held in the country of the accused are rarely successful, as the witnesses are often unwilling to travel in the country they fell enemy. One of the

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<sup>16</sup> OSCE Mission to Croatia 2005. *Background Report: Domestic War Crime Trials 2004*

most radical propositions was to abolish right to a double citizenship.

Regional cooperation between Serbia and Croatia started officially on 13<sup>th</sup> October 2006 by Agreement for prosecution war crimes, crimes against humanity and genocide, signed by Office of the War Crimes Prosecutor from Serbia and State Bar Association of Croatia. This agreement allows transfer of the war crimes trials in the country of the accused, which is not necessarily the country where the crime has been committed.

We already said that war crimes trials offer a proper human rights response, but no broader strategy in which war crimes prosecution links up with other key elements of transitional justice such as truth-seeking, reparations, institutional reform is developed. It has lacked the larger vision how to move from retributive to restorative justice.

This raises an important question. How can people and communities, deeply divided and traumatised, regain trust in fellow citizens and state institutions, achieve a sense of security and economic stability, rebuild a moral system and a shared future? Apparently, this is a complex and long-term process, which ultimately has to involve all layers and structures of a society.

Public opinion in Croatia is still divided, even almost 15 years after the end of the war. Political discussion about past two wars (World War II and 1991-1995 war in Croatia and Bosnia) is manipulated and polarized about questions of domestic criminals of war and heroes. Sense of collective responsibility and "culture" of refusal to admit crimes, lead only to the general confusion and "dehumanization" of the victims and, consequently, to the denial of their rights. The

difficult process of dealing with the past means changing “black and white” vision of historical narrative that describes our compatriots in absolutely biased and non-critical way. Dealing with the past means facing the role and position of proper nation in war dynamics.

The situation in Serbia is not very different. Diffused public opinion about the past war is that Serbia did not start the conflict, had only paramilitary units fighting and that it did not loose the war. On one side nationalistic current blames international community for giving Serbia the biggest responsibility during the conflict, while other part of civil society wants to overcome nationalistic positions that put the country in politically very difficult position.

Finally, various activities have been launched in the countries of former Yugoslavia on different levels, but as yet many preconditions for “Dealing with the Past” are still not in place. This is especially true for macro-political conditions. At the onset, peace agreements brokered by the international community left all conflicting sides with a sense of defeat, and kept those responsible for staging the wars in power for several years. Thus, to date the political elite lacks the will to confront past abuses and assume responsibility.

In whole region no public debate about the past was ever undertaken. This fact has a great impact on everyday life and provokes constant “delay of grieving” and discrimination of the victims. In successor states of the former Yugoslavia, there is still not a single official body that would systematically try to establish the fact about war crimes and other gross human rights violations.

National legal instruments are not enough in order to achieve truth telling and truth seeking. There is an obvious

need for a regional level public agreement about the mechanisms for establishing and telling the facts about the past.

The regional dimension of the wars on the territories of former Yugoslavia and the subsequently established new borders add a specific challenge to dealing with the past processes: on the one hand, certain very concrete and pressing issues, such as identifying missing persons, war crimes prosecution and witness protection, can only be addressed by taking a regional approach.

Since the end of 2005, representatives of the civil society for ex Yugoslav region, guided by Humanitarian Law Centre from Belgrade, Documenta from Zagreb and Research and Documentation Centre from Sarajevo, are working on a regional approach for establishing the truth. Regional approach and cooperation (RECOM) should give more chance to deal with the past than the national level perspective. RECOM certainly will not be able to operate without full support from the states, which are still not ready to give secret documents about the past.

The author of this text is strongly convinced that only by explaining the past from all the possible points of view; we can hope to mark the decisive step towards the reconciliation. In our search for the role in future reconciliation and integration processes, we must consider numerous international cases in the past (Nuremberg, Tokyo, Rwanda, Sierra Leone etc.). To this horizontal timeline has to be joint also vertical one which investigates cited impact and mirco-marco linkages between individual identities, group behaviour and institutional structures.

The problem of reconciliation as one of the most important in post-conflict societies, is possible only by systematic, persistent, long-lasting confrontation with past in order to create a democratic environment. If we don't face the past, if the perpetrators of war crimes are not brought before the justice, there's a great probability that the past happens to us once again.

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## **Summary**

Almost a decade of war and violence devastated the economic and political systems of countries of former Yugoslavia and had a huge impact on the social fabric.

Mutually excluding "truths" about these wars dynamics and the atrocities committed quickly developed, and were used in creation of new national identities.

One of the most difficult questions to be answered by a country in transition from past conflicts to a democracy based on the rule of the law is how the society shall deal with the atrocities and injustices of the past. Both legal and political developments of measures concerning human rights gave as result notion of transitional justice.

In the UN report "The rule of law in conflict and post-conflict societies" transitional justice is described as "the full range of processes and mechanisms associated with a



society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.

In case of successor states of the former Yugoslavia traumatic legacies of the past have to be dealt with in order to build a stable future; that special attention should go to the needs and rights of people including in particular victims; and that only a comprehensive approach will rebuild trust among citizens and between citizens and the state.

So far, the focus has been on prosecution of war crimes. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by United Nations Security Council on 25 May 1993. It was only in 1995 that the States created after the dissolution of Yugoslavia had an obligation to accept cooperation with the ICTY. Consequently, the EU made this an important condition of its accession policy vis-à-vis the Western Balkan countries concerned, making the start of negotiations depending on full cooperation with the ICTY. The work of Tribunal is to be legal, political and moral catalyst.

Apart from preventing war leaders from perpetuating their political careers, the ICTY trials play a crucial role in establishing truth. The truth established by the ICTY in its verdicts against indicted individuals is a court-established truth, which is not questionable by some other court, or challengeable by historical, political or moral tests.

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Since the end of 2005, representatives of the civil society for ex Yugoslav region, guided by Humanitarian Law Centre from Belgrade, Documenta from Zagreb and Research and Documentation Centre from Sarajevo, are working on a regional approach for establishing the truth. Regional approach and cooperation (RECOM) should give more chance to deal with the past than the national level perspective. RECOM certainly will not be able to operate without full support from the states, which are still not ready to give secret documents about the past.

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