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What's the Story? Transitional Justice and the Creation of Historical Narratives in Croatia and Serbia

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Summary

Fifteen years after the end of the conflict in the former Yugoslavia, discourses about the present and future are based upon revised and reconstructed narratives about the past. Therefore, the relationships between transitional justice, political ideologies and historical narratives are still contested and vague. Recent history in Serbia and Croatia is determined more by each nationality's collective emotional memory than by common factual history.

This paper analyses the impact transitional justice mechanisms have on historical narratives and the creation of collective memory about the war. As the "existing empirical knowledge about the impacts of transitional justice is still limited", its influence on local societies is measured through its impact on political ideologies and historical narratives triggered by war crime trials. So far, in Serbia and Croatia the main transitional justice tool has been the prosecution of war crimes. We argue that transitional justice, instead of triggering truth seeking and truth telling processes that would lead to reconciliation, multiplied mutually exclusive historical narratives that determined national collective identities.

Keywords: transitional justice, historical narratives, Croatia, Serbia, ICTY

Introduction

Twenty years after the break up of Yugoslavia, relationships between political ideologies and narratives about the past in Serbia¹ and Croatia are still contested and vague. Once the common socialist narrative banning everything that could question

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¹ At the beginning of domestic trials for war crimes Serbia was still part of Serbia and Montenegro. We will use the name Serbia throughout the paper in order to facilitate the reading.

the then proclaimed ideology of brotherhood and unity was discarded, the new successor countries had to challenge and re-invent their own national traditions.

Recent history in Serbia and Croatia is determined more by each nationality's collective emotional memory than by common factual history. Mutually exclusive "truths" about war and the atrocities committed quickly developed, and were used by political elites and mass media in the creation of new national narratives, reinforcing at the same time the fragmentation of post-war societies.

This paper analyses the impact transitional justice mechanisms have on historical narratives and the creation of collective memory about the war. As the "existing empirical knowledge about the impacts of transitional justice is still limited" (Freeman, 2006), its influence on local societies is measured through its impact on political ideologies and historical narratives triggered by war crime trials. So far, in Serbia and Croatia, the main transitional justice tool has been the prosecution of war crimes. The rationale behind such choice was that transition towards a stable democracy and strengthening of the rule of law in all post-Yugoslav states was not possible without justice and accountability for the committed crimes.

Assuming that in contemporary societies media have considerable power in informing public knowledge about history and shared historical narrative, we analyse local media reports on domestic war crime trials. Scholars like Peskin, Subotic, Akhavan, Orentlicher and others dealt with the impact that the international criminal tribunals had on the post-Yugoslav region and its transition towards democracy. Judicial intervention and compliance with international law, crucial for the trials before the International Criminal Tribunal for the former Yugoslavia, are not the main focus when it comes to war crime trials in domestic, local courts. This paper explores different representations in the media of historical narratives established by local courts in Serbia in the Ovčara trial, and subsequently compares them to background, non-legal elements, i.e. historical context, command structure, description of the events or historical facts found in judgements rendered at the ICTY.

How can we then explain state behaviour and strategies for dealing with the past presented at local courts for war crimes? Unlike the conditionality strategy applied for the state's cooperation with the ICTY, trials for war crimes at the local level are not associated with imminent push factors such as the EU membership perspective. Therefore, various theories created around the impact of international tribunals or local political elites just cannot stand in this situation. This research analyses changes over time in media narratives. How and why those changes occur and what might be possible ways to tackle this problem in the larger context of global justice cascade? There is continuous development in the way legal heritage is discussed and remembered. According to Osiel, trials are significant if they comprise the potential to trigger a public debate about past wrongdoings and society's wounds (Osiel,

1997). Hence, what is the influence of a legal narrative on the creation of political ideologies and remembrance of war?

Political ideologies in Croatia and Serbia rely greatly on mutually contested historical master narratives about the nature of the wars from the 1990s. Nevertheless, judicial processes do not deal with the causes of war itself but with *jus ad bellum* aspects. Therefore legal documents describe only the context of war and represent historical material that is easily manipulated. In addition, the very understanding of the tribunals' legacies is not necessarily fixed, but may change over time as the domestic perceptions of the past and the domestic politics of the present change.

Theoretical Framework – Law and Literature

The theoretical framework for this research is Hegel's work on the direct relationship of historical narrative to law. Use is made of Hegel's idea of the State as divided into three parts: 1) immediate actuality of the state as a self-dependent organism, or constitutional law; 2) relations among states in international Law; and 3) world history. History represents the world's court of judgement; it is the "necessary development, out of the concepts of mind's freedom alone, of the moments of reason and so of the self-consciousness and freedom of mind" (Hegel, 1967).

Taking Brooks and Gewirtz's methodological approach, law is analysed not as a set of rules and policies, but as a source of "stories, explanations, performances, linguistic exchanges – as narratives and rhetoric" (Brooks & Gewirtz, 1998: 1). Furthermore, law is given a dimension of "cultural discourse through which social narratives are structured and suppressed" (Brooks & Gewirtz, 1998: 1). Thus, attention is given more to the actual facts than legal rules of procedure, and to the way language is used as much as the idea expressed. While shaping reality through language, law uses distinctive linguistic methods, forms and expressions and requires strategies of interpretation. On trial, historical narrative is constantly questioned and challenged, so that "reality" is always divided into various versions of truth. The popularity of the law and narrative approach can be understood as "loss of faith in the idea of objective truth and the widespread embrace of ideas about the social construction of reality. Narrative, in other words, is seen as the social construction of reality" (Brooks & Gewirtz, 1998: 12). To sum up, law "brings together story, form, and power" (Brooks & Gewirtz, 1998: 1).

This paper deals with legal and media discourses about war crime trials. The case study presented in this paper is the "Ovčara" trial held before the Special Court for War Crimes in Belgrade, Serbia for crimes committed at an agricultural farm near Vukovar, Croatia. We approached the *problematique* by analysing trial transcripts and media reports about domestic war crime trials held in Serbia for the

Ovčara-Vukovar hospital case. Foucault's definition of discourse being "practices that systematically form the objects of which they speak" (Foucault, 2002) is taken as the basis. Foucault conceptualises discourse analysis as "the understanding of rules and regularities in the creation/dispersal of objects, subjects, styles, concepts and strategic fields" (Foucault, 2002). For Foucault, the main subject of discursive analysis is not the same as that of linguistic analysis, i.e. the rules in accordance with which a particular statement has been made and rules in accordance with which other similar statements could be made; instead, he is concerned with "how is it that one particular statement appeared rather than another?" (Foucault, 2002). Foucault's works showed that discourse has a direct impact on social relations and power structures in society. Nevertheless, for the use of this research, his theory is very difficult to operationalise as it often seems too broad to apply to specific contexts. In this paper we use a narrower definition of discourse developed by critical discourse analysis theory, as our main focus is on the relationship between content and situational context in which observed documents are made. We observe the media's "discursive strategies" (Van Dijk, 2009), i.e. their conscious or unconscious linguistic strategies used to establish, reproduce, transform or deconstruct the content of historical narrative present in war crime trials.

Critical discourse analysis is based upon the assumption that language is dialectically interconnected with other elements of social life. Legal heritage and memory are socially situated and developed from the interaction of law and its language with the society itself. Discourse analysis effectively shows how each discourse is produced, distributed and interpreted in a particular conjuncture. We take into account Norman Fairclough's dialectic paradigm that understands discourse as both "socially constituted and socially constitutive" (Fairclough, 2003). The dissemination of media to wide parts of society enhances the constitutive effects of its shared discourses playing a significant role in the construction of social reality. Discourse is articulated within contextual structure, power and ideology in order to generate knowledge and belief. We follow the critical view of ideology as "representations of aspects of the world which can be shown to contribute to establishing, maintaining and changing social relations of power, domination and exploitation" (Fairclough, 2003). This view contrasts various descriptive understandings of ideology as positions, attitudes, beliefs, perspectives etc. of social groups without reference to relations of power and domination between such groups. Ideological representations constructed in the media after trial transcripts and legal documents are not used as an objective historical information reflecting "reality" but rather as a source for the analysis of ideological debates and constructing social reality in public spheres in Croatia and Serbia.

We analyse the role of print media in the establishment of political memory of past wrongdoings. The media help substantively in the (re)creation of histori-

cal narratives about the past war and they stand in line with ideological discourses. Media influence also the creation of collective memory, even though “there is still no default understanding of memory that includes journalism as one of its vital and critical agents” (Zelizer, 2008). Zelizer points out that journalism’s work on the past is often understood as more in line with the main historical discourse than with collective memory. Nevertheless, “just what part of the past and what kind of future are brought into play depends on what editors and journalists believe legitimately belongs within the public domain, on journalistic conventions, and of course on personal ideologies” (Lang and Lang, 1989). The media’s work on memory is selective and strategic: “once journalists begin to make decisions about which stories play in which medium and using which tools for relay, they find themselves squarely in the realm of memory’s work (Zelizer, 2008). In addition, historical discourse offered by the media contributes in spreading a sense of shared history, as one of the main elements necessary to forge a collective identity and a sense of shared identity.

Moreover, interests of political elites are expressed in proposed ways of dealing with the past, in determining responsibility, silencing or insisting on the discourse about the nature of war and in punishing the perpetrators. This research analyses media reports in Serbia and Croatia and concentrates on representations of historical and judicial material. Gellner argued that the national sentiment that relies on the relation and the comparison with others would be politically more effective if nationalists had as fine a sensibility to the wrongs committed by their nation as they have to those committed against it (Gellner, 1983). On the other hand, Michal Bilig’s work on banal nationalism shows how our national identity and homeland constitute the very core of everyday mass media content (Bilig, 2009). This research tries to look at possible changes over time in media representations and perceptions of war crime trials, especially regarding crimes committed by one’s own nationals.

Selection of Memory Material

Legal narratives might be the main source of the memory of war, but they are subsequently shaped by media representations and interpretations. Selection in news production and its interpretative structure of the courts’ activities, may lead to biased reports inherited from the period of dissolution of Yugoslavia. Edited information reflects certain relations of power: it differs in news reports made by media supporting the official attitude of the state and its proposed main national ideology, or in relatively independent media. Both Croatian and Serbian media are estimated as “partially free” and connected with the state elites in a non-transparent way. Therefore, relations of power and influence of party politics are very important factors that certainly have important effects on the creation of ideologies. In Serbia me-

dia ownership is unknown in 18 out of 30 media analysed by The Anti-corruption Agency² and state institutions have a clear economic influence on the work of media through different funding schemes. Croatia, on the other hand, has adopted very rigid legal norms in the past and thus suffers from a lack of pluralism.

In order to describe which topics in media coverage are important to the public we rely on agenda-setting theory. This theory claims that the press and the media do not reflect reality, but filter and shape it. Shaw and McCombs theorised the influence of the media as not telling audiences what to think but what to think about. Furthermore, the media influence public policies by “establishing an information agenda ensuring information selectivity, limiting the view of the public of social and political realities, and giving an advantage and attracting attention to some issues and diverting it from others” (Windhauser, 1977). Media articles are performing ideological work on the past as they are interpreting the past following present perspectives, usually omitting the historical meaning of past arguments and viewpoints. In addition, media are translating legal documents into everyday language and therefore modifying and reconstructing the discourse content.

Reports on war crime trials are not simply dialectically opposite on the axis of Serbian-Croatian media. The difference in reporting of state-owned, independent or media heavily supporting certain political parties spreads over the geographical borders of the two countries. In addition, there is an important change in tone while reporting on war crime trials held before the ICTY or at the local level. Therefore, this research is based on a more nuanced analysis, while bearing in mind external trials held internationally before the International Criminal Tribunal for the former Yugoslavia (ICTY) and domestic trials performed simultaneously in Serbia and Croatia. While the ICTY indicted only high-ranking officials from military and political elites, domestic courts dealt with direct perpetrators. This research shows that the differences in legal proceedings have an impact on the way accountability and reckoning of crimes is represented within the interpretative framework that deals with the selection, omission, and preference of certain media material, i.e. the “news frame” (Gamson, 1991).

Moreover, in some cases held at the local level, indictments themselves represent a choice of narrative to follow, notably when excluding middle-ranking officials from a list of alleged perpetrators. Thus, even though war crimes have been proved before the ICTY beyond any reasonable doubt, responsibility can be operated through a comprehensive legal mastering of the past.

² <http://www.antikorupcija-savet.gov.rs/Storage/Global/Documents/mediji/IZVESTAJ%20O%20MEDIJIMA,%20PRECISCENA%20VERZIJA.pdf>

While historically war crimes were dealt with by executions or summary trials set up by victors after conflict or simply remained unpunished, they are now considered just like other crimes that demand a proper trial and due process. As there is “a misguided impulse to capture ineffable human suffering within the confines of the judicial process” (Akhavan, 2001), criminal trials for systematic violations of human rights rarely produce agreement. Mark Osiel stated that legal proceedings are actually founded on civil dissensus, given the discrepancy between widespread and organised political violence and individual guilt as the only mode of accusing perpetrators for the crimes committed. War crime trials are defendant-oriented with victims as tools in the pursuit of justice and therefore victims can very rarely reach the needed level of satisfaction with proceedings and judgements.

Legal processes before tribunals often neglect historical trajectories, and larger social and cultural forces, while focusing on proving individual guilt. One of the consequences of the described dissensus is precisely the process of attribution of collective guilt that relates post-war trauma and nationalist ideologies and creates greater social distances between ex-warring parties.

The transition towards stable democracy and strengthening of the rule of law in all post-Yugoslav states was deemed possible only if backed by transitional justice mechanisms and accountability for crimes committed. Accountability cannot be understood and reduced only to trial and punishment, nor is it permissive of blanket amnesties. While war crimes remained barbaric acts, criminal justice mechanisms are constantly developing. Trials concentrate on defining the facts that can lead to eventual accountability of the accused for very specific crimes; they do not describe the historical causes of war itself.

Law and History

What is the impact of legal narratives on historical records in post-conflict societies in Serbia and Croatia? According to the “expressive theory of law”, law’s meaning can have significant consequences in shaping social norms. Legal actions, from the Durkheimian point of view, are particular rituals *per se*, they also mean, symbolise or express the *conscience collective*. Thus, the legal impacts greatly affect the creation of collective memory after mass atrocities, as they involve highly effective rituals. Legal material directly influences collective memory, but in a very selective way. Judicial truth is often quite different from the official historical narrative. The notion of truth is related to the presentation of evidence in ritual practices and public discourse. Unlike the proceedings before the ICTY, in both Serbia and Croatia there is no live coverage from the local courtrooms, which further narrows and shapes legal narratives, once they are transmitted by the media to the general public. This research analyses the specific use and/or misuse of certain keywords carrying

ideological connotations. Simultaneously, we emphasised strategies of “forgetfulness” and omission of parts of the narrative that could undermine some of the most widespread national ideologies.

Halbwachs pointed out that our understanding of the past is influenced by present-day interests. Media representations are in fact “reading” history backwards and reflect at the same time power relations within society. Thus, to sum up, there is a two-level game going on: legal and political on one side, and doctrinal and historiographical on the other.

Many scholars argued that history should not be written in courts. Mark Osiel noted that the law is likely to discredit itself when it presumes to impose any answer to an interpretative question about the past. In addition, justice is “compromised because history occupies a central place in nationalist myth-making” (Wilson, 2005). Even more, in the region of the former Yugoslavia, wars in Croatia and Bosnia are deeply embedded in official narratives, up to the point of “civil religion” in Croatia in particular (Jović, 2009). Hannah Arendt argued that questions of great importance for the entire society, related primarily to the causes of conflicts, will be neglected. The aim of this paper is not to judge whether “correct” historical accounts of past events are described in trials for war crimes, but how those findings are represented in the media and consequently socially constructed.

War crime trials before domestic courts are important indicators of the politicization of history set up during the nation-building project. For example, show trials, trials in absentia or those directed against members of paramilitary forces serve to manufacture the legitimacy of the state and to lift up the collective responsibility for the past crimes. Accordingly, criminal trials against direct perpetrators of no interest for state institutions such as the army or police contribute to “removing from collective memory those larger social mechanisms that involve broader segments of the population in the establishment and execution of dictatorial regimes and their atrocities” (Edmunds, 2009).

Most transitional justice literature assumes that the movement for setting up judicial institutions dealing with past atrocities is internal, in the interest of the states willing to fulfil the transition towards democracy. The region of the former Yugoslavia is rather specific, as the first fair trials were triggered at the ICTY, an *ad hoc* tribunal founded by the UN Security Council. State collaboration with the tribunal was highly conditioned by different factors such as economic aid and European Union membership. This research deals with domestic trials for war crimes as they bare much less “judicial interventions” and make internal state strategies for dealing with the past more visible. At the beginning of the work of the Special Court for War Crimes in Belgrade Bruno Vekarić, the deputy war crime prosecutor, outlined that “societies need to deal with the past not to appease the international community

but because of them". Nevertheless, Peskin challenges the Kantian version of international law founded in an idealized vision of human rights norms by explaining how international tribunals can cause domestic political crises and state instability.

Both Serbia and Croatia encountered serious problems in enabling fair trials for war crimes before domestic courts. The major problem was, and still is, the low domestic demand for normative change and the high degree of politicization of the judiciary. For example, the Serbian public largely refused to believe that Serbs had committed war crimes, and they blamed other nations and ethnic groups for starting the war. Some of the participants in recent wars, i.e. political elites, the church, elite intelligentsia, and the military, stayed in power after the transition and actively blocked transitional justice projects because of their own responsibility in creating, spreading and imposing old regime propaganda. Croatia institutionalized its official historical narrative about the Homeland War when in 2000 the Croatian Parliament approved a "Declaration on the Homeland War" as "just and legitimate defense" in order to "defend its internationally recognized borders against Greater Serbia's aggression".

Even when the institutional challenge such as local judicial capacity was met, judgements were put back on trial as in the case of "Ovčara" by the Serbian Supreme Court and none of the indictees was found guilty as in the "Lora" case by the Split district court. Moreover, trials were organized almost uniquely against direct perpetrators, leaving a so-called "impunity gap" between high-ranking officials brought before the international tribunal and the lowest ranked alleged criminals. Thus, the state has a decisive role in proposing only certain, non-compromising parts of its history as official narrative to follow.

The "Ovčara" Trial

On December 4th 2003, the War Crime Council of the Belgrade District Court³ issued its first indictment against eight alleged perpetrators of war crimes committed in a farm building in Ovčara, close to Vukovar, Croatia. Based on documentation ceded to the Serbian Authorities by the ICTY, the indictment accused members of the Territorial defense of Vukovar (TO Vukovar) and the paramilitary formation "Leva Supoderica" of crimes against prisoners of war, according to the Third Geneva Convention of 1949 on the Treatment of War Prisoners and Geneva Convention Annexed Protocol on Protection of Victims in Non-international Armed Conflicts. In particular, those indicted were accused of violence, murder, cruel treatment and torture, as well as outrages upon personal dignity, humiliating and degrading treatment. The

³ After the judicial reform Belgrade District Court became High Court, therefore we will use hereinafter its commonly widespread name: Special Court for War Crimes.

events described concern the execution of at least 200 war prisoners at Ovčara farm, transferred from Vukovar hospital to the Yugoslav People's Army (JNA) barracks.

Almost simultaneously, in The Hague, before the ICTY, three former JNA high-ranking officers were tried for the same crimes. The indictment issued by the ICTY against Mrkšić, Radić and Šljivančanin⁴ describes events dating from the beginning of the siege of Vukovar in late August 1991, the fall of the city to Serb forces, the forced removal of about 400 non-Serbs from the Vukovar hospital and the killing of at least 264 Croats and other non-Serbs. JNA generals are accused of participation in a so-called Joint Criminal Enterprise (JCE) with the aim of persecution of "Croats and other non-Serbs present at Vukovar hospital after the fall of the city, through the commission of murder, torture, cruel treatment, extermination and inhumane acts". The international tribunal's indictment also differs in the nature of crimes and in criminal procedure undertaken in order to prove those crimes. Namely, the "Vukovar three" were accused of crimes against humanity and violations of the laws or customs of war according to the Statute of the ICTY; therefore victims are presumed to be also civilians and not only prisoners of war. Moreover, they are charged on the basis of individual criminal responsibility and superior criminal responsibility, whereas the Serbian indictment deals only with direct executors and thus prosecutes exclusively individual responsibility. The detainees were transferred to Ovčara from the JNA barracks, but the indictment issued by the War Crime Prosecutor in Belgrade did not include any of the events before the arrival at Ovčara farm, and accordingly did not question the responsibility of various army officers that allegedly agreed to render the prisoners to the TO and paramilitary forces. Consequently, such a selective indictment cleared *a priori* any involvement in the crime of state institutions such as the army or the military police. However, both the indictment and the judgement agree on the Vukovar TO and the paramilitary unit Leva Supoderica being components of the then JNA.

Punishment for the offence described by the Serbian indictment is regulated by Article 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY). Hence the rule of *tempus regit actum*, i.e. that the law that was in force at the time a criminal act was committed shall be applied to the perpetrator of the criminal act. Yet, when trying war crimes committed during the conflicts in the former Yugoslavia, as a general rule, the Serbian courts apply the 1993 FRY Criminal Code as the law more favourable to the accused. The reason behind this is that if after the perpetration of an act a less severe punishment is determined by law, such punishment shall be imposed. In the case of Article 144 (war crime against prison-

⁴ The initial indictment, confirmed on 7 November 1995, was later amended to include Slavko Dokmanović, mayor of wartime Vukovar. Following the death of the fourth indictee, the indictment was changed three more times and was finalised on 15 November 2004.

ers of war) of the SFRY Criminal Code, the maximum punishment was the death penalty, whereas in the FRY Criminal Code the maximum punishment was twenty years of imprisonment.

Media Coverage of the Trial in Serbia and Croatia

Three domestic trials addressed by the War Crime Prosecutor's Office in Belgrade for the war crimes committed at Ovčara farm near Vukovar have been resolved by final judgements. This research focuses on the case Ovčara I – Vujović et al., started before the Special Court for War Crimes in Belgrade on March 9th 2004. First instance judgement was rendered on December 12th 2005, but was reversed by the Serbian Supreme Court a year later and the case was put back on trial due to "procedural mistakes". A new first-instance judgement was rendered by the District Court's War Crimes Chamber on March 12th 2009. On September 14th 2010 the Appellate Court in Belgrade confirmed the first instance judgement.

The length of the trial as well as specific circumstances such as the opening trial for the newly founded Special Court and controversial decision of Supreme Court or even the simultaneity of the ICTY case on the Vukovar hospital secured relatively good media coverage in both Serbia and Croatia. In Serbia, differently from the reports concerning trials held before the ICTY, the tone of the articles describing the Ovčara case tried to get an impartial, almost indifferent quality. On the other hand, Croatian press mainly showed scepticism, as the case was processed in Serbia and not in the country where it was perpetrated, Croatia. Croatian media remained victim-oriented, but at the same time insisted on the relationship of Ovčara crimes within the general frame of Serbian aggression led by JNA forces.

The choice of the indictment to bring charges against the alleged perpetrators for the criminal offence of war crimes against prisoners of war avoided discussion about the background situation in which the crime was committed. Instead, the case held before the ICTY brought charges for crimes against humanity. For persecutions on political, racial, and religious grounds, extermination, murder, torture, and inhumane acts the court has to prove that the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his acts for purely personal motives completely unrelated to the attack on the civilian population. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict. The role of context is therefore crucial in trials of crimes against humanity. Nevertheless, the presence of official historical narratives about the causes of war could be noticed in sometimes free interpretation of legal material exposed in the courtroom.

In Serbia, in 2003 there were about 70 newspaper articles dealing with the investigation process and later indictment for crimes committed at Ovčara. News

were usually short and regarded investigatory work before the indictment was issued. Therefore, very often headlines are the main sources of information, as most of the newspapers used agency news in the articles' text. All the accused were caught during the police operation "Sabljica" in the immediate aftermath of ex Prime Minister Djindjić's murder. Therefore, most of the articles depict the political will to deal with past atrocities, but at the same time recall constantly that the accused were members of paramilitary units or Serbs from Vukovar attached to the TO. Croatian media also paid little attention to the issue of the indictment. This is quite predictable, considering how unsuccessful were other attempts at coming to terms with the past, for example show trials set up throughout the region or the Truth Commission formed by the Government of Serbia and Montenegro in 2001 and which faded away in 2003.

Once the start of the trial approached, it gained much more attention in the media. Serbian newspapers had headlines mostly related to the start of the trial, but also some of them underlined the fact that the accused were members of TO (for example *Dnevnik* – Eight accused for "Ovčara" from the TO Vukovar, *Blic* – The Duke surrendered, *Glas javnosti* – Chetnik duke voluntarily at court), or that the crime has been committed (*Večernje novosti* – The injured were also executed, *Večernje novosti* – 192 war prisoners killed, *Danas* – Guilty for murder of 192 war prisoners).

On March 10th 2009 many newspapers in Serbia cited the first defendant's initial statement already in the title. Vujović accused some JNA officials of ordering the massacre and therefore triggered a debate about the role of the JNA and consequently the Federal Republic of Yugoslavia in the war in Croatia: *Balkan* – Defendant demands the arrest of Aleksandar Vasiljević, ex chief of KOS (Counter-intelligence service), *Blic* – General Vasiljević knows who ordered the massacre of civilians, *Glas javnosti* – General Vasiljević keeps the secret of Ovčara, *Politika* – Indictree accuses general Vasiljević. Others opted for the historical moment of the trial: *Politika* – Historical event for the judiciary, *Politika* – From Zvornik to Ovčara, *Blic* – Turning point for Serbia, *Večernje novosti* – Test for Belgrade, *Danas* – History in the courtroom, *Dnevnik* – Ovčara trial – test for Serbian judiciary.

Croatian newspapers reported with great interest the beginning of the Belgrade trial. They concentrated on the fact that the victims were mostly Croatian nationals. Unlike the Serbian media who gave attention to the defendants' statements, the Croatian ones looked first on the crime itself. On the visual plan there are also significant differences: while in Serbian papers the photos are depicting mostly the courtroom of the new modern tribunal the Serbian state should be proud of, the Croatian ones have chosen photos of the monuments in Vukovar or portraits of victims' families. Main headlines announcing the beginning of the trial were: *Jutarnji list* – Death squad at Ovčara was killing Croats for seven hours, *Večernji list* – 50

witnesses to testify for Ovčara crimes, *Vjesnik* – Only Perić admitted killing of prisoners at Ovčara.

As already mentioned in the introduction, this research is trying to operationalise how certain statements appear in the discourse, both legal and media. We explore the circumstances that made possible certain kinds of definitions regarding several key concepts present in war crime trials reporting in Serbia and Croatia: 1) number of victims; 2) who were the victims: prisoners of war, civilians or wounded; 3) nation labelling; 4) the role of the JNA; 5) the use of history; 6) what happened in Vukovar beforehand?

The indictment issued by the War Crime Prosecutor in Belgrade named at least 192 victims (200 after amendment), differently from the ICTY one that based its case on 264 victims (around 60 are still treated as missing). Even though judicial truth differs from history or the official narrative about the war, some of the media, mostly Croatian⁵, insisted on the facts provided by The Hague tribunal. Numbers are particularly important when it comes to the penalties. On December 12th 2005 the Special Court for War Crimes rendered judgement in the Ovčara case. Eight persons were sentenced to 20 years imprisonment (maximum penalty), three to 15, one to 12, one to 9 and one to 5 years. Two were released due to a lack of evidence. *Večernji list* highlights “Only a year for each killed at Ovčara” and “Murderers at Ovčara (punished) as for theft of mobile phone” (12/3/2007) and gives a short survey in which everybody asked for more severe punishments. *Jutarnji list* announces “20 years of imprisonment for the eight worst executors from Ovčara”, and *Vjesnik* also quotes “Criminals from Ovčara got from 5 to 20 years”. Serbian newspapers *Glas javnosti*, *Danas*, *Blic*, *Politika*, *Dnevnik* report mainly by stating the overall number of prison years, 231, which definitely makes the sentencing look severe and adequate. *Večernje novosti* and *Kurir* underline the maximum punishment. When in March 2009 the Special Court diminished punishments for some of the previously convicted war criminals, in Serbia only *Politika* daily reported that fact already in a headline. Belgrade’s strategy was again to announce the overall years of imprisonment for the crimes committed. The Croatian dailies remembered that the sentence was lighter and, even though the articles were shorter than a couple of years ago, assumed more emotional comments about “shame” (*Večernji list*), “difference between sentence and punishment” (*Jutarnji list*), “(ir)responsibility” (*Vjesnik*).

The second problem analysed in media material is the labelling of the victims. Croatian newspapers keep on underlining that nearly 200 victims were “Croats” or “Croatian prisoners” (*Jutarnji list*, *Vjesnik*, *Glas Slavonije*, *Vukovarske novine*),

⁵ *Glas Slavonije* – Pokajnik Stuka imenovao zločince koji su 1991. strijeljali 260 Hrvata na Ovčari; *Jutarnji list* – Pokajnik s Ovčare [...] ispitivan o masakru 260 Hrvata pokraj Vukovara.

whereas *Večernji list* calls them “defenders, civilians and wounded”. Only one article from *Vukovarske novine* ever mentioned “Croatian war prisoners”. This omission is very important as it is absolutely necessary in order to explain the indictment. Moreover, this is precisely the point in which the ICTY and Special Court legal arguments differ. As for reports of the Serbian media the situation turns out to be more complex. Usually prisoners’ nationality is never mentioned, they are mainly labelled as “prisoners of war”. *Danas* varies largely in labelling the victims: it mentioned on March 9th 2004 that 192 members of Croatian army were killed, two days later that “prisoners of war, civilians and army members” were executed, and in 2005 calls them “civilians taken from Vukovar hospital”. Most alarming is the case of *Politika* that on March 11th 2004 analyses “the Croatian view point on trial” in the article entitled “Victims without nationality”. While the author claims that media outlined that the victims were “civilians, wounded and hospital staff”, mainly “Croats and other non-Serbs”, it comments that “this statement is partially true, because among the executed victims there were *Serbs* as well” (emphasis added). Nevertheless, just a couple of lines afterwards the author mentions “trials in Split where the accused were *Croatian* army militiamen for crimes against *Serbian* prisoners” (emphasis added). However, the War Crimes Chamber noted the accused’s knowledge that victims were protected:

[t]he fact that among the prisoners there were wounded and civilians, as well as the Serbs belonging to the “opposing side” [...] is beyond doubt. However, this Court believes [...] that the awareness of the accused and their intent point to the fact that those were perceived as the members of the opposing party, prisoners of war (as all those who do not acknowledge the perpetration of the offence, as well as witnesses heard and witnesses-collaborators used the term “prisoners” in relation to the injured parties). Hence, bearing also in mind such awareness of the accused, the Court qualified the act as the offence from Article 144 FRY CC.

Serbian newspapers carefully avoided mentioning the defendants’ nationality, whereas the Croatian ones insisted on it. Even if there is a hint about it, it is usually put in the form of a witness statement, as in the article published by *Blic* on September 15th 2005 “Witness: Serbs were killing imprisoned Croats at Ovčara”. For the Serbian media nationality becomes an important issue once the accused half Serbian – half Croat Ivan Atanasijević admits shooting at the prisoners. Titles like “Admits to have shot Croatian prisoner” (*Danas*) in perspective of Atanasijević being a Croat is not a problem, because it still leaves “clear” the Serbian side. Moreover, when the 2005 sentence was revoked suddenly “Croats were not satisfied” (*Gradjanski list*), “Ovčara case made Croats angry” (*Blic*).

Even though the Ovčara case was put back on trial, the overall impression is that the Trial Chamber with presiding Vesko Krstajić contributed greatly to disman-

tle ideological narratives about the events in Vukovar. Unfortunately, the indictment did not include JNA commanders or soldiers, but the court was satisfied that the army “deliberately left prisoners to the members of TO and paramilitary”. This trial triggered precisely the debate over the role of Belgrade in controlling the JNA. Almost simultaneously with the beginning of the trial in Belgrade and The Hague charges were pressed at Croatian district court, involving some of the JNA ex officials. During the trial all defendants accused the JNA for organising the massacre at Ovčara and described that it was the army that commanded over the TO. Croatian media accused JNA officers of exercising “Milosevic’s concept based on mass killings and ethnic cleansing” (*Vjesnik*, March 9th). *Večernji list* also remembers on various occasions the JNA General Staff that “initiated the formation of paramilitary units and let them make war in Vukovar”. *Jutarnji list* as well underlines that “a number of very high officers that appeared on court as witnesses are clearly responsible for what happened” in Vukovar. Some Serbian newspapers underlined that the Ovčara trial was the “first time that direct responsibility of JNA was transferred to the Serbian forces in Vukovar” (*Dnevnik*). The sentence established that the regular army of JNA did not take part in the crime at Ovčara and that its members did not know that colonel Mrkšić decided to render prisoners of war to the TO. To sum up, anonymous members of TO were convicted, the JNA’s responsibility managed to disappear and the state continued to escape broader public debate about responsibility in the war.

Finally, is there a possibility to reach some kind of ideal truth and factual history? “We will not talk about the causes of war, this should be left to the course of history”, underlined judge Krstajić at the end of trial, “what is indisputable is the fact that crimes happened at Ovčara”. Nevertheless, this trial marks the process of alienation from the long-time official version of “liberation” of Vukovar, to “Vukovar conflict”, “operation” and finally “fall of the city”. Even though the indictment for the Ovčara crime was really narrow, some background information regarding the role of the army and the FRY state were indisputably proven. Dismantling of the old ideologies related to the war in Serbia was perhaps best described by defendant Predrag Dragović’s statement: “I feel sorry for the victims and for Serbian history”.

Conclusion

The innovative element this project is dealing with is the impact of domestic tribunals for war crimes on the creation of historical narratives. In addition it gives a comparative perspective on Croatian and Serbian media reporting on war crime trials. The problem of judicial responsibility is tackled on two levels: international and domestic. The International Criminal Tribunal for the former Yugoslavia

(ICTY) provided full compliance of both Serbia and Croatia, but the cooperation was made possible only by judicial conditionality performed by the international community, mainly the EU. Domestic trials for war crimes offered a very challenging framework in which the main aims of transitional justice were set apart and political strategies of denial were put in action. Different ways to deal with proceeding for serious breaches of humanitarian law are analysed in depth.

This research tracks the process of domesticating of the war crime trials. Crimes described in detail during the ICTY Vukovar hospital trial were referred to local courts: in Ovčara trial part of the material gathered during the investigation process was used to indict lower ranked perpetrators. According to the Statute of the ICTY the indictees can be accused of crimes against humanity, violations of the laws and customs of war, genocide and breaches of the Geneva Convention. Consequently, the ICTY gave a broader political and historical context of the war situation as the Tribunal builds its cases around the practice of proving a Joint Criminal Enterprise and command responsibility. The War Crimes Chamber in Belgrade cannot prosecute crimes that were not included in the legislation at the time the crimes were committed. At the domestic level, Prosecutions have no incentive to examine the context as they do not need to prove systematic violations of humanitarian law, but concentrate separately on each single crime. In those circumstances, the truth-telling capacity of the domestic war crime trials is extremely limited.

This research compares notions of collective and individual responsibility, guilt and accountability and their relation with new political ideologies. Even though the ICTY's jurisprudence can establish only individual guilt, the defendants rather insist on collective guilt when accusing The Hague Tribunal. The reasoning again derives from the attempt to discredit international humanitarian law's possibility to pursue command responsibility and by extension, general responsibility. On the other hand, the accused at domestic courts carry no political weight and belong mostly to paramilitary formations outside the official army. Nevertheless, recent trials for war crimes in both Serbia and Croatia see former military officers accused for wrongdoings and there is a change in tone of the reports through time.

Ostojić argues that it is "the pacification of the domestic political scene and the strengthening of democratic institutions that gradually improved prospects for establishing accountability" (Ostojić, 2011). This research supports the hypothesis that post-conflict societies accepted consequences of past atrocities, but still did not take full responsibility for the crimes committed. Instead, twenty years of instrumental denial and subsequently little or no interest for dealing with the past "cleared" the terrain for more objective and fair trials. In addition, historical knowledge and continuity with the past is broken in attempt to create a new political community, cleared of past wrongdoings.

In Serbia, war crime trials persist to be a minor topic in the public sphere. There is a great deal of silencing and auto-censure about the nature of the war itself that balances between “possible responsibility for war” and “responsibility of the other party” and therefore trials are represented mostly in a very technical, seemingly objective manner. On the other hand, Croatian identity is strongly connected to the Homeland War and crimes are understood mostly as legitimate defence. Scholars like Peskin and Subotić explain the scarce response to transitional justice mechanisms by the power balance between nationalistic and liberal political elites and model their identity and behaviour. This research’s thesis is that instead of triggering truth-seeking and truth-telling processes that would lead to reconciliation, the focus on war crimes has multiplied the mutually exclusive historical narratives that are increasingly determining national collective identities. Politics of interpretative denial does not deny “the raw facts; rather, they are given a different meaning from what seems apparent to others” (Cohen, 2001). War crimes and legal heritage hence become consciously distant. In addition, general argument for not dealing with the past is a fragility of newly established democracy of countries in transition from conflict.

Artificially isolated question of transitional justice and democratic transition justified no apparent need for systematic dealing with the past. The ICTY trials have lifted away any kind of denial of committed crimes. Nevertheless, there is little public interest in domestic war crime trials due to the fact that the democratic transition was conducted separately and with no mean of connecting issues of dealing with past wrongdoings with the regime transition. Still, transitional justice helped judicial reform and rule of law practices, but only once the democratic consolidation process had already started. Compliance with the ICTY was managed with great democratic deficit as political elites acted upon conditionality dictate. Nevertheless, the continuous process of collecting “judicial truths” through domestic war crime trials might overcome the political and institutional influence which courts are contending with.

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