Memory Laws
and the Politics of History

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Wydawnictwo Naukowe

Memory Laws and the Politics of History

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Judicial facts memorized in law – the story of the Hague tribunal

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Abstract

The idea of the research is to provide an analysis of a certain type of memory laws in the region of the Western Balkans that prohibit the denial of historical crimes. The criminal codes of Serbia, Montenegro, Bosnia and Herzegovina, Macedonia and the territory of Kosovo offer several variations of the crime of negationism – denial, minimization, or condonation of crimes of genocide, war crimes or crimes against humanity. There are three interrelated factors that make these countries interesting for a comparative research of this kind. First is that they share a past full of atrocities committed on all sides, not only from the two world wars but from the more recent civil wars in the aftermath of the breakup of socialist Yugoslavia, a state that once incorporated all these successors. Combined with a lack of any commonly accepted history by national academia or political elites, there are plenty of opportunities for various interpretations of the same events by both benevolent and malign actors. Second factor which contributes to historical misunderstandings is the controversial role of the International Criminal Tribunal for former Yugoslavia, constituted *ad hoc* by the United Nations Security Council Resolution while the civil wars were still raging. Although the Tribunal gave legal qualifications of all the important atrocities that occured during the civil wars, the most famous probably being the crime of genocide in the municipality of Srebrenica, it was never fully accepted in its legitimacy and impartiality by political elites and common people of the region. The official history of crimes of the Yugoslav civil wars, written in its judgments, was nevertheless incorporated into some of these criminal codes. The third factor lies in the prerequisites of the EU membership process. The formal aspiration of all these countries to align themselves with the EU legislation in this field, resulting in the implementation of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. Thus, the denial, minimization or condonation of crimes of the common Western Balkans past has been put into context of spreading hatred and xenophobia among its peoples. The author's hypothesis is that taken together, these three factors make

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the original idea of the memory laws in conflict ridden societies – to bring stability, conciliation and some redress for victims – difficult to implement in the specific Western Balkans context, and can even lead to further social polarization in its multiethnic societies and greater instability in inter-state relations.

Keywords: negationism, denial, transitional justice, international criminal law, Western Balkans.

Introduction

Courts of law represent expert bodies of renowned jurists, a branch of state power, legitimate arbiters of social disputes, but do they and can they, also be entrusted with the task of creating and enforcing a collective memory of a society? It is doubtful if they have the proper tools at their disposal, since the facts they establish are directed towards settling of a dispute and not explaining in all the details the background of events that led to the dispute's subject matter. Occasionally they do have to establish a lot of factual background, but still, some facts might be deemed irrelevant for the purpose of reaching judgment, unavailable at the time of the judgment, or simply incorrectly established. Criminal courts, in particular, seek to establish an individual's criminal responsibility and they use tools at their disposal which are not particularly suited to truth revelation – defendants can lie in their defense without consequences, prosecutors can arrange for plea bargains to finish the proceedings expeditiously, in adversarial systems courts do not seek evidence not otherwise presented by the parties, defendants might even die and the trial would be suspended without ever revealing what did really happen. However, sometimes criminal courts do serve as careful creators of historical evidence and the Court in Nuremberg, established to try the high-ranking members of the Nazi German party after the Second World War, comes to mind immediately. Its judgments produced a trove of evidence for future historians to meticuluosly study the tragedy that was the Holocaust.

The success of Nuremberg prompted not only further developments in the field of international criminal law and transitional justice more generally, but also expectations that international criminal courts can establish factual bases that would be commonly acceptable for communities that are undergoing a process of reconciliation. The International Criminal Tribunal for former Yugoslavia was definitely one such project, as will be shown below. It was created to bring peace and justice to a conflict-riven country, to prevent further atrocities and to supress denialism of crimes committed by forming a plausible and complete picture of the Yugoslav civil wars. 30 years after its establishment, as a citizen of a country from which a highest number of convicted persons before the Tribunal comes, and as a lecturer in international law working with younger generations, I can attest that denialism is well and alive and ever-growing as time passes by. I am reinforced in this belief by recent amendments to the criminal codes of the Bosnia

and Herzegovina, a country that suffered most from the civil war, and Montenegro, one of the states that contributed to the conflagration by sending its troops to neighbouring Yugoslav republics where they committed crimes. In Macedonia, Serbia, and the Kosovo territory voices for amendments in the similar fashion to be adopted are growing daily.

If one has to criminally prosecute deniers it is a sign denialism has become an acute social problem. However, I would not like to delve into the reasons pro and against criminalization of denial, since my recent monography exhaustively analyzed this issue from the point of view of the freedom of expression.[2] So I asked myself a question why is this happening? Is it because, as I already slightly touched upon – the judicial truth differs from historical truth by default, or can it be also that the Tribunal might have got some things wrong?

This article is supposed to answer these questions in some measure. It starts by explaining why was it expected from the Tribunal that was based in the Dutch capital of the Hague to deliver the truth to Western Balkan's ethnic communities and how it was meant to be a barrier to future denialist practices (part 1 – The Court that was supposed to forge the Truth). Then it goes on to offer one particular case study of a Western Balkan country and its experience with the memory created by the Tribunal. Bosnia and Herzegovina is chosen as the example because of its complex ethnic and institutional structure and troublesome past (part 2 -"My Bosnia, you damned wretch" – or why is Bosnia and Herzegovina preconditioned for denialism). The third part of the article presents the main hypothesis – that the ICTY in large measure contributed itself to denialism through deficiencies of its legal process as a tool for writing of history, but also due to some rather unexpected missteps it might have made when dealing with conflicting interests of the great powers (Part 3 – Of Misplaced Expectations and Inadequate Choices –ICTY as a Flawed Truth Seeker). In the final part I provide the argument that the inspiration for criminalization of denial of Tribunal's judgments, adopted recently in some of the Western Balkan countries, is part of the dynamic of the integration process into the EU, and thus is not an organic social development (Part 4 – The EU as the *spiritus movens* of denial criminalization). At the end I offer some conclusions.

1. The Court that was supposed to Forge the Truth

1.1. High expectations

The International Criminal Tribunal for former Yugoslavia (ICTY) was formed by the United Nations Security Council (UNSC)'s subsidiary body, while the civil wars in this country were still raging, as a measure for the protection of international

2 See M. Vučić, *Sloboda izražavanja i istorijski zločini*, Beograd, 2022.

peace and security under Chapter VII of the UN Charter.[3] The UNSC Resolution adopted on May 25th, 1993, establishing the ICTY includes a decision that "all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute."[4] The former Yugoslav states were not only required to cooperate with the Tribunal pursuant to the resolution establishing it, but also agreed in the framework of the peace treaty that ended the conflict, the so-called Dayton Agreement, to cooperate fully with the Tribunal, including by arresting those whom it had indicted.[5]

One of the often presented critiques to the ICTY's fact finding work was about „overreaching with respect to the nature of the facts its prosecutor sought to establish".[6] In particular, the ICTY prosecutor sought to establish the "historical truth" through the vehicle of the trial of highest ranking defendants such as the former Yugoslav President Slobodan Milošević.[7] It is doubtful if any court in the world should aim to discover the historical truth," or just stick to those facts that bear on the defendant's criminal responsibility.

This function of the Court did not go neither against the expectations of civil societies in former Yugoslavia, nor its foreign political sponsors. An illustrative example of these expectations is the argument of the Deputy Director of the Humanitarian Law Center, the most prominent NGO in Serbia that dealt with criminal proceedings for atrocities: "By establishing the "facts … about the crimes" committed during the 1990s conflict, the ICTY could help forge a common version of historical truth among former Yugoslav communities".[8] Why was it important to forge a common historical truth? Noting there are now multiple versions of the truth, same expert remarked: "What we are seeing now, there are … sort of conflicts of memory. We have wars of memory, like … Serbian version of the past or this Croatian version

3 Creating the ICTY was a Chapter VII enforcement measure taken to restore "international peace and security" and was justified in part on this ground. See S.C. Res. 827, Preamble, para. 6 (May 25, 1993).

4 S.C. Res. 827, para. 4 (May 25, 1993).

5 General Framework Agreement for Peace in Bosnia-Herzegovina, Annex IA, art. 10, Nov. 21, 1995. The name Dayton Agreement was given to the treaty by the air-force base of the US army close to this city where the parties signed the Agreement.

6 N. Kandić, *The ICTY Trials and Transitional Justice in Former Yugoslavia*, "Cornell International Law Journal" 2005, 38, p. 789.

7 See Milošević's case sheet on the ICTY's website for a quick overview: https://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf, 20.2.2023.

8 Quoted in A. Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*, Times Books, 1998, p. 5.

of the past, in conflict with each other. And you have … wars for memory. And that is what we are waging here".[9]

On the other hand, expressing U.S. support for a Security Council resolution formally creating the ICTY, Ambassador Madeleine Albright vowed: "The only victor that will prevail in this endeavor is the truth. … And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process."[10]

Forging a common and accurate understanding, therefore, was necessary to avoid future manipulation of the past. Recalling how nationalist leaders weaponized the past to foment ethnic violence in the 1990s, another NGO expert who was closely following trials in the Hague commented at the time: "If you don't have justice, you can always manipulate the past. … A lot of space is left for manipulation, [as happened] after the Second World War. You have different historiographies … But "once you have a sentence by a legal authority, you have firm ground [for discussion]".[11]

These and similar thoughts comply with the mainstream doctrinal approach of the field of transitional justice, where much of the field's scholarship assumes a context in which citizens are capable of forging a unitary vision of the country's past and future – a resolution, of a common tragedy that plagued the society in the past.[12]

1.2. Shielding against future denial

Different historiographies, manipulation and "memory wars" serve as a fertile ground for future crime denialism. As Nataša Kandić insisted: "If attempts at re-writing history, such as the denial in Germany of the Holocaust, are to be prevented, the courts must do everything possible to bring out the truth. In this context, one of the tasks for the ICTY is to put an end to the practice of the successor states of the former Yugoslavia of passing over in silence or denying atrocities, or persistently broadcasting their distorted and biased versions of the past".[13]

U.S. Prosecutor Telford Taylor made the same point with characteristic eloquence in one of the post-war prosecutions of Nazis in Nuremberg. Evoking the singular role of the proceedings, Taylor elaborated that, for victims, "it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable."[14] Dianne Orentlicher conducted

9 Ibid.

10 Provisional Verbatim Record, U.N. SCOR, 3,217th mtg., at 12, U.N. Doc. S/PV.3217 (May 25, 1993).

11 Interview with Filip Ejdus, Research Fellow, Center for Civil-Military Relationships, on record with the author, 2022.

12 See for example P. Hazan, *Judging War, Judging History: Behind Truth and Reconciliation*, Stanford 2010, p. 9.

13 N. Kandić, op. cit.

14 Cited by D. Orentlicher, *Some Kind of Justice – The ICTY's Impact in Bosnia and Serbia*, Oxford 2018, p. 100.

numerous interviews in the last decade with leading members of Bosniak civil society and concluded that "most Bosniaks who placed store in the ICTY's role in establishing the truth emphasized its expected social impact: they considered it "an important test of the Hague Tribunal to prevent denial."[15]

However I must point out that this expectations were simply not followed by the very persons that were expected to deliver the historical truth – the ICTY judges rendering judgments on the individual criminal responsibility. For example, ICTY judge Fausto Pocar insisted that, "whatever goals the Security Council might have had in mind when it established the ICTY, the Tribunal cannot pursue "political" goals such as fostering reconciliation" … Instead, its task is to "deal with cases as any other court would do, ensuring that principles of due process are applied".[16] By 2004, Judge Antonio Cassese, former President of the ICTY, voiced doubts about his earlier expectations, writing: "The much-hoped-for beneficial impact of ICTY trials on persons and groups living in the former Yugoslavia is meager and tardy. In some cases, proceedings are even having an adverse effect on and are ultimately rekindling nationalism and ethnic animosity."[17]

2. "My Bosnia, you poor wretched soul"[18] – or why is Bosnia and Herzegovina preconditioned for denialism

2.1. Bosnia and Herzegovina as a vulnerable state

In my previous work on the issue of crime denialism, I formulated a theory of the "vulnerable society".[19] I put forward several elements of the definition of the vulnerable society: "Firstly, the history of such a society is burdened by the experience of a civil war or a conflict of similar nature among various social groups. Secondly, a vulnerable society lacks a consensual historical interpretation of the nature, causes, and consequences of the conflict. Thirdly, the national identity of a vulnerable society is considered threatened by different interpretations of the same historical events in other states. Fourthly, the consensual interpretation of a historical conflict, either among social groups of the same society or among states previously involved in the conflict is substituted by a temporary arrangement that had enabled the continuation of co-existence of conflicting social groups. This arrangement may

15 Ibid.

16 Cited in D. Džidić, Hague Tribunal President: *We Offered Truth, Not Reconciliation*, "Balkan Insight" 2017, June 21, available at: https://balkaninsight.com/2017/06/21/hague-tribunal-president-we-offered-truth-not-reconciliation-06-21-2017/, 20.2.2023.

17 A. Cassese, The ICTY: *A Living and Vital Reality*, "Journal of International Criminal Justice 2004, 2, p. 585-595.

18 The quote is my translation of the title of one of the most well-known traditional folklore songs in BiH – so called „sevdalinka".

19 See generally M. Vučić, *Memory Laws in Vulnerable Societies*, "Sociological Review" 2022, 1, p. 165-188.

be in the form of the amnesty law, armistice, or peace treaty.[20] It had been already before the publication of my article noted in the doctrine that: "In deeply divided societies, "the past" is fertile ground for clashing narratives, each shaped as much by (instrumentalized) mythology as objective facts".[21] The existence of one or more of elements that make a society vulnerable creates a fertile ground upon which memory laws can sow the seeds of further future conflicts. Through the analysis of four case studies (BiH, Rwanda, Spain and Israel),[22] I argued that "memory laws in vulnerable societies contribute to existing social conflicts instead of being an instrument of stability".[23] At the same time, the imposition of only one proper historical interpretation controls the social groups that share a different version of history. This social control has the potential to erode the democratic foundations of society, to restrict the guaranteed human rights and freedoms and in the end, to open the old wounds suffered in historical conflicts, never fully healed."[24]

Continuing with this line of thought, I would like here to take the Bosnian example as the explanation of why the ICTY's truth could not be received as the commonly accepted truth in this society. The structural obstacles on this path exist that are related to the institutional organization of the BiH state, factual separation of its various ethnic communities and the conflictual interpretations of its past and present reality among those communities.

2.2. Institutional paralysis in BiH

The governance structures adopted in Dayton further compromised Bosnians' experience of the ICTY's truth. The peace agreement finalized in Dayton and signed in Paris, adopted a model, "consociationalism". Consociationalism generally connotes a power-sharing arrangement, typically instituted in divided societies, in which representatives of every major ethnic, religious, or other relevant group participate in national decision-making institutions on matters of common concern, while each group exercises significant autonomous authority on matters of particular concern to the group.[25] In this way, governance structures are designed to prevent violence in societies racked by ethnic, religious, and other significant divisions. However, it was noted in the doctrine that "consociational arrangements can also reify ethnic divisions and exacerbate the very malady [they were] allegedly designed to treat".[26]

As representatives of Bosnia's principal ethnic groups gathered in Dayton to negotiate peace, the Bosniak delegation hoped the final accord would establish

20 Ibid., p. 177.
21 M. Ignatieff, *Articles of Faith*, "Index on Censorship" 1996, 5, p. 110.
22 M. Vučić, op. cit. p. 181-183.
23 Ibid., p. 183.
24 Ibid.
25 A. Lijphart, *Consociational Democracy*, "World Politics" 1969, 4, p. 207.
26 I. Shapiro, *Democracy's Place*, Cornell University Press, 1996, p. 102.

a reintegrated state.[27] The Peace agreement instead established two largely autonomous entities within a nominally unified state. The arrangement was enshrined in the Constitution of Bosnia and Herzegovina, which was set forth in Annex 4 of the agreement. Forty-nine percent of Bosnia's territory was assigned to the predominantly Serb and largely self-governing Republika Srpska (RS), and 51 percent to the Federation of Bosnia and Herzegovina ("Federation"), an amalgam of cantons largely inhabited by Bosniaks and Croats, with Serbs, Jews, and others constituting minorities. The inter-entity boundaries largely followed the war's frontline.

With a weak central government and tense relations among Bosnia's recently warring parties, the defining feature of political decision-making processes in Bosnia and Herzegovina is paralysis.[28] In response, the Peace Implementation Council (PIC), an international body devised in Dayton to guide the peace process in Bosnia, enhanced the authority of the High Representative, a position created in Dayton to coordinate implementation of the DPA's civilian provisions.[29] The mandate of the High Representative was affirmed by the UN Security Council immediately after conclusion of the Dayton agreement.[30] Later on, the PIC augmented the original High Representative's authority, vested in the Dayton agreement, citing two years of "systematic obstructionism" by Bosnian leaders in the implementation of the Agreement. In December 1997, it agreed he had executive authority to ensure compliance with Dayton through what came to be known as the "Bonn powers." These included removing individuals from public office "who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation", and, what is more important for our discussion here, for imposing laws himself.[31]

It would be by using the "Bonn powers" that the current High Representative would enact (or impose?) the amendments of the criminal code of Bosnia and Herzegovina that criminalized the denial of the judicially proven cases of atrocities that occurred during the civil war in this country if they are capable of incitement to hatred or violence.[32] This decision of the HR provoked reactions not only in BiH

27 J. McEvoy, *Power Sharing Executives: Governing in Bosnia, Macedonia, and Northern Ireland*, University of Pennsylvania Press, 2014, p. 109.

28 C. Bennett, *Bosnia's High Representatives: Never-Ending Story*, "Balkan Insight" 2015, Nov. 20, https://balkaninsight.com/2015/11/20/bosnia-s-high-representatives-never-ending-story-11-20-2015/, 22.2.2023.

29 I. H. Daalder, *Getting to Dayton: The Making of America's Bosnia Policy*, Brookings Institution Press, 1999, p. 165.

30 S. C. Res. 1031, paras. 26-29 (Dec. 15, 1995).

31 See more about these developments in C. Cordone, *Bosnia and Herzegovina: The Creeping Protectorate*, [in:] *Honoring Human Rights Under International Mandates: Lessons from Bosnia, Kosovo and East Timor*, A. H. Henkin, ed., 2003, p. 63.

32 *High Representative Decision Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina*, "Official Gazette of Bosnia and Herzegovina" 46/21.

but in other neighbouring countries that were directly or indirectly involved in the civil war as well.[33]

2.3. Physical and emotional separation of ethnic communities in BiH

According to the 2013 Bosnian census, 92 percent of Bosnian Serbs live in Republika Srpska, 82 percent of whose population is Serb. Approximately 93 percent of Federation residents are either Bosniak or Croat. Within the Federation, there is significant de facto segregation as well. For example, ethnic Croats constitute approximately 69 percent of residents in the contiguous cantons of Herzegovina Neretva, West Herzegovina, and Canton 10, and 77 percent of the geographically separate Posavski canton, while almost 82 percent of residents in the remaining six Federation cantons (Una-Sana, Tuzla, Zenica-Doboj, Bosnian-Podrinje, Central Bosnia, and Sarajevo) are Bosniak.[34]

Physical division and consequential lack of inter-ethnic contact contributes to totally opposite perceptions on the factual basis of the war and atrocities, or what I would term "emotional separation". The surveys conducted by the Belgrade Center for Human Righs captured stark differences in the responses of citizens in predominantly Serb, Croat, and Bosniak regions, respectively, to questions about relative victimization and responsibility for war crimes. In 2010, 75 percent of respondents in the Federation said the largest number of victims were Bosniak, while only 3 percent of respondents in Republika Srpska chose this answer. While these figures suggest a striking Federation/RS divide, responses within the Federation also break sharply along ethnic lines: almost 89 percent of those living in majority Bosniak regions identified Bosniaks as the largest victim group, while only 12 percent of respondents in majority Croat regions chose this response.[35]

The picture is even starker when one consults surveys on the trust in the ICTY itself. In 2002, the International Institute for Democracy and Electoral Assistance administered a survey of all states and entities of the former Yugoslavia. Only 3.6 percent of respondents in the predominantly Serb entity of Republika Srpska (RS) said they trusted the ICTY, while 50.5 percent of those surveyed in the predominantly Bosniak-Croat Federation said they trusted the Tribunal. When responses are broken down by ethnicity, the divisions are even more stark: only 1.8 percent of RS respondents who identified themselves as Serb said they trusted the ICTY, while 42.2 percent of RS respondents who identified themselves as "other" said they trusted the Tribunal. Within the Federation, 70.2 percent of respondents

33 See more in M. Vučić, *When law enters history: prohibition of crime negationism and its limits in international law*, "Annals of the Faculty of Law in Belgrade" 2021, 69(4), p. 873.

34 Data available on the website.

35 Data available at: http://bgcentar.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-BiH-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2012-detaljne-tabele.pdf, 20.2.2023.

who identified as Muslim said they trusted the Tribunal, compared to 14.4 percent of Croat respondents.[36]

Raw data is supported by some of my personal insights acquired in the course of interviews with representatives of victims associations on both sides of the ethnic divide such as the President of the Republika Srpska Association of Families of Missing Persons in the RS capital of Banja Luka. We discussed together the famous Siege of Sarajevo, which besides Srebrenica presents in the mind of the Bosniak community the prime example of the systematic policy of war crimes and crimes against humanity that Bosnian Serbs conducted during the war to ethnically cleanse large swathes of BiH territory that they perceived as rightfully theirs. Due to constant shelling and sniper shooting of civilians in the city for several years, the ICTY convicted several individuals for crimes committed during the siege of Sarajevo. A landmark conviction was rendered in December 2003 in a case against Stanislav Galić, who was sentenced by the Trial Chamber to twenty years' imprisonment for his role in the siege.[37] The Appeals Chamber raised Galić's sentence to life in prison.[38] Further major convictions of middle and high ranking Bosnian Serb military personnel followed.[39] However, the view expressed in the interview I conducted, and the view widely shared among local Serb community of Sarajevo is that the so-called siege represented in fact "a front-line in the two way war" where the Serb forces holding Sarajevo under siege were actually sandwiched between the Bosniak forces in the innner city and the surroundings, while Serb civilians who spent the siege inside the city endured various atrocities by local Bosniak population throughout the whole period.

This different qualifications of the same facts concerning the manner and nature of war operations will be revisited again in the next part of the article. The dynamic described evokes a phenomenon said to be common in intergroup conflicts, which social psychologists have called competitive victimhood.[40] Typically, competitive victimhood is defined as "a group's motivation and consequent efforts to establish that it has suffered more than its adversaries".[41]

36 Cited by D. Orentlicher, op. cit., p. 136.

37 ICTY, Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgment, para. 769, Dec. 5, 2003.

38 ICTY, Prosecutor v. Galić, Case No. IT-98-29-A, Appeal Judgment, para. 185, Nov. 30, 2006.

39 ICTY, Prosecutor v. Milošević, Case No. IT-98-29/1-T, Trial Judgment, Dec. 12, 2007; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Trial Judgment, para. 6048, Mar. 24, 2016; Prosecutor v. Mladić, Case No. IT-09-92-T, Trial Judgment, para. 5190, Nov. 22, 2017.

40 E.g. M. Noor et al., *When Suffering Begets Suffering: The Psychology of Competitive Victimhood Between Adversarial Groups in Violent Conflicts*, "Personality & Social Psychology Review" 2012, 16, p. 351.

41 Ibid., p. 351.

3. Of Misplaced Expectations and Inadequate Choices – ICTY as a Flawed Truth Seeker

3.1. Criminal Courts are no Real Historians

Thus, we can conclude that the expectations of the ICTY were directed to the need to receive some kind of superimposed, impartial and objective truth about the historical conflicts in former Yugoslav states. These expectations were slightly out of touch with the primary function of an international criminal tribunal which seeks to deliver convictions for individual culprits, and not to establish the full historical overview of the causes and nature of a conflict. "As a criminal court whose job is to establish the guilt or innocence of individual defendants, the ICTY is not capable of establishing a comprehensive truth, much less one citizens will believe across ethnic lines".[42] It was furthermore noted that, "as a foreign court, the ICTY cannot assume a burden of reckoning with the past that only former Yugoslav citizens can discharge".[43]

Even if it was possible for a criminal court to do just such a thing, it bears repeating that "historical truth is always provisional, unsettled, and constructed in no small part by subjective interpretation".[44] In addition, it might have been obvious from the start that prevailing institutional and functional deficiencies of BiH's political system would lead to the inability of the ICTY's historical truth to be invariably accepted by all the ethnic communities that participated in the conflict. Finally, the decision of the HR, who is in essence an institution of quasi-colonial administration with dubious legitimacy in the eyes of Bosnian political elites and common people, to impose the criminalization of the denial of the judgments adopted by the ICTY, further delegitimized the ICTY's legacy as a source of historical truth and might have led to reinvigorated denialist practices.

3.2. "Competitive Victimhood" or Bias?

The roots of denialism might be traced in the somewhat perplexing, at least on surface, charging practices of the Tribunal. It was noted that the ICTY's charging distribution is "generally in line with patterns one would expect to find based on the data on civilian casualties and the nature of ethnic conflict in Bosnia – in particular, which ethnic groups were engaged in conflict with each other".[45] However, it is telling that two-thirds of those indicted by the Tribunal were ethnic Serbs, 21.1 percent

42 J. N. Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina*, "Journal of International Criminal Justice" 2009, 7(3), p. 479.

43 E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, University of Pennsylvania Press, 2005, p. 116.

44 R. G. Teitel, *Transitional Justice*, Oxford 2000, p. 69-70.

45 Data provided by the Research and Documentation Center of Sarajevo (RDC), http://mnemos.ba/ba/home/index, 22.2.2023.

were ethnic Croats, 5.5 percent were Bosniaks, 5 percent were Kosovo Albanians, 1.2 percent were ethnic Macedonians, and 1.2 percent were ethnic Montenegrins.[46] Besides, some previous studies have indicated that 90 percent of Serb defendants were found guilty of at least some charges, compared to 75 percent of Bosniak suspects, 73 percent of Croat suspects, and 33 percent of Kosovo Albanian suspects.[47]

These discrepancies in the number of indicted and convicted persons on the basis of their ethnic background is hardly a fact that can help the ICTY's truth to be fully and invariably accepted by all these communities, who have always lived an uneasy co-existence in the Balkans, and share a common history full of conflict, atrocities and misunderstandings on the nature and causes of these atrocities. As Timothy William Waters aptly notes, "There is little about the history of Yugoslavia, its dissolution, or the violence that followed that is uncontested, and the prospects of saying something both meaningful and uncontroversial are vanishingly small."[48]

It has also come to my attention that the most famous "deniers", at least when Republic of Serbia is concerned, come from the circles of lawyers who either served as defense counsel in The Hague, or teach criminal and public international law in Serbian universities, or both. My personal conviction is, as someone who also forms a part of this community of international lawyers in Serbia, is that they do not it with the intent to incite violence or hatred against other ethnic groups, but rather out of the need to expose the deficiencies in the formal and material application of international law by the ICTY chambers.

3.3. Evidence providers or Myth Creators

A fact which definitely influences the denialist discourse surrounding the atrocities prosecuted in front of the ICTY, especially in relation to Bosnia and Herzegovina, is that the majority of factual basis used for the Tribunal's fact-finding purposes was provided by civil society organizations of the Bosniak ethnic community. Bosnian women's organizations began documenting wartime rapes with a view to securing justice as early as 1992, when the conflict was just beginning.[49] Rape survivors started collecting testimonies of other victims after their release the concentration camps where they were put by local Bosnian Serbs. However, the task of collecting key evidence was quickly taken over by the Bosnian wartime government, which set up a Commission for Gathering Facts on War Crimes in early 1992. It was not until the very end of hostilities that its work was delegated to the already mentioned NGO – the Research and Documentation Center, curiously led by the same person who was secretary of the government Commission. These efforts were strongly backed

46 Ibid.

47 D. Orentlicher, op. cit., p. 224.

48 T. W. Waters, *The Context, Contested: Histories of Yugoslavia and Its Violent Dissolution*, [in:] *The Milošević Trial: An Autopsy*, ed. T. W. Waters, 2013, p. 3.

49 A. Čerkez, *Bosnian Woman Helped Make Rape a War Crime*, Associated Press (8th March 2013).

by international advocacy groups. Amnesty International describes the interplay between Bosnian women's organizations and international advocates this way:

> In 1992 women's organizations in BiH and Croatia reported the occurrence of rape in Bosnia and Herzegovina on a massive scale. Following such reports human rights organizations, women's organizations and other civil society actors worldwide campaigned for the establishment of an international tribunal which would prosecute all allegations of rape and other war crimes which took place in the context of the conflicts in the former Yugoslavia.[50]

Thus came to being one of the most vividly impressed images of the Yugoslav wars – the raped Bosniak woman. The argument that Bosnian Serbs used rape as a tool of war and the convenient vehicle for ethnic cleansing was constructed from testimonies of individual victims of rape held in concentration camps scattered all over BiH.

3.4. Bargaining for truth

One of the most prominent obstacles to equalizing judicial truth with historical truth in the case of the ICTY is that so many times the convictions were based on plea bargains with defendants. Twenty ICTY defendants entered guilty pleas between May 1996 and December 2007, usually following negotiations with prosecutors who hoped to convince the suspects to plead guilty in exchange for a steep reduction in sentence: "From the prosecutors' perspective, plea agreements offered distinct advantages: most obviously, they usually averted lengthy and costly trials".[51] Tellingly, most guilty pleas were entered in 2002 and 2003, "a period in which the ICTY faced intensive pressure to wrap up its work expeditiously".[52] The first plea bargain was made with the key person whose plea and later testimonies provided the basis for the pyramidal construction of responsibility for genocide of the highest ranking Bosnian Serb political and military figures. By his own account, a certain Dražen Erdemović (of Croatian ethnicity, by the way) plead responsibility for having personally killed 70 of the estimated 7,000-8,000 victims of the Srebrenica massacre

50 Amnesty International, *Bosnia & Herzegovina: 'Whose justice?': The women of Bosnia and Herzegovina are still waiting*, EUR 63/006/2009, September 30th 2009, https://www.amnesty.org/en/documents/eur63/006/2009/en/#:~:text='%20%3A%20The%20women%20of%20Bosnia%20and%20Herzegovina%20are%20still%20waiting,-September%2030%2C%202009&text=Rape%20and%20other%20forms%20of,Bosnia%20and%20Herzegovina%20(BiH), 20.2.2023.

51 J. N. Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, "European Journal of International Law" 2009, 20, p. 415.

52 N. A. Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, "Vanderbilt Law Review" 2006, 59, p. 87-88.

at the Branjevo farm near Pilica on July 16, 1995.[53] Six weeks after he first pleaded guilty, Erdemović testified in proceedings against Ratko Mladić and Radovan Karadžić and later provided valuable testimony in cases against other senior suspects. He remained the only direct perpetrator of genocide in Srebrenica convicted in front of the ICTY, all the rest were convicted under the doctrine of command responsibility or for aiding and abetting genocide. The point is, if we know who killed 70 persons, and we know there are around 8.000 casualties of the Srebrenica massacre, where are all the other perpetrators and their stories? They were irrelevant because of the pyramidal prosecutorial strategy to go from Erdemović as a lowest cog, to the masterminds of genocide in persons of Karadžić and Mladić, following strictly the supposed chain of command under the doctrine of command responsibility,[54] finding all the persons in that chain responsible for issuing orders which were never actually procured before the Court.

And what to say about the case of Biljana Plavšić, Karadžić's second hand during the war and former President of Republika Srpska, who pleaded guilty of the crime against humanity of persecution, becoming thus the first high-ranking Bosnian Serb to be convicted in front of the ICTY. In its sentencing brief, the prosecution wrote: "Mrs. Plavšić'plea guilty and acceptance of responsibility represents an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation."[55] However, after her release from prison, having served two-thirds of the sentence, already in 2009, she publicly disavowed her confession, saying in an interview that she had pleaded guilty to crimes against humanity to avoid facing a lengthy trial on other charges, including genocide. Against her earlier gesture of remorse, Plavšić now insisted: "I have done nothing wrong."[56] Plavšić explained that her defense lawyer had advised her to plead guilty to some charges to reduce the length of the trial and added: "When I got to see how all that goes in the Hague Tribunal, I told myself I should do something for myself. At least I could spare myself the trouble of sitting there and listening to false witnesses."[57] Not long after, Plavšić was warmly welcomed by the then and now leader of Republika Srpska, Milorad Dodik, upon her return to Belgrade.

So can we rely on Erdemović and Plavšić telling us the whole truth about the conflict or just the part that went in their favour, or just plain telling lies. They have certainly deserved to be convicted for what they have done, but must we now refrain from minimizing or denying the facts they provided in their pleas, when we

53 ICTY, Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, para. 55, Nov. 29, 1996.

54 Which, by the way, is not accepted in Serbian or many other European criminal codes.

55 ICTY, Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1-S, Sentencing Judgment, para. 74.

56 Quoted in K. B. Carlson, *Model(ing) Justice: Perfecting the Promise of International Criminal Law*, Cambridge 2018, p. 155.

57 Ibid., p. 156.

see how easy it was for them to renounce them quickly after the danger passed? Is it really in the interest of victims, in the interest of tolerance and non-discrimination to provide their words with the aura of inviolability sanctioned by criminal law?

If the ICTY ever really planned to establish historical truth through its judgments this was most certainly the case in the trial of former President of the Federal republic of Yugoslavia and Serbia, Slobodan Milošević. As Timothy Waters has noted, "what made this trial extraordinary was the way it wove together the many crimes charged in the Tribunal's overall work … what been isolated, disparate acts, told and tested in separate trials, was now joined in a single case, under a single theory that implied a claim about the wars as a whole. The case that was brought against Milošević placed him at the very center of a web of criminality."[58] To paraphrase another author, the indictment's sweep in the Milošević case was in no small part a reflection of prosecutors' effort to address victims' hopes the Tribunal would do more than prosecute individuals one by one, and instead render an authoritative history of the 1990s conflicts.[59] However, the trial of Milošević took so long, not the least because of such a mammoth indictment, that the defendant died in his detention cell within weeks of the trial's end. Thus, it can be concluded that if the idea was to create a definitive truth about the conflict, failure to judge Milošević's case, a capstone Tribunal's case, and an unusual proceeding that strove the establish "the authoritative history" of the whole conflict, than that idea was not completed, and all the other pieces of the truth puzzle established in other judgments, remain just that – pieces, unable to be connected into a whole canvass.

3.5. Who did it then and why?

Some judgments, or more precisely, some acquittals left certain historical issues completely unaccounted for. The most important are related to commission of atrocities against Serbs in Croatia and in the region of Srebrenica before the genocide itself.

On November 16, 2012, judgment of the ICTY Appeals Chamber overturned the conviction of Croatian generals Ante Gotovina and Mladen Markač. This was, at least according to Croatian human rights experts who closely followed the trial, the ICTY's "most controversial judgment" up to that point.[60] In April 2011, a unanimous trial chamber convicted Gotovina and Markač of crimes against humanity committed against Serbs during Operation Storm, the Croatian offensive launched in August 1995 to rout Serb rebels from the Krajina region of Croatia.[61] The trial

58 T. W. Waters, *The Milošević Trial: An Autopsy*, Oxford 2013, *Preface*, p. xv.

59 D. Wippman, *The Costs of International Justice*, "American Journal of International Law" 2006, 100, p. 875-876.

60 B. Ivanišević, *Hague Failed to Justify Gotovina Acquittal*, "Balkan Transitional Just", 19th November 2012, available at: https://balkaninsight.com/2012/11/19/hague-failed-to-justify-gotovina-acquittal/, 20.2.2023.

61 ICTY, Prosecutor v. Gotovina et al., Case No. IT-06-90-T, Trial Judgment, April 15, 2011.

verdict had powerful regional reverberations: if Serbs found vindication in Gotovina's conviction, Croatian citizens were shocked. Croatia's leaders condemned the Trial Chamber's finding that an operation they considered purely defensive entailed a "joint criminal enterprise" whose purpose was to permanently remove Serbs from Krajina.

The judgment was reversed for reasons that left much confusion and criticisms directed to the Court's reasoning: "Faced with the question of whether the Croatian army indiscriminately (and thus unlawfully) fired hundreds of artillery projectiles into four towns in Krajina, the separatist Serb region of Croatia, the Trial Chamber developed and applied a presumption: artillery projectiles that fell more than 200 meters away from a legitimate military target would, absent contrary evidence, be presumed to have been fired indiscriminately, and thus unlawfully. Using this presumption, the Trial Chamber concluded that four towns in Krajina had been subjected to unlawful artillery fire".[62] Appellate judges unanimously agreed that the Trial Chamber failed to provide a reasoned foundation for the 200-meter standard. This was not something controversial, since international humanitarian law is rather scant on this standard and practice of different armies in the world differs. But, the story did not end there. "Undertaking a *de novo* review rather than simply correcting what it considered a legal error,39 the majority "swept aside" not only the trial verdict's conclusions based on the 200-meter standard, "but also all the other evidence of Gotovina's guilt" in the trial judgment".[63]

So there it was, that the conviction and 24-year sentence was overturned on the same factual basis as an acquittal, without a single new fact, testimony or evidence being presented. Someone obviously made a serious error, either the Trial Chamber or the Appeals Chamber, but for our argument, the most important consequence was that all the suspected culprits were free to go, and no one was left to answer for several thousand dead civilians. So one might wonder, is the truth of the ICTY that there was no crime against humanity in Krajina? By claiming the opposite, would someone act with the intent to spread hatred against Croatians?

To add insult to injury, later developments gave some evidence to possible motivations of the appellate judges to render such an unusual judgment: "The majority opinion was motivated by judges' desire to avoid a legal precedent against which Western military forces might more readily be judged guilty of war crimes". Several facts fueled this narrative. First, a group of retired military advisors from the United States and other Western countries prepared an amicus brief urging the Appeals Chamber to reject the 200-meter standard.[64] Second, the trial verdict convicting Gotovina and Markač of participating in a "joint criminal enterprise"

62 D. Orentlicher, op. cit., p. 179.

63 Ibid., p. 180.

64 ICTY, Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful

to expel Serbs from Krajina had "raised fresh questions about the role Croatia says American advisers played in the campaign".[65] Finally, American judge Theodor Meron was among those voting for acquittal. These views, understandably expressed predominantly in Serbian media, were reinforced when several years later Danish media published a "private" letter from ICTY judge Frederick Harhoff to "56 contacts" sharing concerns about Appeals Chamber decisions starting with Gotovina. Criticizing recent judgments that "suddenly back-tracked" on previous ICTY jurisprudence, Harhoff implied American and Israeli pressure was behind the judicial retrenchment:

> You would think that the military establishment in leading states (such as USA and Israel) felt that the courts in practice were getting too close to the military commanders' responsibilities … In other words: The court was heading too far in the direction of commanding officers being held responsible for every crime their subordinates committed.[66]

Judge Harhoff was promptly deposed from the Tribunal after the letter's publication. And that is also a historical fact which might be interpreted from several angles.

The story of Naser Orić and the causes of Srebrenica is another example. Naser Orić was a wartime commander of the Srebrenica garrison of Bosniak army. The Office of the War Crimes Prosecutor (OWCP) in the Republic of Serbia declared in 2013 that it was investigating Orić for crimes committed against ethnic Serbs in the Srebrenica region during the conflict period 1992-1995. In Serbia, there is a widespread perception that the Srebrenica genocide, if it happened at all, was just an act of vengeance exerted upon Bosniaks from Srebrenica who had for three long years, headed by Orić, terrorized the local Serbian population in surrounding municipalities. However, Orić had been tried and acquitted before the ICTY before the OWCP's reveal.[67]

On the other side of the front, as of December 2017, the ICTY had rendered final convictions of five Bosnian Serbs on genocide-related charges in connection with Srebrenica, and two other genocide convictions of Bosnian Serbs at the trial level. Its first trial verdict finding that genocide was committed in Srebrenica was rendered in 2001.[68] In January 2015, the Appeals Chamber upheld the convictions of two

Artillery Attacks During Operation Storm, submitted in *P*rosecutor v. Gotovina et al., Case No. IT-06-90-A, Jan. 12, 2012.

65 Brak treści przypisu???

66 M. Burcharth, *The e-mail that went around the world*, "Information", available at: https://www.information.dk/moti/2013/12/the-email-that-went-around-the-world, 20.2.2023.

67 ICTY, Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment, Disposition, 269, June 30, 2006; and Prosecutor v. Orić, Case No. IT-03-68-A, Appeal Judgment, July 3, 2008.

68 ICTY, Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, para. 599, Aug. 2, 2001). On April 19, 2004, the ICTY Appeals Chamber sustained the trial chamber's conclusion that the Sre-

Bosnian Serb officers on the charge (among others) of genocide itself – the first time it had done so (Krstić was convicted on appeal of aiding and abetting genocide).[69] Later that year, the Appeals Chamber also sustained the conviction of Zdravko Tolimir on the charge (among others) of genocide in relation to Srebrenica.[70] In March 2016, an ICTY trial chamber convicted Radovan Karadžić of genocide and other charges in connection with Srebrenica.[71] Ratko Mladić was convicted of genocide in relation to Srebrenica in November 2017.[72]

So on the one side of war, we have one indicted commander who was ultimately released, and on the other side a bunch of convicted persons from direct commanders, to general chief of staff and political leaders. Is wars such a one-sided affair? Well, genocide certainly is, because it presupposes that the victim side was unable to protect itself properly and thus became prone to extinction. However, here is the dispute not so much on the legal qualification, but on the causes and consequences, who fired the first rifle, was the Srebrenica massacre an orgy of senseless slaughter or an operation to eliminate completely an enemy stronghold that caused so much suffering for the other side civilian and military personnel for so long?

Again, one might turn to statistics to check how the ICTY's truth about Srebrenica is perceived among Serbs, who should be the main addressees of its message of truth, remorse and responsibility. Between 2001 and 2006, a rising percentage of Serbian respondents who said they had heard about the Srebrenica massacre said they believed what they had heard (from 62 percent in 2001 to 70 percent in 2006), before the percentage dropped to 60 percent in 2009, and finally to 56 percent in 2011, the final survey year. In 2011 a smaller percentage (33 percent) of total survey respondents than in 2001 (48 percent) said the Srebrenica killings were "a war crime for which the perpetrators should answer" rather than "an inevitability of war," with fluctuations in the period between these two surveys. Notably, as well, a smaller percentage (37 percent) qualified the killings as a war crime in 2004, after the ICTY rendered its first genocide conviction in the Krstić case, than in 2001 (48 percent). Among respondents who said they believed large numbers of Muslims were killed in Srebrenica, an even smaller percentage said they considered the massacre to constitute a genocide. For example, in contrast to the 40 percent of total respondents in the 2011 survey who said they believed large numbers of Bosniak civilians had been killed in Srebrenica, 80 percent said they believed reports that "Croats killed many civilians in the Storm and Flash operations," whose principal

brenica massacre met the legal definition of genocide. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeal Judgment, para. 37, Apr. 19, 2004.

69 *Prosecutor v. Popović* et al., Case No. IT-05-88-A, Appeal Judgment, para. 472, 486, 494, Jan. 30, 2015.

70 *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Appeal Judgment, para. 648, Apr. 8, 2015.

71 *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Judgment, paras. 6022, 6071, Mar. 24, 2016.

72 *Prosecutor v. Mladić*, Case No. IT-09-92-T, Trial Judgment, paras. 5188, 5191, Nov. 22, 2017.

victims were ethnic Serbs. Similarly, 82 percent of total respondents in the 2011 survey said they believed the Kosovo Liberation Army, the Serbian government's adversary in the 1999 Kosovo war, committed crimes during that conflict.

Srebrenica being the emblematic crime of the whole war, well-known even outside the Western Balkans, one might ask how do then fare, other, "lesser" crimes committed in Prijedor, Vlasenica, Han Pijesak, Bihać … and many other municipalities in this beautiful country. Who remembers them, who believes in them, who pays them respect that they deserve, who expresses remorse and accepts responsibility? Not many and the number is getting smaller as time passes by and other events take over.

4. The EU as the *spiritus movens* of denial criminalization

The prerequisites of the European Union membership process pushed the Western Balkans' countries to adopt the legislation criminalizing denial of their common past. The formal aspiration of all these countries to align themselves with the EU legislation in this field, resulted in the implementation of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.[73] Thus, the denial, minimization or condonation of crimes of the common Western Balkans past has been put into context of spreading hatred and xenophobia among its peoples. This is not to claim that the criminalization of negationism would have been left unfinished without the EU's incentives. However, it materialized as a part of the conditionality policy of the EU in the membership process, and can thus easily be perceived by citizens of the Western Balkans' countries as another imposition from abroad upon their own past and identity. Thus we have here a two-pronged imposition of history and the consequences of interpreting this history. Firstly, there was a court created by a resolution of an international organization, first of its kind, that got the task of writing down the history through its judgments. Secondly, there came the weight of the EU financial and policy conditioning to will the states and the populations to accept this history as the official one under threat of criminal penalty. Additionally, in the case of BiH, which is the most acute example, a semi-colonial institution (ab)used its powers widely interpreted by an informal international body for the implemenation of peace to formally institute the piece of legislation criminalizing the Hague imposed and the Brusells conditioned truth. The legitimacy of this memory can thus be denied from two or even three points of view, obscuring the fact that the Hague-written history is the only common and probably the only acceptable history that this region would ever have.

However, the main problematic concerning the legal inspiration of the negation criminalization in the Western Balkans is that this inspiration is not in itself built

73 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55, 6 December 2008, p. 55-58.

on a solid basis. I have previously conducted a research with a hypothesis that the institute of the prohibition of negationism from the EU Framework Decision is too widely construed and represents an unattainable ideal in practical application, due to existing differences among EU member states on the relation between racism and xenophobia, on the one hand, and negationism on the other.[74] The research results have shown that these differences influenced wide-ranging discrepancies in the implementation of the Framework Decision among member states. There are some who fully implement the Decision,[75] some who used the Decision to equalize the crimes of the Nazi German regime with totalitarian communist regimes from their national histories,[76] some states just simply ignored the Decision and claimed that their judicial practice on hate speech is adequate enough to cover the domain of the crime of negationism,[77] states that limited the application of the Framework Decision only to the crimes of the Nazi Regime,[78] and in some instances constitutional courts of member states have stroke down the initiatives for criminalization of negationism of any other crimes except the Holocaust as contrary to the freedom of expression which effectively limited the Decision's reach.[79]

This analysis tells us that even the EU member states cannot agree on the value and purpose of wide criminalization of negationism. Why then mere candidates for membership, such as BiH, notwithstanding all their trauma-burdened societies riven with past conflicts and unsettled in the interpretation of the nature and causes of these conflicts, should go further than the majority of the already existing members and use such an intrusive tool for denialism suppression such as criminal law? As I indicated in the conclusion of the afore-mentioned research paper:

> If they plan to implement this EU legal act into their legislation without careful examination of their own socio-historical contexts, it is possible that instead the suppresion of xenophobia and racism the result of this implementation becomes a repressive reaction of the state to the crimes on which no social consensus exists, which at the end leads to unjustified encroachment on the freedom of expression, as a foundational European value and basic human right.[80]

It must be borne in mind that all these states are also members of the Council of Europe, thus legally bound to respect the provisions of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights

74 M. Vučić, *U potrazi za pravom merom: zabrana negaonizma u uporednom evropskom zakonodavstvu*, "Strani pravni život" 2022, 2, p. 221-242.

75 Ibid, p. 227-229.

76 Ibid, p. 229-231.

77 Ibid, p. 231-232.

78 Ibid, p. 232-233.

79 Ibid, p. 233-234.

80 Ibid, p. 235.

(ECtHR). And this jurisprudence is not encouraging when wide criminalization of negationism is concerned. I have previously noted in my research that:

> the overview of cases involving negationism before the ECtHR shows that in practice it is very difficult to ascertain the hateful intent behind the negationist act, which might make the interference of memorial laws with the freedom of expression wider than intended. Therefore, the practice of the EctHR might serve as a general referential framework for their application. However, this jurisprudence is constantly evolving and depends on the context of the cases being adjudicated. Therefore, only partial conclusions about this referential framework can be reached so far. The Holocaust, as a form of genocide that is inherently against democratic values, that is confirmed through abundant historical literature and decisions of an international court that enjoyed the wide support of the international community, deserves special protection, and any form of its denial is not protected by the freedom of expression, regardless of its potential to incite hatred or violence. Negation of other historical genocides and atrocities generally cannot per se be considered as against the law, and various contextual elements have to be taken into consideration. Firstly, if the intention to incite hatred or violence towards a targeted individual or a group is found to exist it definitely makes a negationist act illegal. In case the intention is lacking or is difficult to ascertain subjectively, the string of objective contextual elements defines the limit of the freedom of expression in any particular case …The *Perinçe*k case confirms the restrictive approach of the Court when accepting limitations to the freedom of expression for crimes other than the Holocaust. It seems that the Court would not be willing to accept any *historically disputable* crime as a taboo topic, regardless of the existence of numerous material evidence, historical research, and political declarations that create its official history. It is yet to be seen, if and when one of the cases dealing with the negation of the crimes established by an international criminal court comes before the ECtHR, say for example a complaint by a citizen of Bosnia and Herzegovina against the application of newly amended criminal provisions of this state, if the judicial quality of truth would prove to be a more decisive factor for the ECtHR's analysis.[81]

Conclusion

Asymmetries in the number of indicted and convicted persons based on their ethnic background, agreements with defendants that hide more than reveal the truth behind a crime, possible structural biases in evidence collection, one-sided evaluation of conflicts through convictions and acquittals – these are some of the points raised in connection with the hypothesis that the ICTY contributed to the rise of denialism, rather than prevented it as was the starting expectation. Still, it must be noted that the denialism in BiH is structurally conditioned, due to institutional

81 M. Vučić, *When Law Enters History: Prohibition of Crime Negationism and it Limits in International Law*, "Annals-Belgrade Law Review" 2021, 69(4), p. 870.

deficiencies, factual distancing between its various communities and general state vulnerability. It seems that the doubts about the impartiality of the ICTY and its more than imperfect handling of certain procedural and material aspects of its decisions created a negative picture of international law as a concept. If one tries then to place the results of such an international court in the position of legally protected truth, which should impact on the collective memory of a people, the denial of its findings and judgments can easily follow: "To be anti-ICTY should not be equated with total denial".[82]

In light of the persistence of robust denialism despite decades of judicial fact-finding, perhaps what BiH (or the region) needs to establish a commonly accepted history that would become part of the official memory is a truth commission. The work of such a commission, which would have to assemble the eminent historians and other relevant experts from all ethnic communities, could be then protected by identical memory laws adopted in national parliaments of former Yugoslav countries. This home-grown initiative would resist the temptation of denial and enjoy much greater legitimacy than the imposition by force of law on the citizens of a judicial truth created by the ICTY as is currently the case.

82 D. Orentlicher, *Some Kind of Justice – The ICTY's Impact in Bosnia and Serbia,* Oxford 2018, p. 194.