

The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem

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## THE IMPACT OF THE ICTY ON THE FORMER YUGOSLAVIA: AN ANTICIPATORY POSTMORTEM

*By Marko Milanović\**

A strange thing about the International Criminal Tribunal for the Former Yugoslavia (ICTY) is that for most of its life, it has thought about its death. The Tribunal, of course, kept getting a reprieve.<sup>1</sup> But today it seems more likely than not that the ICTY will indeed close down sometime in 2017, after the conclusion of the two cases it currently has at trial.<sup>2</sup> Yet even after its closure, the ICTY will continue in a sort of un-death, through the unfortunately named Mechanism for International Criminal Tribunals, which will complete retrial and appellate proceedings in the cases currently tried before the ICTY.<sup>3</sup>

As is only natural when faced with one's impending demise—and especially having been faced with it for so long—the ICTY has spent much time reflecting on its legacy, partly to justify its own existence and the resources invested in it. There have been many conferences, speeches, and articles on the various aspects of that legacy, both internationally and in the former Yugoslavia. The Tribunal's own website also proudly proclaims a number of its achievements: holding leaders accountable, bringing justice to victims, giving victims a voice, establishing the facts, developing international law, and strengthening the rule of law.<sup>4</sup>

There is little doubt that some of the Tribunal's purported achievements are very real and significant. Others, however, are more speculative or aspirational. To start with the former, it is exceptionally unlikely that any of the high-ranking political and military leaders that have been tried by the ICTY would ever have been (successfully) prosecuted before domestic courts.<sup>5</sup> At that level of individualized justice, at least, the Tribunal has made a positive net contribution, even if it was an imperfect one. Similarly, but for the ICTY and

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<sup>1</sup> See, e.g., Fausto Pocar, *Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY*, 6 J. INT'L CRIM. JUST. 655 (2008); ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW 483–91 (2015).

<sup>2</sup> See Judge Theodor Meron, Address to the U.N. Security Council (June 3, 2015), at [http://www.icty.org/xl/file/Press/Statements%20and%20Speeches/President/150603\\_president\\_meron\\_un\\_sc\\_en.pdf](http://www.icty.org/xl/file/Press/Statements%20and%20Speeches/President/150603_president_meron_un_sc_en.pdf).

<sup>3</sup> See Thomas Wayne Pittman, *The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals: From Completion to Continuation*, 9 J. INT'L CRIM. JUST. 797 (2011); Guido Acquaviva, *Was a Residual Mechanism for International Criminal Tribunals Really Necessary?*, 9 J. INT'L CRIM. JUST. 789 (2011).

<sup>4</sup> ICTY, Achievements, at <http://www.icty.org/sid/324>.

<sup>5</sup> See also Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89, 90 (2009).

the different forms of pressure exerted upon the successor states of the former Yugoslavia by the international community, there would never have been any prosecutions of mid- or low-level perpetrators by the national courts of these states, or they would have happened on a much smaller scale. The Tribunal has clearly had some modest positive impact, especially in Bosnia,<sup>6</sup> in enhancing the capacity of the national judiciaries of the post-Yugoslav states to deal with war crimes cases, even if these judicial systems continue to operate under the persistent political influence of their respective governments.<sup>7</sup>

That the Tribunal has also made significant contributions to developing international law is also beyond doubt—even if for international lawyers, this is quite a self-serving achievement. Had it not been for the “judicial activism” of the late Antonio Cassese and the other judges of the Appeals Chamber in *Tadić*,<sup>8</sup> we could today perhaps still be talking about the orthodox position that individual criminal responsibility for war crimes does not exist in internal armed conflicts.<sup>9</sup> And without the tribunals for Yugoslavia and Rwanda, there might never have been a permanent International Criminal Court.

In other areas, the Tribunal’s impact has clearly not been significant—for example, its creation in 1993 failed to deter the commission of crimes in the then-ongoing Yugoslav conflicts, with some of the worst atrocities, such as the July 1995 Srebrenica genocide, having been committed after the Tribunal’s establishment. That said, this article is not meant to provide a comprehensive overview of the ICTY’s legacy.<sup>10</sup> Rather, the focus is on only one aspect of that legacy—or one of the Tribunal’s claimed achievements—that of establishing the facts regarding the crimes committed during the breakup of the former Yugoslavia. In addition to its punitive function, this is perhaps the one aspect of the ICTY’s legacy that is potentially the most meaningful for ordinary people living in the former Yugoslavia, and the one where the consequences of the ICTY’s work may be felt the longest. This is how the Tribunal’s website describes its achievements in this regard:

The Tribunal has established beyond a reasonable doubt crucial facts related to crimes committed in the former Yugoslavia. In doing so, the Tribunal’s judges have carefully reviewed testimonies of eyewitnesses, survivors and perpetrators, forensic data and often previously unseen documentary and video evidence. The Tribunal’s

<sup>6</sup> See Yaël Ronen, *Bosnia and Herzegovina: The Interaction between the ICTY and Domestic Courts in Adjudicating International Crimes*, DOMAC/8, Sept. 2011, at <http://www.domac.is/media/veldu-flokk/Domac8-2011-YR.pdf>.

<sup>7</sup> See, e.g., European Commission, 2015 Serbia Progress Report, at 11, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_serbia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf) (“[J]udicial independence is not assured in practice. There is scope for political interference in the recruitment and appointment of judges and prosecutors.”); European Commission, 2014 Bosnia Progress Report, at 12, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-bosnia-and-herzegovina-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf) (“There are persistent flaws in the independence and impartiality of the judiciary. Political interference has continued.”).

<sup>8</sup> Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. Former Yugo. Oct. 2, 1995).

<sup>9</sup> See Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT’L L. 265 (1996); SANDESH SIVAKUMARAN, *THE LAW OF NONINTERNATIONAL ARMED CONFLICT* 57–61 (2012); Marko Milanović, *On Realistic Utopias and Other Oxymorons: An Essay on Antonio Cassese’s Last Book*, 23 EUR. J. INT’L L. 1033, 1046–48 (2012).

<sup>10</sup> Other articles in this symposium will be dealing in particular with some of the ICTY’s contributions in developing substantive and procedural international criminal law.

judgements have contributed to creating a historical record, *combatting denial and preventing attempts at revisionism and provided the basis for future transitional justice initiatives in the region.*

As the work of the ICTY progresses, important elements of a historical record of the conflicts in the former Yugoslavia in the 1990s have emerged. The ICTY has established crucial facts about crimes, *once subject to dispute*, beyond a reasonable doubt.

...

Determining the facts of the crimes committed in the former Yugoslavia is crucial in order to combat denial and prevent attempts at revisionism. The detail in which the ICTY's judgements describe the crimes and the involvement of those convicted *make it impossible for anyone to dispute the reality* of the horrors that took place in and around Bratunac, Brčko, Čelebići, Dubrovnik, Foča, Prijedor, Sarajevo, Srebrenica and Zvornik, to name but a few.<sup>11</sup>

These passages provide an opportunity to reflect on what exactly does it mean for a court to "establish the facts" and for whom?<sup>12</sup> The facts in the cases before the ICTY were certainly established to the satisfaction of the Tribunal's judges, but even they would not say that they are the only audience that matters. Note, in that regard, the italicized references to facts that were *once* subject to dispute (but presumably no longer), or to the supposed *impossibility* for anyone to dispute the *reality* of the horrors that took place.

As will be demonstrated, however, the unfortunate reality in the Balkans is that reality has always been and remains in dispute. This article will discuss the findings of a series of public opinion surveys conducted in Serbia, Kosovo, Croatia, and Bosnia and Herzegovina. The detail and amount of data obtained through these surveys provide an unprecedented level of insight into the reception of factual determinations by international criminal tribunals by target audiences in post-conflict societies.

The picture painted by the surveys is depressing: denialism and revisionism are not just alive and well in the former Yugoslavia—they are thriving. For example, twenty years on, barely one-fifth of the Bosnian Serb population believe that any crime (let alone genocide) happened in Srebrenica, while two-fifths say that they had never even heard of any such crime.<sup>13</sup> That is what "truth and reconciliation" look like in today's Bosnia, despite all of the Tribunal's work in "shrinking the space for denial."<sup>14</sup>

It is simply unsatisfactory, in my view, to continue theorizing about the potential impact of international criminal justice on processes of intercommunal reconciliation,

<sup>11</sup> ICTY, Achievements – Establishing the Facts, at <http://www.icty.org/sid/324#establishing> (emphasis added). This language has existed in several iterations for more than a decade on the Tribunal's website, and could hence be taken as at least partly reflective of its self-perception. For earlier versions, see the Web Archive at <http://web.archive.org/web/20050204005624/http://www.un.org/icty/glance/index.htm> and <http://web.archive.org/web/20090425055927/http://www.icty.org/sid/324#establishing>.

<sup>12</sup> For an argument addressing systemic faults in how international criminal tribunals approach evidence and fact-finding, see NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

<sup>13</sup> See *infra* Part II.

<sup>14</sup> Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, OPEN SOCIETY JUSTICE INITIATIVE (2008), at [http://www.opensocietyfoundations.org/sites/default/files/serbia\\_20080501.pdf](http://www.opensocietyfoundations.org/sites/default/files/serbia_20080501.pdf).

without attempting to systematically and objectively measure such impact. Whether the work output of the ICTY has *in fact* shaped the views and attitudes of the affected populations in the former Yugoslavia is an empirical question. Ad hoc, anecdotal evidence can take us only so far in answering that question. As will be explained, the surveys are an imperfect measure of the ICTY's impact, but nonetheless they are better than anything we have had before.<sup>15</sup> It is only once that empirical question is answered with a degree of reliability that we can proceed to theorize about the causes of the ICTY's impact (or lack thereof), and about the generalizability of these findings with respect to other international criminal tribunals and other post-conflict societies.

One potential analytical approach would be to evaluate the survey results from the standpoint of social psychology.<sup>16</sup> Doing so would allow us to understand why exactly some of the target audiences in the former Yugoslavia have so persistently resisted internalizing the ICTY's factual findings.<sup>17</sup> That is an argument I will proceed to make in a future paper. This one, however, focuses on the empirical question of the ICTY's impact with respect to whether target audiences accept the existence of specific mass atrocities committed during the Yugoslav wars.

## I. THE SURVEYS

### *BCHR/OSCE War Crimes Surveys*

The public opinion surveys that will be discussed were commissioned by the Belgrade Center for Human Rights (BCHR), and sponsored by the Organization for Security and Cooperation in Europe (OSCE).<sup>18</sup> They were conducted by a leading Serbian polling agency, Strategic Marketing, part of the global Ipsos group.<sup>19</sup> The surveys generally used a stratified random representative sample with more than one thousand respondents per survey, face-to-face interviews, and detailed questionnaires. Since all of these surveys were conducted by the same polling agency, with the same methodology and identical or similar questionnaires, they are particularly amenable to comparisons.

<sup>15</sup> In that sense this article is rather self-consciously part of the empirical turn in international law scholarship. See generally Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AJIL 1 (2012). See also YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS (2014).

<sup>16</sup> This is of course not the only possible analytical standpoint. For a very different approach, rooted in the psychoanalytical tradition, see STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).

<sup>17</sup> For a similar approach, see Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT'L L. 405 (2012).

<sup>18</sup> All of the survey results, whether as detailed tables or more brief presentations, are available at <http://www.bgcentar.org.rs/istrazivanje-javnog-mnenja/stavovi-prema-ratnim-zlocinima-haskom-tribunalu-domacem-pravosudu-za-ratne-zlocine/>. Unfortunately, most of the detailed tables are available only in Bosnian-Serbian-Croatian.

<sup>19</sup> See Ipsos Website, at <http://www.ipsos.rs/>.

### *The Serbian Surveys*

The BCHR commissioned a total of six surveys in Serbia: in 2003,<sup>20</sup> 2004,<sup>21</sup> 2005,<sup>22</sup> 2006,<sup>23</sup> 2009,<sup>24</sup> and 2011.<sup>25</sup> The gaps in coverage were due to lack of project funding, which is also why no further surveys were conducted after 2011.<sup>26</sup>

The target audience of all of the surveys was the population of Serbia proper, without Kosovo. According to the 2011 Serbian census, 83.32 percent of the population identify as Serb by ethnicity.<sup>27</sup> In terms of design, the surveys posed a multitude of questions, in several broad groups: first, regarding the respondents' attitudes toward the ICTY; second, regarding the respondents' attitudes toward particular events or crimes committed during the Yugoslav conflicts; third, regarding the respondents' attitudes toward domestic courts; and finally, regarding their attitudes toward the media and other possible shapers of public opinion. While all of the surveys contained a core of identical or nearly identical questions,<sup>28</sup> the questionnaire evolved and grew more elaborate over time; the 2011 survey had 112 questions. The responses were cross-referenced and analyzed with regard to relevant

<sup>20</sup> See *Attitudes Towards War Crimes, the ICTY, and the National Judiciary – 2003*, PowerPoint presentation of the survey results, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Attitudes-towards-war-crimes-the-ICTY-and-the-national-judiciary-2003.ppt>.

<sup>21</sup> *Javno Mnenje u Srbiji i Stavovi Prema Međunarodnom Krivičnom Tribunalu za Bivšu Jugoslaviju u Hagu ICTY 2004 – Detaljne Tabele*, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unardnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2004-detaljne-tabele.pdf> (available in Serbian only; hereinafter 2004 BCHR Serbia Survey).

<sup>22</sup> *Javno Mnenje u Srbiji i Stavovi Prema Međunarodnom Krivičnom Tribunalu za Bivšu Jugoslaviju u Hagu ICTY 2005 – Detaljne Tabele*, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unardnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2005-detaljne-tabele.pdf> (available in Serbian only; hereinafter 2005 BCHR Serbia Survey).

<sup>23</sup> *Javno Mnenje u Srbiji i Stavovi Prema Međunarodnom Krivičnom Tribunalu za Bivšu Jugoslaviju u Hagu ICTY 2006 – Detaljne Tabele*, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unardnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2006-detaljne-tabele.pdf> (available in Serbian only; hereinafter 2006 BCHR Serbia Survey).

<sup>24</sup> *Javno Mnenje u Srbiji i Stavovi Prema Međunarodnom Krivičnom Tribunalu za Bivšu Jugoslaviju u Hagu ICTY 2009 – Detaljne Tabele*, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Srbiji-i-stavovi-prema-Me%C4%91unardnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2009-detaljne-tabele.pdf> (available in Serbian only; hereinafter 2009 BCHR Serbia Survey).

<sup>25</sup> *Attitudes Towards War Crimes, the ICTY and the National Judiciary 2011 – Detailed Tables*, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Attitudes-towards-war-crimes-the-ICTY-and-the-national-judiciary-2011-detailed-tables.zip> (in English; hereinafter 2011 BCHR Serbia Survey).

<sup>26</sup> See also *2010 Survey of Public Opinion on Historical Facts*, BCHR, available in Serbian only, at <http://www.bgcentar.org.rs/istrzivanje-javnog-mnenja/istrzivanje-javnog-mnenja-o-istorijskim-cinjenicama/>, a survey asking many of the same questions as the other ones but in the context of wider research on the knowledge of historical facts within the Serbian population, which fed into an academic project “News from the Past: On the Knowledge, Ignorance, Use and Abuse of History,” by five leading Serbian historians working under the auspices of the BCHR. See also NOVOSTI IZ PROŠLOSTI: ZNANJE, NEZNANJE, UPOTREBA I ŽLOUPOTREBA ISTORIJE (Vojin Dimitrijević ed., 2010).

<sup>27</sup> In absolute numbers, 5,888,150 out of the total population of 7,186,862. The most numerous minority are the ethnic Hungarians at 3.53% of the population. See Republic of Serbia, 2011 Census Atlas, at 63, at <http://pod2.stat.gov.rs/ObjavljenePublikacije/Popis2011/Popisni%20atlas%202011.pdf>.

<sup>28</sup> The 2003 survey was the most limited, focusing only on attitudes towards the ICTY and I will generally not refer to it in my analysis.



demographic data (e.g. the ethnicity, age, level of education, or political party affiliation of the respondents).

### *The Bosnian Surveys*

The BCHR commissioned two surveys in Bosnia and Herzegovina: in 2010<sup>29</sup> and 2012.<sup>30</sup> The methodology used in these surveys was based on the Serbian surveys, with detailed questionnaires. Importantly, it is almost meaningless to draw conclusions from average responses on the level of Bosnia as a whole, because of persistent divisions in post-conflict Bosnian society. Rather, the surveys aggregate responses with regard to the two subentities of the state of Bosnia and Herzegovina:<sup>31</sup> the ethnically mostly Bosniak (Bosnian Muslim), but also Croat, Federation of Bosnia and Herzegovina (Federation) on the one hand,<sup>32</sup> and the ethnically mostly Serb Republika Srpska (RS) on the other.<sup>33</sup>

Due to intense ethnic cleansing during the Bosnian conflict, polling on the basis of the two entities can serve as a proxy for ethnic affiliation, which was (unlike with the Serbian polling) not expressly asked about in the survey.<sup>34</sup> In other words, it is reasonable to assume that polling in the RS will reliably reproduce the views of the Bosnian Serb population, while polling in the Federation will do so for Bosniaks and Bosnian Croats. This assumption is corroborated by the strong divergences in the results between the two entities, which suggest divisions across ethnic lines. Beyond that, it is unfortunately not possible to put hard numbers on the ethnic makeup of the entities. The first post-war census was held in Bosnia in October 2013, but its final results—including those on politically exceptionally controversial questions regarding ethnicity, language, and religious affiliation—are yet to be published as of the time of writing.<sup>35</sup> Indeed, it is widely speculated that the delay is political rather than technical in nature, and that the results will confirm the full extent of ethnic homogeneity in the two entities.<sup>36</sup>

<sup>29</sup> *Javno Mnenje u BiH i Stavovi Prema Međunarodnom Krivičnom Tribunalu za Bivšu Jugoslaviju u Hagu ICTY 2010 – Detaljne Tabele*, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-BiH-i-stavovi-prema-Me%C4%91unardnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2010-detaljne-tabele.pdf> (available in Bosnian only; hereinafter 2010 BCHR Bosnia Survey).

<sup>30</sup> *Javno Mnenje u BiH i Stavovi Prema Međunarodnom Krivičnom Tribunalu za Bivšu Jugoslaviju u Hagu ICTY 2012 – Detaljne Tabele*, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-BiH-i-stavovi-prema-Me%C4%91unardnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2012-detaljne-tabele.pdf> (available in Bosnian only; hereinafter 2012 BCHR Bosnia Survey).

<sup>31</sup> For an accessible overview see *Bosnia-Herzegovina Country Profile – Overview*, BBC NEWS (Mar. 18, 2015), at <http://www.bbc.com/news/world-europe-17211415>.

<sup>32</sup> Including the state and Federation capital of Sarajevo.

<sup>33</sup> Including (for survey purposes only) the neutral Brčko district.

<sup>34</sup> This was done in order to avoid needlessly antagonizing (or possibly even intimidating or discouraging) respondents, bearing in mind that the surveys were conducted through face-to-face interviews.

<sup>35</sup> Preliminary results without ethnic or religious affiliation are available on the official census website at <http://www.popis2013.ba/index.php/en/>. The last pre-war census was held in 1991.

<sup>36</sup> See Rachel Irwin, Dzenana Halimovic, Maja Bjelelac & Dražen Huterer, *Bosnian Census Risks Deepening Ethnic Rifts*, IWPR (Dec. 6, 2013), at <https://iwpr.net/global-voices/bosnian-census-risks-deepening-ethnic-rifts>; Valery Perry, *How Will the BiH Census Results Be Used?*, DEMOCRATIZATION POLICY COUNCIL (Dec. 19, 2014), at <http://www.democratizationpolicy.org/how-will-the-bih-census-results-be-used->. In February 2016, a tentative publication date was set for June 2016, but it is by no means clear that the full results will

### *The Croatian Surveys*

The BCHR commissioned two surveys in Croatia as well in 2010<sup>37</sup> and 2011,<sup>38</sup> roughly at the same time the Bosnian surveys were conducted. Like the Bosnian surveys, the Croatian surveys did not explicitly ask about ethnic affiliation. However, the official results of the 2011 Croatian census show that 90.42 percent of the Croatian population identify as ethnic Croats, while 4.36 percent identify as Serbs.<sup>39</sup> The survey results are thus broadly representative of the views of the overwhelmingly ethnic Croat majority.

### *UNDP Surveys in Kosovo*

An obvious gap in the BCHR surveys is that none of them cover the population of Kosovo—it was simply infeasible for a Serbian polling agency to operate in the territory of Kosovo after 1999. The surveys do include questions about crimes committed in Kosovo, but the target audience was Serbia without Kosovo. Fortunately, however, two similar surveys were commissioned by the United Nations Development Programme (UNDP) in Kosovo, and conducted there in 2007<sup>40</sup> and 2012<sup>41</sup> by UBO Consulting, a local polling agency. Both surveys were conducted using a random representative sample, but with an intentional overrepresentation of minorities.

## II. KEY FINDINGS

Below are some of the key findings from the surveys, focusing on a few select issues, namely: (1) confidence (or lack thereof) in the ICTY; (2) general narratives of victimhood; (3) and specific crimes, such as the Srebrenica genocide and the siege of Sarajevo.

### *Confidence in the ICTY*

The first set of survey results to consider are those regarding the confidence, or lack thereof, in the ICTY. The questions in this part of the surveys were detailed and comprehensive.

indeed be published as scheduled. See *June Date Set for Release of Bosnian Census*, BALKAN INSIGHT (Feb. 5, 2016), at <http://www.balkaninsight.com/en/article/eurostat-sets-roadmap-for-publication-of-2013-census-results-02-04-2016>.

<sup>37</sup> *Javno Mnenje u Hrvatskoj i Stavovi Prema Međunarodnom Krivičnom Tribunalu za Bivšu Jugoslaviju u Hagu ICTY 2010 – Detaljne Tabele*, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Hrvatskoj-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2010-detaljne-tabele.pdf> (in Croatian only; hereinafter 2010 BCHR Croatia Survey).

<sup>38</sup> *Javno Mnenje u Hrvatskoj i Stavovi Prema Međunarodnom Krivičnom Tribunalu za Bivšu Jugoslaviju u Hagu ICTY 2011 – Detaljne Tabele*, at <http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnenje-u-Hrvatskoj-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2011-detaljne-tabele.pdf> (in Croatian only; hereinafter 2011 BCHR Croatia Survey).

<sup>39</sup> See *Population by Ethnicity*, 2011 Census, available at [http://www.dzs.hr/Eng/censuses/census2011/results/htm/e01\\_01\\_04/e01\\_01\\_04\\_RH.html](http://www.dzs.hr/Eng/censuses/census2011/results/htm/e01_01_04/e01_01_04_RH.html).

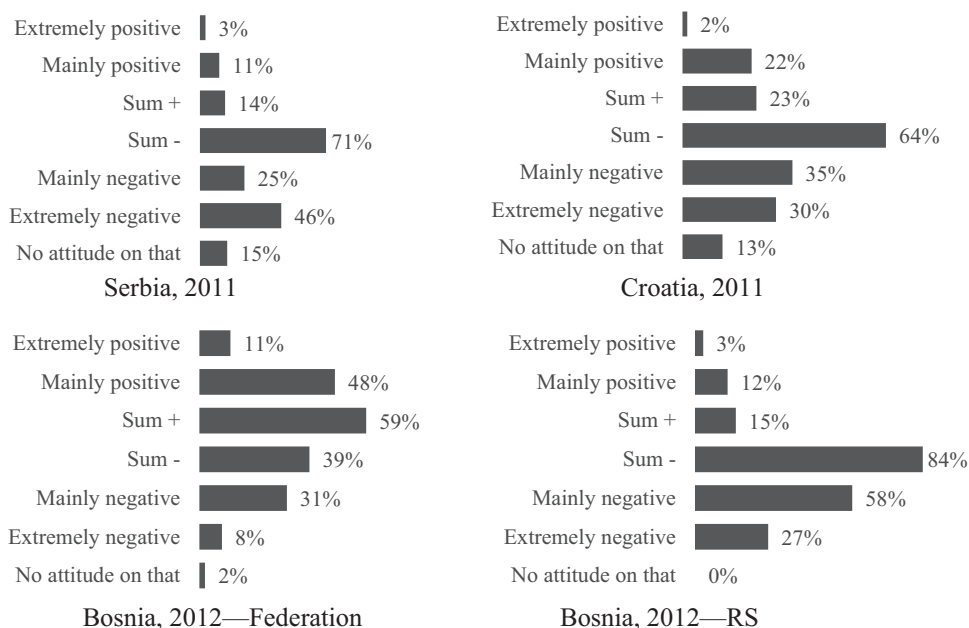
<sup>40</sup> UNDP, *Public Perceptions on Transitional Justice* (2007), available at <http://www.uboconsulting.com/publications/Transitional%20Justice.pdf> (hereinafter 2007 UNDP Kosovo Survey).

<sup>41</sup> UNDP, *Perceptions on Transitional Justice* (2012), available at [http://www.ks.undp.org/content/dam/kosovo/docs/TJ/English-Web\\_965257.pdf](http://www.ks.undp.org/content/dam/kosovo/docs/TJ/English-Web_965257.pdf) (hereinafter 2012 UNDP Kosovo Survey).



Respondents were asked, for example, how familiar they were with the organization and work of the ICTY; how they informed themselves about the ICTY's work; and why exactly they had or lacked confidence in the Tribunal. One important question posed was: "What is your attitude toward the ICTY in general?" Respondents were asked to answer this question on a five-point scale, ranging from extremely positive to extremely negative.

WHAT IS YOUR ATTITUDE TOWARD THE ICTY IN GENERAL?<sup>42,43,44,45</sup>



As for Kosovo, in the 2012 UNDP survey, 87 percent of Kosovo Serb respondents were not satisfied with the work of the ICTY (a significant increase from 57 percent in 2007), while 82 percent of Kosovo Albanians were either partially or very satisfied with it (an increase from 69 percent in 2007).<sup>46</sup> A similar ethnic disparity is evident when respondents are asked whether trials before the ICTY meet international fair trial standards (84 percent of Kosovo Serbs say no, 72 percent of Kosovo Albanians say yes).<sup>47</sup>

These results speak for themselves: while Bosniaks and Kosovo Albanians view the ICTY favorably, Serbs and Croats regard it very poorly. But what else do the results reveal?

First, the figures shown above for Serbia are presented on the basis of the total respondent population—looking at the majority (i.e. ethnic Serb) population, Sum + would be 11 percent and Sum - 76 percent, i.e. the difference between the two would be eight percentage points

<sup>42</sup> 2011 BCHR Serbia Survey, *supra* note 25, at 130.

<sup>43</sup> 2011 BCHR Croatia Survey, *supra* note 38, at 9.

<sup>44</sup> 2012 BCHR Bosnia Survey, *supra* note 30, at 9.

<sup>45</sup> *Id.*

<sup>46</sup> UNDP 2012 Kosovo Survey, *supra* note 41, at 17.

<sup>47</sup> *Id.* at 15.

greater than in the total respondent population.<sup>48</sup> Second, looking at the 2012 Bosnian survey, in the Herzegovina area—the part of the Federation with the highest concentration of ethnic Croat population—Sum- actually rises to 85 percent, while Sum+ falls to 15 percent.<sup>49</sup> This means that of the two ethnic communities in the Federation—Bosniak (Muslim) and Croat—it is only the Bosniaks who are actually satisfied with the ICTY, while Bosnian Croats roughly think of the ICTY as poorly as do the Bosnian Serbs.

Third, the results are stable over time.<sup>50</sup> The 2010 Bosnian survey results are largely the same as the 2012 results.<sup>51</sup> The same is true of Croatia, where Sum+ was 21 percent while Sum- was 70 percent in 2010.<sup>52</sup> The stability is most noticeable in Serbia, where we have the most survey data for a longitudinal comparison. The 2009 results are virtually identical to the 2011 results.<sup>53</sup> The 2004, 2005, and 2006 surveys did not ask the same question about general attitudes toward the ICTY, but asked whether the respondents thought the Tribunal would be able to judge Serb accused without bias—the respondents overwhelmingly thought not, with Sum- ranging from 63 percent to 69 percent, and Sum+ from 7 percent to 10 percent.<sup>54</sup> There is thus good reason to believe that these results remain broadly representative of popular opinion.

Fourth, it is important to note two demographic relationships that may have some explanatory power: in the Croatian and Serbian surveys, there is a correlation between the age and level of education of the respondents and their attitudes toward the ICTY. Younger respondents (aged 16–23) are significantly more likely to have more positive (and less negative) attitudes toward the ICTY than older respondents—for example, 35 percent of Croatian respondents aged 18–29 had positive attitudes toward the ICTY, and 51 percent had negative attitudes; the same numbers for the over 60 age group were 14 percent and 70 percent, respectively.<sup>55</sup> Similarly, the more educated the respondents, the softer their attitudes—for example, while 39 percent of Croatian respondents with university education had positive attitudes toward the ICTY, only 12 percent of those with elementary education did so (negative attitudes were 53 percent and 71 percent respectively).<sup>56</sup> The age correlation appears to be stronger than the educational one.<sup>57</sup> Remarkably, both correlations are missing from the two Bosnian surveys, in which attitudes toward the ICTY do not seem to be significantly affected by the respondents' age or education.<sup>58</sup> This could be explained, perhaps, by the Bosnian respondents' attitudes being formed and hardening at an earlier age than in Serbia or Croatia.

<sup>48</sup> 2011 BCHR Serbia Survey, *supra* note 25, at 131.

<sup>49</sup> 2012 BCHR Bosnia Survey, *supra* note 30, at 10.

<sup>50</sup> See also Klarin, *supra* note 5, at 91–92 (discussing earlier surveys with similar results).

<sup>51</sup> 2010 BCHR Bosnia Survey, *supra* note 29, at 10–11.

<sup>52</sup> 2010 BCHR Croatia Survey, *supra* note 37, at 8.

<sup>53</sup> 2009 BCHR Serbia Survey, *supra* note 24, at 13.

<sup>54</sup> 2004 BCHR Serbia Survey, *supra* note 21, at 69; 2005 BCHR Serbia Survey, *supra* note 22, at 60; 2006 BCHR Serbia Survey, *supra* note 23, at 47.

<sup>55</sup> 2011 BCHR Croatia Survey, *supra* note 38, at 9. See also 2010 BCHR Croatia Survey, *supra* note 37, at 8; 2011 BCHR Serbia Survey, *supra* note 25, at 131; 2009 BCHR Serbia Survey, *supra* note 24, at 14.

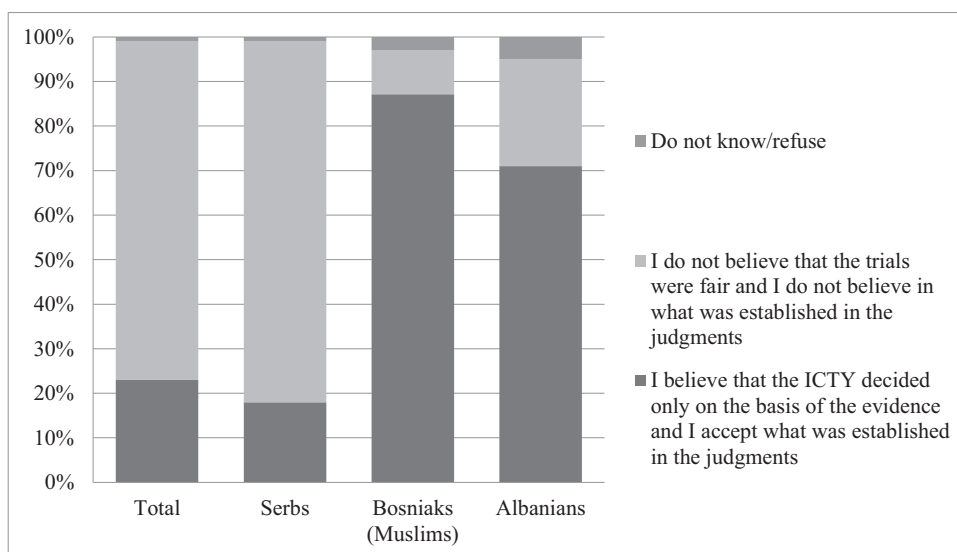
<sup>56</sup> 2011 BCHR Croatia Survey, *supra* note 38, at 9.

<sup>57</sup> This is most apparent from the fact that positive attitudes tend to peak, and negative drop, for those respondents who are *still in education*, i.e. most likely are in the 16–23 age group, which was the youngest respondent group used in Serbian surveys (compared to 18–29 in Croatia and Bosnia). The age correlation is otherwise completely absent from the 2009 Serbia survey.

<sup>58</sup> 2010 BCHR Bosnia Survey, *supra* note 29, at 11; 2012 BCHR Bosnia Survey, *supra* note 30, at 10 (although a slight age correlation exists among the Federation respondents).

Finally, we must look at what the respondents say about *why* they do not trust the ICTY. In all of the surveys, the top reason given by the respondents for distrusting the ICTY is its alleged bias and lack of objectivity, specifically bias against the members of the respondents' own ethnic group.<sup>59</sup> Thus, Croats dislike the ICTY because they think the ICTY is biased against Croats, while Serbs dislike it because they think it is biased against Serbs; for Serbs in particular, the main indicator of bias is that ethnic Serbs are the most numerous group of accused before the Tribunal.<sup>60</sup> The only exception is the (mostly Bosniak) Federation respondents, where the main reason for negative attitudes toward the ICTY is that it is slow and does not do its work efficiently and well.<sup>61</sup> The surveys show a direct correlation between the respondents' level of distrust in the ICTY, on the basis of their perception that it is biased against members of their own ethnic group, and their preparedness to accept the ICTY's judgments:

WHAT DO YOU THINK ABOUT THE JUDGMENTS OF THE ICTY WHICH FOUND THAT THE ACCUSED SERBS WERE GUILTY OF WAR CRIMES? SERBIA, 2011; BASE: TOTAL POPULATION<sup>62</sup>



### *Victims and Perpetrators*

The surveys also focused on victimhood, which is foundational to many ethnic nationalist narratives<sup>63</sup>—one's own group is perceived as the victim of crimes committed by others, and

<sup>59</sup> 2011 BCHR Serbia Survey, *supra* note 25, at 132; 2011 BCHR Croatia Survey, *supra* note 38, at 12; 2012 BCHR Bosnia Survey, *supra* note 30, at 14.

<sup>60</sup> See also Ronen, *supra* note 6, at 32.

<sup>61</sup> 2012 BCHR Bosnia Survey, *supra* note 30, at 15.

<sup>62</sup> 2011 BCHR Serbia Survey, *supra* note 25, at 82.

<sup>63</sup> On the concepts of group and national narratives, see generally the contributions in *NARRATIVE AND IDENTITY: STUDIES IN AUTOBIOGRAPHY, SELF AND CULTURE* (Jens Brockmeier & Donal Carbaugh eds., 2001). In particular, see Carol Fleisher Feldman, *Narratives of National Identity as Group Narratives: Patterns of Interpretative Cognition*, in *NARRATIVE AND IDENTITY*, 129, at 143. See also Daniel Bar-Tal, Neta Oren & Rafi Nets-Zehngut, *Sociopsychological Analysis of Conflict-Supporting Narratives: A General Framework*, 51 J. PEACE RES. 662 (2014).

never as the perpetrator of crimes.<sup>64</sup> The BCHR surveys tried to unpack these narratives by asking two basic questions: first, who suffered the largest number of casualties during the wars in the territory of the former Yugoslavia, and second, who committed the most crimes during the wars in the territory of the former Yugoslavia.

These were the answers from the 2011 survey in Serbia:

WHO SUFFERED THE LARGEST NUMBER OF CASUALTIES DURING THE WARS IN THE TERRITORY OF FORMER SFRY 1991 TO 1999?

	Total	Nationality			
		Serb	Muslim (Bosniak)	Albanian	Other
N	1407	1215	36	17	136
Serbs	68.8	74	2	2	47
Bosniaks (Muslims)	12.8	9	86	39	22
Croats	1.4	1	0	4	6
Albanians	1.1	1	1	18	0
Slovenians	0.2	0	0	1	1
DK/Refuses	15.7	15	10	37	24
Total			100%		

WHO COMMITTED THE MOST CRIMES DURING THE WARS IN THE TERRITORY OF FORMER SFRY 1991 TO 1999?<sup>65</sup>

	Total	Nationality			
		Serb	Muslim (Bosniak)	Albanian	Other
N	1407	1215	36	17	136
Croats	39.5	41	8	2	40
Albanians	16.7	18	4	5	10
Bosniaks (Muslims)	9.7	10	4	4	7
Serbs	7.2	5	53	39	12
Slovenians	0.1	0	1	1	0
DK/Refuses	26.9	26	30	50	31
Total			100%		

Note the dependence of the results on the ethnic affiliation of the respondents: 74 percent of ethnic Serbs believe that Serbs were the greatest victims of the Yugoslav wars. Conversely, only 5 percent of Serbs believe that Serbs were the greatest perpetrators. Turning now to Bosnia:

<sup>64</sup> On myths of victimhood generated within Serb and Croat nationalist movements, see, e.g., DAVID BRUCE MACDONALD, *BALKAN HOLOCAUSTS?: SERBIAN AND CROATIAN VICTIM CENTERED PROPAGANDA AND THE WAR IN YUGOSLAVIA* (2002).

<sup>65</sup> 2011 BCHR Serbia Survey, *supra* note 25, at 157, 159.

WHO SUFFERED THE MOST CASUALTIES?

	Total	Entity	
		Federation	RS
N	1037	699	338
Bosniaks	53.9	78	04
Serbs	11.2	0	34
Croats	7.8	11	1
Everybody equally	21.3	7	50
DK/Refuses	5.8	3	11
Total		100%	

WHO COMMITTED THE MOST CRIMES?

	Total	Entity	
		Federation	RS
N	1037	699	338
Serbs	59.7	87	4
Bosniaks	6.8	2	16
Croats	4.1	1	11
Everybody equally	27.5	9	66
DK/Refuses	1.9	2	3
Total		100%	

These results are from the 2012 Bosnia survey.<sup>66</sup> The comparison with the Serbian surveys is methodologically made more difficult by the inclusion of an additional possible answer (“everybody equally”) for both questions in the Bosnian survey—indeed the option that proved to be most popular in the RS for answers to both questions.

The discrepancy between the RS polling and the attitudes of the Federation respondents is striking. While the dominant RS narrative is that everybody suffered and everybody is to blame, 87 percent of the Federation respondents blame Serbs as the greatest perpetrators of crimes during the conflict. On the other hand, while looking at the geographical stratification of the polling with regard to the greatest victim question, it can again be observed that answers vary with the (presumed) ethnic composition of the relevant areas in the Federation: thus, 92 percent of the Sarajevo respondents said that Bosniaks were the greatest victims of the conflict, while 68 percent of the Herzegovina respondents (where the ethnic Croatian population is most concentrated) say that the Croats were the greatest victims.<sup>67</sup>

Turning now to Croatia: in the 2011 survey, 43.4 percent of the respondents said that Croats were the greatest victims of the conflicts; 29.2 percent that it was the Bosniaks; 19.1 percent that it was everybody equally; 7.3 percent refused to answer/did not know; and 1 percent said that it was the Serbs. On the other hand, 83.8 percent of respondents said that the Serbs committed the most crimes; 8 percent refused to answer/did not know; 7 percent said that it was everybody equally; 0.8 percent said that it was the Bosniaks; and 0.4 percent said that it was

<sup>66</sup> 2012 BCHR Bosnia Survey, *supra* note 30, at 138–41; *see also* 2010 BCHR Bosnia Survey, *supra* note 29, at 135–138.

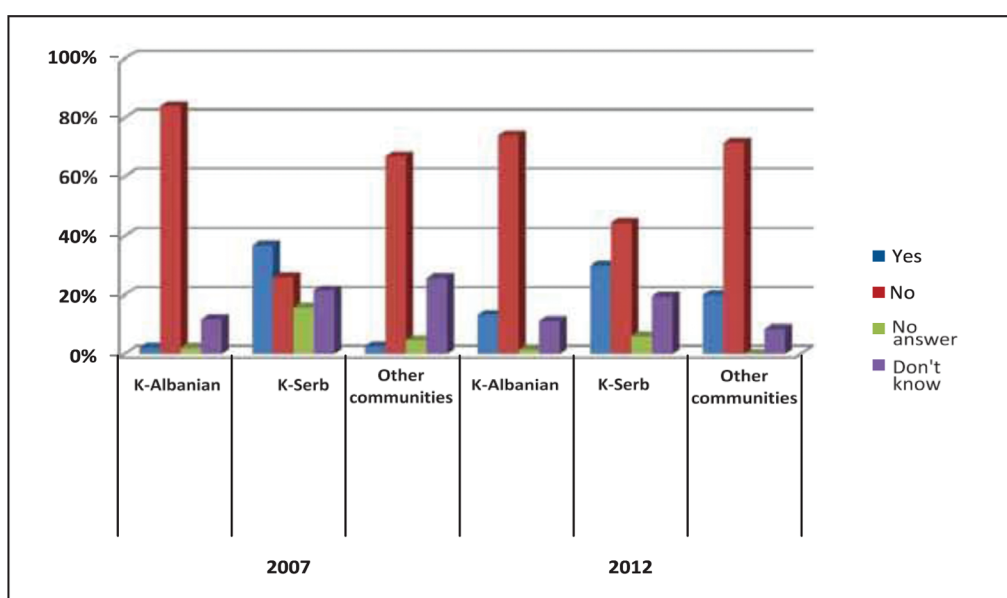
<sup>67</sup> 2012 BCHR Bosnia Survey, *supra* note 30, at 139.

the Croats.<sup>68</sup> The results of the 2010 survey were virtually identical, within the margin of error.<sup>69</sup>

The Croatian results are particularly interesting in light of the fact that more than 90 percent of the Croatian population is ethnic Croat.<sup>70</sup> Here too, we can observe a strong victimhood narrative, with a clear plurality of the respondents saying that Croats were the greatest victims. Even so, it is striking that almost a third of the population identified Bosniaks as the greatest victims. While the victimhood narrative is strong, it is nonetheless affected by the fact that the Bosnian conflict was far more brutal than the Croatian one. The Serbs, unsurprisingly, emerge as the greatest villains.

Finally, turning to Kosovo:

DO YOU THINK THAT MEMBERS OF YOUR ETHNICITY COMMITTED WAR CRIMES?<sup>71</sup>



There is somewhat more acceptance on the Kosovo Serb side that ethnic Serbs committed crimes than there is on the Albanian side for members of their own ethnicity. Nonetheless, a clear majority on both sides does not accept the responsibility of the members of their own group.<sup>72</sup> On a more positive note, there is an 11 percent increase in the 2012 survey in the “yes” answer on the Kosovo Albanian side, but there is also a 20 percent increase in the “no” answer on the Kosovo Serb side, showing a hardening of attitudes in the ethnic Serb community. In sum, as in all of the other post-Yugoslav societies, Kosovo is sharply divided along ethnic lines.

<sup>68</sup> 2011 BCHR Croatia Survey, *supra* note 38, at 84–85.

<sup>69</sup> *Id.* at 76–77.

<sup>70</sup> See Population by Ethnicity, *supra* note 39, and accompanying text.

<sup>71</sup> See 2012 Kosovo UNDP Survey, *supra* note 41, at 7.

<sup>72</sup> *Id.*



The surveys thus show that victimhood narratives, in which one's own group is seen as the principal victim of crimes, and others as the principal perpetrators, are thriving in the Balkans. The one anomaly in the survey results—but one easily explained—is the RS in Bosnia, where the dominant narrative is that all groups were equally both victims and perpetrators. However, as will be demonstrated from an examination of specific crimes, this is simply due to the particularly amnesiac RS form of denialism.<sup>73</sup> Be that as it may, the surveys clearly show that the different ethnic communities in the former Yugoslavia are (still) engaged in competitive victimhood, which is a major impediment to mutual forgiveness and reconciliation. In such a state, “members of conflicting groups experience a strong wish—and thus also strive—to establish that their in-group was subjected to *more* injustice and suffering at the hands of the out-group than the other way around.”<sup>74</sup>

Let us now examine the survey results with regard to specific crimes.

### *Srebrenica*

The first crime to be discussed is Srebrenica, undoubtedly the worst atrocity of the wars in the former Yugoslavia, the object of several proceedings before the ICTY, and the only crime that the ICTY legally qualified as genocide.<sup>75</sup> As with other specific events that were addressed in the BCHR surveys, the respondents were asked a series of three questions. First, have you *heard* that this event happened? Respondents who respond affirmatively were then asked whether they *believed* that the event did actually happen. Finally, those who responded affirmatively to the second question were asked whether they believed that the event was a *crime*.

Turning first to the polling on Srebrenica in Serbia, in the most recent survey, conducted in 2011, 71.6 percent of the total respondent population said that they heard of several thousand Muslims/Bosniaks being executed in a few days in Srebrenica in July 1995.<sup>76</sup> Of those who said they heard of the event, 55.7 percent believed it to be true; thus, of the total Serbian population, 39.9 percent heard of Srebrenica and believed it actually happened, 31.7 percent heard of it but did not believe it happened, and 28.4 percent did not hear of it at all.<sup>77</sup> Of the 39.9 percent of respondents who both heard of Srebrenica and believed it happened, 83.7 percent thought it was a crime, which corresponds to 33 percent of the total population.<sup>78</sup>

The polling on Srebrenica in Serbia has produced remarkably consistent results over the years on the basis of this tripartite question structure.

<sup>73</sup> On the different possible varieties of denial, see ERIC GORDY, *GUILT, RESPONSIBILITY, AND DENIAL: THE PAST AT STAKE IN POST-MILOSEVIC SERBIA* (2013), at 89–118.

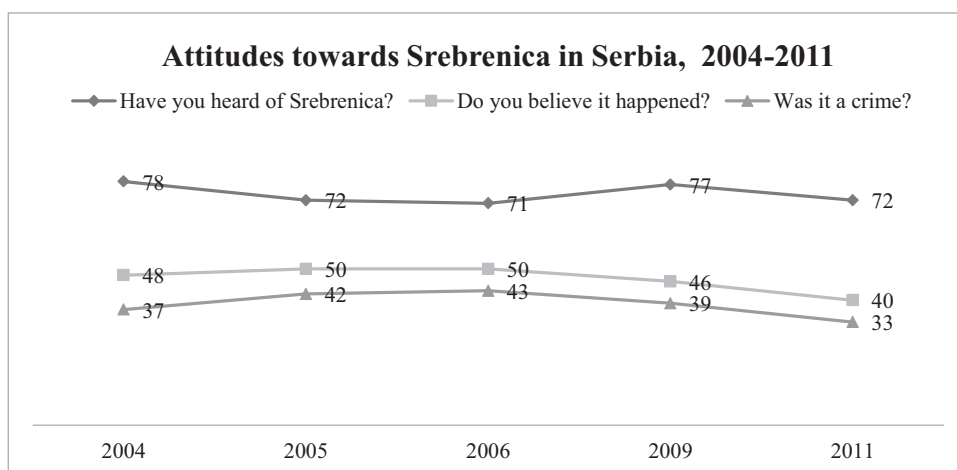
<sup>74</sup> See Masi Noor, Nurit Shnabel, Samer Halabi & Arie Nadler, *When Suffering Begets Suffering: The Psychology of Competitive Victimhood Between Adversarial Groups in Violent Conflicts*, 16 PERSONALITY & SOC. PSYCHOL. REV. 351, 352 (2012).

<sup>75</sup> See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Judgment (Apr. 19, 2004); Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, Appeals Judgment (May 9, 2007); Prosecutor v. Popović et al., Case No. IT-05-88-A, Appeals Judgment (Jan. 30, 2015).

<sup>76</sup> 2011 BCHR Serbia Survey, *supra* note 25, at 162.

<sup>77</sup> *Id.* at 169–70.

<sup>78</sup> *Id.* at 184.



This longitudinal comparison shows a mild overall downward trend. The acceptance of Srebrenica as a crime peaked in 2005 and 2006. A partial explanation for that peak might be the publicity given in Serbian media to a graphic video of a Serbian paramilitary unit, the *Scorpions*, executing several Bosniak boys from Srebrenica; this video, filmed by the perpetrators themselves, was first shown on June 1, 2005 during Slobodan Milošević's trial before the ICTY.<sup>79</sup> The 2009 peak of respondents who have heard of the event is harder to explain, but could perhaps be tied to the publicity generated by the arrest of Radovan Karadžić in July 2008.

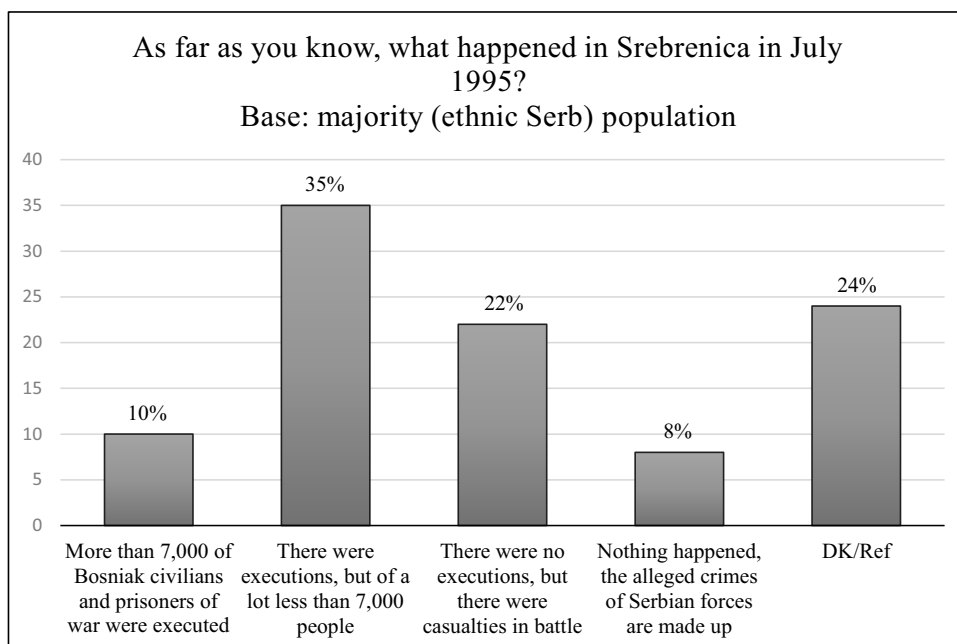
The 2009 and 2011 surveys also asked more granular questions about Srebrenica, which presented the respondents with several possible options in describing the event. The prompting implicit in these options inevitably led to some discrepancies with the tripartite question asked above, for instance with regard to the number of respondents who were aware of the event. This question is nonetheless instructive in understanding different forms of denial, especially when the target population is narrowed down to the majority, i.e. ethnic Serb, part of the Serbian population: In brief, only 10 percent of Serbs in Serbia accept the facts regarding Srebrenica as they were established by the ICTY, i.e. that more than seven thousand Bosniak men and boys were executed. This is in contrast to 85 percent of Bosniaks in Serbia.<sup>80</sup> A further third of the Serbian population accepts that there was a crime, but disputes the magnitude of the crime.<sup>81</sup>

Turning now to attitudes toward Srebrenica in Bosnia itself. Respondents were asked the same tripartite question as in Serbia. Comparing the results between the Federation and the RS, the surveys show a sharp divide in attitudes toward Srebrenica in the two communities.

<sup>79</sup> An edited version of the video is available at <https://www.youtube.com/watch?v=Gk5xOM7ECwI>. For more on the video and the *Scorpions* episode, see Vladimir Petrović, *A Crack in the Wall of Denial: The Scorpions Video in and out of the Courtroom*, in *NARRATIVES OF JUSTICE IN AND OUT OF THE COURTROOM: FORMER YUGOSLAVIA AND BEYOND* 89 (Dubravka Zarkov & Marlies Glasius eds., 2014); Gordy, *supra* note 73, at 124–44.

<sup>80</sup> 2011 BCHR Serbia Survey, *supra* note 25, at 161.

<sup>81</sup> This compares with the 40% of respondents who heard of the event and said that they believed it happened in response to the tripartite question.



In the 2012 survey, 97 percent of the Federation respondents said that they had heard of over seven thousand Muslims/Bosniaks being executed in Srebrenica in July 1995.<sup>82</sup> In the RS, on the other hand, only 59.2 percent of the respondents said that they had heard of Srebrenica.<sup>83</sup> Of those Federation respondents who said they heard of the event, 99.5 percent believed it to be true.<sup>84</sup> In the RS, however, only 34.8 percent believed it to be true.<sup>85</sup> Finally, of those respondents who both heard of Srebrenica and believed it to be true, 99.1 percent of the Federation respondents and 97.4 percent of the RS respondents believed it to be a crime.<sup>86</sup> Thus, of the total Federation population, 95.7 percent of respondents thought that Srebrenica was a crime, but only 20.1 percent of the total RS population thought the same.<sup>87</sup>

These results are broadly consistent with the 2010 Bosnia survey,<sup>88</sup> with one exception: in 2010 53.9 percent of the RS respondents said they heard of Srebrenica (compared to 59.2 percent in 2012),<sup>89</sup> but 53.4 percent believed it happened (compared to 34.8 percent in 2012).<sup>90</sup> Thus, while (in absolute numbers) 6 percent more of RS respondents were aware of Srebrenica in 2012 when compared to 2010, there is also an almost 20 percent drop in those who believed it happened. Of the total RS population in 2010, 25.4 percent

<sup>82</sup> 2012 BCHR Bosnia Survey, *supra* note 30, at 38.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 46.

<sup>85</sup> *Id.* at 47.

<sup>86</sup> *Id.* at 61–62.

<sup>87</sup> *Id.*

<sup>88</sup> 2010 BCHR Bosnia Survey, *supra* note 29, at 37–73.

<sup>89</sup> *Id.* at 37.

<sup>90</sup> *Id.* at 46.

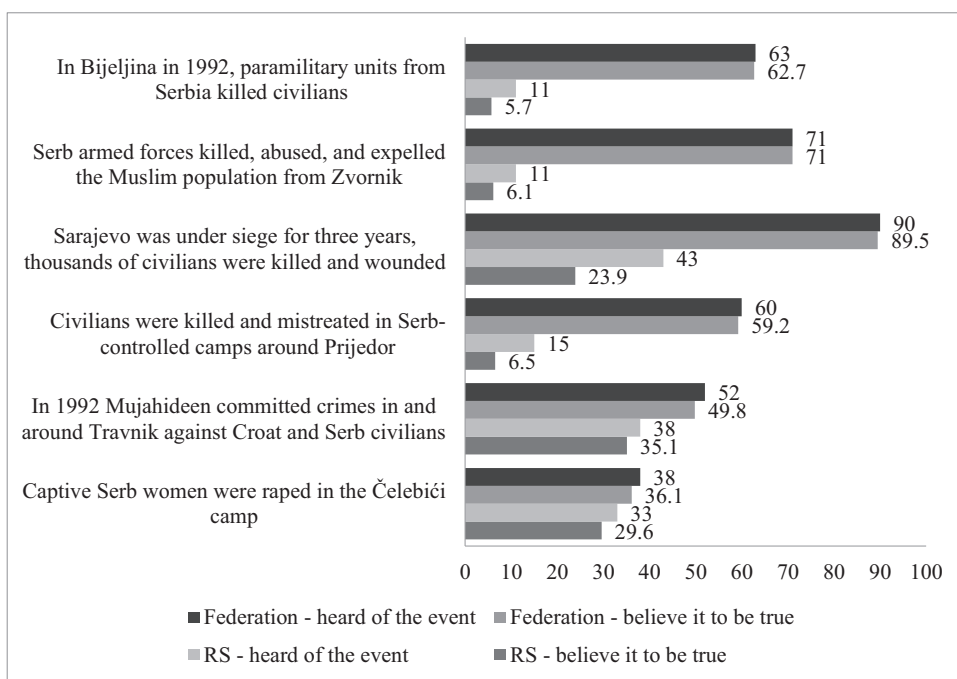
believed that Srebrenica was a war crime, compared to 20.1 percent in 2012.<sup>91</sup> This indicates a significant downward trend in a remarkably short period of time.

Unfortunately, the Bosnian survey did not ask the granular, multiple choice question on Srebrenica from the Serbian survey. The comparison between Serbian and RS responses is nonetheless striking. When asked whether they had heard of Srebrenica, 71.6 percent of the 2011 Serbian respondents and 59.2 percent of the 2012 RS respondents said they did, a 12 percent margin. Of the Serbian respondents who said they had heard of Srebrenica, 55.7 percent believed it to be true, while this was the case with only 34.8 percent of the RS respondents, a 21 percent margin. Even while taking into account that the Serbian population is likely ethnically more diverse than that of the RS, it is notable that Srebrenica denialism is significantly stronger in the RS, where the crime actually happened, than in Serbia.

### *Divided Realities in Bosnia*

The extent and depth of ethnic divisions within Bosnia regarding the crimes committed in the conflict is even more visible when a wider spread of crimes is considered.

ATTITUDES TOWARD SPECIFIC CRIMES IN THE BOSNIAN CONFLICT, 2012 BCHR BOSNIA SURVEY, ON THE BASIS OF THE TOTAL RESPONDENT POPULATION OF THE FEDERATION AND THE RS<sup>92</sup>



<sup>91</sup> *Id.* at 61.

<sup>92</sup> Chart made on the basis of the 2012 BCHR Bosnia Survey, *supra* note 30, at 40, 46–47.

Note, first, that these were some of the most serious crimes committed during the conflict; all of them were the subject of important, high-profile proceedings before the ICTY.<sup>93</sup> Second, ethnic bias manifestly clouds the responses on the RS (i.e. Bosnian Serb) side, where the results can only be described as appalling: only 15 percent of RS respondents say that they *even heard* of abuses in the Prijedor camps; only 11 percent that they heard of crimes in Bijeljina and Zvornik. The one outlier here is the siege of Sarajevo, but even here, less than half of RS respondents (43 percent) said they heard of it, and less than a quarter (23.9 percent) believe it actually happened. With regard to all other crimes where Serbs were the perpetrators, the percentage of RS respondents who believe they actually happened is in the single digits. Third, ethnic bias is also apparent in the Federation responses, albeit somewhat less so, as evident in the significant drop of respondents who heard of crimes against Serbs and Croats perpetrated by Bosniaks (Travnik and Čelebići), when compared to crimes where Bosniaks were the victims. Remarkably, virtually all of the Federation respondents who say they heard of a crime also say that they believe it happened, even when the perpetrators were Bosniaks. This is *not* the case with the RS respondents, where the percentage of respondents who believe the crime happened drops precipitously whenever the perpetrators are Serbs. Finally, and perhaps most surprisingly, the RS respondents are more prone to saying that they have not heard of crimes even when the victims were Serb, with for instance only 38 percent saying that they heard of the rapes of Serb women in the Čelebići camp. This indicates a general desire within the Bosnian Serb population toward the suppression of collective memories—or the expression of those memories—regarding the conflict as a whole.

It is also instructive to compare the RS results with the 2011 Serbia survey. In doing so, it can be observed that the population of Serbia is both more knowledgeable of crimes and willing to accept that they happened than the population of the RS. For example, whereas only 11 percent of the RS population heard of crimes in Zvornik and 6.1 percent believed that they happened, 43.3 percent of the total Serbian population heard of these crimes and 23 percent believed it happened.<sup>94</sup> Similarly, 53.4 percent of Serbian population heard of the siege of Sarajevo and 37.4 percent believe it happened; 40.8 percent heard of the Prijedor camps and 27 percent believed they happened; 56.1 percent heard of the rapes of Serb women in the Čelebići camp and 49.5 percent believed they happened.<sup>95</sup> These numbers may be low, but they are still much higher than in the Republika Srpska.

### *Crimes in Croatia*

When it comes to the Croatian conflict, the questions again dealt with high-profile events that were the subject of proceedings before the ICTY and/or Serbian and Croatian domestic courts, and had the same tripartite structure as before. The results of the Serbian and the Croatian surveys will be compared, focusing on the final part of the question, i.e. was the event (if you heard of it and believed it to be true) a crime or an inevitability of war.

<sup>93</sup> See, e.g., Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeals Judgment (Mar. 17, 2009) (dealing with Bijeljina and Zvornik, inter alia); Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Judgment (Mar. 22, 2006) (Prijedor); Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Judgment (Nov. 30, 2006) (Sarajevo); Prosecutor v. Delić, Case No. IT-04-83, Trial Judgment (Sept. 15, 2008) (mujahedeen crimes near Travnik); Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeals Judgment (Feb. 20, 2001) (Čelebići camp).

<sup>94</sup> 2011 BCHR Serbia Survey, *supra* note 25, at 169.

<sup>95</sup> *Id.*

	N	Inevitability	Crime	Not heard of the event / heard but does not believe it happened	Total
Paramilitaries from Serbia and the JNA killed civilians in Vukovar	1407	11.4	21.1	67.4	100%
In the camp Lora in Split, members of Croatian military police tortured Serb detainees	1407	3.5	60.6	35.9	
JNA bombed Dubrovnik	1407	23.5	22.5	54.0	
In 1993 in Medački džep near Gospić, members of the Croatian armed forces committed atrocities against Serb civilians	1407	2.5	56.0	41.5	
During the operations Flash (Bljesak) and Storm (Oluja) in 1995, Croatian soldiers and police committed war crimes against Serbs	1407	3.0	76.1	20.9	
During the war in Croatia, Croats who lived in Srem were intimidated and expelled (Hrtkovci, Kukujevi)	1407	5.3	14.5	80.2	

Serbia: Responses about crimes by or against Croats<sup>96</sup>

The surveys are mirror images of one another. In general, the Serbian population responds to questions involving Serb perpetrators by saying that they have not heard about the event or do not believe it to be true, as does the Croatian population with regard to crimes involving Croat perpetrators. Of particular note are some of the high “inevitability” scores, with for instance 23.5 percent of the Serbian population believing that the bombing of Dubrovnik was an inevitability of war, while 22.5 percent believed it to be a crime. The responses regarding Operation Storm also demonstrate completely diverging realities: while 76.1 percent of Serbian respondents believed that crimes were committed against Croatian Serbs during that military operation, only 26.1 percent of Croatian respondents did so. The Croatian respondents also showed a remarkable absence of awareness regarding Croat-run camps in Bosnia.

<sup>96</sup> *Id.* at 169. The response base is the total respondent population in Serbia. Note that one of the crimes in question did not take place in Croatia itself (the intimidation of ethnic Croats in Srem, a part of Serbia).



	N	Inevitability	Crime	Not heard of the event / does not believe it happened	Does not know/ refuses to answer	Total
There were numerous crimes in and around Knin against the Croatian population	1000	5.8	65.8	25.4	3.0	100%
In 1993 in Medaki džep near Gospi, members of the Croatian armed forces committed atrocities against Serb civilians	1000	4.5	20.8	72.5	2.1	
At the end of 1991 and the beginning of 1992, Serbian forces in Škabrnja tortured and killed more than 60 people	1000	1.7	77.7	17.5	3.1	
In the camp Lora in Split, Serb detainees were severely mistreated and some of them died due to their injuries	1000	5.7	25.9	66.2	2.1	
At Ovčara near Vukovar in 1991, Serb forces tortured and killed around 200 Croatian prisoners	1000	2.3	85.0	11.6	1.0	
During the war in Croatia, crimes were committed against Serb civilians in Osijek	1000	7.5	26.1	62.0	4.4	
During and after operation Storm (Oluja), Croatian forces killed, abused, and robbed the Serb population	1000	6.9	23.4	67.3	2.5	
Croat forces in Bosnia created several camps in which civilians were mistreated and killed	1000	3.9	17.3	77.3	1.5	

Croatia: Responses about crimes by or against Croats<sup>97</sup>

### *Crimes in Kosovo*

The 1998–1999 Kosovo conflict is obviously both the most recent and the one that most directly affected the population of Serbia, so it is to be expected that attitudes toward crimes in this conflict would be the hardest.

Three quarters of the Serbian population believe that Kosovo Albanians committed crimes against Serbs, while again roughly three quarters of the population say that they did not hear

<sup>97</sup> 2011 BCHR Croatia Survey, *supra* note 38, at 35. The response base is the total respondent population in Croatia.

	N	Inevitability	Crime	Not heard of the event / heard but does not believe it	Total
The Kosovo Liberation Army committed crimes during the Kosovo war (1999)	1407	3.1	78.1	18.8	100%
A large number of bodies of Albanian civilians was found in the mass grave in Batajnica near Belgrade	1407	6.2	24.2	69.7	
Even before the 1999 NATO bombing, Kosovo Albanians were killed and expelled	1407	5.4	16.7	77.9	
In Podujevo and in Suva Reka (Kosovo) members of Serbian armed forces killed many women, children, and old men of Albanian nationality	1407	2.2	16.6	81.2	

Serbia: Responses dealing with the Kosovo conflict<sup>98</sup>

or do not believe that Serbs committed crimes against Kosovo Albanians. As explained above, the BCHR surveys were not conducted in Kosovo, but only in Serbia proper. However, the UNDP Kosovo surveys examined above confirm the strength of ethnic polarization in Kosovo as well, with strong majorities in both the Kosovo Serb and Kosovo Albanian communities refusing to accept that members of their group committed war crimes.<sup>99</sup>

### III. DISCUSSION

#### *A Word of Caution*

The surveys demonstrate a strong relationship between the respondents' ethnicity, their perception of the ICTY's bias against members of their own group, and their (lack of) trust in the ICTY and in its findings.<sup>100</sup> Ethnic Croats and ethnic Serbs (whether in Serbia, Kosovo, Croatia, or Bosnia) exhibit strong levels of disapproval of the ICTY, with the ratio of positive to negative ratings ranging from roughly 3 to 1, to 6 to 1. The two communities with a favorable view of the ICTY are the Bosniaks and the Albanians—and this is simply because the ICTY's findings largely validate their own worldviews.<sup>101</sup>

<sup>98</sup> 2011 BCHR Serbia Survey, *supra* note 25, at 169. The response base is the total respondent population in Serbia.

<sup>99</sup> See *supra* note 71, and accompanying text.

<sup>100</sup> See also 2011 BCHR Croatia Survey, *supra* note 38, at 58 (showing that only 28% of Croatian respondents were prepared to accept ICTY judgments finding that Croatian soldiers committed war crimes).

<sup>101</sup> See also Ronen, *supra* note 6, at 32.

The surveys do not, however, provide us with a *direct* measure of any impact that the ICTY has had, especially in the medium- to long-term.<sup>102</sup> By their design the surveys are not impact snapshots; for instance, they did not measure attitudes regarding a particular set of crimes immediately before and after the delivery of an ICTY judgment addressing these crimes. Similarly, we cannot tell from the surveys alone whether the respondents' distrust in the ICTY as an institution *causes* their distrust in the ICTY's factual findings, or is it rather the respondents' dislike of what the ICTY says that triggers its discreditation—it is likely that both processes reinforce one another in a sort of feedback loop, but again this is not a conclusion that can be drawn directly from the data. That said, this feedback relationship is perhaps most apparent in the Kosovo surveys—recall that while in 2007, 57 percent of Kosovo Serb respondents disapproved of the ICTY, that number jumped to 87 percent in 2012, while at the same time the number of ethnic Albanian respondents who were satisfied with the ICTY jumped from 69 percent in 2007 to 82 percent in 2012.<sup>103</sup> These shifts must be due to the ICTY's own activity in the intervening period, with major judgments handed down which convicted high-ranking Serb defendants for crimes against Albanians<sup>104</sup> and acquitted Albanian defendants for crimes against Serbs.<sup>105</sup> This again corroborates the finding that the ICTY is only trusted if its work validates the groups' own internal narratives.

It is also important to note that even though the purpose of the surveys was to capture the respondents' attitudes and beliefs, that capture was necessarily imperfect. The surveys tell us what the respondents *said* they believed about particular events or institutions, not what they *actually* believed. In other words, (some of) the respondents may well have misrepresented their actual attitudes and beliefs.<sup>106</sup> We have seen above,<sup>107</sup> for example, how the ethnic Serb population of Serbia is more prepared to both admit knowledge of crimes in Bosnia and accept them as true than the population of the Republika Srpska, which is much more proximate to the crimes. It is hard to escape the impression that a significant portion of the RS respondents who say they never even heard of thousands of dead or injured civilians in the siege of Sarajevo are actually being (consciously) deceptive. They are lying—to themselves and/or to others—in order to protect their sense of identity, which is threatened by the question. This means, in short, that as with any survey, the responses should be treated with caution, and not as a perfect measure of the respondents' actual attitudes and beliefs. One could reasonably say, however, particularly in the light of the sheer sizes of majorities that reject the ICTY's findings, that it is unlikely that most of the respondents engage in conscious deception, i.e. that they know that the ICTY's findings are true but refuse to acknowledge this when asked.

<sup>102</sup> See Orentlicher, *supra* note 14, at 13 (discussing different possible definitions of impact).

<sup>103</sup> UNDP 2012 Kosovo Survey, *supra* note 41, at 17.

<sup>104</sup> See Prosecutor v. Šainović et al., Case No. IT-05-87, Trial Judgment (Feb. 26, 2009).

<sup>105</sup> See Prosecutor v. Haradinaj et al., Case No. IT-04-84, Trial Judgment (Apr. 3, 2008); Prosecutor v. Haradinaj, Case No. IT-04-84-A, Appeals Judgment (Sept. 23, 2010); Prosecutor v. Haradinaj, Case No. IT-04-84bis-T, Retrial Judgment (Nov. 29, 2012). Note that the retrial judgment acquitting the two defendants was handed down just as the 2012 UNDP survey was being conducted.

<sup>106</sup> The way the questions themselves were framed, and indeed the order in which they were asked, could obviously also have had an effect on the responses provided. See generally ROGER TOURANGEAU, LANCE J. RIPS & KENNETH RASINSKI, *THE PSYCHOLOGY OF SURVEY RESPONSE* 255–88 (2000) (extensively discussing misreporting in surveys regarding sensitive questions).

<sup>107</sup> See *supra* note 94, and accompanying text.

In sum, measuring the *causality* of the ICTY's impact poses a counterfactual question—what would the situation look like had there never been the ICTY, or had it done things differently—questions which are necessarily difficult to answer. The best thing we can do is speculate, if in an informed way.

### *What Impact?*

Where little speculation is required is in observing the effects that the ICTY's existence and work have had on the day-to-day politics in the countries of the former Yugoslavia. These effects were at times tremendous, and operated both internally, within the political context of each individual country, and externally, affecting their mutual relations. For instance, it is a matter of historical record that (at U.S. insistence) the ICTY's indictment of Bosnian Serb political and military leaders Radovan Karadžić and Ratko Mladić meant that they could not participate in the Dayton peace process, in which the Bosnian Serb side was represented by Slobodan Milošević, while ICTY indictees were subsequently excluded from holding public office in Bosnia, pending trial.<sup>108</sup> Similarly, when the post-Yugoslav states started their transition to democracy, the ICTY was a pivotal element in their relationships with the European Union, and the West generally, because of conditionality policies for further integration.<sup>109</sup> Another example is the 2001 decision of the new democratic Serbian government, led by its Prime Minister, Zoran Djindjić, to arrest and surrender Milošević himself for trial before the ICTY, which precipitated a chain of events which culminated in the 2003 assassination of Djindjić at the hands of a mixed cabal of war criminals, organized crime, and secret police personnel.<sup>110</sup>

Even events of comparative little significance in the short-term could produce important medium-term consequences. For example, the (voluntary) surrender to the ICTY of the leader of the far-right Serbian Radical Party, Vojislav Šešelj, in February 2003 was an event of lesser importance when compared to, say, the surrender of Milošević. But nobody could predict at the time that while Šešelj was detained in The Hague, his two party deputies—Tomislav Nikolić and Aleksandar Vučić—would bring the Radicals to the height of their popularity, only to ultimately break with Šešelj and form their own Serbian Progressive Party, absorbing much of the Radicals' membership and infrastructure.<sup>111</sup> In part by “moderating” their ultra-nationalism and adopting an ostensibly pro-European agenda, Nikolić and Vučić won a series of elections and are now the President and Prime Minister of Serbia, respectively. Today they have effectively demolished any opposition, have firm control over the media and the state

<sup>108</sup> See, e.g., CHRISTINE BELL, *PEACE AGREEMENTS AND HUMAN RIGHTS* 283 (2004); KARIN VON HIPPEL, *DEMOCRACY BY FORCE: U.S. MILITARY INTERVENTION IN THE POST-COLD WAR WORLD* 150–51, 197–98 (2000); James Gow, *The ICTY, War Crimes Enforcement and Dayton: The Ghost in the Machine*, in *INTERNATIONALIZED STATE-BUILDING AFTER VIOLENT CONFLICT: BOSNIA TEN YEARS AFTER DAYTON* 47, 55 (Marc Weller & Stefan Wolff eds., 2007).

<sup>109</sup> See generally Mathias Dobbels, *Serbia and the ICTY: How Effective Is EU Conditionality?*, College of Europe EU Diplomacy Paper 6/2009, at <http://aei.pitt.edu/11556/>; Orentlicher, *supra* note 14, at 25–27.

<sup>110</sup> See *Twelve Guilty of Djindjic Murder*, BBC NEWS (May 23, 2007), at <http://news.bbc.co.uk/2/hi/europe/6683463.stm>. See also Petrović, *supra* note 79, at 99; Gordy, *supra* note 73, at 69–86.

<sup>111</sup> See generally *Serbia Profile – Leaders*, BBC NEWS (Aug. 5, 2015), at <http://www.bbc.com/news/world-europe-17912584>. See also Lily Lynch, *The Balkanist Guide to the Serbian Elections: Party Edition*, BALKANIST (Mar. 14, 2014), at <http://balkanist.net/balkanist-guide-serbian-elections-party-edition/>.

apparatus, and enjoy high levels of electoral support.<sup>112</sup> Their relatively “soft” brand of authoritarianism seems likely to endure beyond just an electoral cycle or two. And none of this might have happened had the less electable Šešelj not been indicted by the ICTY and physically removed from Serbia, thus enabling the “progressive” duo’s gradual rebellion and assumption of power.<sup>113</sup>

Obviously, this is impossible to know for sure. My point is only this: one seemingly trivial decision by the ICTY—to indict Šešelj, undeniably small fry when compared to other Serb defendants—may have had more consequences for the Serbian people than anything else that the ICTY has done. (This is notwithstanding the spectacularly botched trial he received in The Hague and all the troubles the Tribunal has had with him for very little payoff.)<sup>114</sup> Crucially, political impacts such as these, be they negligible or tectonic, exist regardless of the ICTY’s judicial function or whatever it ultimately finds in its judgments. These impacts are also highly contextual, contingent, unpredictable, and of mainly local or regional interest. They can nonetheless be of enormous long-term importance, for instance by leading to the retrenchment of nationalist politics, transmission of nationalist narratives through public education, and so forth.

### *Truthiness and Reconciliation*

As noted at the outset, the impact of concern in this article is of a different kind, although it is inevitably related to the overarching political context: has the ICTY in any way influenced people’s attitudes about crimes in the Yugoslav wars, and did it meaningfully contribute to some long-term process of reconciliation? Again, these are not questions that can be directly answered using the surveys, especially bearing in mind the multitude of factors that influence public opinion on these issues. What can be said is that the surveys paint a very depressing picture: not only is denialism widespread, it is perfectly mainstream.

One could put forward two different hypotheses to explain this picture: yes, the situation is bad, but it would have been *worse* had it not been for the ICTY; or, yes, the situation is bad, but it was *made* worse by the ICTY. Both of these hypotheses could reasonably fit the data: the 10 percent of Serbian respondents who believe in the facts regarding the Srebrenica genocide

<sup>112</sup> In the 2014 parliamentary elections, the Serbian Progressive Party (with a few minor parties on its list) won 48.35% of the vote, which translated to 158 out of 250 seats in the parliament. The next party in line—the Socialist Party of Serbia, which used to be led by Slobodan Milošević—won 13.49% of the vote and forty-four seats in parliament, and is in the ruling coalition. The largest opposition party is the Democratic Party, which won 6.03% of the vote and nineteen seats in parliament. See National Assembly of the Republic of Serbia, Number of Mandates Won—X National Assembly Convocation, at <http://www.parlament.gov.rs/national-assembly/national-assembly-in-numbers.1743.html>. Public opinion polls consistently show that the levels of public support remain broadly the same. See, e.g., Poll: *Opposition Has Support of 20 Pct of Voters*, B92 (Jan. 21, 2015), at [http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=01&dd=21&nav\\_id=92937](http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=01&dd=21&nav_id=92937).

<sup>113</sup> See also Orentlicher, *supra* note 14, at 17 (discussing removal of indictees from Serbian politics).

<sup>114</sup> The story of the farcical mess that has been the Šešelj trial is a long and complicated one. See Gordy, *supra* note 73, at 156–59; Göran Sluiter, *Compromising the Authority of International Criminal Justice: How Vojislav Šešelj Runs His Trial*, 5 J. INT’L CRIM. JUST. 529 (2007); Alex Fielding, *The Šešelj Mess Just Got Messier Following His Provisional Release to Serbia*, BEYOND THE HAGUE (Nov. 24, 2014), at <http://beyondthehague.com/2014/11/24/the-seselj-mess-just-got-messier-following-his-provisional-release-to-serbia/>; Daisy Sindelar, *In Releasing Šešelj, ICTY Solves One Problem—But Creates Many Others*, RADIO FREE EUROPE (Nov. 20, 2014), at <http://www.rferl.org/content/balkans-seselj-hague-release-creates-problems/26702184.html>.

as the ICTY established them<sup>115</sup> could equally have been 5 percent or 15 percent had it not been for the ICTY. But that may simply support a third, and perhaps most likely hypothesis: whatever impact that the ICTY has had, whether of attitude moderation or polarization, was relatively modest. It can definitely be said that it has not been transformative—a strong majority within each post-Yugoslav community was nationalist before and remains so today, believing only in the existence of those events which reinforce their prior beliefs.

The basic assumption of transitional justice is that, over time, the truth about crimes committed in the conflicts as established by the ICTY will be accepted by the relevant targeted audiences, thus putting them on the path of reconciliation. But even accepting the presumed validity of a causal link between truth and reconciliation, each ethnic group in the former Yugoslavia is still firmly attached to its own version of reality. The post-Yugoslav societies are today nowhere near even to simply accepting the potential legitimacy of out-group perspectives. To paraphrase Stephen Colbert, they only care about their own *truthiness*, which they feel in their gut<sup>116</sup> and are constantly fighting to protect.<sup>117</sup> If anything, nationalism in the region is on the rise,<sup>118</sup> while victimhood is a competitive group sport.<sup>119</sup> As noted by Refik Hodžić, the people of Bosnia (and, I would add, of the other countries of the former Yugoslavia) are still “living the war for the ‘truth’ about ethnic superiority intended to shape the attitudes of the coming generations. And in war, there can be no acknowledgement of the enemy’s suffering, let alone reconciliation.”<sup>120</sup>

<sup>115</sup> See *supra* note 80, and accompanying text.

<sup>116</sup> See *The Colbert Report*, “The Word” segment (Comedy Central broadcast Oct. 17, 2005), at <http://thecolbertreport.cc.com/videos/63ite2/the-word—truthiness> (“That’s where the truth comes from, ladies and gentlemen, the gut. Do you know you have more nerve endings in your stomach than in your head? Look it up. Now, somebody is going to say ‘I did look that up, and it’s wrong.’ Well, mister, that’s because you looked it up in a book. Next time, try looking it up in your gut. I did, and my gut tells me that’s how our nervous system works . . . The truthiness is anyone can read the news to you. I promise to *feel* the news at you.”) See also Merriam-Webster, 2006 *Word of the Year*, at <http://www.merriam-webster.com/word-of-the-year/2006-word-of-the-year.htm> (defining truthiness as “the quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true.”).

<sup>117</sup> See, e.g., Julian Borger, *War Is Over—Now Serbs and Bosniaks Fight to Win Control of a Brutal History*, THE GUARDIAN (Mar. 23, 2014), at <http://www.theguardian.com/world/2014/mar/23/war-serbs-bosniaks-history-visegrad> (reporting on the struggle over collective memory in the town of Višegrad, including the following words of a war crime-survivor: “Those who committed the war crimes against us are still winning. *They are killing our truth.*” (emphasis added)).

<sup>118</sup> See, e.g., *Nationalists with Divided Goals Extend Hold over Bosnia in Vote*, REUTERS (Oct. 13, 2014), at <http://www.reuters.com/article/2014/10/13/us-bosnia-election-nationalists-idUSKCN0I21AY20141013> (reporting on the results of the 2014 Bosnian elections, and noting that “[n]ationalists deeply divided over the future of Bosnia have extended their rule over the Balkan country, offering scant hope of genuine change to a political system designed to end a war but seen as ineffective in peace . . . All three [nationalist parties] command huge networks of political patronage through the power of public sector jobs, of which there are many given Bosnia’s highly decentralised system of power.”); Vučić’s *Initiative Equalizes the Responsibility for the War*, RADIO FREE EUROPE (Aug. 17, 2015), at <http://www.recom.link/most-rse-vuciceva-inicijativa-izjednacava-odgovornost-za-rat/> (prominent human rights activist Nataša Kandić stating that “It’s been a long time since the state of inter-ethnic relations was as bad as it is now in 2015.”).

<sup>119</sup> See also Elazar Barkan and Belma Bećirbašić, *The Politics of Memory, Victimization, and Activism in Postconflict Bosnia and Herzegovina*, in HISTORICAL JUSTICE AND MEMORY 95, 98 (Klaus Neumann & Janna Thompson eds., 2015) (“Each ethnic group in Bosnia and Herzegovina advocates its own particular ‘ethnic truth’—an interpretation of the past that is enslaved to dominant interests—and thereby has perpetuated the conflict. The fierce political battle between competing truths, memories, and ethnic identities has intensified in the past decade, especially because of the rise of a new generation of ethno-nationalist parties.”).

<sup>120</sup> Refik Hodžić, *Twenty Years Since Srebrenica: No Reconciliation, We’re Still at War*, BALKANIST (June 29, 2015), at <http://balkanist.net/twenty-years-since-srebrenica-no-reconciliation-were-still-at-war/>.



## IV. CONCLUSION

Can one meaningfully write the ICTY's postmortem when it is not even fully dead yet? Is it not, as Zhou Enlai supposedly quipped when asked about the impact of the French Revolution, simply "too early to say" what the ICTY's impact on the former Yugoslavia was?<sup>121</sup> Did it not, for example, take Germany generations to come to terms with its past?<sup>122</sup> Obviously, there is no way to know what the former Yugoslavia will look like twenty, thirty, or fifty years from now, and even less so what role the ICTY will be seen to have played in that distant, unknown future. But that is an observation so trivial that it is hardly worth making. It could be said, equally trivially, that one's perspective may vary on precisely how much time counts as "too soon." After all, it has been over *twenty years* since the end of the wars in Bosnia and Croatia. People who were not even born then are having their own children today. On a human scale at least, that is plenty of time. So even if this postmortem is premature, it is premature only so very slightly.

This article tried to answer the "what" question—what was the impact of the ICTY on the attitudes of the peoples of the former Yugoslavia toward specific crimes that were the object of its judgments? At best, the answer to that question is that the ICTY failed to persuade the relevant target populations that the findings in its judgments are true. It manifestly did not succeed in "combatting denial and preventing attempts at revisionism," let alone in "mak[ing] it impossible for anyone to dispute the reality of the horrors that took place" in the Yugoslav wars.<sup>123</sup> This is simply a fact, as established by the best evidence we have available.

Equally important, but more open and contestable, is the "why" question—why has the ICTY proven to be so ineffectual in inducing attitude change? The "why" question will be addressed in more detail in an upcoming companion article.<sup>124</sup> Suffice it to say that the causes of the ICTY's ineffectiveness are complex, consisting of subjective and objective limitations on individuals' processing of information about war crimes, limitations that are largely independent of the quality of the Tribunal's own work. First, from the moment it appeared on the stage, the ICTY has been the object of intense, vilifying propaganda by dominant elites, especially in the Croat and Serb ethnic communities, through nationalist-controlled media which marginalized competing viewpoints. The elites included everything from the political leadership of the state, as well as opposition politicians which could be even more nationalist, local intellectuals, legal academics, and media commentariat, to clergy, especially the Roman Catholic Church in Croatia and the Serbian Orthodox Church.<sup>125</sup> Second, the vast majority of ordinary people will obtain information about the ICTY's work only indirectly, through the mediation of local media and elites. They have neither the time nor the expertise to assess the ICTY's work directly.

Third, information about specific events is mentally processed within a belief structure which has a longer historical and cultural pedigree. We saw in the surveys how those same large majorities of various ethnic groups that disbelieve crimes committed by members of their own

<sup>121</sup> Apparently Zhou did not mean *that* French Revolution, but was rather referring to the events of 1968. See Richard McGregor, *Zhou's Cryptic Caution Lost in Translation*, FINANCIAL TIMES (June 10, 2011), at <http://www.ft.com/intl/cms/s/0/74916db6-938d-11e0-922e-00144feab49a.html#axzz3jZJxzhJ3>.

<sup>122</sup> Cf. Gordy, *supra* note 73, at 168–70; Orentlicher, *supra* note 14, at 23.

<sup>123</sup> *Supra* note 11.

<sup>124</sup> See Marko Milanović, *Establishing the Facts About Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*, GEO. J. INT'L L. (forthcoming).

<sup>125</sup> See, e.g., IAVOR RANGELOV, NATIONALISM AND THE RULE OF LAW: LESSONS FROM THE BALKANS AND BEYOND 172 (2014); Klarin, *supra* note 5, at 90; Orentlicher, *supra* note 14, at 27.

group also believe that their own group has historically been the greatest victim.<sup>126</sup> It is theoretically possible for, say, a Serb nationalist to accept the full extent of the Srebrenica genocide or any of the other Serb-perpetrated crimes in the former Yugoslavia as established by the ICTY, while still retaining all of his other beliefs that form the nationalist belief system or worldview. But that is unlikely.<sup>127</sup> The individual beliefs are mutually reinforcing; changing one has an effect on others, which is why belief systems are resistant to change, while some structural beliefs can be particularly rigid and inflexible.<sup>128</sup>

Finally, decades of research in social psychology (much of it repeatedly experimentally verified) have informed us about numerous limitations to human rationality and cognition. Mechanisms such as cognitive biases, heuristics, motivated reasoning, and ingroup/outgroup discrimination constantly (and largely involuntarily) shape the attitudes of the respondents, who are inclined to believe what they want to believe and reason about the ICTY and its work in a way that is most protective of their own sense of identity.<sup>129</sup> The ICTY thus operates in a bias-driven downward spiral. The more it challenges established nationalist narratives, the more likely that it will generate distrust, and hence less likely that it will be believed.<sup>130</sup>

This “why” question is undoubtedly complex, and reasonable people can surely disagree about the root causes of the ICTY’s ineffectiveness. But we can say with certainty that what the ICTY has left us with is a paradox: that one institution could at the same time have had so much impact on the former Yugoslavia, and yet so little.

<sup>126</sup> See *supra* Part II, *Victims and Perpetrators*.

<sup>127</sup> See Daniel Bar-Tal, Lily Chernyak-Hai, Noa Schori & Ayelet Gundar, *A Sense of Self-Perceived Collective Victimhood in Intractable Conflicts*, 91 INT’L REV. RED CROSS 229, 250–51 (2009) (discussing links between a sense of collective victimization and the readiness to accept a standard conflict narrative).

<sup>128</sup> See JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 265–66 (2000).

<sup>129</sup> Cf. Dan Kahan, *Fixing the Communications Failure*, 463 NATURE 296 (2010) (discussing the process of “cultural cognition” which leads to attitude polarization when people are exposed to counter-attitudinal scientific evidence).

<sup>130</sup> See Ford, *supra* note 17, at 463–64.