INTRODUCTION ........................................................................................................... 8

THE CONTEXT OF STUDY ......................................................................................... 8

CHARACTERISTIC OF SOCIETIES IN TRANSITION (1): HISTORICAL DISCONTINUITY .... 9
CHARACTERISTIC OF SOCIETIES IN TRANSITION (2): LACK OF SHARED UNDERSTANDING .... 12

RESEARCH OBJECTIVES ......................................................................................... 13

RESEARCH QUESTIONS ......................................................................................... 14

METHODOLOGIES .................................................................................................. 15

METHODOLOGY: COLLECTIVE MEMORY .................................................................. 15
METHODOLOGY: INTERNATIONAL CRIMINAL INVESTIGATION ................................. 17
RESEARCH LIMITATIONS ...................................................................................... 18

STRUCTURES .......................................................................................................... 19

THEORETICAL PART ............................................................................................... 19
CASE STUDY ............................................................................................................ 21

PART I ................................................................................................................... 22

CHAPTER 1 THEORIES OF COLLECTIVE MEMORY ................................................. 22

1.1 INTRODUCTION ............................................................................................... 22
1.2 THE BOOM IN COLLECTIVE MEMORY DISCOURSES ...................................... 22
1.3 ORIGIN OF COLLECTIVE MEMORY STUDIES .............................................. 25
1.4 WHAT IS COLLECTIVE MEMORY? .................................................................... 26
1.4.1 Social group: unit of collective memory ..................................................... 26
1.4.2 Carriers of collective memory .................................................................... 26
1.4.3 Relationship between individual and collective memories ....................... 27
1.4.3.1 Conflation of individual and collective memories .............................. 27
1.4.3.2 Distinctiveness of collective memory .............................................. 28
1.4.4 The extent of collectiveness ...................................................................... 29
1.5 Formation of Collective Memory ......................................................... 30
  1.5.1 Processes of collective memory formation: the importance of ‘narrative’ ....... 30
  1.5.2 Purpose driven formation of collective memory: the ‘memory agenda’ ........ 32
1.6 Relationship between present and past ............................................. 33
1.7 The Manifestation of Collective Memory ........................................... 34
1.8 Typology of Collective Memory ....................................................... 35
  1.8.1 Categorization according to ‘source’ ............................................ 35
  1.8.2 Categorization according to ‘relevance to memory carrier’s life’ .......... 37
  1.8.3 History and collective memory ................................................... 37
  1.8.3.1 The difference between history and collective memory .................... 37
  1.8.3.2 Historical accuracy and collective memory ................................ 38
1.9 Applicability to Transitional Societies ........................................... 39
1.10 Collective Memory in Transitional Societies and the Law ..................... 42
  1.10.1 Two main functions of the Law ................................................ 43
  1.10.1.1 Instrumental purpose of law ................................................. 43
  1.10.1.2 Expressive purpose of law ................................................ 43
1.11 Collective Memory in Transitional Societies and Crime Investigation ....... 45
  1.11.1 Criminal investigation and production of a narrative account .......... 45
  1.11.2 Historiography and criminal investigation .................................. 46
  1.11.2.1 Liberal legalists ................................................................. 47
  1.11.2.2 Law and society scholars .................................................. 47
  1.11.2.3 Law and history in international criminal investigation ............... 49
1.12 Conclusion ...................................................................................... 50

CHAPTER 2 THEORY OF INTERNATIONAL CRIMINAL INVESTIGATIONS ............52

2.1 Introduction ................................................................................... 52
2.2 Distinctiveness of International Investigations .................................... 53
  2.2.1 Focus of investigation ............................................................... 54
  2.2.2 Accessibility of information ...................................................... 56
  2.2.3 Subject matter of investigation ................................................ 57
2.3 Information Processing and Evidence Analysis .................................. 58
  2.3.1 Investigation as a form of information processing ......................... 58
  2.3.2 Nature of information ............................................................... 59
  2.3.2.1 Distinction between raw data and information ......................... 59
  2.3.2.2 Distinction from knowledge .................................................. 60
  2.3.2.3 Evidence ............................................................................. 62
  2.3.3 The analysis of evidence ........................................................... 65
2.4 Framework of Investigation (1): Legal Framework .............................. 69
  2.4.1 Law as a frame of investigation ................................................ 70
  2.4.2 The nature of international law ................................................ 71
  2.4.3 Legal frames utilized in investigative process ............................... 73
2.5 Framework of Investigation (2): Organizational Framework ................. 76
  2.5.1 Functional separation model ..................................................... 78
  2.5.2 Linear model ........................................................................... 82

2
CHAPTER 3 ICTY - LEGAL FRAMEWORK OF INVESTIGATION ........................................... 99

3.1 INTRODUCTION ........................................................................................................... 99
3.2 DUAL CHARACTER OF THE ICTY .............................................................................. 99
3.3 EVIDENCE-GATHERING BY THE ICTY ................................................................. 102
  3.3.1 Reliance on states ................................................................................................. 102
  3.3.2 Two modes of evidence-gathering ......................................................................... 103
    3.3.2.1 Evidence-gathering by the ICTY ................................................................. 103
    3.3.2.2 Coercive and non-coercive instigative measures ........................................ 103
    3.3.2.3 Direct enforcement vs request for judicial assistance from states .......... 105
3.4 STRUCTURE OF THIS CHAPTER ............................................................................. 106
3.5 LEGAL SOURCE OF ICTY INVESTIGATIONS ....................................................... 107
  3.5.1 Article 25 of the UN Charter .............................................................................. 107
  3.5.2 Constituent legal instrument .............................................................................. 109
    3.5.2.1 Primary jurisdiction ...................................................................................... 110
    3.5.2.2 Personal jurisdiction .................................................................................... 111
    3.5.2.3 Temporal, Territorial jurisdiction ................................................................ 112
    3.5.2.4 Subject-Matter jurisdiction ......................................................................... 113
    3.5.2.5 Articles defining the external powers of the ICTY ........................................ 114
  3.5.3 Internal division of powers .................................................................................. 116
    3.3.3.1 Powers of the Judicial Branch (Chambers) .................................................... 116
    3.3.3.2 Power of the Prosecutor ............................................................................ 118
  3.5.4 Interpretation of the Statutes and the RPE ............................................................ 119
3.6 INHERENT POWERS ................................................................................................. 120
  3.6.1 Power to make judicial findings regarding non-compliance of States ............ 122
  3.6.2 Power to address directly to the private individuals who may be of assistance
       in the task of dispensing criminal justice .............................................................. 122
  3.6.3 The contempt power ............................................................................................ 123
  3.6.4 Other sources of international law regulating the power of ICTY .................... 123
3.7 POWERS TO CONDUCT INVESTIGATIONS .............................................................. 125
  3.7.1 Request for assistance to the states .................................................................... 125
3.8 LIMITS TO POWERS

3.8.1 Statutes and RPE

3.8.2 Individual rights

3.8.2.1 Judicial authorization

3.8.2.2 Principles of proportionality – necessity & specificity

3.8.3 General principle of law of criminal procedure

3.9 SPECIFIC INVESTIGATIVE MEASURES

3.9.1 Interviewing witnesses

3.9.1.1 Definition of witness

3.9.1.2 Power of the Prosecutor to interview witnesses

3.9.2 On-Site investigation

3.9.2.1 Definition of on-site Investigations

3.9.2.2 On-site investigation in inter-state legal assistance

3.9.2.3 Importance of on-site investigations

3.9.2.4 Search and seizure operations

3.9.3 Interception of communications

3.10 SUBSTANTIVE LAW – CRIME OF GENOCIDE

3.10.1 Introduction

3.10.2 The notion of genocide

3.10.3 The underlying acts

3.10.3.1 Killing members of the group

3.10.3.2 Causing serious bodily or mental harm to members of the group

3.10.3.3 Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

3.10.3.4 Imposing measures intended to prevent births within the group

3.10.3.5 Forcibly transferring children of the group to another group

3.10.3.6 Acts that do not constitute genocide

3.10.4 Protected groups

3.10.5 Genocidal intent

3.10.6 Genocidal policy or plan

3.11 CONCLUSION

CHAPTER 4 CASE STUDY SREBRENICA INVESTIGATION

4.1 INTRODUCTION - METHODOLOGY

4.2 BACKGROUND

4.2.1 Location of Srebrenica

4.2.2 Chronology of Bosnian War

4.3 ICTY INVESTIGATION ON GENOCIDE

4.3.1 Preliminary investigations

4.3.2 The formation of an investigation team

4.3.3 External supports

4.3.4 Initiation of investigation

4.3.4.1 Access to crime sites

4.3.4.2 Erdemović confession

4.3.5 Collection of evidence
CHAPTER 5 COLLECTIVE MEMORIES OF SREBRENICA ............................................. 225

INTRODUCTION........................................................................................................... 225
5.1 LANDSCAPE OF MEMORY (I) – SITES OF COMMEMORATION.......................... 228
  5.1.1 Potočari memorial centre.................................................................................. 228
  5.1.2 Bosnian Serb commemorations....................................................................... 232
  5.1.3 History of victimhood....................................................................................... 234
6.5 LEGAL CONSTRAINTS AND COLLECTIVE MEMORIES .......................................................... 281
CONCLUSION ......................................................................................................................... 284

GENERAL CONCLUSION ......................................................................................................... 285

BEYOND TRIBUNAL’S REACH ................................................................................................ 285
   Outreach .................................................................................................................................. 285
   ‘Bridging the Gap’ Programme ............................................................................................ 286
FURTHER RESEARCH QUESTION: (1) THEORY OF COLLECTIVE MEMORY .................... 289
FURTHER RESEARCH QUESTION: (2) COMMEMORATIVE JUSTICE .................................... 290
   All-encompassing collective memories .............................................................................. 290
   Linkage between collective memories and reconciliation process ..................................... 292
   Truth and reconciliation commission ................................................................................. 292
   Commemoration .................................................................................................................. 293
INTRODUCTION

The Context of Study

The contexts for this study are those societies that are emerging from a past of war, revolutions and repressive rule. In these societies, dealing with the legacy of a violent past is often critically important. It is within this context the issue of collective memory becomes pertinent. Debates on how to deal with the past and with collective memory often start when societies are shifting from an autocratic or authoritarian regime to a more democratic system. In the context of social science discourses, researchers refer these societies as ‘societies in transition’. Kazuo Ogushi draws a distinction between post-authoritarian transition and post-conflict transition. The former considers the preceding political system, while the latter connotes violence associated with the past regime. In the context of this study, these terms will be used interchangeably.

In societies in transition, the manner in which a given society forms collective memory plays a crucial role in solidifying that society, since it serves to legitimise the newly emerging government. Eric Hobsbawm spoke about the importance of ‘invented traditions’ and commemorations that form a basis for nation-building attempts and for the use of history in order to legitimate action and cement group cohesion. In this context,


2 Kazuo, Ogushi, Taishiteikouki no jinken kaifuku to seigi (Restoration of human rights and justice at the time of regime transitions), Tokyo, Waseda University Press, 2012, p.7

judicial investigations into gross violation of human rights committed by a past regime play a role for the formation of collective memories of that regime. There are two common characteristics that can be observed across societies in transition, namely, 1) historical discontinuity, and 2) lack of shared understandings.

**Characteristic of Societies in Transition (1): Historical Discontinuity**

Many societies throughout the world suffer violent conflicts or struggle to overcome a violent past; and societies emerging from conflict often must deal with this evil past. There is variety of ways in which each society in transition deals with its own past. A closer look, however, allows one to observe that there are several characteristics common to many societies in transition. One of the commonalities is that these societies often experience periods of historical discontinuity, as a result of which societies in transition must engage in the process of producing their own history.

Wars, revolutions, and repressive rule impose gaps to the society and that threaten its historical continuity. Needless to say, historical accounts generated during the transitional period do not exist in isolation from the specific society’s previous history. In the period of transition, however, a conscious attempt is often made to draw a line between ‘now’ and ‘then’, thereby laying the foundation of a new chapter of the society. The society draws such a line to discontinue the legacy of the past. Drawing a line of discontinuity is characteristic of transitional societies, and it takes place even where there is also considerable adherence to historical and political continuity. The element of discontinuity thus sets a unique condition on historical inquiries carried out by societies in transition.

In the context of historical inquiries during a time of transition, claims are often made to the effect that setting records that accurately reflect the evils past are vital during periods of radical political changes. The proponents of this position assert that establishing the

---

5 Ibid.
‘truth’ about the state’s past wrongs and identifying those responsible for these past wrongs will serve to lay a foundation of the new political order.’ By adhering to this position, collective history making with regard to the repressive past lays necessary foundation for a new democratic order of the society in transition. This position stems from the following two assumptions, namely, that 1) ‘truth’ and ‘history’ are identical, and that 2) ‘autonomous’ and ‘objective’ history is possible.

This position, however, has been criticised being too simplistic since it underestimates the significance of the present political context in which transitional societies are shaping their historical inquiries. Furthermore, modern historical theories cast serious doubts on the validity of these two assumptions. Historical theories acknowledge that when a historical account takes its ‘interpretive turn’, there are no such things as ‘single’, ‘clear’, and ‘determinate’ understanding or ‘lesson’ to draw from the past. Historical understanding, instead, depends on political and social contingency of the present.

This finding of modern historical study resonates well with theories on collective memories advocated by Halbwachs in 1920s. According to Halbwachs, “the beliefs, interests, and aspiration of the present shape various views of the past”. Collective

---


7 There are many advocates for this position. See for example:

“Successor government(s) (have) an obligation to investigate and establish the facts so that the truth be known and be made part of the nation’s history. [...] There must be both knowledge and acknowledgement: the events need to be officially recognized and publicly revealed. Truth-telling... responds to the demand of justice for the victims [and] facilitates national reconciliation.”

A.H. Henkin, Conference Report, pp.4-5 (as cited in R.Teitel, Transitional Justice, p.69); Michael Scharf and Paul Williams enumerate the creation of a historical record as an important objective of justice process required to create peaceful societies after war:

“This include establishing individual responsibility and denying collective guilt, dismantling and discrediting institutions and leaders responsible for the commission of atrocities, establishing an accurate historical record, providing victims catharsis, and promoting deterrence”


memories as a form of representation of the past are therefore, “a process of reconstructing the past in the light of the present”. In societies in transition, the process of collective memory formation is synchronized with the process of historical account formation.

It is important to note that at the time of transition, collective memories are emerging under highly political context and thus that political purposes direct their orientation. Regarding the political nature of collective memory formation at the time of transition, Michel Foucault’s works on the close relationship between power and the control of knowledge is insightful. Foucault claims that every political regime is associated with a ‘truth regime’. This means that it is those in power who dictate and define what is ‘to be understood’ as truth of the society. Changes in political regimes, accordingly, result in changes in truth regimes. On this point, British social anthropologist Paul Connerton finds that the relationship between individual and collective memory is hardly an innocent one. Collective memories can be changed and modified by institutions in power who act as guardians of them. Cannerton states as follows:

“Concerning memory as such, our experience of the present very largely depends upon our knowledge of the past. We will experience our present differently in accordance with the different pasts to which we are able to connect that present. Hence the difficulty of extracting our past from our present factors tend to influence – some may want to say distort – our recollections of the past, but also because past factors tend to influence or distort, our experience of the past.”


P. Connerton, How Societies Remember, p.2.
In the societies of transition, the new political regime often attempts to dominate the construction of a truth regime by moulding specific collective memories that serve to legitimize the regime. Those in power within the transitional society define collective memories and thus have a striking effect on their formation within the society in transition, at least at the official level.\textsuperscript{14} Connerton points out that the ‘memory agenda’ of a group or its elites, e.g., political elites, casts the memories of individuals. ‘What’ and ‘how’ an individual remembers reflects to a significant extent the trends in the society to which he or she belongs. Individuals tend, consciously or unconsciously, to modify or adjust their memories of the past to the dominant understanding of the past. In this sense, striking a balance between discontinuity and continuity, between the old and the new ‘truth regimes’, defines the character of collective memory formation in societies in transition.\textsuperscript{15}

**Characteristic of Societies in Transition (2): Lack of Shared understanding**

Another characteristic of societies in transition is that in those societies consensus concerning shared truth is fragile, if not missing altogether.\textsuperscript{16} For example, it is often highly contentious in post-conflict societies to reach agreement on the number of victims.

Social theories find that epistemological consensus in a society are usually created by the mechanisms of cultural transmission, such as rituals, literatures, symbols etc.\textsuperscript{17} Judicial process such as trials, for example, is a social ritual and is a form of cultural transmission. In ordinary societies, the substance of social consensus transmitted through this mechanism of cultural transmission presumes a threshold of socially shared understanding about the truth. For example, the factual findings of the court at criminal trials are presumed to be true by the members of society. Were this not the case, the judicial system of the county would not function.

\textsuperscript{14} P. Connerton, *How Societies Remember* p.37. This society-oriented view of memory formation was advocated first by Maurice Halbwachs as will be discussed at infra. Chapter 1.

\textsuperscript{15} R. Teitel, *Transitional Justice*, p.64.

\textsuperscript{16} R. Teitel, *Transitional Justice*, p.64.

Teitel states, however, that at the time of transitions these threshold mechanisms of social consensus are often fragile or missing altogether. For example, there is no longer a shared understanding as to what the authority of the society is. It is characteristic of periods of transition that the conventional social consensus in various sectors of the society is missing. During this period, public trust in political and historical truth establishing mechanism is largely absent. The expectation is therefore that “the new social consensus will emerge through a process of historical accountings.”

In connection to the ‘truth regime’ as discussed earlier, the ‘truth regime’ in transitional societies is not autonomous; rather, it is intimately related to the processes of creating historical narratives.

RESEARCH OBJECTIVES

There are three research objectives in this study.

First, the research objective is to examine criminal investigations carried out by ‘international’ prosecutors as opposed to national prosecutors. In societies in transition, local judicial investigative organs often do not function fully or lack legitimacy due to perceived linkage to the previous regime. Furthermore, local investigative agents simply lack resources to investigate crimes on such a scale as the Srebrenica massacres of July 1995, where more than 7000 people were allegedly killed. The objective is to understand the uniqueness of international criminal investigations which is distinctive from domestic criminal investigations.

The second research objective seeks to outline the investigative process and explore a theoretical framework of international criminal investigations. This concerns the procedure and practice that contribute to labelling certain events as a crime of genocide and identifying individuals as suspects. To this end, the following will be examined:

1. The legal tools available for international criminal investigation,
2. The types of evidence collected, filtered and selected during the process of international criminal investigation,
3. The process through which facts are interpreted and assembled to classify certain event as international crime, and

---

18 R. Teitel, Transitional Justice, p.64.
4. The decision-making process of investigative organ in order to bring charge of the crime of genocide

The primary objective of the thesis is therefore the process and practice of international investigating agents as opposed to the outcome of the trial.

The third objective is to examine collective memories shared by different groups concerning the same war episodes. Collective memories are not fixed phenomena and their narratives are constantly shifting with time. The objective of this study is to compare the narratives shared by these groups at a given time and see if there is a connection to a narrative constructed by international criminal investigators of the same events. Investigative agents such as international prosecutors assemble an account of atrocious events during the armed conflict from a range of often contested and conflicting information sources. A narrative that investigative agents construct is not merely an assembled piece of information that gives details of the event; it has a broader implication. International criminal investigation, as part of a wider legal process, provides an alternative for the post-conflict society to define and attribute meaning to their past events. This study posits that a successful international crime investigation creates a ‘meta-narrative’ that provides one of pillars for the construction of collective memories.

RESEARCH QUESTIONS

Against the backdrop of the three research objectives, this study will attempt to answer two research questions.

The first research question concerns the investigation process. What are the factors that influence and shape the outcome of international criminal investigations? For example, why and how international prosecutors who investigated the events in Srebrenica of July 1995 determine to charge ‘genocide’, as opposed to other charges such as war crimes, crimes against humanity, or simply the aggregation of numerous murders? The genocide charge, of course, must be proven ‘beyond reasonable doubt’ at the trial phase to eventually become a legally sanctioned authoritative narrative. It remains a fact, however, that it is the international prosecutors who first constructs the ‘meta-narrative’ about the event and assign legal characterization to it. During the trial phase, the parties, i.e., the prosecutor and the defence, dispute the validity of this ‘meta-narrative’.

The second research question relates to the linkage between collective memories and international criminal investigations. To what extent the meta-narrative constructed by
international investigative agents is adopted to the collective memories shared by the members of the society concerned?

**METHODOLOGIES**

The subject matters of this study are as follows: 1) collective memories and 2) international criminal investigations. For each subject matter, the methodology will be as follows: firstly, to explore the theoretical framework, and then to apply this theoretical framework to a specific case study. The case study considered will be collective memories of the Srebrenica episodes of July 1995 and the ICTY investigations into these events.

**Methodology: Collective Memory**

First, as concerns the theory of collective memories, the study will rely on prominent scholastic writings and literatures on this subject. Particularly, it will draw on the writings of the early 20th century sociologist, Maurice Halbwachs. Collective memories are a social concept and has no organic basis and do not exist in a physical sense. They are, however, a product of shared communications among members of a social group and are rooted in a society with its own inventory of signs and symbols. Collective memories visibly manifest their contents in literatures, texts, rites, images, buildings, and memorials, which are component parts of the culture of a social group. To this end, the case study will consider the publicly manifested signs and symbols in order to examine the content of collective memories.

Although various collective memories are formed and observed at different layers of the society, the case study will focus on collective memories as manifested by the two ethnic groups in Bosnia and Herzegovina, *i.e.*, the Bosnian Serbs and the Bosnian Muslims. The collective memories of the Srebrenica episodes of 1995 are likely to be quite different in the case of the Bosnian Serbs and in that of the Bosnian Muslims. To examine the content of the collective memories on Srebrenica shared by Bosnian Serbs and Bosnian Muslims, the study will use empirical data collected by the two researchers who conducted extensive field interviews with both Bosnian Serbs and Bosnian Muslims in Bosnia and Herzegovina. The first field research that this thesis will rely on was conducted by a Polish scholar, Jagoda Gregulska in April 2009. Gregulska stayed in Srebrenica and

---

15

conducted extensive ethnographic research and interviewed Bosnian Serbian women living in Srebrenica. The focus of Gregulska’s research was to examine the way memories of Bosnian Serb women in Srebrenica are being shaped and constructed. The data collected by Gregulska demonstrates to what degree the dominant Bosnian Serb collective memories on Srebrenica have influenced the women’s collective memories and the way these are explained to the outsiders.

The second empirical research this study will draw on, the case study of Srebrenica collective memories, was conducted in Bosnia and Herzegovina in 2006, by an American scholar, Diane E. Orentlicher, and her group of researchers. The empirical data collected by Orentlicher through interviews with Bosnian Muslims demonstrates how they see the war and the Srebrenica incident and how they see the ICTY and its effect to their collective memories. Their views are in stark

---


On methodology of her research, Gregulska explains the following:

“Initially I planned to interview a group of women consisting of three categories: those who lived in Srebrenica before the war, throughout the war and after it; women who lived in Srebrenica before the war, who emigrated during the war and came back after 1995 and women who moved to Srebrenica after the war. This plan, however, had to be modified during the field work since there was not even one woman who belonged to the first group living in Srebrenica at the time when the field work was conducted. The few dozen Bosnian Serbs who decided to stay in Srebrenica during the war were either killed or moved out afterwards. As a result, all the seventeen interviews were made with women representing the remaining two groups.

The women were contacted by a snow ball method, through Serbian victims’ organisations, individual contacts, especially with younger women. In three cases I was able to interview both mothers and daughters. Several women were engaged in the work of various organisations (victim organisations, youth organisations, UNDP), others were homemakers. The age group included women in their fifties and sixties who were adults when the war started as well as younger women who lived through the war as young children.

Except for one woman, all the women who were approached were eager to talk. One woman initially agreed to an interview but after two days cancelled it explaining that she had prejudices against foreigners investigating events of Srebrenica and was afraid of manipulation of her words.

The interviews with women consisted of roughly two parts. The first question asked was ‘When did the war begin for you? ’ and was meant to provoke the interlocutors to talk about their personal experience. During this part no questions were asked (other than clarifying certain details like places or dates) as the aim was to see which events were mentioned by women and what was omitted, how they constructed their stories, what they included. The second part of the interview consisted of several questions usually relating to the elements of the war that were not mentioned by the women (such as the siege of Srebrenica, genocide, role of Radovan Karadžić). The main historical events referred to in the interviews and commemorating practices belong to the period of 1992-1995, the time of war in Bosnia-Herzegovina. Although the women were making comments about various moments both in the history and the present time, the focus of the interviews was the memory of the war events, especially those related to Srebrenica.”
contrasts to those of the Bosnian Serbs as described in the research conducted by Gregulska.²¹

Methodology: International Criminal Investigation

The theory on international criminal investigations is an exploratory study seeking to theorize the process and procedure utilized by international prosecutors when investigating international crimes. There are few publications on investigative practices by international prosecutors. This scarcity stems from the fact ‘the investigation’ undoubtedly is the most confidential part of their work and persons who have been privy to it are normally bound by strict confidentiality obligations. Therefore, this study first refers to the theory of national criminal investigations developed by British criminologist Martin Innes. It will then modify and adopt this theory to international criminal


On the methodology applied in this research Orentlicher explains the following:

“...This report [The Impact of the ICTY in Bosnia] draws upon a wide range of sources, including extensive qualitative interviews conducted in Bosnia and Herzegovina between June 2006 and July 2009. The first set of interviews was undertaken by Eric Witte, a consultant to the Open Society Justice Initiative, in June and July 2006. The remaining interviews were undertaken by Professor Orentlicher during visits to Bosnia from November 29–December 8, 2006; June 8–12, 2007; and July 13-23, 2009. In addition, Professor Orentlicher interviewed various officials and staff of the ICTY in The Hague on November 17, 2006 and March 6–9, 2007 in connection with this study, as well as a companion study of the impact of the ICTY in Serbia. Ines Tadić served as Professor Orentlicher’s interpreter for interviews with non-English speaking sources in November–December 2006; Haris Imamović al so in July 2009.

The interviews in Bosnia were not undertaken as part of a quantitative research project and the sources therefore cannot be described as representative in the sense that a quantitative project would support. However, interviews were conducted with a wide cross-section of individuals from each major ethnic group in Bosnia. Several considerations guided the selection of interviewees. Some sources, such as judges and prosecutors at the State Court of Bosnia and Herzegovina, were selected by virtue of their first-hand knowledge of a subject [...] the relationship between the ICTY and the State Court of BiH’s War Crimes Chamber. A second broad category of interlocutors comprises intellectuals whose specialized knowledge and positions—whether as journalists, academics, leaders of civil society organizations, or otherwise—enable them to observe broad trends in their country and whose insights, collectively, were particularly helpful in synthesizing information from other sources. While interviewees included Muslims, Croats, and Serbs, this report generally does not identify their ethnicity, as many emphasized their discomfort with the extreme ethnicization of politics and identity in Bosnia.

Finally, interviews were conducted with victims of wartime atrocities in several locations, including Prijedor, Potočari, Tuzla, Banja Luka, Lašva Valley and Sarajevo. These interviewees came from all three of Bosnia’s major ethnic groups, but—reflecting that Muslims constituted the vast majority of civilian victims—Muslim survivors loomed especially large in the research. Interviews were conducted with both leaders of victims' associations and people who are widely described in Bosnia as “ordinary victims.”
investigations, based on this author’s experience in working with investigations conducted by the Office of Prosecutor (OTP) of the ICTY (1995-2009) and the Office of Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (2010-2016).

As for case studies, the empirical data collected through interviews conducted by this author with core former ICTY staff members who worked on the ICTY Srebrenica investigation of July 1995 will be used. The interviewees were as follows: two senior prosecutors, one senior investigator, and one crime analyst. The interviews were conducted between February 2017 and March 2018. The duration of each interview ranged between three to eight hours. The interviews were conducted in a semi-structured format and the focuses of the interviews were the following:

1. Chronology of the investigation process
2. Organizational settings and internal personal dynamics of the investigation team
3. The type of information collected during the process of investigation
4. The decision-making process when charging with genocide.

**Research Limitations**

Due to resource limitations, direct field research to collect empirical data on collective memories in Bosnia and Herzegovina was not carried out. Instead, the study utilizes empirical data collected by other researchers. The scope of data collection is confined to the interests and focuses of those researchers. On the Bosnian Serb collective memories, the interviewees were limited to the group of local Bosnian Serb women in Srebrenica. The analysis of the data collected suggests, however, that their narrative of Srebrenica corresponds to the collective memories that are shared by a much broader community of Bosnian Serbs in Bosnia and Herzegovina as is manifested in the speeches of national politicians or discourses broadcasted by Bosnian Serb national media.

As for the data collected from the Bosnian Muslims, the main interview samples correspond to intellectuals who were in a position of being able to see the events of Srebrenica from a broader perspective and reflect on them. Their view, however, is likely to reflect the view of the ‘truth regime’ as manifested by the Bosnian Muslims at national level.

The data used to examine collective memories were collected in 2006 and 2009; nearly a decade before the time of this study. Collective memories are constantly changing and it
is likely that different collective memories have emerged in the meantime. The objective of this study, however, is not to examine whether collective memories on Srebrenica have transformed in the past ten years. The focus of the study is, rather, to examine potential impact of international criminal investigations on the formation of collective memories on Srebrenica. To this end, it is pertinent that data is collected relatively soon after the conclusion of the first Srebrenica trial at the ICTY. This study is not a sociological study where an in-depth analysis on how the collective memories on Srebrenica are formulated by various members of the society. The primary focus of this study is to examine the contours of international criminal investigations on the collective memories of Srebrenica.

In terms of data collection on investigation on Srebrenica, the interviews were limited to the prosecution side. This is due to the fact this study focuses on how the prosecutor constructed the Srebrenica case through the investigation. Defence investigations commence once the prosecution investigation is completed, and the defence investigation is normally pursued along the line of refuting the ‘meta-narrative’ created by the prosecution side.

In terms of what ‘collective’ the gathered data samples represent, the analysis of this study is confined to 1) Bosnian Serb women in Srebrenica, and 2) Bosnian Muslim intellectuals. In this sense they do not represent the entire Bosnian Serb or Bosnian Muslim collectiveness in Bosnia and Herzegovina. This does not mean, however, that their collective memories have no connections to the collective memories shared by wider communities. On the contrary, the Bosnian Serb women in Srebrenica interviewed by Gregulska clearly demonstrated to what degree their collective memories are framed by dominant Bosnian Serb national discourses on Srebrenica. The views of Bosnian Muslim intellectual on Srebrenica, on the other hand, suggest that their position reflects the national ‘truth regime’ on the Bosnian Muslims. This study does not find great discrepancies between the national collective memories and the data collected through representative samples.

**STRUCTURES**

**Theoretical Part**

Theoretical Part consists of three Chapters: theoretical pillars will be examined in each Chapter. Chapter 1 will examine the theory of collective memories and its applicability to the societies in transition. Once the most relevant theoretical foundations of collective memories are identified, the discussion will then continue to the relationship between law
and the formation of collective memories. Next, the role of criminal investigations in the formation of collective memories will be examined.

Chapter 2 concerns the theory of international criminal investigations. First, it will examine the ‘Setting’ which determines the basic conditions where an international criminal investigation is being carried out. The ‘Setting’ will address critical questions of international criminal investigations, namely, 1) what information is to be collected, 2) how the information is collected, 3) why certain information is sought, 4) who collects the information, 5) when the information is collected, and 6) where information is collected. The ‘Setting’ includes the legal framework, both procedural and substantive, and the social organisational setting of investigative institutions. The legal framework determines the power and limits of investigative institutions in collecting information. It also determines the type of information required by investigative agents as well as the scope of investigative activities, e.g., elements of crime, modes of liability. The ‘Setting’ as concerns the social organisation of investigative institutions, e.g., relationship between prosecutorial professionals and police investigation professionals, hierarchical vs. flat institutional setting, is also an important element for consideration since the dynamics of social settings within an investigative institution have profound influence on investigative strategies, e.g., finding out so-called ‘WHODUNIT’ vs. prioritizing to secure convicting evidence, as well as the modus operandi of the investigations. Next, the study will examine the ‘Process’ of investigation, with a primary focus on the stages that shape the eventual outcome of the investigation and its connectivity with collective memory. It will highlight several steps which characterise international criminal investigation as an information process: 1) collection of raw data, e.g., witness accounts, documentary information, forensic information, open source/public information, 2) collation of data, e.g., data processing, representative samples of a mass scale violence, 3) analysis of data, e.g., generation of working hypothesis for investigation and validation process, 4) presentation of analytical product, e.g., issuance of an indictment. The notion of ‘meta-narrative’ will be introduced. ‘Meta-narrative’ is constructed through international criminal investigative processes, and it plays a critical role in the formation of collective memories in post-conflict societies. The indictment is the final product of the investigation process; it contains the ‘meta-narrative’. It is therefore important to analyse the structure of the indictment and the types of information it contains. The basic information structure of the indictment consists of the following: 1) historical / background information which includes the context of the events wherein the alleged crime took place, 2) victim/ victimisation related information, e.g., number of victims, level of suffer sustained by victims, duration of victimization, 3) perpetrator / perpetration related information, e.g., perpetrators ID, role of perpetrators in the commission of crime, conducts of the perpetrators, and 4) legal characterisation of the events, e.g., charges. In the latter part of the Chapter, the study will discuss the practices of evidence collection
by various international tribunals, both historical and contemporary. Finally, the difference between historical researches and criminal investigations will be highlighted, and historian’s dominant claim about the limits of judicial criminal investigations to form collective memories will be critically examined.

Case Study

Chapters 3, 4 and 5 cover the case study. As its case study, the thesis will analyse the Srebrenica investigation conducted by the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the former Yugoslavia (ICTY). It will first examine legal structures of the ICTY in relation to the institution’s power to conduct investigations: legal sources, its contents, and limitations on ICTY’s investigative powers.

The study will then chronicle in detail the processes of the Srebrenica investigation conducted by the ICTY. The investigation produced a huge amount of forensic information obtained from the exhumation of mass graves. The result of the investigation provoked strong reactions both from the victim side (Bosnian Muslim) and from the perpetrator side (Bosnian Serb). While the Bosnian Muslim side widely accepted the result of the investigation and the narrative on Srebrenica massacres, the Bosnian Serb side totally rejected the result for a long time. This position of the Bosnian Serb, however, later shifted towards more nuanced views on the events. In examining the process of Srebrenica investigation, this study will highlight the opportunities and constraints under which the Srebrenica investigation was carried out. Chapter 5 will examine collective memories of the Bosnian Serbs and the Bosnian Muslims concerning Srebrenica. The empirical question here is first to understand why and how the two sides have contrasting collective memories concerning the narrative presented by the ICTY. The extent to which the ‘meta-narrative’ produced by the ICTY has an impact on the collective memories of the Bosnian Muslims and the Bosnian Serb is, after all, the ‘relevance’ of such narrative to the societies concerned.\(^\text{22}\)

\[^{22}\] According to Kirmayer, memories are most vividly assessed and developed when they fit appropriate cultural, social templates, and have a ‘receptive audience’, Laurence J. Kirmayer, ‘Landscapes of Memory: Trauma, Narrative, and Dissociation’, in M. Lambe and P. Antze (eds.), *Tense Past: Cultural Essays in Trauma and Memory*, New York, Routledge, 1996 (as cited in J. Gregulska, *Memory in Srebrenica* p.15).
PART I

CHAPTER 1  THEORIES OF COLLECTIVE MEMORY

1.1  Introduction

This chapter explores the theoretical pillars of collective memories. First, it will examine the recent flourishing of collective memory discourses and point out the problematics in theorizing collective memories. Following this, the focus will be to identify the foundational elements in theorizing collective memories: the carriers, the formation, the manifestation, and the categories of collective memories.

The discussion will then proceed to examine the role of law and criminal investigations in collective memories; this will be followed by an examination of the applicability of collective memory theories to transitional societies.

1.2  The Boom in Collective Memory discourses

In recent years, discussions about collective memories have blossomed in various disciplines of social science. These disciplines include sociology, psychology, history, anthropology, communications and law. In anthropology, “a vast number of scholars are currently occupied with research about memory” and “the list of contributions in this recent field of research is too voluminous to even begin to report.” A similar situation occurs in the discipline of history; as historians Noa Gedi and Yigal Elam write, "today it is almost impossible to read a text in history that does not mention the term ‘Collective Memory’ or its complementary counterpart ‘narrative’.” According to Dominick LaCapra the problem of memory has recently become preoccupation concern of


historians and critical theorists. The subject matter of the collective memory study covers a broad spectrum of human living; it ranges from collective memories of family life and, collective memories of religious institutions to collective memories of war and genocide. In line with this, there are numerous discussions on collective memories in the context of countries in transition, e.g., post-communist regimes in Eastern Europe, Latin American / South African Truth Commissions etc.

In contrast to the boom in the field of collective memory discourse, however, there are unsettled areas in the study of collective memories. These areas relate to fundamental issues of collective memories, such as 1) how to measure the contents, 2) what analytical methods to apply, and 3) how to establish a general theory on the formation and representation processes of collective memories.

Firstly, it is arguable that studies on collective memories to date have not sufficiently articulated the concept of collective memories as a distinct notion from individual memory. Theories on collective memories have been too nuanced and underdeveloped. In the absence of an established methodology to analyse collective memories, analogies of individual memories and their psychoanalytical methods have often been applied to the study of collective memories. Cognitive psychologists who undertake the advanced studies of individual memories today are mostly interested in how individual humans remember past events. Psycho-analysis has developed remarkable methodologies to analyse the psychological aspects of the process of remembering in the human brain. When it comes to examining the actual contents of memories, however, psychologists primarily focus on individuals, and are exclusively concerned with individual memories. The threshold between ‘individual’ and ‘collective’ is often crossed without the

26 Dominick LaCapra, ‘Introduction’ in History and Memory after Auschwitz, Ithaca, Cornell University Press, 1998. Even a journal History and Memory devoting specifically devoted to the topic of collective memory has been published.


“There is a relatively unexplored intellectual terrain made up of various remembrance environments lying somewhere between the purely personal and the absolutely universal. These environments (which include, for example, the family, the workplace, the profession, the fan club, the ethnic group, the religious community, and the nation) are all larger than the individual yet at the same time considerably smaller than the entire human race.”
methodological and descriptive terminology adjustments which are applicable only to individuals. Expressions such as, ‘to remember’, ‘to forget’, or ‘to repress the past’, are used uncritically in analysing collective memories. Hence the following criticism of Amos Funkenstein:

“Consciousness and memory can only be realized by an individual who acts, is aware and remembers. Just as a nation cannot eat or dance, it cannot speak or remember. Remembering is a mental act, and it is absolutely and completely personal.”

These category errors stem from confusions on difference between ‘collected’ memories and ‘collective’ memories. Collected memories are an aggregate of individual memories which behave and develop just like its individual composites, and which can therefore be studied by neurological, psychological, and psychoanalytical methods and insights concerning the memories of individuals. Collective memories, on the other hand, do not behave according to such rules but have their own dynamics for which an appropriate method of analysis must be found. Due to these conceptual confusions, the nature and dynamics of collective memories that are distinctive from individual memories are frequently misinterpreted.

Secondly, many terms are used interchangeably with the term ‘collective memory’. These alternative terms include, ‘social memory’, ‘public memory’, ‘collective remembrance’, and ‘popular history making’. In addition to those synonymous terms, the scope of collective memories often extends too widely to the point where it becomes increasingly difficult to discern the boundary between collective memories and other related and more traditional concepts such as, ‘culture’, ‘identity’, and ‘myth’. It is against this backdrop

30 W. Kansteiner, Finding Meaning in Memory, p.181.
31 For example, Carol Crumbley defines social memory (akin to collective memory) as follows:

“Social memory is the means by which information is transmitted among individual and groups and from one generation to another. Not necessarily aware that they are doing so, individuals pass on their behaviour and attitudes to others in various contexts but especially through emotional and practical ties and in relationships among generations [...] To use an analogy from physics, social memory acts like a carrier wave, transmitting information over generations regardless of the degree to which participants are aware of their roles in the process.”

Carol Crumbley, ‘Exploring Venues of Social Memory’, in Jacob Climo et.al (eds), Social Memory and History: Anthropological Approaches, Walnut Creek, Altamira Press, 2002. Pursuant to this definition, it
that critiques of collective memory discourse warn against “imprudent semantic extension” and “terminological profusion” of the concept of collective memories.\textsuperscript{32}

This study shares the concern regarding the conceptual confusions surrounding the term. Mindful of the shortcomings of collective memory studies to date, however, this study still finds that the concept of collective memories should not be abandoned altogether; instead, the key points of collective memory discourses should be clarified and articulated.\textsuperscript{33} Indeed, there are several theoretical pillars that warrant the study of collective memories as a valid subject for scientific research. Those theoretical pillars are, \textit{inter alia} 1) the carriers of collective memories, 2) the formation process of collective memories, and 3) the types of collective memories.

\subsection*{1.3 Origin of Collective Memory Studies}

French sociologist Maurice Halbwachs is widely considered to be the founder of the notion of collective memories. The study of collective memories by Halbwachs in the 1920s was path breaking and monumental, and most scholars who study collective memory today still take the work of Halbwachs as their primary theoretical reference point.\textsuperscript{34}

is difficult to discern collective memory from the notion of culture as traditionally defined by anthropologists. See the following definition of culture by Kluckhohn and Kroeber in 1952:

“Culture consists of patterns, explicit and implicit, of and for behaviour acquired and transmitted by symbols, [...] including their embodiment in artefacts; the essential core of culture consists of traditional (i.e. historically derived and selected) ideas and especially their attached values; culture systems may, on the one hand, be considered as products of action, on the other hand as conditioning elements of further action”

A. Kroeber A and C. Kluckhohn, \textit{Culture; A Critical Review of Concepts and Definition}, New York, Random House, 1952, p.357. Gedi and Elam contend that before the term ‘collective memory’ became so prevalent, historians had used alternative terms such as ‘myth’ which essentially covers the same area now being dealt with under collective memory discourses. N.Gedi and Y.Elam, \textit{Collective Memory}, p. 31.\textsuperscript{32}

W. Kansteiner, Finding Meaning in Memory, p.181; L. Klein, On the emergence of Memory, pp.127-150.\textsuperscript{33}


Halbwachs was born in Reims in France in 1877 and died in 1945 at the Nazi concentration camp in Buchenwald. He started his academic training as a student of Henri Bergson and later studied Emile Durkheim’s perception of social time. In 1925, Halbwachs wrote his first book on collective memories entitled “The Social Frames of Memory”. His second book, “The Legendary Topography of the Gospels in the Holy Land” was published in 1941 and his third book “Collective Memory (1950)” was published in the late 1940s. This last work consisted of essays written during the 1920s and 1930s and covered a wide range of issues relating to collective memories.

1.4 What is Collective Memory?

1.4.1 Social group: unit of collective memory
According to Halbwachs, collective memories are not given but rather socially constructed phenomena. He argued that individuals remember in a social context and that it is in society that people normally acquire their memories. Collective memories are constructed by social groups: it may be individuals who ‘remember’ in the literal and physical sense; however, it is social groups which determine what is ‘memorable’ and how it will be remembered. Collective memory is defined as “shared understanding of group’s past.” It provides a social framework through which individual memories are shaped and interpreted. The social group is a basic unit of collective memory, and there are as many collective memories as there are social groups. For example, there are collective memories at the level of families, professions, political parties, ethnic and regional groups, social classes and nations. Each social group has distinctive collective memories that its members constructed often over a long period of time.

1.4.2 Carriers of collective memory
Halbwachs also focused on the carriers of collective memories. In fact, in all ‘collective’ terms there is an inherent epistemological problem, and ‘collective’ memories are not an

---


This problem derives from the fact that these collective terms assume that they have capacities which in fact can only be actualized on an individual level. Collective memories as such have no organic basis, and they do not exist in the literal sense: individuals are the carriers of collective memories. Halbwachs writes the following:

“While the Collective Memory endures and draws strength from its base in a coherent body of people, it is individuals as group members who remember.”

“No memory is possible outside the framework used by people living in society to determine and retrieve their recollections.”

Humans are always part of several mnemonic communities, and the collective remembering can be explored on different scales; it takes place in very private settings as well as in the public sphere. On one side of the spectrum one might pursue the collective memories of small groups such as families whose members weave a common vision of the family’s origin and identity. On the other side, one could argue about the emergence of regional collective memories such as European collective memories, or even at the level of the international community.

1.4.3 Relationship between individual and collective memories

1.4.3.1 Conflation of individual and collective memories

Recent psychological and neurological studies focus on the conflation of individual and collective memories and emphasize the social nature of individual remembering and forgetting. This psychological finding echoes with Halbwachs who wrote in 1925:

39 N. Gedi and Y. Elam, Collective Memory, p.34.
40 M. Halbwachs, On Collective Memory, p.48
41 Ibid., p.48.
42 For the current discussion, the collective memory that is being developed in the public sphere is more relevant.
43 W. Kansteiner, Finding Meaning in Memory, p.189. Kansteiner mentions the possible emergence of European collective memory.
“(t)he idea of an individual memory, absolutely separate from social memory, is an abstraction almost devoid of meaning.”

British anthropologist Maurice Bloch emphasizes the reciprocal relationship between autobiographical memories and collective memories. Autobiographical memories are a memory of events that an individual has personally experienced in the past. Bloch’s claim is that collective memories are affected significantly by subjective, cognitive interpretations of those individuals. The individual’s experience and subjective impressions play a significant role in the process of collective memory formation. Collective memories are built on the tension between the individual and the social group.

1.4.3.2 Distinctiveness of collective memory

While stressing the importance of individuals as carriers of memory, Halbwachs also made a clear distinction between individual memories and collective memories and emphasized the distinctive nature of the latter:

“Collective Memory, for its part, encompasses the individual memories while remaining distinct from them. It evolves to its own laws, and any individual remembrances that may penetrate are transformed within a totality having no personal consciousness.”

Individual memories and collective memories are governed by different dynamics and they operate within different time frames and spatial borders. Collective memories are not the mere aggregation of individual memories. Collective memories exceed individual memories. It is of course individual members who remember, not the collective per se, but those individuals, once placed in a specific group context, rely on this group to remember or recreate their own past. An example is that collective rituals such as war commemorations. The commemorations and the message conveyed through them define the way that individual members of the society recall their memories of the event.

45 Maurice Halbwachs, (as cited in W. Kansteiner, Finding Meaning in Memory, p.185).
47 J. Gregulska, Memory in Srebrenica, p.15.
49 Ibid.
The theory regarding the conflation of individual and collective memories and the distinctive character of collective memories is applicable to the process of collective memory formation in societies in transition.

In societies in transition, the stigma of the past atrocities extends to almost every members of the society. Each one of these members may not have experienced the same event. The collective nature of the atrocious regime, however, affected every corner of society, and it is this collective nature of the events that conflates individual and collective memories at the time of transition. Individual accounts of the events range from the memories of perpetrators to the memories of innocent victims, as well as to the memories of bystanders. What is common between these individual accounts is, however, that they all speak about the collective tragic experience of a society albeit from totally different perspectives.

In this context, at a transitional period, personal accounts of ‘my ordeal during the war’ do not remain just within the domain of individual memories but are elevated to a ‘historical account’ of the time. The authenticity of such historical accounts is endorsed by the fact that they are based on the first-hand experience of individual members of the society. In this situation, even if one chooses to neglect, forget, or even deny the past, an explanation is usually required as to why this memory needs to be repressed.

1.4.4 The extent of collectiveness
Memories are most ‘collective’ when they transcend the time and space which the original events occurred. Kansteriner claims that “once collective memories gain this level of universality, they become powerful life of their own; ‘unencumbered’ by actual individual memory and become the basis of all collective remembering as ‘disembodied’, ‘omnipotent’, or ‘low-intensity’ memory.” 50 Arguably this point has been reached regarding the memory of the Holocaust during World War II in several national societies. 51 As a result, millions of people share a limited but common range of stories and images about the Holocaust, although few of them have any personal link to the actual events. For many, the stories and images do not constitute particularly intense or overpowering experiences, but they nevertheless shape people’s identities and world views.

50 W. Kansteiner, Finding Meaning in Memory, p.189.
51 Ibid.
Collective memories of war in transitional societies have the potential of reaching this level. As discussed above, the experiences of events that feed the substance of collective memories in transitional societies - e.g. gross violation of human rights, genocide - are present across almost all members of the society and they are present not only in those individuals who were affected directly by these events. The difficulties in transitional societies are, firstly, the need to bridge a rift that exists between contested memories, and secondly, the lack of mechanism which facilitates the critical processes of shaping collective memories. This means that, in societies in transition, three out of the four processes of collective memory formation, namely, sharing, discussion, and negotiation among members of the society, are either missing or not fully functioning.

1.5 Formation of Collective Memory

1.5.1 Processes of collective memory formation: the importance of ‘narrative’

Collective memories are formed through communications among members of a social group. Halbwachs wrote:

“Wealth these [individual] remembrances are mutually supportive of each other and common to all, individual members still vary in the intensity with which they experience them. I would readily acknowledge that each memory is a viewpoint on the Collective Memory, that this viewpoint changes as my position changes that this position itself changes as my relationships to other milieus change. Therefore, it is not surprising that everyone does not draw on the same part of this common instrument.’” 52

As collective memories are socially constructed products, they proceed along the following conventional processes for their formation, namely; 1) sharing, 2) discussion, 3) negotiation, and 4) contestation among the members of the social group. First, collective memories originate from shared communications about the meaning of the past by individual members of a social group. Their contents are determined and shaped by the social group; they do not exceed the boundaries of this group. 53

For the construction of collective memories, ‘context’ or ‘narrative’ of the events is critical. The basis of collective memories is a contextual or narrative organisation of the

53 Ibid., p.51.
past and it follows the rules and conventions of narrative. A successful narrative of the past must have a beginning and end, an interesting storyline and impressive heroes. Remembrance of those narratives of events which are important to the greatest number of the members of the group is the foundation of collective memories. Such memories emerge as an outcome of the group’s life or arise from the relationship with other groups. In other words, collective memories are how members of a group transferred, passed and shared a narrative of certain events important for the group. In post-conflict societies, understanding the prevailing narratives about atrocious events is crucial. According to Kirmayer, collective memories of traumatic events such as war atrocities are articulated through narrative, while being crucially mediated and negotiated. This concept is particularly useful in the case of Srebrenica where contrasting narratives exist among the Bosnian Muslims and among the Bosnian Serbs.

The narratives of collective memories are further categorized into two types; (1) the story of ‘me’ as a member of my group, and (2) the story of ‘my group.’ The former includes thoughts, feelings or images about the individual's past as a member of a group, or the current reality that one feels is connected to a membership of the group, or the individual’s future prospects. The story of ‘my group’ includes the person’s ideas, emotions, and mental pictures about the past of the group itself, including the group’s origins and the

55 *Ibid*.
56 Adam, Czarnota, *Law as Mnemosyne Married with Lethe: Quasi-judicial institutions and Collective Memories*, (a copy provided to this author by A.Czarnota), p.8. (Hereafter: A. Czarnota, Law as Mnemosyne Married with Lethe)
60 e.g., for some African Americans, “We were brought to this country against our will as slaves almost four centuries ago”, R.D. Ashmore, K. Deaux, and T. McLaughlin-Volpe, *An Organizing Framework for Collective Identity*, p.96.
historical ups and downs of the group\textsuperscript{61}, the present status and condition of the group\textsuperscript{62}, and the likely future of the group\textsuperscript{63}. For the purposes of this study, the focus is on the latter category; the story of ‘my group’.

1.5.2 Purpose driven formation of collective memory: the ‘memory agenda’

British social anthropologist Paul Connerton emphasizes a more purpose-driven formation of collective memories. Connerton argues that the ‘memory agenda’ of a group or its elites frames the memories of individuals. What is remembered by a person reflects the trends in the society to which he or she belongs. Individuals tend to modify or adjust their memories of the past to the dominant understanding of that past. This modification can be done in different ways; individuals can adjust personal stories to the dominant political framework of interpretation by presenting their memories in a way that lets them fit in and confirm the agreed version of the past. Or they can also tell their stories in a way that absolutely contradicts or challenges the dominant discourse.\textsuperscript{64} The counter-narratives held by individuals may create unofficial memories that contrast with the official memories imposed by the elites and governments. Peter Burke points out those official and unofficial memories of the past may differ sharply, and unofficial memories are sometimes historical forces.\textsuperscript{65} In transitional societies, establishing official memories is complicated. As discussed in the introductory section of this study, at the time of transition the threshold understandings of the truth shared by members of the society are often fragile or missing altogether. The contestation between competing ‘memories’

\textsuperscript{61} e.g., for some Serbs in the former Yugoslavia, “The Turks massacred our people at the Battle of Kosovo in 1389”, R.D. Ashmore, K. Deaux, and T. McLaughlin-Volpe, \textit{An Organizing Framework for Collective Identity}, p. 96.


\textsuperscript{63} e.g., for many Israelis and Palestinians, “With all the violence, I don’t see that we will ever have peace here, and they will continue to kill us”, R.D. Ashmore, K. Deaux, and T. McLaughlin-Volpe, \textit{An Organizing Framework for Collective Identity}, p. 96.

\textsuperscript{64} P. Connerton, \textit{How Societies Remember}. (as cited in J. Gregulska, \textit{Memory in Srebrenica}, p. 16).

therefore becomes even more critical in this situation, since there is no consensus on the protocol through which the competing versions of memories could be settled or mediated.

In the case of Srebrenica, the situation is complicated further. As will be discussed later in the case study section, at least two versions of ‘official memories’ exist; one shared by the Bosnian Serbs, and the other one shared by the Bosnian Muslims. In these circumstances, while the personal memories of the Bosnian Serb may stand in contradiction to the war narrative advanced by the Bosnian Muslim side, they can simultaneously be in conformity with the version of official memories advocated by the Bosnian Serb national elites. 66

1.6 Relationship between present and past

For Halbwachs, the past is a social construction mainly shaped by the concerns of the present. This is called the ‘presentist’ approach. He argued that the beliefs, interests, and aspirations of the present shape the various views of the past as they are respectively manifested in history. He argued that the images of the past are not retrieved as they were originally perceived, but rather as they fit into the present conception of those who retrieve them. The past is always reconstituted according to the present. Collective memories are the process “not retrieval but of reconfiguration that colonizes the past by obliging it to conform to present configurations.” 67 Connerton points out the following:

“Concerning memory as such, our experience of the present very largely depends upon our knowledge of the past. We will experience our present differently in accordance with the different pasts to which we are able to connect that present. Hence the difficulty of extracting our past from our present: not simply because present factors tend to influence – some may want to say distort- our recollections of the past, but also because past factors tend to influence, or distort, our experience of the present.” 68

66 J. Gregulska, Memory in Srebrenica, p.17,

“sometimes it is claimed that there is the third narrative on the past in Bosnia – the one promoted by the international community.”


68 P. Connerton, How Societies Remember (as cited in J. Gregulska, Memory in Srebrenica, p.17).
According to Jeffery Olick, memories and images of the past are produced in the present for present purposes. To this end, they serve as indices not of anything that happened in the past and its effect on the present, but of the structure of needs and interests of the present.  

1.7 The manifestation of Collective Memory

Jan Assman developed Halbwachs’ concept of collective memories by paying attention to the mode of representation of collective memories. He argued that collective memories take place in two modes, namely, 1) potentiality and 2) actuality. The collective memories in potentiality mode are stored in archives, libraries, and museums, whereas the collective memories are in the mode of actuality when they adopted and gave new meanings in new social and historical contexts. This distinction suggests that certain past events might shift from the realm of actual collective memories to potential collective memories and vice versa. In the process of this traverse, collective memories may change the intensity, depth and meaning for the social group concerned. In the context of transitional societies, as will be discuss later, the process of criminal investigations aiming at unearthing the evidence of past state atrocities by means of collecting a number of live witness accounts and exposing state archives has the potential of transforming the collective memories from potentiality to actuality.

As collective memories are products of shared communications among members of a social group, it is rooted in a society with its inventory of signs and symbols. Collective memories are visibly manifested in literatures, texts, rites, images, buildings, and monuments that are component parts of the culture of a social group. These objects are designed to recall fateful events in the history of the social group. The way in which collective memories visibly manifest themselves is called the ‘materiality’ of collective memories. Richard Terdiman explains this ‘materiality’ of collective memories:

---

“Memory seems to reside not in perceiving consciousness but in the material: in the practices and institutions of social or psychic life function within us, but strangely, do not seem to require either our participation or our explicit allegiance.”  71

Larry Ray analysed the function of public ritual and commemoration in linking collective memories and individuals:

“Public rituals and symbols of commemoration inscribe a collective narrative memory into individual life histories. Narrative emphasis on continuity and development leads to a unity of the self as a project with access to personal and collective memories.” 72

In transitional societies, collective memories are often manifested in the form of memorials, commemorations, the statements of political elites, literatures, and other mediums of social expressions. It is therefore important to review these in order to understand the substance of collective memories.

1.8 Typology of Collective Memory

Collective memories are categorized according to; 1) the source of memories, and 2) their relevance to memory carriers’ lives.

1.8.1 Categorization according to ‘source’

Halbwachs insists that there are two types of collective memories according to their source; ‘lived’ and ‘borrowed’ memories. Lived memories are based on events that memory carriers experienced themselves while borrowed memories are based on what carriers learned externally and not from their own experience. 73

Lived memories are memories of events that one has personally experienced in the past. They serve to reinforce bonds between participants who participated in an event. They tend to fadeout with time, however, unless they are periodically reinforced through contact with the persons with whom one shared the same past experiences. With the

73 M. Halbwachs, On Collective Memory, p.57.
passage of long time intervals, lived memories may be lost altogether unless they are brought to awareness again through contacts among those who share the same lived memories. Lived memories always rely on the existence of others. Only group members remember, and the memories will disappear if they do not come together for a long time to re-light the memories.

In the case of borrowed memories, on the other hand, the individual does not remember events directly. One can increase borrowed memories through education, reading or conversation but they are not generated through personal experience. It can be stimulated in indirect ways through reading or listening or in commemorations or during festive occasions when people gather together to remember in common the deeds and accomplishments of long-departed members of the group. For borrowed memories, the past is stored and interpreted by social institutions. Halbwachs writes:

“During my life my national society has been theatre for a number of events that I say, ‘I remember’, events that I know about only from newspapers or testimony or those directly involved. These events occupy a place in the memory of the nation, but I myself did not witness them. In recalling them, I must rely upon the memory of others, a memory that comes, not as corroborator or complete of my own, but as the very source of what I wish to repeat. I often know such events no better nor in any other manner than I know historical events that occurred before I was born. I carry a baggage load of historical remembrance that I can increase through conversation and reading. But it remains a borrowed memory, not my own. These events have deeply influenced national though, not only because they have altered institution but also because their tradition endures, very much alive, in region, province, political party, occupation, class, even certain families or persons who experienced them first-hand. For me they are conceptions, symbols. I picture them pretty much as others do. I can imagine them, but I cannot remember them.”

In terms of the substance, borrowed memories cover a much broader time-span than lived memories and present the past in a summarised way. In comparison, lived memories are much richer and full of details, but they rely on continued retelling for their existence. With the passage of time, lived memories inevitably give way to borrowed memories as the individual loses touch with his or her pasts.

---

Ibid. 74
1.8.2 Categorization according to ‘relevance to memory carrier’s life’

Halbwachs also made a distinction between the type of collective memories which have organic relations to memory carriers’ lives and therefore form an important part of their lives, and the type of collective memories that are preserved in archives and have no organic relation to the carriers’ lives. He called the former ‘organic’ memories, and the latter ‘dead’ memories.

History for example, is typically a remembered past to which one no longer has an ‘organic’ relation. Halbwachs emphasised the liveliness of collective memories in comparison to history.

This study finds, however, that history may also be transformed into an organic memory under certain conditions; individuals can celebrate even what they did not directly experience and keep it alive. Indeed, history reaches one’s memory only through written records and other types of records such as photography. But it can be kept alive through commemorations, festivities, and the like.

1.8.3 History and collective memory

1.8.3.1 The difference between history and collective memory

Halbwachs made a distinction between history and collective memories:

“Collective memory differs from history in at least two respects. It is a current of continuous thought whose continuity is not at all artificial, for it retains from the past only what still lives or is capable of living in the consciousness of the groups keeping the memory alive.”

According to Halbwachs, history consists of “learned history” and “lived history”, and “lived history” is directly connected to collective memories. As he wrote;

“Our memory truly rests not on learned history but on lived history.”

“Lived history is clearly differentiated from written history: it possesses everything needed to constitute a living and natural framework upon which our thought can base itself to preserve and recover the image of its past.”

75 M. Halbwachs, On Collective Memory, p.80
“History is neither the whole nor even all that remains of the past. In addition to written history, there is living history that perpetuates and renews itself through time and permits the recovery of many old currents that have seemingly disappeared. If this were not so, what right would we have to speak of a “collective memory”?  

According to Wertsch and Roedinger III, the difference between collective memories and history is summarized as follows:

Collective memory:

- involves an identity project (usually based on a narrative of heroism, a golden age, victimhood, etc.);
- is impatient with ambiguity;
- ignores counter-evidence in order to preserve established narratives;
- relies on implicit theories, schemas, and scripts that simplify the past and ignore substantiated findings that do not fit the narrative;
- is conservative and resistant to change.

In contrast, formal history:

- aspires to arrive at an objective account of the past, regardless of consequences for identity;
- recognises complexity and ambiguity;
- may revise existing narratives in light of new evidence (from archives, etc.);
- is constrained by archival materials;
- can change in response to new information.

1.8.3.2 Historical accuracy and collective memory

What follows from the above distinction between history and collective memories is that issues of historical accuracy and authenticity aimed at credible and accurate recounting of the past are not so much vital importance for collective memories. What is more

---

76 M. Halbwachs, On Collective Memory, pp.57, 64.
important for the study of collective memories is to examine the function of collective memories in establishing social identity, authority, solidarity, and political affiliation.

In the context of collective memories in post-conflict societies, the important issue is not how accurately the content of the collective memories reflect the reality of the past, but why social actors constructed their collective memories in a particular way at a particular time. In line with this, the study of collective memories covers the issue of contestation of various collective memories; why does one collective memory have more prevailing power than the other rivalling collective memories?

1.9 Applicability to Transitional Societies

Collective memory formation in transitional societies is placed in a unique circumstance in terms of; 1) scale, 2) time span, and 3) conflation of collective and individual memories.

Firstly, due to extensive nature of the atrocities it is impossible for all members of the society to personally experience every event that occurred during the atrocious regime. In this respect, the majority of memories of past atrocities are borrowed memories.

The events concerned occurred in the recent past, however; and due to their pervasive nature, it is assumed that most members of the society have gone through similar events albeit not all of them experienced the same ones. In other words, the individual can identify a common pattern in the atrocities he/she experienced. Collective memories of the atrocious regime consist of millions of memories of those who lived through the period, and as such they are ‘lived’ memories. These memories are often manifested in the form of rituals, commemorations, or legislations.

Thirdly, as observed earlier, the conflation of the individual and the collective is characteristic of the memories of the past atrocious regime.

Consequently, as far as the collective memories of past atrocious regimes in transitional societies are concerned, the boundary between borrowed memories and lived memories is blurred.

The following Figure shows various types of collective memories classified by categories. The yellow boxes indicate relevance for the collective memories of transitional societies. The dotted circles show that in transitional societies the content of these memories
overlap. This shows clearly that the collective memories of war in transitional societies are fundamentally socially experienced memories that have the character of ‘lived’ and ‘organic’ memories for the members of the society.
Figure 1: Typology of Collective Memory (Source: author)
1.10 Collective Memory in Transitional Societies and the Law

Typically, the law is considered a main tool of social control to regulate ‘future’ social behaviour, *i.e.*, for the deterrence of crime. In societies in transition, however, the law must deal with the ‘past’. It must not only deal with the harms done by previous atrocious regimes, but also go further to create historical accounts. To effectively regulate the future behaviours of the society, the law must regulate the society’s past during the corresponding period. This is where the law and collective memories meet. The law’s striking power extends to the shaping of collective memories through regulations of the society’s past or historical narratives. De-communisation in the former Soviet bloc counties, the Truth and Reconciliation Commission in South Africa, and the increasing number of apologies for state crimes committed in the past are all examples of this trend. Although collective memories may emerge by itself independent from law, they often adapts institutional rules provided by the law.78

As discussed earlier, collective memories are created in a framework and through symbols and rituals. This is known as ‘materiality’ of collective memories. In transition, the shared frameworks, political as well as religious, and social, are threatened. In the lacunae of social frameworks, it is the law that provides this framework. The pivotal role in shaping collective memories in a society is often carried out by law and by legal processes. According to Adam Czarnota, collective memories of transitional societies have been created throughout the history by legal means.80

Establishing historical accounts in periods of transition takes a diverse form; trials, truth commissions, official histories. The framework of law, its language and vocabulary, and its procedures play an even more important role in the truth regime of the societies in transition. According to Teitel:

78 A. Czarnota, Law as Mnemosyne Married with Lethe, p.8.
“[at the time of transition] Independent historical accounts derive from private journalists’ or historians’ initiatives, though even these often draw on the law (and evidence collected through judicial investigations) for their authority and as a constraint.”  

It is further asserted that the framework of international law serves to up-lift the truth-seeking process from politicized national context. Even where international justice is utterly ad hoc, as for example in the former Yugoslavia, it is considered less political than the other alternatives in the region.  

1.10.1 Two main functions of the Law

Legal theories suggest that the law has two main functions in a society that are distinguished by the purposes it serves.  

1.10.1.1 Instrumental purpose of law

This is the most common view; the law considered in instrumental terms. The law is considered as a device to remedy social problems. In this context law is used to achieve some practical end, to make a difference. Legitimacy of the act of criminal prosecution, for example, is based on the action to advance public interest to punish individuals who committed crimes (retribution) and to prevent future crimes (deterrence).

Prosecution of crimes is, from this view, an indispensable device of public policy. The law is used to reduce the prevalence of undesired behaviours, events, or states of affairs. This utilitarian idea of prosecution in the international criminal justice system is expressed in the foundational legal instruments establishing international criminal tribunals.  

1.10.1.2 Expressive purpose of law

Although an instrumental view of the law is dominant, the law also serves another important function; it is also created and used for expressive purposes. The law exists and

---

82 Ibid.
83 See for example, preambles of UNSC Res 827 (1993) for the ICTY and UNSC Res 955 (1994) for the ICTR.
is applied not so much as a means of achieving some practical ends, but as a way of declaring and affirming social values. For international criminal prosecution, the following two aspects of this expressive approach are particularly relevant; one is the use of the prosecution as a forceful and dramatic way of making moral statements about undesirable or offensive conducts. The act of prosecuting certain conducts as international crimes declares that these conducts are undesirable. An act of prosecution performed in this way is therefore not simply a necessary process to inflict just punishment upon those who have broken a rule. The act of prosecution itself becomes a means of expressing important values about right and wrong. In this way, the law and the way it is used, can make a powerful statement. The law can condone, but it can also condemn.\textsuperscript{84}

The other expressive use of law considers the law the way it is implemented. In the context of international criminal prosecution, the prosecutorial organs of international tribunals can invoke the law to express their own presence; their activity, their responsiveness to the concerns of the international community, and their ability to make a difference. Those who work in such organizations are also subject to requirements arising from membership in them, which may be quite different from those originating in their legal mandate.\textsuperscript{85}

The expressive function of the law is critically important for collective memory formation in transitional societies. As discussed earlier, in transition the shared frameworks - political, religious, social - are threatened. The law and the legal process express important


values about rights and wrongs; they influence in the shaping of collective memories in this circumstance.

Such values, however, can only become tangible through actual legal processes and the results thereof. Criminal investigation is part of this legal process through which a specific situation is transformed into a prosecutable case. It provides a basic framework upon which subsequent legal processes, - prosecution, trial, and appeals- are based.

1.11 Collective Memory in Transitional Societies and Crime Investigation

1.11.1 Criminal investigation and production of a narrative account
Gross violations of human rights - such as mass murder, sexual assaults, massive deportation of population represent one of the most serious transgressions of moral and legal codes of societies in transition. They carry a special symbolic status calling for a response by the newly emerging authority. This is generally called ‘dealing with the past’.

This special symbolic status of the atrocities, and the strong social reaction demanding justice, do not, however, automatically qualify the action as international crimes, i.e., war crimes, crimes against humanity, or genocide. Qualifying certain acts or series of acts as international crime, is an outcome of specific social process. Acts are labelled and defined as crime through the process of information collection, interpretation, and re-construction by investigative agents operating as part of an international criminal justice process.

What is often understood and referred to as the ‘fact’ of a case at criminal trial is manufactured through investigative work performed by investigative agents. Certain incidents are charged as a ‘crime’, as a result of the creation of authoritative accounts by international criminal investigative agents. As such, the work performed by investigative agents is concerned with the social construction of meaning.\(^6\) The work that investigative agents perform consists in setting out how and why they believe that the victims were killed or disappeared; it is closely affiliated with the construction of collective memories in transitional societies. Criminal investigations into past atrocities have an impact on how the incidents are to be remembered by the wider community. The criminal investigation produces a narrative of incidents in line with the legal epistemological framework. It is an attempt to give an answer to questions such as; whether the event

\(^6\) M. Innes, Investigating Murder.
concerned derive from a high-level policy decision or an isolated event, who the victims and/or the perpetrator are, and who did what to whom.

As discussed earlier, an expressive capacity of the law announcing moral statement concerning undesirable or offensive matter is central in the context of a transitional society, where a shared understanding of what is ‘right’, ‘truth’, or ‘moral standard’ is largely absent. An international criminal investigation conducted by a third party, who is perceived by the public as relatively impartial and unbiased, is essential to creating pedagogical statements for the societies concerned. The internal dynamics of the investigation process, such as the choice of charges, selection of suspects, and determination on the scope of investigations, are quite significant in this regard.

A narrative of atrocious events constructed through investigations provides a foundation for the subsequent judicial process. The present study finds that this narrative construction process has an influence on the formation of collective memories in the societies in transition. Criminal trials adjudicating mass-scale victimization constitute a public forum where competing historical narratives, submitted by both the Prosecution and the Defence, are presented. The two contrasting narratives submitted by both parties would seek authoritative recognition by the Chamber; and the final judgment would endorse one or more narrative(s). It is important to note, however, that a foundational narrative - let us call it a ‘meta-narrative’- which the judicial processes rely upon is produced through international criminal investigations conducted by prosecutors.

1.11.2 Historiography and criminal investigation
Dealing with the ‘facts’ and creating a ‘narrative’ are not the monopoly of criminal investigators. Historians also handle similar tasks. Historians, however, often claim that judicial investigation is inappropriate means to establish historical truth. According to this claim, truth establishment by judicial means such as criminal investigation is biased and limited in scope, and that it shall therefore never serve the purpose of truth establishment. Anthropologist Richard Wilson finds that there are two schools of thought maintaining this position; 1) liberal legalism and 2) law-and-society. First, liberal legalism asserts that the justice system should not attempt to write history at all as it sacrifices high standards of judicial procedure. Second, law-and-society scholars claim that, even when
courts attempt historical inquiry, they are bound to fail due to inherent limitations of the legal process.\textsuperscript{87}

\textbf{1.11.2.1 Liberal legalists}

Liberal legalism’s claim is that the sole function of criminal judicial process is to determine whether the alleged crime occurred and, if so, whether the defendant can be held criminally responsible for them. Hannah Arendt who represents this position insisted in her book “Eichmann in Jerusalem: A Report on the Banality of Evil” that the main purpose of a criminal court is to administer justice and determine the guilt or innocence of an individual. By Arendt, a judicial institution should not attempt to answer broader questions such as why a conflict occurred between certain peoples in a certain place and time, nor should it pass judgment on competing historical interpretations. She claims that doing so would undermine fair procedure and due process, and the credibility of the legal system.\textsuperscript{88}

\textbf{1.11.2.2 Law-and-society scholars}

While liberal legalism asserts inappropriateness of judicial system to write a historical account, more recent approaches in law-and-society research go a step further to declare that courts will inevitably fail in this task, even when they try. By Wilson, there are four positions in this approach; incompatibility theory, the Dickensian ‘law is an ass’ view, the partiality thesis, and the view that law is monumentally boring.\textsuperscript{89}


“Justice demands that the accused be prosecuted, defended and judged, and that all other questions of seemingly great import – of ‘How could it happen?’ and ‘Why did it happen?’; of ‘Why the Jews?’ and ‘Why the Germans?’; of ‘What was the role of other nations?’; be left in abeyance”

“The purpose of the trial is to render justice and nothing else; even the noblest of ulterior purposes – ‘the making of a record of the Hitler regime which would withstand the test of history ... can only detract from law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out punishment’”

\textsuperscript{89} R.A. Wilson, \textit{Writing History}, p.16.
The first position which Wilson calls ‘incompatibility theory’ underlines the distinctive methods and principles applied between historical research and judicial process. They claim that while criminal law demands a threshold of proof that is ‘beyond reasonable doubt’, historians deal in ‘the broader frame of probabilities’. The way law approaches historical facts is positivist and realist, demanding definite and verifiable evidence typically produced through scientific forensic methods. History, however, is more pluralistic and interpretative in both its methods and conclusions. Law often endorses one version above all others, whereas historians may integrate the elements of competing accounts. Historians often acknowledge that historical truths are provisional and that their evidence and conclusions are not always verifiable or without ambiguity.\(^90\)

The second critical position is termed ‘legal exceptionalism’ and it highlights a distinct legal way of ‘knowing’.\(^91\) This position asserts that unique rules and special categories of law distort the way historical events are understood and may even lead to an absurd conclusion from the point of conventional way.

The third position ‘partiality thesis’ extends the critique of legal exceptionalism further to point out how courts can be overly selective and limited in scope.\(^92\) By this position, law’s minimal regards for history and socio-political context of the conflict is fatal error from the point of historical narrative construction. Studies of Nuremberg trial by historians such as Donald Bloxham, Saul Friedlander and Michael Marrus represent critical views of partiality thesis. Those historians all maintain that the Nuremberg Trial did not adequately address the most important Nazi crime of all – Holocaust. As per this position, the trials left an incomplete and impoverished historical record because crimes

---

\(^90\) R.A. Wilson, *Writing History*, p.16.

> “While this critique of criminal law is valuable, I shall draw attention to the fact both law and history often apply similar methods and aims. Both explore the details of specific events while keeping an eye on the general implications of the case in question. Both weigh evidence and finely evaluate its value. Both carefully examine their sources, distinguishing between primary and secondary documents, and often grant greater weight to the former. Both use eyewitness testimony and search for corroborating documentary evidence. Finally, both rely on overarching narratives to organize individual facts, visual images, and other forms of evidence into a coherent whole.”


> “Inside the courtroom, law’s ways of knowing seem strange, out of touch, disconnected from the usual ways in which people acquire information or make decisions”

\(^92\) Clifford Geertz claims that “Whatever it is the law is after, it’s not the whole story”. Cliford Geetz, *Fact and Law in Comparative Perspective*, London, Fontana Press, 1983, p. 173.
against humanity were subordinated to crimes against peace and conspiracy to wage an aggressive war."

1.11.2.3 Law and history in international criminal investigation

To what extent the critical views of criminal judicial process in establishing historical records are valid? Those who claim the limits of international criminal process in performing truth finding function insist that historical truth does not equate judicial truth. In this view, the latter applies simplistic binary views of history; guilty or innocent. Referring to historians Tzvetan Todorov and Michael Robert Marrus, Martin Imbleau wrote the following:

"Courts are not propitious for the hatching of historical truth because trial content and that of an historical expose differ in the fact that in the former, the image of the past results from the confrontation between the accusation and the defence and not from an elaborated account or an accumulation of evidence and arguments following a very precise methodology."

These criticisms have some merits and is understandable, but it remains too academic. One must go beyond abstract theory and look at the real role and implications of judicial processes in history formation in real life.

In practice, just like historians, investigators or judges must previously agree on the facts before constructing certain accounts. The challenges they meet in doing so are not fundamentally different from those encountered by historians. Wilson points out many common denominators between judicial investigators and historians.

93 R.A. Wilson, Writing History, p.19

"In place of an explanation built on German nationalism and anti-Semitism, the court identified war and 'renegade militarism' as the primary motivating factors for the anti-Jewish policies of Nazi Germany. Justice Robert H. Jackson considered the extermination of the Jews not a principal Nazi objective in and of itself but a function of other war aims of the German High Command."


95 R.A. Wilson, Writing History,

"1) Both have a third-party position in relation to the event and,
Historical narratives of transitional societies are produced by various means such as trials of the old regime, quasi-judicial or ad hoc bodies created for that very purpose e.g., truth commission, or by historians. Conducting historical research is of course not the primary role of criminal investigators. Evidence of genocide, crimes against humanity is generated through the judicial forum, or they are primarily gathered through judicial processes taking place immediately following these crimes. Historians often depend on documentary evidence accumulated during international criminal process. The Nuremberg trial is a good example of this.

In the period of immediate aftermath of genocide or other international crimes, where victims were held at secret detention centres, their bodies being disposed secretly, and security forces, supported by the state, denied any access to information, an intrusive and extensive criminal investigation is often the only way for gathering evidence.

1.12 Conclusion

In this Chapter, several theoretical pillars concerning the concept of collective memories are identified. Those pillars relate to 1) carriers of collective memories, 2) the formation process of collective memories, and 3) types of collective memories.

With respect to the relationship between individual and collective memories, the discussion brings out the fact that individual memories are deeply affected and defined by social groups to which the individual belongs. Collective memories have their own lives and are distinguished from mere aggregations of individual memories.

2) If acting in good faith, both intend to establish the same truth.
3) The accounts provided by witnesses are essential elements for both professions in their quest for truth.
4) Their concern with the evidence and with the credibility of witnesses is also present in the two instances.
5) There is also usually the same complementary aspect between the oral account provided by witnesses and the material evidence provided either by experts or independently.
6) The same perspicacity in trying to reveal and detect contradictions, inconsistencies or improbabilities, and finally the same attention is given to omissions, forgery, lies and allusions.
7) When the evidence is not complete, both must accept the risk of guessing following logical steps to conclusion.
8) Both should be experts in the revelation of forgery and fakes and in the manipulation of suspicion vis-à-vis what is before them.”
In terms of formation, collective memories are shaped through social conventions of 1) sharing, 2) discussion, 3) negotiation, and 4) contestation among the members of the social group. Their formation is, however, conditioned from the present interests of the memory carriers.

In terms of the collective memory formation in transitional societies, the conflation of individual and collective memories occurs due to pervasive and widespread nature of the atrocities. In such societies, law is often utilized in shaping collective memories; to this end, judicial investigations conducted by international prosecutors, unearthing the evidence of atrocities and identifying and exposing the responsible individuals, play a role in the formation of collective memories. Despite historian’s doubt on criminal investigation’s capacity in establishing the facts, there are no fundamental differences between historians and criminal investigators on methodologies in building factual scenario.

In the next Chapter, the methodology of international criminal investigations will be examined more in detail.
CHAPTER 2 THEORY OF INTERNATIONAL CRIMINAL INVESTIGATIONS

2.1 Introduction

This chapter focuses on the first and crucial phase in ‘building a case’ in the criminal judicial process, that is, the criminal investigation. For the purpose of the subsequent discussions, ‘international criminal investigation’ is defined as follows:

A process of searching, collecting, collating and synthesising information, which is conducted by international prosecutors against individuals who are allegedly liable for international crimes, in order to prove the guilt or innocence of these individuals in a court of law.96

The structure of this chapter is as follows. First, general characteristics of international criminal investigations will be examined through a comparison with criminal investigations at the domestic level. Although there are some common features between the two, important differences exist which render international investigations a distinctive exercise. Following this, the discussion will proceed to the process of international investigations with special emphasis on information processing and the analysis of evidence. Thereafter the study will examine the frameworks of an international investigation, which in this context relates to the infrastructure providing the foundations for the investigative work. The focus will be both on the legal framework, used as a reference point for the analysis of information, and on the organizational framework of the office of the prosecutor. At the end, the practice of international investigations with specific references to the work of several international tribunals will be discussed.

Before moving to the substance, an important methodological observation should be pointed out; although the phase of criminal investigations clearly constitutes a crucial one in building criminal cases, few written sources exist that provide a closer insight in the investigative practices by international prosecutors. This scarcity stems from the fact ‘the investigation’ is undoubtedly the most confidential part of the prosecutors’ work and persons who have been privy to its actual functioning are normally bound by strict confidentiality obligations. This caveat not only applies to the international or hybrid tribunals established in the last twenty-five years, but also extends to the historical

tribunals as the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) in Tokyo; little is known about the way in which the prosecutors of the IMT and IMTFE gathered evidence and built their cases. This study therefore is necessarily exploratory; it does not carry out a systematic comparison across international tribunals and courts. Instead, examples to illustrate several key issues will be discussed. To this end, this study will draw on criminal law and on international law, and to a lesser degree on criminology and sociology.

2.2 Distinctiveness of International Investigations

Nothing will highlight the key features of international criminal investigations better than a comparison with criminal investigations as they are carried out every day in domestic criminal justice systems around the world. In the following paragraphs, the commonalities and differences between international and national investigations of criminal cases will be examined, without putting too much emphasis on the different legal and judicial cultures that abound.

First, it should be clear that investigations carried out by the international prosecutors possess a wide range of similarities with domestic criminal investigations. International and national investigations share two basic features; both consist of (1) collecting evidence and (2) legally interpreting the collected evidence. Authors who have studied domestic criminal investigations in detail, e.g., Charles Swanson, Neil Chamelin, and Leonard Territo, as well as those who have conducted comparative analyses between international and national criminal investigations, e.g., Morten Bergsmo and Michael Keegan, have highlighted the similarities between these two types of investigations.


Keegan, indicate that the two basic aspects of criminal investigations - whether national or international - are fundamentally similar.

The first aspect includes collecting and analysing information pertaining to certain acts of individuals and putting the alleged crime into a historical and social context. The second pertains to the evaluation of the evidence against the elements required for chargeable offences and to its preservation and presentation in accordance with procedural requirements.

Despite these similarities, however, there are also a number of important differences between international and domestic criminal investigations. Based on a detailed review of the early practice of the ICTY Prosecutor, Morten Bergsmo and Michael Keegan identified three: 1) the focus of the investigation, 2) the accessibility of the information, and 3) the subject matter of the investigation.

### 2.2.1 Focus of investigation

In a domestic investigative setting, the first and foremost concern of the investigation is to ‘determine who committed a particular crime [and] the broader social context in which the crime occurred might be of less importance in this respect’. For cases being investigated by international prosecutors, on the other hand, clarifying the context in which the crime was committed is of prime concern, much more than the identity of the direct perpetrators. It is the context of the crime that determines various aspects of the investigative work, i.e., 1) the subject matter jurisdiction of the tribunal, 2) the type of chargeable offenses, and 3) the scope of the criminal responsibility of military, police and political institutions through which criminal offences were committed in a systemic manner. Under the Rome Statute of the ICC, for example, an act of killing may be charged under various headings, as a war crime (Article 8.2(a)(i), (c)(i), (e)(ix)), and/or

---


100 *Ibid.*

101 M. Bergsmo and M. Keegan, *Case Preparation for the ICTY*, p.4; M. Keegan, *The Preparation of Cases for the ICTY*, p.120. Bergsmo and Keegan worked as legal advisor and trial attorney respectively for the Office of the Prosecutor of the ICTY during the early stages of its establishment.


103 M. Bergsmo and M. Keegan, *Case Preparation for the ICTY*, p.4.
an act of genocide (Article 6 (a)), and/or a crime against humanity (Article 7 (a)). It is the context in which the act of killing was committed that determines the chargeable offence. To invoke a war crime charge—that is, grave breaches of the 1949 Geneva Conventions— the existence of an international armed conflict, within which the alleged criminal act was committed, has to be proven. Similarly, with regard to charges of crimes against humanity and genocide, the focuses are on the broader pattern of offences of which the particular crime was an integral part, as well as on persons’ ‘special intent’ to destroy in whole or in a part of a defined group(s).

Another difference between international and national criminal investigations is the number of unknown variables for investigation. In the case of national prosecutors, their investigations would typically deal with a crime involving a single perpetrator or a small group of perpetrators, where the identities of victims and even the identities of the alleged perpetrators may often be known. It is not uncommon that some of these variables may be missing at the start of the investigation, i.e., the identities of victims, witnesses, or perpetrators, but ‘it is very rare in domestic investigations for all of these variables to be missing’. In contrast, in the case of the investigation carried out by international prosecutors, a situation whereby several essential variables are missing is not at all uncommon. First of all, the sheer scale of crimes and the numbers of victims and potential perpetrators are overwhelming and may range into the thousands, which renders it practically impossible to ascertain the identities of all victims and perpetrators. The main difficulty the international prosecutor would face in such a case is where to begin an investigation. This requires a conscious determination of the focus of the initial investigation; whether it should be, for example; 1) a particular act or series of acts, 2) a geographical area, 3) particular institutions such as the military, police and political parties, 4) the type of crimes committed, or 5) the scale of victimisation. Hitomi

106 M. Bergsmo and M. Keegan, Case Preparation for the ICTY, p.4; M. Keegan, The Preparation of Cases for the ICTY, pp.20–121; M. Innes, Investigating Murder, pp. 221-240.
107 For complexities of ascertaining the number of victims and their identities, see S. Totten and E. Markusen (eds.), ‘Part 2 Investigation’, in Genocide in Darfur: Investigating the Atrocities in the Sudan, London, Routledge, 2006; M. Bergsmo and M. Keegan, Case Preparation for the ICTY.
108 M. Bergsmo and M. Keegan, Case Preparation for the ICTY, p.5.
Takemura singles out a specific but crucial aspect, the ‘big fish and small fish debate’, thus referring to the difficult question whether it is advisable to target high-level politicians or military leaders or whether international prosecutors should focus on middle-level persons, or even low-level executioners. In the absence of clearly defined mandates, international prosecutors can exercise broad discretion in the selection both of the subject of investigation and of chargeable offences. In the international setting the prosecutor is often faced with the decision of whether it is preferable to use limited charges to secure conviction and punishment, or to address the scale and degree of victimization, which cannot possibly be captured with narrow charges. National prosecutors, on the other hand, may decide to omit certain charges which are harder to prove and concentrate on charges which bear a higher likelihood of conviction and of maximizing the sentence.

2.2.2 Accessibility of information

A second difference with domestic investigations concerns the accessibility of information. In domestic settings, national law enforcement authorities can immediately dispatch agents to collect and preserve evidence. Police officers have full access to the crime scene as well as to the individuals essential for the investigation. This is not the case in international settings. The practice of many international tribunals has demonstrated that the lack of accessibility of information is one of the most problematic points in their investigative process. Ordinarily, international prosecutors do not have access to a crime scene without prior consent of the state concerned. Therefore, they must obtain evidence by either requesting the state authorities to gather evidence on their behalf, or as Göran Sluiter phrases it, “to condone on-site investigations” by international prosecutors in their own territory. Given that international prosecutors seldom have the capacity and resources fully to investigate on their own, they require assistance from states - often the ones where the crimes were committed -, international organisations, and even non-governmental organisations (NGOs).


110 M. Bergsmo and M. Keegan, Case Preparation for the ICTY, p.4; M. Keegan, The Preparation of Cases for the ICTY, p.4; M. Innes, Investigating Murder, pp. 120-121; H. Fujiwara and S. Parmentier, Investigations, p.575.

111 M. Keegan, The Preparation of Cases for the ICTY, p.21; M. Innes, Investigating Murder, pp.221-240; R. Ericson, Making Crimes, Chapter 4.

2.2.3 Subject matter of investigation

A third difference is the subject matter of investigations. Although international crimes resemble domestic ‘organized’ crimes in the form of crime syndicates - involving elements such as multiple perpetrators, command and control structures, and the problem of sensitive sources - they do differ both in quantity and quality.

One aspect is that the nature of international crimes is often one of extreme violence. The factual allegations of international crimes are usually that entire cities and towns have been devastated, their populations murdered, imprisoned, or forcibly removed. These constitute situations of real ‘mass victimisation’, defined by criminologist and victimologist Ezzat Fattah as:

“victimization directed at, or affecting, not only individuals but also whole groups. In some cases, the groups are very diffuse, the members have nothing or not much in common, and the group is not targeted as a specific entity. More often, however, the acts of victimization are directed against a special population.”

The sheer scale and severity of these factual circumstances are rarely encountered in ordinary national investigations.

Another aspect relates to the peculiar behavioural patterns and motives of the perpetrators of international crimes. Those who commit international crimes usually pursue political motives or objectives. The offences are committed within a political context and are often the result of actions committed by groups of state agents or by state-supported groups, whose conduct is officially sanctioned or at least condoned. In contrast, domestic crimes, including organised crimes, are normally perpetrated by private individuals or organisations. They do not usually involve states as such in the perpetration of the crime, and even if they do involve state agents, the motive of those agents is predominantly for personal gain, and the act itself is prohibited and punishable under domestic law.

---


The preceding paragraphs have demonstrated that there are quite some differences between criminal investigations at the domestic level and those at the international level. For these reasons, a separate scrutiny of international criminal investigation is warranted. Before delving into the practice of international tribunals, in the following section, first discussions will be made on the two main aspects of criminal investigations at the international level; namely the process of investigations on the one hand, and the existence of legal and organizational frameworks on the other hand.

### 2.3 Information Processing and Evidence Analysis

#### 2.3.1 Investigation as a form of information processing

What are the essential aspects of the process of international criminal investigations work and how does it work? This is the central question of this section, and to address it one must make a distinction between processing all kinds of information that is collected by the prosecutorial team on the one hand and analysing the real evidence on the other hand.

Arguably criminal investigations are essentially a form of information processing through which valid knowledge is produced from a myriad of tested raw data in order to serve a specific purpose. Although criminologist Martin Innes developed the notion of ‘information processing’ for the process of criminal investigations at the national level, and related to homicide investigations in particular, the previous comparative analysis made clear that collecting information is one of the commonalities of both national and international investigations. It therefore makes sense to look at the process of international criminal investigation through the lens of ‘information processing’.

Following Innes, an international criminal investigation is considered as a particular form of a pursuit for ‘sense making’ with the purpose of establishing what ‘really’ happened. That is, explaining who did what to whom and why. In doing so, the international prosecutors investigating the crimes do not simply compile the facts from a range of sources, but instead make interpretations and inferences, which contribute to how the ‘facts’ of a case are assembled and established. In this connection, it can be said that

---

115 M. Innes, Investigating Murder, p.56.
the ‘facts’ of an international criminal case constitute the outcome of the interpretive, definitional, and classificatory work of the international prosecutor and his/her agents.

For Innes a criminal investigation consists of the following aspects; the identification, the interpretation, and the ordering of information, all with the objective of ascertaining whether a crime has occurred, and if so, who was involved and how.” In the context of international investigations, it should be noted that ascertaining that the crime has taken place needs to be done at two levels; first of all, the crime base needs to be ascertained, because it is concerned with what happened on the ground; on top of this, the crime needs to be related to the level of higher command authorities who are allegedly responsible for the commission or facilitation of the crime on the ground. Particularly the second aspect, making the link between crimes and the command structure, constitutes the distinctive feature of international criminal investigations and requires sufficient resources.118

But what are useful facts and what are less useful facts for the investigators, in other words what is valuable ‘information’ in this regard? The logic of Innes’ notion of ‘information processing’ implies that the information utilized in criminal investigations is of a special nature and needs to be distinguished from three other categories.

2.3.2 Nature of information
2.3.2.1 Distinction between raw data and information

Firstly, information should be distinguished from ‘raw data’, which contain non-relevant or meaningless data from the perspective of international prosecutors. Information is derived from a pool of raw data ‘according to the interests of particular investigating officers who are working in a particular environment’.119 During the investigation conducted by international prosecutors, a significant amount of raw data can be collected

117 M. Innes, Investigating Murder, p.113.
by entities other than the office of the prosecutor, such as states, international organisations and non-governmental organisations.

2.3.2.2 Distinction from knowledge

Secondly, information should also be differentiated from ‘knowledge’, which possesses qualities of a higher order in the sense that it contains information that has been interpreted and classified by prosecutors in such a way that it makes a substantial contribution to their understanding of the crime. While ‘information’ still possesses a certain degree of ambiguity and can be subject to multiple interpretations, once it becomes ‘knowledge’ the prosecutor can and does use it with the belief that it has more value, or that it is proven, and therefore has a factual status.\(^{120}\)

‘Knowledge’ provides the basic material that investigating officers can use to construct a narrative of criminal cases.\(^{121}\) Precisely the manner in which a narrative of the crime is being constructed is vital in building a criminal case that can later hold in court. If the narrative is not convincing the case is very likely to be deficient and to be turned down by the judges, but on the other hand the narrative itself is very much contingent upon the depth and level of ‘knowledge’ possessed by investigating officers. So, the question arises how information can turn into knowledge; such transformation takes places when information is situated and corroborated with other information available to the prosecutor or his/her agents. This in turn largely depends on the diversity of sources available and thus also on the resources available to collect information, which in the international sphere is far from obvious.

By and large, the experience of international criminal investigations suggests two important findings. Establishing a narrative of a crime base is relatively easy, as it mostly involves crimes that are analogous to domestic crimes, e.g., murder, rape, torture. Also, the scale of the crimes (mass victimisation) often renders them easy to prove. Conversely, the construction of a narrative with regard to the commanding structure of international crimes is a far more difficult enterprise, since it requires a more complex analysis of the

\(^{120}\) Ibid.

\(^{121}\) Ibid.
actual state apparatus and its functioning. Yet, as the ICTY Prosecutor Brammertz underscored, “clarifying these links is central to the successful prosecution of members of the political, military and civilian leadership”. In the past, international prosecutors have employed the theory of ‘conspiracy’, by placing emphasis on the consistency, continuity, and foreseeability of the conduct of the accused or a group of accused. Pursuant to this scenario, all the crimes are attributed to the ‘conspiracy’ through which an accused might have masterminded the commission of the crime from the outset. One of the examples of reliance on the ‘conspiracy’ theory can be found as early as the Nuremberg IMT. At Nuremberg, the prosecution took the view that the Holocaust was the result of a linear and coherent development controlled by a core group of Nazi leaders over a period of about twenty years. This view, however, was subsequently criticized by historians and researchers as being an over-simplistic narrative, and even devoid of meaning. A similar issue emerged at the Tokyo IMTFE as well. As John Pritchard observed:

“(...) as a direct result of the prosecution’s emphasis on the doctrine of criminal conspiracy to wage aggressive war, evidence directly linking the individual defendants to what is a broadly historical record of domestic and world history becomes hard to follow. For most of the Trial, there

---


124 X. Aguirre, Methodology for the International Crimes Investigation, pp.364-365. Similarly, when dealing with ethnic conflict, the narrative by the prosecution tends to rely on a so-called ‘instrumentalist’ theory that emphasizes the role of leadership and protagonists manipulating the national identity of the population as an instrument to control them. However, there is a deep divide among researchers of nationalism who support the ‘instrumentalist’ theories on the one hand and those who find the so-called ‘primordialist’ approach claiming that the national identity is indeed rooted in culture and history. X. Aguirre, Methodology for the International Crimes Investigation, p.365.

was little attention paid to any indisputably criminal activity on the part of the individual accused.\textsuperscript{126}

The same criticism also resonates with the criticism of the contemporary international tribunals, where prosecutors started relying on a vague concept of ‘Joint Criminal Enterprise’ (JCE) in lieu of more clearly defined and specific allegations against an accused.\textsuperscript{127}

2.3.2.3 Evidence

A third and final mode of ‘information’ that should be mentioned in the context of crime investigations is ‘evidence’. Evidence is a specific form of ‘knowledge’, and the warrants for this ‘knowledge’ are endorsed by the principle of legality. It is basically information that has been tested and selected, and that can now be understood and represented in accordance with the rationale of a legal frame.

Evidence generation process in international criminal investigations is essentially a form of information processes. This process is, however, conditioned by various factors which makes it distinctive from other information processes. One of the conditions is that it is framed by legal frameworks which include substantive law regarding the definition of international crimes as well as rules on procedure and evidence.

Figure 2 below clearly illustrates how raw data are processed into evidence with the progression of the investigation activities of prosecutors.


The pyramid in the center of the figure depicts the hierarchy of data processed during the investigation. As the data move from the lower to the higher layers in the hierarchy, the volume of data becomes smaller, showing how a small amount of ‘evidence’ is eventually generated from a far broader pool of ‘raw data’. The dotted arrow at the bottom of the figure indicates the temporal axis that corresponds to the progression of the investigation. Two arrows on both sides of the figure show the orientation of the investigation at a given stage of the investigation. At the beginning of the investigation, the orientation is inductive as the investigation must deal with a huge amount of unorganized raw data. As the investigation progresses, however, more value-added data is produced, and the investigative orientation shifts towards a more deductive one.

This model can easily be applied to the actual practice of international criminal investigations. In relation to the two different levels of crimes to be proven, as mentioned earlier, an investigation of the crime base usually follows a more inductive orientation, whereas an investigation into the command responsibility often starts with a deductive
orientation. To illustrate these points, it is useful to go back to a very telling remark made by Telford Taylor, the Chief Counsel of the Nuremberg prosecution, ‘father’ of all international criminal justice institutions:

“One might assume that the selection of defendants would be governed entirely by ‘what the evidence showed’, but in fact the problem was not so simple as all that. The available ‘evidence’ of all kinds was infinitely vast and varied, and we could not possibly scan more than a small fraction of it. It was necessary, therefore, to approach the problem of evidence collection with some preconceptions and according to a plan. In short, it was necessary to use deductive as well as inductive methods of investigation. Accordingly, all professional staff members were expected to familiarize themselves as rapidly as possible with the organization and functioning of that particular part of the Reich with which the staff member in question was most immediately concerned. In addition, a special section was set up to compile a sort of register or ‘Who’s Who’ of leading German politicians, civil servants, military men, business men, etc. From these studies one could draw tentative a priori conclusions with respect to the locus of responsibility for the crimes and atrocities known to have been committed. It goes without saying that these conclusions were subject to constant revision and check as more evidence came to light. The deductive and inductive methods supplemented and complemented each other. Tentative conclusions reached by deduction from a general knowledge of the structure of the Third Reich provided a guide in approaching the formidable mass of detailed evidence. As the evidence was collected and analyzed, new and more accurate light was shed upon the general organization of German government and business which, in turn enabled us to draw up new and more precise conclusions and inferences.”

It is clear that the Nuremberg Military Tribunal, as well as the Tokyo Tribunal, adopted a heavily deductive and suspect-driven approach. This was possible because a charging theory had been determined before the evidence gathering ever commenced, and because the actual evidence gathering was conducted strictly along the lines of that theory. Such approach resulted in the extremely short duration of their investigations (little less than six months) in comparison to that in contemporary international tribunals that tend to take much more time.


129 At the very outset of the investigation the investigators themselves acknowledged the lack of basic evidence and the lack of knowledge on the local political, historical context. See, The Law Reports of the Trials of War Criminals, Vol. XV, 1949.
Obviously, not all international tribunals apply the same deductive model. In recent years, other approaches of criminal investigations have also been identified, notably in the case of East Timor. The analytical process of the Special Crimes Investigation Unit (SCIU) was bound to be inductive rather than deductive since its investigations were confined to a specific crime base that had been limited for practical and political reasons. This in turn led to harsh critiques as in the case of Joao Fernandes, where the prosecutor limited the scope of investigation to a simple murder case and failed to investigate it in the broader context of the massacre at the Maliana Police Station where the accused had played a crucial role. It has been criticized that there was simply no examination of the massacre as a whole; no examination of how and why it happened.\(^{130}\)

In sum, one can conclude this first point by confirming that international criminal investigations normally include many steps that can be analysed through the lens of ‘information processing’. That said, the next question relates to the way the international prosecutors analyse the evidence.

2.3.3 The analysis of evidence

In any criminal investigation, the tension between the collection and the analysis of evidence is a recurring theme. The fundamental question is whether more evidence needs to be collected to make sure that there is sufficient evidence to proceed with the prosecution, or whether the analysis of the collected evidence should come first in order to determine that there is a need for more evidence. These questions are far from theoretical as they have to be addressed in a context of limited resources and limited time.

Many observers have repeatedly emphasised the central role of analysing evidence. The vast amounts of potential evidence, as well as the complexity of the subject matter of investigation, demand a highly focused process of evidence collection that is guided by a systematic review of the collected evidence to determine its meaning at regular intervals. If such approach were not taken, the process of information gathering would lead to an overwhelming amount of data but little understanding of their significance.

---


Specific issues exist in the context of analysis of evidence in international investigations. First, the very context of international investigations produces ‘cognitive bias’, at two levels that greatly affects the analysis of evidence. First of all, external entities assembling information on behalf of the international prosecutor may pre-select information or prioritize certain events, in line with their own perspective. These entities may be states, international organizations, NGOs, or other intelligence agencies, and their mandates and objectives are usually quite different from those of international staff of the tribunals appointed with a specific mandate to carry out independent investigations and prosecutions. The potential ‘bias’ arises as soon as international prosecutors utilize evidence gathered by external entities, which is common practice in international tribunals.

The following two examples provide a clear illustration. NGOs (or UN Commissions) may conduct human rights investigations on the same subject matter as prosecutors, e.g., crimes of genocide, but their focus is quite different. NGOs tend to focus on regimes or elements within a regime, such as its army or secret police, with a view to effect changes in policy, either by direct pressure on the offending government, or by indirect influence on other nations to change their policies towards the offending government. By contrast, investigations by international prosecutors are focused on individuals and assemble evidence to prove their guilt or the lack thereof beyond reasonable doubt in a court of law.131 These two types of investigations imply two different standards of proof that should be clearly distinguished. In an international criminal investigation, proving individual guilt or innocence is paramount, and the armed conflict constitutes the context in which the indictable acts have occurred. In a human rights inquiry, the equation is reversed; it is the collective situation that is of prime importance and provides the context in which the individual serves as an illustrative example.132 M. Keegan describes the initial reliance of the officer of the prosecutor of the ICTY to the report of UN Commission of Experts and the problems arising from it as follows:

‘(...) the process of the investigations by the OTP started with the review and analysis of reports from the U.N. Commission of Experts, governments, and NGOs. By and large those reports fell into two categories. They were designed either to present an overall picture of the

---


132 R. MacGrath, Problems of Investigation into War Crimes, p.902.
conflict or to address certain characteristics of the conflict, depending on the character or interest of the particular organization or group preparing the report. All of them, however, were prepared from the perspective of establishing a historical record of what occurred either to answer to or influence the actions of some group of decision makers, as opposed to the more exacting process of establishing a legally sufficient case for prosecution.133

Another example relates to the work of intelligence agencies, whose primary purpose is also different from that of criminal investigations. To rely too heavily on the materials of intelligence agencies can have serious consequences since their information can be extremely selective, or worse, may be manipulated in order to achieve specific political ends.134 To minimize this very real problem, it is vital for international prosecutors to remain aware of the interests and perspectives of the various agencies and to counter their influence by cultivating multiple information sources and always seek to corroborate all available information. It is therefore critical for international prosecutors to understand not only the internal logic of those interlocutors but also their focus, including the selection of events and targets, in order to preserve their independence and to properly assess their relevance for criminal investigations under their supervision.

The second level of cognitive bias relates to the nexus between the scale of the crime and its provability. Arguably it is completely wrong to assume that since the scale of international crimes is huge, they are therefore easy to prove. The crime base in itself may be evident because of the large number of victims, perpetrators and resources involved, but this is not necessarily the case when it comes to the command responsibility, whose proof of criminal liability beyond reasonable doubt requires far more complex conceptual thinking and elaborate strategy of evidence collection.135 Prosecutor Telford Taylor observed after his experience in the Nuremberg proceedings that the issue of war crimes ‘was far bigger and far more difficult of solution than anyone had anticipated’ and ‘those who were dealing with the war crimes problems could not escape the conclusion that the

134 An infamous case is the involvement of William Donovan, OSS Chief, for the exclusion of Warren SS General Karl Wolff from the Nuremberg investigation.
135 See M. Bergsno and M. Keegan, Case Preparation for the ICTY.
root causes of the crimes were far deeper and more far-reaching than had been suspected’.\textsuperscript{136}

Besides these two types of cognitive bias, additional factors may complicate their criminal investigations even more. The many cultural and linguistic differences between investigating officers, interpreters and witnesses are a common problem. In some cultures, hearsay is not necessarily distinguished from direct knowledge of a witness as illustrated by Keegan in relation to the ICTY:

‘(...) in response to the question ‘What crimes did you witness?’ many of the witnesses from the former Yugoslavia may include information that they heard from a family member or trusted friend. As interpreted, the description may come out entirely in the first person. This failure to distinguish between what they actually saw and what they heard from someone close to them is necessarily an attempt by the witness to mislead the investigator. To the witness, it may be a legitimate answer to the question asked because in the witness’ mind it is the truth, and therefore has the same value as if it had been personally experienced. The fault lies with a lack of precision on the part of the investigator. When specifically requested to distinguish between what they personally saw and what they heard from other witnesses are perfectly willing and able to comply. It is simply a matter of understanding the directions of the investigator. The importance of being able to communicate clearly with witnesses in the development of an investigation cannot be understated.’\textsuperscript{137}

These issues were also extensively dealt with at the ICTR in its first case of Akayesu, as illustrated by this long citation from the trial judgment:

“155. Dr. Mathias Ruzindana noted that most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else. Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener. Similarly, with regard to events in Taba, the Chamber noted that on examination it was at times clarified that evidence which had been reported as an eyewitness account was in


\textsuperscript{137} M. Keegan, The Preparation of Cases for the ICTY, pp.123-124; See also R. MacGrath, Problems of Investigation into War Crimes, p.898.
fact a second-hand account of what was witnessed. Dr. Ruzindana explained this as a common phenomenon within the culture, but also confirmed that the Rwandan community was like any other and that a clear distinction could be articulated by the witnesses between what they had heard and what they had seen. The Chamber made a consistent effort to ensure that this distinction was drawn throughout the trial proceedings.

156. According to the testimony of Dr. Ruzindana, it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be "decoded" in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question. The Chamber noted this in the proceedings. For example, many witnesses when asked the ordinary meaning of the term Inyenzi were reluctant or unwilling to state that the word meant cockroach, although it became clear to the Chamber during the course of the proceedings that any Rwandan would know the ordinary meaning of the word. Similar cultural constraints were evident in their difficulty to be specific as to dates, times, distances and locations. The Chamber also noted the inexperience of witnesses with maps, film and graphic representations of localities, in the light of this understanding, the Chamber did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions.9

138

In sum, the point on analysing evidence can be concluded by emphasising how important it is for international prosecutors to be aware of the risk of cognitive bias, both in the process of collecting the information and when making the nexus between the crimes committed and the command structures. Moreover, these problems can be exacerbated by cultural and linguistic differences. Only a sufficient degree of awareness can give rise to a careful evaluation of the various biases by the prosecutorial offices, so that subsequent investigation work may be properly oriented and structured.

2.4 Framework of Investigation (1): Legal Framework

From the previous section it became clear that international criminal investigations can take very different forms depending on the type of information processing and the type of evidence evaluation. These processes in turn are heavily molded by two fundamental frameworks, the first being the legal frame and the second the organizational structure of

---

9 ICTR, Prosecutor v. Jean-Paul Akayesu, Trial Judgement, ICTR-96-4-T, 2 September 1998, paras.155-156. (Hereafter: Akayesu TJ)
the prosecutors’ offices. Both frames strongly determine the outcome of the international investigations and therefore warrant further analysis.

The influence of the law upon the practices by international prosecutors as described above can be termed a ‘frame’. According to criminologist Erving Goffman, the legal frame provides a set of principles and procedures through which a certain type of acts become subject to criminal investigations. Other criminologists, such as Keith Hawkins and Bridget Hutter, advanced on this point and claim that the law and the investigative work of the prosecutor reciprocally frame each other. They point out that while the law frames the investigative work of the prosecutor from the outset, it is the prosecutor who actually interprets the situation and decides when, where, how, and why a particular law is invoked in a particular setting.

The investigative activity of collecting and constructing information is a key factor in determining the ways in which the law is enacted. In this connection, what Richard Ericson writes with regard to domestic criminal investigations is applicable to the international criminal investigations:

`When constructing an account of his investigation, the detective is involved in process of transforming an individual event into categories which have a character of permanence and exactness. These categories are drawn from the available stock of categories within the police and wider legal organisations. Use of these categories allows the detective, his superordinates, and the other court officials, to accept his legal account as 'the facts', and therefore to act as if they were in a state of perfect knowledge, and as if this perfect knowledge has fairly stable constitutive elements.`

2.4.1 Law as a frame of investigation

The investigative work carried out by international prosecutors is structured by the law under which it is undertaken. The two types of law pertinent to international criminal...
investigations are the statutory legal instruments of international tribunals, and their respective rules of procedure and evidence.\textsuperscript{142}

First of all, the statutory legal instruments of international tribunals define which acts are regarded as crimes subject to international criminal investigations.\textsuperscript{143} For example, Article 6 of the Charter of the IMT, Article 5 of the Charter of the IMTFE, Articles 2, 3, 4, and 5 of the ICTY and ICTR Statutes, and Articles 5, 6, 7, 8, 9, and 10 of the ICC Statute define and distinguish certain types of offences as subjects of international investigations.

Secondly, a set of rules concerning procedure and evidence regulate the work of international prosecutors, providing them with a range of powers to assist them in carrying out their enquiries, along with guidelines on corresponding actions that are considered to be appropriate and legal, meaning that they are supported by the law.

Thirdly, the law also determines the relationship between the prosecutor and other actors in the criminal justice system, \textit{e.g.}, judges, police officers, within an investigation.

\textbf{2.4.2 The nature of international law}

A second consideration to bear in mind relates to the nature of the law that frames the international criminal investigations. Law applied in this context is primarily international law, which is essentially consensual and non-compelling, as opposed to the essentially mandatory and compelling nature of domestic criminal law. As discussed earlier, this difference is typically seen in the accessibility to the information and the modality of evidence gathering by international and national prosecutors.

International law entrusts criminal justice institutions with legal competences, with a view of conducting investigations and trials but also capturing the complex realities of societies that have experienced mass violence. These societal realities contain numerous

\textsuperscript{142} For a detailed discussion of the law as a frame in domestic homicide investigations, see M. Innes, \textit{Investigating Murder}, pp.54-56.

\textsuperscript{143} The statutory legal instruments referred to here are the Rome Statute of the International Criminal Court (ICC), Statutes of ICTY/ICTR, The Charter of International Military Tribunal (Nuremberg Trial), The Charter of the International Military Tribunal for the Far East (Tokyo Trial), the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia during the period of Democratic Kampuchea (ECCC), the Statute of the Special Court for Sierra Leone (SCSL), and the Statute of the Special Tribunal for Lebanon (STL).
socially significant events for which there are a myriad of ambiguities, perspectives, and interpretations. Proponents of international law claim that international law is a set of knowledge and rationalizing principles which can be used to establish the ‘truth’ of events in transitional societies. This claim, however, is based on an analogy with domestic criminal law principles which are highly developed and subtle, and applicable in ordinary circumstances. International law, which defines and proscribes international crimes, is different in many respects from domestic law.

Certain crimes proscribed by international law, such as war crimes, or genocide, originated from and evolved in a specific historical context. One can only talk of grave breaches of the Geneva Conventions, for example, in the context of an international armed conflict. The Genocide Convention, which defines the crime of genocide, envisaged the incorporation of that crime into the domestic criminal legal system of state parties, along with the obligation to prosecute and punish acts of genocide. Generally speaking, the crimes proscribed by international law are too abstract, ambiguous, or sui generis to sufficiently serve as a useful point of reference. Furthermore, the very definition of international crimes is itself often open to discussion.

Notwithstanding the above limitations of international law, the definition of crimes under international law still has a fundamental impact on international investigations, since it provides a ‘mode of rationality’ which sets conditions and shapes the way international prosecutors think and understand offences. For example, an act of killing in the context of international investigations may be charged as war crime, crime against humanity, or genocide, or the combination thereof. The elements required to charge each offence, however, differ greatly. To invoke a war crime, the victim has to be considered as one of the ‘protected persons’ under the Geneva Conventions, whereas to invoke crimes against humanity and genocide, the existence of the ‘widespread and systematic attack as part of a state or organizational policy’ and the ‘special intent of the offender’ needs to be proven respectively. Should the act of killing do not meet any of these elements, even if it may still constitute an offence under domestic criminal law, the international prosecutors will disregard it in the subsequent investigations. The elements of crimes under international law therefore determines as to how the international prosecutors understand and act towards an act of killing.

---

144 E. Goffman, Frame Analysis.
The limits and particularities of international law as discussed earlier frame the way the international prosecutors conduct investigations. In the following paragraphs, the discussion will proceed on how the legal frame is utilized by international prosecutors.

2.4.3 Legal frames utilized in investigative process

In the investigative phase, the international prosecutor must first interpret and reorder fragments of information that have been collected from multiple sources to establish the facts concerning particular acts or events. This process can be called a ‘descriptive’ processing of information by the prosecutors whose primary purpose is to ‘ascertain just what happened’. The information selected at this stage constitutes a ‘factual basis’.

The prosecutor will then evaluate the factual basis through a filter of ‘charging theory’, following which a decision will be made as to whether the factual basis provides sufficient grounds for chargeable offences. At this stage, a lot of information will have been discarded and dropped. The remaining information still needs to go through a further evaluation process from the viewpoint of evidential regulations, i.e., the admissibility of evidence in a courtroom trial, at which point more information will be dropped. The sifting of the information through the ‘charging theory’ and the ‘admissibility’ filters can be called as a ‘prescriptive’ processing of information. The purpose of this ‘prescriptive’ process is to select and reorder the information in conformity with the legal norms.

With reference to the practice of the international prosecutors, a memorandum from Joseph B. Keenan, Chief of the International Prosecution Section of the Tokyo IMTFE captures well the ‘descriptive’ and ‘prescriptive’ processing of information. In the memoranda, Keenan instructed his staffs to develop the case in the following order:

1. Ascertain just what happened during the period and document important events.

\[145\] ‘Instruction from Joseph B Keenan, Chief of International Prosecution Section of the IMTFE’ (Addressed to the working groups of Assignment A, B, C, D, E, F, and G, 28 December 1945), in Tokyo Saiban heno michi, kokusai kensatsu-kyoku, seisaku kettei kankei bunsho [The Road to Tokyo Trial: International Prosecution Section, Collection of Policy-making related documents], Tokyo, Gendai shiryo shuppan, 1999.

\[146\] ‘Charging theory’ as referred hereto denotes a set of principles through which specific conduct(s) of particular individual is charged with criminal liability. In accordance with the charging theory a piece of evidence may be classified as either incriminatory or exculpatory.
2. Determine what acts, incidents, or policies of the Japanese Government were pertinent to the general conspiracy charge which forms the basis of this case.

3. Determine the individuals primarily responsible for such acts, incidents and policies. Determine key defendants.

4. Develop admissible evidence (documentary and/or witnesses) providing the actions or participation of the key defendants.

5. Prepare a trial brief of facts covering the period.  

The first point relates to the ‘descriptive’ processing of information, whereas the second and third points relate to the ‘prescriptive’ processing of information, using the ‘conspiracy charge’ as a filter. The fourth instruction relates to the ‘admissibility filter’.

The international prosecutors constantly apply both ‘descriptive’ and ‘prescriptive’ processing of information in order to build a case. Subsequently the original information collected from various sources will be allotted to the following four categories: (1) historical and social contextual information. This relates to the information that gives contextual background explanations about the area and emergence of the conflicts in which the alleged crimes had been committed, as well as geographical information of the area concerned. In the context of international criminal investigations, evidence on the historical/political context under which the alleged crimes took place plays a very important role; (2) information on victims and victimization. This relates to the information on the forms and gravity of victimization. It includes information concerning victims’ ID, description of crimes provided through witness testimonies and attachments thereto, as well as any other material prepared by experts, e.g., medical certificates, post-mortem examination reports. Distinctive in international criminal investigation is that the scale of victimization is far larger than that of ordinary crimes both in quantity and frequency; (3) information on perpetrators and perpetration. This relates to crime scene information regarding actual execution of the crimes. This includes information on a perpetrator’s profile. It also relates to the linkage information, where the perpetrator is at a commanding position, e.g., military structure/chain of command information; and (4) information on sanctions and mitigation. The basic structure of the indictment prepared by international prosecutors, which is the final product of the investigation process, follows this categorization.

Of the four categories, the information allotted to the first category usually takes a significant portion of the indictment. This reflects the characteristic of the international investigation where the contextual information carries the heavier load and bears more weight. Regarding the second category—victimization—it can be argued that international prosecutors often place strong emphasis on this, as opposed to the account on the conduct of the accused. However, overemphasizing the level of victimization, which is often used in lieu of a more precise description of the role of the accused, runs the risk of blurring the level of individual responsibility. This problem was already highlighted by Hannah Arendt. In her critical observations of the Eichmann trial of 1961 she mentioned that “the case was built on what the Jews had suffered, not on what Eichmann had done”. The third category pertains to vital information, as it relates to the conduct of the accused. This category of information contains a detailed and lengthy account of the crime base, which is accompanied by a narrative of the conduct of the accused, and which is often subsumed into a ‘conspiracy’ scenario. The fourth category of information relates to the information which may mitigate or aggravate the level of responsibility of the accused.

Figure 3 shows how legal frames are applied in selecting the information during the investigation. The original information is derived from various sources and then through the ‘descriptive’ and ‘prescriptive’ filters to be placed into the four resulting categories. The categorized information is then further filtered from the point of legal ‘admissibility’, which differentiates evidence and non-evidence, only the former will be used in the final construction of the case.

---

148 H. Arendt, Eichmann in Jerusalem, p.6.
Figure 3: Legal Frame Model of International Criminal Investigation
2.5 Framework of Investigation (2): Organizational Framework

Besides the influence of legal frameworks, international criminal investigations also incur the influence of organisational frameworks in which they take place. It is therefore useful to explore these linkages in more detail.

The resources deployed to conduct an international criminal investigation are always highly disproportionate to the scale of the crimes to be investigated; a small number of staffs must process vast amounts of information. Furthermore, the international criminal investigation is a multidisciplinary enterprise, meaning that different professions are gathered to work together as a team. The main players are lawyers, among whom senior prosecutors and their associate attorneys play pivotal roles. Alongside are investigators, whose background is mainly stemming from national police forces, as well as analysts in political, military and criminal specializations. With regard to the multidisciplinary nature of the international criminal investigations, the ICTY Manual on Developed Practice which was co-published by the United Nations Interregional Crime and Justice Research Institute (UNICRI) and the ICTY in 2009 observes the following:

“Investigating serious violations of international humanitarian law requires a multidisciplinary approach, and requires operational teams of specialists who bring together a range of skills and capabilities. Experience has shown that in addition to investigators with a traditional police background, team require the services of military, criminal and political analysts, historians, demographers, forensic specialists and linguists. [...]

While there is a need to employ investigators with traditional police skills in handling witnesses and evidence, a police background in serious fraud, financial enquiries or organized crime investigations is often particularly useful for complex, document-intensive war crimes cases. Investigators should have inquisitive minds and willingness to do a great deal of reading to familiarize themselves with all the circumstances of their cases. At different stages of an investigation, the emphasis may change as to the various sets of skills required in the investigative team. Some parts of an investigation, for example, may involve exhumation of mass graves, or may be more intensively focused on evidence gathering, whereas examinations of archive holdings may be a much more analytical exercise.” 149

Experts on local culture, politics, and linguistics are also indispensable in the international criminal investigations, since the information gathered during the investigation requires an interpretation in its original social context. According to Xabier Agirre, who researched extensively on the history of the international tribunals, throughout the history of the international tribunals international prosecutors have taken different approaches on the issue of engaging local experts in the investigations. In the Nuremberg trial, a number of analysts familiar with the German society and institutions, as well as German-speaking interrogators were integrated in the prosecution teams. The Tokyo trial, on the contrary, the FBI agents with experience in organized crime investigations but lacking background knowledge about Japan were hired in the international prosecution section and this caused a greater difficulty in the investigation. The investigators ended up soliciting basic information about Japanese society from the accused. At the ICTY, prosecutors were reluctant to engage local experts for reasons of impartiality and security. In contrast, the prosecutor of the Special Court for Sierra Leone has relied largely on national investigators. The prosecutor of the ICC has hired different experts on the countries under investigation and has developed extensive networks with local governmental and non-governmental actors to assist the investigations with this kind of contextual knowledge.

Given the limitations and the multiplicity on resources, the investigative strategy is determined by institutional limits such as the division of labour and the resource allocations within the investigative organ. The organizational structure of the investigating offices can be classified into three prototypes according to the degree of functional divisions; (a) the ‘functional separation model’, (b) the ‘linear model’, and (c) the ‘tripartite model’. Furthermore, there are two other prototypes of organizational settings of the investigative office; (d) a thematic organization, and (e) a periodical-geographical organization. Each model will be briefly examined below.

2.5.1 Functional separation model
This model contains a structural separation along the lines of professional functions, namely, the prosecution/legal section and the investigation section (see Figure 4). The investigation section is primarily responsible for establishing facts, and it consists of several teams dealing with specific cases. The legal section is in charge of developing a

150 X. Aguirre, Methodology for the International Crimes Investigation, p.360.
152 X. Aguirre, Methodology for the International Crimes Investigation, p.362.
charging theory and evaluating the material collected by the investigation section. A variation of this model includes a legal section consisting of sub-teams and an investigation section consisting of one big team without sub-teams.

The Office of the Prosecutor of the ICTY, for example, was initially structured in this way. It was based on a bottom-up investigative strategy taken from a pyramid theory, which assumed that, the more extensive the crime base the greater the chance to reach the highest echelon of the responsible authority. In line with this strategy, the resources were divided into the following sections:

1. The Investigation Section, consisting of various teams of investigators and analysts, who were managed by Team Leaders, who themselves were experienced professionals and senior police investigators. These teams were responsible for investigating each antagonist in the conflict, and to gather and review the oral, documentary, and physical evidence necessary to establish the factual basis;

2. The Prosecution Section, which consisted of senior trial attorneys and legal assistants, who were responsible for the preparation and presentation of cases before the Trial Chambers;

3. The Legal Advisory Section, which comprised a small group of international lawyers who gave advice to the Investigation and Prosecution Sections on questions of international and comparative law;

4. The Records and Information Section, which maintained custody of evidence collected and handled its storage, search and retrieval capability.\(^\text{153}\)

A variation model, which consists of several legal sub-teams and one investigating team, was adopted at the Nuremberg IMT and the Tokyo IMTFE, Special Court of Sierra Leone, as well as at the War Crime Department of the Bosnian State Prosecutor.\(^\text{154}\)

\(^{153}\) M. Bergsmo and M. Keegan, Case Preparation for the ICTY.

The functional separation model is based on the idea that a solid factual basis must be established before a legal argumentation can commence. To this end, it ensures autonomy of the fact-finding activities. This model also aims at safeguarding a ‘facts driven’ investigation as opposed to a ‘suspect driven’ investigation, which bears a greater risk of losing a broader and impartial perspective and getting trapped into a ‘tunnel vision’. In connection with the ‘descriptive’ and ‘prescriptive’ processing discussed in a previous section of this chapter, this model leans more towards the ‘descriptive’ processing. This, for example, is reflected in the resource allocation at the ICTY where, at least in the initial stage of its life, the investigation section was by far “the largest section in the office (of the Prosecutor), functioning in many respects as its engine”. The disadvantage of this model is, however, that a rigid segregation of the investigative and legal sections hampers the smooth communication flow between the two sections. Consequently, the overall investigations lose focus and linger on by collecting numerous amounts of information which is not of direct use for actual prosecutions, and even less at the trial stage, in the courtroom.

This also was the point which the British members of the IMTFE, who arrived in Tokyo several months after the American members, severely criticized the initial setting of the IMTFE International Prosecution Section (ISP). They argued that the investigative activity of the ISP, led thus far by the Americans, had collected numerous amounts of unrelated information without clear searching criteria which would serve directly to the building up of a criminal case.

---

155 This functional separation was originally taken from the Queen’s Counsel model of the Commonwealth in which the senior trial lawyers are ‘detached from the investigative component’ up to the point when the police, acting independently, complete the investigation and hand over the criminal case to them for prosecution. See J Hagan, Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal, Chicago, University of Chicago Press, 2003, p.224. (Hereafter: J. Hagan, Justice in the Balkans).

156 M. Bergsma and M. Keegan, Case Preparation for the ICTY.

Figure 4: Functional Separation Model
2.5.2 Linear model

The linear model does not contain a clear structural separation between prosecution and investigation sections. Instead, an entire investigation team comprised of an attorney, an investigator and an analyst, reports directly to the Chief Prosecutor or to his executive office (see Figure 5).

This was the organisational structure adopted by the ICTY Office of the Prosecutor in 2001 in an attempt to adapt to the changing needs of the office’s work. By then, following a string of successful arrests and surrender of indicted suspects, the ICTY’s investigative workload had considerably increased and the scope of the investigations had become far more extensive, in terms of geography as well as the level of investigative targets. A separation of the investigative and prosecutorial functions within the office proved to be more detrimental than effective. As the investigations progressed, senior trial lawyers were confronted with a situation where they had to catch-up at the very late stage of trial preparation with a case which had not necessarily been structured from a prosecutorial point of view.158 Additionally, within the investigative section, information sharing among the investigative teams became stalled due to the fact that each team had been assigned to one side of the conflict, and, as a result, exculpatory information deriving from teams working on opposite sides of one same specific armed confrontational incident tended to go unnoticed, as explained above in the functional separation model.159 As a result, the office of the prosecutor went through a major reorganization and the previous intentional division between the investigation and the prosecution sections was abolished. Henceforth, attorneys became much more closely involved with a case right from the beginning of an investigation. The senior attorneys became responsible for the daily legal supervision of the entire investigative process up to the drafting of the indictments.

The advantage of this model is that it ensures a clear focus of the investigation right from the outset. This model leans more towards the ‘prescriptive’ processing in that the emphasis is placed on an expeditious and focused investigation. The potential risk of this model is that it might contain less institutional safeguards which would prevent the investigation from being trapped into a ‘suspect’ driven investigation. In the ‘suspect

158 M. Bergsmo and M. Keegan, Case Preparation for the ICTY.
159 An example of this is a military offensive where a number of civilians were allegedly killed from both side. See also R. MacGrath, Problems of Investigation into War Crimes, p.899.
driven’ investigation the factual basis tends to be built on simplistic assumptions and only the information is sought that confirms a predetermined charging theory.

**Figure 5: Linear Model**

2.5.3 **Tripartite Model**

This organizational model contains three independent sections which interact with each other and contribute to the investigative process with their own respective expertise (see Fig 6). The investigation section is responsible for the collection of evidence, whereas the analysis section and the legal section are responsible for building a solid and accurate factual basis and building a legal argumentation, respectively. Investigators, attorneys, and analysts are loosely tied to their functional sections and report to their respective section team leaders, who themselves are from the same professional background. The actual investigative activities are conducted by sub-teams consisting of an investigator, an attorney, and an analyst.
The main objective of this structure is to combine these different professional skills to construct a case, and to promote information sharing within as well as across sections. It is assumed that the combination of approaches of the various team members, for example lawyers, analysts, and investigators, working on the investigation, would create dynamism in advancing the investigation. It is also aimed at adopting a more holistic and balanced investigative approach, as opposed to an approach leaning towards either ‘descriptive’ or ‘prescriptive’ processing. This model was adopted by the ECCC as well as at the ICC.

Figure 6: Tripartite Model

---

160 According to this author’s observation, generally speaking, police investigators are more inclined to focus on identifying the culprits through the unearthing of physical and personal evidence, whereas lawyers tend to be more focused on collecting evidence which may prove beyond reasonable doubt the guilt or innocence of the accused person in the courtroom.

2.5.4 Thematic organization

Besides the functional models discussed above, there are two other ways of organizing the office of the prosecutor. One is thematic, where each investigative team is organized either by type of offence, for example sexual assaults, imprisonment, mass killing, or by institution or entity, for example military, civilian administration, political, police, and media.\(^{162}\)

While this allows a coherent and more focused information collection, it has been suggested that this model tends to have more difficulty keeping a holistic vision of the case.

2.5.5 Periodical–geographical organization

This model organizes investigating teams by time periods, geography, or by the party to the conflicts. For example, at the ICTY, investigation teams were organized according to the different sides of the conflict. This allowed one team to work coherently on one party to the conflict, starting from the crime base and climbing up the chain of responsibility to its leadership. However, at the later stage of the investigation the team faced the problem of information sharing, in particular regarding exculpatory information.\(^{163}\)

2.5.6 Internal relationship within investigative organ

Finally, apart from the formal structure of the prosecutor’s office, the internal relationship within the office of the prosecutor also has a significant impact on evidence gathering.

In the case of the SCSL, which adopted a functional separation model, the office of the prosecutor was highly divided from the outset between its investigation and prosecution sections.\(^{164}\) Both sections comprised a parallel hierarchy and the chief of each section reported directly to the Chief Prosecutor. Whereas this structure ensured the autonomy of

---

\(^{162}\) See for example at the IMTFE, International Prosecution Section (IPS), Assignment Chart, 28 December 1945:

\(^{163}\) M. Bergsmo and M. Keegan, Case Preparation for the ICTY, p.5. For the structure of the International Prosecution Section of the Tokyo IMTFE, see IMTFE, International Prosecution Section (IPS), Assignment Chart, 28 December 1945; IPS, Darsey memo, 9 December 1945; IPS, Keenan memo, 28 December 1945.

the investigative process, it resulted in the lack of proper legal oversight, which was necessary to ensure that investigative actions were legally permissible. Furthermore, the organizational setting within each section differed significantly. The prosecution section was divided into teams which worked along the line of cases pending before the SCSL, whereas the investigation section was organized by departmental units rather than cases. According to the chief of the investigation section of the SCSL, ‘prosecutors were not allowed to get involved in the actual conduct of investigations and needed to keep an arm’s length so they themselves don’t get called as a defence witness.’

In the case of the ECCC, the modality of investigation provided by the statute was fundamentally different from the other international tribunals. It is based on a civil law tradition where there is a clear distinction between preliminary and judicial investigations. Co-Prosecutors, a Cambodian and an international, are equally in charge of the preliminary investigation. The investigation proper or ‘judicial investigation’ rests with the Co-Investigating Judges where one Cambodian and one international judge have equal status. Pursuant to the ECCC Statutes and Rules of Procedure, the scope of the investigation is determined by the interaction between international and national officials since both sides must give their consent to take any investigative step.

### 2.6 The Practice of Evidence Gathering

In the previous sections, the main issues in relation to information processing and the evaluation of evidence have been presented and discussed, and these processes were explained on the basis of the legal and organisational frames within which international prosecutors normally function. Against this background, it is now useful to present in more detail and using various examples how the processes of evidence gathering, the crux of any crime investigation by international prosecutors, actually take place.

As mentioned before, evidence gathering may include one or more of a wide range of activities; recording testimony from eye witnesses and victims, obtaining documents

---

167 Brammertz makes a distinction between (a) crime base witnesses (who were close enough to the places where the crimes occurred), (b) international witnesses (belonging to the international community and who
from military or state archives clarifying the chain of command within army units, obtaining videotapes of events or interrogations, obtaining records of radio intercepts or telephone wiretappings, exhumation of mass graves, on-site inspections of the crime scenes, etc.168

2.6.1 Preliminary investigations
Irrespective of the exact activity undertaken, evidence gathering typically begins with the preliminary investigation. There is a huge variance of legal provisions, however, across international tribunals as to how to deal with preliminary investigations. In the majority of cases, the notion of preliminary investigation is not clearly defined in the statutes and this phase is presumed to form an integral part of the investigative stage. For example, the Statutes of ICTY/ICTR do not mention preliminary investigation and, instead, use the phrase ‘initiation of investigation’, thus making no distinction between the preliminary and the formal investigation.169 The Statutes of the SCSL and the STL, as well as the Charters of the post-second world war Tokyo IMTFE and the Nuremberg IMT, merely mention the term ‘investigation’ and make no further distinctions.170 However, in the case of the ICC and the ECCC, the phase of preliminary investigation is clearly defined and it is distinguished from investigation proper. The ICC Statute provides that the preliminary investigation consists in a search for information about an alleged crime, for the purpose of establishing if there is “a reasonable basis to proceed with an investigation”.171 The initiation of the preliminary investigation by the Prosecutor on his/her own initiative is based on any relevant information he/she may have received from any reliable source, as well as “written or oral testimony at the seat of the Court”.172 It should be emphasised that the ICC is the first international tribunal that provides a specific place for victims of international crimes to participate in the proceedings relevant to their interests, either to provide all types of information to the prosecutor who can then start an investigation proprio motu (Article 15), or at the trial stage when victims could challenge court

\[\text{were involved in the conflict in a professional capacity, and (c) insider witnesses (who served in the same organization as the accused). S. Brammertz, *International Criminal Tribunals*, p.8.}\]

168 G. Sluiter, Collection of Evidence, p.7.
169 ICTY Statute Article 18(1); ICTR Statute Article 17(1).
170 IMTFE Charter, Art 8(a).
171 Rome Statute Article 53(1).
172 Rome Statute Article 53(1).
decisions about the (in)admissibility of cases (Article 19). The participation of victims in the proceedings before the ICC, including the preliminary investigations by the OTP, also has an impact on their right to reparation under the Statute of the ICC or that of the Trust Fund for Victims. A section within the office of the prosecutor is specifically tasked with preliminary investigations. This section, however, does not usually conduct a preliminary investigation on its own but relies, instead, on the material collected and submitted to the ICC by external entities. In the case of the ECCC, the Statute confers exclusive authority to carry out preliminary investigation on the Co-Prosecutors, whereas the investigation proper or ‘judicial investigation’ rests within the responsibility of Co-Investigating Judges. Co-Prosecutors first receive and consider all written complaints or information alleging a commission of crimes within the jurisdiction of the ECCC and then decide, at their discretion, whether to reject the complaint or to conduct a preliminary investigation. The purpose of a preliminary investigation is “to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses.” What is quite distinctive about these preliminary investigations carried out by Co-Prosecutors is that suspects may be taken into custody during the preliminary investigative phase.

2.6.2 The substantive problem of evidence-gathering
2.6.2.1 Evidence gathering by external entities

As mentioned earlier, the most characteristic feature of evidence gathering by international prosecutors is that, unlike national prosecutors who have full control over the necessary evidence within their country, international prosecutors do not have the full control over the evidence gathering. Moreover, the evidence itself is often located outside the territory where the international tribunals are seated. This is particularly true in the

---


175 ECCC Internal Rules, Rule 50(1).

176 G. Sluiter, Collection of Evidence, p.8.
cases of the ICC, the ICTY, and the STL which are all seated outside the territory where the alleged crimes were committed. Under these circumstances, the assistance by the states where the evidence is located becomes crucial for international prosecutors. The legal basis whereby states are obliged to assist in the investigations of international prosecutors strongly varies by tribunal as it can be based (a) on a treaty, i.e., ICC, (b) on a resolution of the UN Security Council, i.e., ICTY/ICTR, (c) on legislative acts by the UN transitional administrations, i.e., East Timor, Kosovo, (d) on bilateral agreements, i.e., ECCC, STSL, or (e) on military occupation, i.e., IMT, IMTFE. As the legal basis of state assistance differs from one tribunal to another, so does the level of state obligation to assist international prosecutors. In the same measure, the collection of evidence is also affected, since the extent of a state’s legal obligation affects the independent function of international prosecutors in the collection of evidence.

As the legal basis of state assistance differs from one tribunal to another, the level of state obligation to assist the international prosecutors also varies. The critical theoretical question in this connection is whether the extent of state obligation affects the effective functioning of international prosecutors in the collection of evidence. In practice, however, the legal difference does not fundamentally affect the quality and amount of evidence that international prosecutors eventually obtain. A more substantive problem is the heavy reliance of international prosecutors on state assistance in evidence gathering. State authorities, for example, have the power to withhold information from international prosecutors, which gives them a real potential to frustrate the international criminal investigation if they so wish. States that do not wish to comply with a request for assistance from an international prosecutor seldom refuse explicitly to cooperate, but rather send a reply saying that they could not locate the witness or that a particular document was not found within their territory. It leaves international prosecutors very vulnerable and dependent, as they have few means to verify the validity of such claims and to oppose them. On the other hand, it is difficult to ascertain whether there is a direct correlation between these two elements, since in practice international prosecutors almost always solicit and seek cooperation by the states, regardless of the legal obligation of the states concerned. Notable exceptions were the post-World War II military tribunals, where investigations were conducted without seeking any assistance from Germany and Japan. However, these tribunals too had to turn to the members of the Allied Powers and to secure their assistance when it came to the gathering evidence located in the territories under their control.

Apart from states, it is common practice in international tribunals that information and evidence are being used that have been gathered by external entities. Most international prosecutors work in this way, at least during preliminary investigations, regardless of the variance in the legal provisions that govern the evidence gathering activities. For example,
in the case of the ICTY it was the UN Commission of Experts established by the UN Security Council prior to the establishment of the ICTY that had collected mass data and analysed allegations of war crimes in Bosnia and Herzegovina from the outset of the investigation.\(^7\) The same holds true for the Special Tribunal for Lebanon and for most of the tribunals established by the United Nations. The ECCC too makes use of data collected by an outside body in its investigation into the atrocities committed by the Khmer Rouge. Before its establishment, an NGO called the Documentation Centre of Cambodia (DC-Cam) had collected significant amounts of data on the atrocities, which was used by the ECCC Co-Prosecutors in their preliminary investigation.\(^8\) While reliance on evidence gathering conducted by an external entity is common practice with international prosecutors, the degree of reliance on the external entity varies with each tribunal. In the case of the ICTY/ICTR, for example, the power of enforcement measures granted by the UN Security Council enabled the prosecutors to conduct investigations more independently than other international tribunals.

The ICC constitutes a special case, being part of a system of complementarity where the main locus for investigations and prosecutions lies with the states and their domestic criminal justice systems. Yet, whenever called to deal with specific cases, either by referral or *proprio motu*, the ICC prosecutor frequently relies on evidence gathered by external agencies in the absence of a proper police force that can conduct investigations in situ. Prominent actors in this respect are NGOs and United Nations institutions and agencies. Indeed, in his very first case of the Congolese militia leader Lubanga, ultimately charged with the conscription and use of child soldiers, the prosecutor heavily relied on the information provided by other sources. By presenting it as evidence to the trial chamber rather than using the data as starting point for his own investigations, the prosecutor took an unprecedented step that have raised serious questions.\(^9\) The strong reliance on confidential information from the UN Peacekeeping Mission in the Democratic Republic of Congo, and the unwillingness of the prosecutor to disclose it, led to the Trial Chamber decision of June 2008 to halt the proceedings and to release the

---

\(^7\) The Commission of Experts was established by UN Security Council Resolution 780 (1992) and its final report was submitted on 27 May 1994. For details of the inner working of the Commission, see J. Hagan, *Justice in the Balkan*, pp.33-59.

\(^8\) K. Un and J. Ledgerwood, ‘Is the trial of ‘Duch’ a catalyst for change in Cambodia’s courts?’, *Asia Pacific Issues*, 2010, p. 95.

accused. However, it would be equally problematic to abandon the use of information from external sources altogether, Baylis argues, given the heavy workload of the OTP and the limited resources at its disposal. She proposes a ‘directed reliance’ approach whereby the prosecutor would elaborate procedures and policies for the direct use of third parties when engaging in evidence gathering that can be transferred to the prosecutor. If the quality of these ‘outsourced’ data and information can be improved, this approach will ultimately also benefit the work of the prosecutor.

A counter example is the case of the two post-World War II military tribunals, where the reliance on external entities for evidence gathering continued throughout the entire investigation, in particular by the Allied armed forces and their intelligence agencies dispatched to Germany and Japan prior to the arrival of the prosecution teams. In Nuremberg, e.g., the Office of Strategic Services (OSS) had advanced into Germany prior to the arrival of the Office of Chief of Counsel (OCC) headed by Justice Robert Jackson. The extent of the contribution by the OSS to the investigation of the OCC was not only limited to the exploitation and the collection of evidential material, but also to the preparation of core cases subsequently prosecuted at the Nuremberg IMT. Also in the case of the Tokyo tribunal, members of the Counter Intelligence Corps (CIC) of the US Army went to Japan prior to the arrival of the prosecution team, and carried out extensive search operations to collect material which would help determine the responsibility to be assigned to the senior civilian and military leaders of Japan. The information provided by the CIC formed the foundation of the investigation that was subsequently carried out by the International Prosecution Section (IPS). The reason for the heavy reliance on intelligence agencies in the two historical tribunals can be explained in two ways; first,

---


the military occupation of the Allied forces of Germany and Japan provided a unique context, which is very different from that of current-day international tribunals; secondly, the intelligence agencies possessed the necessary resources and expertise, i.e., methodology on war crimes investigation, local cultures, politics, languages, that the prosecution offices did not possess, as a result of which the former effectively assumed the role of the enforcement arm of the two tribunals. It is also instructive for today’s tribunals to have a quick look at the different types of evidence gathered at the two post-world war II tribunals. At the Nuremberg trial, documentary evidence played a central role because the Allied forces were able to retrieve massive records that the German military and civilian high command had meticulously kept; the Tokyo tribunal, however, witnessed a very complicated investigation because of the Japanese government’s strategy to destroy many confidential documents during the two-week period between Japan’s acceptance of surrender and the arrival of the Allied occupation forces in Japan. Obviously, the experience of the two historical tribunals cannot just be transposed unto today’s international criminal investigations, but they do highlight the importance as prosecutors of being able to rely on written documents to conduct preliminary investigations, to design a prosecutorial strategy and to construct criminal cases in a convincing way.

2.6.2.2 Local and international political environment

In the case of some of the hybrid courts the extent of evidence gathering is particularly contingent on the grand design of the court as well as the political and material supports that the courts receive from various stakeholders, both at the national and international level. The grand design refers back to the general frameworks they operate in mentioned earlier; the organizational framework on the one hand, e.g., funding sources of the court,

185 As a result, the Chief Counsel Robert Jackson adopted a clear evidential strategy from the outset of the investigation to prepare the case essentially based on documentary evidence. He instructed the OSS, which was assisting the investigation of the OCC, as follows: “The War Crimes Office wants especially to have documents such as military or political orders, instructions, or declarations of policy which may serve to connect high personalities with the actual commission of crimes. Original or certified copies of such documents are needed together with a full account of their acquisition, location, custody and reproduction.” See War Crimes Information Memo No 2, OSS, classified secret, 30 April 1945 (as cited in John Hagan and Scott Greer, ‘Making War Criminal’, Criminology, 2002, Vol.40, p.245).

186 Moreover, Chief Prosecutor Joseph Keenan assumed at the outset that useful Japanese documents had already been destroyed and directed his staff to focus on interrogating war crimes suspects and witnesses with the goal of securing oral evidence from them. Because of Keenan’s general indifference, Totani argues, a number of governmental records that might have established the guilt of the accused for war crimes remained beyond the reach of the IPS. See Y. Totani, Tokyo War Crimes Trial, pp.22-24.
the organizational structure, the ratio of international and national staffs, and the legal framework on the other hand, e.g., applicable laws, the permanent or temporary character of the court, and whether it is part of the domestic criminal justice system. In East Timor, for example, the evidence gathering of the Special Crimes Investigation Unit (SCIU) was very much plagued by the domestic and regional political environment. The SCIU was established and funded by the United Nations Transitional Administration in East Timor (UNTAET) and it formed part of the Dili District Court. However, it was almost exclusively staffed by international experts, including prosecutors, investigators, and a case manager, and moreover, its work was crippled from the outset due to a serious shortage of resources, mismanagement, internal strife, and a reluctance of the UN to expose the Indonesian military command that was likely the most responsible for the atrocities committed in East Timor after the referendum in 1999. The staffing level of the SCIU was grossly inadequate to handle the number of complex cases, and at the time of assuming its investigation more than 300 people, mostly low-level militias, had already been detained without a proper judicial screening. The UN in New York did little to rectify the resource problem, which strongly affected the proper investigation by the SCIU, as can be read from the observations of the UN High Commissioner for Human Rights:

“A serious lack of resources, both human and material, has hampered the investigative work of the Serious Crimes Investigation Unit. This has prevented investigations being undertaken in connection with the overwhelming majority of crimes against humanity and war crimes committed during 1999. Because of the delay in or non-existence of investigations, a number of detainees, who had been held for months in pretrial detention, have been released by the General Prosecutor on grounds of insufficient evidence.”

187 UNTAET Regulation 2000/16.
189 For example, the number of investigators ranged from the minimum of 2 to the maximum of 10. S. Katzenstein, *Hybrid Tribunals*, p.259.
190 *Report of the High Commissioner for Human Rights on the Situation of Human Rights in East Timor*, U.N. Doc. E/CN.4/2001/37. The resource shortage persisted throughout the investigative phase. As for the reluctance of the UN for rendering necessary assistance to the SCIU, several observers suggested that there was an obvious policy consideration. In comparison to the investigation carried out in Kosovo, one observer made the following comment:
Furthermore, the lack of necessary support was not restricted to the area of material resources, but also touched upon the more substantive area of evidence gathering, as noted by one observer:

"[...] under former SCU management, investigations may have been structured in such a way as to prevent the possibility that senior Indonesian officials would be indicted. For instance, rather than adopt investigative techniques commonly used to probe chains of command, such as tracking money trails, investigations were dispersed and targeted at lower-ranking perpetrators. When one investigator did begin to follow a money trail, the UN official states, 'he was told to immediately stop his investigation'. The UN official notes that the SCU management ignored offers made by militia leaders to cooperate with the SCU and provide information regarding the responsibility of 'higher ranking' Indonesian government officials."

As for the assistance from states, Indonesia either refused to cooperate with the SCIU to provide access to witnesses and evidence in its own territory, or to extradite its citizens to East Timor. Consequently, the SCIU investigation only reached the crime base covering lower-level perpetrators, while more culpable military commanders who were most likely residing in Indonesia remained untouched.

"The UN went into Kosovo with human rights lawyers and pathologists accompanying the first troops, determined to find evidence of human rights violations and to prosecute. In East Timor neither INTERFET nor subsequent UN forces have assisted in any meaningful way in finding the evidence. It is clear that the UN and various powerful forces still regard not embarrassing Indonesia as far more important than attaining justice for East Timor."

Statement by Robert Wesley-Smith, Spokesperson, Australians for a Free East Timor (Personal e-mail correspondence with Suzanne Katzenstein dated 23 January 2003 (as cited in S. Katzenstein, Hybrid Tribunals, p. 272).

Furthermore, a lack of proper investigative management exacerbated the effectiveness of the investigation:

"Certain policies of confidentiality under the early management rendered nearly impossible any collaboration among investigative teams, as illustrated by one example: 'In one instance, a “secret” witness who was assisting the “secret” team was implicated in several serious offences including murder and sexual assault by another team unknown to each other.' Even for ‘non-secret’ investigations, inter-team communication and coordination was ‘actively discouraged.’ Investigations teams would unknowingly work on the same figures."


A second example comes from Kosovo, where the creation of the hybrid system was prompted by a crisis-driven political necessity rather than it being a product of any grand design or theory. It was also the by-product of the UN having to assume the responsibilities to recreate a basic government infrastructure in a war-torn area.193 The participation of international jurists in the domestic court of Kosovo was not envisaged from the outset and the Special Representative of the UN Secretary General (SRSG) first appointed only local judges and prosecutors pursuant to the UNMIK Regulation 1244 in 1999, which endorsed the SRSG’s power to appoint judicial officers. The problem that was revealed following this appointment, however, was that the existing judicial system in Kosovo was deeply divisive between the two ethnic groups, i.e., ethnic Serbs and Albanians.194 The national prosecutors appointed by the SRSG showed significant disparity in the way they investigated and prosecuted cases between the two ethnic groups. The first international prosecutor in Kosovo described the following:

“[…] KFOR and UNMIK administrators had realized that there was a significant disparity in the way the Albanian Kosovar prosecutors and judges were ordering detention. When former KLA members were arrested by KFOR or CivPol for attacks on Serbs, they would often be proposed for release by the prosecutor, and then released by the investigative judge, while Serbs would often be detained in custody for the same crimes. KFOR, which had a mandate to ensure a ‘safe and secure environment,’ reacted to the Kosovar judicial release orders by adopting a detention practice separate from judicially ordered detention called a ‘COMFOR hold.’ Arrestees might be locked up in KFOR detention facilities for a time to be determined by KFOR without consideration of any judicial orders, if KFOR felt they posed a danger to safely and security.” 195

Faced with this situation, the SRSG passed the Regulation 2000/6 in February 2000, allowing the international prosecutors to join in the Kosovo judiciary endowing them with the power to overrule the Kosovar prosecutors by taking over the new and pending


194 In this system, virtually all of the judicial personnel were Serbian, and most of them refused to work in a new court system out of fear for their safety. On the other hand, the majority ethnic Albanians had little or no experience in the court system due to the fact they had been excluded from the judicial system for decades. See R.F. Carolan, Examination on the Role of Hybrid Tribunals, pp.17-19.

criminal investigations and cases. While first limited to the Mitrovica District Court and to criminal cases only, three months later the participation of the international jurists was expanded throughout all the Kosovar courts, including the Supreme Court of Kosovo. This in turn resulted in the prosecution of former KLA members, which had been abandoned by the Albanian judiciary previously. ¹⁹⁶

2.6.2.3 Security situation

A third factor that present substantive problem of the evidence gathering by international prosecutors relates to the security situation in the territory where potential evidence is located. It goes without saying that this factor also heavily affects the very practicality of the process of evidence gathering.

The example of the ICTY is a telling one. There, the evidence gathering was severely hampered, at least at its initial phase, by the volatile and uncertain security situation in the former Yugoslavia. When investigations began the war in the former Yugoslavia was still going on and insecurity was thus rampant. Without military backing and in the absence of cooperation by the former Yugoslav states, it was very difficult, if not impossible, for the prosecutor to have a direct access to crime scenes and witnesses within the territory of the former Yugoslavia. Faced with this circumstance, the prosecutor had to locate witnesses who had fled the former Yugoslavia and were scattered around the world as refugees. During this phase, humanitarian organizations, which had been working with refugees, played a pivotal role by identifying potential witnesses for the prosecutor and facilitating the meetings between the witnesses and members of the office of the prosecutor. In addition to this role, these organizations had even recorded preliminary statements from these witnesses and passed them to the office of the prosecutor. With improving security and state cooperation, the prosecutor gradually began to gather evidence on-site by visiting crime scenes, including mass graves, or conducting document exploitation missions to the national archives that held the relevant documentary evidence. Although the UN Security Council’s power of enforcement equipped the ICTY with the legal authority to conduct investigations independently, the cooperation by the former Yugoslav states was critical at this stage. One of the most

effective and visible forms of cooperation included giving permission to the ICTY to conduct investigations on their territory.  

2.7 Conclusion

This chapter has explored the phase of international criminal investigations and the various factors that shape them. It is a truly crucial phase, in which the complex process takes place of collecting all necessary data and transforming them into evidence that has to be evaluated by the trial judges. If the core business of international prosecutors consists of building a criminal case that can hold in a court of law, the heart of that same enterprise consists of adequate criminal investigations.

Criminal investigations are well known to domestic prosecutors all over the world. While there has been too great a tendency to blur the distinction between national and international criminal investigations, the mere analogy between them is untenable. The few commonalities are overtaken by some fundamental differences and it is striking that the latter points have not been given adequate consideration in scholarly and other writings about the work of international prosecutors. One consequence of these blurred boundaries has been that the focus and priority of some investigations have resulted in the waste of scarce resources. Moreover, they have sometimes yielded irrelevant investigative products, devoid of the social context in which the alleged crimes have been perpetrated.

It is therefore essential to develop a distinctive conceptualisation of international criminal investigations. What truly characterises an international criminal investigation is, first and foremost, the nature of international law through which it operates. International prosecutors are forced to operate on the basis of international law principles that are essentially consensual and non-compelling. This basis ultimately affects the modality of evidence gathering by international prosecutors, in which they have to rely heavily on the investigative capacities of external entities like NGOs and state authorities. Secondly, also the organisational structure of the prosecutors’ offices, or in other words how investigators work together, strongly affects the shaping of international investigations.

---

Both aspects thus exert a direct influence on the type of information processing and evidence gathering, two crucial components of international investigations.

Trying to present criminal investigations by international prosecutors has proven a difficult exercise, partly because all tribunals operate in their unique contexts and have thus adopted their own practices. Possibly this wide variety in criminal investigations, coupled with the emphasis on confidentiality in investigative procedures, have resulted in few writings on the matter, both scholarly and practical. This limited number of sources also explains why this study’s approach has foremost been to identify a number of key issues and to give telling examples from some tribunals, in lieu of conducting a systematic comparison of established principles and practices across tribunals. However, it is crystal clear that much more research is needed to ‘unearth’ the actual investigative practices by international prosecutors and to evaluate their strengths and weaknesses, as well as their potential to be shared by and transferred to other prosecutorial offices.

This concludes the Part I of this study. In Part II, the case study of ICTY investigation and formation of collective memory on Srebrenica will be discussed.
PART II

CHAPTER 3 ICTY - LEGAL FRAMEWORK OF INVESTIGATION

3.1 Introduction

In Part I, discussions have been to identify theoretical pillars of the two main subjects of this study; collective memory and international criminal investigations. The discussion will now proceed to examine to what extent these theories are applicable to the actual cases. As a case study, this study will highlight the ICTY and the case of Srebrenica; how ICTY’s investigation into Srebrenica was conducted and how its investigations influenced the collective memory on Srebrenica.

As a starting point, this Chapter will look at legal structures of the ICTY. The legal structure is considered as a framework of ICTY’s work, which provides the powers and the limits to its investigations.

3.2 Dual Character of the ICTY

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established as a subsidiary organ by the Security Council of the United Nations. The ICTY is a unique organ as compared to other organs of the UN. First, it is the first criminal court ever established by the UN with binding powers over individuals. Second, it was established by unilateral act of the Security Council, as opposed to multilateral acts of states such as treaties. The novelty of the ICTY creates unique characteristics. It has a dual character.

First of all, the ICTY has two controversial objectives as defined by the Security Council. According to the relevant Security Council Resolutions, the first objective of the ICTY is “to put an end to such crimes (violations of international humanitarian law) and to take effective measures to bring to justice to the persons who are responsible for them”, while the second objective is “to contribute to the restoration and maintenance of peace” in the former Yugoslavia.\(^{198}\)

---

\(^{198}\) UN Doc S/Res/808 (1993) paras. 8-9 referring the aim of the ICTY to “end the crimes committed and bring persons responsible to justice” and to “contribute to the restoring and maintaining peace”; UN
The first objective seems clear; ICTY is expected to work as a judicial organ. It is expected to function as a purely judicial organ and as a court of law; strictly applying the established law and legitimacy of their decisions shall solely be based upon the rule of law. The ICTY is expected to discharge international criminal adjudication through criminal prosecution of individuals for crimes under international law.

On the other hand, the second objective is not abundantly clear. ‘The restoration and maintenance of peace’ appears to be a statement of the political aim of the Security Council, which is vested with a primary responsibility for the “maintenance of international peace and security” under the Charter of the United Nations (the UN Charter).

It is not clear as to how the ICTY, as a judicial organ, is expected to contribute to this end. On its face, this second objective does not seem consistent with the first objective.

S/Res/827 (1993), paras. 5-7; adding the goal of “ensuring that such violations are halted and effectively redressed”; UN S/Res/955 (1994) paras. 6-7, refers an additional goal to “contribute to the process of national reconciliation”, First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/49/342-S/1994/1007 (1994) paras. 12-16, included the goals of bringing to justice the persons who are responsible for crimes perpetrated in the former Yugoslavia; “to contribute to ensuring that such violations of international humanitarian law are halted and effectively redressed; to restore rule of law and to contribute to the restoration and maintenance of peace as well as promoting reconciliation and restoring true peace”; UN Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, U.N. Doc. S/2004/616 (2004) para 38, “The United Nations has established or contributed to the establishment of a wide range of special criminal tribunals. In doing so, it has sought to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity of victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.”; Multiple goals pursued by the ICTY and other ad hoc tribunals; see Minna Shrag, ‘Lessons Learned from ICTY Experience’, Journal of International Criminal Justice, 2004, Vol.2, p.428. On the contrary, the ICC Statutes does not offer much guidance on the goals the ICC should achieve. There is only reference in the preamble of the ICC Statue where is states “to put an end to impunity for the perpetrators of [war crime, crimes against humanity, genocide, and aggression] and thus to contribute to the prevention of such crimes”. Preamble of the Rome Statute of the International Criminal Court; M.M. Deguzman points out that “The ICC’s core selectivity problem is that the Court lacks sufficiently clear goals and priorities to justify its decisions”, M.M. Deguzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’, Michigan Journal of International Law, 2012, Vol.33, p.267

Article 24 (1) of the UN Charter provides the following:

“[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”
The second aspect of the dual character of the ICTY concerns its independence. On the one hand, it has been asserted that the ICTY is ‘subsidiary’ to the Security Council since it was created by the Council, and its basic powers are established by the Council. On the other hand, however, it has been stressed that the ICTY must possess a high degree of independence as a judicial organ vis-à-vis the Security Council. To demonstrate this independence of the ICTY, judges are empowered to legislate for the rules of procedure and evidence. Empowering the judges with legislative powers is unusual under national jurisdictions. Furthermore, it is arguable whether the Security Council is competent under the UN Charter to confer legislative power upon the judges of the ICTY.

The third aspect in terms of the dual character of the ICTY derives from the fact that it is an international organisation and at the same time a criminal court. As an international organisation, the ICTY acts on the international plane where the principles of international law, which are essentially consensual and non-compelling, prevail, while as a criminal court it relies upon principles of domestic criminal law, which are essentially mandatory and compelling. As a result, there may be a situation where the ICTY issues binding orders compelling states to comply which would be perceived as intrusions on their sovereignty. The binding order may include an order to produce evidence or to arrest, detain and transfer a suspect. If the ICTY or other non-state entities, such as the UN Peace Keeping Forces or the NATO Forces acting upon the request of the ICTY, arrest individuals bypassing a state, this action would be perceived by the state concerned as a serious intrusion on its sovereignty. The cooperation regime that controls the relationship between ICTY and states, international organisations, and individuals is often explained in terms of ‘vertical’ vs ‘horizontal’ or ‘supra-state’ or ‘inter-state’. Vertical cooperation regime can be found at Article 29 of the ICTY Statue and it defines the relationship between ICTY and states distinctive from the voluntary cooperation relationship typically exists between the states which respect the state’s sovereignty. As seen later in this Chapter, the power of the ICTY and its vertical relationship with states derives from the UN Security Council’s power acting under Chapter VII of the UN Charter. According to this power, the obligations of the states to cooperate with the ICTY are mandatory and

---

200 See Article 15 of the ICTY Statute and Article 14 of the ICTR Statute.
201 See for example, the arrest of Slavko Dokmanović by the United Nations Transitional Administration for Eastern (UNTAE) on 27 June 1997.
202 SFOR (Stabilization Force) or IFOR (Implementation Force) in Bosnia and Hercegovina are examples of this.
all-encompassing. These obligations include the power of the ICTY Prosecutor to conduct on-site investigation and to subpoena witnesses.\textsuperscript{203}

What can be said from the above observations is that the ICTY possesses a dual character, and that its dual functions often contradict each another. The dual character of the ICTY draws a distinctive trajectory on the discharge of critical functions of the ICTY such as evidence-gathering or the arrest of the accused.

\section*{3.3 Evidence-gathering by the ICTY}

\subsection*{3.3.1 Reliance on states}

As a criminal court, the ICTY lacks sufficient personnel and powers to perform all necessary investigative and prosecutorial activities on its own, and thus it requires assistance from external entities, such as states or international organisations, in order to function effectively. This becomes particularly pertinent in the evidence-gathering and the arrest of accused persons.\textsuperscript{204} This fact may seriously hamper the Prosecutor’s investigative efforts when the state or other actors, from whom the ICTY has to seek cooperation, are unwilling to cooperate with the ICTY for one reason or another.\textsuperscript{205}

\begin{thebibliography}{9}


\bibitem{205} These are common problems of contemporary international tribunals. In this respect, the post-WWII tribunals in Nuremberg and Tokyo operated under obviously different circumstances. These tribunals bore no significant need for legal assistance from states or other entities. The accused and evidence were in the

\end{thebibliography}
3.3.2 Two modes of evidence-gathering

3.3.2.1 Evidence-gathering by the ICTY

The Rules of Procedure and Evidence (RPE) of the ICTY provides that all the evidence that is to be presented at trial must be collected by the parties to the proceedings, namely, the Prosecutor and the Defence. The judicial branch of the ICTY, i.e., the Chambers, may also play a certain role in assisting the parties with that task, but this role is minimal in comparison to the autonomous evidence-gathering by the parties. For the purposes of this study, ‘evidence-gathering’ is examined from a broad perspective. It includes all investigative activities aiming to collect information that supports the respective positions of the parties to the proceedings and may assist the Chamber in establishing the guilt or innocence of the accused. The taking of testimony from an eyewitness, the seizure of documents clarifying the chain of command, the obtention of videotapes of events or interrogations, the exhumation of mass graves, on-site inspections, etc., are the examples of evidence-gathering. Evidence-gathering also includes the service of judicial documents, such as search warrants or summons to appear for a witness, if the ulterior objective of this service is the collection of evidence.\(^\text{206}\)

3.3.2.2 Coercive and non-coercive instigative measures

The evidence-gathering conducted by the ICTY necessarily encompasses the use of coercive measures, as in the national criminal investigations. The statutory legal instruments of the ICTY, however, do not define what constitutes ‘coercive measures’, and do not distinguish them from ‘non-coercive measures’. The ICTY Prosecutor’s power of applying coercive measures was confirmed in the jurisprudence of the ICTY. At the hands of the Allied Powers, which were responsible for the establishment of the Nuremberg and Tokyo tribunals.

\(^{206}\) In the case of the Nuremberg Trial, the prosecutors could rely on the results of the War Crimes Commission, intelligence information, gathered by the Allies as well as evidence that was gathered by national committees for the investigation of war crimes and tribunals. K. Ambos and S. Bock, ‘Procedural Regimes’ in Luc Reydams, Jan Wouters, and Cedric Reyngaert (eds.), International Prosecutors, Oxford University Press, 2012, p. 493; George Ginsburgs and Vladimir Nikolaevich Kudriavtsev (eds.), The Nuremberg Trial and International Law, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1990, p.73.

\(^{206}\) G. Sluiter, Collection of Evidence, p.7.
The ICTY Chamber held that, the execution of coercive measures is “perfectly within the powers of the Prosecution provided for in the Statute.”

In practice, the powers of the ICTY Prosecutor to take coercive measures are broadly formulated and their use is less restricted compared to the national criminal justice system. The primary functions of coercive measures in criminal investigations are to serve for the ‘truth-finding’ and to support the administration of justice. Furthermore, coercive measures may also be taken to safeguard the execution of sentences, or to prevent additional crimes from being committed, or to seize the properties of the accused (or suspects) for the purposes of compensation to the victim, in the event that such persons were to be convicted. Coercive measures are, however, by nature intrusive investigative acts that infringe the rights and liberties of the suspect (accused) or third person and, are applied ‘in defiance of the will of the person’. In the national system, the use of coercive measures is restricted by setting certain thresholds or by imposing substantive requirements that prosecutor must fulfil in order to resort to such measures. The justification for the extensive use of coercive measures by the ICTY is often argued that they are necessary corollary of the fact that the Tribunal lacks its own policing and enforcement powers. The exercise of this power by the ICTY, however, is not unlimited and must be placed under certain conditions and limitations. The limit of ICTY’s Prosecutor’s exercise of coercive measures will be discussed in the subsequent section ‘3.8. Limits to Powers’ of the current Chapter.

---

207 Prosecutor v. Kordić and Čerkez, ICTY, Decision on the Defence Motion to Suppress Evidence, 25 June 1999, Case No. IT-95-14/2, p.6. In this particular situation, no search warrant had been obtained from the authorities of Bosnia and Herzegovina, but a search warrant had been issued by the ICTY judge prior to the search operation. The SFOR international forces provided assistance on the execution of the search warrant.

208 Ibid., See also Rule 105 ‘Restitution of Property’ of the ICTY RPE.


210 Ibid.

211 K. De Meester, The Investigation Phase in Int’l Criminal Procedure, p.461. Meester cited the interview of OTP staffs at the ICTR, who claims that ‘a broad formulation of coercive powers is necessary: one reason is to give the Prosecutor with greater prospects of getting reasonable access to member states, another reason is the type of criminality that the international criminal tribunals are dealing with: complex investigation and participation of at the highest level of state’ Footnote 1 of K. De Meester, The Investigation Phase in Int’l Criminal Procedure, p.461.
3.3.2.3  Direct enforcement vs request for judicial assistance from states

In the case of national investigations, part of the evidence may be located outside the geographical jurisdiction of the court. In the case of the ICTY, it must operate under difficult circumstances. Alleged crimes that are subject to the ICTY investigations were committed outside the territory where the ICTY is located. The ICTY Prosecutor therefore must seek almost all the evidence located in the territories of the states other than the seat of the Tribunal. There are two choices for the ICTY to obtain evidence in this circumstance; 1) obtaining the evidence directly through on-site investigations in the territory of the states concerned, or 2) having others, *i.e.*, state authorities obtain the evidence for the ICTY. Both methods of evidence-gathering require assistance by the states, albeit of a very different nature.

In the case of on-site investigations, the assistance provided by the states is generally confined to ‘condoning’ the presence of investigators of the ICTY in their territory and allowing them to conduct investigations without interference. This ‘passive’ form of assistance differs considerably from the ‘active’ legal assistance where states or international organizations actively gather evidence on behalf of the ICTY.212 However, there is uncertainty regarding to what extent a state must assist the ICTY in the collection of evidence. In other words, it is uncertain to what extent the power of the ICTY extends over the state to this end. Regarding this, the ICTY Chamber finds that the Prosecutor shall, ‘normally’ rely on the cooperation of the competent state authorities except when the Prosecutor is authorized by national law or special agreement to execute the coercive measures directly on the territory of the state.213

In practice, the ICTY Prosecutor operates on a dual cooperation regime in its relationship with states; one is ‘vertical’, which applies to the ICTY’s relationship with states of the former Yugoslavia, and the other one is ‘horizontal’ which applies to the ICTY’s relationship with states other than former Yugoslav states.214 The dual cooperation regime is clearly demonstrated in the practice of the ICTY Prosecutor in the following example; when applying coercive measures such as search and seizure operations, the ICTY

212 G. Sluiter, Collection of Evidence, p. 8.
213 Blaškić subpoena AC Decision, para.53 and 55.
214 As far as the former Yugoslav states are concerned, the obligation to cooperate with the ICTY is further substantiated by Article IX of General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton, Ohio, 02 November 1995. (Hereafter: the Dayton Peace Agreement)
Prosecutor does not normally request for a judicial warrant or an order to the Chamber. Such requests are directed to the national authorities instead. The exception is where the cooperation by the national authorities could not be ascertained. In such a situation, the Prosecutor first obtains a judicial warrant from the ICTY Chamber to conduct a direct on-site investigation on the territory of such states. This is mostly pertinent to the cases of the former Yugoslavia. In relation to states or entities of the former Yugoslavia, coercive measures are executed directly by the ICTY Prosecutor after having obtained the authorization from a Judge of the ICTY.

3.4. Structure of this Chapter

The subsequent discussions of this Chapter will proceed in the following manner; it will examine first the procedural legal source that empowers the ICTY’s investigators to conduct investigative activities and the restrictions of these power. Once the source of the power of the ICTY investigation is established, the second question is the precise content of this power. The questions must be examined to answer whether the substantive power of the ICTY concerning evidence-gathering is sufficient for its effective functioning as a criminal court? ‘Effective functioning’ in this context means that the ICTY possesses enough investigative power to gather evidence to determine the guilt or innocence of the accused. The question also relates to whether the ICTY should have at its disposal sufficient tools to satisfy its ‘needs’ in terms of evidence-gathering. This study holds a view that the quality and sufficiency of evidence being collected by the ICTY Prosecutor are framed and conditioned by the legal frame applicable to the ICTY investigations.

Once the procedural framework of the ICTY investigation is set, the discussion will then proceed to a substantive legal framework that defines type of crimes being dealt with by the ICTY Prosecutor, i.e., crime of genocide. The examination of substantive legal elements required to prove the crime of genocide is essential as these elements guide and determine the types of evidence that the Prosecutor will seek during the course of his/her investigations.

---

216 *Ibid.*. The ICTY Manual on Developed Practices also confirms that the practice of requesting judicial authorization to execute a search or seizure operation happens only “in areas protected by uncooperative local authorities”, UNICRI-ICTY, ICTY Manual, p.18.
3.5. Legal Source of ICTY Investigations

3.5.1 Article 25 of the UN Charter
The ICTY was established as a subsidiary organ of the UN Security Council by UN SC Resolution 808 as an enforcement measure under Chapter VII of the UN Charter. As such, the binding nature of the Security Council resolution on UN Member States under Article 25 of the UN Charter provides the basis for the binding nature of the ICTY’s decisions. Article 25 of the UN Charter reads as follows:

“[t]he members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

The source of the binding powers of UN SC Resolutions stems from the agreement of the Member States of the UN to accept and carry out the decisions of the Security Council.

On this point, Delbrück claims that:

“[a] decision under Art. 25 is not the sum total of individual wills but an act by an organ which is to be binding upon all UN members no matter what position is towards the particular decision”.

The binding nature of the Security Council’s resolution under Article 25 was also unequivocally confirmed by the International Court of Justice (ICJ) in the Namibia case:

“[w]hen the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations which are not members of the Council. To hold otherwise would be to deprive this

217 Article 25 of the UN Charter.
219 Ibid.
When it comes to the question of to whom this binding force of Article 25 extends, the situation is a little more complex. There is no doubt that such power extends to the UN Member States. Concerning non-member states, Delbrück finds that it does extend to the UN non-member states as well, albeit with the limitations contained in Article 2 (6) of the UN Charter. Article 2(6) provides that the UN has authority to ensure that non-member states act in accordance with principles laid down in Article 2 of the UN Charter insofar as it may be necessary for the maintenance of international peace and security.

This binding power under Article 25 of the UN Charter is substantiated in Article 29 of the ICTY Statute, which obliges states to cooperate with the ICTY. The Appeals Chamber in the Blaškić subpoena Appeals Decision held that by virtue of Article 25 and Chapter VII of the UN Charter, “obligation to lend cooperation and judicial assistance to the International Tribunal” under Article 29 of the Statute shall be imposed upon “all States.” According to the Appeals Chamber:

“[t]he exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be ‘ordered’ either by other States or by international bodies.”

The Appeals Chamber further found that Article 29 of the ICTY Statute imposes “an obligation on Member States towards all other Members” or in other words, an

---


221 Article 2 (6) of the UN Charter provides the following:

“[t]he Organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”

222 J. Delbrück, Article 25, p.414.

223 As far as the former Yugoslavia is concerned, the obligation to cooperate with the ICTY is further substantiated by Article IX of the Dayton Peace Agreement (General Framework Agreement for Peace in Bosnia and Herzegovina), Dayton, Ohio, 2 November 1995.

224 Blaškić, subpoena AC Decision, para 26.

225 Ibid.
“obligation erga omnes partes” as opposed to “obligation erga omnes”. The Appeals Chamber further paid attention to the difference between the obligations derived from Article 29 of the Statute and the obligations derived from the Dayton Peace Accord of December 1995 which are incumbent upon the states and entities of the former Yugoslavia only.

In the practice of the ICTY, the Blaškić subpoena case raised the question whether it is competent to issue a subpoena, i.e., an order with a threat of sanction in the case of non-compliance, to a state or to state officials. The decision of the ICTY Appeals Chamber was that while the Tribunal could issue subpoena against private individuals, it could not apply or address subpoena to states or to state officials who are acting in an official capacity. The Appeals Chamber advanced two grounds for the reasoning of this conclusion; first, it found that the ICTY does not possess any power to take an enforcement measure against the states. This power rests with the UN Security Council. Second, under current international law, states cannot be subject to criminal sanctions.

3.5.2 Constituent legal instrument
The primary legal source of the ICTY investigation is its constituent instrument; the Statute of the ICTY. The Statute of the ICTY was adopted as an annex to UN Security Resolution 827. Together with the Rules of Procedure and Evidence (RPE), the ICTY Statute constitutes the ICTY’s principal legal framework.

The ICTY Statute contains 34 articles. Out of these 34 articles, 20 are relevant when it comes to defining the power of the ICTY. These 20 articles fall into four categories: 1) articles pertaining to the primary jurisdiction of the ICTY, i.e., ratione materiae, ratione personae, ratione loci and ratione temporis; 2) articles defining the power of the ICTY in their external relationship, i.e., relationship with states and state organs such as national judicial organs; 3) articles regulating the relationship between internal organs of the ICTY, i.e., the Chambers, the Office of the Prosecutor, and the Registry; and 4) articles relating to the relationship with other organs of the UN, i.e., the UN General Assembly. In terms of the investigative powers of the ICTY Prosecutor, the following provisions are

226 Ibid.
227 Blaškić, subpoena AC Decision, para. 29.
228 Blaškić, subpoena AC Decision, para. 46.
229 Ibid. para. 25.
pertinent: those concerning the primary jurisdiction, the power of ICTY’s external relationship, and the internal relationship between ICTY organs.

3.5.2.1 Primary jurisdiction

The primary jurisdiction, in the context of the ICTY, is equivalent to the power to exercise judicial functions with limitation in terms of time, space, person, and subject matter.230

In this respect, Article 1 of the ICTY Statute reads as follows:

“[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”231

Similarly, Article 1 of the Statute of the ICTR, a sister organization of the ICTY, states the following:

“[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.”232

There are differences between the two Statutes in terms of the scope of personal, temporal and territorial jurisdictions.

---

230 Blaškić subpoena AC Decision, para. 28; see also ICTY, Prosecutor v. Tadić, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 02 October 1995, Case No. IT-94-1, para.10. (Hereafter: Tadić, jurisdiction AC Decision)

231 Article 1 of the ICTY Statute.

232 Article 1 of the ICTR Statute.
3.5.2.2 Personal jurisdiction

Regarding personal jurisdiction, the ICTY and ICTR Statutes contain different definitions. Both the ICTY and the ICTR have jurisdiction over natural persons. 233 The difference, however, lies in terms of the extent of nationality of those who become subject to prosecution by the tribunals. While Article 1 of the ICTY Statute places no limitation as far as nationality is concerned, Article 1 of the ICTR Statute sets two additional criteria, namely 1) those (regardless of nationality) who committed crimes under the jurisdiction of the Tribunal within the territory of Rwanda, and 2) Rwandans who committed the crimes within the jurisdiction of the Tribunal in the territory of the neighbouring states.

An important point in relation to the personal jurisdiction is the legal basis under which individuals are bound by the orders/decisions of the ICTY. The power to issue binding orders to individuals is critical for the ICTY in conducting investigations. As has already been discussed, the enforcement measure taken by the Security Council under Chapter VII of the Charter is binding on Member States pursuant to Article 25. Article 25, however, expresses the binding nature of the Council’s Resolution only on ‘states’. It is disputable whether the binding power under Article 25 also extends directly to individuals as opposed to states. 234

The practice of the Security Council suggests that, albeit unusual, it is not a totally new situation for the Council to take a measure that directly affects individuals, as opposed to measures affecting states. For example, on 31 March 1992 the Council passed Resolution 748 requesting Libya to hand over two Libyans who were suspected of having placed a bomb on a Pan American airliner which exploded over Lockerbie, Scotland. In the resolution, the Council stated the following:

“[the Security Council] determined […] the failure by the Libyan Government to demonstrate by concrete actions its renunciation of

233 According to the UN Secretary General’s report, juridical persons are not included in the personal jurisdiction of the Tribunal. The report stresses the individual criminal responsibility irrespective of their official positions in terms of commission of war crimes and states the following: “[t]he criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups” UN Doc S/25704, paras. 50-51.

234 In relation to this point the Appeal Chamber Decision on Blaškić subpoena case concluded that the Tribunal has an ‘inherent’ power to enter into direct contact with individuals when this is required for evidence gathering purposes. Blaškić, subpoena AC Decision, para.55.
terrorism and in particular its continued failure to respond fully and
effectively to the requests in Resolution 731[to hand over the suspects]
constitute a threat to international peace and security. 235

In the Lockerbie case, the ICJ found prima facie that Resolution 748 is intra vires and
rejected Libya’s application for provisional measures.236

3.5.2.3 Temporal, Territorial jurisdiction

Those articles delimiting the territorial and temporal jurisdiction of the ICTY demonstrate
its ad hoc nature. In comparison with the ICTR, there are substantial differences in the
actual scope of temporal jurisdiction.

The ICTR Statute confines its temporal jurisdiction to the period between 1 January 1994
and 31 December 1994. The relevant provision reads:

“[t]he temporal jurisdiction of the International Tribunal for Rwanda
shall extend to a period beginning on 1 January 1994 and ending on 31
December 1994.” 237

Thus, the ICTR’s jurisdiction does not extend to any crimes committed beyond 31
December 1994.

The ICTY Statute, on the other hand, provides an open-ended jurisdiction for the ICTY.
Article 8 of the ICTY Statute provides that:

“[t]he temporal jurisdiction of the International Tribunal shall extend to
a period beginning on 1 January 1991.” 238

236 ICJ, Lockerbie case (Libyan Arab Jamhiriya v. United Kingdom), Provisional Measures, Order of 14
April 1992, 3 ICJ Rep., para.16. (Hereafter: Lockerbie, ICJ Provisional Measures)
237 Article 7 of the ICTR Statute.
238 Article 8 of the ICTY Statute.
ICTY has thus jurisdiction to any time after 1 January 1991. This open-ended temporal jurisdiction of the ICTY is important for the ICTY Srebrenica investigation which will be discussed at the Case Study, since the Srebrenica events concerned took place after the establishment of the ICTY.

In terms of territorial jurisdiction, as opposed to temporal jurisdiction, the ICTY Statute takes more restrictive approach. The first part of Article 8 of the ICTY Statute reads as follows:

“[t]he territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters.”

Meanwhile, Article 7 of the ICTR Statute states:

“[t]he territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.”

3.5.2.4 Subject-Matter jurisdiction

In terms of subject-matter jurisdiction, the ICTY Statute enumerates four categories of offences: 1) Grave Breaches of the Geneva Conventions of 1949 (Article 2); 2) Violations of the Laws and Customs of War (Article 3); 3) Genocide (Article 4); and 4) Crimes against Humanity (Article 5).

---

239 The UN Secretary General’s report makes the following remarks

“[t]he Secretary-General understands this [‘since 1991’] to mean anytime on or after 1 January 1991. This is a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no indictment as to the international or internal character of the conflict is being exercised.”

UN Doc S/25704, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 03 May 1993, para.63. The temporal jurisdiction of the ICTY will end on a date to be determined by the Security Council.

240 Article 8 of the ICTY Statute.

241 Article 7 of the ICTR Statute.
The ICTR Statute excludes the ‘Grave Breaches of the Geneva Conventions of 1949’. Grave Breaches of the Geneva Conventions of 1949 may only be prosecuted in international armed conflicts. It is arguable that, by excluding this category of offence, the UN Security Council applied a *prima facie* characterization on the nature of the conflict in Rwanda as being ‘internal’ as opposed to ‘international’ which may invoke the involvement of international players in the Rwandan conflict.

3.5.2.5 *Articles defining the external powers of the ICTY*

These provisions are crucial for the investigative power of the ICTY. The external power envisaged in the ICTY Statute is three-fold; 1) the power over states; 2) the power over national courts; and 3) the power of the ICTY to issue binding orders to individuals.

Concerning the first, Article 29 of the ICTY Statute (Article 28 of the ICTR Statute) provides the obligation of states to cooperate with and to extend judicial assistance to the ICTY. Section 2 of Article 29 obliges states to comply with requests/orders issued by the ICTY *“without undue delay”* in the areas of:

1. *The identification and location of persons;*
2. *The taking of testimony and the production of evidence;*
3. *The service of documents;*
4. *The arrest or detention of persons;*

---

242 Two questions arise from the foregoing analysis. The first question is whether the Council is exercising a quasi-judicial function in the case of the ICTR by determining *a priori* the conflict in Rwanda being internal in nature. The position of this study is that the Security Council was discharging a quasi-judicial function since determination of the internal conflict inevitably requires scrutiny of legal elements that constitute the internal conflicts and their applicability to the context in Rwanda. In this respect, the Security Council’s act is deemed to be *ultra vires* as it is not vested with judicial functions under the Charter.

The second question is in relation to the determination on *“threat to international peace and security”*. Resolution 955 establishing the ICTR was adopted on 8 November 1994. In the same resolution, the Council determined that the situation in Rwanda constituted a “threat to international peace and security”. Determination of a *“threat to international peace and security”* by the Security Council at the time of adoption of the Resolution 955 was linked to an on-going conflict in Rwanda whose ending was still volatile and unforeseeable. By setting a limit on the temporal jurisdiction of the ICTR until the end of 1994, the Security Council *a priori* presumed that a *“threat to peace and security”* in the area would cease to exist by then. This runs contrary to the basic preconditions of Chapter VII measures.
5. *The surrender or the transfer of the accused to the International Tribunal.*

The Statute does not specify, however, in what forms the states should comply with these ICTY requests. It is unclear whether the states must execute the request on their own or whether they should condone the ICTY carrying out on-site investigations within their own territory.

Regarding the second aspect, *i.e.*, condoning the on-site investigation, Article 9(2) of the Statute provides the primacy of the ICTY over national courts:

```
“[t]he International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.”
```

Thus, as far as the ICTY Statute is concerned, the supremacy of the ICTY over national courts is unconditional.

Furthermore, Article 9(2) of the ICTY Statute implies that the ICTY, in a certain circumstance, can exercise a review of decisions made by the national courts. Article 10(2)(b) of the ICTY Statute provides that, as an exception to *non-bis-in-idem* principle, the ICTY may try a person who has been tried by a national court for war crimes, when:

```
“the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.”
```

A provision concerning the power of the ICTY to issue binding orders to individuals can be found in Article 19 (2):

```
[ Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue orders and warrants for the arrest, detention, surrender
```

243 Article 29 of the ICTY Statute.
244 Article 9(2) of the ICTY Statute.
245 Article 10(2)(b) of the ICTY Statute.
This power, however, is conferred only to the Chambers of the ICTY. The Prosecutor
does not possess such power, and accordingly must obtain an order from the Chambers. 247

To summarise the above observations, the articles of the Statutes defining the external
relations of the ICTY provide the source of binding power of the ICTY over states,
national courts, and individuals.

3.5.3 Internal division of powers
A basic principle of the law of international organisations is that one organ of an
organisation may not usurp or interfere with the powers assigned to another organ. There
are articles in the Statute that delimit and regulate the powers of various internal organs
within the ICTY. In terms of internal organs, Article 11 of the Statute provides that
the three organs that constitute the ICTY are; 1) the Chambers; 2) the Prosecutor; and 3) a
Registry. The Prosecutor may not exercise powers which have been reserved for the
Chambers or the Registrar. The question is how to find out whether certain powers have
been reserved for a specific organ of the ICTY, or whether simultaneous exercise is
envisaged.

3.3.3.1 Powers of the Judicial Branch (Chambers)

Pursuant to Article 15 of the ICTY Statute, the judges who are the members of the
Chambers are granted power to adopt the Rules of Procedure and Evidence (RPE). When
the ICTY Statute was drafted, it was felt that it would be best to leave to judges of the
ICTY to regulate the details of the procedure, since there were no suitable sets of rules
that could be referred to as precedents. Article 15 of the ICTY Statute therefore delegates
to judges the power to adopt rules of procedure and evidence for a number of specified
objectives, as well as for ‘other appropriate matters’. 248

246 Article 19(2) of the ICTY Statute.
248 See G. Sluiter, Collection of Evidence, pp.23-24. Article 15 of the ICTY Statute reads the following:
The question that arises here is the exact scope of this delegation. May the judges, through the RPE, claim powers that have not been already attributed to them by the Statute? Although the text of Article 15 of the ICTY Statute is silent on this, it is generally acknowledged that there is a clear hierarchy between the Statute and the RPE. According to Hafner, "Leaving aside the Charter (of the UN), the Statute could [...] be seen as the primary law, the RPE and other instruments drawn up within the Tribunal as secondary law." Due to the rudimentary character of the ICTY Statute, there remain important gaps. The judges of the ICTY have been entrusted with the task of filling these gaps by means of establishing the Rules of Procedure and Evidence. The Statute is meant to be a ‘working’ instrument, leaving much room for further regulation of expected evidentiary rules and unexpected matters. Article 15 of the ICTY Statute reflects the ‘working’ character of the Statute; thus, it allows for extensive interpretation, which is essential for the ICTY’s effective functioning.

Article 19 (2) of the Statute, further implemented by Rule 54 of the RPE, empowers the Chambers to issue, at the request of the Prosecutor, the necessary orders and warrants, including warrants for arrests and surrender. The place of these provisions within the Statutes, as well as the ‘triggering’ role of the Prosecutor, indicate that the issuance of the orders and warrants is reserved for the judicial branch, i.e., the Chambers, of the ICTY.

The Statute, however, does not define the meaning of ‘orders’ and ‘warrants’. In relation to the investigations, for example, it is arguable whether a request to intercept telecommunications, i.e., wiretaps, directed to a state, falls under the powers of the Prosecutor to collect evidence as provided for in Article 18 (2) of the Statute; or does it fall under the exclusive ‘order and warrants’ domain of Article 19 (2) of the Statute? The answer to this question should be given by interpreting these provisions upon consideration of the general principles of law of criminal procedure, as emerging from domestic law of criminal procedure. According to Sluiter, in most national jurisdictions, the prosecutor has no powers or very limited and exceptional compulsory powers. In light of this domestic experience, the domain of powers to take coercive measures should be

"The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the administration of evidence, the protection of victims and witnesses and other appropriate matters."


250 G. Sluiter, Collection of Evidence, p. 25.

251 The ICTY Statute was amended 9 times from its adoption on 25 May 1993 until 07 July 2009.
exclusively reserved for the Chambers, *i.e.*, Article 19 (2) of the ICTY Statute, as opposed to the power that pertains to the Prosecutor.

It is therefore held that, should the ICTY Prosecutor directly requests a state to search premises for evidence without a warrant or order issued by the Chamber, such act is considered in breach of internal division of powers assigned to the organs in the ICTY as it is usurpation of powers assigned to another organ. In the practice of the ICTY, the Prosecutor turns to the judicial branch and applies for a search warrant before a compulsory search operation is conducted. Rule 39 of the RPE provides that the Prosecutor may ‘summon and question suspects, victims and witnesses’. As used here, however, the term ‘summon’ does not create legal obligation of the individual to comply.

3.3.3.2 Power of the Prosecutor

With respect to the power of the Prosecutor, the independence of the Prosecutor is guaranteed pursuant to Article 16 (2) of the ICTY Statute, which reads as follows:

“*[t]he Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.*”

Article 18 (2) of the Statute confers on the Prosecutor the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In discharging these tasks, the Prosecutor may, as appropriate, seek the assistance of the state authorities concerned. Pursuant to this provision the Prosecutor is explicitly empowered to request the state’s cooperation under its own authority to conduct investigations and initiate prosecutions.

Once an indictment is prepared, the Prosecutor shall transmit it to the judge of the Trial Chamber for review. The judge, in turn, confirms the indictment once he/she is satisfied that a *prima facie* case has been established by the Prosecutor (Articles 18 (4), and 19 (1) of the ICTY Statute).

---

252 Article 16 (2) of the ICTY Statute.
253 See for example, Rule 39 of the ICTY RPE.
When the indictment is confirmed, the confirming judge may issue an order at the request of the Prosecutor including warrants for the arrest, detention, surrender or transfer of persons (Article 19 (2) of ICTY Statute). It must be noted that, pursuant to the Statute, it is the Prosecutor who triggers the process of coercive measures such as issuing an order for arrest warrants.

As for the power of the Prosecutor to appeal against the rulings of the Trial Chambers, Articles 25 and 26 of the ICTY Statute provide that the Prosecutor may appeal to the Appeals Chamber on two grounds, namely; 1) an error on a question of law invalidating the decision, or 2) an error of fact which has occasioned a miscarriage of justice.

3.5.4 **Interpretation of the Statutes and the RPE**

The Statute and RPE are the most important explicit legal sources of power to the ICTY. The exact scope of this power, however, depends to a large extent on the interpretation of the provisions in the Statutes and the RPE. How does the ICTY confirm the existence and scope of its power?

Although the Statute and the RPE are not treaties, the jurisprudence of the ICTY suggests that it takes the provisions of the Vienna Convention on the Law of Treaties (‘Vienna Convention’) as a starting point of interpretation. Pursuant to Article 31 of the Vienna Convention, the ICTY Statutes must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in its context and in the light of the object and purpose. According to the Vienna Convention, recourse may be made to the preparatory work of the treaty and circumstances of its conclusion as a supplementary material for the interpretation of the treaty. In the case of the ICTY, the supplementary material for the interpretation of the Statute and the RPE includes the Reports of the UN Secretary General, proposals for the Statute and RPE submitted by Member States and various organisations to the Secretary General, as well as debates at the UN Security Council. In particular, the Report of the UN Secretary General that was adopted together with the ICTY Statute is considered to be a highly authoritative interpretation of the Statute, as it has been ‘approved’ by the Security Council.
In the case of the ICTR, the Secretary General was not requested to draw up a report, since his previous report containing ICTY Statute and commentary already constituted a sufficient blueprint to draw up a Statute for the ICTR.254

In practice, ICTY faced important questions on the interpretation of its own Statute and RPE. In addressing these questions, the ICTY emphasised its own object and purpose in the interpretation of the Statutes. In the Tadić protective measures case, for example, the Trial Chamber defined the objective of the ICTY as; “to do justice, to deter further crimes, and to contribute to the restoration and maintenance of peace.”255

The other objective of the ICTY, to provide fair and effective prosecution, has also been used on several occasions as a justification for an extensive interpretation of the Statute and the RPE. Although such extensive interpretation appears to be tenable, it must be noted that the cardinal rule of the interpretation of international instrument, *i.e.* the ordinary meaning of the text, shall prevail.

### 3.6 Inherent powers

The main source of the power of the ICTY is thus the express provisions of the Statute and RPE. Considering the objective of the ICTY as well as the context in which it was established, these provisions may be interpreted extensively; however, there are limits to extensive interpretation. This brings the discussion to the next level: Can the ICTY claim, in addition to its powers explicitly provided for in the Statutes, the power necessary for its functioning, such as conducting an effective investigation? This is to say, whether the ICTY may invoke so-called ‘implied’ or ‘inherent’ power or not.256

---

254 See G. Sluiter, *Collection of Evidence*, p.26. It should be noted that after the adoption of the ICTR Statute by the Security Council, the UN Secretary General discussed the legal aspects of the ICTR Statute, pursuant to the request by the Security Council. This report of the Secretary General, however, has not been formally approved by the Security Council and therefore has not reached the status of the Secretary General’s commentary to the ICTY Statute.

255 ICTY, Prosecutor v. Tadić, Decision on the Prosecutor’s Motion to Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para 18. (Hereafter: Tadić, protective measures TC Decision)

256 See G. Sluiter, *Collection of Evidence*, p.27.
The Appeals Chamber of the ICTY defined inherent power as follows:

“[the power] that inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged, and its judicial role safeguarded.”

According to the Appeals Chamber, the ‘inherent power’ is not expressly provided for in the Statute but relates to the judicial functions of the ICTY.

In this regard, the International Court of Justice speaks of the ‘inherent’ jurisdiction as follows:

“[it] (the Court) possesses an inherent jurisdiction enabling it to take such action as may be required, on one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute.”

The jurisprudence of the ICTY suggests that the following four categories are considered by the ICTY Chambers as inherent powers of the court:

1. So-called Kompetenz-Kompetenz or la competence de la competence;
2. Power to review judicial findings regarding non-compliance of states;
3. Power to address directly to private individuals who may be of assistance in the task of dispensing criminal justice; and
4. Power to find contempt of the court.

With regard to the investigations, categories 2, 3, and 4 are pertinent.

---

257 Blaškić, subpoena AC Decision, para. 33.
258 Ibid., para 27.
3.6.1 Power to make judicial findings regarding non-compliance of States

In the Blaškić subpoena Appeal Decision, the Appeals Chamber held that the ICTY is not vested with any enforcement powers over the states in the event of non-compliance in accordance with the Article 29 of the Statute.  

The Tribunal is, instead, “endowed with the inherent power to make judicial finding concerning a state’s failure to observe the provisions of the Statute or the Rules.”  

According to the Appeals Chamber; “[the ICTY] must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction.”

Furthermore, the ICTY has the power to report the result of such judicial findings to the UN Security Council, who has power to impose sanctions against non-compliant states. The report from the ICTY informing of the non-compliance of the state shall, however, not run contrary to the report prepared by other fact-finding bodies established by the Security Council, and it shall not contain any recommendations or suggestions as to what actions should be taken by the Council.

3.6.2 Power to address directly to the private individuals who may be of assistance in the task of dispensing criminal justice

This is a critical power in conducting investigations. In the Blaškić subpoena Appeal Decision, the Appeals Chamber mentioned the ‘ancillary or incidental jurisdiction’ of the ICTY, as opposed to the ‘primary jurisdiction’ of the ICTY.

The conceptual difference between the two derives from the different categories of individuals to whom the powers of the ICTY extend. The power of the ICTY in relation to ‘primary jurisdiction’ extends to individuals whom the ICTY prosecutes, whereas the power of the ICTY in relation to ‘ancillary or incidental jurisdiction’ extends to the

---

260 Blaškić, subpoena AC Decision, para. 33 et seq.
261 Ibid.
262 Ibid.
263 Blaškić, subpoena AC Decision, para.36.
264 Blaškić, subpoenaa AC Decision, paras.28 and 48.
individuals who may be of assistance to the ICTY in discharging criminal justice such as investigations.\textsuperscript{265}

According to the Appeals Chamber, under certain circumstances the ICTY may address itself directly to the individual who falls under the ancillary/incidental jurisdiction of the Tribunal. This power is considered to be a part of the ‘inherent powers’ of the ICTY, since without such power the ICTY is “\textit{unable to guarantee a fair trial to persons accused of atrocities (in the former Yugoslavia).}”\textsuperscript{266}

### 3.6.3 The contempt power

As a means of legal remedy in the case of non-compliance by individual persons, the Appeals Chamber also acknowledged ‘inherent contempt power’ to hold such individuals in contempt of the Tribunal. According to the Appeals Chamber, the ICTY may enter into direct contact with a private individual under two circumstances, namely, 1) when it is authorised by the legislation of the state concerned and 2) when the authorities of the state or entity concerned, having been requested to comply with an order of the Tribunal, prevent the Tribunal from fulfilling its functions.\textsuperscript{267}

### 3.6.4 Other sources of international law regulating the power of ICTY

The question here is to what extent different sources of international law, other than the UN Charter and the Statutes and RPE, would govern the activities of the ICTY? And if so, how these sources relate to the ICTY’s ‘primary legal framework’, such as the ICTY Statutes and RPE?

One should consider that, as a starting point, international organisations, including their subsidiary organs, are subjected to international law. A practical application of this view is found in the case law of the Court of Justice of the European Communities, according to which:

\textsuperscript{265} \textit{Ibid.} paras. 28 and 48.

\textsuperscript{266} \textit{Ibid.} para.55.

\textsuperscript{267} \textit{Blaškić}, subpoena AC Decision, para. 57 et seq.
“[…] the European Community must respect international law in the exercise of its powers.”

There is no reason why this should be different for the UN, including the UN Security Council and the ICTY. They should abide by the peremptory norms of international law in all circumstances and respect the rules of international law when they have not been empowered to deviate from these rules.

In addition to customary international law, the question arises as to the applicability of general principles of law and treaties as other sources of international law. General principles of law are also applicable to international organisations and can thus also bind the ICTY. General principles of law relating to criminal law and law of criminal procedure are relevant to the ICTY investigations. As far as treaties are concerned, the ICTY is bound by them insofar as it is a party, or if the UN is a party on their behalf. They may, as a minimum, also bind the ICTY to the extent that they reflect or contain applicable rules of customary law or general principles of law.

At the early stage of the ICTY, however, the Tribunal was reluctant to admit that it is also bound by rules other than those set out in the Statute and the RPE. In the Tadić protective measures case, the Trial Chamber clearly struggled with the question on the sources of law outside the Statute and RPE. The gist of the reasoning of the majority in the Tadić protective measures case appeared to be that the unique character of the ICTY may justify derogation from relevant internationally recognised standards. In a separate opinion, Judge Stephen took a different approach in that he interpreted the ICTY Statute and RPE in a wider context of ‘internationally recognised standards’.

In retrospect, it would seem as though Judge Stephen’s approach received more and more support in the later decisions of the ICTY, where the Statute and RPE are construed more along the line of relevant international law, considering the ICTY’s ‘unique character’. Thus, after initial hesitations, the ICTY gradually took international law more and more into account without, however, explicitly expressing the view that it considers itself bound by international law outside the Statutes and Rules.

---


In the *Erdemović* Appeals Decision, focusing on the legality of the accused’s guilty plea and on duress as a defence under international law, Judges MacDonald and Vohrah – in a separate opinion – found that Article 38 (1) of the ICJ Statute was applicable and examined whether, with a view to the determination on the issue at hand, relevant rules of customary international law and general principles of law could be found.  

In the *Blaškić subpoena* case the Appeals Chamber expressed the following view on the applicability of customary international law to ICTY: it concluded that the ICTY is bound by customary international law; because the rules of customary international law:

“[…] must also be taken into account, and indeed [they] have always been respected, by international organisations as well as international courts.”  

It further ruled that:

“[…] although it is true that the rules of customary international law may become relevant where the Statute is silent on a particular point […] there is no need to resort to these rules where the Statute contains an explicit provision on the matter.”

The rulings mentioned above confirm that the customary international law is applicable and binding in the area where the ICTY Statute and RPE are silent. In terms of the hierarchy of the sources applicable to the ICTY, customary international law plays a gap-filling function and is placed lower than the Statute and RPE. It goes without saying, however, that peremptory norms of international law, such as *jus cogens*, occupy the highest place in any hierarchy, even above the Statute and RPE.

### 3.7 Powers to Conduct Investigations

#### 3.7.1 Request for assistance to the states

The Prosecutor of the ICTY oversees the investigations of crimes within the jurisdiction of this institution. The ICTY has adopted mainly adversarial criminal procedures, thereby assigning the task of evidence-gathering primarily to the parties of the procedure. It is

---


271 *Blaškić*, subpoena AC Decision, para.41.

272 *Ibid.*, para.64.
undisputed that the Prosecutor is in charge of his/her own investigation, having no higher judicial authority such as an investigative judge, as is the case in some civil law countries. This function of the Prosecutor is endorsed by Article 18 (2) of ICTY Statute. To this end, the Prosecutor is endowed with important investigative and prosecutorial powers, in that he/she ‘triggers’ a request for assistance to the states. Article 18(2) of the States reads as follows:

The prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.”

The ICTY was created by international law, and as such it is a separate legal system from domestic legal systems. The relationship between these different legal systems, therefore, defines the modality as well as degree to which the ICTY may exercise the power to investigate. With regard to the applicability of international law within domestic legal orders, the basic rule of international law is that states are free in the way they apply and give effect to international law in their national legal orders. Applying this rule to the ICTY, states are in principle free to choose the means and methods to give effect within their national legal order, for example, how to execute the request for assistance from the ICTY to collect certain types of evidence.

As discussed, the legal basis for the power of the Prosecutor to conduct investigations and initiate prosecutions is found in Article 18 of the ICTY Statute. Pursuant to Article 18 (2) of the ICTY Statute, the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In discharging this task, the Prosecutor may, as appropriate, seek assistance of the state authorities concerned. The provision refers to “national authorities”, which suggests that the Prosecutor may choose the appropriate organ within the state to assist his/her investigations. The ICTY Prosecutor’s power to request assistance from the most appropriate state organ sensu stricto does not create the duty of the organ concerned per se to co-operate with the Prosecutor since the obligation to co-operate rests solely with the state, which is an international legal person, and not with the organ which is a component part of the state.

273 Article 18 (2) of the ICTY Statute.
274 See for example, Rule 42 of the RPE with regard to the questioning of the suspect.
Rule 39 of the PRE further clarifies and supplements the powers of Article 18 of the ICTY Statute. Pursuant to Rule 39 (ii), the Prosecutor is authorized the following:

“to undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including taking of special measures to provide for the safety of potential witnesses and informants.”

Based on Rule 39 (iii), the ICTY Prosecutor may, in addition to seeking assistance from state authorities, also seek assistance from any relevant international bodies, including the International Criminal Police Organization (INTERPOL). With respect to those powers provided for in Rule 39 of the RPE, which is not part of the Statute, the question arises as to what extent such attribution is in conformity with the ICTY Statute. In this regard, Morris and Scharf express the view that this attribution by the RPE reflects the notion of implied powers, stating that the implied power of the Prosecutor ultimately stems from the relevant provisions of the Statute. They argue that Rule 39 of the RPE is linked to the broad power already conferred upon the Prosecutor by Article 18 of the Statute.

The other example of additional power attributed to the Prosecutor by the RPE is Rule 40, pursuant to which the Prosecutor is empowered to request from states, in case of urgency, the provisional arrest of an accused or the seizure of physical evidence. The power to request a suspect’s provisional arrest cannot be tied to the powers attributed to the Prosecutor by Article 18 (2) of the Statute. This power, which is exercised in an emergency only, may however, be considered as being essential for the performance of the Prosecutor. It is argued that the attribution of far-reaching powers in situations of urgency, such as the one envisaged in Rule 40, is essential for the effective functioning of every system of criminal justice. In this regard, Rule 40 is within legal claim of an implied power.

In addition to the above cases, which require direct assistance by states to the Prosecutor, the Prosecutor also possesses the power to apply to (a Judge of) the Trial Chamber for issuing certain requests or orders to states on his/her behalf. This power is attributed to the Prosecutor by Article 19 (2) of the Statute and is further substantiated in Rules 54 of

275 Rule 39(ii) of the RPE.
the RPE. Pursuant to this provision, the Prosecutor may, at any stage of the legal proceeding, apply to the judicial branch for orders and warrants:

“as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.”  

It has to be noted that this power of the Prosecutor to request for judicial warrants does not oblige the Prosecutor to abide by this rule.

### 3.8 Limits to Powers

The conditions under which the ICTY Prosecutor may exercise his/her powers, which include execution of coercive measures, and the conditions under which he/she may issue a request for legal assistance, are hardly defined in the legal frameworks of the ICTY. One should look therefore at other sources of international law governing, and thus limiting, the exercise of the powers attributed to the Prosecutor. The ICTY is obviously bound by international law, unless the Statute clearly deviates from it.

#### 3.8.1 Statutes and RPE

When looking at the relevant provisions in the Statute, the power attributed to the Prosecutor seems almost limitless. Article 18 (2) of the Statute empowers the Prosecutor *inter alia* to collect evidence, but it does not stipulate under which conditions the Prosecutor may do this. The same applies to Rule 39 of the RPE, which concerns the ‘Conduct of Investigations’. On its face, these provisions appear to cover wide range of requests for assistance, even including the ones with coercive measures.

#### 3.8.2 Individual rights

The ICTY is bound to respect human rights. It is bound not only to the human rights set out in the Statutes and RPE, but it is also bound to individual rights that are applicable to these organisations by virtue of their character as customary international law or general principles of law.

---

276 Rule 54 of the RPE.
3.8.2.1 Judicial authorization

The extent to which internationally protected human rights may affect the exercise of powers by the Prosecutor is well illustrated by an example where the Prosecutor requests a state to search private premises for evidence. A search of an individual person’s home infringes upon that person’s right to respect for his or her home, as protected by Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the European Convention on Human Rights (ECHR). These provisions, however, allow for infringements upon these rights as long as they are in accordance with the law and not arbitrary. The European Court of Human Rights, in the cases of Funke v. France and Camenzind v. Switzerland, dealt with the questions as to when a search is in accordance with the law and not arbitrary, in particular whether or not judicial intervention is required in authorising the search. In both cases, the European Court of Human Rights dealt with the power attributed to law enforcement officials to conduct searches, without prior judicial authorisations. In both cases, the Court emphasised the importance of legal safeguards for the individual whose premises are being searched for evidence. The legal safeguards may be set out in detail in legislation. In the Funke case, the Court ruled that:

[... in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law [...] appear too lax and full of loopholes for the interference with the applicant’s rights to be lawful. 277]

Likewise, in the case of Camenzind, the European Court, in considering whether the interference with Mr. Camenzind’s rights to the inviolability of his home was justified under Article 8 (2) of the ECHR, did require that coercive measures, such as searches, must always have judicial authorisation. The Court, however, ruled that:

“notwithstanding the margin of appreciation which the Courts recognises the Contracting States have in this sphere, it must be particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant. If individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 8, a legal framework and very strict limits on such powers are called for” 278

In the case of *Kruslin v. France*, dealing with wiretaps, the European Court offered some guidance as to the nature of legal safeguards applicable to infringements upon individual rights. The Court ruled that when national authorities have the power to infringe upon individual rights, domestic law, written and unwritten, should:

“indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.”

How do these findings apply to the exercise of powers by the Prosecutor of the ICTY? It is true that the *Funke* and *Camenzind* cases decision found that judicial authorisation of searches is not required in all cases. However, the European Court emphasised in the *Funke, Camenzind*, and *Kruslin* cases that sufficient legal safeguards, *inter alia* detailed legislation regulating the conduct of a search, must exist ‘with reasonable clarity’. In the case of the ICTY, sufficient legal safeguards are not provided for in the Statutes or RPE. An adequate legal safeguard may exist at national level regulating the conduct of law enforcement officials to conduct the search at the request of the national prosecutor, but such safeguards are difficult to enforce in the case of a search conducted by the Prosecutor of the ICTY. In the absence of detailed norms safeguarding the search and offering adequate legal protection to the individual, it is argued that the Prosecutor of the ICTY should, under international human rights law, obtain a judicial decision from the Chambers to request assistance from states, which may prompt the use of coercive process such as searches or interception of telecommunications. The Chambers intervention safeguards the required legal protection of individuals and prevents the potential abuse of power by the ICTY Prosecutor. De Meester further claims that a combined reading of Rule 39 (vi) and Rule 54 of the RPE leads to conclude that a warrant from a Trial Chamber or a Judge ‘is necessary for the conduct of the investigation’ by the ICTY Prosecutor.

In practice, however, the ICTY Prosecutor does not normally request for a judicial warrant or an order to the Chamber. Such requests as the execution of coercive measures are directed to the national authorities instead. The exception is where the cooperation by the national authorities could not be ascertained. In such a situation, the Prosecutor

---

first obtains a judicial warrant from the ICTY Chamber. This is mostly pertinent to the cases of former Yugoslavia. In relation to states or entities of the Former Yugoslavia, coercive measures are executed directly by the ICTY Prosecutor after having obtained the authorization from a Judge of the ICTY.

3.8.2.2 Principles of proportionality – necessity - specificity

These principles stem from international human rights law that coercive measures which restrict fundamental rights of individuals should be in service of ‘a sufficiently important objective’ and the degree of restriction should not exceed what is ‘necessary to accomplish the objective’. It also accompanies with the principle of subsidiarity which dictates that coercive measures can only be relied upon when less intrusive measure would not suffice.

In the Stakić case, Trial Chamber clarified what is meant by ‘the principle of proportionality’. By the Chamber, coercive measures are considered proportionate only if they are, 1) suitable, 2) necessary, and 3) their degree and scope are in a reasonable relationship to the envisaged target.

The necessity principle demands that the application of coercive measures should be strictly for the purposes of obtainment of evidence. In addition, the material being sought must be relevant to the investigation and subsequent prosecution (requirement of relevancy) and not entail a ‘fishing expedition’ (requirement of specificity).

3.8.3 General principle of law of criminal procedure

All international criminal tribunals, including their organs, are bound to apply and respect general principles of law. General principles of law of criminal procedure, as they arise

282 Ibid., The ICTY Manual on Developed Practices also confirms that the practice of requesting judicial authorization to execute a search or seizure operation happens only “in areas protected by uncooperative local authorities”, UNICRI-ICTY, ICTY Manual, p.18.
285 ICTY, Prosecutor v. Stakić, Order to the Registry of the Tribunal to Provide Documents, 5 July 2002.

131
from various national legal systems, are particularly relevant in this respect. To a certain extent, general principles of law of criminal procedure are already incorporated in international human rights instruments. However, in addition to these human rights principles, rules of conduct for the Prosecutor may be formulated based on general principles of law.

There are neither detailed codes of professional conduct, nor similar regulations in the legal framework of the ICTY. This does not mean that the Prosecutor may conduct his/her activities including the issuance of requests for assistance arbitrarily. ‘Rules of conduct’ deriving from general principles of law are applicable to the Prosecutor and binding on his/her office. To identify these ‘rules of conduct’ a comparative analysis of domestic systems is necessary. Such comparative analysis, which falls outside the scope of this study, would reveal a number of basic rules relating to matters such as the use of force, confidentiality, integrity and impartiality. The rules were codified in general terms by the UN General Assembly as a Code of Conduct of Law Enforcement Officials in 1979. This provides a basic guideline to carry out a comparative analysis of various legal systems.

In the Barayagwize case, the ICTR Appeals Chamber made it clear that the Prosecutor is in her activities bound by due diligence standards. The examination of these standards focused in this case on the duties of the Prosecutor to ensure respect for the rights of a suspect and an accused. However, ‘due diligence standards’, based on general principles of law, could be used by the ICTY to develop rules of conduct for the Prosecutor that would go beyond the protection of individual rights.

In practice, the Prosecutor of the ICTY demonstrated awareness of the applicability of the general principles of criminal procedure that govern his/her conduct. For example, in a Rule 7bis application related to grant the Prosecutor access to Kosovo in order to conduct investigations, the Prosecutor herself expressed the view that she could not initiate investigations arbitrarily or capriciously. She acknowledged the applicability of these general principles to her conduct.

3.9 Specific Investigative Measures

3.9.1 Interviewing witnesses
3.9.1.1 Definition of witness

Again, there is no clear provision found at the ICTY’s legal documents defining who is a ‘witness’. Rule 90(B) of the RPE indirectly suggests that a witness is someone who
'reports the facts of which [he or she] has knowledge’. The RPE nevertheless makes a distinction between ‘expert witnesses’ and ‘fact witnesses’. ‘Expert witnesses’ are those testifying in their field of expertise, while ‘fact witnesses’ are those who testify about the events they saw, i.e., eye-witnesses, or those who obtained the knowledge indirectly, i.e., hearsay witnesses. The third category of witnesses is ‘threatened witnesses’. ‘Threatened witnesses’ are ‘fact witnesses’ who have good reason to fear violent reprisals due to their testimony. This category of witnesses includes ‘insider witnesses’ who have worked closely with or in the same organisation as an accused, and who may give valuable information on the conduct of the accused. Witness statements are one of the primary sources of evidence for the ICTY Prosecutor: reliance on ‘insider witnesses’ is crucial for the investigation of senior political and military leaders.

3.9.1.2 Power of the Prosecutor to interview witnesses

Article 18(c) of the Statute confers upon the ICTY Prosecutor the power to interview witnesses during an investigation. The question here is; whether individuals are obliged to cooperate with the ICTY Prosecutor or not pursuant to this provision? The question was dealt with at the Blaškić subpoena case. In the judgement of Blaškić subpoena case, the ICTY Appeals Chamber held that, pursuant to Article 18(2) of the Statute, as well as from the spirit and purpose of the Statute, the ICTY:

\[\text{has an incidental or ancillary jurisdiction over individuals other than those who the International Tribunal may prosecute and try.}\]

---

287 Rule 94 bis of the ICTY RPE.


The individuals referred to here are those who may be of assistance in the task of dispensing criminal justice entrusted to the ICTY. Pursuant to Rule 39 (i) of the RPE, the Prosecutor may ‘summon and question suspects, victims and witnesses’. There are no conditions set forth in Rule 39 (i); therefore, the Prosecutor does not need to obtain warrant from the Chamber to summon a witness.

In reality, however, to contact the witnesses, the Prosecutor relies on the cooperation of the states where the witness is located, unless 1) the legislation of the state authorises allows the ICTY to enter into direct contacts with private individuals, or 2) the state concerned prevents the ICTY from fulfilling its functions. The examples of the second case is the case of the former Yugoslavia states where, the ICTY Prosecutor does go through official governmental channels in order to identify, summon and interview witnesses.

### 3.9.2 On-Site investigation

#### 3.9.2.1 Definition of on-site Investigations

The Statute and RPE mention ‘on-site investigations’, but they do not define what the term means. Due to lack of a clear definition in the legal framework of the ICTY, reference should be made to the experience and the use of the term in inter-state legal assistance.

#### 3.9.2.2 On-site investigation in inter-state legal assistance

A key rule of international law concerning on-site investigations in the inter-state context is that a state cannot take measures on the territory of another state by way of enforcing

---

292 Blaškić, subpoena AC Decision, para.48. The Appeals Chamber further finds that “Article 29 [of the Statute] also imposes upon states an obligation to take action required by the International Tribunal vis-à-vis individuals subject to their jurisdiction.”

293 Blaškić, subpoena AC Decision, paras. 53, 55. By the Appeals Chamber, 

“[i]n particular, the presence of State officials at the interview of a witness might discourage the witness from speaking the truth and might also imperil not just his own life or personal integrity but possibly those of his relatives. It follows that it would be contrary to the very purpose and function of the International Tribunal to have State officials present on such occasions.”

Blaškić, subpoena AC Decision, para.53.

294 The ICC Statute, for example, does not contain the term ‘on-site investigations’ but instead refers to “investigative steps within the territory of a State Party” (Article 57 (3) (d)) or refers to “direct execution of a request” on the territory of a state (Article 99 (4)).
national laws without the consent of the latter. Individuals may not be arrested, summons may not be served, police or tax investigations may not be carried out, exhumation of bodies of victims and orders for the production of evidence may not be executed on the territory of another state, except under the terms of a treaty between these states or when the state concerned gives consent. In the Lotus case, the Permanent Court of International Justice (PCIJ) confirmed this point as follows:

 [...] the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissible rule to the contrary it may not exercise its power in any form in the territory of another State.

The ICTY Appeals Chamber’s decision on Blaškić subpoena case also confirmed that the binding power does not extend to state officials, with the exception of those officials acting in their private capacity. This restriction relates to the production of documents in the possession of those individuals acting in their official capacity. In the Krstić case, however, the ICTY Appeals Chamber concluded that functional immunity enjoyed by state officials does not extend to the production of evidence that ‘the officials saw or heard in the course of exercising their official functions.’

The general principle of international law is, however, still undisputable: state conducting investigations on the territory of another state without the consent of the latter is violating state sovereignty.

The term ‘on-site investigations’ raises another question; which acts of criminal procedure are considered ‘investigations’? Rule 2 of the ICTY RPE defines ‘investigations’ as:

‘[a]ll activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after an indictment is confirmed.’

According to this definition, acts that are generally referred to as investigative acts, such as the hearing of witnesses or the exhumation of mass graves, or the collection of documents, are all considered to be ‘investigations’. Acts that is closely related to

295 ICTY, Prosecutor v. Krstić, Decision on Application for Subpoenas, Case No. IT-98-33-A, 1 July 2003, para. 27.

296 Rule 2 of the ICTY RPE.

135
investigative acts should also be considered ‘investigations’. For example, the service of judicial documents such as search warrants on the territory of a state is not directly an investigative act, yet it also pursues the investigative purpose.

In light of the above discussions, the four essential components of ‘on-site investigation’ can be summarized as follows: first, it concerns the activities on the territory of a state; second, the activities on the territory of a state must be conducted with the purpose of gathering evidence for international criminal adjudication; the evidence-gathering must be conducted by the parties in the criminal proceedings, i.e., the Prosecutor or the Defence, and by the judicial branch. i.e., the Chambers, or investigative agents working on their behalf, and under their control; finally, it must be conducted with a high degree of autonomy and independence, without influence by domestic authorities.

3.9.2.3 Importance of on-site investigations

On-site investigations offer many advantages for the ICTY Prosecutor when compared to legal assistance offered by a state. The advantages are; more direct access to, and evaluation of, potential evidence, and more transparent judicial control in gathering evidence. This undoubtedly results in yielding more-reliable evidence. From the perspective of the requested states, an on-site investigation on their territory offers the practical advantage of saving resources.

In addition to these advantages, the special character of present-day international criminal tribunals underscores the importance of on-site investigations. The nature of the crimes subject to international investigation is complex and vast. National jurisdictions have little experience in the investigation of such crimes, and this explains why the ICTY often chooses not to rely on national authorities for evidence gathering. To give an example, the exhumation of mass graves and forensic analyses require special expertise that may not be available in the state where the mass graves are located.

Another important consideration is the absence of other alternatives. The ICTY was confronted with states loci delici, which were unable or unwilling to execute requests for assistance. Furthermore, peacekeeping forces deployed in the area where the investigation is taking place were often not equipped to execute legal assistance requests on behalf of the ICTY. In such situations, an on-site investigation by the ICTY is not only a preference, but also a necessity.
3.9.2.4 Search and seizure operations

No explicit provisions specifying search and seizure operations can be found in the Statute or RPE. The power of conducting search and seizure operations derives from Article 18(2) of the ICTY Statute. It is unclear as to what conditions apply particularly in the situation when the Prosecutor enforces search and seizure operation directly without directing a request to such states concerned. In practice, the ICTY Prosecutor holds the original material seized from the relevant authorities as a result of search and seizure operations. This practice was criticized by an ICTY Judge who states that; “[t]he power of seizure of the Office of the Prosecutor is a very powerful weapon in its hands. By seizing material, the OTP denies the accused access to that material. Experience has demonstrated that the results can be deleterious to the rights of the accused.”

3.9.3 Interception of communications

The interception of communications may take different forms and is done covertly without the knowledge of the suspect (or accused) persons. Such measures include, wire taps, video-surveillance and other forms of electronic surveillance. There is no specific reference to the interception of communication can be found in the ICTY statutory documents. The power of the ICTY Prosecutor to resort to the interception of communications derives from the general power to collect evidence pursuant to Article 18(2) of the ICTY Statute.

Interception of private communications interferes with a right to respect to private life and relevant human rights law requires that such measures be taken under clear circumstances and conditions (foreseeability). In light of this, lacunae of ICTY law concerning interception of communications should not be construed that unconditional application of this measure by the ICTY Prosecutor is warranted; such measure must be conducted with a judicial authorization by a judge or the Chamber of the ICTY.

In the case law of the ICTY, the admission of the intercepted evidence which were obtained by states security apparatus and the reliability of the intercepted evidence has played an important role. In the Krstić trial, for example, intercepted communications between the members of the Bosnian Serb Army (VRS) proved to be key elements of the

298 K. De Meester, The Investigation Phase in Int’l Criminal Procedure, p.528
prosecution case. Usually, the intercepted communications are gathered independently by state intelligence agencies who operate in war-like situations outside the ICTY procedural framework.

3.10 Substantive Law – Crime of Genocide

3.10.1 Introduction
In the preceding discussions, procedural rules and the Statute of the ICTY have been examined. The procedural rules and the statute are, however, not the only legal framework that conditions the investigative activities carried out by international prosecutors. Substantive law that defines international crimes and the elements required to charge those crimes is also pertinent as it conditions the types of evidence sought by investigators during the investigation to prove the crime.

There are multiple international crimes that international prosecutors may consider during their investigations. This study will focus, however, on the crime of genocide; this is the crime that was charged and convicted in the Srebrenica case at the ICTY and had the most significant impact on the formation of collective memory on Srebrenica, as will be discussed later in the case study.

3.10.2 The notion of genocide
Often called ‘the crime of crimes’, what makes genocide special category of crime is that it requires dolus specialis, (special intent); specific intent to destroy a national, racial, religious, or ethnic group and as such, in whole or in part, through one of the following categories of criminal conducts:

- **Killing members of the group**
- **Causing serious bodily or mental harm to members of the group**
- **Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part**
- **Imposing measures intended to prevent births within the group**

---

Forcibly transferring children of the group to another group

By Cassese:

when mass slaughter targeting a racial, religious, or ethnical group flares there often is a legal and political battle over whether the term genocide applies because the label conveys a deep condemnation and particular expressive purposes

The term ‘genocide’ comes from the Greek ‘genos,’ meaning ‘race, nation, or tribe,’ and from the Latin ‘caedere,’ meaning ‘to kill.’ Raphael Lemkin, a Polish Jewish jurist, first adopted this term in 1944. Lemkin’s work focused on Nazi atrocities during World War II in association with the Shoah, or Holocaust. The Nuremberg trials did not, however, widely employ the term ‘genocide.’ Although the term appears in the indictment of the German war criminals, it does not occur in either the Charter of the International Military Tribunal or in the judges’ opinions. However, the phrase ‘crimes against humanity’ in Article 6(c) of the Charter did include the acts of genocide. The crimes against humanity under the Nuremberg Charter were restricted to international war. Genocide, however, does not always occur during the international conflict. The UN later corrected this flaw through Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which explicitly recognizes the potential for genocide to occur ‘in time of peace and in time of war’. In 1948, the UN

---


302 Article 6(c) of the Charter of the International Military Tribunal provides the following:

“CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

303 cf. Rwanda

139
defined genocide as ‘acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such’.  

In what follows, the elements of the crime of genocide will be discussed from the aspects of objective elements, i.e., the underlying acts (actus reus), protected groups, and subjective elements, i.e., genocidal intent (mens rea).

3.10.3 The underlying acts

The five criminal acts elaborated in the Genocide Convention focus on physical destruction. The acts referred to mean ‘criminal acts’.

The drafters of the Genocide Convention considered and rejected the idea of cultural genocide, e.g., the destruction of the language and culture of a group. The interpretation of the conducts that fall into the five underlying acts of genocide should therefore be seen from the aspects of physical or biological destruction.

3.10.3.1 Killing members of the group

As for the killing of the group, ‘killing’ must be interpreted as ‘murder’ i.e., voluntary or intentional killing. There are two material elements of the killing; 1) the victim is dead, and 2) the death resulted from an unlawful act or omission of the accused or subordinate. On this, the ICTR, in the Prosecutor v. Akayesu Trial Judgment, states the following:

“500. With regard to Article 2(2)(a) of the [ICTR] Statute, like in the Genocide Convention, the Chamber notes that the said paragraph states “meurtre” in French while the English version states “killing”. The Trial Chamber is of the opinion that the term ‘killing’ used in English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term “meurtre”, used in the French

---

304 Approved by the General Assembly, by a vote of 55 to 0 on December 9, 1948—one day before the adoption of the Universal Declaration of Human Rights- the Genocide Convention entered into force in 1951, and over 100 states have ratified it.

305 Three out of the five enumerated acts require a proof of result as material element; killing members of the group; causing serious bodily or mental harm to members of the group and; forcibly transferring children of the group to another group. In these three cases, the accused can still be prosecuted for attempting to commit the crime even if no result can be proven. The proof of crimes of result requires evidence that the act itself is a ‘substantive cause’ of the outcome. As for the other two acts, the do no demand such proof, but require a further specific intent. W.A. Schabas, Genocide in International Law, p.177.

version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so, as provided for, incidentally, in the Penal Code of Rwanda. […]

501. Given the presumption of innocence to the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which “meurtrre” (killing) is homicide committed with the intent to cause death. The Chamber notes in this regards that the travaux préparatoires of the Genocide Convention, show that the proposal by certain delegations that premeditation be made necessary condition for there to be genocide, was rejected, because some delegates deemed it unnecessary for premeditation be made a requirement; in their opinion, by its constitutive physical elements, the very crime of genocide, necessarily entails premeditation.”

3.10.3.2 Causing serious bodily or mental harm to members of the group

The Akayesu Trial Judgment ruled that ‘serious harm’ need not be permanent or irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to person’s ability to lead a normal and constructive life. The types of acts that fall under this category are; inhuman treatment, torture, rape, sexual abuse and deportation:

“502. Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.

503. In the Adolf Eichmann case, who was convicted of crimes against the Jewish people, genocide under another legal definition, the District Court of Jerusalem stated in its judgment of 12 December 1961, that serious bodily or mental harm of members of the group can be caused by the enslavement, starvation, deportation and persecution […] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause the inhumane suffering and torture.

504. For purposes of interpreting Article 2(2)(b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.”

3.10.3.3 Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

In the Akayesu case, the ICTR Trial Chamber held that these acts include the following; ‘subjecting a group of people to subsistence diet, systematic expulsion form homes and the reduction of essential medical services below minimum requirements’, or the ‘deliberate deprivation of resources indispensable for survival, such as food or medical services’:

“505. The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.

506. For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and reduction of essential medical services below minimum requirement.”

3.10.3.4 Imposing measures intended to prevent births within the group

This includes ‘sexual mutilation, the practice of sterilization, forced birth control, and the separation of the sexes and prohibition of marriages. It can be both physical and mental. Rape can also be included when the women raped refuse subsequently to procreate:

507. For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is

---

304 Akayesu TC Judgment, paras. 502-504.
305 Akayesu TC Judgment, paras. 505-506.
determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.

508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.306

3.10.3.5 Forcibly transferring children of the group to another group

Such an act would cause serious consequences for the future viability of a group as such.311 As material element, this act requires a proof of a result, namely, that children be transferred from the victim group to another group. But in the Akayesu case, the Trial Judgement went further and suggested that it also includes ‘threat’ of such transfer:

“509. With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.” 312

Although the Genocide Convention does not specify what is meant by ‘children’, it is conventionally understood to mean persons under eighteen years of age.313
3.10.3.6 Acts that do not constitute genocide

3.8.2.6.1 Ethnic cleansing

Ethnic cleansing, forcible expulsion of civilians belonging to a particular group from an area, village, or a town, is not considered in the genocide convention as a punishable act. In the Jelišić trial at the ICTY, the Prosecution asserted that Jelišić had contributed to the ethnic cleansing in Brčko and had, for a period, acted as the principal executioner at the Luka concentration camp ‘with the intent to destroy, in whole or in part, a racial, ethnic or religious group’ and claimed that the accused demonstrated considerable authority, that he had received instruction to kill as many Bosnian Muslims as possible, and that the accused’s genocidal intent could be shown by the accused’s own words. The Trial Chamber, however, ruled that Jelišić could not be found guilty of the crime of genocide, and concluded that ‘the acts of Goran Jelišić are not the physical expression of an affirmed resolve to destroy in whole or in part a group as such. All things considered, the Prosecutor has not established beyond all reasonable doubt that a genocide was committed in Brčko’.

3.10.4 Protected groups

Defining the notion of the group as well as the identification of the four groups enumerated in the Genocide Convention – national, ethnical, racial, and religious – is a complicated matter. How does one define a ‘group’ protected by the Genocide Convention? The ‘group’ seems to suggest ‘collectiveness’. The case laws of the ICTY and ICTR have contributed to clarifying the notion of a ‘group’. The Akayesu Trial

314 According to Schabas, the expression ‘ethnic cleansing’ may be first used immediately following the WWII by the Poles and Czechs intending to ‘purify’ their countries of Germans and Ukrainians. It is a direct descendant of expressions used by the Nazis in their racial ‘hygiene’ programmes whose goal was to make the German territory ‘free of Jews’. The term resurfaced in 1981 in Yugoslav media accounts of the establishment of ‘ethnically clean territories’ in Kosovo. W.A. Schabas, Genocide in International Law, p.221.


316 In Akayesu trial, the Trial Chamber held the view that there may be genocide even if one of the acts prohibited by the convention is committed ‘against one’ member of a group. Akayesu TC Judgment, para.521. Cassese, however, criticizes this view that it is not consistent with the text of norms on genocide, which speak instead of ‘members of a group’. A.Cassese, G. Acquaviva, M.Fan, A. Whiting, Int’l Crim Law Cases and Commentary, p.134.
Judgement, which was the first judgment convicting the accused of genocide, set a definition of a ‘group’. By Akayesu TC, it has to be a ‘stable group’.  

511 [c]onstituted in a permanent fashion, and membership of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

In Akayesu, the Trial Chamber further defined the four categories of a group indicated in the Genocide convention. First, a ‘national group’ was defined as ‘a collection of people who are perceived to share a legal bond of common citizenship, coupled with reciprocity of rights and duties’. An ‘ethnic group’ is defined as ‘a group whose members share a common language or culture’; a ‘racial group’ is a ‘group based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors’; and a ‘religious group’ is a ‘group whose members share the same religion, denomination or mode of worship.

In the Krstić case at the ICTY, the Trial Chamber found that the ‘Bosnian Muslim population of Srebrenica’ constitute a ‘part of’ a protected group under the Genocide Convention:

“559. Originally viewed as a religious group, the Bosnian Muslims were recognised as a “nation” by the Yugoslav Constitution of 1963. The evidence tendered at trial also shows very clearly that the highest Bosnian Serb political authorities and the Bosnian Serb forces operating in Srebrenica in July 1995 viewed the Bosnian Muslims as a specific national group. Conversely, no national, ethnical, racial or religious characteristic makes it possible to differentiate the Bosnian Muslims residing in Srebrenica, at the time of the 1995 offensive, from the other Bosnian Muslims. The only distinctive criterion would be their geographical location, not a criterion contemplated by the Convention. In addition, it is doubtful that the Bosnian Muslims residing in the enclave at the time of the offensive considered themselves a distinct national,

317 Akayesu TC Judgment, para.511.
318 Akayesu TC Judgment, para. 511
318 Akayesu TC Judgment, paras. 512-515
ethnical, racial or religious group among the Bosnian Muslims. Indeed, most of the Bosnian Muslims residing in Srebrenica at the time of the attack were not originally from Srebrenica but from all around the central Podrinje region. Evidence shows that they rather viewed themselves as members of the Bosnian Muslim group.

560. The Chamber concludes that the protected group, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims. The Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4. The question of whether an intent to destroy a part of the protected group falls under the definition of genocide is a separate issue that will be discussed below.

561. The Prosecution and the Defence, in this case, concur in their belief that the victims of genocide must be targeted by reason of their membership in a group. This is the only interpretation coinciding with the intent which characterises the crime of genocide. The intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought. Mere knowledge of the victims’ membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such. As the ILC noted:

[...] the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group.” 319

3.10.5 Genocidal intent
An act of genocide must be an intentional act in the sense of being directed at a particular group. While it is rare to find explicit manifestations of intent by perpetrators, the perpetrator’s action provides the evidence of intent.320 The evidence of intent is normally inferred from factual circumstances. To this end, the Krstić Trial made significant contribution in elaborating the definition of mens rea of genocide:

“593. The Defence argues in rejoinder that, “although the desire to condemn the acts of the Bosnian Serb Army at Srebrenica in the most pejorative terms is understandably strong”, these acts do not fall under the legal definition of genocide because it was not proven that they were committed with the intent to destroy the group as an entity. First, the killing of up to 7,500 members of a group, the Bosnian Muslims, that numbers about 1.4 million people, does not evidence an intent to destroy a “substantial” part of the group. To the Defence, the 7,500 dead are not

319 Krstić, TC Judgment, paras. 559-561.
320 In Akayesu case, the ICTR Trial Chamber held that intent 'is a mental factor which is difficult, even impossible to determine’, Akayesu TC Judgment, para.523.
even substantial when compared to the 40,000 Bosnian Muslims of Srebrenica. The Defence also points to the fact that the VRS forces did not kill the women, children and elderly gathered at Potocari but transported them safely to Kladanj, as opposed to all other genocides in modern history, which have indiscriminately targeted men, women and children. The Defence counters the Prosecution’s submission that the murder of all the military aged men would constitute a selective genocide, as the VRS knew that their death would inevitably result in the destruction of the Muslim community of Srebrenica as such. According to the Defence, had the VRS actually intended to destroy the Bosnian Muslim community of Srebrenica, it would have killed all the women and children, who were powerless and already under its control, rather than undertaking the time and manpower consuming task of searching out and eliminating the men of the column. The Defence rejects the notion that the transfer of the women, children and elderly can be viewed cynically as a public relations cover-up for the planned execution of the men. First, it says the decision to transfer the women, children and elderly was taken on 11 July, i.e. before the VRS decided to kill all the military aged men. Further, the Defence points out, by the time the evacuation started, the world community was already aware of, and outraged by, the humanitarian crisis caused by the VRS in Srebrenica, and the VRS was not concerned with covering up its true intentions. The Defence also argues that the VRS would have killed the Bosnian Muslims in Žepa, a neighbouring enclave, as well, if its intent was to kill the Bosnian Muslims as a group. Furthermore, the Defence claims that none of the military expert witnesses “could attribute the killings to any overall plan to destroy the Bosnian Muslims as a group”. To the Defence, a true genocide is almost invariably preceded by propaganda that calls for killings of the targeted group and nothing similar occurred in the present case. Inflammatory public statements made by one group against another – short of calling for killings - are common practice in any war and cannot be taken as evidence of genocidal intent. The Defence argues that, despite the unprecedented access to confidential material obtained by the Prosecution, none of the documents submitted, not even the intercepted conversations of VRS Army officers involved in the Srebrenica campaign show an intent to destroy the Bosnian Muslims as a group. The Defence contends that the facts instead prove that the VRS forces intended to kill solely all potential fighters in order to eliminate any future military threat. The wounded men were spared. More significantly, 3,000 members of the column were let through after a general truce was concluded between the warring parties. The Defence concludes that the killings were committed by a small group of individuals within a short period of time as a retaliation for failure to meet General Mladić’s demand of surrender to the VRS of the BiH Army units in the Srebrenica area. The Defence recognises that “the consequences of the killings of 7,500 people on those who survived are undoubtedly terrible”. However, it argues that these consequences would remain the same, regardless of the intent underlying the killings and thus “do not contribute to deciding and determining what the true intent of the killing was”. The Defence concludes that “there is no proof and evidence upon which this Trial Chamber could conclude beyond all reasonable doubt that the killings were carried out with the
intent to destroy, in whole or in part, the Bosnian Muslims as an ethnic group”.

594. The Trial Chamber concludes from the evidence that the VRS forces sought to eliminate all of the Bosnian Muslims in Srebrenica as a community. Within a period of no more than seven days, as many as 7,000-8,000 men of military age were systematically massacred while the remainder of the Bosnian Muslim population present at Srebrenica, some 25,000 people, were forcibly transferred to Kladanj. The Trial Chamber previously described how the VRS attempted to kill all the Bosnian Muslim men of military age, regardless of their civilian or military status; wounded men were spared only because of the presence of UNPROFOR and the portion of the column that managed to get through to government-held territory owed its survival to the fact that the VRS lacked the military resources to capture them.

595. Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica. Intent by the Bosnian Serb forces to target the Bosnian Muslims of Srebrenica as a group is further evidenced by their destroying homes of Bosnian Muslims in Srebrenica and Potočari and the principal mosque in Srebrenica soon after the attack.

596. Finally, there is a strong indication of the intent to destroy the group as such in the concealment of the bodies in mass graves, which were later dug up, the bodies mutilated and reburied in other mass graves located in even more remote areas, thereby preventing any decent burial in accord with religious and ethnic customs and causing terrible distress to the mourning survivors, many of whom have been unable to come to a closure until the death of their men is finally verified. The strategic location of the enclave, situated between two Serb territories, may explain why the Bosnian Serb forces did not limit themselves to expelling the Bosnian Muslim population. By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in
Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory. "321

3.10.6 Genocidal policy or plan

The question relates to whether contextual element is required to establish the crime of genocide. Crimes against humanity, for example, require the ‘widespread and systematic’ nature of the offence as a prerequisite element to charge this category of crime. As for genocide, no such element is required by customary and international treaties. 322 At the ICTY Jelišić trial, the Appeals Chamber held that ‘the existence of a plan or policy is not a legal ingredient of the crime’, although ‘it may facilitate proof of the crime’. 323

3.11 Conclusion

The purpose of this Chapter has been to identify the legal frameworks that set conditions to the ICTY Prosecutor’s investigative activities.

In line with this central theme, this study examined the scope of the powers of the ICTY, as provided in relevant legal texts; the UN Charter, the ICTY Statute, the ICTY Rules of Procedure and Evidence. Pursuant to these provisions, it became clear that the power of the ICTY to issue binding orders over states derives from the fact that it was established as an enforcement measure of the UN Security Council acting under Chapter VII of the UN Charter, as well as Article 25 of the UN Charter obliging UN Member States to comply with the UNSC resolutions. On the other hand, in terms of the power of the ICTY over individuals, it was explained in the realm of ‘inherent power’, which the ICTY possesses in order to function effectively as a judicial organ.

The discussion then advanced to examine the power of the ICTY in the collection of evidence. As a criminal court, the ICTY lacks sufficient powers to perform all necessary investigative and prosecutorial activities on its own, and thus it requires assistance from external entities, such as states or international organisations, in order to function effectively. The on-site investigation, that is the ICTY Prosecutor sends his/her investigators to the ground and gather evidence directly without interference by state authorities, is critical for successful investigations. In principle, consent of states concerned is required for the ICTY investigators to carry out an on-site investigation in

321 Krstić, TC Judgment, paras. 593-595.
323 Jelišić, TC Judgment, para.48.
the territory of those states. The exception can be found, however, with respect to the former Yugoslavia states whose obligation to cooperate with the ICTY investigations was further substantiated by the Dayton peace accords.

In conclusion, this study finds that procedural rules of the ICTY provide sufficient power to the ICTY to carry out effective criminal investigations on its own, although the extent of its power is much less compelling when compared to that of national prosecutors under the domestic settings.

Having identified legal provisions concerning the investigation, a substantive law pertaining to the definition of genocide was then discussed. The elements of crime of genocide and mode of liability to prove the crime of genocide guide the way the ICTY Prosecutor carries out investigations and the modality of evidence collection. To this end, the discussions focused on the underlying acts and *mens rea*, such as ‘special intent’, which makes the crime of genocide a special category of crimes. There are two specific elements that the Prosecutors must prove when he/she intends to prosecute the crime of genocide; 1) a proof that the victims fall under the category of ‘protected group’ as stipulated in the Genocide Convention, and 2) a proof that ‘special intent’ existed and was shared by those who perpetrated the illicit acts concerned.

In the next Chapters, discussions will proceed to the ICTY Srebrenica investigations and the collective memories on Srebrenica.
CHAPTER 4 CASE STUDY SREBRENICA INVESTIGATION

4.1 Introduction - methodology

This Chapter is dedicated to chronicle the ICTY investigations on the Srebrenica events of July 1995. To obtain empirical data, the author of this study conducted interviews with core former ICTY staff members who worked on the ICTY Srebrenica investigation of July 1995. The interviewees were; two senior prosecutors, one senior investigator, and one crime analyst. The interviews were conducted between February 2017 and March 2018. The duration of each interview ranged between three to eight hours. The interviews were conducted in a semi-structured format and the focuses of the interviews were the following:

1. Chronology of the investigation process.
2. Organizational settings and internal personal dynamics of the investigation team.
3. The type of information collected during the process of investigation.
4. The decision-making process when charging with genocide.

Before jumping straight to the ICTY Srebrenica investigations, it is useful to set the scene with some contextual material concerning the war in Bosnia and Herzegovina and the fall of the Srebrenica enclave.

4.2 Background

4.2.1 Location of Srebrenica

Srebrenica is a small town located in a valley in eastern Bosnia and Herzegovina, about fifteen kilometres from the Serbian border. Srebrenica consists of the municipality (opština) part and the town of Srebrenica which is located in the centre of the municipality. According to the census conducted in 1991, the population of Srebrenica was 37,000, of which 73 percent were Bosnian Muslim and 25 percent were Bosnian Serb. Before the war, many of Srebrenica’s residents worked in the factories at Potočari, a few kilometres north of Srebrenica, or in the zinc and bauxite mines to the south and northeast of the town. Prior to the war, the standard of living was known to be high and members of the
different ethnic groups lived together.324 Toward the end of the Bosnian war that lasted from 1992 to 1995, however, Srebrenica became the theatre of the largest massacres in Europe since the end of the Second World War and the symbol of the failure of the international community to protect civilians in the so called ‘safe area’.325 Over 7,000 Bosnian Muslims were killed in Srebrenica during the two weeks military campaign launched by the Bosnian Serb army. How could this happen? To understand this, first, the war in Bosnia and Herzegovina must be put in a broader context which led to the breaking up of the former Yugoslavia.

4.2.2 Chronology of Bosnian War

Following the end of Cold War and the collapse of communist regimes in Central and Eastern Europe, free elections were organized in 1990 in all republics of the Yugoslavia. These elections were won by nationalist parties across the nation. In Bosnia and Herzegovina, a republic which consisted of Bosnian Muslims (43.7 percent), Bosnian Serbs (31.4 percent), and Bosnian Croats (17.3 percent), the three nationalist parties received altogether 71.1 percent of the vote.326

Following this, Bosnia and Herzegovina began to face external and internal threats. On the one hand, it became the target of territorial claims by neighbouring republics of Serbia and Croatia.327 The external threat increased with Croatian independence in June 1991, when a war began between the Yugoslav People’s Army (JNA) and the newly created Croatian army, following the declaration of ‘Republic of Serb Krajina’ which covered a third of Croatia’s territory.328 On the other hand, the three nationalist parties in Bosnia and Herzegovina began to compete severely over the future status of Bosnia and Herzegovina.

324 Krstić, TC Judgment, para.11.
326 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, p.23.
327 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, p.23.
328 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, p.23; On JNA, see Miroslav Hadžić, The Yugoslav People’s Agony: The Role of the Yugoslav People’s Army, Aldershot, Ashgate, 2002.
The Party of Democratic Action (SDA, Bosnian Muslim), the Croat Democratic Community (HDZ), reaffirmed the independence of Bosnia and Herzegovina on 14 October 1991. The Serb Democratic Party (SDS), on the other hand, opposed this step toward independence and proclaimed on 9 January 1992 a ‘Serb Republic of Bosnia-Herzegovina’ covering the territories that it considered as Serb. On 1 March 1992, 63.7 percent of Bosnian voters turned out for the self-determination referendum, which was boycotted by SDS, and 99 percent voted in favour of independence. The referendum was immediately followed by the erection of barricades by the Bosnian Serb around the capital Sarajevo. A month later, on 6 April 1992, the European Community recognized the independence of Bosnia and Herzegovina. The next day, the SDS proclaimed the secession of the ‘Serb Republic’ (Republika Srpska, RS) in the territories that it controlled. Sarajevo, the capital of Bosnia and Herzegovina now became encircled by Bosnian Serb forces and, in the weeks that followed, the entire country went into war.

Initially, the war in Bosnia and Herzegovina was fought between the Army of the Republika Srpska (VRS), which was drawn from the Yugoslav People’s Army (JNA) one side, and a coalition of the Army of the Republic of Bosnia-Herzegovina (ABiH), which was drawn from the Bosnian Territorial Defence (mainly Bosnian Muslims) and the Croat Defence Council (HVO).

With the heavy support of Socialist Federal Republic of Yugoslavia (SFRY), the VRS managed to link up Serb populated areas and within a few months it seized 70 percent of the territory of Bosnia and Herzegovina. This VRS offensive was accompanied by a first wave of ‘ethnic cleansing’, that is violent expulsion of populations non-Serbs. The ‘ethnic cleansing’ took particularly violent forms in certain strategic municipalities mainly populated by non-Serbs, such as Prijedor and Sanski Most in western Bosnia and Herzegovina, Brčko in the valley of the Sava, and Foča, Višegrad, and Zvornik in the

---

329 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, p.23.
330 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, footnote no. 11.
331 On the origins of the ABiH, see Marko Hoare, How Bosnia Armed: The Birth and Rise of the Bosnian Army, London, Saqi books, 2004.,
valley of the Drina in eastern Bosnia and Herzegovina. The ‘ethnic cleansing’ campaign was accompanied by massive or selective, executions, sexual violence, the destruction of mosques and Bosnian Muslim cultural sites, and the opening of concentration camps. 332

Around this time, Srebrenica began to occupy a particular place. In April 1992, Srebrenica was captured by Bosnian Serb forces aiming at controlling the entire region bordering with Serbia. The Bosnian Muslim population in Srebrenica then became a target of ‘ethnic cleansing.’ 333 But, a month later, Bosnian Muslim combatants led by Naser Orić succeeded in retaking the control of the town. From that point on, Srebrenica became a refuge point for the Bosnian Muslim populations in eastern Bosnia and Herzegovina who had been driven out by Serbian ‘ethnic cleansing’ campaign. 334 As a result of the influx of refugees, the number of inhabitants in Srebrenica grew from around thirty thousand to around sixty thousand people. 335 Given the lack of housing, provisions, and medicine and the difficulty of moving in humanitarian aid, living conditions in the enclave rapidly became dire. To obtain supplies, the Srebrenica enclave’s inhabitants carried out raids against neighbouring Bosnian Serb villages that resulted in several dozen deaths among the local Bosnian Serb population. At the same time, the Orić’s forces succeeded in enlarging the territory under their control, joined up with other Bosnian Muslim enclaves, and even threatened to reach Tuzla. In March 1993, the VRS launched a massive offensive against the Srebrenica enclave and considerably reduced its size and threatened to take the town. 336 But the intervention on 16 April 1993 of General Philippe Morillon, commander of the United Nations Protection Force (UNPROFOR), halted the VRS attacks, and the Srebrenica enclave was declared by the UN a ‘safe area.’ 337

Placed under the UN protection, Srebrenica was supposed to be protected by a UN military contingent (blue helmets) and, if needed, by NATO aircraft. A month later, five


337 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, p.28.
other ‘safe areas’ were created; Sarajevo, Tuzla in the central Bosna, Bihać in western Bosnia and Herzegovina, and Goražde and Žepa in eastern Bosnia and Herzegovina. This way, Srebrenica became the origin of a redefinition of the UNPROFOR mandate in Bosnia and Herzegovina.338

In reality, however, the ‘safe area’ still remained highly vulnerable; of the 34,000 blue helmets requested by the UN, only 7,600 were granted and deployed. From March 1993 to March 1994, the war in Bosnia and Herzegovina was marked by intense fighting between the ABiH and the Croat HVO and by violent campaigns of ‘ethnic cleansing’ in central Bosnia and Herzegovina and in Herzegovina. Bosnian Serb forces in the meantime continued to secure their territorial gains despite the fact that the Bosnian Serb offensive against the Goražde ‘safe area’ of in April 1994 was halted at the last moment by the warning of the NATO ultimatum. The fate of the three Bosnian Muslim enclaves of eastern Bosnia and Herzegovina—Srebrenica, Žepa, and Goražde—remained one of the principal issues in the peace negotiations brokered by the UN and the European Community and it spoiled the peace plans presented by international mediators, i.e., the Vance-Owen plan of January 1993, the Owen-Stoltenberg plan of May 1993.339

Finally, it was a unilateral intervention of the United States that unblocked the impasse. In March 1994 of an agreement that put an end to the fighting between Bosnian Croats and Bosnian Muslims was signed and created a Federation of Bosnia-Herzegovina composed of several Bosniak and Croat cantons. The reestablishment of the Croat-Muslim alliance was accompanied by a discreet lifting of the UN arms embargo. With the hardening of economic sanctions against Federal Republic of Yugoslavia and the Republika Srpska, this allowed for a gradual shift in the balance of military power on the ground.340

Yet, it was not until 1995 that broader and more rapid political and military changes were set in motion. In May 1995, a deadly bombardment of the town of Tuzla by Serb artillery provoked NATO to retaliate with air strikes. The VRS then took more than four hundred blue helmets hostage, showing UNPROFOR’s vulnerability. The air strikes ceased and UNPROFOR decided to focus on its own security to the detriment of the safety of civilian populations. In June 1995, the French and British governments sent a heavily armed

338 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, p.28.
339 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, p.28.
340 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, p.28.
Rapid Reaction Force (RRF) to Bosnia and Herzegovina. The ABiH, for its part, launched an offensive against the Bosnian Serb positions around Sarajevo but failed to break the siege. Several weeks later, on 6 July 1995, the VRS attacked the Srebrenica enclave. Despite its status as a ‘safe area,’ Bosnian Serb forces advanced on the enclave without being confronted by a determined response on the part of the Dutchbat in Potočari or NATO airstrikes. On 11 July, General Ratko Mladić’s soldiers entered the town of Srebrenica, which had by then been abandoned by its inhabitants. In the days that followed, over seven thousand Bosnian Muslim men were massacred by the Bosnian Serb forces and the rest of the population of the enclave was expelled toward central Bosnia and Herzegovina. Finally, on 14 July, the VRS attacked the enclave of Žepa, which fell in its turn on 25 July.\(^341\)

The capture of the Srebrenica and Žepa ‘safe areas’ and the massacres that followed in Srebrenica marked the definitive failure of UNPROFOR and led the major western powers to shift for a policy that favoured the use of air strikes. Thus, they threatened to bombard Bosnian Serb forces if they attacked the Goražde ‘safe area’ next. At the same time, the Croatian army launched a vast offensive (‘Operation Storm’) against the ‘Republic of Serb Krajina’ on 4 August and in a few days recaptured most of the territory that had been lost in 1991, thereby opening up the region of Bihać. At the end of the same month, following a deadly shelling of Sarajevo, NATO and the RRF bombarded Bosnian Serb military installations for several weeks. The Croatian and Bosnian forces took advantage of the bombardments to recapture large areas of western Bosnia and Herzegovina. In three months, the map of the frontlines that had emerged in 1992 was significantly changed. The United States then exploited the new situation on the ground to launch new peace negotiations and, starting in September 1995, two framework agreements were signed on the future institutional architecture of Bosnia and Herzegovina. The peace negotiations continued in November at the US air base in Dayton, Ohio, and on 21 November 1995 a territorial compromise was found, providing for the partition of Bosnia and Herzegovina between two constitutive entities: the Federation of Bosnia-Herzegovina (51 percent of Bosnian territory) and the Republika Srpska (49 percent). The Dayton agreements, signed on 14 December 1995 in Paris, officially put an end to the war in Bosnia-Herzegovina. Goražde was brought under the jurisdiction of the Federation of Bosnia-Herzegovina but Srebrenica and Žepa remained in the RS.\(^342\)


It thus appears that Srebrenica played an important role in the main phases of the war in Bosnia and Herzegovina. Obstacles to the conquest of eastern Bosnia and Hercegovina by the VRS, the enclaves of Srebrenica, Žepa, and Goražde were the object of violent fighting and fierce negotiation throughout the war. In April 1993, Srebrenica became the first ‘safe area’ protected by UNPROFOR, before this model was extended to other towns. Two years later, the capture of the Srebrenica ‘safe area’ by Bosnian Serb forces and the massacres that followed revealed the complexity of decision making procedures within UNPROFOR, represented its definitive failure in Bosnia and Hercegovina, and precipitated the massive intervention of NATO aviation. Beyond the single case of Bosnia and Herzegovina, the painful experience of Srebrenica influenced the attitude that the major western powers adopted toward the Kosovo crisis several years later and led the UN to revise its conception of its peace-keeping operations. The unparalleled extent of the Srebrenica massacres also explains why it became the symbol of the ‘ethnic cleansing’ that had been massively practiced by Bosnian Serb forces over the course of the 1990s. The trials relating to the Srebrenica massacres are among the most significant conducted by the International Criminal Tribunal for the Former Yugoslavia (ICTY).343

4.3 ICTY Investigation on Genocide

4.3.1 Preliminary investigations

The massacres related to the Serb takeover of Srebrenica began on 11 July 1995, just as the ICTY was issuing its first indictment against Karadžić and Mladić. Within ten days, Jean-René Ruez, a French investigator at the ICTY began collecting preliminary evidence.344

Until then, the ICTY investigations had focused on events that occurred early in the war beginning in 1991 in Croatia and 1992 in Bosnia and Herzegovina. Srebrenica was the first case that the ICTY investigated as events were unfolding.345 According to Ruez;

343 I. Delpla, X. Bourgarel, and J. Fournel, Judge, Historian and Legislator, p.29.
344 Jean-René Ruez arrived at the ICTY on 7 April 1995 and was assigned initially to a team investigating the seize of Sarajevo. Jean-René Ruez, former ICTY Srebrenica Investigation Team Leader, Personal Interview by Author, Lyon, 09 February 2017. (Hereafter: J-R. Ruez, Personal Interview by Author)
345 J-R. Ruez, Personal Interview by Author;

“An exception before Srebrenica investigation was the investigation into the Zagreb market shelling. The Zagreb shelling investigation, however, began based on evidence collected by the French Military Intelligence and it was not a case that was initiated by the ICTY.”
“The inquiry began in Tuzla on 20 July 1995; in judicial terms, it was thus a flagrante delicto investigation.”

Rumours about the widespread massacres in and around Srebrenica quickly began to circulate among media, NGOs, and the international community immediately after the fall of the UN Safe Area. To check the veracity of this information, Richard Goldstone, the Chief Prosecutor of the ICTY decided to despatch an advance team to Tuzla where refugees who had fled Srebrenica were sheltered on the Tuzla airfield. The ICTY team sent to Tuzla was composed of Ruez, a former UN civil affairs officer, investigator, and crime analyst.

Upon arriving in Tuzla, the team was provided several dozen witness statements taken by the local police. Crime analyst and Research Officer, Stefanie Frease and a local colleague began summarizing the statements into English and prioritizing them by gravity.

At the time, there were approximately 25,000 refugees in Tuzla, mostly women, children and the elderly. Most of the displaced people seeking shelter on the tarmac had been forced to evacuate Srebrenica before the systematic killings took place. Their accounts, therefore, were limited to what they saw in Potočari or as they were being bused to safe


347 J-R Ruez, Personal Interview by Author: I. Delpla, Interview with Ruez, p.47.

348 J-R Ruez, Personal Interview by Author; Ruez explained the steps of preliminary investigation as follows

“First of all, we needed people to conduct interviews, which comprise the initial mass of information. During the summer of 1995, there were 25,000 refugees scattered among I do not know how many refugee centres in Tuzla alone. There were 6,000 of them at the air base and the others were scattered among the refugee centres in the city and surrounding villages. A second massive source of information was the database of the War Crimes Commission directed by Mirsad Tokača, which contained an inventory of 600 accounts. Furthermore, a huge effort to compile witnesses’ accounts had been undertaken by the Tuzla police and AID, the Agency for Information and Documentation—that is, the Bosnian secret service. So we had to analyse this pre-existing data to select high-priority witnesses. When we arrived in the area at the end of July, we had thus identified a population of 1,200 potential witnesses, with half-page to one-page interview summaries available for each of them.”

territory, *e.g.*, single murders, seeing of large groups of men taken prisoners, bodies lying on the roadside, and hearing gun shots *en route* from Potočari to Kradanj, Bosnian Muslim controlled territory. It was impossible to prove whether the bodies the witnesses saw were civilians or soldiers who had been killed in combat. "This information could not be linked to any organized massacres that occurred after the mass deportation.

The team adopted a strategy to focus on three lines of inquiry; 1) the situation in Potočari (separation of men from women and children – spotting of dead bodies, 2) what happened or was witnessed by the evacuees who had been transferred from Potočari to Kradanj, and 3) massacres based on statements of survivors. 349

At the same time, a handful of survivors of large, systematic massacres that happened at various locations, *e.g.*, Kravica warehouse, Orahovac, Petkovic dam, and Branjevo Military Farm etc. began to arrive. were their primary focus. The first-hand accounts of survivors gave the investigators the first impression on the scale of the massacres. 350

The Ruez’ team stayed in Tuzla the entire month of August 1995. Additional investigators and interpreters were brought in to record statements. Among the interpreters was Adisa Karamuratovic, a native of Tuzla who would become an essential part of the team.

At this point, Ruez requested the ICTY HQ for reinforcements. The HQ, however, turned it down saying that too many staff members were on vacation, and instead called Ruez and his team back to The Hague. 351

The team was disbanded once investigators returned to The Hague at the end of August. The investigators were instructed to return to their respective teams. Only Ruez remained working on the subject and continued analysing statements and building up the

349 J-R Ruez, Personal Interview by Author:

"Among the witnesses at this time, one witness, however, stood out. He was a survivor of what was later called the Orahovac execution site that took place on 14 and 15 July 1995."

350 J-R Ruez, Personal Interview by Author.

351 J-R Ruez, Personal Interview by Author.

352 Ruez ironically now calls it “Operation Deliberate Forces”, J-R Ruez, Personal Interview by Author.
chronology of events. Little by little, Ruez managed to put together pieces of information and establish a solid chronologies of the events. In some parts, the chronology was established day by day and in some parts hour by hour. The information gathered at this point, however, was still fragmented and it was not possible for the investigator to fully understand the exact scale of the massacres. The information obtained from survivors was sometimes fuzzy and alleged crime sites were still inaccessible as they were under the control of the Bosnian Serb Armed Forces, VRS.

At this point, it was still inconceivable at this point that the the scale of massacres would constitute genocide, although it was becoming clear that almost all the Bosnian Muslim men who had been captured by the VRS were missing. Survivors and the families of the missing were still hoping that those who were missing were alive and kept at prison camps under the VRS.

The VRS was hiding what really happened in Srebrenica. According to the VRS, the people who went missing were killed in combat and there were no civilians among the victims. To misguide the public, the VRS released a small number of Bosnian Muslim prisoners who had been captured after 18 July 1995, when an order was issued by the VRS Command to stop the killing. The purpose of this was to demonstrate that the Bosnian Muslim men from Srebrenica were captured as prisoners of war as opposed to having been executed.

However, as the prisoner exchanges between the VRS and the Army of the Republic of Bosnia-Herzegovina (ABiH) progressed, ending in March 1996, it was becoming abundantly clear that those missing people were most likely all dead.

---

353 Ruez had to go back to Sarajevo investigation team, but he refused to hand over the evidence he had collected from Srebrenica survivors. He had to carry all the statements everyday between his house and the office and spend most of the work on the analysis of these statements. J-R Ruez, Personal Interview by Author.

354 J-R Ruez, Personal Interview by Author.

355 J-R Ruez, Personal Interview by Author.

356 J-R Ruez, Personal Interview by Author.

357 J-R Ruez, Personal Interview by Author.
4.3.2 The formation of an investigation team

Shortly after the Srebrenica massacres occurred, the ICTY Investigation Division was headed by a former Dutch police commander. Ruez was his subordinate. Ruez was still in his mid-thirties when he arrived at the ICTY from France. \(^{358}\) According to Ruez, Srebrenica changed his life. Ruez was a police superintendent for ten years and has a master's degree in law. His family is German as well as French; he speaks German, and this was a source of his early interest in war crimes. France had a troubled relationship with the Tribunal, and Ruez also had his difficulties during his work with the ICTY investigation management. The relationship between Ruez and his Dutch superior was not an effective working relationship, but had limited long-term impact. \(^{359}\) From the outset, Ruez knew how important the Srebrenica investigation was, but he could not get his Dutch superior to assign anyone else to work with him on the case. Throughout 1995, there was not a single team dedicated to the Srebrenica investigation. The investigators would be ‘borrowed’ from other investigation teams and once the field mission was over, they would return to their respective teams where they had been assigned. The management of the ICTY investigation was slow in taking actions when it came to supporting the Srebrenica investigation. They did not obstruct the investigation, but simply did not provide enough resources for it to advance at the appropriate pace. Ruez also had a feeling that his Dutch superior was attempting to remove him. \(^{360}\) He was unable even to get proper office space. \(^{361}\) In October 1995, the Dutch government issued a report on the Srebrenica massacres and Ruez was not given access for months to an English-language translation of it. He eventually located the report in a filing cabinet by accident. The Srebrenica investigation at the ICTY remained without much assistance until his Dutch superior finally left the Tribunal. \(^{362}\)

One day in 1996, Ruez ran into Stefanie Frease, a member of the original four-person advance team, in the hallway of the Office of The Prosecutor (OTP) and asked what she was working on now. Upon returning from Tuzla, however, she was reassigned to a

\(^{358}\) J. Hagan, Justice in the Balkans, p.132.
\(^{359}\) J. Hagan, Justice in the Balkans, p.133.
\(^{360}\) Initially, the management attempted to appoint someone new who had no prior knowledge about Srebrenica as a lead investigator of the Srebrenica investigation team. This appointment, however, had to be cancelled as it went against the internal administrative rule which forbid the government secondee to be promoted. J-R Ruez, Personal Interview by Author.
\(^{361}\) J. Hagan, Justice in the Balkans, p.134; J-R Ruez, Personal Interview by Author.
\(^{362}\) J. Hagan, Justice in the Balkans, p.133.
documentary project unrelated to Srebrenica investigation. Ruez immediately asked her to permanently join the Srebrenica team. She then sought approval from the new Chief of Investigation, an Australian, John Ralston, who agreed to assign her to the case. This meant that there were now two people assigned to investigate a massacre of thousands. Ruez and Frease ironically called their pairing the “ghost team.”

As the ‘ghost team’ began into motion in the spring of 1996, going into the field to locate crime sites, Ruez was assigned with one more team member, Asif Syed, who came from Pakistan and had experience as a human rights police officer in Africa. Syed was initially assigned to a different team at the ICTY. When things did not work out well on his first team assignment, Syed requested a change. He was reassigned to work with Ruez. Syed later told Ruez, though, that he had not been told about his reassignment for the first three months. The ghost team was now a threesome, the absolute minimum needed to maintain an on-site investigation. This skeletal team was bolstered during its field

363 J. Hagan, Justice in the Balkans, p.135; J-R Ruez, Personal Interview by Author; Stefanie Frease, former ICTY research officer, Skype Interview by Author, 01 April 2018. (Hereafter: S. Frease, Skype Interview by Author)

364 Ruez explains the role of the investigation team leader and the team members as follows:

“Whether the head of a group leads two people or ten people, his [investigating teams leader] role does not change. However, if he lacks sufficient resources or manpower, he will end up having to act as a one-man band instead of a conductor. In the beginning of this inquiry, I must confess, we had two rather than ten people. It was not until 1998 that the tribunal assembled what might reasonably be called an “investigative team” as defined by ICTY—that is, a team that includes a team leader, a legal advisor, several investigators, analysts, a full-time interpreter and a secretary.”

“The role of a police chief is that of coordinator. He is not supposed to be a one-man band who plays all of the instruments himself. He has to use what he knows in order to surround himself with people who can bring their own expertise to bear and thereby cover the many facets of such a situation. We are engaged in a judicial inquiry whose goal is to produce trials before an international court. Some trials have already taken place, and others are in progress or will be in the future. The role of the leader of the investigating team is therefore to try to understand what happened, to give a direction to the inquiry, and subsequently to assemble experts who will contribute to efforts to find out the truth. And finally, once we think we have reached a reasonable stage in that search and thus are in a position to bring charges, we have to supply technical evidence in support of them.”

I. Delpla, Interview with Ruez, p.47.


366 At least one member of the team must always be at the exhumation site to maintain the ‘chain of custody’ of the evidence and represent the Tribunal. Another team member had to be doing the day-to-day work back in The Hague. Ruez explained that this meant “in reality you have to have three people to make sure you can cover these rotations.” J. Hagan, Justice in the Balkans, p.143.
missions by “borrowing” investigators and operational personnel from other teams for a few weeks at a time.\footnote{\textsuperscript{367}}

In the fall of 1996, Peter McCloskey joined the team as legal advisor. McCloskey had a wealth of experience as prosecutor working for more than a decade in the US Department of Justice's Civil Rights Division. According to McCloskey, it is not a common practice in the US for a lawyer to be ‘embedded’ into an investigative team to work alongside police investigators from the outset of the investigation. McCloskey, however, had a unique background as a US prosecutor. Civil rights cases in the US are one of exceptions where lawyers are required to work very closely with police investigators throughout the life of the investigation. In civil rights cases, the police are often subject to an investigation themselves, and they are often reluctant to bring the cases forward. For this reason, it is necessary that a prosecutor gets deeply involved in the investigation and make sure that the case moves forward.\footnote{\textsuperscript{368}}

Lawyers and police investigators working on the same team tend to create tense working relationship. This is due to the fact that the focus and approach between lawyers and investigators vary significantly. For example, investigators would first try to find out as much as possible what happened, while lawyers would focus on information that generates evidence which can be used in the court room.\footnote{\textsuperscript{369}} Against this general tendency, Ruez and McCloskey’s professional relationship was exceptionally good from the outset. According to McCloskey, there were neither ego problems nor defensiveness that sometimes complicates the collaborations between lawyers and investigators in an investigation team. McCloskey explains, “I had a team leader and investigator that was very open to having me there, and while there’s always a bit of a tension, it worked out

\footnote{\textsuperscript{367} The first members of the Srebrenica volunteer team were; Jean-René Ruez (France), Fred Buckley (USA), Jean Pierre Capelle (France), Asif Seyd (Pakistan), and Stefanie Frease (USA), Peter Nicholson (UK). J-R Ruez, \textit{Personal Interview by Author}.}

\footnote{\textsuperscript{368} Peter McCloskey, former ICTY Senior Trial Attorney, \textit{Skype Interview by the Author}, 22 March 2018. (Hereafter: P. McCloskey, \textit{Skype Interview by Author})}

\footnote{\textsuperscript{369} This is based on this author’s observations while working at the ICTY OTP (1995-2009) and at the ECCC Office of Co-Investigating Judges (2009-2016).}
very positively." In an interview with John Hagan, McCloskey described Ruez as "a very impressive, charismatic, magnetic figure." 

Military analyst, Peter Nicholson accompanied Ruez to all the field missions in 1996. Nicholson played a key role in dealing with the Rule 70 material; intelligence provided by governments in confidence. Through Nicholson, the team was able to forward numerous requests to the governments.

Over time the ghost team added several more members. Members of the Srebrenica ghost team clearly developed intense commitments to their work and to one another. There is a shared sense of purpose that comes out of that kind of work. Most team members remained in the team throughout the duration of the investigation. This is exceptional for an ICTY investigation team where the turn-over rate is usually quite high.

John Hagan, a criminologist who conducted an extensive empirical research on the employees of the ICTY observes the following:

“[o]ne of the most striking features of the tribunal experience is the juxtaposition of the horror of the violence and victimization that is its day-in and day out focus, and the shared sense of purpose and energetic determination that sustains the commitment of those who persist in its work. Mark Harmon, awaiting the outcome of the Srebrenica trial, easily conceded that "this is a grim business that we’re in. We’re not dealing with material that is joyful or that elevates the spirit here. It’ll wear you out. These crimes are so horrific that they weigh on your mind." Still, Harmon had no doubts about staying with this work, and he has a good sense of why he continues to find it important and rewarding. Harmon finds the power of the tribunal in what it is able to communicate, often most eloquently through the voices of the victims of the assailants it

372 J-R Ruez, Personal Interview by Author.
373 Ruez had extraordinarily strong ties to the members of the Srebrenica investigation team that he led for more than five years. J. Hagan, Justice in the Balkans, p.133; S. Frease, Skype Interview by Author; P. McCloskey, Skype Interview by Author.
374 J-R Ruez, Personal Interview by Author; S. Frease, Skype Interview by Author; P. McCloskey, Skype Interview by Author.
375 This is based on this author’s personal observation.
prosecutes. For Harmon, this point was vividly illustrated by a survivor of the massacre of twelve hundred Muslim men that Dražen Erdemović helped execute. As the survivor of this horrendous event came to the conclusion of his testimony, he was asked whether there was anything else he wished to say. Harmon recalled his answering that “from all of whatever I have said and what I saw, I can only come to the conclusion that this was extremely well organized; it was systematic killing and that the organizers of that do not deserve to be at liberty. Yet if I had the right and courage in the name of all those innocents and all those victims, I would forgive the actual perpetrators of the executions because they were misled.” Harmon found this an extraordinary statement “from someone who should be in normal expectations, somebody who was grievously wounded himself, barely survived, somebody who should be extremely bitter but has a spirit like that, an expression like that is elevating. That’s what gets you through the day. People like that.” This was a courtroom version of the alternation experience associated with teamwork on mission and described throughout this book. The consolation and motivation that Harmon found in his work with colleagues such as Ruez in the courtroom paralleled the motivation that many others found while on mission, working with team members and with victims in the Balkans.  

4.3.3 External supports
There were early signs of external governmental support to the Srebrenica investigation. For example, even before the ICTY embarked on a full-scale exhumation project in Srebrenica, the US government already began searching for burial sites in and nearby Srebrenica through the aerial imagery. Revealing the crimes committed by VRS appears to match the US political interest at the time. Within weeks of the massacres, the US government sent Assistant Secretary of State, John Shattuck, to Tuzla to meet with the survivors. Based on the survivors’ accounts, the US State Department asked the Central Intelligence Agency (CIA) to begin searching aerial photographs for evidence. The search produced preliminary results on 3 August 1995; photos taken on 13 July 1995 showed several hundred prisoners gathered on a soccer field near Srebrenica. The prisoners had disappeared from the photos taken several days later, and there was evidence of freshly moved soil nearby. These photos were shown

376 J. Hagan, Justice in the Balkans, pp.174-175.
377 J-R Ruez, Personal Interview by Author.
at the UN Security Council on 5 August 1995.\textsuperscript{379} In the fall of 1995, the Bosnian Serb forces were finally driven out by the NATO bombing, and the Bosnian war was now coming to an end with the Dayton Accords in November 1995.\textsuperscript{380}

Worried that the Dayton Accords might provide amnesties for the Bosnian Serb leadership, Richard Goldstone worked with his deputy Graham Blewitt to push through a new indictment of Karadžić and Mladić for Srebrenica.\textsuperscript{381} In October 1995, a draft indictment against Karadžić and Mladić was prepared by Mark Harmon, a Senior Trial Attorney of the ICTY. The indictment incorporated the alleged crimes committed in Srebrenica. The basis of this inclusion was the chronology of events prepared by Ruez.\textsuperscript{382} It unfolded an organized chain of mass executions of large groups of prisoners, starting from the area close to Srebrenica on 13 July and continuing day by day on various sites much more north, in the area of Zvornik, the 14-15 and 16 July.

Blewitt recalls:

\begin{quote}
“We wanted to make sure that we were going to be part of the Dayton solution.

The Dayton accords put little pressure on NATO forces to arrest indicted war criminals, but they at least guaranteed the continued role of the tribunal and the prosecution of war crimes as a recognized part of official Balkans policy.”\textsuperscript{383}
\end{quote}

On 15 November 1995, Goldstone flew to Washington for meetings with high-ranking US government officials. Prior to his departure a letter he had written, a letter of complaints about the delay in getting intelligence information, was leaked to the \textit{Washington Post}. CIA director, John Deutch was outraged, but the meeting between the two men bore concrete results; the establishment of a secure telephone link between

\begin{flushleft}
\textsuperscript{379} The two photos, though very useful for the investigation, were proven by that same investigation unrelated. Imagery alone, without proper correlation by human sources can easily lead to wrong conclusions. J-R Ruez, \textit{Personal Interview by Author}.

\textsuperscript{380} J. Hagan, \textit{Justice in the Balkans}, p.133; J-R Ruez, \textit{Personal Interview by Author}.


\textsuperscript{382} Author’s interview with Mark Harmon, The Hague, 27 March 2018. (Hereafter: M. Harmon, \textit{Personal Interview by Author}).

\end{flushleft}
Washington and The Hague and the immediate expansion of a CIA unit to process requests from the Tribunal. According to Goldstone he, “got everything [he] was seeking.” The US embassy in The Hague now became the transfer point for Ruez and members of the Srebrenica investigation team to receive the crucial information. Based on survivor’s testimonies, the “ghost team” could frame suspect areas, request aerial imagery taken before and after the alleged date of the executions and spot disturbances of the ground that they could then search for evidence.

David Scheffer, US Ambassador at large on War Crimes described this process as follows:

“[a] team of experts would fly over to The Hague and present the summary to them so that there could be some discussion. Eventually a great deal of information was made available to the tribunal, especially aerial imagery. Sometimes we gave them so much that it would pile up at the US embassy in The Hague, where it was archived, and the tribunal had access to it.”

4.3.4 Initiation of investigation

4.3.4.1 Access to crime sites

In 1996, given the recent end of the war, the main objective of the investigation was to gain access to the crime sites, and start collecting evidence. The focus of the investigation was clear; it concerned the criminal events that followed the fall of the enclave on 11 July 1995. This means that the investigation did not relate either to the causes of the fall of Srebrenica enclave or the crimes of seizing the UN safe area. Nor did the investigation address UNPROFOR air strikes or the reasons they were not carried.

In January 1996, while interviewing witnesses in Tuzla, Ruez received a phone call from The Hague informing that the US Assistant Secretary of State for Human Rights, John

---

385 J-R Ruez, Personal Interview by Author.
387 J-R Ruez, Personal Interview by Author.
388 J-R Ruez, Personal Interview by Author.
389 J-R Ruez, Personal Interview by Author.
Shattuck accepted to take him to Belgrade and then drive down to Bratunac, Potočari, and Srebrenica. Shattuck wanted to show the press the soccer field in Nova Kasaba that US Ambassador to the UN Madeleine Albright had presented at the UN Security Council in August 1995, and to demonstrate that freedom of movement was a reality following the Dayton Peace Accord. Ruez enriched the mission some additional spots to be checked on their way to Srebrenica.

When Ruez visited some of the alleged crime scenes for the first time after the massacres, most were intact. At Kravica warehouse, Ruez managed to go inside the building and scraped blood samples from the wall which were later sent to a Dutch forensic laboratory to verify it was human blood. The warehouse sustained bullet holes showing that the shooting took place from the openings at short range inside the building, as opposed to the bullet holes shot from outside, which could happen during combat. The burial sites of the corpses, however, could not be identified at this time as they were covered with snow. Ruez took the first pictures of Potočari.

One important result from this visit was that the investigator could now feel the geographical distances between various crime sites. The sites were scattered in an area of 70 kilometres from north to south, and 40 kilometres from east to west. Within this area, there were numbers of assembly points of prisoners, detention facilities, execution sites, and burial sites. The sheer size of the area suggested that a massive logistical support was required which was only possible with the involvement of a military organization.

A mystery for Ruez was why the VRS did not demolish the crime scenes and destroy the evidence immediately. As a police investigator, Ruez knew that in the normal criminal mind-set, perpetrators would destroy evidence when they realized that the police were after them and start building-up their own story to conceal the crime. In the case of Srebrenica, however, the situation was very different. It appeared as though total silence

390 J-R Ruez, Personal Interview by Author.
391 J-R Ruez, Personal Interview by Author.
392 J-R Ruez, Personal Interview by Author; J. Hagan, Justice in the Balkans, p.135.
393 J-R Ruez, Personal Interview by Author.
394 Investigators later found out that the killing sites were deliberately scattered in a wide area to conceal them from the eyes of the international community, namely the UN; J-R Ruez, Personal Interview by Author.
became the norm of code among the perpetrators after the massacres. It looked as though the perpetrators adopted the rule of silence, which is often observed with Mafia groups; “Don’t speak, don’t discuss, don’t talk”. This contradicts the usual behavioural patterns of criminals.\textsuperscript{395}

The reality was that when ICTY investigators began interrogating the Srebrenica perpetrators in 1999, it was already too late for the perpetrators to organize themselves to conceal the evidence. In interviews conducted by ICTY investigators and prosecutors, perpetrators of the Srebrenica massacres tried to hide their own involvement, while they were quite open to implicate what others did. This helped the investigators to advance the case. The accounts given by the perpetrators against their own peers provided critical evidence as they collaborated and reinforced the stories that the investigator had already gathered from other sources.\textsuperscript{396}

\textit{4.3.4.2 Erdemović confession}

In March 1996, the Office of the Prosecutor received a phone call again from Shattuck who was in Belgrade. Shattuck told Ruez that he convinced Serbian authorities to hand over Dražen Erdemović, a former member of the VRS 10\textsuperscript{th} Sabotage Detachment and a member of an execution squad, to the ICTY.\textsuperscript{397}

Erdemović initially went to Belgrade for medical treatment after having been shot by his colleague. In Belgrade, however, he tried to approach the US Embassy. The embassy refused to meet him. In desperation, Erdemović tried to contact a western journalist. The interpreter of the journalist, however, was an agent for the Serbian State Security and handed over Erdemović to the State Security. A French journalist with whom Erdemović tried to contact called the ICTY informing about Erdemović. It was Ruez who spoke with the journalist. Erdemović seemed to have a story to tell that is inconvenient to the

\textsuperscript{395} J-R Ruez, Personal Interview by Author.
\textsuperscript{396} J-R Ruez, Personal Interview by Author.
\textsuperscript{397} J-R Ruez, Personal Interview by Author.
Belgrade authority, and Ruez was not certain that the State Security would ever agree to hand over Erdemović.\textsuperscript{398}

Erdemović’s evidence later turned out to be crucial since it provided a rare linkage between one of the massacres and the VRS Main Staff.\textsuperscript{399} The 10th Sabotage Detachment was a unit directly under the VRS Main Staff’s Security and Intelligence Administration led by General Zdravko Tolimir.\textsuperscript{400} Had it not been the involvement of this detachment, the VRS would claim that the massacres were committed by rogue elements, paramilitary units that wanted to take personal revenge against the Bosnian Muslims.\textsuperscript{401}

According to Erdemović, on the day of the massacre at the Branjevo farm on 16 July, Tolimir ordered members of the 10th Sabotage Detachment to move from their base in Vlasenica to Zvornik in a small van. In Zvornik, they were received by Lieutenant Colonel Vujadin Popović who was the security officer for the Drina Corps. Popović led the group to a military farm in Branjevo and informed them that prisoners would be arriving soon and that they had to shoot them. The first bus with prisoners arrived at 10 am and the execution started immediately. The execution continued from 10 am until 3 pm. Once the execution was over, Erdemović’s group was sent to the Culture Centre in Plica village. In Plica, however, members of the 10th Sabotage Detachment refused to participate in the execution claiming that they had already killed enough for the day. By then volunteers from Bratunac had arrived and immediately joined the execution of prisoners. While the execution was going on, Erdemović was sitting outside across the street at a café with other members of the 10th Sabotage Detachment and Popović.\textsuperscript{402} They

---

\textsuperscript{398} J-R Ruez, Personal Interview by Author.

\textsuperscript{399} J-R Ruez, Personal Interview by Author; M. Harmon, Personal Interview by Author.

\textsuperscript{400} Tolimir was eventually convicted and sentenced to life imprisonment by the ICTY. See ICTY, Prosecutor v. Zdravko Tolimir, \textit{Trial Judgment}, IT-05-8812-1, 12 December 2012.(Hereafter: \textit{Tolimir, TC Judgment})

\textsuperscript{401} J-R Ruez, Personal Interview by Author; See also ICTY, Prosecutor v. Dražen Erdemović, \textit{Trial Judgment}, IT-96-22-A, 07 October 1997, para.8

\textsuperscript{402} The 10th Detachment consisted of mixed members including Bosnian Serbs, Bosnian Croats, as well as Bosnian Muslims. According to Erdemović they all had to participate in the killing of Bosnian Muslim prisoners; J-R Ruez, Personal Interview by Author.
could all see the killing was taking place.\textsuperscript{403} That day, 1200 prisoners were executed at the Branjevo farm and some 500 at the Pilica Culture Centre.

Erdemović was an invaluable eyewitness for the Srebrenica investigation. He not only had participated in shooting prisoners, he also had witnessed a mass execution and could describe the structure of the killing operations. Ruez was already using the information Erdemović was providing to help launch the exhumation process, to confirm the details of how the massacres unfolded, and to chart the organization and chain of command that led the massacres.\textsuperscript{404}

Erdemović continued to be cooperative and Ruez developed an effective relationship with him. Crime analyst Stefanie Frease remarks:

\begin{quote}
\textit{“Ruez was brilliant with him... He knows his business very well and he is able to identify with people... Some of it was maybe chemistry as well.”}
\end{quote}

\textsuperscript{405}

When Erdemović began testifying at the ICTY in mid-1996, the Commander of the VRS Main Staff General Ratko Mladić was still denying that massacres ever occurred in Srebrenica. The denial, however, became more difficult to sustain when Erdemović described in detail how an eight-man execution squad in which he personally shot and killed approximately seventy Bosnian Muslims at the farm site near Srebrenica and that more than twelve hundred Bosnian Muslim men were executed around him and that bulldozers ploughed the soil to cover the bodies.\textsuperscript{406}

\textsuperscript{403} J-R Ruez, Personal Interview by Author.

\textsuperscript{404} J-R Ruez, Personal Interview by Author; J. Hagan, Justice in the Balkans, p.138.

\textsuperscript{405} J. Hagan, Justice in the Balkans, p.139.

\textsuperscript{406} J-R Ruez, Personal Interview by Author.
4.3.5 Collection of evidence

4.3.5.1 Finding crime sites

As seen earlier, Ruez called 1996 “the year of finding the crime scenes.” He recalled that the spring and summer of 1996 as a “blur of feverish activity”:

“finding the graves, continuing to interview people, finding the locations that the people were talking about and finding the graves.”

The biggest worry for Ruez was that “without bodies, there is no crime.” General Mladić was still adamantly denying the Srebrenica massacres.

The process of finding the first grave sites and exhuming the bodies was much more challenging than it would later appear in the media. Without aerial imagery to bring the investigators close to the targets that they dug in with shovels in search for dead bodies, it might have been impossible to find specific sites. As Ruez puts it:

“You might have all the evidence in the picture you just don’t know where to look.”

To receive the best result from the US aerial imagery, the investigators had to give them enough information to narrow the search for imagery. The ground search, however, was made more complicated and threatening due to the reluctance of the IFOR to

407 J-R Ruez, Personal Interview by Author.
408 J. Hagan, Justice in the Balkans, p.140.
409 J. Hagan, Justice in the Balkans, p.140; J-R Ruez, Personal Interview by Author.
410 J. Hagan, Justice in the Balkans, p.140; J-R Ruez, Personal Interview by Author.
411 M.B. Harmon and F. Gaynor, Prosecuting Massive Crimes, p.405:

“Merely locating a crime scene can be a formidable task. The majority of the crimes committed during the break-up of the former Yugoslavia were totally unreported. A few did attain almost instant worldwide publicity. In general, however, unspeakable atrocities took place in isolated locations, under cover of darkness, in non-descript buildings, in common fields and forests, out of sight of media cameras or military surveillance, totally unknown to the wider world.”

412 J. Hagan, Justice in the Balkans, p.140; J-R Ruez, Personal Interview by Author.
413 J-R Ruez, Personal Interview by Author; J. Hagan, Justice in the Balkans, p.145.
414 IFOR is the NATO Implementation Force.
provide protection, the hostility of local Bosnian Serbs in the area, and the concerns about land mines. 415

After narrowing down the potential location of the site, Ruez passed this information to the US government to search for the aerial images that match up. By the end of November 1995, US government aerial imagery of the greater Srebrenica area began to arrive at the ICTY. 416 At the time of the massacres, the Bosnian Serb side already knew that the intelligence capabilities, e.g., aerial imagery, of NATO were focusing on the Bratunac area given some 30 Dutch soldiers had been taken hostage. To avoid their actions being captured on NATO aerial imagery, prior to the execution, the VRS Security Forces conducted detailed reconnaissance in the area of Zvornik, far away from Bratunac, to identify execution sites for thousands of captured Bosnian Muslims. Five principal grave sites were used by the VRS to bury bodies following the executions. Just before the Dayton Accords in November 1995, fearing that these sites would be discovered, the VRS conducted a massive reburial operation; they attempted to dig up the bodies and relocate them to secondary burial sites about thirty smaller graves spread throughout the countryside. 417

The aerial images were submitted by the US government under Rule 70 of the ICTY Rules and Procedure. Pursuant to Rule 70, the ICTY investigators were able to use the information only for lead purposes and not as evidence. McCloskey recalled:

“We would go over to the embassy, we'd review the photographs, we'd see where it was on the map.” 418

One IFOR commander complained,

“They were very difficult to work with, because they were not well coordinated in their efforts. They didn’t know exactly where they wanted to go, they wanted to kind of explore. They would hear a rumor and suddenly decide they wanted to go check out an area.”

In short, the IFOR leadership regarded Ruez and his colleagues as a pain to work with. J. Hagan, Justice in the Balkans, p.140.

The aerial imagery shown by M. Albright at the UN Security Council on Bratunac soccer field eventually turned out to be a wrong one; J-R Ruez, Personal Interview by Author.

J-R Ruez, Personal Interview by Author.

The challenge for the investigation team was that although they could view the aerial photographs at the embassy in The Hague, they could not take away the photographs. The investigators had to draw maps and sketches and took them to the Srebrenica crime scenes. The aerial photograph steadily increased the team’s listing of the graves and their knowledge of each grave’s history. Some of the aerial photographs gave remarkable cross-validations with the witness account. Frease described an example of important match-up:

“We had a witness who talked about being at the Kravica warehouse and who drew a sketch of the warehouse complex and how the buses came around and that they parked in front and there was an aerial image of exactly his sketch.”

At the Branjevo military farm massacre site, the US provided an imagery taken over Bosnia and Herzegovina on July 17, 1995. The photographs showed bodies spread over a field. “The site matched the description that the witness told us,” Ruez noted, “how the bodies are lined up, and the bodies are still visible in these photographs.” Concerning the site in Orahovac school, first, the ICTY investigator received a map of Orahovac area found by a Bosnian intelligence officer whom he had close contact with. The map indicated a school. The investigator requested five aerial images of this spot taken at

419 P. McCloskey, Skype Interview by Author. By McCloskey, “[at the Embassy] we’d get a sketch of the disturbed area, and the roads and the houses nearby, and Ruez is a pretty good artist, so his sketches were fairly accurate, and then we’d have a map grid coordinate, down to . . . maybe 25 yards of accuracy.” J. Hagan, Justice in the Balkans, p.145. When it became obvious that visiting the site in the imagery was extremely dangerous due to mines in the area, permission was granted by the US government for the team to take the imagery out of the building. J-R Ruez, Personal Interview by Author.


“We’d have the map and we’d have the point on the map where the grave was believed to be, and we’d have this little sketch, and we’d get in the truck and we’d drive out.” McCloskey’s job as legal advisor was “to make sure they were doing it the way it would be appropriate for trial.”

421 J. Hagan, Justice in the Balkans, p.141; S Frease, Skype Interview by Author.

422 J. Hagan, Justice in the Balkans, p.140. J-R Ruez, Personal Interview by Author. McCloskey explained the importance of the match ups at the trial:

“Sometimes we could see [in the photos] the actual holes sitting there waiting to be filled, sometimes we’d come in a couple of days later [with the photos] and see the dirt had been filled in . . . that was important because we didn’t have any witnesses for the trial that could talk to us about that.”

different times from the US government. The first image was taken on 5 July 1995 which didn’t show anything noticeable. The next image taken on 20 July showed two wide white areas suggesting that soil had been disturbed. These locations match exactly with the account of survivors who explained where the execution and burial of bodies took place.\textsuperscript{423}

Gradually the pieces were fitting together:

“\textit{and then we would have these photographs that show exactly when these things were created, or within a time frame of days. So that’s why these [photos] were so valuable.}” \textsuperscript{424}

However, the site matching was only the first step. Before the start of the digging, the team had to determine as precisely as possible where the bodies were buried. This process required the investigators to move between the eyewitness accounts and aerial images. They were making progress, but there also were puzzling aspects on what they were finding.\textsuperscript{425}

\textbf{4.3.5.2 Exhumation}

The collection of field evidence started in April 1996 as the investigation team began entering the Republika Srpska (RS) territory. Field visits were carried out with heavy protection provided by the US forces that had the only IFOR base, ‘Camp Lisa, within the RS territory.\textsuperscript{426}

When Ruez visited Kravica warehouse earlier, in January 1996, it was still intact. When he went back in June 1996, the site was still in the same condition. Two experts from the US Navy forensic team stayed on at the Kravica warehouse site for a week and managed to collect hundreds of samples such as explosion traces, blood samples, pieces of hair,\textsuperscript{427}

\begin{flushright}
\textsuperscript{423} J-R Ruez, Personal Interview by Author.
\textsuperscript{424} J. Hagan, Justice in the Balkans, p.145; J-R Ruez, Personal Interview by Author.
\textsuperscript{425} J-R Ruez, Personal Interview by Author.
\textsuperscript{426} J-R Ruez, Personal Interview by Author.
\end{flushright}
skin, from the demolished sites. The tissues discovered pointed to the fact that they were human remains.427

In Ruez’s office in The Hague, one could see a chart identifying more than thirty burial sites with the bodies of thousands of persons executed in July 1995. The vertical axis of the chart gave the location of the grave, while the horizontal axis recorded the evidence each contained: “bodies, body parts, documents, chemical and human residues, bullets, shell casings, blindfolds, ligatures, watches”, explained Ruez.428 Ruez then pointed to a framed picture of a Seiko wrist watch. The watch tells the story of when time stopped for the victims of Srebrenica. The team learned from the manufacturer that the watches keep time for twenty-four to thirty-six hours after their movement ceases. This information was joined with the numbered day of the month on the watches to estimate the timing of the execution.429

The arrival of Dr William Haglund, a pathologist, was an important event in 1996 as with his arrival, the exhumation of the mass grave the investigators had identified became realistic. Before joining to the ICTY, Haglund was working as pathologist at the ICTR. Haglund joined the ICTY mission in June 1996 and as soon as he arrived in the field, he realized that many crime site locations had already been identified and with a scratch of the surface of these sites one would find numbers of remains.430

Before the exhumations could begin the issue of security had to be addressed. Exhumations were operating in highly tenuous circumstances. The Bosnian Serb still fully occupied the area and land mines were a major concern. In July 1996 Ruez was finally able to lead the team to the initial sites he and the team had identified, each of them having been verified as containing ‘multiple bodies’. The last process of demining the area was that the exhumation team drove a heavy Y-shaped British vehicle over the site to set off and divert the explosion of any mines that had been missed. As the last

427 J-R Ruez, Personal Interview by Author.
430 J-R Ruez, Personal Interview by Author.
The investigators then began poking a five-foot steel probe into the soggy soil. They smelled the end of the probe to detect the stench of decaying bodies. Frease called this, "scratch and sniff test." During the summer of 1996, three sites were excavated; Orahovac, Brajnevo, and Cerska valley. The bodies were placed in a refrigerated container and taken to a makeshift morgue in Kalesija to establish causes of death. Overall, 450 bodies were recovered in 1996.

The Cerska valley site was discovered in combination of several witness accounts. One witness was at the end of Konjevic Polje overlooking at the Cerska valley. The witness could not cross this point as the VRS had interdicted the column of Bosnian Muslims who were trying to escape from Srebrenica to Tuzla. A part of the column of the men had already passed a day earlier. The witness saw from his hiding place in the woods that three busses accompanied by APCs were arriving at the valley. Ten minutes later, the witness heard intensive shooting coming from the same direction. Shortly thereafter the witness heard the excavator working.

Another witness managed to pass the Bosnian Serb interdiction line during the night and entered the Cerska valley barefoot. While walking he realized that he was walking on sticky stuff and then realized that it was blood. The other two survivors decided to return to the direction of Srebrenica from their hiding places in Cerska. When they reached the valley, they smelled a terrible stench.

Putting these accounts together, it was clear that something awful had happened in Cerska valley. It was assumed that approximately 150 people (50 people each in a bus x 3) were killed there. The investigators first tried to identify the location that the survivors were talking about. Video footage was shot during the visit, and this was shown to the survivors.

432 J. Hagan, Justice in the Balkans, p.143; S. Frease, Skype Interview by Author.
433 J-R Ruez, Personal Interview by Author.
434 J-R Ruez, Personal Interview by Author.
435 J-R Ruez, Personal Interview by Author.
The chance of finding the exact location of the killing site appeared to be slim as the Cerska valley stretches over 4 kilometres. At one point, however, one survivor recognized a water pipe in the video and confirmed that it was close to this point where he saw the bodies. The investigators then returned to the site with this information. While the group stood close to the location, Frease walked down the road a short distance and turned around, noticing what appeared to be claw marks from heavy equipment in the hillside. On the other side of the road was a steep incline with dirt and tree branches covering the area. In the ten months since the execution foliage was overtaking the area. With closer inspections, shell casings were discovered along the road near hillside. At this point, the investigation team began to probe the soil and ended up digging three small trenches which exposed bodies, legs, and skulls. Two months later Bill Haglund’s team exhumed the site, uncovering 149 bodies, hands attached in the back.

The Branjevo military farm site that Erdemović had described earlier was also exhumed in the summer of 1996. The grave itself was about one-third of a football field. Rainstorms overwhelmed the work on this site and it turned the grave into a muddy swimming pool from which the water had to be pumped out daily. One worker at the exhumation site recorded:

"[the bodies were] gelatinous, oozing corpses, hardly skeletalized at all."

The workers found themselves slipping and sliding among the bodies they were trying desperately to preserve:

"[in] mud to their knees, it was difficult to discern where one body ended and another began." 436

436 J-R Ruez, Personal Interview by Author.
438 Ibid.
In the case of a site called Nova Kasaba it took a while to find the location as this site was located slightly outside the US aerial imagery coverage. At this site, the team found bullets lying under the bodies, which indicated that people were shot inside the pit.\textsuperscript{439}

Fall set in and the exhumation season in 1996 was ending, the primary sites identified by Erdemović and other witnesses were largely exhausted. The team would next have to look for the secondary sites where bodies were reburied.\textsuperscript{440}

4.3.5.3 Locating secondary burial sites

As the exhumations progress, investigators came to realize that many burial sites had been ‘robbed’.\textsuperscript{441} There were traces of excavations, and the bodies inside were cut in two as if heavy machinery was used. The Cerska valley site was the only execution site that appears to have been untouched. A Bosnian Serb witness testified about the moment when he saw the VRS digging up the bodies and took them for reburial in a remote area.\textsuperscript{442}

Investigators now began to piece together what happened after the massacres. There were five major execution sites with mass burial pits located nearby, showing that the victims were killed and buried on the spot or nearby.\textsuperscript{443}

---

\textsuperscript{439} J-R Ruez, Personal Interview by Author.

\textsuperscript{440} J-R Ruez, Personal Interview by Author.

\textsuperscript{441} J-R Ruez, Personal Interview by Author; Ruez explained how the investigators came to search for the second burial sites:

"Without a body, you have no crime, and this inquiry began as a crime without any bodies. At the end of 1996, once Bill Haggard’s team had exhumed all of the primary mass graves, Newsweek magazine ran a story with the well-chosen headline, ‘Genocide Without Corpses.’ Only around five hundred bodies had been located and autopsied by the end of 1996, whereas 80 percent of the major crime scenes had been dealt with. This first phase of the exhumations had nevertheless demonstrated that the mass grave sites had been reopened as part of a cover-up effort and that most of the bodies they had contained had been concealed and very probably removed to another location. So we had to launch a search in 1997 for the secondary mass graves."

1. Delpla, Interview with Ruez, p.48.

\textsuperscript{442} J-R Ruez, Personal Interview by Author.

\textsuperscript{443} J-R Ruez, Personal Interview by Author.
Ruez explains:

“Several months later, in the fall of 1995, it became apparent to the Serb military that there was going to be an agreement reached at Dayton, and they began to worry about the ease of finding the poorly disguised burial sites.” 444

At the Dayton talks, Richard Holbrooke placed pressure on Slobodan Milošević to support John Shattuck’s trips into Republika Srpska:

“A few days later, this request produced a strange sight: Milošević’s special military security forces escorting Shattuck into Banja Luka, which no American official had visited in several years, as he sought access to mass grave sites of massacres committed by Serbs.” 445

The VRS had responded to the threat of looming exhumations by organizing a large-scale reburial operation. Ruez explains further:

“The excavators came and dug up most of the dead bodies.” 446

Some of the first evidence of this operation was discovered from aerial photos taken on 29 September 1995, showing heavy equipment being used at the Branjevo military farm site, where Erdemović had said one of the mass executions had occurred. In late October 1995, more digging was apparent. The operation was organized with new, smaller, and more distant graves dug for the reburial of the bodies. 447

The investigation team eventually discovered about thirty secondary sites. Many of the reburials were done under the cover of night, and they left bodies, in whole and in part, behind. In addition, they often moved incriminating evidence along with the bodies. For example, one execution site was located near a glass factory, and identifiable pieces of

---

444  J. Hagan, Justice in the Balkans, p.141.
446  J. Hagan, Justice in the Balkans, p.141.
447  J-R Ruez, Personal Interview by Author.
glass were moved with the bodies to the secondary site.\textsuperscript{448} To carry out the reburial operations, a great deal of calculation must be involved. By Ruez:

\begin{quote}
\textit{``You have to imagine these dozens of trucks carrying tons of dead people. The bodies were rotting. This went on for two to three weeks. Going through towns where people must have smelled the dead bodies. Seeing the limbs sticking out. You have things falling out of the trucks. Just completely crazy. All of this is a part of the crime. This was a further crime against humanity in the sense that it was a crime against everyone who became aware of it. It was only as these primary and secondary grave sites were discovered and exhumed that it became possible to confirm the stories of the Srebrenica massacre.''} \textsuperscript{449}
\end{quote}

John Ralston, the ICTY Chief of Investigations, observed:

\begin{quote}
\textit{``If we hadn't dug up thousands of bodies in Srebrenica, then the re-visionists would be in there saying, 'Well, they weren't really killed, they're just missing.'''} \textsuperscript{450}
\end{quote}

The Bosnian Serb reburial operations were conducted just before the Dayton Accord in November 1995. During the exhumations in 1996, investigators were followed by Serbian agents who disguised themselves as journalists. The agents, however, stopped chasing the team when they realized that the team could find only a small number of bodies in the exhumation sites. It later became evident that the Bosnian Serb deliberately left a few bodies in the initial burial site to downplay the scale of massacres and to claim that the story of mass murder was a fabrication by the Bosnian Muslim side.\textsuperscript{451}

At Branjevo military farm, for example, instead of approximately 1,200 bodies estimated by witnesses, the exhumation team found only 115. At this point, General Mladić no longer denied the existence of mass graves, but his argument was that these graves were in combat zones and the bodies buried there were collected from various locations for

\textsuperscript{448} J-R Ruez, Personal Interview by Author.
\textsuperscript{449} J. Hagan, Justice in the Balkans, p.142.
\textsuperscript{450} J. Hagan, Justice in the Balkans, p.142.
\textsuperscript{451} J-R Ruez, Personal Interview by Author.
‘sanitation’ purposes. The ICTY team had to show multiple bodies indicating clear signs of execution, such as bodies with their hands tied behind their backs.\textsuperscript{452}

Throughout 1998, the interview process continued. The investigators were in contact with Tuzla and Sarajevo Bosniak government authorities. If 1997 was the year dedicated to finding the secondary sites, 1998 was the time of exhumation of the secondary burial site.\textsuperscript{453}

The exhumation effort went on for several years, during which the team discovered numerous mass graves with a total of approximately 6,000 bodies recovered.\textsuperscript{454}

\subsection*{4.3.5.4 Exhumation – resource issue}

Notwithstanding the progress made on exhumations in 1996, it was still possible to question whether the time, money, and effort were well spent. The bodies necessary to make the crime base were still mostly in the ground. Back in The Hague, Ruez was feeling that his team still did not get sufficient support from the ICTY management. In September 1997, investigation team leaders were called to a meeting by Blewitt, Deputy Prosecutor of the ICTY, who announced the end of the exhumation season. There had been no exhumations conducted on Srebrenica crime sites that year. Ruez insisted that there should be at least one exhumation on Srebrenica case before the end of the year. The management conceded this request but the exhumation experts this time refused to conduct another exhumation, since they had gone through a rough time at the sites in Brčko where they were surrounded by angry local crowds who didn’t want the exhumation to be carried out.\textsuperscript{455}

Before further spending on the exhumations was approved, Ruez had to make the case for the ICTY management; \textit{“You had to identify a lot of sites and then build an argument

\textsuperscript{452} J-R Ruez, Personal Interview by Author.  
\textsuperscript{453} J-R Ruez, Personal Interview by Author.  
\textsuperscript{454} On the excavations conducted by ICTY investigation, see the testimony of Dean Manning at the Krstitć trial, 26 May 2000: http://www.icty.org/x/cases/krstic/trans/en/000526it.htm, last accessed on 8 December 2011. (Hereafter: D. Manning, testimony at Krstić trial).  
\textsuperscript{455} J-R Ruez, Personal Interview by Author.}

182
Furthermore, as the plans went forward, a new challenge emerged. The chief pathologist at the morgue had modified some statements on the reports made at the burial sites. Ruez says:

“The chief pathologist at the time was a kind of guy who never believed this thing would one day see the courtroom and took it upon himself to just change some of the causes of death without ever asking the people who were doing the autopsies.”

There were additional complaints concerning the procedures used at the exhumation sites. There were charges that some bodies and their parts had been misidentified. Blewitt concluded that only an investigation into this allegation could remove doubts. Hence McCloskey was assigned to make certain that every pathology report from the first year of exhumations was complete and authentic. As Ruez recalls, McCloskey spent much of 1997:

“revisiting every single pathologist wherever they were on the planet, to have them all re-examine their reports and confirm or modify them so that they were correct.”

4.3.5.5 Search and seizure – documentary evidence

Time is now 1998. While Ruez was frustrated that the exhumations had not progressed in Srebrenica, the opportunity emerged in early 1998 to take another major step. McCloskey and Ruez sensed that the lack of progress on investigation had led the VRS to let down their guard. There was a reason to think that well-executed search and seizure operations could produce uniquely useful information. The targets were the VRS Brigade headquarters in Zvornik and Bratunac. This phase of the investigation involved tracing the logistical work and the chain of command from the ground-level operations, already

459 J-R Ruez, Personal Interview by Author.
exposed by Erdemović, up through the as-yet-unexposed hierarchy of authorities responsible for the planning, preparation, and execution of the massacres.  

The search and seizure operation required external cooperation, but now of a more strategic and complicated kind associated with a search and seizure operation in a hostile territory. This required the acquiescence of the RS authorities in Banja Luka, as well as protection from UN and NATO forces.

Stefanie Frease played a crucial internal bridging role among ICTY investigation teams in launching this initiative. One day she heard in the hallway of the OTP that a search and seizure operation was being planned in Banja Luka. Frease stated:

"I went back to our guys and I said, 'Why aren't we doing this?'"  

The Srebrenica investigation had established quite solid evidence on crime-base, i.e., what happened on the ground. What was still lacking was the information about the planning and chain of command that made this massive operation possible, and this information was likely in the Brigade headquarters.

Frease knew that the Banja Luka operation would require a significant number of experienced professionals. She explained:

"[we] piggybacked on to that one [the Banja Luka operation] because you need people who know the subject matter, you need people who know the language, you need to come up with a procedure for how you are going to process all the material. You have to know what you're looking for and so we assembled a big group of people."  

460 J-R Ruez, Personal Interview by Author.
461 S. Frease, Skype Interview by Author.
463 J-R Ruez, Personal Interview by Author; S. Frease, Skype Interview by Author.
The overall search and seizure operation was overseen by John Ralston, the Chief of Investigations. The ICTY investigations at this time adopted a ‘linear model’, organized around eleven teams, each consisted of a Team Leader and a Legal Advisor, a few investigators, crime and military analysts, an interpreter, and a secretary. Two or three Team Leaders then reported to Investigation Commanders, who in turn reported to the Chief of Investigations. Ralston had worked with Blewitt, ICTY Deputy Prosecutor for five years on war crimes in Australia and had risen through the investigation hierarchy. Ralston had great respect for Ruez and McCloskey, noting that the investigation teams work best when:

“[the] team leader and the legal advisor are sort of joined at the head.”

Ralston recognized that Ruez was a dynamic leader and emphasized that he had carefully picked McCloskey to work with him. By Ralston:

“I never had a lot of people I could put in there, so we made sure everybody we did put in there was excellent and...They all clicked pretty well.”

Ralston commended the selflessness of McCloskey as an experienced lawyer in a long-term investigation:

“For the first couple of years Peter was here [The Hague], he was never in court. He didn’t have anybody charged, there was an investigation and that’s what we wanted. That changed when Krstić got arrested.”

466 Based on author’s observations while working at the ICTY OTP (1995-2009). For theoretical discussion on a ‘linear model’, see Chapter 2.5.2 supra.
467 J. Hagan, Justice in the Balkans, p.147.
468 I. Delpla, Interview with Ruez, p.47;

“There were only ninety people in the ICTY Prosecutor’s Office, just thirty of them with police experience, to cover all criminal aspects of a conflict that had begun in 1992 and was ongoing at the time, since the war was not over then and nobody knew when it would end.”

Radislav Krstić, the Commander of the VRS Drina Corps got arrested by the US Special Forces and handed over to the ICTY on 2 December 1998.\textsuperscript{470}

The search and seizure operation helped to fix Krstić as a key target in the Srebrenica investigation.

The first search and seizure operation for the ICTY was orchestrated by Ralston in 1997 in Prijedor, and Banja Luka came about ten months later, in February 1998. The Srebrenica team’s searches and seizures were conducted in Zvornik and Bratunac about a week after the Banja Luka operations. In each instance the plan was to send a representative of the ICTY with authorizing documents to a high-level authority, such as the office of the President and the Ministries of Justice and Defence of the RS. This was immediately followed by the ICTY team going to the site. Two members of the team, the leader and the legal advisor, would enter the site first and negotiate to gain access based on a warrant issued by the ICTY Chamber.\textsuperscript{471} If access was refused or (more often) delayed, the person in charge locally was asked to call the higher-level authority. Ralston recalled saying on at least one occasion, “I suggest you ring your President.”\textsuperscript{472} The Office of the High Representative (OHR) in Bosnia and Herzegovina as well applied political pressure to secure the cooperation.\textsuperscript{473}

Eventually, Ralston and his team gained access to all the sites they pursued in Bosnia and Herzegovina:

“We sought and got cooperation in each of the locations, although it took some negotiation. We had escort forces providing backup and ensuring a secure environment for us to conduct the missions – we seized materials and came out.” \textsuperscript{474}

\textsuperscript{470} J-R Ruez, Personal Interview by Author.
\textsuperscript{471} J. Hagan, Justice in the Balkans, p.148; S. Frease, Skype Interview by Author.
\textsuperscript{472} J. Hagan, Justice in the Balkans, p.148.
\textsuperscript{473} J. Hagan, Justice in the Balkans, p.148.
\textsuperscript{474} J. Hagan, Justice in the Balkans, p.148.
An exhibits officer was appointed in each room searched in each site. Each item of evidence was taken to the officer:

“[he] (exhibit officer) logs it, bags it, and then he’s got custody of it until you actually get it to secure premises.”

The documents were taken away by the truckload. Much of the evidence connected to charges against General Krstić in the Srebrenica case came from the search and seizure operations.

Ruez was certain that the Bosnian Serbs had hidden or destroyed all the most obvious documentary evidence before their arrival. Indeed, the Drina Corps had destroyed a lot of documentation from 1995. However, Ruez also observed that:

“[we] found all our golden nuggets in departments where they never thought we would find thing.”

These units included the engineering department that maintained log books recording the allocation of fuel and movements of security personnel, which revealed, for example, that:

“[the] day before they installed these people in the detention sites, you have the movement of all these guys going to these sites.”

The drivers’ log indicated where they went and when. The engineering records noted “digging pits in Branjevo”. Branjevo was not a military zone. These pieces of information validated the chronology of events. Ruez recalled that "the Serbs went to great lengths to hide the evidence of the crimes." He then explained that "they did a sloppy job. They moved bodies from mass graves but left behind many. They erased records and cleaned out archives. Binders from 1995 were missing. But they left some things. They did not remember to destroy the engineering logs showing how they used heavy

477 J-R Ruez, Personal Interview by Author.
478 J. Hagan, Justice in the Balkans, p.149; J-R Ruez, Personal Interview by Author.
479
equipment to dig the graves. We found time tables of the military police guarding prisoners.”

This information also cross-validated the investigation team’s identification of the detention and execution sites and confirmed that the selection and use of these sites was planned in advance:

“[They] didn’t know what they needed to hide.”

Ruez emphasizes that:

“[before] this [operation] we had all the material that enabled us to reconstruct the events through the eyes of the victims, but not through the actions of the perpetrators, and the two should be overlaid.”

This was the difference between knowing of the crimes and knowing who at the higher level planned, prepared, and executed the operation. With only the victim reports:

“[you] have a good reconstruction of what happened, but you don’t know who did it.”

The search and seizure operation altogether acquired more than thirty thousand documents from Zvornik and Bratunac.

4.3.5.6 Intercepts

In April 1998 investigators gained access to ABiH intercepted communications of the VRS units. Researcher and criminal analyst Stefanie Frease was particularly interested in the record of intercepted radio and telephone communications. Her language skills and

---

480 J-R Ruez, Personal Interview by Author.
481 J. Hagan, Justice in the Balkans, p.149
482 J. Hagan, Justice in the Balkans, p.149; J-R Ruez, Personal Interview by Author.
483 J. Hagan, Justice in the Balkans, p.149.
484 J. Hagan, Justice in the Balkans, p.149.
485 S. Frease, Skype Interview by Author.
cultural background in the Balkans stirred her interest in what the Bosnian Serb military figures were saying in their communications. The intercepts captured:

“[the] conversations of what was happening... [on] those days, and that kind of evidence was extraordinary.” As the case progressed, her interest in the intercepts kept increasing, “so I wanted to take it up I wanted the project.” 486

As the intercept investigation moved forward, it was expanding in size and scope. At first, Frease had difficulty understanding what all the material was and why, it often appeared to repeat itself. This turned out to be crucial, because the ABiH had two recording sites on different mountaintops, and the various units occasionally recorded the same conversations. While initially confusing, it later helped to cross-validate and establish the veracity of crucial conversations. The overall challenge was to sort out what was in the intercepted materials, what it meant, and why it was there.487

Frease did not assume that the content of these materials could be taken at face value:

“There were just all these questions...what does this mean and is this stuff real? That was always in my mind too. Are they bullshitting us or is this stuff real?” 488

She hired translators to work at the Tribunal and began to narrow down the range of material. She travelled back to Bosnia and Herzegovina to interview the intercept operators who would later testify in court. Much of the translating and matching up of material was done by a small group who worked on the intercepts at the Tribunal.489 The movement back and forth between the various versions of the materials was tiresome. Frease states as follows:

486 J. Hagan, Justice in the Balkans, p.149.
487 S. Frease, Skype Interview by Author; J-R Ruez, Personal Interview by Author.
488 J. Hagan, Justice in the Balkans, p.150.
489 S. Frease, Skype Interview by Author.
“Very tedious, very, very tedious. But it mattered that it was done with precision, and I knew that it was going to have to be as close to perfect as we could get it.” 490

Finally, the essential bits of conversations began to emerge, for example, discussions of fuel that was needed and persons who had to be moved:

“I remember getting so excited when we found the fuel conversation.” 491

The challenge was to find and understand what was being said, some of which involved understanding euphemisms and coded words. As John Ralston also observed:

“Generally speaking, people don’t use plain language in communications over electronic media, so you have to work out what it is they’re saying and how it relates to what’s going on.” 492

There was an issue of authentication about the intercepts. The intercepts were therefore used to validate the information that the investigators had already known from other sources. In this way, the Prosecution tried to counter the argument of the Defence who challenged the authenticity of the information. 493 The work on analysing intercepts continued throughout the investigation and on into the period of the trial itself. 494

4.3.5.7 Summons

Starting from the end of 1998, numerous VRS members, from a driver to the General, were summoned for interviews by ICTY investigators. The summonses were served

490 J. Hagan, Justice in the Balkans, p.150.
491 J. Hagan, Justice in the Balkans, p.150; S. Frease, Skype Interview by Author.
492 J. Hagan, Justice in the Balkans, p.150.
493 S. Frease, Skype Interview by Author; J-R Ruez, Personal Interview by Author.
pursuant to Rule 39 of the RPE. Krstić himself was also interviewed before his arrest.

In the interviews, with an attempt to hide what their own units were doing during the Srebrenica massacres, the witnesses would testify in detail about what the other units were doing. The witnesses themselves were aware of only a small fraction of information since there was a policy of ‘the code of silence’. The investigators knew far more than what most of the witnesses knew. It was rare that the investigators knew far more than what the perpetrators themselves. This happened because of the scale of the crime and the code of silence as mentioned before.

The VRS insider witness statements were mostly recorded by a very small number of investigators who had been working on the case for a long period of time. It normally takes time for a new investigator to become fully familiar with the case. In a complex case like the Srebrenica investigation, the investigator would be tested of his/her knowledge by insider witnesses in the interview. If the witness realized that the investigator had less knowledge than the witness, it would become impossible to extract meaningful information from the witness. Until 2000, Ruez conducted most of the insider witness interviews.

---

495 P. McCloskey, Skype Interview by Author; M. Harmon, Personal Interview by Author.

Rule 39 (1) (Conduct of Investigation) provides that;

“In the conduct of an investigation, the Prosecutor may: (i) summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations.”

This allows the Prosecutor to summon witnesses without going through the Trial Chamber who also possesses power to summon witnesses pursuant to Rule 54.

496 J-R Ruez, Personal Interview by Author.

497 J-R Ruez, Personal Interview by Author.

498 J-R Ruez, Personal Interview by Author.

499 J-R Ruez, Personal Interview by Author.
4.3.6 Analysis of evidence

4.3.6.1 Analysts

To reconstruct the facts in criminal investigations, one must approach them from several directions at the same time. It requires different types of analytical work to reconstruct international crimes of this scale.\footnote{Ruez explains this process as follows;}

First are the medico-legal analysts, who managed all aspects of the exhumation, which was a fundamental dimension of the Srebrenica case. In addition to what is called the ‘scientific police’ analysis of the execution sites which determined the cause of death, the medico-legal analysis assisted to establish the number of victims and circumstances of their killing.\footnote{J-R Ruez, Personal Interview by Author.}

Second, establishing the chronology of events is an essential work of crime analysts. For the case like Srebrenica, establishing precise chronologies is critical since hundreds of events happened simultaneously. The chronology of events must be assembled from a morass of information which is vast in volume. This is done by sifting through piles of witness statements and documents. Events must be organized along a timeline. For that, analysts try to separate the wheat from the chaff since there is always some chaff among the witnesses’ accounts, no matter how honest they are. This is understandable given human psychology.\footnote{I. Delpla, Interview with Ruez, p.47}

Dealing properly with the mountain of documents recovered through searches and seizure operations at Brigade HQs requires a military analyst whose expertise is to determine which units were involved in what under what chain of command. For the Srebrenica
investigation, Rick Butler, an American military analyst oversaw the analysis of documents and examined the military aspects of the Krivaja 95 operation.\textsuperscript{503}

The next step was to analyse transcripts of the radio communications intercepted by the Army of the Republic of Bosnia-Herzegovina (ABiH). These transcripts are helpful in reconstructing the facts and identifying which units were involved, and to trace who played what role in the chain of command and thereby identify perpetrators.\textsuperscript{504}

The investigation team also undertook a massive weapons seizure operation in the fall of 1997. 3,500 weapons were seized and all of them went through ballistic tests using comparative firing tests. The analyses of the weapons seized, however, led nowhere since the VRS had transferred weapons after the Srebrenica events, between 1995 and 1998.\textsuperscript{505}

4.3.6.2 Chain of command

The year 1998 was important as it was the year of the arrest of Radislav Krstić, the Commander of the Drina Corps. All the crime scenes geographically fell under the responsibility of the Drina Corps. Chronologically, the execution sites started from Kravica warehouse very close to Srebrenica town on 13 July. The sites then moved to the north, on 14, 15 and 16 July 1995. The last execution site, Pilica Cultural Centre was located just 300 meters south of the border with other VRS Corps. This showed that the perpetrators were cautious that the executions took place strictly within the boundary of the Drina Corps area of responsibility. This was necessary to keep the operation secret from other army units. If the operation were to take place across the other Corps areas of responsibility, those Corps must be informed of the operation, and more people must get involved. In terms of the involvement of civilians, some execution sites were in the village where civilians were living, \textit{e.g.}, 800 hundred meters away from where they live. It was hard to imagine that these people were unaware of what was going on. The investigators

\textsuperscript{503} J-R Ruez, Personal Interview by Author; J. Hagan, Justice in the Balkans, p.149.

\textsuperscript{504} J-R Ruez, Personal Interview by Author; S.Frease, Personal Interview by Author.

\textsuperscript{505} J-R Ruez, Personal Interview by Author.
believe that even the blindfolds used to bind the prisoners were prepared by the local villagers.\textsuperscript{506}

The analysis of the evidence revealed that there were two phases in terms of locations and the times of the massacres.\textsuperscript{507}

The first phase of the massacres took place in the south of Srebrenica town before 14 July 1995. Anybody could kill Bosnian Muslim prisoners during this phase when the killings were much less organized. The VRS was caught by surprise when thousands of Bosnian Muslims surrendered following a harrowing night of ambushes in the woods and being fired upon by a variety of weaponry.\textsuperscript{508}

A more organized process of the killing began on 14 July; VRS Security Officers did the reconnaissance of the potential execution and burial sites on 13 July and organized the extermination process. The VRS hierarchical structure at the time was the following: Main Staff of the VRS, Mladić was the Commander, and below him was Zdravko Tolimir who was in charge of both Intelligence and Security of the VRS Main Staff. Colonel Ljubiša Beara, Chief of Security, fell under Tolimir, and he was responsible for the Military Police which took care of the prisoners during the Srebrenica attack. Beara in this sense represented Mladić and his order carried the same weight on the ground. Under Beara was Lieutenant Colonel Vujadin Popović who was the Chief of Security of the Drina Corps who fell under the Command of General Radislav Krstić, Commander of the Drina Corps. The real Chain of Command of the operation, however, was that Popović fell under direct command of Beara. Under Popović were the Security Officers of Bratunac and Zvornik Brigades. The entire extermination processes was commanded and controlled by these people.\textsuperscript{509}

\textsuperscript{506} J-R Ruez, Personal Interview by Author.

\textsuperscript{507} J-R Ruez, Personal Interview by Author.

\textsuperscript{508} J-R Ruez, Personal Interview by Author.

\textsuperscript{509} J-R Ruez, Personal Interview by Author.
During the search at the Zvornik brigade, investigators seized a map showing all the units in the brigade. By overlaying this map with the location of the crimes, one could identify which units were present at which location in a given time.\textsuperscript{510}

In terms of the political linkage, Miroslav Deronjić was the key link between the crime and Radovan Karadžić, the President of the RS. Deronjić was the Head of the Serb Democratic Party (SDS) in Bratunac and, at one point he was the Vice President of the RS Parliament.\textsuperscript{511} Deronjić was indicted by the ICTY and testified as a Prosecution witness in a number of cases. He was then transferred to a prison in a third country where he died of cancer.\textsuperscript{512}

4.3.6.3 Narrative of events

What follows is a summary of evidence, presented in a narrative form, about the Srebrenica events of July 1995. This summary is important as it represents the ‘meta-narrative’ which is constructed from the viewpoint of the ICTY Prosecutor, and which was presented at the Krstić trial at the ICTY. The source is Jean-René Ruez, ICTY Srebrenica investigation team leader, who dictated this narrative during the interview conducted by the author on 09 February 2017.

4.3.6.3.1 Genesis of attack on Srebrenica

‘Krivaja 95’ is the codename that was given by the Army of the Republika Srpska (VRS) for the attack on the UN Safe Area of Srebrenia. The primary objective of the Krivaja 95 operation was not to occupy the Srebrenica enclave, but rather to reduce it to the size of the town and to make the residents’ living conditions so intolerable that the UN would be forced to evacuate them from the area.

In 1992, Bosnian Muslim refugees from Vlasenica and Zvornik poured into Srebrenica. Naser Orić, Commander of the 28\textsuperscript{th} Brigade of the Army of the Republic of Bosnia-Herzegovina (ABiH) based in Srebrenica launched an offensive and got very close to taking over the Serb-controlled town of Bratunac. Orić advanced further and at one point

\textsuperscript{510} J-R Ruez, Personal Interview by Author.
\textsuperscript{511} J-R Ruez, Personal Interview by Author.
\textsuperscript{512} M. Harmon, Personal Interview by Author.
his troops were almost reaching Tuzla. Mladić’s VRS launched a massive offensive against the ABiH 28th Brigade in 1993. When VRS was about to capture Srebrenica, UNPROFOR led by French General Morillon intervened. According to Ratko Mladić, if he had continued with the offense in 1993, he would have taken the entire Srebrenica enclave and no massacres would have happened in 1995.

On 9 July 1995, Radovan Karadžić, President of Republika Srpska, issued a new order authorizing the VRS Drina Corps to capture the town of Srebrenica.513

On 10 July 1995, against the advice of his staff officers, Ratko Mladić decided to capture the town of Srebrenica. This was not part of the initial plan. When the VRS took Srebrenica on 11 July 1995, the population fled in two directions; 1) a column of men set off towards Tuzla hoping to get through the VRS held territories, while 2) women, children, the elderly, and the men who did not want to abandon their families or thought they had nothing to fear from Bosnian Serb forces set off toward a small industrial zone called Potočari, where the Dutch UN contingent was based in an abandoned factory. Around 25,000 refugees assembled in this area.

4.3.6.3.2 Column of Bosnian Muslim soldiers

Most of the men who decided to walk to Tuzla, gathered at a place called Šušnjari, in the northwest corner of the enclave. This group of approximately 15,000 included members of the 28th Division of the ABiH as well as all able-bodied men and a few women. It was not until the following day at noon that the tail end of the column finally left Šušnjari for the 100 kilometer-or-so trek through treacherous terrain. Members of the column could be considered ‘potential combatants in civilian dress’—a day before the departure, a general mobilization order had been issued to the entire Bosnian Muslim male population in the enclave—or in any case as legitimate military targets to the degree that men were still carrying arms or were marching among soldiers.

The first part of the column reached a crucial intersection at Konjević Polje in the evening of 12 July. Led by soldiers, around 8,000 men successfully crossed. Four days later that number fell to approximately 6,000 following numerous ambushes and—a pitched battle against the Serbs near Zvornik. On 16 July 1995 the men reached free territory at Nezuk.

513 M. Harmon, Personal Interview by Author.

196
Those who were killed while attempting to flee are considered combat deaths and are therefore not counted among the victims by ICTY investigators.

After the head of the column passed through Konjević Polje, Bosnian Serb forces closed the area, trapping the other refugees and runaways in the hills between Konjević Polje and Srebrenica. On 13 July, this group decided to surrender to the Bosnian Serb forces, misled to do so by the fact that some Bosnian Serb soldiers were wearing stolen blue helmets and claimed through megaphones that the UN and the International Red Cross were present and would protect them based on the Geneva Conventions.

4.3.6.3.3 Forced transfer of women and children

At the same time, a process began of forced transfer of the population who had sought refuge in Potočari. The process started on 12 July using buses and trucks. In Potočari itself, VRS troops created an atmosphere of terror, committing numerous murders while separating men from women and children. Chaos reigned among the refugees. The evacuation was completed in the late afternoon of the 13\textsuperscript{th} July 1995.

4.3.6.3.4 Extermination – phase 1

Next, the men were assembled in several places. This was Phase One of the extermination operation. Among others, the assembly points included Bratunac, Sandići, the soccer stadium of Nova Kasaba, and the Kravica warehouse.

4.3.6.3.4.1 Bratunac

In Bratunac, executions began on the 12\textsuperscript{th} July 1995 with clubs, axes, and throat-cutting. This was not a mass execution but can be characterized as sporadic murders. Summary executions also took place along the road between Konjević Polje and Sandići.

4.3.6.3.4.2 Konjević Polje

At the road intersection of Konjević Polje, there were two assembly sites where sporadic murders also took place. Some men were even killed in mass graves previously dug for them, where they were subsequently buried. Bullets were found under the bodies.
At Nova Kasaba, there were also sporadic executions, as well as some that were more systematic. At this stage, it is clear that, regardless of the men’s initial status, they could no longer be considered combatants. Only soldiers and escapees were killed in combat operations, many of the corpses had their hands or arms tied behind their backs. The type of restraint used, especially in this area, was a flexible metal band, highly practical for tying someone up from behind and impossible to slip out of once attached.

A group of close to one thousand individuals were taken into the Kravica warehouse and executed with automatic weapons and offensive grenades.

One hundred and forty-nine prisoners, their hands tied behind their backs and some with bound feet, were transported in three buses to the Cerska valley. All of them were shot along the roadside and their bodies covered with dirt by an excavator.

Other prisoners were transported to the Jadar river, where they were shot from behind.

By 13 July, numerous executions had already begun, but the execution process was still disorganized, or even anarchical. During this time, anyone who wanted to pull a trigger had license to kill. On 13 July Bosnian Serb army leaders, realizing that not all the prisoners could be executed in this way, decided to assemble the prisoners in Bratunac. While this was being done, officers of the security branch of the Drina Corps moved more than thirty kilometres northward to the Zvornik zone scouting for possible detention and burial sites, which were in fact to be used as execution sites, too. Transfer of the prisoners was scheduled to start on the night of the 13th to the 14th July. No provision of food or drink was made for the prisoners. Records of the movement of security officers were found during searches at Bratunac and Zvornik brigades HQs. The drivers failed to destroy these records. The drivers’ log-books provide accurate locations of the crime scenes. These crime sites matched to those listed in the drivers’ handwritten records. Due to lack of transportation, the prisoners who could not be transferred were executed on the spot.
4.3.6.3.5 Extermination – phase 2

Phase Two of the extermination operation began during the night of the 13th to the 14th July 1995, when the first convoy of prisoners headed north from Bratunac to Zvornik. The prisoners were informed that they would be transferred as part of prisoner exchange. Instead, the captive men were taken to schools in Grbavci and Petkovci.

4.3.6.3.5.1 Grbavci – Orahovac, Petkovci

The prisoners held at the Grbavci school were blindfolded and executed in two nearby fields in Orahovac. After a number of them were tortured, those held at the Petkovci school were executed at the bottom of a nearby dam. In Orahovac, the wounded and dead were gradually buried, some while still alive, by excavators and backhoes. At the Grbavci school site, many blindfolds were discovered in a garbage pile. In the pits, numerous corps were blindfolded. At the dam near Petkovci, used cartridge cases and a very large number of cranial fragments were found which suggest that the killers shot the victims in the head.

4.3.6.3.5.2 Kozluk

The evacuation of prisoners from Bratunac continued into the night of the 14th to the 15th July 1995. Approximately 500 prisoners were transferred to the Ročević school, north of Zvornik. On the 15th, they were all executed at a place not far away from Kozluk.

4.3.6.3.5.3 Branjevo military farm Pilica cultural centre

The same day, prisoners who remained in Bratunac were taken to two public buildings in Pilica, the school and the cultural centre. Approximately 1,200 prisoners held at the school were executed on the 16th at the Branjevo military farm and 500 prisoners from the Pilica cultural centre were executed that same afternoon. The same type of residue in the cultural centre was found in the Kravica warehouse.

The chronology of the ‘clean-up’ operation on the ground, *i.e.*, the burial of bodies, proceeded from the south to northward. The crime scenes of the first phase fell in a southern zone, where the executions were less organized, and then they moved to the northern zone during the second phase. In both cases, all of crime scenes were within the area assigned to the Drina Corps.
Next came Phase Three of the operation. During the Dayton negotiations in the fall of 1995, it became clear to Republika Srpska authorities that there would be inquiries into these events. The Drina Corps then launched an effort to camouflage evidence of their crimes that was logistically as great as the extermination operation itself. They intentionally left a small number of corpses in the primary mass graves so that, if they were discovered, investigators would conclude that there had indeed been murders corroborating the witness accounts, even if, instead of numbering in the hundreds or thousands, the victims numbered in the tens and twenties.

A fair number of the corpses were found with their hands tied behind their backs, and one victim had an artificial leg and vertebrae that were so fused together that he would not have been able to stand erect. The very fact that these individuals were executed obviously contradicts the claim of the VRS that the victims were combatants.

During this third phase of the Drina Corps’ operation, primary mass graves were reopened with excavating equipment and the corpses were transported in trucks toward more remote locations and dumped into twenty-six secondary grave sites spread throughout the zone controlled by the Drina Corps. All these pits were dug along similar lines, and they were obviously excavated by engineering units of the Drina Corps, since each pit was of the precise depth. Anywhere between one and four truckloads of bodies were dumped into each pit. Analysis of the objects found at these locations, such as cartridge cases, blindfolds, ligatures, and fragments of broken glass, along with the examination of soil and pollen samples, offered clues that linked primary and secondary mass grave sites.

Except for a handful of sites, the southern zone was also part of this effort to conceal evidence. One such exception was a site in the Cerska valley that went untouched. There are three hypotheses for this. The first hypothesis is that the site contained only 150 bodies and that the officers deemed this too insignificant a number to be worth the trouble of reopening the pit. The second hypothesis is that because of a lack of organization during the day of 13 July, the security officers may well have been unaware of this execution site. The third hypothesis is that the site is so remote that they thought it would not be found.
4.3.6.4 Number of victims

Ruez holds a view that the total number of victims in Srebrenica who fall under the jurisdiction of the ICTY is approximately 6400 to 7000 who could be identified through DNA testing. Ruez discounted about a thousand who might be part of the column who had tried to breakthrough from Srebrenica to Tuzla, were killed during the combat, in addition to those who committed suicide. The most recent report by the ICTY on forensic evidence from the Srebrenica investigation counts 6849 being proven from the DNA testing. Media reports, however, still adopt a much higher number of 8,000 of the victims in Srebrenica, and the media never revised this figure to date.

4.3.7 Construction of ‘forensic truth’

The characteristic of the ICTY investigation in Srebrenica is that it combined linguistic evidence such as documents seized from archives or witness testimonies, with physical scientific material discovered from the exhumations. The ICTY was the only organ that had access to the crime sites and was capable of exhuming bodies. It was also the only organ which had power to conduct search and seizure operations at national or military archives in the RS and capture critical documentary evidence. Those materials helped the ICTY investigators to corroborate or to go beyond witness testimony by cross-checking forensic evidence collected from exhumations. French historian Isabell Delpla described the investigation conducted by the ICTY at Srebrenica as:

```
'[
the] privileged site where historical narrative is anchored in the world of physical reality [...] Disciplines rooted in language and representation, such as witness testimony and documentary evidence, were combined with physical and technical science to bring the human dimension in Srebrenica. Usually this is the role of social sciences to provide the means of reaching beyond the point of view of witnesses and actors by means of long-term history or statistical and economic analyses.
```
In the case of Srebrenica, however, it was the physical and medical sciences that played this role. Indeed, forensic experts played a decisive role in the Srebrenica investigation by turning corpses into witnesses ‘from beyond the grave’—that is, reconstructing a portion of the events based on autopsy reports when no testimony existed.”

In what follows, the discussion will focus on how the forensic evidence was deconstructed and fed to the creation of ‘meta-narrative’ of Srebrenica.

The contexts in which lawyers, investigators and forensic experts interact during the Srebrenica investigation are seen at three different phases; namely, pre-forensic investigation, forensic investigation and the expert witness testimony during the trial.517

4.3.7.1 Pre-forensic investigation

Once a decision to seek forensic expertise was taken, the Srebrenica investigation team had to locate the crime scenes and graves, before planning the excavation and exhumation processes. As discussed earlier, this was not an easy undertaking:

“Merely locating a crime scene can be a formidable task. The majority of the crimes committed during the break-ups of the former Yugoslavia were totally unreported. A few did attain almost instant world-wide publicly. In general, however, unspeakable atrocities took place in isolated locations, under cover of darkness, in non-descript buildings, in common fields and forests, out of sight of media cameras or military surveillance, totally unknown to the wider world.”518

With the assistance of the US government, the ICTY investigation team was able to examine aerial images dating between 7 July and 27 July 1995. Combining the eye-witness testimony of survivors with the analysis of the photographs showing disturbed soil, the investigation team began to identify suspicious mass grave sites.519 Through a forensic site assessment, the parameters of the graves were established, confirmed and


519 M. Klinkner, Proving Genocide, p.450.
defined to facilitate meticulous planning of the exhumations. Furthermore, forensic experts assisted investigators in establishing the scope of the forensic investigation by giving an indication as to which site would yield what type of evidence.

4.3.7.2 The experts

The ICTY forensic teams consisted of forensic experts, investigators and dozens of support personnel. The key positions of those were the investigator, the chief archaeologist, the chief anthropologist and the chief pathologist; the last three headed the forensic teams at the grave site or mortuary and led the forensic examination. ICTY investigator Dean Manning summarized an investigator’s duties regarding exhumations and autopsies the following:

“[...] attendance at exhumation sites, on site briefings relating to the crime scenes, the examination and assessment of evidence in situ and the comparison of evidence obtained from various exhumation sites and autopsies, the handover of bodies to authorities of Bosnia and Herzegovina, and the examination, assessment and transport to the ICTY offices in The Hague of evidence obtained during the exhumation and autopsy process”.

The role of forensic archaeologists is to apply their survey and excavation skills to the site; they are experienced in identifying, excavating and recording complex features, and recovering human remains and artefacts. They are also experts in recognizing any alteration to soils, human remains, and other materials recovered which helped elucidate what happened to the victims at the point of death and thereafter. During the Srebrenica investigations, primary as well as secondary graves were located. The forensic archaeologists investigate the link between execution and burial sites, and the link between primary and secondary graves.

The forensic pathologists’ main role was to perform the post-mortem examination of bodies and human remains to establish the cause of death and identity of the victims.

---


203
Criminal aspects of death tend to leave physical traces and the pathologist has experience in recognizing torture and/or starvation prior to death, trauma, entrance and exit wounds from firearms, etc. They work closely with the anthropologists, odontologists and radiographers.

Forensic anthropologists are specialists in analysing skeletal and dental remains as well as taphonomic alterations. They can distinguish between bones’ state during an individual’s lifetime, at the time of death and after death and can thus contribute towards establishing ancestry, sex, age at death, stature, handedness, etc. They reconstruct fragmented and disarticulated skeletons to facilitate the calculation of the minimum number of individuals (MNI) and to aid the identification process.

Everything that is undertaken at the site or within the mortuary is thoroughly recorded in the most appropriate media such as log books, autopsy reports, photographs, X-rays and field notes.

4.3.7.3 Limits of the site

During the Srebrenica investigation, 17 mass graves had been exhumed and further 23 sites were examined. The sites were selected according to the prosecution’s strategy and the boundaries of the sites. The forensic experts had to work within the established physical boundaries for them. Forensic experts Skinner and Sterenberg observed, however, that a crime has no natural boundaries. Though the limits are set in space and in time, the scene is not the same as in the past, and the representation of the actual burial scene is partial. Although the forensic experts’ working environment has been determined,

522 Ibid.
523 M. Klinkner, Proving Genocide, p. 451. ‘Taphonomy’ is the study of how organisms decay and become fossilized.
525 M. Klinkner, Proving Genocide, p.452.
526 D. Manning, Witness Statement at Milošević Trial, p.4.
it is defined not only by the presence of data and information but also through the absence of potential evidence.\footnote{Lorin de la Grandmaison points out that various mass graves in Srebrenica were not investigated. This fuelled speculations of bias and misrepresentation of facts. G. Lorin de la Grandmaison, M. Durigon, G. Moutel and C. Herve, \textit{The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Forensic Pathologist: Ethical Considerations}, \textit{Medicine, Science and the Law}, 2006, Vol.48, p.85,}

\subsection*{4.3.7.4 Operational constraints}

The security levels at the site and during personnel transportation are critical to facilitate forensic investigations.\footnote{\textit{The most dangerous activity, by far, is driving to and from the site"}, Skinner, M., Alempijevic, D., and Djuric-Srejic, M., \textit{Guidelines for International Forensic Bio-Archaeology Monitors of Mass Grave Exhumations}, \textit{Forensic Science International}, 2003, Vol.134, p.85} Land mines and other ordnances must be cleared every day before the forensic team began their on-site work. Support structures such as equipment, facilities and health and safety considerations would impact on procedures and results of the forensic work. Inadequate equipment would compromise the quantity and quality of the evidence collected and such limitations needed to be revealed in court.\footnote{Clark J., \textit{Pathological Investigation}, in J. Payne-James (ed.) \textit{Encyclopaedia of Forensic and Legal Medicine}, Elsevier, 2005, p.367, \textit{Appropriate Personal Protection Equipment (PPE) can also shelter forensic scientists from smells, sights, emotions and provide confidence in the overall value and integrity of the work conducted." Williams E.D., and Crews, J.D., \textit{From Dust to Dust: Ethical and Practical Issues Involved in the Location, Exhumation, and Identification of Bodies from Mass Graves}, \textit{Croatian Medical Journal}, 2003, Vol.44, p.253}

\subsection*{4.3.7.5 Safeguarding neutrality of experts}

Forensic work is time bound and subject to budgetary constraints. Time was critical for the Srebrenica investigation team. General Krstić was arrested and transferred to The Hague on 3 December 1998, while the exhumation work was still going on.\footnote{Pursuant to Article 21 (4)(c) of the ICTY Statute, the accused has right to have trial \textquoteleft without undue delay\textquoteleft.} Browne N.M., et al. draw attention to the danger of the legal approach which is explicitly value-driven, and which \textquoteleft contrasts sharply with the purported intellectual openness of the
Consequently, forensic scientists must complete exhumations and autopsies within a limited time-frame, sometime at the risk of compromising the independence and neutrality of their work. The objectives of the exhumation in the Srebrenica investigations were clear from the outset as stated by investigator Dean Manning:

- to corroborate victim and witness accounts of the massacres;
- to determine an accurate count of victims;
- to determine cause of death and time of death;
- to determine the identity of the victims and any link to the missing from Srebrenica;
- to determine the gender [sic] of the victims;
- to identify any links between primary mass graves and secondary mass grave sites;
- to identify links to the perpetrators.

On-site briefings given by the investigator to the forensic team should contain factual and background information “avoiding speculative scenarios which could bias the expert to try to prove the prosecutor’s theory of a case.” The point on how much investigation related information should be shared with forensic experts is contentious among experts, and it seems there is no consensus. The issue here is whether the experts remain prejudice-free when they are given a brief, or when the investigators seek subtly to influence the investigation. Providing forensic experts with a prosecution theory, will guide forensic activities in a certain direction, thus, influencing the investigation to the detriment of the

---


534 D. Manning, Witness Statement at Milošević Trial.

neutral and objective overall view. In the Srebrenica investigation, the forensic experts received remarkably little information about the case.

Pathologist Dr Christopher Lawrence testified on this point during the cross examination of the Popović trial at the ICTY. When asked whether forensic pathologists are expected to prove the theory of the prosecution, he replied as follows:

“No. My job as a forensic pathologist in this, along with everything else I do, is to test the information that I have been given to see if it is true. In the course of any investigation that I do, I am given information, but it is my job to test that information to see if it is correct.”

Forensic science faces a paradox regarding the best level of briefing; whilst more background information implies a greater involvement with the prosecution’s strategies, it can fix the quality of research by raising the experts’ awareness of details and potential evidence. Some argue that it is simplistic to believe that forensic experts remain impartial when given little information:

“First, there may be no simple or uncontroversial way of separating ‘scientific’ facts from their ‘background’ context. And secondly, the umbrella term ‘forensic science’ embraces a set of intensely practical

536 In one of the ICTY Srebrenica trials, forensic scientist, John Clark further testified the following:

“There is an argument whether we should … do a case sort of blind or with some information. I think there is a happy medium. I think we probably reached this here, and certainly we had little detailed information about the cases. Other than to the extent that we were generally informed whether his was a primary grave of whether this was a grave which had been disturbed. And that explained why so many of the bodies were disrupted … but in terms of what weapons had been used …we were the main instigators of that information from our findings”

Testimony of John Clark at Popović et al. Trial (IT-05-88-T), 19 February 2007, paras.7348-7349. (Hereafter: J. Clark, Testimony at Popović Trial)

537 J. Clark, Testimony at Popović Trial, para. 7519. “Testing, in the context of forensic science, means examining the body for clothing, personal possessions, identifying features, taphonomic characteristics, blindfolds, ligatures, gunshot injuries, blast injuries, sharp and blunt-force trauma, burning, dismemberment, etc.” Clark J., ‘Pathological Investigation’, in J. Payne-James (ed.) Encyclopaedia of Forensic and Legal Medicine, 2005, Elsevier (2005), p. 368. Similarly, archaeologists and anthropologists at the site employ methods, such as surveying, trenching and excavating, to gather information before analysing it.

538 M. Klinkner, Proving Genocide, p.454.
disciplines to which the paradigm of pure scientific enquiry cannot readily be applied.  

4.3.7.6 Forensic truth

Findings from the exhumation site and mortuary are summarized in individual reports prepared by the chief anthropologist, chief archaeologist and chief pathologist and by those responsible for other site-unrelated scientific investigations. In the case of the Srebrenica investigation, the reports would contain information on:

1. Minimum number of individuals located in the exhumed sites,
2. Sex of the deceased,
3. Cause of death,
4. Presence of blindfolds and ligatures,
5. Mineralogical and pollen samples,
6. Self-winding watches located in the mass graves,
7. Blood and tissue samples,
8. Suspected explosive residue,
9. Shell cases

The scientists weigh the data and decide whether to include limitations of analysis or exclude certain facts from their reports. In this sense, the report, as the process of documenting and interpreting the evidence, is an act of selected knowledge creation and contains ‘forensic truth’. ‘Forensic truth’ is a constructed theory of what is likely to be true given the circumstances. The report makes this ‘forensic truth’ accessible to others and needs to be intelligible, clear and unambiguous whilst explaining all the important scientific findings. These reports are reviewed by the investigator and forwarded to The Hague. Forensic science, despite its limits, claims to represent objective and

541 M. Klinkner, Proving Genocide, p.456.
independent truth, whereas once it enters the legal arena as evidence it is used by the
parties to persuade the judges to believe a version of the truth.\textsuperscript{542}

### 4.3.8 Selection of target

The ‘hunt for the responsible’ began in early 1998.\textsuperscript{543} For Srebrenica investigators, the
selection of Radislav Krstić was both straightforward and complicated. Krstić was the
Commander of the Drina Corps during the time of the massacres in Srebrenica. Krstić,
however, was claiming that he only assumed command after the killings had taken place.
The precise time of his appointment to the Commanding position of the Drina Corps was
a critical issue to establish his command responsibility. Solid evidence was needed to be
able to link Krstić to the massacres.\textsuperscript{544}

Parallel to the investigation into the 1995 events in Srebrenica, there was another team at
the ICTY-OTP investigating crimes committed by the Bosnian Muslim forces (ABiH) in
Srebrenica in 1992-1993. An investigator from this investigation obtained a document
during an interview of a witness. The witness was General Zivanović, Krstić’s
predecessor at the Drina Corps. Zivanović was upset that Krstić was trying to shift the
blame on him indicating that Zivanović was in command of the Drina Corps during the
massacres, not him. The document showed clearly that Krstić was in command of Drina
Corps as from 13 July 1995.\textsuperscript{545}

General Krstić, was seen being congratulated for the action he took in Srebrenica. He
appeared next to General Mladić when in December 1995 a ceremony was organized for
the Drina Corps. Krstić supported General Mladić against President Karadžić when he
tried to remove General Mladić.\textsuperscript{546}

\textsuperscript{542} Although reports may be tendered as evidence in a case, the authors of the reports are not necessarily

\textsuperscript{543} J-R Ruez, Personal Interview by Author.

\textsuperscript{544} J-R Ruez, Personal Interview by Author; M. Harmon, Personal Interview by Author; P. McCloskey,
Skype Interview by Author.

\textsuperscript{545} M. Harmon, Personal Interview by Author.

\textsuperscript{546} J-R Ruez, Personal Interview by Author.
The executions were conducted mainly by Military Police elements of the Drina Corps. So, the lines of the Drina Corps military police were pursued. 547

4.3.9 Selection of charges
At the end of 1996, Newsweek magazine published an article titled ‘Genocide without Corpse’. 548 The media labelled the massacres in Srebrenica as genocide, while at the ICTY a genocide charge was not yet fully brought into focus. It was a media labelling but not a legal characterization yet. 549

The scale of criminality was an important factor for the prosecutor to charge genocide in the Srebrenica investigation. 550 The scale of the crime per se is not a legal prerequisite to charge genocide. The ICTY prosecutors, however, considered that to commit the massacres in such a scale must require the intent to exterminate the group en masse. 551 This is clearly stated by the opening statement of ICTY senior trial attorney Mark Harmon at of the Krstić trial as follows:

"1 (Another issue that judges will face in this trial) and must decide is whether thousands of Bosnian
2 Muslim civilians were summarily executed by the VRS as
3 described in paragraph 24 of the indictment and whether
4 those acts constituted genocide. The evidence that
5 these large-scale murders occurred, as described in the
6 indictment, is overwhelming, and we assert that they
7 constituted genocide." 552

547 J-R Ruez, Personal Interview by Author.
549 J-R Ruez, Personal Interview by Author.
550 M. Harmon, Personal Interview by Author; P. McCloskey, Skype Interview by Author.
551 M. Harmon, Personal Interview by Author; P. McCloskey, Skype Interview by Author.
The Prosecution had to prove ‘special intent’ which is a specific requirement of genocide charge. The evidence suggested that the plan to kill ‘all’ Bosnian Muslim men was not conceived at the outset of the Krivaja 95 operation. The decision to kill all military aged Bosnian Muslim men was likely to have taken place after the operation had started. In this respect, the testimony of Colonel Joseph Kingori, a Kenyan UN Military Observer (UNMO) stationed in the Srebrenica Area was key. In the afternoon of 12 July 1995, Kingori saw Mladić with Krstić, in the area of the White House in Potočari. Bosnian Muslim men detained at the White House were being forced to leave their belongings. According to Kingori:

“8 Q. All right. Thank you very much, Colonel.
9 Now, did you actually see the men being separated, and
10 did you see what happened to them when they approached
11 one or both of these locations?
12 A. If I can start with the White Building, I was
13 personally there, and I saw the men being taken towards
14 that building. They were being forced to leave their
15 belongings at the road junction with the truck that
16 leads to the building just somewhere there, all their
17 belongings. By that I mean even the money they had,
18 the pocketknives they had, their wallets, and any other
19 belongings, maybe bags and all that. They were leaving
20 all of them out there before they entered the
21 building.

Q. Now, in light of what you saw, that is, identification papers and other personal effects being dropped on the ground, what conclusions, if any, did you come to?

A. It was a bit difficult now to know what was actually going on, but if you do not -- normally, if you don't want to have someone -- if you do not want someone to have an identification card, it literally means that maybe you don't want him in that way to identify himself or be identified by someone else, because that is the only thing -- that is, the ID card -- the only thing one can use to identify himself."

This included leaving their identification cards behind. The pretext often given for separating the men from the women was to search for 'war criminals.' Yet the removal of identification cards contradicted this purpose. The ICTY prosecutors saw it as evidence that the VRS now treated Bosnian Muslim men as a group regardless of their attributions."

The Bosnian Muslim men were then placed on buses, and it was clear that they were fearful."

"3 Q. Did you have any conversations with any of the men, the Muslim men who had been put on those buses?

[...]
5 buses?

6 A. This was an emotional period. This was an emotional time, as far as I was concerned, because some of the men are people we had lived together with in that village, and they were being put in these buses.

10 Even, you know, when they were lined up beside the road, they could cry and shout to us, requesting for assistance, asking us what we can do to help them.

13 They could shout and say, "You know these people are going to kill us, and then you are not doing anything about it." And I mean, to us it was a bit emotional.

16 It was very emotional.”

Later, Krstić was seen on camera boasting that this operation was being conducted ‘very successfully’ and would continue ‘to the end’.556

4.4 Other Investigative Reports on Srebrenica

4.4.1 Type of investigations

While the ICTY Srebrenica investigation was ongoing, several investigative reports on the ‘Srebrenica event’ were made public.557 The entities that commissioned these investigations included parliamentary commissions, i.e., France and the Netherlands558, international organizations, i.e., the UN,559 governments, i.e., the Dutch Government’s


559 Report of the Secretary-General pursuant to General Assembly resolution 53/35 The fall of Srebrenica UN A/54/549, 15 November 1999.
report, which was mandated to an independent research institute, the NIOD\textsuperscript{560}, and the Republika Srpska (RS) Government’s report.\textsuperscript{561}

Each report claimed its uniqueness such as; ‘comprehensive’ (UN), ‘methodical’ (French parliamentary report), ‘systematic’ (NIOD), ‘cathartic’ (Dutch parliamentary report), ‘detailed’ and ‘scientific’ (RS). What is common, however, is that they all pursued the same objectives, namely, to contribute to establishing the ‘truth’ and to evaluate moral, political, and criminal ‘responsibility’ for the massacres. These reports are part of a common approach for producing a public discourse of truth. What is also worth noting is that all these reports used (sometimes verbatim) chronologies and the factual basis established by the ICTY. To this end, the ICTY investigation provided a predefined framework for those reports.

4.4.2 Constraints to the reports
These investigative reports, however, had certain procedural and institutional constraints which conditioned the way the reports were constructed and how the Srebrenica event was interpreted. The first constraint was the national context in which the investigations were commissioned. The second constraint was what Fournel called ‘temporalities’ of the reports.\textsuperscript{562} ‘Temporalities’ reflected the temporal scope of the reports as well as the time needed to gather necessary data, and the lapse of time which separates the report from the original event. In what follows I will reflect upon these constraints more in detail.

4.4.2.1 National context

One thing to be noted is the entities that commissioned the investigations were all involved in the Srebrenica event in one way or another. The evaluations of the action or inaction of these entities were therefore the central focus of the analysis of these reports. Descriptive and analytical frameworks of the reports were conditioned by the role played by the institutions that ordered the reports.


\textsuperscript{561} Commission for Investigation of the Events in and Around Srebrenica between 10 and 19 July 1995 (April 2004). The RS government report was demanded by the Office of the High Representative of the international community in Bosnia-Herzegovina, the OHR. It was prepared by a mixed commission of experts, including legal experts, historians, and the head of the International commission on missing persons.

\textsuperscript{562} J.L., Fournel, Report-Form, p.55.
For example, the RS investigation only dealt with Bosnian Serb responsibility in the massacres. While the Bosnian parliamentary debate dealt mainly with Bosnian Muslim responsibility in the fall of the enclave, the UN report dealt with the role of UNPROFOR in Bosnia and Herzegovina. The French investigation was centred around the role of France in UNPROFOR and that of General Janvier in the fall of the enclave. Lastly, the Dutch parliamentary report and that of the NIOD gave priority to the role of Dutch officials in UNPROFOR and the role of Dutchbat in Srebrenica and the consequences and aftermath of the enclave’s fall in Dutch politics. This (inter)national orientation explicitly defined the data collection and the object of investigation but also—and more tacitly—shaped the analyses of the reports.  

4.4.2.2 Temporal constraints

According to Fournel, the constraints of ‘temporalities’ is categorized as follows:

1. The temporal scope of the inquiry,
2. The time allocated for the preparation of the report
3. The lapse of time between the event and preparation of the report

With respect to the first, the temporal scope of the ICTY investigations and the RS government’s inquiry were both restricted to July 1995. Both sought to establish criminal responsibilities of the Srebrenica massacres of July 1995. For the ICTY, the investigation was carried out to prosecute individual(s) who were the most responsible for the massacres. The ICTY investigation was confined by temporal jurisdiction stipulated in the Statute of the ICTY. In the case of the RS, the inquiry itself stemmed from a decision of the Human Rights Chamber of Bosnia and Herzegovina.  

The Office


564 J.L., Fournel, Report-Form p.55.

565 Establishment of the Commission was ‘motivated by the Republika Srpska obligation to respond to the Decision of the Human Rights Chamber at the Constitutional Court of Bosnia and Herzegovina dated 3 March 2003’. Ćekić, Smail, Results of the Research by the Commission and the Working group (of the Republika Srpska government) related to the event in and around Srebrenica in 10-19 July 1995.
of the High Representatives (OHR) restricted the temporal scope of the RS government investigation not to include any events before 10 July 1995. Other reports, on the other hand, did not limit their temporal scope to July 1995. Most reports started from the intervention of the UN as a participant of the war in Bosnia and Herzegovina. Some reports expanded the temporal scope much further; one report placed greater emphasis on the legacy of Tito, the other reports referred back to the Second World War or went as far back as the wars of the nineteenth and early twentieth centuries. The degree of historical reference reflects how each report intended to establish a causal hierarchy. The difference in temporal scope stemmed from the fact that the questions these reports tried to address related mostly to moral and political responsibility as opposed to criminal responsibility.

With respect to the time allocated for the preparation of the report, this had a serious impact on the outcome of the reports. The most obvious case is the RS report, where the OHR imposed a strict deadline for the completion of the report. In the case of NIOD, they initially enjoyed an unlimited time frame for the completion the report. Towards the end of the process, however, finalization of the report had to be done in haste due to the Dutch governmental calendar. Consideration for the timing of the publication also put pressure on the pace of the inquiry. This was the case of the UN, French Parliament, RS reports, as well as the ICTY investigations. In each of these cases, those who commissioned the report pressed for the report to be finished within a reasonable time limit. For example, publication of the first report on Srebrenica, i.e., the UN report ‘Fall of Srebrenica’ in 1998, coincided with the military intervention of NATO forces in Kosovo.

---

566 The OHR request is likely motivated by the memory of an earlier RS report carried out for the ICTY in 2002, which invoked the Second World War to justify denial of the Srebrenica massacre.

567 French MPs report limits itself to a short period of reference; around two years, from the establishment of ‘safe areas’ in March 1993 to July 1995. The NIOD adopts the temporal scope beginning with the deployment of the Dutchbat in Srebrenica rather than the establishment of the ‘safe areas’. It occasionally refers, however, to the history of the nineteenth century in an ‘interplay’ of chronological scales, wherein the aim is to clarify the event in part by placing it in the context of the long term.

568 The RS commission was to submit its conclusions at the end of six months and provide monthly progress reports.

569 The ‘epilogue’ written solely by the head of the NIOD commission was published without endorsement by the other members of the commission.
With respect to the lapse of time between the event and the commission of the investigations, it concerns about the degree of ‘detachment’ from the subject matter of the investigation. Historians emphasize the importance of ‘detachment’. This contrasts with the urgency of police work, in which an immediate, rapid action is required to ensure that the evidence does not disappear. This police work was well illustrated in the interview with the ICTY investigation team leader Jean-René Ruez.\textsuperscript{570} The interview of Ruez clearly shows that what is a virtue for the historian is a handicap for the police officer.

NIOD’s report asserts ‘detachment’ as its methodological requirement. However, numerous events took place between 1996 (the time NIOD was commissioned to investigate) and 2002 (publication of the NIOD final report).\textsuperscript{571} All these events significantly modified the perception of the Srebrenica event and the meaning assigned to it as well as the conditions of acceptability of the public on the discourse concerning the event.

\textbf{4.4.2.3 Constraints related mode of evidence-gathering and position of researchers}

The mode of evidence gathering is contingent upon the following questions: 1) who gathers the data and writes the report, \textit{i.e.}, Members of Parliaments, historians, police officers, high-ranking international civil servants, legal experts?; 2) how does diverse and changing nature of potential readers, \textit{i.e.}, the national community, the international community, legal professionals, etc., affect the writers?; 3) what is the nature of the elements taken into consideration in the epistemic approach, \textit{i.e.}, what types of evidence, traces and proof are drawn upon in the work?

There are differences between ‘neutrality’, and ‘objectiveness’. ‘Objective’ stance of the researchers is assumed by their detachment from the event and by the functional separation between participants in the event and the role of drafting a comprehensive survey of that event. However, even if some defend this claim to objectivity— in practice, the actual report writing is more complicated. The researchers and investigators can

\textsuperscript{570} I. Delpla, Interview with Ruez, pp.42-54.
\textsuperscript{571} The Kosovo war, the fall of Milošević, the trials by the ICTY, the internal political conflicts in post-Dayton Bosnia, the changes of President and Secretary of State in the United States, and 9.11 and the ‘war against terrorism’ etc.

217
sometimes practically be considered as ‘participants,’ as when they are marked by a personal on-site experience or carried out their activity in the context of a legal procedure. This for example was the case of David Harland, a UN official and the principal author of the UN report ‘Fall of Srebrenica’. Harland spent time during the Bosnian war in Sarajevo as a high ranked UN official and had been present at the negotiations accompanying the fall of Žepa. Indeed, the passage of the NIOD report devoted to Žepa is based on David Harland’s report. The same can be said about Jean-René Ruez, chief investigator of the ICTY Srebrenica investigation who, arriving on the crime scene about ten days after the massacres took place, made him virtually a ‘participant’ in the event.

Nearly all the reports show awareness of the limits of their work and of the negative effects produced by the various temporal constraints inherent to such processes.

4.4.3 NIOD report
Pieter Lagrou points out that for several reasons the NIOD report on Srebrenica published in April 2002 stands out among Srebrenica reports. \[572\]

First, its immediate impact: following the publication of the report, the Dutch Government accepted its collective responsibility for the criticisms expressed and resigned.

Second, its size: more than three thousand pages in three volumes and a large number of annexes (I-XIII), a total of nearly seven thousand pages. \[573\] The team who engaged in

---


the inquiry grew from three to twelve full-time researchers that, over six years of work with a generous budget.\footnote{In 2001 alone, the budget was nearly one million Euros.}

Third, the identity of the NIOD: NIOD is an institute created in October 1945 to study the period of the Nazi occupation in the Netherlands. For over 50 years, NIOD had exclusively devoted itself to producing historical studies of the Second World War and, to a lesser extent, of colonial and post-colonial history. Compared to parliamentary commissions of inquiry and internal audits of international organizations, which operate under more severe time constraints, dispose of limited resources, and depend much more closely on their institutional sponsors, this massive NIOD report claimed its uniqueness on its exhaustiveness, impartiality, and critical distance.

4.4.3.1 Limit of historical positivism

The inquiry on Srebrenica conducted by NIOD, however, came under certain criticism on its method of investigation. Despite its stance of historical positivism and desire for objectivity, critics observed that the methodology applied in the NIOD Srebrenica report was too weak and its result would hardly stand up to cross-examination in a court of law. NIOD’s report often used second hand, inaccessible, and sometimes very questionable sources, and it uncritically adopted the points of view of the warring parties to the Bosnian conflict.\footnote{I. Delpla, Facts, Responsibility, Intelligibility, p.137.}

4.4.3.1.1 Number of victims

For example, in contrast to the ICTY’s calculation of the number of the dead which is primarily based on exhumed bodies, the NIOD report uncritically adopts a figure supplied by local sources which claims a thousand Bosnian Serb deaths in the Srebrenica region


\*219
between 1992 and 1994.\textsuperscript{576} None of these sources were considered reliable by the ICTY. NIOD researchers had no access to the crime site and were therefore unable to verify the veracity of testimony on site or film the sites to help witnesses clarify their statements. In the analysis on the column of Bosnian Muslims who fled Srebrenica, the NIOD investigation admits the difficulties of exactly reconstructing its route given the imprecise recollections of witnesses. The difficulties also demonstrate the lack of resources available to historians. NIOD’s historical investigation also clearly reflects difference between the profession of historian and that of a police officer and the limit of the former: police officers are more familiar with encountering criminals and reconstructing their logic. For the NIOD investigation, the fact that the cover-up and reburial operation took place was a mystery given that the massacres in Srebrenica had already been widely known through testimony and aerial images. The ICTY investigation, by contrast, explained clearly why one might want to destroy evidence in such circumstances.

4.4.3.1.2 Cause of massacres

NIOD presented the massacres in Srebrenica itself as an undeniable reality. The epilogue of the NIOD report sets the massacres against a backdrop of ethnic cleansing and revenge. According to NIOD, the massacres in Srebrenica were triggered by the departure of the Bosnian Muslim column into the woods. By thwarting the plans of the VRS in its advance on Žepa, the column presented to the Bosnian Serbs as an unexpected ‘problem’.\textsuperscript{577} The VRS expected the men would give themselves up at Potočari but the unforeseen departure of the column disrupted its plans. Confronted with an unmanageable number of prisoners, the Bosnian Serbs decided to kill them in a massacre requiring vast organization. Historian, Isabelle Delpla harshly criticizes this conclusion of NIOD and points out a number of illogical assumptions and incoherence of the report.\textsuperscript{578}

\textsuperscript{576} Appendix IV on the NIOD Srebrenica report
\textsuperscript{577} This argument is made explicit in part IV, Chapter 2, section 20, of the NIOD report, which is devoted to examining the executions and the decision to carry out the massacre.
4.5 Naser Orić trial

In the shadow of the Krstić trial, there was yet another trial related to Srebrenica going on at the ICTY: *Prosecutor v. Naser Orić*. Orić was a Bosnian Muslim commander of the ABiH 28 Corps based in Srebrenica from 1992 until the fall of the enclave in July 1995.579

By April 1992, Bosnian Serb forces had taken control of most of eastern Bosnia and Herzegovina, including Srebrenica, and had expelled or killed many of its Bosnian Muslim inhabitants. Small groups of Bosnian Muslim fighters, however, gathered in the woods and formed islands of resistance against the Serbian offensive. Orić, then 25 years of age, led one such group and, employing guerrilla warfare, eventually achieved the withdrawal of the Bosnian Serb forces from Srebrenica. Soon afterwards Orić was elected commander of the Bosnian Muslim forces in the enclave. Seeking food and also weapons, Orić’s troops raided a number of Bosnian Serb hamlets in the vicinity of Srebrenica between 1992 and 1995. Orić’s units were always followed by a crowd of civilians who raided the Bosnian Serb villages following an attack. The prosecution also accused Orić of having failed to prevent or punish, by virtue of his position as commander, the murder and cruel treatment of numerous Bosnian Serb prisoners who were detained in Srebrenica.580

At trial, the prosecution and defence presented two entirely different versions of events. While the prosecution portrayed Orić as a ‘powerful warlord’ implementing a ‘strategy of wanton destruction’, the defence led evidence concerning the crimes committed by Bosnian Serbs against Bosnian Muslims, the prevailing chaos, the desperate situation of the Bosnian Muslims, and the absence of any structured armed force.581

To prove the case, the prosecution often had to rely on disputed evidence which tended to contradict its own contentions in previous cases of the ICTY against the Bosnian Serb

---

579 The author was member of Naser Orić investigation team of the OTP between 2001 and 2003. The source of the information in the below discussion is based on the authors personal observations during his time of working with the Orić investigation team.


581 T. Blumenstock and W. Pittman, *ICTY Judgment of Srebrenica Muslim Commander*, pp.1077-1093
accused, e.g., Krstić trial. The defence, on the other hand, was barred from invoking *tu quoque* as a ground for excluding responsibility, and it had difficulty refuting evidence which tended to show a degree of co-ordination between Bosnian Muslim fighters during the raids on Bosnian Serb villages.\textsuperscript{582}

Ultimately, the trial chamber was persuaded that Orić did not possess effective control over the groups of Bosnian Muslim fighters and found that they rather operated largely independently of any superior authority. The trial chamber was also not satisfied that any responsibility under Article 7(1) of the ICTY Statute attached.\textsuperscript{583}

On 30 June 2006, after some 21 months of trial proceedings, a judgment in the case of *Prosecutor v. Naser Orić* was rendered. Orić was acquitted of all charges of ‘wanton destruction’. The Chamber convicted Orić for failing to prevent the murder of four and cruel treatment of five Bosnian Serb individuals detained in the eastern Bosnian town of Srebrenica between December 1992 and March 1993 and sentenced him to only two years. The Trial Chamber then ordered his immediate release, since he had already been in confinement in excess of three years at the time the judgment was rendered. This is the lowest sentence ever passed by the ICTY to date.\textsuperscript{584}

The Orić trial received great attention and polarized ethnic Bosnian Serb and Bosnian Muslim communities in Bosnia and Herzegovina. In the perception of the former, Orić was responsible for many killing of Bosnian Serb civilians, which ultimately provoked a military from the Bosnian Serb forces which resulted in the mass killings of July 1995. The latter group viewed Orić as a Robin-Hood-like defender of the Bosnian Muslim population in besieged Srebrenica, who prevented, at least for some years, the fall of the enclave and the tragic events that followed.\textsuperscript{585}

The judgment caused very strong reactions on the Bosnian Serb side and with respect to the sentence Orić received. The Bosnian Serb President Milorad Dodik promptly stated that it was ‘proof that in Bosnia there is no punishment for criminals [committing crimes]

\textsuperscript{582} T. Blumenstock and W. Pittman, *ICTY Judgment of Srebrenica Muslim Commander*, pp.1077-1093.


\textsuperscript{584} T. Blumenstock and W. Pittman, *ICTY Judgment of Srebrenica Muslim Commander*, pp.1077-1093.

\textsuperscript{585} T. Blumenstock and W. Pittman, *ICTY Judgment of Srebrenica Muslim Commander*, pp.1077-1093.
against Bosnian Serbs." Vinko Lale, the head of an association of Serbian prisoners of war, stated that Orić’s acquittal would “radicalize (ethnic Bosnian Serbs) the situation on the political field.”

“The other hand, the Muslim side paid attention to the relatively minimal scope of the Orić indictment, and criticized that the initiation of proceedings against Naser Orić was an ill-motivated attempt by the ICTY to demonstrate parity in the light of the larger number of Serb indictments. The criticism continued further when the ICTY began the referral of its cases under Rule 92bis of the ICTY RPE to the authorities of the former Yugoslavia, to meet the demand of the UN Security Council to complete all trials by 2008. For the Bosnians, such referral of the cases (mostly Serbian offenders) involved offences far more grave and superiors than that was demonstrated in the Orić case.”

Conclusion

From the prosecutorial point of view, the ICTY Srebrenica investigation of July 1995 is one of the most successful cases at the ICTY in establishing facts, and it represents the best practices of the ICTY-OTP. Despite initial reluctance of the ICTY-OTP management, significant amount of resources were eventually invested in this investigation which included massive forensic exhumations, as well as document seizure operations and summoning sensitive insider witnesses. The investigators meticulously reconstructed a solid narrative of the events, which became incontestable at the trial phase. The Srebrenica investigation also demonstrated its own uniqueness in the sense that it received significant support from external entities such as the US government in the production of evidence. The final verdict confirmed that genocide and the accused was held responsible for this crime.

In stark contrast, Naser Orić investigation reflected the failure of an OTP investigation. The lack of external supports in this investigation was obvious from the outset. The scope of the case was eventually forced to narrow representing a tiny fraction of the criminality of what allegedly had taken place in Srebrenica between 1992 and 1995. These narrow charges were not even upheld in the final judgment and the accused was acquitted on Appeal.

587 Ibid.
The two contrasting endings of the Srebrenica cases at the ICTY were the result of a rigorous legal process. These results, however, had significant impacts on the formation of collective memories on Srebrenica, carried by the Bosnian Serbs and the Bosnian Muslims. In the next Chapter, the contrasting collective memories on Srebrenica held by the Bosnian Serbs and Bosnian Muslims will be discussed.
CHAPTER 5  COLLECTIVE MEMORIES OF SREBRENICA

Introduction

The war in Bosnia and Herzegovina which lasted for 4 years from 1992 to 1995 is widely considered one of the bloodiest and most violent conflicts in Europe since World War II. Following the cession of Bosnia and Herzegovina (BiH) from the Federal Republic of Yugoslavia (FRY) in April 1992, a fierce battle was fought among the three main ethnic groups, Bosnian Muslims, Bosnian Serbs and Bosnian Croats, over the territorial control. Bosnian Serbs, who first resisted the disintegration of the FRY, chose for dissolution of the BiH and to divide it into separate ethnic entities. Bosnian Croats who initially fought together with Bosnian Muslims, eventually shared the same vision as Bosnian Serbs, and a very violent war was waged by all three ethnic groups until November 1995 when the Dayton Peace Accords brought an end to the fighting. Following the Dayton Peace Accords, the BiH was effectively divided into two semi-autonomous entities: Federation and Republika Srpska (RS).

Srebrenica, a small town located in the eastern BiH, became a symbol of the culmination of the Bosnian war, where over 7000 Bosnian Muslim men and boys were killed by the Bosnian Serb armed forces (VRS) in the period of two weeks in July 1995. Not only that it is the most widely known episode during the Bosnian war, Srebrenica also become a subject of bitter contestation over how this episode should be remembered. There is a wide gap between Bosnian Muslims and Bosnian Serbs as to how they perceive the war and how they construct narratives concerning Srebrenica. Everything from the motives, character, events, to the interpretation of war in Bosnia and Herzegovina has been disputed by parties to the conflict. The only consensus between them seems to be when they blame the foreign powers and their involvements in the war. Even then, Bosnian Muslims and Bosnian Serbs blame the international community for different acts and the lack thereof.


Researchers, however, suggest that in terms of style and rhetoric, there are a lot of similarities in the way that Bosnian Muslims and Bosnian Serbs construct their own collective memories. They both apply national or ethnic affiliation as the most important category in the narratives. Then, a highly divisive, ‘us (Bosnian Serbs or Bosnian Muslims)’ and ‘them (Bosnian Muslims or Bosnian Serbs)’ construction of categories is introduced. What is common for both Bosnian Muslims and Bosnian Serbs is while they emphasize the suffering among members of their own nation; ignore victims on the other side.\footnote{G. Duijzings, Commemorating Srebrenica.} For Bosnian Muslims, systematic and organized killing of over 8,000 Bosnian Muslim men and boys in Srebrenica represents the worst crimes ever committed by the Bosnian Serb against Bosnian Muslim populations in the country. For the Bosnian Serbs, on the other hand, the event was retaliation against what the Bosnian Muslims had done to Bosnian Serb villagers when Bosnian Muslim armed forces launched the attacks in 1992.

In 2003, the ICTY rendered an epoch-making verdict on Radislav Krstić, the Commander of the VRS Drina Corps, and ruled that the Srebrenica massacres in July 1995 was an act of genocide. This was confirmed in the International Court of Justice judgement on \textit{Bosnia and Herzegovina v. Serbia and Montenegro} in 2007.\footnote{ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, I.C.J. Reports 2007, p.43. (Hereafter: Genocide case, ICJ Judgment)}

Srebrenica, while being the most symbolic and known episode of the Bosnian war, is also the most contested one. Although in 2003, the government of Republika Srpska, under strong pressure of the international community, officially acknowledged genocide in Srebrenica, the nature and the scale of the crime still remain negated in general by the Bosnian Serb population. Similarly, there is no agreement about the nature and the scale of the attacks on the Bosnian Serb villages in the Srebrenica municipality conducted by the Bosnian Muslim forces from 1992 to 1995. From the Bosnian Serb perspective, these were unjustified attacks against the civilian population and as such occupy an important place in their national narratives of the war. The Bosnian Muslim side, on the other hand, explains these episodes as the counter-attack against the positions of Bosnian Serb forces.
The focus of this Chapter is to examine the Bosnian Serb and Bosnian Muslim perception of the Bosnian war (1992-1995) and the episode of Srebrenica. It will further examine the extent the Krstić trial findings on genocide is perceived by both sides.

In terms of data, the subsequent discussions will be based on empirical data and analysis conducted by two researchers who conducted field research in 2006 and 2009.

In April 2009, Polish scholar Jagoda Gregulska stayed in Srebrenica and conducted an extensive ethnographic research in Srebrenica and interviewed 17 Bosnian Serb women living in Srebrenica. The focus of Gregulska’s research was to examine the way memory of Bosnian Serb women in Srebrenica is being shaped and constructed. This is one of few ethnographical researches conducted in Srebrenica with the focus on collective memory and to this end the data collected and the analysis provides invaluable insights into how Bosnian Serb women perceives the Bosnian war and transmit their collective memories to the next generation. According to Gregulska, across the interviews she conducted, there are clear patterns and narratives common to all the accounts which demonstrate how Bosnian Serb collectively understand and transmit the narratives of the war and the legacy of Srebrenica.

Second, this paper will draw upon empirical data collected by Diane E. Orentlicher and her group of researchers in Bosnia and Herzegovina in 2006. The analysis of the data collected by the team of Orentlicher was published as “The Impact of the ICTY in Bosnia” from the Open Society Justice Initiative in 2008. This report demonstrates how Bosnian Muslims in Bosnia and Herzegovina see the war and how they view the ICTY and its verdicts. Their views make a stark contrast to the ones of Bosnian Serb as described in the research conducted by Gregulska.

---


It has to be noted from the outset that the two views on Srebrenica which will be presented in this Chapter are the prevailing narratives held by the Bosnian Muslims and the Bosnian Serbs respectively in 2006 and 2009 respectively: the results of the research are confined to the conditions under which they were conducted. There are potentially a variety of narratives held amongst the people in Bosnia and Herzegovina and they could shift with time.

5.1 Landscape of Memory (1) – Sites of Commemoration

To examine the collective memories, first, this study draws upon the concept of ‘landscape of memory’ introduced by Laurence Kirmayer. The idea of ‘landscape of memory’ is first to map out social and cultural circumstances which trigger the recollection and articulation of memories. As seen in Chapter I of this study, according to Kirmayer, collective memories of traumatic events such as war atrocities are articulated through narrative, while being crucially mediated and negotiated. The narrative is typically manifested in the landscape of memory such as commemoration sites where public remembering, the public memories are being negotiated, contextualized and shaped.595

Following this concept, this study will first describe the landscape of memories in Srebrenica from the point of commemoration sites and show how they are interpreted by the local populations.

5.1.1 Potočari memorial centre

The most important memorial site in Srebrenica is the Srebrenica Genocide Memorial, officially known as ‘Srebrenica–Potočari Memorial and Cemetery for the Victims of the 1995 Genocide’. The Memorial Centre is located a few kilometres from the town of Srebrenica and it was established as a result of persistent insistence by the Bosnian Muslim women organisations with the political and financial supports by the Office of the High Representative (OHR). In 2003, the Centre was officially inaugurated by US

President Bill Clinton. Since then it is the central site of annual commemorations of the Srebrenica massacres of July 1995.\footnote{596}

The first years of commemorations at Potočari met with strong oppositions from both the RS government and the local Bosnian Serb population. Numerous provocations and acts of violence were reported, among them was in 2005, just a few days before the tenth anniversary of the massacres, explosive material was discovered close to the venue, although in the subsequent years fewer incidents occur.\footnote{597}

The location of the Centre has symbolical and emotional meaning to many victims. It is established in the buildings of a former battery plant, which turned during the war into the headquarters of the UNPROFOR Dutch Battalion. At this place on 11 July 1995, many Bosnian Muslim women saw for the last time male members of their families, who, not allowed to enter into the base, embarked on a deadly journey through the forests with the aim of reaching the Bosnian Muslim controlled territory.\footnote{598}

The Memorial Centre consists of two parts: Memorial Room located in the buildings of the factory, where an exhibition about the events of July 1995 is displayed and a cemetery located across the road, where remains of victims of genocide are buried. The central part of the cemetery belongs to an open-air mosque, and it is surrounded by a circle of stone panels with names of victims of genocide inscribed in an alphabetical order.\footnote{599}

The most important annual commemorative ceremony held at Potočari is the funeral of the victims of genocide on 11 July. Every year, on 11 July, the Memorial Centre is visited by tens of thousands of people who come to honour the memory of the victims and to participate in the burial of hundreds of bodies of Bosnian Muslim men and boys discovered the previous year. Every year new bodies are excavated from the primary and secondary mass graves and identified in a lengthy process of DNA matching. In the ceremony in 2017, out of 8372 names mentioned on the panel in the cemetery, 37 new

\footnote{596 The OHR linked the question of burial of the genocide victims directly to the issue of reconciliation and as such the establishment of the Memorial Centre provided a symbolic expression of re-establishment of the Bosnian Muslim presence in RS. J. Gregulska, Memory in Srebrenica, p.30.}

\footnote{597 J. Gregulska, Memory in Srebrenica, p.30.}

\footnote{598 Krstić, TC Judgment, paras.53-59.}

\footnote{599 J. Gregulska, Memory in Srebrenica, p.31.}
bodies were buried together with 6500 bodies who had been already buried in the cemetery in previous years.600

Prior to the commemoration itself, a three-day, 100 km-long ‘March of Peace’ to Srebrenica takes place, commemorating the journey of Bosnian Muslim men who tried to reach territory controlled by the Bosnian Army in July 1995. The March of Peace has been staged for several years, gaining in international character with each passing year. The event receives extensive media coverage as the televised images of grieving families weeping by freshly-dug graves have come to symbolise the continuing trauma experienced by the thousands of Bosnian Muslim families.601

Every year, the ceremony was attended by numerous Bosnian and foreign officials, highest rank diplomats, representatives of international organisations and foreign delegations. Srebrenica occupies the centre of the official commemoration of the war in Bosnia and Herzegovina and as such was given a very special status. In 2008 the Council of Ministers of BiH pronounced 11 July a day of mourning for the entire country, both Federation and RS, and the Brčko District.602 Srebrenica is much more than just a local problem. In January 2009, The European Parliament declared 11 July an annual day of commemoration of genocide in Srebrenica.603 The trend of giving Srebrenica a meaning

600 Potočari Memorial Centre homepage; https://www.rferl.org/a/bosnia-marks-22nd-srebrenica-anniversary/28610193.html
601 Gregulska participated in the march and reports the following:

“I participated both in the Peace March and funeral ceremony in 2008 and was overwhelmed by the scope of the ceremony. Dozens of buses brought numerous groups from all over Bosnia followed by Muslim families from abroad. While for many Muslim families, 11 July became an occasion for private reunions of members scattered around the world, the Memorial Centre is also a destination of organised groups and representations of towns, municipalities, victims’ and veteran associations. For the Muslim population, commemorations became a public ritual enforcing national identity. As such, the Memorial Centre represents what Pierre Nora (1989) would call both milieu de mémoire and lieu de mémoire of the Muslim nation. Estimates say that over 20 000 people gathered in Potočari on 11 July 2008. Almost all women, out of respect for the religious character of the ceremony, covered their heads with scarves. Once in a while a t-shirt with the motto “Never Forget Srebrenica” could be spotted in the crowd.”

J. Gregulska, Memory in Srebrenica pp.31-32.

602 The RS authorities rejected the decree and refused to lower its flags. J. Gregulska, Memory in Srebrenica, p.32.

603 Ger Duijzings sees that this significant involvement of the international community as:

“a platform of ritual declarations of guilt and responsibility by members of international community, who use it to express their regret for having allowed the massacre to happen.”
far beyond the local context is apparent in the opening speech of the Memorial Centre delivered by Bill Clinton in 2003:

“Bad people who lusted for power killed these good people simply because of who they were. (...) We remember this terrible crime because we dare not forget, because we must pay tribute to the innocent lives, many of them children, snuffed out in what must be called genocidal madness. I hope the very mention of the name “Srebrenica” will remind every child in the world that pride in our own religious and ethnic heritage does not require or permit us to dehumanize or kill those who are different.”

Commemorations at Potočari are meant not only to provide the families of victims with a sense of closure and comfort, but also to serve as a symbol of violence based on nothing more than religious and ethnic belonging. In this vision of the massacres, there is no space for dynamics of war, revenge or tactics so often recalled by the Bosnian Serb side in their attempt to explain the events of July 1995. The message of Clinton, and consequently by other representatives of the international community is clear: Bosnian Muslims were killed because of who they were, not what they did.

Ger Duijzings points out that the international community, by sponsoring the Memorial Centre, positioned itself very close to the Bosnian Muslim interpretation of war. The massacres in Srebrenica is 'de-contextualised' and made to a generic symbol of Bosnian Muslim suffering and irrational acts by the Bosnian Serb.

For Bosnian Muslims, the commemorations in Potočari is also an opportunity for sending political messages and voicing not only their grief and sense of loss, but also to convey concrete demands and accusations. The Memorial Centre is used to compel Bosnian Serbs to accept the facts about the massacres. Bosnian Serb acknowledgement of genocide, however, may potentially undermine the legitimacy of the RS, as it is described by the

G. Duijzings, Commemorating Srebrenica, p.158.
604 [https://www.youtube.com/watch?v=eA7N2pXoNJA](https://www.youtube.com/watch?v=eA7N2pXoNJA) 20 September 2003
605 J. Gregulska, Memory in Srebrenica, p.33.
606 J. Gregulska, Memory in Srebrenica p.33
607 G. Duijzings, Commemorating Srebrenica, p.163
Bosnian Muslim side as 'a genocidal entity'. Organisations of Mothers and Women of Srebrenica, who were the driving force behind the establishment of the Memorial Centre, used the extensive attention they receive on 11 of July to remind the world about the wide-spread impunity of war criminals in Bosnia and Herzegovina and difficulties of life in the Bosnian Serb dominated entity as Srebrenica is now. They insist that since Srebrenica is a site of genocide, it should not fall under the jurisdiction of the entity that was established as a consequence of ethnic cleansing.

5.1.2 Bosnian Serb commemorations

While Srebrenica and Potočari are filled with tens of thousands of visitors and top-ranked diplomats of 11 July, it stands in sharp contrast with almost empty streets on the following day, when the local Bosnian Serb population hold their commemorative ceremonies. 12 July is marked in the Orthodox Serb calendar as Petrovdan (St Peter's Day), a religious holiday aimed at commemorating Christian victims of religious persecutions. In Srebrenica, however, this date symbolises more than the religious holiday, as on this day, in 1992, Bosnian Muslim forces killed several dozen Bosnian Serbs in a village of Zalazje and other villages nearby. With time, commemorations on 12 July came to honour victims of other locations as well and developed into the main commemorative date for local Bosnian Serbs. The Bosnian Serb claim, that between 3000 and 3500 Bosnian Serbs were killed in Srebrenica municipality, mainly due to the attacks of Bosnian Muslim forces against the villages. The findings of the Research and Documentation Centre (RDC) from Sarajevo, on the contrary, provide evidence for death of 480 Bosnian Serbs, the majority of them soldiers.

608 Over time, demands for the RS to be cancelled and for Bosnia and Herzegovina to return to its pre-Dayton unitary shape have been replaced by some with demands for a special status for Srebrenica. J. Gregulska, Memory in Srebrenica, p.35.

609 Since the 2005 decree of the OHR, the Memorial Centre does not fall into the jurisdiction of the government of the RS, to which it geographically belongs. J. Gregulska, Memory in Srebrenica, p.30.

610 Nederlands Instituut voor Oorlogsdocumentatie (NIOD), Srebrenica, een ‘veilig’ gebied. Reconstructie, achtergronden, gevolgen en analyses van de val van een Safe Area [Srebrenica, a “Safe” Area: Reconstruction, Background, Consequences and Analyses of the Fall of a Safe Area], 2002. J. Gregulska, Memory in Srebrenica, p.37.


While the Bosnian Muslim acts of public remembrance in Potočari are strongly supported and attended by representatives of the international community and media, Bosnian Serb commemorations are mainly organised by the local community, and, so far, have not been visited by any of the diplomats present in Potočari a day earlier. Similarly, representatives of Belgrade-based women's pacifist organisation ‘Women in Black’, who participated in the ‘March of Peace’ and marked their presence at the Potočari Memorial Centre by displaying a big banner ‘Solidarity’ did not attend any of the commemorations of the Bosnian Serb victims. Politicians of the RS, on the other hand, who are mostly absent at the funeral in Potočari, regularly show up at the ceremonies of 12 July. 613

In the first years after the war, the Bosnian Serb population of Srebrenica commemorated 11 July as the day of liberation of the town. This was followed by the 12 of July - day of mourning of victims. Now, only the latter celebration remains. This shift came both as a result of the fact that with time it becomes more difficult and embarrassing to openly celebrate the 'liberation' of Srebrenica, but it was also aimed to counter the Bosnian Muslim emphasis on victimhood displayed in Potočari. 614 In some villages plaques were erected in order to honour the victims of Bosnian Muslim attacks. The most important example can be found in Bratunac, Zalazje, Kravice and Skelani. Since ceremonies on 12 July are held simultaneously in different venues, there is no spectacular gathering as the one in Potočari. Commemorations, organized by the ‘Republic of Srpska Government Committee for Upholding Traditions of the Wars of Liberation’, encompass religious service at the churches, cultural events at the libraries and visiting graves of the killed Bosnian Serbs in Bratunac and lying of wreaths at the Monument to Murdered Civilians and Fallen Warriors of the RS Army. 615

Duijzing points out, that those events organized by Bosnian Serbs on 12 July represent ‘counter-commemorations’ and ‘counter-monuments’. 616 While one of the aims of the Bosnian Muslim commemorations at the Memorial Centre is to de-contextualise the Srebrenica massacres, and to present it as a generic symbol of illogical evil, Bosnian Serb commemorations aim precisely at the opposite effect. By commemorating casualties of the war, Bosnian Serbs not only emphasize their victimhood and send the message that

613 J. Gregulska, Memory in Srebrenica, p.34.
614 G. Duijzings, Commemorating Srebrenica, p.162
615 J. Gregulska, Memory in Srebrenica p.34
616 G. Duijzings, Commemorating Srebrenica, p.162

233
there were victims on both sides; they also try to challenge the vision of war presented by their Bosnian Muslim counterparts. In the Bosnian Serb version, 11 July was not an illogical outburst of mass scale violence but a consequence of the Bosnian Muslim attacks against Bosnian Serb villages. For the Bosnian Serbs, the story of 1995 cannot be told without these elements. Bosnian Serb commemorations also recall that the Bosnian Muslim population of Srebrenica was not as defenceless, as it is presented in the vision of the past advocated in Potočari commemoration. Some of the men, who died in 1995 without weapons, were soldiers before.\footnote{617}

Both commemorations raise many controversies and are driven by many different agendas. Together with the moral order claimed by both sides, there are clear political implications linked to the acceptance of the vision of the past presented by both sides.

### 5.1.3 History of victimhood

According to Duijzings, the memory dynamics in Srebrenica should be understood into a broader perspective of regional memory politics starting from World War II. Duijzings offers valuable thoughts about how and why 'the commemorative arena' in Srebrenica is organised in this particular way. By presenting Bosnian Muslim commemorations of 11 July and Bosnian Serb ceremonies of 12 July on the backdrop of politics of memory managed by Tito's communist elites, as well as their nationalist successors, Duijzings presents how both populations came to the point where they face the 'commemorative arena' of the present.\footnote{618}

In his view, current situation in Srebrenica can be understood only in light of the decade’s long restrictions of public mourning of World War II victims under the communist regime and the consequent outburst of public recollection of the narratives of Bosnian Serb victimhood after Tito's death and especially just before the outbreak of the wars of the ‘90s. Such claim is by now a common place. According to some authors, one of the main causes of the violence in the Balkans of the ‘90s, was the fact that the country's communist elite, and as a result the Yugoslav society, had never ‘worked through’ the bitter experiences and memories of the World War II.\footnote{619} Until late 1980s it was not possible to

\footnotesize

617  J. Gregulska, Memory in Srebrenica p.35.

618  G. Duijzings, Commemorating Srebrenica pp.141, 142, 144, 162, 163.

619  Robert M. Hayden, 1994, 'Recounting the Dead. The Rediscovery and Redefinition of War Time Massacres in Late- and Post-Communist Yugoslavia', in Rubie S. Watson (ed.), Memory, History and Opposition under State Socialism, Santa Fe, School of American Research Press, 1994; Sarah, Wagner, To
present the war events in any other framework than the one of a fight between fascist and partisans. In this framework, neither victims nor perpetrators were entitled to ethnic belonging, they were to be identified in public, commemorated or forgotten according to their claimed ideological stand. Consequently, the predominantly Bosnian Serb victims of Jasenovac concentration camp and other Ustasha concentration camps were not mourned in public in order not to undermine the idea of 'Brotherhood and Unity' promoted by Tito. The research conducted by Gregulska in Srebrenica supports this view; Jasenovac and the Bosnian Serb losses in the World War II were repeatedly mentioned by the interviewees as important events in the Bosnian Serb history.\textsuperscript{530}

\section*{5.1.4 Involvement of external actors}

Duijzings further assesses the involvement of the representatives of international community, and observes the changing nature of the Bosnian Muslim ‘being in history’, a concept which he takes from Maurice Bloch.\textsuperscript{621} He points out that while for the Bosnian Serbs, victimhood has always been an essential point in their national narrative and a way of ‘being in history’, for the Bosnian Muslims, who previously centred their identity discourse around religion, in the past few years resemble Bosnian Serbs more.\textsuperscript{622} The commemorations in Srebrenica are the most vivid illustration of this shift.

The word ‘Srebrenica’ used to stand for nothing more than a name of a small town in eastern Bosnia and Herzegovina. Today, it is mentioned in line with places such as Auschwitz and Hiroshima. As the war in Srebrenica became ‘internationalised’ so did the memory of it. Commemorations of the war became a battlefield where political, national and religious forces confront over how events of 1992-1995 should or should not be remembered. Public remembering in Srebrenica is hardly ever done without an agenda; never done without making the claim for truth and justice. The brutality and the scale of the massacres in Srebrenica, the prevailing state of denial among the local Bosnian Serbs,

\begin{footnotes}
\item[\textsuperscript{620}]J. Gregulska, \textit{Memory in Srebrenica}, p.28.
\item[\textsuperscript{621}]G. Duijzings, \textit{Commemorating Srebrenica}, pp.144-145. Duijzings adopted the concept of ‘being in the history’ from the book of Maurice Bloch entitled \textit{How We Think They Think} in 1998.
\item[\textsuperscript{622}]G. Duijzings, \textit{Commemorating Srebrenica}, p.147
\end{footnotes}
and the bitterness existing in both communities, is further exacerbated by high involvement of external actors.623

5.2 Landscape of Memory (2) - the public discourse

Bosnia and Herzegovina is one independent state despite the territorial and administrative division into two entities. This means that it has a common political state level arena, media outlets that cover the whole country and many institutions and networks covering the entire population. At the same time, however, the government and the parliament are seen with bitter confrontations of nationalistic parties. Each party advocates agendas of the national groups they represent. The educational system is also divided into de facto two systems in two entities: Federation which is predominantly Muslim-Croat, and Republika Srpska which is predominantly Bosnian Serb. Consequently, children attending schools in different parts of the country learn the history through different curriculums, where different versions and interpretations of the past are promoted.624

In Srebrenica, children attend two branches of the same school where each branch has classes of Bosnian Serb language and Bosnian language. As far as media is concerned, members of particular national groups tend to follow media outlets that lean towards their visions of the past and simultaneously distrust reports presented by TV stations and newspapers associated with the other ethnic group. Sarajevo based television stations, newspapers and magazines are more likely to be trusted by Bosnian Muslims, whereas Bosnian Serbs tend to watch and read media reports from stations and newspapers of Republika Srpska or Serbia.625

As a result of those divisions, members of each national group have little chance to be exposed to the narratives of the other side. It is possible to live in Bosnia and Herzegovina, only listening to stories, information and opinions that confirm the vision adjusted to the national vision of one's own ethnic group. Certainly, both national groups have access to see the view and narratives of the other side and follow them if they so wish. However, when a question of reliability of media outlets that belong to the other side, is asked, the answers often confirm the division. Media associated with the other national group are

623 J. Gregulska, Memory in Srebrenica, pp.29-30.
624 J. Gregulska, Memory in Srebrenica, p.74.
625 Ibid.
seen as biased and not trustworthy when the matter of politics, war or ethnic divisions, are concerned.  

5.3 Bosnian Serb Narrative of War

5.3.1 Accounts of war

The Bosnian Serb narrative about the war is constructed in direct opposition to what they consider ‘their (Bosnian Muslim’s)’ story. ‘They’ or ‘the other side’ which means Bosnian Muslims, are constantly seen as denying Bosnian Serb victimhood and manipulating the history. The Bosnian Serb narratives are constructed from the position of refuting to, as perceive, Bosnian Muslim lies.

In the eyes of the Bosnian Serb, Serbs fought a defensive war between 1992 and 1995. They had to defend themselves because the Bosnian Muslim leaders wanted to turn the country into a ‘Islamic Republic’:

“They (Muslims) supported the idea of a Muslim country in Bosnia-Herzegovina. You (Serbs) will be all destroyed; nothing will be left of you. Serbs had to defend themselves, Serbs were only defending themselves.”

For those who hold the most radical views about the war, it was clear that it was the Bosnian Muslim who wanted the war to happen and it was who had gained most from it:

“They entered the war as Muslims, speaking Serbo-Croatian and left it as Muslims speaking some sort of Bosnian language: that is one way of explaining who wanted this war. Everyone says that Serbs wanted the war. Why I, as a Serb would want that war? I had my language, my nation, my

626 Ibid.
627 To the contrary, Orentlicher’s report points to the Serbian side’s constant denial and distortion of truth:

“The most salient quality of prevailing Serb responses to massive and systemic atrocities committed by Serbs against other ethnic groups has been denial or distortion of the truth about past crimes:203 They argue that what Serbs did was a “gesture of revenge”204 for what Muslims had already done to Serbs, and that it takes at least “two sides to fight.””

D.F. Orentlicher, Someone Guilty be Punished, p.42

628 J. Gregulska, Memory in Srebrenica, p.49
629 J. Gregulska, Memory in Srebrenica, p.68
The war was therefore perceived as a nation-building exercise provoked by the Bosnian Muslim. According to this narrative, all Bosnian Muslims were originally Serbs who were forced to convert into Islam by the Ottoman rulers. That showed that the Bosnian Muslim nation, as Bosnian Muslims claim now is a fake:

“They were Muslims before the war, now they call themselves Muslims but, in my opinion, they change with the wind. Until 1974 they introduced themselves as Orthodox, which was not true as we, Serbs are Orthodox. That was until 1992, when they became Bosnians. While in reality we are all Bosnians, only that we are of Serbian nationality.”

Some blamed the war on the nationalistic leaders, mainly those who wanted independence of the republics. Alija Izetbegović, the President of BiH was to be blamed for the war:

“Everyone knows that he (Izetbegović) wanted to sacrifice peace and so he did. It is clear who started the war. It is clear as a day. It was all politicians; one should never blame the common people.”

Some blamed ‘others’, ‘foreign powers’ and ‘America’ for bringing the war to Yugoslavia. According to this view, the ‘common people’ did not want that war and that it was decided outside of Bosnia and Herzegovina. Common people, therefore, were not guilty and should not be blamed for anything. It was forces from ‘outside who came and destroyed Srebrenica.”

When it comes to the nature of the war, Bosnian Serb women interviewed by Gregulska have no doubts that it was a civil war, not an aggression by Serbia as it is presented by the Bosnian Muslim side. One woman wondered that she did not understand why Milošević was indicted for things that happened in Bosnia and Herzegovina. According to her, Serbian government played no role in the war and if there were Serbs from Serbia fighting in Bosnia and Herzegovina, they came to help their brothers. As one woman pointed out:

---

630 Ibid.
631 J. Gregulska, Memory in Srebrenica, p.6.
According to the interviewees of Gregulska, Bosnian Serbs organised themselves in a territorial defence and were trying to defend their villages from the Bosnian Muslim attacks. As a result, there were casualties on the Bosnian Muslim side. Other interviewee claimed that there were many of those (Bosnian Muslims) who were trying to escape through the forests in July 1995 and died on the mine fields. She does not agree that they should be considered being killed by the Bosnian Serbs. The important fact for many was that Bosnian Muslim women and children were transported by buses and trucks to the territories under Bosnian Muslim control. This episode is used as a reference point to counter the claim that Bosnian Serbs were responsible for genocide. Except for one, none of the interviewees agreed that there was a genocide committed in Srebrenica. Several women strongly opposed allegations that Bosnian Muslim women were raped, and gang raped by the Bosnian Serbs:

“Those women were dirty and stinky. What man would put his hands on such a woman?”

5.3.2 Centrality of Bosnian Serb victimhood
The central theme of the Bosnian Serb narrative is the Serb victimhood and their losses in Srebrenica. According to this narrative, Bosnian Serb in Srebrenica were a minority and became targets of brutal attacks of Bosnian Muslim soldiers. From 1992, Bosnian Serb villages in the Srebrenica municipality were attacked, destroyed and burnt and the Bosnian Serb population was brutally tortured and killed. One interviewee began her account by saying:

“In 1992 Muslims started an action aiming to kill all the Serbs. Attacking on important holidays, killing everything what moved: animals, men, women, children, old men.

They were killing whatever Serbs they found, they burnt them alive.”

Destroyed villages such as Kravice, Zalazje, Skelani symbolize the violence of Bosnian Muslims. Although in those places Bosnian Muslim population had also experienced

632 J. Gregulska, Memory in Srebrenica, p.72.
633 Ibid.
634 J. Gregulska, Memory in Srebrenica, p.69.
brutal attacks by the Bosnian Serb side, those victims have no place in the Bosnian Serb narratives. For those who lost relatives in one of the destroyed villages, the Bosnian Muslim attacks were the most important events of the war and they recall vivid and detailed accounts of all the suffering endured by the Bosnian Serb there as well as cruelty of the Bosnian Muslim forces. Some even spoke of genocide committed against the Serbian nation. For others, the casualties from those villages served to make a point that “there were victims on both sides”. Two interpretations were predominant here: 1) the Bosnian Serbs were the biggest victims of the war, and 2) crimes were committed by everyone and that both sides were equally guilty.635

The sense of denial of the Bosnian Serb victimhood is a motif clearly visible in the Bosnian Serb narratives. It was illustrated both at the level of personal experience; “Am I not a victim? Did I not suffer?”, to the broader, national perspective as “Nobody cares about Bosnian Serb victims”. One of the women Gregulska interviewed accused Bosnian Serb leaders of being ashamed of civilian victims and not investing efforts in documenting crimes and speaking out loud “as they (Bosnian Muslims) do”. There was a shared sense among the Bosnian Serbs, about the absence of Serbian account of history from public discourse in Srebrenica, and in Bosnia and Herzegovina in general.636 As discussed at Chapter 1 of this study, the conflation of personal experience of ordeal during the war and collective memory of national victimhood is happening here.

5.3.3 Missing Serbs
The fact that bodies of many Bosnian Serb victims have not yet been found or identified was also important in the Bosnian Serb narratives of war. This offers one more point to demonstrate the cruelty of the Bosnian Muslim. At the same time there was no mentioning of the Bosnian Muslim victims. The fact shows that in the first months of the war in 1992, many Bosnian Muslims were as well murdered in Srebrenica town, several of them being burnt alive in their houses in the centre of the town. A dozen of Bosnian Muslim children were killed by grenades while playing in front of the school.637 None of those events are mentioned in the narratives of the war in Srebrenica presented by the Bosnian Serbs:

635 J. Gregulska, Memory in Srebrenica, p.35.
636 J. Gregulska, Memory in Srebrenica, p.49.
637 J. Gregulska, Memory in Srebrenica, p.70.
“No Muslim was killed in Srebrenica before it became a protected enclave. And how could anyone be killed when it was a protected zone? They were killing each other and blaming that on Serbs.”

5.3.4 Siege of Srebrenica

The siege of Srebrenica does not occupy much place in the majorities of the Bosnian Serb stories, except for the part about the Bosnian Serb victims are mentioned. There is no talk of Srebrenica being under siege. Srebrenica enclave was surrounded by the Bosnian Serb army to protect the Bosnian Serb villages from the attacks launched by the Bosnian Muslims from the town. Bosnian Serbs were aware that the population of the Srebrenica town grew drastically since thousands of Bosnian Muslims fled into it from villages. As for the reasons why all those Bosnian Muslims came to town, the common Bosnian Serb narrative explains that it was due to “military tactics”, “political arrangements” and “strategies”.

What was important to the interviewees was the fact that despite the proclamation of Srebrenica in 1993 as demilitarised zone protected by the UN, Bosnian Muslim attacks against Bosnian Serb villages continued from the town. That was a proof that not all the Bosnian Muslims gave up their weapons and continued attacking Bosnian Serb population. This continued until July 1995, when Bosnian Serb army led by Ratko Mladić finally entered and ‘liberated’ Srebrenica. In the Bosnian Muslim and international discourses, this event is referred to as 'the fall of Srebrenica'. From Bosnian Serb viewpoint, Srebrenica was ‘liberated’ in July 1995:

“It all lasted until April 1993 when Srebrenica was a protected zone, but it continued only on smaller scale. All the Serb villages were attacked by those people of Srebrenica who now talk only about July 1995. They were not disarmed. Then came July 1995. I do not justify what happened. But I cannot deny that it was some sort of natural consequence of what was happening before.”

5.3.5 July 1995

July 1995 does not occupy an important place in the Bosnian Serb narratives of the war and is referred to only in a vague term. It is being mentioned as “something horrible”, “what happened down there”, “all that stupidity”. Most striking is that for the Bosnian

638 J. Gregulska, Memory in Srebrenica, p.70.
639 Ibid.
640 J. Gregulska, Memory in Srebrenica, p.71.
Serb a narrative, the event in July 1995 was to be expected, or a natural development and consequence of the attacks by Bosnian Muslims against the Bosnian Serb population in the preceding years.\(^{641}\)

Bosnian Serbs generally express regret about what happened in Potočari but did not consider it as something that was viciously planned or organised:

"I do not want to go into what happened in 1995 but personally I do not think that anybody gave such an order."\(^{642}\)

According to one of the interviewees, Serbs ‘left’ Srebrenica in July 1995:

"Some were forced, some not but in general they left. Some alive, some not. I cannot say, it was horrible what happened, and I would never wish anything like that to anyone, but nothing was bigger and more horrible than what happened to Serbs in the period before."\(^{643}\)

It was also understood that what happened in Srebrenica in July 1995 was a result of some sort of political arrangements and agreements that involved leaders of the fighting sides as well as representatives of foreign powers involved in the war. One woman mentioned that she keeps at home a newspaper article from the biggest Bosnian daily from few years ago where the headline read: “Alija sold everything”:

"There are some people who say that openly, in public. They had some arrangement."\(^{644}\)

According to another woman, no one can say that the Bosnian Muslims in Srebrenica were killed without the previous permission from the Bosnian Army:

"There were too many victims and events to think that this could have happened just like that."\(^{645}\)
5.3.6 Number of victims
As far as human losses in the war are considered, Bosnian Serbs admit that there were more Bosnian Muslim victims since they represented a bigger population. Bosnian Serbs belonged to minority, so there were less Bosnian Serb victims. However, if the ratio of number of victims to the size of the population is examined, “there were almost the same proportions of victims on both sides”:

“Here Serbs were always killed. Their people were also killed, that is war. Who is stronger than kills. They say that there were less Serb victims, but we were less numerous populations. Same in proportions.” 646

In their eyes, there is a lot of controversy about the number of victims claimed at the Potočari Memorial Centre. It is sort of a “common knowledge” among the Bosnian Serbs in Srebrenica that the list of victims in Potočari includes those who died before 11 July and as such should not be considered victims of genocide. The Bosnian Muslim side “manipulates” with numbers and Bosnian Muslims were “burying everyone at the Memorial Centre”. None thinks that as many as eight thousand Bosnian Muslims were killed in July 1995. One interviewee bluntly stated that it was simply impossible to “kill them all”. 647

5.3.7 Sense of injustice
The most wide-spread motif present in almost all the interlocutors interviewed by Gregulska was the sense of injustice done to the Serbian nation both during and after the war. The interviewees were reporting a biased approach of the judiciary, represented by the rulings of the ICTY, media, presenting a black and white vision of the war where there were only Bosnian Muslim victims and Bosnian Serbs were perpetrators, and commemorating practices, resources and attention paid to commemorations of the Bosnian Muslim population with no public space for the Bosnian Serb side:

“The Tribunal is a political court. It is impossible to give one nation one thousand years and two to the other. Each of them was set free. How come? Serbs were not killing themselves. Orić said that he was defending his nation. How was he defending his nation by entering Serb villages? Is

646 J. Gregulska, Memory in Srebrenica, p.72
647 J. Gregulska, Memory in Srebrenica, p.36
For many Bosnian Serbs, they lost any confidence in the ICTY since the acquittal at the trial of Naser Orić, who commanded the Army of the Republic of Bosnian and Herzegovina in Srebrenica. Orić, considered a hero and defender by the Bosnian Muslim population, is perceived a major villain by Bosnian Serbs. In the eyes of Bosnian Serb, Orić is responsible for the destruction of many Serbian villages in Srebrenica municipality and is notorious war criminal that should be held responsible for brutal killings of Bosnian Serb civilians. The fact that he was acquitted served as a proof that the ICTY as well as the international community supported only Bosnian Muslim victims and did not care for justice for the Serbs. There is a paradox when it comes to the perception of individual guilt and responsibility for the crimes. On the one hand, majority of the Bosnian Serb interviewees wished that all individuals responsible for committing crimes were brought to trials; one woman put it “even if they were Serbs, even if that was my own father”. At the same time, however, the ICTY and other courts were biased. One interlocutor of Gregulska’s interview admits that since the verdict in the Orić case she “did not wish to see anyone facing that court”. For the other interlocutor, nationality did play a role. She rhetorically asked, “how could she want her Serbs to lay down in jail?”

Orić came to symbolise both the suffering of the Bosnian Serbs during the war and the injustice and bias experienced afterwards:

“I think that all the criminals should be brought to courts. But when Naser (Orić) burnt all the Serb villages, he got two years. How could I now wish for one of our Serbs to lay down there (in prison) when their walk around?”

The issue of criminal responsibility illustrates subtle interdependence between the Bosnian Muslims and Bosnian Serbs. Whenever a question of responsibility and guilt of Radovan Karadžić or Ratko Mladić was mentioned it was always matched by guilt of Muslim leaders. If Karadžić was to be sentenced, so was Bosnian Muslim war time president, if Mladić was a war criminal, so was Orić. Several interviewees spoke of

648 J. Gregulska, Memory in Srebrenica, p.57
649 J. Gregulska, Memory in Srebrenica, p.58
650 J. Gregulska, Memory in Srebrenica, p.73
Karadžić, Mladić and Milošević as defenders of the Serbian nation who “*did what had to be done*”:

“I understand Mladić. If I had listened to all that cries of despair and howls he did in Srebrenica I would not have done anything else that what he did.”

An interesting point is that Gregulska observed most of the interlocutors she interviewed appear to be caught in between of what they thought they should be telling and what they probably thought was more truthful. A common message here is that “on the one hand, the guilt should be taken from the collectivity of Serbs and assigned to individuals, on the other hand, they were defenders, standing up for and sacrificing for the nation.” One woman said that in her view “Karadžić did not bring anything unworthy to the nation” but soon she reflected that she should not be putting Serbs in bad light. Bosnian Serb narratives in the other parts of Bosnia and Herzegovina, recorded by Orentlicher, showed very similar sentiments:

“[i]t’s our opinion that the guilt is individual and everyone should be responsible for what he did. So, my organization never stood behind those [ICTY defendants]. If they have committed war crimes, they should be held responsible. [...] The truth is the Bosniaks were the major victims. They suffered the most.

[...] gesture of revenge by one segment of the Serb army for what the Bosnian Army did to Serbs [in Srebrenica] in the first two years of the war. [...] it takes two to fight. [...] We Serbs see [the Hague Tribunal] as a political court [that does not treat everyone equally].”

Similarly, another Bosnian Serb in Foča:

“Whoever committed war crimes deserves to be punished [...] whoever was prosecuted before the ICTY deserves to be. [...] the ‘so-called’ (Sarajevo) siege

651 J. Gregulska, *Memory in Srebrenica*, p.58
652 Ibid.
653 Ibid.
654 Interview with Gordan Kalajdžić, an officer of an RS veterans’ group in Foča, July. 20, 2009 (as cited in D.F. Orentlicher, *Someone Guilty be Punished*, p.93.)
Sarajevo was a front line in a two-way war.

The ICTY is one-sided, partial, biased.”

In the interviews, Orentlicher observed what might be seen as a progress in the sense Bosnian Serb interlocutors did not generally deny that Bosnian Serbs committed specific war crimes and often said that those who did deserved to be prosecuted. But many of them went further to neutralize these points by asserting: 1) everyone committed war crimes; 2) it is mainly Bosnian Serbs who are prosecuted by a ‘political court’; and 3) the few Bosnian Muslims who have been prosecuted have received lenient sentences.655

“Later we consider several contextual factors accounting for Bosnian Serbs’ failure to acknowledge fully and condemn war crimes committed by Bosnian Serbs. For now, we note the relevance of a dynamic that one of our interlocutors in Foča, Josip Davidović, came close to acknowledging: strong peer pressure. In a tone that suggested he realized how his remarks must have sounded, Davidović said near the end of our interview: ‘You have to be partial or biased when it is about your people, you have to be partial. This is an unwritten rule, regardless of how much you would like it to be different.’

Davidović might have added that ‘you have to be partial’ especially when speaking to foreign interviewer who may quote your remarks in a public report. During interviews in Prijedor, we were told that local Serbs ‘unofficially acknowledge’ the ethnic cleansing that happened there during the war but, with rare exception, will not do so publicly. One of the few local Serbs who has acknowledged that Serbs in Prijedor committed ‘ethnic cleansing’ wholesale, Molimir Popović, told us ‘many [Serbs] talk like this but won’t come out and [do so publicly].’” 656

The Bosnian Serb narratives and vision of the war described above may not be treated as a coherent, homogenous story. It is more of a selection of certain motifs and elements that are predominant in the Bosnian Serb public discourse. Certainly, many of those opinions, interpretations and information are challenged within the group as well and many Bosnian Serbs do not agree with the vision of the war supported by their national leaders. The national narrative sketched above is simplified and reduced and they do not include many nuances. At the same time, however, it presents the elements that do occupy the public

655 Interview with Nedjeljko Mitrović, president of the Republika Srpska Association of Families of Missing Persons in the RS capital of Banja Luka, July 23, 2009 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.93.)

656 Ibid.
discourses and as such are the dominant historic frameworks available to members of Bosnian Serb community.  

5.3.8 Denial
In September 2002, a year after the ICTY Krstić Trial Chamber judgement, Bosnian Serb authorities published an analysis of wartime atrocities covering Srebrenica episode of July 1995 as well. The overall tone of the report was - distancing, distortion, and denial. The report - conducted by the Republika Srpska’s Government Bureau for Relations with the International Criminal Tribunal for the Former Yugoslavia (ICTY) - claims that no more than 2,000 were killed in Srebrenica, and that all were armed soldiers of the Bosnian Army and not civilians. Time magazine summarized the report’s key findings:

“Authorities in the Federation Entity of Bosnia and Herzegovina and the international community have severely condemned a report released by authorities in the Republika Srpska claiming the July 1995 massacre of Bosnian Muslims at Srebrenica never happened. Though it is widely accepted that between 7,000 and 8,000 Bosniak men and boys were massacred by Bosnian Serb forces when they took control of Srebrenica in eastern Bosnia between 11 and 15 July 1995, the report offers a completely different story, blaming deaths on “exhaustion,” among other things. The report — conducted in early September by the Republika Srpska’s Government Bureau for Relations with the International Criminal Tribunal for the Former Yugoslavia (ICTY) — claims that no more than 2,000 were killed, and that all were armed soldiers of the Bosnian Army and not civilians. Of those 2,000, the new study says that 1,600 were killed in battle or while attempting escape, and 100 died simply because they were “exhausted.” The study also claims that it is possible that fewer than 200 members of the Bosnian Army were killed by members of the Bosnian Serb Army in acts of revenge or because they were not aware of the particulars of the Geneva Convention on prisoners of war.”  

International organizations in Bosnia and Herzegovina were dismayed by this report. The International Commission on Missing Persons (ICMP) issued a statement noting

657 J. Gregulska, Memory in Srebrenica, p.73.

that the RS report’s treatment of missing persons “contains what ICMP believes to be serious inaccuracies” and placing these in a broader context: “Manipulation of the issue of the missing for political purposes, including the manipulation of numbers of missing, has been an ongoing practice within Bosnia and Herzegovina that only serves to cause further pain and suffering in a society that has already suffered so much.” 659 Then High Representative Paddy Ashdown said the report’s findings were:

“so far from the truth as to be almost not worth dignifying with a response. It is tendentious, preposterous, and inflammatory.” 660

5.3.9 Acknowledgment by RS authorities

A year passed since this devastating RS report was published; there was a significant turn of the RS government on Srebrenica in 2003. First, during the annual anniversary of the Srebrenica massacres in 2003, then RS Prime Minister Dragan Mikerević attended the annual commemoration ceremony in Potočari for the first time. Mikerević also acknowledged that the by-then well-established crimes had to be addressed, although he apparently did not use the word genocide: 661

“These reports prove that there was a crime here. One needs to learn from one’s mistakes, and there have been a lot of mistakes in our history.” 662

On June 2004, the RS investigative commission which was mandated by the Office of the High Representative (OHR) issued its final report. 663 It was the first time the RS authorities themselves; commission included one international and one Bosnian Muslim member, compiled data on almost 7,800 victims of the Srebrenica massacres and identified 32 previously unknown mass grave sites. 664 The report also admits that

660 D.F. Orentlicher, Someone Guilty be Punished, p.95.
661 D.F. Orentlicher, Someone Guilty be Punished, p.95.
662 D.F. Orentlicher, Someone Guilty be Punished, p.94.
663 The first interim report was issued on April 14, 2004. An addendum was completed in October 2004. In April 2004, the High Representative Paddy Ashdown discharged two Bosnian Serb officials for obstructing the work of the commission. See ‘Bosnian Serbs admit Srebrenica massacre’, AFP, June 11, 2004.
the perpetrators of the massacres "undertook measures to cover up the crime by moving the bodies" to other sites.  

Less than two weeks later, then RS President Dragan Čavić appeared on RS television and made an extraordinary remark. Čavić, a member of the party of Radovan Karadžić, said that the report:

"undoubtedly establishes that in nine days of July 1995 atrocities were committed in the area of Srebrenica."

"I have to say that these nine days of July of the Srebrenica tragedy represent a black page in the history of the Serb people."

The RS government itself issued an apology after the commission issued its final report. Čavić, however, lost his re-election in 2006, most likely due to this historic ‘black page in history’ statement.

Another trigger point came in February 2007, when the International Court of Justice (ICJ) ruled that Bosnian Serbs committed genocide in Srebrenica. The ICJ’s key legal and factual conclusions relied heavily on the ICTY’s judgments, including the Krstić case.

666 Bosnia Herzegovina: President Dragan Čavić Acknowledges Atrocities against Muslims in Srebrenica in 1995, Reuters, at http://www.itnsource.com/shotlist//RTV/2004/06/22/40622. 0052/?s=srebrenica. In the lead-up to the report, Čavić had indicated that his government would, in the words of the New York Times, ‘begin to redress its hard-line stance’ on wartime atrocities by Serbs. Čavić said: “After years of prevarication, we will have to finally face up to ourselves and to the dark side of our past. We must have courage to do that.”
668 Genocide case, ICJ Judgment, para.297. The Court also found that Serbia had breached its legal obligations to prevent and punish genocide. See ibid. para.438 (responsibility for failure to prevent genocide) and paras. 449-450 (responsibility for failure to punish as well as to prevent genocide). The ICJ found, however, that the Srebrenica genocide itself could not be legally attributed to Serbia. See ibid., para.415. It also found that Serbia’s legal responsibility for complicity in genocide had not been established.
669 The ruling came in a case brought by Bosnia and Herzegovina against Serbia and Montenegro, and thus RS authorities were not respondents. But the ICJ assessed Bosnian Serbs’ wartime actions as part of its assessment of Belgrade’s legal responsibility for the crimes perpetrated in Bosnia and Herzegovina. RS leadership had unsuccessfully tried to have the case discontinued. Between June 1999 and October 2000,
RS Prime Dragan Milorad Dodik’s first response to the ICJ judgment was to reject its finding of genocide and attribute the Srebrenica killings to rogue elements of the Bosnian Serb army. Accordingly, he said, individuals had to be held accountable, not the institutions or people of RS. Two days after the ICJ rendered its judgment, the government of Republika Srpska issued a statement “express[ing] its deepest regret for the crimes committed against non-Serbs during the recent war in Bosnia and condemn[ing] all persons who took part in these crimes.” The government said it was “essential that a deepest apology be extended to the victims, their families and friends, regardless of their ethnicity,” but apparently stopped short in acknowledging political responsibility for genocide committed by its own armed forces.

Again, the picture was mixed: While the RS government’s response to the judgment went farther in condemning the crimes committed in Srebrenica than would have been imaginable ten years earlier, it also took care to avoid language of unqualified acceptance of responsibility, if only political.

In somewhat similar fashion, in late March 2010, the Bosnian Serb Parliament adopted an unprecedented declaration “condemning in strongest terms the crime committed in July 1995 against Muslim population of Srebrenica” and apologizing to the families of the victims. Notably, however, the declaration avoided any reference to genocide. What was still a landmark acknowledgment of the underlying facts was then further undermined by the parliament’s “expectation that the highest
authors in other states in the territory of the former Yugoslavia will in the same way condemn crimes committed against the Serbs and apologize and express condolences to the families of the Serb victims.”

5.3.10 Changing position of Bosnian Serb

During interviews that took place in late 2006, Orentlicher and her research group met many individuals who are in a position to observe trends over time that the prevailing rhetoric among Bosnian Serbs had changed; in particular, that it is relatively rare to hear the extreme brand of outright denial, but that most Bosnian Serbs remained unwilling to acknowledge the extent of Bosnian Serb responsibility for wartime atrocities and express unequivocal remorse. For example, Matias Hellman, then the ICTY’s liaison officer in Sarajevo, said in 2006 that the prevailing Bosnian Serb discourse was not to deny that Bosnian Serbs committed wartime atrocities but to suggest that the ICTY was biased against Serbs in its case selection, asking questions like, “Why haven’t you dealt with this crime against Serb victims?”

Speaking well before Dodik’s recent remarks, civil society activist Mervan Mirašćija described the discourse of Bosnian Serb leaders this way:

“Serbian politicians like Dodik realize they should talk about war crimes as something that was bad, they will say that people who committed them should be punished. They insist on individualization, but they won’t say there were no crimes. They may add, "but Serbs were also victims." But they realize that it’s not profitable to deny. That’s a change.”

Rather than deny that Bosnian Serbs committed widescale and systematic wartime atrocities, then, Bosnian Serb leaders invoke the principle of individualization advanced by the ICTY itself, implying that such crimes were committed as acts of individuals, not


676 Interview with Matias Hellman, ICTY liaison officer, Sarajevo, Nov. 29, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.91.)

677 Interview with Mervan Mirašćija, law program coordinator, Open Society Fund Bosnia and Herzegovina (OSF BiH), Nov. 29, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.91.)
ones that engage broader responsibility among Bosnian Serbs or leaders who acted in their names.\footnote{D.F. Orentlicher, \textit{Someone Guilty be Punished}, p.91.}

According to Orentlicher, the related notion that ‘war crimes deserve to be punished whoever committed them’ was a common theme in the interviews throughout Bosnia and Herzegovina, across ethnic lines. Orentlicher observes that the frequency with which this is affirmed may be a testament to the effectiveness of the ICTY’s normative power. But the phrase is also often invoked among Bosnian Serbs as a watchword for what many other Bosnians describe as an effort to equalize crimes committed by members of all three major ethnic groups.\footnote{D.F. Orentlicher, \textit{Someone Guilty be Punished}, p.91} Journalist Gojko Berić describes the prevailing Bosnian Serb discourse this way:

\begin{quote}
"Serbs, as is well known, would like to equalize those war crimes, make them relative by using the thesis that all three sides committed crimes in wartime and they claim that only Serbs are being prosecuted in The Hague—which of course is notorious nonsense."\footnote{Interview with Gojko Berić, journalist and columnist of Oslobodjenje, Sarajevo, July 17, 2009 (as cited in D.F. Orentlicher, \textit{Someone Guilty be Punished}, p.91.)}
\end{quote}

\section*{5.4 \textbf{Bosnian Muslim Narrative of War}}

\subsection*{5.4.1 \textbf{The truth}}

"People can always say it didn’t happen but now there are documents".\footnote{Interview with Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, Dec. 4, 2006 (as cited in D.F. Orentlicher, \textit{Someone Guilty be Punished}, p.42.)}

"We still had the hope that establishing this court will help to reveal the truth so that justice will be reached."\footnote{Interview with Sead Golić, Association of Forcibly Taken Away and Missing from Brčko, Brčko, July 22, 2009 (as cited in D.F. Orentlicher, \textit{Someone Guilty be Punished}, p.42.)}

An important element for Bosnian Muslim collective memory is that truth should be established as to what happened during the war. This is a recurring theme that came out during the interviews conducted by Orentlicher in late 2006. Most Bosnian Muslim
interlocutors interviewed expressed desire that apart from ‘justice for its own sake,’ that the ICTY to establish ‘the truth’. Considerable value was attached to the ICTY’s ability to establish the fundamental facts of what was done to them, who was responsible, and the nature of the crimes committed.

Orentlicher reports that for the survivors in Srebrenica more personal truth is also important. Those who have not yet learned the fate of their family members hope that the work of the ICTY or now the War Crimes Chamber (WCC) in Sarajevo would help them to answer critical questions; “what happened to their sons, husbands, brothers, parents? where their relatives’ bodies are buried?”

For some, the expectation is to have an answer to a different but also haunting question: “why did their lifelong neighbours turn against them, hunting them down like animals?” For victims who testify before the ICTY, its trials can offer the “chance to tell their personal history and to have it officially recognized.”

---

683 D.F. Orentlicher, Someone Guilty be Punished, p.42


“While the ICTY’s “adjudicated facts” and the evidence that will become part of its archives may rank among its most important contributions, the prosecutor’s treatment of one source of evidence found at mass graves in Srebrenica has been deeply unsettling for many Bosnians.

ICTY Prosecutor Serge Brammertz confirmed reports that his office had disposed of some 1,000 personal artifacts found in mass graves in late 2005 and early 2006 because they were “deteriorating, and presented a risk to health.” Except for this general explanation and a suggestion that this action is standard procedure for prosecutors’ offices, the ICTY prosecutor has not clarified the circumstances behind this episode or indicated why efforts were not made to allow access to the destroyed artifacts for purposes of DNA testing and the like.

Survivors who have literally lost every tangible trace of their families were devastated, fearing that their only chance at recovering a physical link to their loved ones had been destroyed. Forensics experts expressed concern that the ICTY could have destroyed material that holds the key to determining the fate of those still missing—the personal truth which, as we noted earlier, may be the most important truth for many survivors. Mirsad Tokača, who hopes that his database of wartime atrocities will help build the foundation for a “new culture of memory based on facts, not politics,” describes the prosecutor’s destruction of artifacts as “the biggest scandal of the Tribunal. Really, it’s the killing of memory.”

685 Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.42)
For many Bosnian Muslims, the acceptance of Bosnian Serb and their expressed remorse about the truth is an essential condition of social repair. As a witness from Srebrenica, whose husband and brother were among those murdered in Srebrenica, recalls:

“[w]hen The Hague Tribunal was established it gave us a big hope, not only to convict criminals...but we expected to have the truth in this country revealed and proved, because we have a big problem here regarding acknowledgement of the truth.” 686

In the absence of such acknowledgment by the Bosnian Serb side, however, many Bosnian Muslims hope that the ICTY has at least produce “the evidence and proof that will someday make [Bosnian Serbs] understand they lied to themselves.” 687

In a setting where majority of wartime atrocities were committed by one ethnic group, it is particularly important to members of the ethnic groups who had suffered the most that perpetrator group accepts the ‘trial truth’ established in The Hague and express remorse for crimes committed in their name. 688

As discussed earlier, the denial has been a distinctive and pervasive feature of the Bosnian Serb discourse regarding wartime atrocities committed by Bosnian Serbs. One interlocutor of Orentlicher interviews puts it, “one part of the country is in constant denial.” 689 Bosnian Serbs’ unwillingness to acknowledge the complete truth of ‘ethnic cleansing’ has deepened survivors’ personal suffering and it has clearly created the social divide between ethnic communities in Bosnia and Herzegovina. One Bosnian Muslim

686 Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.43) See also Udo Ludwig and Ansgar Mertin, A Toast to the Dead‘; Srebrenica Widows Sue UN, Dutch Government, Spiegel Online International, July 4, 2006, http://www.spiegel.de/interna- tional/spiegel/0,1518,425024,00.html. D.F. Orentlicher, Someone Guilty be Punished, p.43
687 Interview with Emsuda Mujagić, Srce do Mira, Kozarac, July 23, 2009 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.43.)
688 According to the most authoritative database on the war in Bosnia-Herzegovina, 83.33 percent of the civilians who were killed or are still missing as a result of wartime violence were Bosnian Muslim; 10.27 percent Serb; and 5.45 percent Croat. Research and Documentation Center (Sarajevo), Ljudski gubici u Bosni i Hercegovini 91-95 (Human Losses in Bosnia and Herzegovina 1991-95); Patrick Ball, Ewa Tabeau and Philip Verwimp, The Bosnian Book of Dead: Assessment of the Database (Full Report), Households in Conflict Network, 2007
689 Interview with Saša Madacki, director, Human Rights Centre, University of Sarajevo, Sarajevo, July 17, 2009 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.90)
journalist interviewed by Orentlicher in 2009, speculating about what would happen if the ICTY were to convict Radovan Karadžić of genocide but this verdict was rejected by Bosnian Serbs, he said:

“It’s not justice. In that case, we will have no trust among people.”

Persistent forms of denial are antithetical to the notion of a national society that has achieved “common agreement on an interpretation of the past.” Although no one believes that dispelling the fog of denial or justification would come solely or even principally through the work of the ICTY, those who emphasized this point hoped that the Tribunal’s findings of individual guilt, achieved through the crucible of criminal process, would radically shrink the margins of plausible denial.

### 5.4.2 Individualization of guilt

Many Bosnian Muslim interlocutors of Orentlicher, especially intellectuals, emphasized that it is crucial that leaders and citizens of the three major ethnic groups accept that members of their own ethnic group committed atrocities and acknowledge that this was wrong. Some made clear that this is important not only as a gesture of reciprocal acknowledgment and remorse. It is also, they say, that it only becomes clear that Bosnia and Herzegovina has overcome the divisions when most citizens view the responsibility for war crimes, not through an ethnic prism. What is important is that Bosnians recover a common commitment to core values; that war crimes are wrong, whoever commits them.

The Orentlicher’s Bosnian Muslim interlocutors expressed support for the proposition that criminal guilt is individual. This means in other words, however, that Bosnian Serbs should acknowledge the guilt of Bosnian Serb defendants. Yet many who made this point also stressed the importance they attach to the goal of widespread acknowledgment within

---

690 Interview with Gojko Berić, journalist and columnist of Oslobodjenje, Sarajevo, July 17, 2009 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.90.)

691 Interview with Tarik Jusić, executive director, Mediacentar Sarajevo, Sarajevo, Dec. 6, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.90.)

692 Or as Michael Ignatieff has described the goal, to ‘narrow the range of permissible lies’ in relation to the ICTY as far back as 1996. See Michael Ignatieff, Articles of Faith, Index on Censorship 25, No 5, 1996, p.113, (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.90.)

693 D.F. Orentlicher, Someone Guilty be Punished, p.90
each ethnic group that members of their group committed war crimes, a notion that implies a form of collective responsibility:

“For example, Dobrila Govedarica noted the importance of transcending the perspective, which still prevails in the former Yugoslavia, of viewing war crimes in ethnic terms. Instead, she said, “individualizing guilt is important” and it is important to “think of war crimes as something that should not be done against anybody.”

Even so, she said, while “someone who belongs to an ethnic group should not be stigmatized” because of the guilt of others.”

5.4.3 The bystanders
It was not just individuals who were responsible by directly perpetrating crimes:

“[…] there were witnesses who were silent. They weren’t accomplices, but they were nevertheless silent when atrocities were being committed. Some who opposed crimes committed by members of their ethnic group were punished, but how come they’re still silent? … It was impossible not to see that your neighbour was tortured just because he belonged to an ethnic group. So, you shouldn’t stigmatize an entire group but maybe there should be an acceptance of political responsibility. … These individuals didn’t come from nowhere. There had to be either an overall political/societal climate that supported such acts or there had not been awareness that it was wrong.”

“The official history of our region is being written in The Hague. There are so many different histories being offered here. … Now, through The Hague process… we can get the complete picture.”

“Even with the ICTY, there are three truths.”

---

694 Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 30, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.44.)

695 Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.44.)

696 Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.89.)

697 Interview with Sinan Alić, director, Foundation Truth, Justice, Reconciliation, Tuzla, Dec. 5, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.89)
"We have a big problem here regarding acknowledgment of the truth. Because you see it is well known to all that several alleged truths exist—Muslims’ truth, Serbs’ truth, and Croats’ truth."

According to Orentlicher, a question about ‘justice for its own sake’, has emerged during the interviews as the most important justification for the ICTY’s work for most of the Bosnian Muslim interlocutors. Yet many Bosnian Muslims also hoped the justice secured in The Hague would have a broader impact in the Balkans. And what mattered most to many is that the ‘truth’ about wartime atrocities established in the ICTY judgments be publicly accepted as factual truth and condemned without reservation or equivocation.

5.4.4 Acknowledgment and denial by Bosnian Muslims

While the importance of Bosnian Serbs’ acknowledgement of atrocities committed by Bosnian Serbs is critical for Bosnian Muslims, Orentlicher also points out the importance of Bosnian Muslim acknowledgement of crimes committed by members of their own ethnic groups. On this, one interlocutor said:

“[…] just as many Serbs have been unwilling to acknowledge the extent and nature of crimes committed by Serbs, many Muslims have been unwilling to condemn abuses committed by the Bosnian Army against Serbs and Croats’, as they are concerned that ‘this could be seen as equalizing guilt.”

Two principal questions are raised here: First, to what extent have Bosnian Muslims taken on board the factual conclusions reached in the ICTY judgments and acknowledged that wartime atrocities committed by members of their own ethnic group deserve condemnation? Second question concerns the outreach activities of the ICTY: within the bounds of what is possible and appropriate for a judicial institution, has the ICTY performed as much as it could in ensuring that facts established in its judgments as well as basic information about the nature of its work, are known and understood in Bosnia and Herzegovina?

Many Bosnian Muslims consider Bosnian Serb leaders’ and other Bosnian Serbs’ treatment of the genocide in Srebrenica as a key indicator of how far Bosnian Serbs have

698 Interview with Kada Hotić, vice president, Mothers of Srebrenica and Žepa Enclave, Sarajevo, July 24, 2009 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.89.)

699 D.F. Orentlicher, Someone Guilty be Punished, p.43

700 D.F. Orentlicher, Someone Guilty be Punished, p.43
travelled on the road to acknowledgement. Recent years have seen some progress in this regard, yet many Bosnian Serbs remain unwilling to acknowledge that Bosnian Serb forces committed genocide in Srebrenica and to express remorse for their actions.

5.4.5 Naser Orić
Despite the ideal which many Bosnian Muslims advocate that leaders and individuals from all ethnic groups in Bosnia must acknowledge crimes committed by their own ethnic group and condemn them, when it comes to the Bosnian Muslim war criminals, they become more evasive.

As was often noted, when the Bosnian army commander in Srebrenica, Naser Orić, returned to Bosnia and Herzegovina after his initial conviction (later overturned on appeal) and minimal sentence for crimes committed against Bosnian Serb detainees, he was welcomed as a war hero. The Bosnian Muslim chairman of the Bosnian Presidency, Sulejman Tihić, publicly welcomed the verdict as a vindication:

“Now it can clearly be seen who was defending unarmed civilians and who was committing crimes.” 701

Another interlocutor of Orentlicher points out:

“People celebrated Orić here, they didn’t understand he was guilty of anything.” 702

“As long as someone found guilty of war crimes is celebrated as a hero something is terribly wrong, with politicians and with the people.” 703

Apart from intellectuals—including the cosmopolitan media—there is “no understanding” among Bosnian Muslims that “war crimes could also be committed by Muslim soldiers.” If one raises the issue of war crimes for which Bosnian Muslims

703 Interview with Sevima Sali-Terzić, senior legal advisor, BiH Constitutional Court, Sarajevo, Nov. 30, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.97.)
have been prosecuted before the ICTY, the reaction is often defensive because condemning these crimes ‘could be seen as equalizing guilt.’ 704 They emphasise that the ICTY’s prosecution of Bosnian Muslims was an effort to establish a ‘national balance’ among perpetrators. 705 Noting that a reluctance to confront war crimes by members of one’s own ethnic community was common in all three major ethnic groups in Bosnia and Herzegovina, one interlocutor said:

‘Ninety-nine percent of Bosnians think of war crimes in terms of ethnic groups and from my point of view that’s a problem.’ 706

In 1997, Dani, Bosnian Muslim local media outlet investigated war crimes committed by Bosnian Muslims. When this story got picked up by the international media, the journalists were attacked by the Bosnian Muslim leadership. By the Bosnian journalist who got involved in the investigation; ‘it was a terrible experience for us [we] received a lot of threats’ and a bomb was thrown into Dani’s office. ‘Things have changed.’ Now, he says. Even leading politicians acknowledge that members of their ethnic group committed crimes. Still, among ‘ordinary people’ within each ethnic group, the dominant focus is on ‘their own suffering acknowledged.’ 707

5.5 Impact of Judicial Fact Findings

To the extent that there has been movement in the direction of Bosnian Serb acknowledgement of the Srebrenica genocide, a question is whether or to what degree the

704 Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.97.)

705 Interview with Mirsad Duratović, Prijedor, Dec. 8, 2006. Duratović made it clear that he believed all war crimes deserve punishment and that widespread atrocities by Bosnian Serbs did not justify a single violation by Bosnian Muslims. He was nonetheless concerned that the ICTY’s approach did not reflect differences of degree and nature between crimes committed by Bosnian Muslims and Bosnian Serbs. D.F. Orentlicher, Someone Guilty be Punished, p.97.

706 Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.97.)

ICTY’s work has been a contributing factor. Bosnian interlocutors whom Orentlicher interviewed suggest that there was significant impact in this regard:

“Damir Arnaut, a senior legal advisor to the Muslim member of the BiH Presidency, is convinced that the ICTY’s finding in Krstić that Bosnian Serbs committed genocide in Srebrenica had a significant impact in this regard. Arnaut concedes that there are enduring indicators of denial, such as the opposition of Serb members of parliament to a resolution that would declare July 11 a day of remembrance for the victims of genocide in Srebrenica (the interview in which he expressed this view took place some eight months before the aforementioned declaration by Serbia’s Parliament). But Arnaut believes that Krstić changed the dynamic between members of the ethnic groups who are represented in Bosnia’s trifurcated national government. Whereas in 1998–1999 it was common to hear Serbs deny that there was a genocide in Srebrenica, he notes, now “there is no denial that genocide happened.”626 On the level of daily interactions, Arnaut continued, “it helps that there are judicial findings. ... When you talk about other issues, this elephant isn’t in the room” anymore.

Like Arnaut, journalist Ivan Lovrenović thinks that the Krstić judgment had a discernible impact on the way that Serb politicians talked about Srebrenica. He attributes this to the judgment’s reminder that the international community is aware of what happened and will not allow the issue go away. And yet, Lovrenović continued, “that’s when [Serb politicians] intensively started working on discovering victims on their side.” Whereas they had previously been “completely quiet even about their own victims,” after Krstić they were trying “to equalize [by saying] that Serbs were victims the same as others.”

Orentlicher observed that while many of her interlocutors she interviewed were discouraged by the fact that “three versions of the truth” persists fourteen years after Dayton, this did not lead to conclude that the ICTY was a failure. Instead, many believe that disappointments in this regard make the Tribunal’s role in establishing facts more important.

For victims who suffered unspeakable crimes, the affirmation in ICTY verdicts that their nightmare really happened—that a specific person was responsible and that

---

708 D.F. Orentlicher, Someone Guilty be Punished, pp.96-97.
709 D.F. Orentlicher, Someone Guilty be Punished, p.99.
what he did was criminal—appears to be all the more important in the face of denial by those who abetted the perpetrators through acquiescence or active support.

Noting that ICTY cases “established a lot of things that people forgot about,” one journalist observed that “it matters for [victims] so much.” Without its work, she says, “you wouldn’t be able to counter the political truth.” This is not to say that politicians have stopped manipulating the truth. But now “you have the alternative you can counter with.” 710

Another Bosnian Muslim who directs the non-governmental organization ‘Foundation Truth, Justice and Reconciliation,’ believes that the work of the ICTY is:

“[v]ery important for the whole process of reconciliation because among us we would never be able to come to terms with what happened—are some war criminals? Was Srebrenica a genocide?

[even with the ICTY] there is no consensus and it will continue long after I am dead.

[the situation would be far worse] if there were no ICTY

[ICTY has already] made it harder to deny abuses.” 711

Another interlocutor thinks that “it is an important test of the Hague Tribunal to prevent denial.” But like others, he does not conclude that the widespread treatment of war criminals as ‘national heroes’ by ‘their ethnic group’ means its work has not succeeded. “People can always say it didn’t happen but now there are documents. ... Finally, you cannot say I didn’t know.” 712

One interlocutor, although he believes the ICTY has thoroughly failed to achieve the main goals, i.e., countering impunity and promoting reconciliation, but when asked if, in light of this, it was a mistake to establish the ICTY, he still believes that the ICTY was worth

710 Interview with Nerma Jelačič, then director of Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.99.)

711 Interview with Sinan Alić, director, Foundation Truth, Justice, Reconciliation, Tuzla, Dec. 5, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.100.)

712 Interview with Zdravko Grebo, director, Center for Interdisciplinary Postgraduate Studies, University of Sarajevo, Sarajevo, Dec. 4, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.100.)
establishing. He explains that despite these failures the Tribunal has achieved something deeply consequential:

“[Because of ICTY’s work, there are] adjudicated facts that we can call upon, and that we can point to, that we can try and learn from and build upon which would not have been there had it not been for the Tribunal. […] this alone has justified its existence.”

Conclusion

The Bosnian Serb and the Bosnian Muslim collective memories concerning Srebrenica are created in stark contrast to each other in terms of the content and the acceptability of the narratives presented by the ICTY. With a closer look, however, they both carry similarities in their rhetoric and the way they construct their own collective memories. They both apply national or ethnic affiliation as the most important category in the narratives. What is common for both Bosnian Muslims and Bosnian Serbs is while they emphasize the suffering among members of their own nation; ignore victims on the other side. For Bosnian Muslims, systematic and organized killing of over 7,000 Bosnian Muslim men and boys in Srebrenica represents the worst crimes ever committed by the Bosnian Serbs against Bosnian Muslim populations in the country. For the Bosnian Serbs, their victimhood in Srebrenica before July 1995 and denial of its acknowledgement by the international community takes the centre place in their collective memories.

The elements of narratives that shaped and influenced both Bosnian Serb and Bosnian Muslim collective memories also share several discernible patterns. First, both narratives are constructed in direct confrontation with the vision of the past advocated by the other (‘their’) side. Personal experiences are used both as a confirmation of the national narrative and as a proof that interpretation of the war presented by the other side does not correspond to the war reality. This is what this study calls the conflation between individual and collective memories as seen in Chapter 1 of this study. For example, the

713 Interview with Emir Suljagić, advisor to the mayor, Sarajevo, July 14, 2009 as cited in D.F. Orentlicher, Someone Guilty be Punished, p.100. While Nerma Jelačić believes that the Tribunal has already had “a huge effect in terms of establishing the historical record of what happened, for example conditions in the Omarska camp” and that this “is important for victims [and] for society”, she also believes that this is important “for future generations when we have normal history books.” Interview with Nerma Jelačić, then director of Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006 (as cited in at D.F. Orentlicher, Someone Guilty be Punished, p.100.)

Bosnian Serb national narrative, in which Bosnian Serbs fought a defensive war, offers a framework in which their members attack against Bosnian Muslims be securely explained and morally justified. National narrative gives meaning to the memories of the people, but at the same time it is accepted only because it corresponds to their personal experiences. On the Bosnian Muslim side, while it is quite important that the Bosnian Serb side acknowledges and admits their own guilt, when it comes to the atrocities committed by their own people, it is justified as - according to their narrative, it happened while protecting ‘unarmed civilians’.

Second, both Bosnian Serb and Bosnian Muslim narrations construct the past from the perspective of their current experience and the way they perceive the social and political situation in Bosnia and Herzegovina. This confirms Halbwachs’ claim that the past is a social construction mainly shaped by the concerns of the present. The sense of discrimination against the Bosnian Serbs experienced as biased verdicts of the ICTY, media manipulation and stigmatization of the Serbian nation influence their interpretation of the war events and constitute a proof that in 1992, Bosnian Serbs were attacked as they are attacked these days. Sense of denial of victimhood, feeling of being voiceless and dominant position of the Bosnian Muslim discourse result in distrust of any sources of information that do not fit into the Bosnian Serb national narrative. The Bosnian Muslim side, on the other hand, places themselves in the position of ‘perpetual victimhood’ when it comes to the Srebrenica episode, and demand that only one version of the episode be accepted as it is shown at the Potocari commemoration of July every year. This way, the Bosnian Muslim side places themselves at a higher moral position compared to that of their Bosnian Serb neighbours.

In terms of why both Bosnian Serb and Bosnian Muslim narratives emphasize their own victimhood, while ignoring their own atrocities, several explanations have been offered. One explanation is social-psychological:

“Sometimes the Hague Tribunal is like a mirror and if you see an ugly face, you reject it. But you know it’s true. But officially, you say ‘I’m nicer, etc.”

Other explanation resorts to historical memory, which weighs heavily in Bosnia and Herzegovina. at play in many Bosnians’ reluctance to accept the truth about crimes

---

731 Interview with Jasna Bakšić Muftić, professor, Faculty of Law, University of Sarajevo, Sarajevo, Nov. 30, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.98.)
committed by members of their own ethnic group. Reflecting on why many Bosnian Croats are reluctant to accept the guilt of Bosnian Croat defendants whom the ICTY convicted of war crimes, one interlocutor of Orentlicher recalled the following:

“Croats have long been blamed in the Balkans for crimes committed in World War II, when their state was allied with Nazi Germany. Finally, they get to a point where the Serbs, who took almost all the credit for being on the right side in World War II, are the most guilty ones in the 1990s war. In addition, there is a deep-rooted perception that those who defend themselves cannot, by definition, commit a crime. In this setting, there are ‘strong psychological reasons to resist accepting responsibility.’”

While psychological dynamics are important, the political elites, who are the gate keepers of the ‘truth regime’ are perpetuating ethnic perspectives and manipulating the collective memory. As discussed at the Introduction of this study, concept of ‘truth regime’ is what Foucault claimed that it is those in power who dictate and define what is ‘to be understood’ as truth of the society.

In terms of how politics play role in the collective memory formation on Srebrenica:

“politicians use [the ICTY] for their own aims.”

“politicians maintain ethnic divisionism to retain power,”

“[politicians] pay to ICTY indictments is a tool in pre-elections.”

“At one point, RS leader Milorad Dodik has threatened secession from Bosnia and Hercegovina if the Serb entity is not granted greater autonomy, and provoked a political crisis when he issued a decree purporting to nullify state institutions. Acknowledging Serb responsibility for genocide, many point out, is hardly supportive of his political agenda. Conversely, Muslim leader Haris Silajdžić condemns the Serb entity as a creature of genocide and invoked the ICJ’s February 2007 genocide judgment to demand that Srebrenica be wrested from Serb control.

---

716 Interview with Dobrila Govedarica, executive director, Open Society Fund BiH, Sarajevo, Nov. 29, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.98.)

717 Interview with Mervan Mirašćija, law program coordinator, Open Society Fund BiH, Nov. 29, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.98.)
While many Srebrenica survivors supported with Silajdžić position, Bosnian intellectuals widely believe that Muslim political leaders have nurtured victims’ suffering to entrench their own political positions, just as Serb leaders have perpetuated an anti-ICTY stance to advance a self-serving political agenda. A point emphasized by many interlocutors of Orentlicher is that Muslim leaders have “used and misused victims’ associations.”

It is crucial how the political elites translate judicial findings of the ICTY into political facts. Collective memory of the ICTY and of its judgments in Bosnia and Herzegovina is formed in specific ethno-political context in which it is situated. In this respect, what one Bosnian Muslim journalist pointed out as follows is very telling:

“The scheme of ethnic conflict going on in wartime was in a way verified politically through the Dayton Peace Agreement. The military dimension has been removed, the war finished. Metaphorically speaking, it moved on to the political field and it’s still on today. [...] the ICTY’s work is filtered through an ethnic lens, with each group approving of verdicts convicting war criminals from the other ethnic group.

[...] when it reaches a verdict from our ethnic group. In this setting, it is unlikely that establishing facts at trial can by itself dispel denial. Metaphorically, the ears are stuffed with cotton.”

718 Interview with Sevina Sali-Terzić, legal advisor, BiH Constitutional Court, Sarajevo, Nov.30, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.98.);

D.F. Orentlicher, Someone Guilty be Punished p.98”.

719 On this point, Orentlicher mentions the following intriguing result of a study;

“[s]tudy found that Serbs in the Croatian city of Vukovar were more likely to have positive attitudes toward the ICTY, and more ready to admit that war crimes were committed by members of their own ethnic group, than Serbs in the RS town of Prijedor. The study authors speculate that the differences may have some relation to the different status of Serbs in the two towns: “The Vukovar Serbs lost their primacy and have chosen to remain in Croatia; they must admit to the existence of war criminals on their side if they wish to remain as accepted citizens of the state.” In contrast, Serbs in Prijedor “are still trying to attain recognition for their status and need to distance themselves from the horrors that occurred in their name.” Mikloš Biro et al., “Attitudes toward justice and social reconstruction in Bosnia and Herzegovina and Croatia,” in My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity, 183, 193-95 (Eric Stover and Harvey M. Weinstein, eds., Cambridge Univ. Press 2004). While we do not have an opinion on the authors’ theory, situational factors surely play a large role in the way the ICTY’s work is interpreted.”

D.F. Orentlicher, Someone Guilty be Punished, p.99.

720 Interview with Ivan Lovrenović, editor-in-chief, Dani, Sarajevo, July 17, 2009 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.99.)
PART III

CHAPTER 6 FACTORS SHAPING INTERNATIONAL CRIMINAL INVESTIGATIONS AND COLLECTIVE MEMORY

6.1 Introduction

The purpose of this final Chapter is to recap the discussions in the preceding Chapters and to examine the main research questions set out at the beginning of this study:

1. Why and how international investigative agents classify and treat certain facts as a crime? What are the factors that condition the outcome of the investigations?
2. To what extent the meta-narrative constructed by international investigative agents is reflected on the collective memories shared by the members of the society concerned?

6.2 Conditions and Factors Affecting Investigations

International criminal investigations have multiple purposes. The primary purpose is of course to determine individual criminal liabilities. Another less explicit purpose of the international criminal investigations is to construct a ‘meta-narrative’ to provide an explanation of the incidents in accordance with the given legal frame, as to 1) whether the acts concerned are international crimes or not? 2) who are the victims? 3) who are the perpetrators? and 4) who did what to whom? The ‘meta-narrative’ constructed in this way is expected to serve as a basis of collective memories shared by wider communities that are deeply affected by heinous atrocities of the past. 721

721 The goal of the ICTY in ‘providing a complete historical record’ was emphasized at the ICTY judgement at M. Nikolić judgement:

“Finally, through public proceedings, the truth about the possible commission of war crimes, crimes against humanity and genocide was to be determined, thereby establishing an accurate, accessible historical record. The Security Council hoped such a historical record would prevent a cycle of revenge killings and future acts of aggression.”

ICTY, Prosecutor v. Dragan Nikolić, Trial Judgement , IT-94-2, 02 December 2003 para.60; Many commentators of international tribunals also affirm the role of creating complete historical records as one of their goals. cf. M. Damaška, ‘The International Criminal Court between Aspiration and Achievement’,

266
The case study on the Srebrenica investigation, the following factors are identified as condition the course and outcome of the investigation: 1) normative rules such as law, 2) intra/inter organisational dynamics of investigative organs, 3) resources, 4) personality, 5) policy, 6) security, and 7) state co-operation.

6.2.1 Normative factor

Norms such as law prescribe basic powers of investigative organs in carrying out investigation as well as setting limits of these organs’ activities. Investigative actions are shaped by the presence of legal norms. Substantive law sets out definitions as to what constitute criminal behaviour(s), and procedural law provides the investigative organs with a set of powers for the investigation of crime as well as imposing restrictions on them. Procedural law sets parameters as to what evidence is to be sought to prove different crimes.

De Meester points out, however, that “As far as the ICTY is concerned, however, various procedural amendments which were later adopted in the context of the completion strategy, have reduced the possibilities for such history-recording (consider, for example, the power for the ICTY Trial Chamber under Rule 73bis (D) and (E) to direct the Prosecutor to select the counts in the indictment on which to proceed, as required by a ‘fair and expeditious trial’ or to invite the Prosecutor to narrow the number of crime sites or incidents under one charge.”

This had significant impacts on the trials which began after 2004, including the Oric trial, when the ICTY completion strategy was in full motion. Along the line with the ICTY completion strategy, the Chambers often ordered the Prosecution to cut a number of charges and crime bases to expedite the trial proceedings.

---


K. De Meester, The Investigation Phase in Int’l Criminal Procedure.
6.2.2 Organisational factor

Institutional imperatives of external entities that can extend control over the international tribunals play an important role in shaping the trail of the international criminal investigations. Collaboration and conflict between the Office of Strategic Services (OSS) headed by William Donovan and Justice Robert H. Jackson’s Office of Chief of Counsel (OCC) at the Nuremberg trial is a well-known historical example of this.723 In the cases of the two ad hoc tribunals, in 2000, the UN Security Council imposed an enormous time pressure to comply with the deadlines scheduled by the so-called ‘Completion Strategy’.724 This strategy called upon the ICTY and the ICTR to focus on the investigations on the most senior leaders and transfer intermediary-and lower-level accused to competent national jurisdictions to complete their mandate by 2010. Rules 11bis of the ICTY and ICTR RPE were consequently amended to provide for the referral of indictments to national courts. In response to this, both tribunals must significantly narrow the scope of investigations to speed up. In the case of the ICC, the UN Security Council referral and its political back-up thereafter could shape the trajectory of its subsequent investigations.725

Inside the investigative sections of the tribunals, a division between investigative teams working on various investigations without a unity of command may create serious blockade of information flow between the teams. For example, in the early days of the ICTY, where investigating teams were organized along the lines of the three ethnic groups

723 According to Michael Salter;

“with regard to the origin of this case, most studies of the Nuremberg trial have overemphasised interpersonal differences between the William Donovan, head of the Office of Strategic Services (OSS) and Robert Jackson, the U.S. Chief Prosecutor at the Nuremberg trial, and legalistic conflicts over the role of witness testimony. It is important, however, to take into account the underlying institutional factors behind these conflicts.”


724 UNSC Res/1503 and 1534.

725 UN Security Council unanimously decided to refer the situations on Darfur Sudan and Libya in 2005 and 2011 respectively to the ICC. Following the referrals, however, UNSC fell short in providing any tangible supports to the ICC despite repeated appeal by the ICC Prosecutor to render assistance to her and pressurize states concerned to cooperate. This was due to change in international political environment. On UNSC referral on Libya, see Victor Peskin and Mieczyslaw P. Boduszynski, ‘The Rise and Fall of the ICC in Libya and the Politics of International Surrogate Enforcership’, International Journal of Transitional Justice, 2016, Vol. 10, pp.272–291. Such inaction and lack of support by the UNSC make a sharp contrast to the cases of ICTY, where the UNSC imposed tremendous pressure on intransigent states, including economic sanction, arms embargo, blockage to the membership of the EU, to force these states to comply with the ICTY requests.

268
to the conflict, the information sharing between investigative teams who were working in the same area but investigating the opposite sides, i.e., so-called ‘flip-side’ cases, got stalled. Consequently, exculpatory information deriving from the team working on the opposite side tended to go unnoticed.\textsuperscript{726}

Different focuses of various professionals working for the same investigative project, e.g., lawyers, analysts, investigators, play also a role during the investigation depending on whose view prevails. In general, police investigators are more inclined to focus on identifying the culprits through the unearthing of physical and personal evidence, whereas lawyers are more focused to collect evidence that assists to prove beyond reasonable doubt of the guilt or innocence of the accused person in the courtroom.

6.2.3 Resource factor

Resources deployed to conduct international criminal investigations are usually highly disproportionate compared to the scale of the crimes to investigate. Consequently, a number of potential international crimes have escaped from investigation. This issue is closely connected with the financing of investigative organs.\textsuperscript{727}

Structuring the resources and division of labour within the investigative organ are one of determinate factors of the investigative strategy. The ICTY Office of the Prosecutor, for example, were structured to facilitate an investigation strategy that establishes a crime base and seeks to draw the links to the highest echelons of command and control of the military and civilian leadership. In line with this strategy, the resources are divided into the following three sections:

1) The investigative sections, consisting of various teams of investigators, lawyers, and analysts, to investigate each side in the conflict, and to gather and review the oral, documentary, and physical evidence necessary for indictment and trials;


\textsuperscript{727} See for example, prioritization of exhumation projects at the ICTY was conditioned by the availability of funds. No one could have anticipated the scale and cost of the exhumations, and they could not have begun without a wide-ranging transnational, governmental, and financial supports to the ICTY.
2) The prosecutions sections, which consist of senior trial attorneys and legal assistants, who are responsible for the preparation and presentation of cases before the Trial Chambers;

3) The appeals section, which consist of senior appeals councils and lawyers, and analysts, who prepare arguments before the Appeals Chamber.

The main objective of this structure is to combine the skills of different kinds of lawyers and investigators to construct criminal cases for the prosecution of international crimes. In the investigation sections, the teams are organised in line with various parties to the conflicts, e.g., Serb cases, Croat cases, and Bosnian Muslim cases. This permits the same teams to focus on building the crime base for each side and to extend the line of responsibility to its leadership.

Multinational character of investigating teams is an important factor to avoid being accused of bias for or against one warring party or another. For example, the Srebrenica investigation team (Krstić case) consisted of, at various times, staffs from France, Pakistan, Sweden, Norway, USA, Australia, UK, South Africa, and Canada. Although there was a rapid turnover with some of them, the core members of the team remained throughout the entire duration of the investigation. Stability of the core staffs is often critical in international criminal investigations, not only for the continuity of the investigation, but also to avoid the loss of time that happens with frequent changes of investigative staffs. Often it takes significant amount of time for a new investigator to familiarize with a highly complex case when he/she joins in the middle of the investigation. Furthermore, sensitive witnesses who often have built confidence with a particular investigator would often turn away when this investigator leaves the case.

6.2.4 Personnel factor
The level of trainings of personnel involved in the international criminal investigation is crucial. Such trainings must include a training to eliminate cultural bias of those involved in the investigations. An example of the cultural bias investigators must be aware is the phenomenon of ascribing moral equivalence to both victims and perpetrators. For example, in the case of Rwanda, an observer points out that there was an error in the response to the genocide. For political reasons, the international community initially

---

728 J-R Ruez. Personal Interview by Author.
chose to characterize the conflict as a mutually antagonistic fight in which both Hutu and Tutsi shared culpability.\footnote{P. MacGrath, Problems of Investigation, p.898.}

Training on the history of the region and the socio-political backgrounds of the conflict in question is essential. Similarly, training to work with field interpreters must not be overlooked.

### 6.2.5 Policy factor

Formal or informal policies of the investigative organ clearly shape the strategy of the investigation.

For example, the official policy of the ICTY Prosecutor was to investigate all sides of the conflicts in the former Yugoslavia, up to the highest levels of the military and political hierarchies. It was stressed that those in the senior and high-ranking positions, who planned and ordered the widespread crimes are the most responsible for their commission. Lower and medium level perpetrators have, however, not been excluded as targets for investigation. The initial lack of direct evidence against the leaders at the beginning of the investigations urged the ICTY to readjust their investigative policy to start with the underlings and to gradually move up the ladder to the top commanders and political figures. The trials after the Second World War were conducted in the reverse order. The trials of the most senior leaders were held first before the International Tribunals at Nuremberg and Tokyo and followed by the subsequent proceedings to the various national powers against the medium and lower level perpetrators.\footnote{See, The Law Reports of the Trials of War Criminals, 1949, Vol.XV.} Contrary to the Nuremberg or Tokyo Tribunals, for the ICTY in the absence of occupying forces in the terrain of investigation, access to sources of information and evidence connecting the leaders to the commission of war crimes was limited, at least initially. When the ICTY initiated its investigations in 1994, all the ruling parties of the former Yugoslavia and armed forces involved in the conflicts were still in power.

### 6.2.6 Security factor

Since international criminal investigations are often conducted in the territory in the midst or immediate aftermath of intense armed conflicts, security concern becomes of
paramount importance. The security issue relates both to the safety of investigators as well as securing the material evidence and witnesses.

In Rwanda in 1997, as insurgency gained momentum in the west of the country, it proved more and more difficult for investigators to travel into, or for witness to travel out of, the areas affected despite the fact there was security provided.\footnote{731}{P. MacGrath, Problems of Investigation, p.898.}

The exhumation was an essential part of the investigation and it was important that the exhumation technicians were able to remain on the sites for extended time. But due to security reasons, the team had to arrive on the exhumation sites in the morning and leave before nightfall. Returning the next day to an unguarded site carried the risk that it had been booby-trapped during the night, and each day investigators had to start all over again in terms of security measures. This created considerable slow-downs in investigation.\footnote{732}{Also, the fact that the investigation was directed from the Netherlands created serious implications in terms of logistics, e.g., flying to and from, purchasing airline tickets, keeping up with paperwork—and all that overseen by the investigators themselves.}

6.2.7 State and international co-operation factor

All investigations carried out by an international investigative organ must be carried out within the territories of states. The international criminal investigations are, thus, dependant on the co-operation and assistance of states to facilitate the prosecutor’s investigations.

Moreover, the international criminal investigation organs are without typical national criminal justice setting immediately available at hand, such as police force, prisons, extensive investigative networks, forensic expertise, and so forth.

Two facets of the investigative work required the maximum state co-operation. Firstly, access to victims and witnesses is paramount to constructing criminal cases. The second area concerns receiving evidence from states directly, including state employed witnesses, and information and documentary evidence in the possession or under the control of states. There are two forms of state co-operation, namely: 1) at the request of the prosecutor, the national authorities may carry out all the actions required by the prosecutor, and 2) the
state concerned may authorize the international prosecutor to carry out investigations on national territory.  

In terms of the substance of the investigation, among the array of investigative reports on Srebrenica conducted by various bodies, the one conducted by the ICTY is distinctively a unique one. The ICTY investigation was a criminal one in nature, and it revealed a state crime involving the state apparatus \textit{i.e.}, the army, police forces. The ICTY investigation was independent, but it still drew upon the resources of the states and their cooperation. The examples of reliance to the states can be seen in the evidence collection, such as the aerial imageries provided by the US, or the transcripts of intercepted radio communications prepared by the Bosnian government. Although the investigation was conducted and controlled by international civil servants, it relies heavily on state resources in terms of evidence gathering.

It should also be emphasized that a few influential individuals, such as John Shattuck, the US State Department representative, and Madeleine Albright, the US Ambassador to the UN at the time of Srebrenica massacres who then later became the US Secretary of State, used their international political capital outside the ICTY to champion its cause.

\section{Evaluation of Srebrenica Investigation}
\subsection{Establishing the facts}
The most notable contribution made by the ICTY Srebrenica investigation is the establishment of forensic facts. Without the ICTY investigation which reconstructed the executions and the corpse reburial, identification of the exhumed bodies, it is likely that the number of the dead in Srebrenica would still only be a matter of rumour. The figure of more than 7,475 dead, established by the ICTY investigation in 2001 still holds the most authoritative figure which is referred to by many of those who talk about the Srebrenica massacres today. The other contribution of the ICTY investigation is in the reconstruction of the operation ‘Krivaja 95’. The ICTY investigation chronicled and detailed the ‘Krivaja 95’: from its inception to the planning, chain of command, participating units, logistics, execution, and the reburial operation of the victims. Between

\footnote{In the Blaškić case, ICTY Appeals Chamber held that normally the International Tribunal must turn to the relevant national authorities for the collection of evidence, the seizure of evidentiary material, etc. However, the Tribunal’s Prosecutor was authorized directly to carry out such activities on the territory of a state in two situations: (i) when the state was one of the former belligerents or entities of the former Yugoslavia; and (ii) when such investigative activity was authorized by national implementing legislation. Antonio Cassese, \textit{International Criminal Law}, p.411.}
1999 and 2004, many reports on Srebrenica were produced which were commissioned by several governments and IGO. Most of these reports follow, sometimes verbatim, the factual basis and chronological sequence established by the ICTY investigation. The repetitions in the drafting of these reports demonstrate how official truths are being formed by repeated citations of one particular version of the chronicle.

6.4 Structure of ICTY ‘meta-narrative’

6.4.1 Linkage between intelligibility and responsibility

The ICTY investigation produced a ‘meta-narrative’ on Srebrenica. It provides exhaustive and detailed explanations on the sequence of events as well as causes and result, the determination on responsibility. The ICTY ‘meta-narrative’ begins with a contextualization, *i.e.*, history of the conflict in Bosnia and Herzegovina and the institutions involved in the operation: it will then proceed to the relationships between the chain of command, mode of operation, individual roles, what happened to the victims and how and why it was carried out etc.

In the construction of ‘meta-narrative’, considerable importance was placed on the chronology of events. For the ICTY investigators, the evidence must be as detail and precise as possible to stand up to cross-examinations by the defence. The scope of the ‘meta-narrative’ eventually converges into criminal responsibility of the Bosnian Serb forces.

‘Meta-narratives’ created through criminal investigations must address the following two essentials: ‘intelligibility’ and ‘responsibility’. ‘Intelligibility’ relates to the perspicuity of the narrative. It concerns about how the narrative captures and explains well the highly complex and intricate episode of Srebrenica. It concerns about logic, coherence, clearness of the plots, and authenticity of evidence. ‘Intelligibility’ must meet the threshold of ‘beyond a reasonable doubt’ which is a legal requisite. ‘Responsibility’ concerns the identification of cause and result of the event, the identification of individual(s) who allegedly committed crimes and assign legal liability to this individual(s). All successful ‘meta-narrative’ must address these two essentials.
6.4.2 ‘Forensic truth’ in criminal investigation

6.4.2.1 Forensic information and ‘admissibility filter’

Legal systems, in their administration of justice, often rely on the assistance of scientists.\textsuperscript{734} In the Srebrenica investigation, forensic experts were consulted to aid in the process of establishing factual accounts of the events. The information derived from forensic science in the context of criminal investigations, however, is not simply adopted because of its truthfulness but because it is relevant to the case. It is important to note that:

“science enters the courtroom not in the form of bare facts or claimed truths about the world, but as evidence.” \textsuperscript{735}

Hence Rule 95 of the ICTY Rules of Procedure and Evidence regulates the admissibility of evidence:

“No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceeding.”

Forensic information is meaningless unless it passes the admissibility filter and enters as ‘evidence’ in legal terms.

6.4.2.2 ‘Forensic Truth’ as part of the legal narrative

Benett \textit{et al.} once explained:

“Despite the maze of legal jargon, lawyers’ mysterious tactics, and obscure court procedures, any criminal case can be reduced to the simple form of a story.” \textsuperscript{736}

\begin{flushright}


\end{flushright}
This is what this study calls ‘meta-narrative’. During Krstić trial, forensic evidence became part of ‘meta-narrative’ and more than 12 days were dedicated in examining forensic exhibits and hearing expert witnesses regarding the examination of execution points, primary and secondary graves. Eight expert witnesses were called by the prosecution to give evidence about the forensic findings. Expert witnesses are first examined by the prosecution, then by the defence and lastly by the judges. The examination of expert witnesses is based on the report they wrote during Srebrenica investigation and complemented by forensic exhibits. The role of an expert witness is to provide impartial and neutral evidence to enhance the Tribunal’s understanding of events.

How did the ICTY investigators create a plausible narrative using forensic evidence? In general terms, the powerfulness of forensic evidence is advocated by Jasanof as follows:

“(forensic evidence is) when executed correctly, the results are viewed as no longer bearing traces of human subjectivity.”

At the ICTY, there were, however, no clear-cut criteria to determine the expert status of a witness. At the examination of the expert witness in the Krstić trial, the emphasis was the adherence to protocols which was sought to assist in arguing for a small error of margin and create the image of ‘proper’ science. Hence the examination of an expert witness by the prosecution lawyer Peter McCloskey began asking first the expert’s educational and professional background, his experience and that of his team members to establish the expert as a credible source of information before questioning him about his methods, findings and interpretations. The expert testified that during the exhumations protocols were in place. Because conditions at the sites differ from grave to grave, however, relatively flexible protocols were adopted to allow experts to adapt to each situation. For example, the protocols used by archaeologist Professor Wright comprised a two-page document with procedures regarding individual team member’s

---

737 Two experts were forensic anthropologists (Jose-Pablo Baraybar and Dr William Haplund), two forensic pathologists (Dr John Clark and Dr Christopher Lawrence), one forensic archaeologist (Prof. Richard Wright), one demographer (Dr Helge Brunborg), and two ICTY investigators (Dean Manning and Jean-René Ruez).


739 Krstić (IT-98-33-T), Trial Transcript, Trial Chamber, 28 May 2000, paras.3633-3642. (Hereafter: Krstić, Trial Transcript)
responsibilities, surveying of the site and its surroundings, assignment of numbers to artefacts, bodies and body parts, keeping logs, photographing in situ, transfer of the items of evidence from the site, packaging and storage, and logs as to who attended the site. The procedures were complemented by a checklist for location, attitudes and properties of a skeletonized body, where the forensic archaeologist or anthropologist could indicate the properties of the bodies found.\(^\text{740}\)

The forensic evidence and the findings tendered by the Prosecution regarding the Srebrenica investigations, conducted between 1996 and 1999, can be summarized as follows:

- The minimum number of individuals located in the exhumed graves was 1883.
- A further 2571 individuals at least were believed to be buried in examined but un-exhumed sites.
- Of the individuals recovered, 1656 were positively determined to be male; one was female, whilst the sex of 220 remained undetermined.
- During exhumation and autopsy, 270 blindfolds and 407 ligatures were found.
- Autopsies confirmed that hundreds had died of gunshot wounds.
- For each of the exhumation sites, the sex, age and cause of death of the individuals recovered was listed, as well as ligatures, blindfolds, shell cases, bullets, identification artefacts and religious artefacts.\(^\text{741}\)

The cross-examination by the Defence sought to establish that some of the deceased had died in combat. The anthropologist could not deny that possibility,\(^\text{742}\) nor could the pathologist disagree with the Defence that some injuries may have happened post-mortem.\(^\text{743}\) However, the Defence’s cross-examination hardly managed to discredit the forensic evidence provided. Even defence expert Dr Zoran Stanković, although challenging some of the forensic findings regarding cause of death, claiming that some had been killed in combat, “accepted that the exhumations were conducted by experts


\(^{741}\) D. Manning, Witness Statement at Milošević Trial.

\(^{742}\) See anthropologist Jose Pablo Baraybar’s testimony, 30 May 2000, Krstić, Trial Transcript, para.3859

\(^{743}\) See Dr John Clark’s testimony, 31 May 2000, Krstić Trial Transcript, para.3957.
with ‘substantial professional experience and adequate technical, scientific and moral integrity.’”

6.4.2.3 Reflection of ‘forensic truth’ in the Krstić trial judgments

How did the judges at the Krstić trial then treat the ‘forensic truth’ in their final verdicts? At a glance, the trial judgement accepted most of the findings of the forensic scientists and rendered judgement based on it.

The Trial Chamber first had to establish whether the crime of genocide had been committed before deciding whether Krstić was guilty of it or not. On this point the Trial Chamber found that:

“The extensive forensic evidence presented by the Prosecution strongly corroborates important aspects of the testimony of the testimony of survivors from the various execution sites.”

The Trial Chamber satisfied that there was sufficiently credible and compelling evidence to confirm the actus reus of genocide. The Chamber concluded that “following the take-over of Srebrenica, thousands of Bosnian Muslims were summarily executed and consigned to mass graves.” Furthermore, the Trial Chamber found that forensic evidence suggests that the majority of bodies exhumed had not been killed in combat and decided that most of the over 7,000 missing people had been executed and buried in mass graves. The disappearance of generations of men, reasoned the Trial Chamber, showed the intent to physically destroy Bosnian Muslims. Forensic evidence offered further indication of the intent to destroy the group, as such. The executions had followed a “well-established pattern” and that bodies were not only concealed in mass graves but were later dug up to hide the crimes which must have been unnecessary had the bodies were mostly combat casualties. The Chamber also acknowledged that the fact that the exhumed secondary graves contained mixture of mutilated body parts which renders the

744 Krstić, TC Judgement, para.76.
745 Ibid. para.71.
746 Ibid. para.73.
747 Ibid. para.82.
748 Ibid. para.68.
identification of victims as well as appropriate burials extremely difficult is causing further distress to the survivors.

Once satisfied that genocide had occurred, the Trial Chamber then examined whether Krstić had shared the intention to carry out genocide. The Trial Chamber paid attention to the fact that all located and examined grave sites associated with the Srebrenica incident were within the Drina Corps area of responsibility. In the view of the Trial Chamber, this suggests that Krstić was aware of the genocide:

“due to their massive nature and the level of co-operation required, the executions [and the re-burials] could not have been accomplished in isolation from the Drina Corps Command.”

Furthermore, despite the absence of forensic evidence to suggest that Krstić had been present at any of the executions, the Trial Chamber found that he had participated in the joint criminal enterprise and shared the genocidal intent to kill the Bosnian Muslims.

Consequently, on 2 August 2001, Krstić was found guilty of genocide. On Appeal, however, part of the verdict was overturned. First, the Appeals Chamber concurred with the Trial Chamber that the Bosnian Muslims of Srebrenica did qualify as a protected group under Article 4 of the ICTY Statute. Furthermore, the Appeals Chamber agreed with the Trial Chamber that “some members of the VRS Main staff intended to destroy Bosnian Muslims’, targeting for extinction Bosnian Muslims living in Srebrenica. The Appeals Chamber concluded, however, that whether Krstić had the necessary intent to commit genocide or not was not proven. In the view of the Appeals Chamber, the Trial Chamber failed to supply “adequate proof that Krstić possessed genocidal intent,’ and ruled that Krstić ‘is not guilty of genocide as a principal perpetrator. ‘ Instead, the Appeals Chamber confined Krstić liability to the joint criminal enterprise and found Krstić responsible as an aider and abettor to genocide, instead of as a co-perpetrator, as found by the Trial Chamber.

749 Ibid. para.276.
751 Ibid. para.134.
752 Ibid. para.266.
In the Krstić trial, ‘forensic truth’ clearly played a significant role in the formation of final verdicts. In particular, it helped both Trial and Appeals Chambers to establish the following:

- The mass graves helped to define the targeted group as Bosnian Muslims;
- It contributed to the ruling that the intent to commit genocide existed, through demonstrating the systematic nature of the killings;
- It showed that many of the dead were civilians and that attempts had been made to conceal the crimes.
- Through the location and excavation of the mass graves, forensic science assisted in outlining the amount of organization required to undertake such vast executions and burials, thus indirectly suggesting the involvement or knowledge of the Drina Corps which ultimately led to implicating its commander.
- However, forensic evidence did not establish a direct link between Krstić and the killings.

The Krstić ruling and its use of forensic evidence have been reiterated in the subsequent Srebrenica cases at the ICTY such as Blagojević, Popović et al., and the Milošević cases. Similarly, in the 2007 Genocide case, the International Court of Justice (ICJ) referred repeatedly to the Krstić judgments. In particular the ICJ referred to the definition of the protected group within a geographically limited area and the massacres at Srebrenica. Without specifically mentioning forensic science exhumations, the ICJ referred to the Krstić case and its conclusion that ‘the actus reus of killings in Article II(a) of the Convention was satisfied’. In relation to the intent, the ICJ quoted the Krstić Trial Chamber’s findings that many non-combatant Bosnian Muslim men of military age had been targeted, the executions had occurred on a large scale and the killing methods had been invariable, thus referring to evidence generated through forensic science and presented during the Krstić trial.

---

753 Milošević was charged inter alia with genocide and complicity in genocide in Bosnia and Herzegovina.
754 *Genocide case*, ICJ Judgment, para. 197.
280
With the Krstić judgments that genocide did occur, and in accepting forensic evidence as truthful, a legally sanctioned record was created that has since had ramifications for other trials and then accepted as an account of reality. The chronology of event adopted in the Krstić judgement has been further used in other investigative reports as was discussed earlier in this study.

### 6.5 Legal Constraints and Collective Memories

Simply because international criminal investigation aims at producing an impartial, authoritative account about past events does not mean that they are always successful in this quest, nor does that this record will not be distorted for various political or personal reasons.

A study into the perception of justice, accountability and social reconstruction amongst Bosnian judges and prosecutors, suggests that ‘a historical record with a legal imprint’ produced by the ICTY is not always acceptable to them. The study finds that:

“[a]though international trials render verdicts based on an examination of ‘facts’, the responses... indicate that their perception of truth may outweigh the facts as determined by an international body.”

Evidence generated through international criminal investigation increases the independence and impartiality of these facts: Although the judicial interpretation of facts can be highly disputed, the information from forensic investigations speaks, to some degree, for itself. Despite the constructed nature of ‘forensic truth’, it is invaluable to international criminal justice because it produces a truth of its own. Whilst some may query whether genocide happened, forensic exhumations and the physical evidence the Srebrenica investigation produced from the graves make it very difficult to deny that thousands of Bosnian Muslim men indeed were executed.

As discussed, the results of the ICTY Srebrenica investigation spurred strong reactions from both Bosnian Serb and Bosnian Muslim sides. The Bosnian Muslims hailed the result of the Krstić trial and attached great value to the ICTY’s ability in establishing

---

the truth. The narrative the Srebrenica episode of July 1995 constructed by the ICTY was incorporated without reservations into the collective memories of the Bosnian Muslims. The Bosnian Serbs, on the other hand, rejected the verdict and considered it as an attempt by the international community to demonize the Bosnian Serb in the war in Bosnia and Hercegovina. What reinforced furthermore the Bosnian Serb perception of bias of the ICTY was the acquittal of Naser Orić. In the eyes of the Bosnian Serb, Naser Orić who allegedly was responsible for the killing of several thousand Bosnian Serbs in Srebrenica between 1992 and 1995, represents notorious criminality of the Bosnian Muslims in Srebrenica. In the eyes of the Bosnian Serb, the attack on Srebrenica in July 1995 was a legitimate reaction to counter the crimes committed by Bosnian Muslim forces under Orić.

In comparison to the Krstić investigation, the Orić investigation at the ICTY was conducted under much more restrictive circumstances. First, the Orić investigation started after significant time had already passed since the time of the alleged crimes. The Orić investigation began in 2001: nearly 8-9 years after the alleged crimes were committed. Investigators had no chances of recovering bodies by exhumations and had to rely solely on witness accounts which are inconsistent and the credibility of which was often in doubt. At the time of the Orić investigation, the ICTY had already initiated the Completion Strategy which urged the Prosecutor to narrow the scope of investigations significantly to complete all the pending cases expeditiously. Little assistance was provided by states which potentially possess documentary evidence. Also, internally there was a high turnover of investigative staffs working on this investigation. Due to high turnover of the staffs, institutional knowledge of the case, which is often critical in advancing criminal investigations, was hardly maintained within the investigation team. Consequently, the focus of the Orić investigation was seriously impaired and Orić was charged with just a few minor counts which the Prosecutor believed would have better chance of conviction. Even these charges were not sustained in the final judgement and Orić was acquitted on Appeal.

The meta-narrative constructed in the Orić investigation had different impacts between the Bosnian Serb and Bosnian Muslim. For the Bosnian Serb, it was too narrowly focused and did not capture the totality of crimes committed by Bosnian Muslims in Srebrenica. The subsequent acquittal of Orić strengthened the Bosnian Serb perception of bias of the ICTY. On the part of Bosnian Muslims, the acquittal of Orić provided assurance of their prevailing narrative that the Bosnian Muslims were only victims and not perpetrators.

The two Srebrenica investigations carried out by the ICTY constructed ‘meta-narratives’. These investigations, however, constructed only partial ‘meta-narratives’ and they failed 282
to construct more comprehensive or more inclusive ‘meta-narratives’. The logic of dichotomy embedded in the criminal investigations: guilty or not, revealed a limit to construct comprehensive ‘meta-narrative’ which incorporates both Bosnian Serb and Bosnian Muslim sides of victimization.

Bosnian Serb collective memory is clearly constructed from their current perception of the state they are. From the Bosnian Serb perspective, the fact that they were also victims of the war in Bosnia and Herzegovina and their victimization must also be acknowledged.

The Bosnian Muslim side, on the other hand, maintains their collective memories constructed solely based on their victimhood. The criminality of their own side at the war in Bosnia and Herzegovina has been downplayed or dismissed altogether.

International legal scholar Martti Koskenniemi once noted that in war crimes trials, such as Krstić, the emphasis is on judging the individual and interpreting the historical and political context. International criminal trials are thus seen “to be conducting a political trial to the extent that what those facts are, and how they should be understood, is part of the conflict that is being adjudged.” This reminds us of Foucault’s conception of the ‘truth regime’. Indeed, any form of truth has its limitations:

“Truth is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its ‘truth regime’, its ‘general politics’ of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.”

In the short run, the ICTY investigations of Krstić and Orić appear to have resulted in reinforcing a divide between the Bosnian Serbs and the Bosnian Muslims in Srebrenica.

---


283
Both sides adopted the ‘meta-narratives’ created by the ICTY to confirm their own victimhood and to justify their criminal episodes.

In the long run, however, it is hoped that the forensic truth based on facts established by the ICTY investigations will gain space in the narratives of both sides and will serve as a basis to establish a common narrative of the war in Bosnian and Herzegovina.

**Conclusion**

The investigations conducted by the ICTY are conditioned by many factors. This research identified seven of them, namely, 1) normative factor, 2) organisational factor, 3) resource factor, 4) personnel factor, 5) policy factor, 6) security factor, and 7) state and international-cooperation factor. These factors influence the final outcome of the investigation.

The ICTY investigations into Srebrenica constructed ‘meta-narrative’. Due to legal constraint emanating from legal logic of dichotomy, however, the ICTY investigations revealed their limits to construct a comprehensive ‘meta-narrative’ which incorporates both Bosnian Serb and Bosnian Muslim sides of victimization. The limits of the ICTY investigations in Krstić and Orić cases, in turn, resulted in reinforcing the division between the Bosnian Serbs and the Bosnian Muslims where both sides adopted and used the ICTY ‘meta-narratives’ to confirm their own victimhood and to justify their criminal episodes.
GENERAL CONCLUSION

Beyond Tribunal’s Reach

Outreach

“Most are in agreement—the ICTY didn’t get very close to the public in the former Yugoslavia. It wasn’t that present for people.” 762

Physical distance of the ICTY seriously impaired its visibility for the victim community in Bosnia and Herzegovina. For the victims, whose personal experiences offer factual basis of the ICTY verdicts, what’s happening in The Hague over 2,000 kilometres away is far too remote, and many of them have little knowledge about it. This is particularly true for those living in rural areas and uneducated. Recent empirical study in Bosnia and Herzegovina shows that even in Srebrenica, local population “as a whole were poorly informed about the Tribunal.” 762 The distance and remoteness of the ICTY left room for nationalistic political leaders in Bosnia and Herzegovina to manipulate the image of the ICTY to serve their political agenda.

What the ICTY could and should have done in bridging the gap between The Hague and Bosnia and Herzegovina? Observers point out that the ICTY’s efforts to do so started too late and was too insufficient to overcome deeply rooted misperceptions which had already been created among Bosnians about the ICTY and the facts that it has established.

During the early years, the ICTY did not realize fully the impact of its operation to the affected community, i.e., citizens of the former Yugoslavia. The reason for the indifference of the ICTY may have stemmed from a believe “let the judgment speak for itself.” 763 This is a commonly held idea on the role of judiciaries in many countries.

762 Interview with Asta Zimbo, then director of Civil Society Initiatives Program, ICMP, Sarajevo, Dec. 6, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.101.)


765 Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina on 5 December 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.102.) Describing his early visits to The Hague, Todorović described the prevailing attitude of the ICTY as follows:
where the ICTY judiciaries came from. This approach, however, was problematic when applied by the ICTY which operates far away from the population who are most keenly interested in its work: 764

“[r]emoteness of the Hague Tribunal from Bosnia and Herzegovina was a big one

[...] all others in this country, as the level of knowledge was extremely limited among all [about the ICTY’s work] the criminal political structures [in Republika Srpska were] in control of all the media ... able to have an immense effect on people’s opinions about the ICTY.

[...] the reflections that were here in Bosnia and Herzegovina were only the ones that could have passed through the manipulations of the media bosses, the politicians here.” 765

After several years in its operation, the ICTY gradually became aware that it was “absolutely misunderstood” in the former Yugoslavia and launched a belated Outreach Programme in 1998. 766 A former staff member of the ICTY, who had joined the prosecutor’s office around this time, recalled that local officials in the Balkans “were knowingly misrepresenting the Tribunal,” yet the court had “no capacity to work in the region [and] no capacity to speak in the regional language.” 767

‘Bridging the Gap’ Programme

“It is much more difficult to dismantle already established misperceptions and propaganda than it would have been to start from

“Why do we need to show those people in the Balkans what we are doing, to prove ourselves? What we are doing is right. [...] we will have the verdicts. What the reflections of those verdicts will be is not our interest. We don’t want to be biased.”

764 The ICTY did not translate its judgments into the local languages of the former Yugoslavia until 1999.
765 Interview with Branko Todorović (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.102.)
766 Interview with Anton Nikiforov, special advisor for political affairs to then Prosecutor Carla Del Ponte, The Hague, 5 March 2007 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.102.)
767 Interview with Anton Nikiforov, special advisor for political affairs to then Prosecutor Carla Del Ponte, The Hague, 5 March 2007 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.102.)
In 2004, the ICTY Outreach Programme launched a programme ‘Bridging the Gap’ as an initiative aiming at bridging the information gap between The Hague and local communities in Bosnia and Herzegovina.

Under this program, the ICTY officials and staffs travelled to the towns in Bosnia and Herzegovina where adjudicated crimes occurred and meet with local citizens and officials to explain how they investigated the crimes. The purpose of the visit was to describe the outcome of cases, and to respond to questions. The ‘Bridging the Gap’ programs were organized across Bosnia and Herzegovina, Prijedor, Brčko, Konjić, Foča, and Srebrenica in 2014 and 2015. According to Branko Todorović who took a major role in organizing the events, the local authorities at first was “strictly against this”. In Srebrenica, they had to come up with funds for electricity and bathroom doors at the local cultural centre because the local mayor refused to support this event. “It was held in a very cold room” as “heating was too expensive” Despite the lack of cooperation from local authorities, the turnout for the event was far larger than expected. According to Todorović:

“Simply there is an authentic feeling among people to see what the Hague [Tribunal] is doing.”

After participating in ‘Bridging the Gap’ events, Bosnians—including Bosnian Serbs—whose knowledge of the ICTY had long been filtered by local political leaders and ethnic media were, in Todorović’s words, “(finally) able to see the factual truth, not the political truth,’ and grasped that ‘the truths are horrible.”

---

768 FIDH, Victims’ Rights before the ICC, Ch. III: Outreach, p. 8 (quoting Olga Kavran) (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.102.)

769 By Orentlicher who conducted empirical research in 2006; “The enduring cost of time lost’ was a constant theme in our interviews in Bosnia and Herzegovina. So too, however, was ‘better late than not at all”. Replying to Orentlicher, Nerma Jelačić (before she became a spokeswoman for the ICTY in 2008) said that the ICTY was “now doing all it can” in terms of outreach but that its ‘impact would have been much bigger if it were doing in the ’90s what it is doing now.” D.F. Orentlicher, Someone Guilty be Punished, p.102.


771 Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina on 5 December 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.103.)
“One of the examples Todorović cited involved a Bridging the Gap program in Brčko, where representatives of the ICTY described the outcome of a case from that town. Among Brčko’s Bosnian Muslim community, it had long been rumoured that Serbs had burned the bodies of Bosnian Muslim victims in ovens normally used to cremate animals in a facility known as the Kafilerija. An ICTY police investigator dismissed this myth. He explained that Tribunal investigators had looked into this report, and described how the investigators were definitely able to establish that Serbs had not in fact burned Bosnian Muslim victims in the Kafilerija, as had long been rumoured. Todorović believes that if this expert had not been able persuasively to set this rumour to rest, “it would always cause hate” in Brčko. Instead, ‘the book on that was closed.’” 772

Todorović also cited another powerful moment at the ‘Bridging the Gap’ program in Foča. When people gathered for the program, the air was thick with tension. Then, the ICTY staff presented a videotape about their work on crimes committed in Foča during the war. Todorović describes vividly what happened next: 773

“All present could see on a screen the guy who did the raping in Foča. And all of them could hear and see how the prosecutor was asking him, “Did you rape that little girl? And he said, “Yes, I did.” “And you were very well aware at that moment that she was only 12 years old?” And he said “Yes.” At that time he was probably 45 years old. And then the prosecutor repeated his question, saying “You knew that she was 12 at the most, and what else did you tell her?” He told her, “you know I would do many more terrible things to you but I shall not because I have at home a daughter” who is her age, “so I won’t.” So the prosecutor confirmed, “It’s true you have a daughter at home?” I was in the back rows and there were like 140 people there and [when the technical people changed the tapes] I closed my eyes and you wouldn’t believe it, for a moment there was such a silence … that you can hear. It’s a horrible silence. And it lasted for [a] long [time] …. And for me it was the most important moment of the day. Then we had a lunch break, and you could see the change. Now the people …are leaving the room, looking down, some were commenting, “You know, we really didn’t know this, it is a horrible crime.”

[Todorović] thought that many would not return after the lunch break but they did, and everyone stayed until the end of the program. Todorović said, ‘I really think that they left a bit different.’ Describing

772 Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina, Dec. 5, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.103.)

773 Interview with Branko Todorović, president, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina, Dec. 5, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, pp.103-104.)
Todorović holds a view that many of the ‘ordinary people’ who were not involved in committing war crimes had a chance ‘to make a distance’ from those who did. Todorović says:

“[…] if you insist that all Serbs are guilty, “you don’t give them a chance to change. And if you push a man to the wall, what can he do but say ‘yes, yes, I am the same, so what?’ [the program] can help people understand that people from their communities ‘weren’t convicted because they were Bosnian Muslim, Serb, or Croat but because they committed crimes.’” 774

While the programs like ‘Bridging the gap’ suggest the potential impact of effective outreach efforts, it does not mean that this would fundamentally change deeply rooted animosity between Bosnian Serb and Bosnian Muslim. 775 Jelačić explains the value of the Bridging the gap programme as, “You can genuinely plant that seed, and then you need to go back and water it.” 776 The ICTY faced formidable challenges in trying to ensure that its work is understood in Bosnia and Herzegovina. Particularly in its early years, the ICTY ceded the ground to local nationalistic politicians who were only too eager to distort its work.

Further research question: (1) Theory of collective memory

The case study on collective memories of the Srebrenica events calls for one critical question concerning the theory on the formation of collective memory: that is the role of memory carriers ‘attitudes’ as opposed to their ‘knowledge’ in collective memories. The

774 Ibid.

775 Refik Hodžić, ICTY’s liaison officer in Sarajevo, who played a central role in designing the Bridging the Gap project, expressed concern about the project’s long-term impact. In July 2009, a nationalist group had disrupted the annual commemoration of the Srebrenica massacre, ‘chanting insults’ against the Bosnian Muslim survivors. This came as yet another alarming marker of Bosnia’s increasingly heated political climate. And in this setting, it was hard to be optimistic about the ICTY’s ability to foster change. As late as 2009, The ICTY had only one outreach officer in all of Bosnia and Herzegovina; the ICTY was clearly vastly outmatched when it in creating a compelling narrative. People living in the communities where Bridging the Gap programs have been convened ‘are exposed to other rhetoric’ on a daily basis. Interview with Refik Hodžić, ICTY liaison officer, Sarajevo, July 13, 2009 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.104.)

776 Interview with Nerma Jelačić then director, Balkan Investigative Reporting Network in BiH, Sarajevo, Dec. 1, 2006 (as cited in D.F. Orentlicher, Someone Guilty be Punished, p.104.)
case of Srebrenica suggests that reproduction of the past and the way it is collectively remembered appear to be guided by not what memory carriers ‘know’, but rather, by what they ‘want’ to perform in the public. Selective obliteration and adoption of parts of the forensic truth established by the ICTY investigations by the Bosnian Serb and the Bosnian Muslim suggest that that there is a gap between what individuals actually know and what the collectives, *i.e.*, Bosnian Serb, Bosnian Muslim, present in public as collective memories. The process of 1) acquisition of objective knowledge, 2) incorporation or denial of this knowledge in the context of formation of the collective narrative; should be clarified further.

The formation process of collective memories of war atrocities often takes a long time, and the analysis of this process must also take this into consideration. This is due to the fact that war atrocities often provoke intense reactions of the parties who fought the war and that the focus almost always starts with their own victimhood which is much more real and close to the sentiments of the individuals who got affected by the war. This may shift with time. In this sense, more in depth and through researches must be conducted of the historical tribunals such as Nuremberg and Tokyo and their long term legacies and influence over the collective memories sustained in the affected communities. Little is known, even today, how the prosecutors of these historical tribunals conducted investigations, and their decision-making process of selecting the defendants and the charges against them.

The current study has examined the impact of judicial process in the formation of collective memory in Bosnia and Herzegovina as it stands now. A continuous research on how ‘the ICTY version of the narratives of war in Bosnia and Herzegovina’ will be accepted or transformed with time in the political contexts of national collective memory formations in Bosnia and Herzegovina.

**Further research question: (2) Commemorative justice**

**All-encompassing collective memories**

Since the end of the war in November 1995, many have argued that if Bosnian Muslims, Bosnian Serbs, and Bosnian Croats in Bosnia and Herzegovina cannot reach agreement on how to remember events such as the Srebrenica massacres and fail to develop mechanisms to establish a shared narrative about the war, it is hard to see how the country
can continue to exist. At the same time, others arrived at the conclusion, that Bosnian Muslims and Bosnian Serbs are so reluctant and even hostile to attempts to come to a balanced and shared understanding of the past.

As examined in the case study, the international community, represented by the ICTY, has largely discarded the fact that in Bosnia and Herzegovina there are many visions of the event of July 1995. The international community imposed one version of what Srebrenica represents by assigning responsibility to only one side of the conflict. It is critical to acknowledge, however, the heterogeneity of interpretations in Bosnia and Herzegovina concerning the events in Srebrenica.

While Duijzings’ concern makes sense that there is a danger in the way the international community has shaped the commemorations in Srebrenica to date, it is the position of this author that one has to be cautious in accepting his suggestion to give a “free reign of expression of conflicting memories” on its face value. While Duijzings’ argument may be correct in that plurality of voices and expressions is more desired than imposing one version of the past from above, this study finds, however, that these are not the only two choices: ‘plural expressions at the same time’, or ‘one version imposed from the above’. In Bosnia and Herzegovina, collective memories are defined by ethnicity, and their narratives of the past are also defined in this way. Collective commemorations organized by different groups is Bosnian and Herzegovina are framed to reinforce ethnic identity as opposed to memorializing a particular event as such. By allowing the expressions of plural expression may lead to the fixation of this ethnic division in Bosnia and Herzegovina.

This author’s proposal is that rather than adopting either one of the two choices, one should explore a way engaging all sides of the war in Bosnia and Herzegovina, and the processes of shaping collective memories that is all-encompassing regardless of ethnic origins.

---

777 G. Duijzings, Commemorating Srebrenica, p.143.
778 Ibid., p.144.
779 Ibid., p.163.
780 Ibid., p.166.
Linkage between collective memories and reconciliation process

In this sense, the vision of Wolfgang Petrich, the OHR, who initiated the establishment of the Memorial Centre in Potočari was suggestive. Petrich linked the establishment of the Centre directly to the process of return and reconciliation process. In fact, the opening of the Memorial Centre marked a symbolic re-establishment of the Bosnian Muslim population in Srebrenica and prompted the process of physical return of the IDPs and the refugees to Srebrenica. Without presence of one side of the conflict, one cannot even consider reconciliation. Collective memories should serve to foster reconciliation in Bosnia and Herzegovina.

Reconciliation is a process taking place between two conflicting sides: a process of coming in terms with one's painful past and arriving at the point of a certain closure. Ivana Franjović argues that from the conflict prevention perspective, the latter, i.e., arriving at the point of closure, is actually a more important element of establishing sustainable peace. To expect one to reconcile with a criminal responsibility for committing horrific atrocities is too high threshold to overcome, especially if that criminal is in the state of denial. What is however to a certain extent possible, and more important for peace, is supporting the process of one's reconciliation with his or her past in a sense of not looking for revenge. In this sense, the value of commemorations as a form of symbolic justice is substantial and the Memorial Centre in Potočari can contribute to this end. At the same time, however, the fact that so much international support is given to the Bosnian Muslim public remembering while neglecting of the Bosnian Serb commemorations, has negative influence in the process of reconciliation.

Truth and reconciliation commission

When it comes to societies struggling with legacy of mass human rights abuses, Bosnia and Herzegovina may learn from countries which have already undergone such a process and where certain strategies have been adopted. Since 1980s, the field of transitional justice has observed a significant development and expansion. In this context, a certain vision of desired form of passage from the time of mass scale abuse to the stage of peaceful, democratic society has been promoted. One of the key elements of this passage is establishing and publicly acknowledging truth about painful and violent past. This has taken many forms, the most significant one being Truth and Reconciliation Commissions.

established around the world to investigate past crimes and provide space for the victims to voice their grief. Truth Commissions and focus on public acknowledgment of past abuses became somehow a standard procedure promoted in majority of the societies facing legacy of violent past. An argument contrary to this is, that sometimes too extensive pursuit of truth about the past and justice for the victims of violent regimes may jeopardise the reconciliation processes as it brings back conflictive memories and further divides societies.\textsuperscript{782} Advocates of this approach often quote the example of Spain, which successfully completed the process of transition from authoritarian regime, known for brutal prosecution of opposition, to an established democracy where human rights are respected. This process was accomplished without any truth commissions or public acknowledgement of past abuses. In fact, Spain chose the path of collective public amnesia, named \textit{pacto del olvido} (pact of forgetting). After the death of General Franco, Spanish leadership decided that the democratisation process was too fragile to openly address the painful legacy of the dictatorship, the price could be too high.\textsuperscript{781}

\textbf{Commemoration}

As far as transitional justice is concerned, it is wrong to insist justice or peace dichotomy, considering that for many victims in Bosnia and Herzegovina, be it Bosnian Serbs or Bosnian Muslims, symbolic justice is the only form of justice they will ever experience. In this sense, the importance of commemorations is of a great value and importance. Many of them will not see perpetrators responsible for the crimes committed on the loved ones ever brought to justice, nor will they receive reparations or any other form of compensation for their losses. The only form of justice they can count on is public acknowledgment of their suffering and dignified commemoration of the endured suffering.

In this matter, the annual commemorations in the Memorial Centre in Potočari are an expression of symbolic justice done to the families of the killed Bosnian Muslim men and boys. These commemorations, as well as the very existence of the Memorial Centre, may make some Bosnian Serbs feel uncomfortable. The fact that Bosnian Serb local population is uneasy about the 11 July events should not be a reason for not honouring

\textsuperscript{782} J. Gregulska, \textit{Memory in Srebenica}, p.79.

the memory of victims. Some truths, no matter how uncomfortable and painful need to be spelled out and their memory preserved.

At the same time, however, the fact that these commemorations contribute to the further division of the local community should not be overlooked. If commemoration is part of transitional justice aimed at reconciliation among the Bosnian populations, yet in reality it yields opposite results, a critical examination of the process should be considered.

There are no simple answers to the problem of commemorating violent wars. On the one hand, as this study assert, it is desirable to removing the ethnic affiliation in the commemoration. One should like to see commemorations of all victims rather than exclusive ones for Bosnian Muslim or Bosnian Serb victims. On the other hand, there is a risk of falling into a trap of revisionism of history and blurring the picture of what happened. One should consider the narratives of the Bosnian Serb population and respect their quest for inclusion of their experiences into the public discourse. At the same time however, one should not fall into the trap of questioning and challenging established facts.

We must be realistic: Bosnian Serb national myth of the Bosnian war will remain. The sense of victimhood, injustice and denial of facts will not easily disappear from the Bosnian Serb collective memories as much of the Bosnian Serb interpretation of the war events comes from the experience of their life today: experience and perception of injustice or discrimination in the field of receiving donations, acquittal of Naser Orić, feeling of stigmatisation and denial of Bosnian Serb civilian victims, all contribute to the Bosnian Serb vision of the past as a struggle for survival and self-defence.

At the same time however, it would be naive to believe that more just policy on the distribution of donations; bigger number of Bosnian Muslim officers sentenced by the courts for crimes committed against Bosnian Serb population; more space in the public discourse provided to the Bosnian Serb victims would dramatically reshape the vision of the past currently shared by big portion of the Bosnian Serb population. The Bosnian Serb perception of being victims of the war is not formed because they do not receive donations for reconstruction of their burnt houses. The combination of the facts, however, that they do not receive the donations, that they are not listened to and that they cannot publicly voice their grief, does enhance the memory of the collective war suffering and provides opportunities for nationalistic leaders to spread their message about inherent injustice and perpetual victimhood of the Serbian nation. Although such myths will not be eliminated, their power may be reduced. The memory of war and commemorations, if more inclusive, can play a significant role to counter this process.