

**MANDATE INTERRUPTED: THE PROBLEMATIC
LEGACY OF THE UNITED NATIONS
INTERNATIONAL CRIMINAL TRIBUNAL FOR
THE FORMER YUGOSLAVIA**

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ABSTRACT

The mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), which was founded in 1993, was "to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and thus contribute to the restoration and maintenance of peace in the region."¹ However, this essay will argue that the proceedings and Judgements of the ICTY have not contributed to the restoration of peace in the region, and in certain respects, have rather bred disappointment and cynicism. This analysis does not deny the virtues of certain aspects of the operations of the Tribunal nor does it refute the Tribunal's claim that it "irreversibly changed the landscape of international humanitarian law, provided victims an opportunity to voice the horrors they witnessed and experienced, and proved that those suspected of bearing the greatest responsibility for atrocities committed during armed conflicts can be called to account."² The Tribunal's Indictments and Judgements have indeed provided extensive documentation of the atrocities that were committed. Through the testimony of the survivors, the proceedings gave a profoundly important voice to those who the perpetrators attempted to erase from the world and memory. However, in spite of those procedural

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1 United Nations International Criminal Tribunal for the former Yugoslavia, *Mandate and Crimes under ICTY Jurisdiction*, <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>.

2 *International Criminal Tribunal for the former Yugoslavia 1993-2017*, <https://www.icty.org/>

virtues and outcomes, the disappointment by survivors concerning the limits of justice has also been expressed and documented: "How can you measure justice against all I have suffered?" asked a witness whose husband and two sons had perished during the 1993 assault on Ahmići. 'It's just a word. It means nothing.'"³ The current analysis seeks to emphasize that the disappointment felt by survivors of the genocide and other war crimes has been compounded, for example, by short prison sentences, early releases of the convicted perpetrators, and the failure to achieve convictions for genocide. The disheartening outcome of the legal proceedings seems to have enabled the rise of hate speech,⁴ genocide denial,⁵ the glorification of convicted war criminals,⁶ and the suppression of memorials for the victims in Republika Srpska.⁷ Such divisive rhetoric, far from restoring peace, has served to destabilize Bosnia and Herzegovina, and has led some to reflect that the region may be on the brink of another conflict, if not another genocide.⁸

³ Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in the Hague* 142 (2005).

⁴ See, e.g., Igor Spaic, *Bosnian Serb President in 'Hate Speech' Probe*, BALKANINSIGHT (July 18, 2017), <https://balkaninsight.com/2017/07/18/bosnian-serb-president-in-hate-speech-probe-07-18-2017>.

⁵ *Bosnian Serb Leader Denies Genocide in Srebrenica*, APNEWS (Aug. 14, 2018), <https://apnews.com/b76aa3d8b227474aa065ce3464dca714>.

⁶ For a report on a commemorative plaque honoring Ratko Mladić see *Na Vracama postavljena ploča u čast ratnog zločinca Ratka Mladića*, KLIX (May 6, 2014), <https://www.klix.ba/vijesti/bih/na-vracama-postavljena-ploca-u-cast-ratnog-zlocinca-ratka-mladica/140605030>. See also David Pettigrew, *Spomen-ploča Mladiću nastavak genocida*, ALJAZEERA BALKANS (AUG. 19, 2014), <http://balkans.aljazeera.net/vijesti/spomen-ploca-mladicu-nastavak-genocida>.

⁷ See, e.g., Emina Dizdarevic, *Bosnians Mark 25 Years Since Omarska Camp Closure*, BALKANINSIGHT (Aug. 4, 2018), <https://balkaninsight.com/2017/08/04/bosnians-mark-25-years-since-omarska-camp-closure-08-04-2017>.

⁸ *Suljagić za N1: Ovo je iznošenje plana za budući genocid*, N1 (August 23, 2018), <http://ba.n1info.com/a280582/Vijesti/Vijesti/Suljagic-za-N1-Ovo-je-iznosenje-plana-za-buduci-genocid.html>.

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I. LOSING FAITH

There was a reasonable expectation, at the beginning of the work of the ICTY, that those who played leadership roles in provoking and implementing the atrocities designed to achieve ethnic homogeneity in Bosnian Serb-claimed territory of Republika Srpska, would be brought to justice. Leaders such as Radovan Karadžić and Vojislav Šešelj orchestrated the war crimes and relished their respective roles in doing so. However, it has been precisely the proceedings and outcomes of the Karadžić and Šešelj prosecutions that have cast a pall over the legacy of the ICTY, and raised questions about the ability of the ICTY to bring the perpetrators to justice.⁹ In October 2009, eight municipalities were eliminated from the indictment of Radovan Karadžić to expedite the proceedings in “the interest of justice.”¹⁰ The excluded municipalities were simply “~~struck through~~” in the marked-up indictment.¹¹ The removal of the municipalities from the indictment may well have led to the failure to achieve a genocide conviction for Count 1. The Trial Chamber indeed found that “in light of the systematic and organised manner in which crimes were committed in each of the Municipalities... there existed a common plan to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory...”¹² The Chamber asserted moreover that “the Accused and the Bosnian Serb leadership agreed on

9 See *Geoffrey Nice: Verdict on Karadzic is too lenient*, RADIO SLOBODNA EUROPA (March 28, 2016), <https://www.slobodnaevropa.org/a/geoffrey-nice-verdict-on-karadzic-is-too-lenient/27639840.html>. See also *Vojislav Seselj's Acquittal is a Victory for Advocates of Ethnic Cleansing*, THE ECONOMIST (March 31, 2016), <https://www.economist.com/europe/2016/03/31/vojislav-seseljs-acquittal-is-a-victory-for-advocates-of-ethnic-cleansing>.

10 Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Decision on the Application of Rule 73 BIS (Int'l Crim. Trib. for the former Yugoslavia Oct. 8, 2009), <https://www.icty.org/x/cases/karadzic/tdec/en/091008.pdf> (indicating that “[t]he municipalities removed in their entirety are Bosanska Krupa, Bosanski Petrovac, Cajnice, Donji Vakuf, Ilijas, Kalinovik, Kator Varos, and Visegrad”).

11 Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Third Amended Indictment: Prosecution's Marked-Up Indictment, ¶14 (Int'l Crim. Trib. for the former Yugoslavia Oct. 19, 2009), https://www.icty.org/x/cases/karadzic/ind/en/indictment_091019.pdf.

12 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 3447 (Int'l Crim. Trib. for the former Yugoslavia March 24, 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf.

...the measures they would take to create their own ethnically homogeneous state."¹³ However, in spite of this finding, Karadžić was acquitted of genocide under Count 1, including on Appeal.¹⁴ This was a Judgement that may well have been affected by the removal of the eight municipalities from the indictment. The Chamber found that there was an "organized and systematic pattern of crimes committed" against non-Serbs in the municipalities, that there was eliticide, unlawful detention in approximately 50 detention facilities in which living conditions were deplorably inhumane, including "torture, beatings, and psychological and physical abuse," and that there was the murder of non-Serbs in the villages and the concentration camps on a "mass scale".¹⁵ However, in spite of these findings regarding crimes committed as part of the common plan in the seven municipalities remaining in the indictment, the Chamber was "not convinced that the evidence demonstrated that this amounted to conditions of life calculated to bring about the physical destruction of the Bosnian Muslims or Bosnian Croats in these municipalities"...and was not satisfied "that the acts... were carried out with genocidal intent."¹⁶ Moreover, the agreement to remove eight municipalities from the indictment meant more specifically that there would no genocide conviction for the crimes committed in Višegrad, since it was one of the excluded municipalities.¹⁷ But the Trial Chamber in the Lukić case had found in 2009 that the atrocities committed in Višegrad, at Pionirska Street

13 *Id.* at ¶ 3447.

14 See Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 6071, (Int'l Crim. Trib. for the Former Yugoslavia March 24, 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf. Also see Prosecutor v Karadžić, Case No. (MICT-13-55), Appeal Judgement (Int'l Residual Mechanism for Criminal Tribunals Apr. 11, 2018) <https://www.irmct.org/en/cases/mict-13-55>.

15 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement Summary, (Int'l Crim. Trib. for the former Yugoslavia March 24, 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement_summary.pdf.

16 *Id.*

17 Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, Decision on the Application of Rule 73 BIS (Int'l Crim. Trib. for the former Yugoslavia Oct. 8, 2009), <https://www.icty.org/x/cases/karadzic/dec/en/091008.pdf>. (holding that "[t]he municipalities removed in their entirety are Bosanska Krupa, Bosanski Petrovac, Cajnice, Donji Vakuf, Ilijas, Kalinovik, Kator Varos, and Visegrad.")

house, and in the Bikavac neighborhood, stood out as the most heinous crimes of the 20th century in terms of the "viciousness"... and "sheer callousness, monstrosity and brutality of herding, trapping and locking the victims in the two houses," and setting them on fire and burning them alive:

The Pionirska street fire and the Bikavac fire exemplify the worst acts of inhumanity that a person may inflict upon others. In the all too long, sad and wretched history of man's inhumanity to man, the Pionirska street and Bikavac fires must rank high. At the close of the twentieth century, a century marked by war and bloodshed on a colossal scale, these horrific events stand out for the viciousness of the incendiary attack, for the obvious premeditation and calculation that defined it, for the sheer callousness and brutality of herding, trapping and locking the victims in the two houses, thereby rendering them helpless in the ensuing inferno, and for the degree of pain and suffering inflicted on the victims as they were burnt alive. There is a unique cruelty in expunging all traces of the individual victims which must heighten the gravity ascribed to these crimes.¹⁸

Again, one must wonder if, had the crimes committed in Višegrad not been excluded from the indictment, whether the weight of the gravity of the atrocities against the innocent women, children, and elderly, murdered as part of the widely recognized common plan, would have caused the Chamber to arrive at a Judgement of Genocide for Count 1. Another troubling development involved the release from imprisonment, on December 13, 2014, of Vojislav Šešelj, a chief hate-speech ideologue, for health reasons, only to have him return to Serbia where he experienced a "miraculous recovery".¹⁹ He was subsequently elected to parliament in

18 Prosecutor v. Milan Lukić & Sredoje Lukić, Case No. IT-98-32/1-T, Judgement Summary (Int'l Crim. Trib. for the former Yugoslavia July 20, 2009),

http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tjug/en/090720_judg_summary_en.pdf.

19 The Prosecutor v Šešelj. (Order on the Provisional Release of the Accused Propio Motu). IT-03-67-T. Int'l Crim. Trib. for the Former Yugoslavia Nov. 6, 2014. <http://www.icty.org/x/cases/seselj/tord/en/141106.pdf>. Concerning Šešelj's "miraculous recovery" see, *Serbia Faces Court Conundrum Over Vojislav Seselj*, DEUTSCHE WELLE (April 10, 2018), <https://www.dw.com/en/serbia-faces-hague-court-conundrum-over-vojislav-seselj/a-43330266>.

Serbia, where he continues to promote the idea of "Greater Serbia."²⁰ In the Chamber's Judgement --in Šešelj's absence--it was determined that Šešelj was indeed Serbia's leading hate ideologue who spewed hate speech, recruited soldiers, and incited troops to eliminate non-Serbs. But in a surprising verdict, the Chamber concluded that the prosecution had not demonstrated a close enough "causal relation" between the hate speech and the atrocities committed, atrocities that have also been extensively documented. Šešelj was acquitted since the significance of his hate speech was minimized, and his role was reduced or diminished by the Chamber to that of being a political functionary, with no direct military role.²¹ Moreover, the Chamber described the "conflict" as a "civil war" in which there were three equally prepared warring sides, rather than as an international conflict with eliminationist dimensions.²² This Judgement introduced a certain schizophrenia in the Tribunal's work, in the sense that in the course of the Tribunal's other Judgements, the "conflict" had been found to be an international armed conflict steered by Joint Criminal Enterprises including either Serb or Croatian nationals, and crimes had been judged to be genocide rather than simply part of a civil war. In other words, according to *those* Judgements, it was *not* a civil war. For example, in the case of the Prosecutor v. Jadranko Prlić et. al., we read:

The Chamber found by a majority, with the Presiding Judge dissenting, that the conflict between the HVO and the ABiH during this period was of an *international character*. Evidence has shown that troops of the Croatian Army fought alongside the HVO against

20 Milka Domanovic & Marija Ristic, *Vojislav Seselj Returns to Serbia After 11 Years*, BALKAN TRANSITIONAL JUSTICE (Nov. 12, 2014), <http://www.balkaninsight.com/en/article/vojislav-seselj-arrives-to-serbia-after-11-years>. For Šešelj's election to Parliament see, e.g., *Nationalist Seselj Returns To Serbian Parliament*, RADIO FREE EUROPE RADIO LIBERTY (June 3, 2016), <http://www.rferl.org/media/video/serbia-seselj-parliament/27777077.html>. See also Guy Delauney, *Serbia elections: Radical Seselj back in parliament*, BBC NEWS (April 25, 2016), <http://www.bbc.com/news/world-europe-36128489>.

21 Prosecutor v. Šešelj, Case No. IT-03-67-T, Judgement, ¶ 248 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2016), <http://www.icty.org/x/cases/seselj/tjug/en/160331.pdf>.

22 *Id.*

the ABiH and that the Republic of Croatia had overall control over the armed forces and the civilian authorities of the Croatian Community (and later Republic) of Herzeg-Bosna.²³

The Chamber found that the criminal enterprise in the Prlić case involved Croatian nationals, including Franjo Tuđman and Gojko Šušak, “whose goal was to permanently remove the Muslim population from Herceg-Bosna.”²⁴

The acquittal of Šešelj contradicted, moreover, part of the Karadžić Judgement in which the Chamber had found that Šešelj was part of the overarching Joint Criminal Enterprise, and in which his inflammatory speeches and the atrocities of his men are detailed.²⁵ The first instance verdict in the *Karadžić* case found that:

...Šešelj advocated for a homogeneous Greater Serbia which involved the unification of all Serb lands and the removal of the non-Serb population; as such he clearly shared the common plan. He sent large groups of SRS volunteer fighters to assist the Bosnian Serbs in BiH in the implementation of *the common plan*...²⁶

Diane Orentlicher asserts in her book, *Some Kind of Justice*, that Šešelj's acquittal “on all counts by a 2-1 decision was stunning” and quotes the reaction in the *Economist* --one among many--that the Trial Chamber's reasoning was “so far-fetched” that it “defies belief”.²⁷ In her partially dissenting opinion in the initial Šešelj verdict, Judge Flavia Lattanzi found “insufficient reasoning, or no reasoning at all” in the majority's findings

23 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Judgement Summary (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013), http://www.icty.org/x/cases/prlic/tjug/en/130529_summary_en.pdf (emphasis added).

24 *Id.*

25 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 3462 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf. Also see, for example, ¶ 2602, ¶ 2657, ¶ 2664, ¶ 2798, ¶ 3326, ¶ 3329.

26 *Id.* at ¶ 3458 (emphasis added).

27 See Diane Orentlicher, *SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA*, 188 (2018). See *Vojislav Seselj's Acquittal is a Victory for Advocates of Ethnic Cleansing*, *ECONOMIST*, March 31, 2016.

and concluded with the following remarkable reflection:

On reading the majority's Judgement, I felt I was thrown back in time to a period in human history, centuries ago, when one said – and it was the Romans who used to say this to justify their bloody conquests and murders of their political opponents in civil wars: “silent enim leges inter arma”. [“In time of war the laws fall silent” (Cicero Oratio pro Milone, 52 BCE)]²⁸

Indeed, with the initial Šešelj verdict, one can surmise that the truth had been silenced as well. Eventually, however, upon appeal, Šešelj was convicted of an isolated instance of incitement and the Chamber affirmed that a widespread and systematic attack against the non-Serb population had taken place.²⁹ At that point, however, it was not clear that public trust could be restored.

II. SHORT SENTENCES AND EARLY RELEASES

It has also been problematic that there are a number of cases in which perpetrators were convicted and sentenced, but then released early. The case of Momčilo Krajišnik, a high ranking official in Republika Srpska who served in various capacities, can be mentioned briefly: “...the Trial Chamber found Krajišnik responsible for persecution, extermination, deportation, and inhumane acts, all *crimes against humanity* under Article 5 of the Statute. The Trial Chamber imposed a single sentence of 27 years of imprisonment.”³⁰ On Appeal, however, his sentence was reduced to 20 years.³¹ Subsequently, Krajišnik received an early release in 2013, after

28 Prosecutor v Šešelj, Case No. IT-03-67-T, Summary of the Partially Dissenting Opinion of Judge Lattanzi (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2016), https://www.icty.org/x/cases/seseljtjug/en/160331_summary_of_the_partially_dissenting_opinion.pdf

29 Prosecutor v Šešelj, Case No. MICT-16-99, Appeal Judgement (Int'l Residual Mechanism for Criminal Tribunals Apr. 11, 2018) <https://www.irmct.org/en/cases/mict-16-99>.

30 Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeals Judgment Summary (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009), https://www.icty.org/x/cases/krajsnik/acjug/en/090317_summary.pdf (emphasis added).

31 *Id.*

servicing two-thirds of his sentence, and returned to his former war headquarters in the city of Pale in Republika Srpska where he received a hero's welcome.³²

Another troubling case involved the conviction of three Bosnian Serbs for the unspeakable crimes of rape, torture, and enslavement. This was an important case of genuine historical significance since it inscribed rape as an international war crime in the annals of jurisprudence.³³ However, at least two of the three perpetrators (Radomir Kovač and Zoran Vuković) have already been released from prison, having served two-thirds of their sentences.³⁴ Bakira Hasečić, the president of the Association of Women Victims of War, "expressed outrage at the decision to free Kovač," and said, "it was wrong that war criminals only serve two-thirds of their sentences." Hasečić stated "This is not acceptable to us and we cannot understand it. I see this as a mockery of victims."³⁵ The third convicted perpetrator, Dragoljub Kunarac, who was sentenced to 28 years, will soon have served 2/3 of his sentence and be eligible for release from prison. The *Judgement Summary* detailed that "the rapes were used by members of the Bosnian Serb armed forces as an instrument of terror," and that "Muslim women and girls, mothers and daughters together, [were] robbed of the last vestiges of human dignity, women and girls treated like chattels, pieces of property at the arbitrary disposal of the Serb occupation forces, and more specifically, at the beck and call of the three accused."³⁶ The victims were as young as 12 and 15 years old. One needs to ask if the "civil war" narrative mentioned earlier, which had surfaced in the Šešelj

32 Lana Pasic, *Welcoming the 'villains' and 'heroes' of the Balkan wars: International tribunal's judgments on Balkan war crimes have not brought reconciliation to the region*, AL JAZEERA (Sept. 4, 2013), <https://www.aljazeera.com/indepth/opinion/2013/09/2013938155848853.html>.

33 Prosecutor v. Dragoljub, Kunarac & Kovac, Case No. IT-96-23-T& IT-96-23/1-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

34 Denic Džidić & Denis Džidić, *Hague Frees Bosnia War Rapist Radomir Kovac*, BALKANINSIGHT (July 4, 2013), <https://balkaninsight.com/2013/07/04/another-hague-defendant-granted-early-release>.

35 *Id.*

36 Prosecutor v. Dragoljub, Kunarac & Kovac, Case No. IT-96-23-T& IT-96-23/1-T, Judgement Summary (Int'l Crim. Trib. for the Former Yugoslavia February 22, 2001), https://www.icty.org/x/cases/kunarac/tjug/en/010222_Kunarac_Kovac_Vukovic_summary_en.pdf.

Judgement, may have influenced the sentencing and treatment of the perpetrators. By contrast, in the *Akayesu* case in Rwanda, for example, the accused perpetrator was convicted of genocide, which included the crime of rape, and of rape as a crime against humanity and was sentenced to life in prison.³⁷ In yet another case, Goran Jelišić, who described himself as a "Serb Adolf," and who was found guilty of numerous heinous murders of Bosniaks in Luka concentration camp and in the streets of Brčko, will be eligible for release in 2020, when he will have served two-thirds of his sentence.³⁸ In addition, given the fact that the ICTY found, in the Karadžić Judgement, that there was a "common plan to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory"³⁹--a fundamentally eliminationist or genocidal plan-- it is a matter of concern that there have been so few genocide convictions and life sentences handed down.⁴⁰

37 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, (Int'l Crim. Trib. for Rwanda September 2, 1998), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

38 Prosecutor v. Goran Jelusic, Case No. IT-95-10-T, Judgment Summary (Int'l Crim. Trib. for the former Yugoslavia December 14, 1999),

https://www.icty.org/x/cases/jelusic/tjug/en/991214_summary_en.pdf

39 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 3447, (Int'l Crim. Trib. for the Former Yugoslavia March 24, 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf.

40 Vujadin Popović, Ljubiša Beara, Ratko Mladić, and Radovan Karadžić have received life sentences. See Prosecutor v. Popović et.al., Case No. IT-05-88-T, Judgement, ¶ 3447 (Int'l Crim. Trib. for the former Yugoslavia June 10, 2010), <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

III. AN ANXIETY OF INFLUENCE: THE ICTY, THE MEDIA, AND THE INTERNATIONAL COMMUNITY⁴¹

One should wonder if the problematic dimensions of the Tribunal's legacy identified thus far are to some extent a reflection of the media's and the international community's failure to recognize and respond to the genocide in Bosnia and Herzegovina when it was in progress. In other words, International Tribunals do not operate in a vacuum. For example, Thomas Friedman wrote in the *New York Times* on June 7, 1995: "I don't give two cents about Bosnia. Not two cents. The people there have brought on their own troubles."⁴² This callous comment came about one month before the Bosnian Serb forces seized the Srebrenica "safe area" and murdered 8,372 men and boys. Sarajevo scholar Edina Bećirević has emphasized that from the beginning the international community referred to the Bosnian Serb atrocities in Bosnia as "ethnic cleansing," thereby avoiding the "mandate imposed on them by the UN Convention on Genocide."⁴³ This is also the argument of an article titled, "'Ethnic Cleansing' bleaches the atrocities of genocide": "The term 'ethnic cleansing' is used as a euphemism for genocide despite it having no legal status. Like 'Judenrein' and 'racial hygiene' in Nazi medicine, it expropriates pseudo-medical terminology to justify massacre. Use of the term reifies a dehumanized view of the victims as sources of filth and disease...The term ethnic cleansing corrupts observation, interpretation, ethical judgment and decision making..."⁴⁴ According to this article, for most of the three years of the aggression from 1992 to 1995, the New

41 The expression "Anxiety of Influence" is appropriated from Harold Bloom's book, *The Anxiety of Influence: A Theory of Poetry* (1973). In his book Bloom refers to a dimension of "intra-poetic relationships" between authors and their texts as they negotiate the influence of predecessors on their work. This section reflects on the possible influence that the media and international community, including the United Nations may have had on the work of the ICTY, which itself operated in the context of public discourse. Further, the section considers the extent to which the ICTY Judgements, in turn, influence the media and international agencies.

42 Thomas Friedman, *Foreign Affairs: Allies*, N.Y. TIMES (June 7, 1995), <https://www.nytimes.com/1995/06/07/opinion/foreign-affairs-allies.html>.

43 Edina Bećirević, *Genocide on the Drina River* ix (2014).

44 Rony Blum, Gregory H Stanton, Shira Sagi & Elihu Richter, "Ethnic Cleansing" bleaches the atrocities of genocide, 18 *European Journal of Public Health*, 204-209 (2008).

York Times usually used the phrase "ethnic cleansing" rather than "genocide". But the expression, "ethnic cleansing," was also wielded consistently by the United Nations Security Council (UNSC). In September 1994, a UNSC Resolution 941 demanded, for example, "that the Bosnian Serb authorities immediately cease their campaign of 'ethnic cleansing'."⁴⁵ UNSC Resolution 819, which established the Srebrenica "safe area," condemned atrocities that were being committed by the Bosnian Serb forces as "ethnic cleansing."⁴⁶ The Resolution uses the expression "ethnic cleansing" five times. It is important to note that the Republic of Bosnia and Herzegovina had submitted an "Application instituting proceedings against Yugoslavia (Serbia and Montenegro) for violating the Genocide Convention," to the International Court of Justice on March 20, 1993. The Application stated that "[t]he abominable crimes taking place in the Republic Bosnia-Herzegovina at this time can be called by only one name: genocide. Genocide is the most evil crime a State or human being can inflict on another State or human being. The sheer enormity of this crime requires that the nations of the world stand together as one, and with a single voice stop the destruction of the Bosnian people."⁴⁷ Hence, with Bosnia and Herzegovina's *Application* in March 1993, the term "genocide" had been officially inserted into the domain of public discourse, along with the identification of the Serbian nationalist goal of a "Greater Serbia," as well as an account of the ongoing "systematic shelling and starvation of large cities...by Yugoslav/Serbian forces," crimes of which "civilians were the primary targets..."⁴⁸

If the media and none other than the United Nations Security Council avoided the use of the term genocide and thereby influenced not only the "court of public opinion," but also the ICTY itself, is it possible that the ICTY proceedings and Judgements have minimized the atrocities that

45 SCOR Resolution 41 (23 September 1994), <http://unscr.com/en/resolutions/941>.

46 SCOR Resolution 819 (16 April 1993), <http://unscr.com/en/resolutions/819>.

47 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Application Instituting Proceedings (March 23, 1993) (International Court of Justice).

48 *Id.*

were committed and, in turn, have influenced the media? For example, on November 19, 2018, an article about Bosnia and Herzegovina in the New York Times had a highlighted caption that referred to "tribal fighting," a phrase that also elides the fact of the rulings of genocide.⁴⁹ This "tribal fighting" caption would lead one to believe that the various Bosnian ethnic groups were and are the source of their problems, echoing, in 2018, Thomas Friedman's callous dismissal and demonization of a people in 1995. Another article in the Spanish newspaper *El País* in November 2018, also suggested a moral equivalency, or a shared responsibility for the atrocities in a reassertion of the civil war narrative.⁵⁰ Perhaps this perspective led the author to make an inexplicably egregious error. The article claimed that the memorial to the murdered children in Sarajevo only includes the names of Muslim children and that it unfairly excludes the names of the children of Serb ethnicity who were victims. This claim was false since the memorial also includes the names of the children who were of Serb and Croat ethnicity. But such errors engender a misunderstanding of the genocide and prevent an effective response to the deepening political crisis in the region. One must wonder if the avoidance of the term genocide by the media and by the United Nations Security Council, through the use of the phrase "ethnic cleansing," may have eventually influenced international perception about the crimes that were committed. The phrase "ethnic cleansing" may have provided the international community and the ICTY with a convenient excuse. In his book, *Surviving the Peace: The Struggle for Postwar Recovery in Bosnia-Herzegovina*, Peter Lippman considers the failure to seek and achieve convictions for genocide and other crimes to be the result of "a lack of political will": "The failure to work toward a closer examination and a coherent understanding of the nature of the nationalist regimes that fomented the war enables the powerful states of the world, ultimately, to ignore the criminal nature of those regimes" ...and "prevents the greater

49 Andrew Higgins, *In Bosnia, Entrenched Ethnic Divisions Are a Warning to the World*, N.Y. TIMES (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/world/europe/mostar-bosnia-ethnic-divisions-nationalism.html>.

50 Antonio Pita, *La memoria, última trinchera de la guerra de Bosnia*, EL PAÍS (Nov. 17, 2018), https://elpais.com/internacional/2018/11/07/actualidad/1541612115_961961.html.

powers from recognizing genocide and taking the responsibility to prevent it."⁵¹

And one must wonder, finally, if the avoidance of the term genocide by the media and by international organizations has been subtended by a certain Islamophobia. While the atrocities were in progress in Bosnia and Herzegovina, Bosnian Muslims and other pro-Bosnia forces were hampered by an arms embargo that had been imposed. In his book *The Clinton Tapes*, based on conversations with President Clinton, Taylor Branch reports that "U.S. Allies in Europe blocked proposals to adjust or remove the embargo" since they felt that "an independent Bosnia would be 'unnatural' as the only Muslim nation in Europe."⁵² According to Branch, President Clinton reported that "President François Mitterrand of France had been especially blunt in saying that Bosnia did not belong and that British officials also spoke of a painful but realistic restoration of Christian Europe."⁵³

51 Peter Lippman, *Surviving the Peace: The Struggle for Postwar Recovery in Bosnia-Herzegovina* 175 (2019).

52 Taylor Branch, *The Clinton Tapes*, 9-10 (2009).

53 *Id.*

IV. UNINTENDED CONSEQUENCES: GENOCIDE DENIAL, THE
GLORIFICATION OF WAR CRIMINALS, AND THE SUPPRESSION OF
MEMORIALS FOR THE VICTIMS

With this combination of short sentences and early releases and the paucity of genocide convictions, it seems that the ICTY has failed to establish a decisive narrative about the perpetrator and the victim. The lack of such a narrative that would clearly identify the aggressor and the victim has given way to or has accompanied the resurgence of nationalism, threats of secession, genocide denial and the glorification of convicted war criminals in Republika Srpska, all of which can be seen as real threats to the peace in Bosnia and Herzegovina. The leadership of Republika Srpska has consistently *denied* genocide and other war crimes. Pronouncements of the denial of the Srebrenica genocide have been nothing if not numerous and consistent. In 2014, Milorad Dodik, who is currently the Bosnian-Serb member of the Bosnian Presidency, denied the genocide and praised Karadžić and Mladić as heroes.⁵⁴ In 2015, he stated that the genocide at Srebrenica was the "biggest sham of the 20th century."⁵⁵ In July 2018, the Assembly of Republika Srpska rejected a 2004 Commission report on the Srebrenica genocide.⁵⁶ It was reported that the Assembly of Republika Srpska "called for the entity's current government to revoke the report and form a new, international investigatory commission."⁵⁷ In November 2018, Ana Brnabić, Prime Minister of Serbia, also refused to

⁵⁴ OHR *mirno posmatra: Dodik najavio priznanje za Karadžića i Mladića, ponovo negira genocid i BiH*, Klix (July 10, 2014), <https://www.klix.ba/vijesti/ohr-mirno-posm-dodik-najavio-priznanje-za-karadzica-i-mladica-ponovo-negira-genocid-i-bih/140710004>.

⁵⁵ Julian Borger, *Srebrenica 20 Years On: 'Every year I think this is the year I will bury my son'*, THE GUARDIAN (July 3, 2015), <http://www.theguardian.com/world/2015/jul/03/srebrenica-massacre-20-years-on>.

See also, Dodik: Srebrenica 'najveća prevara 20. vijeka', RADIO SLOBODNA EUROPA (June 25, 2015), <https://www.slobodnaevropa.org/a/27093445.html> *Bosnian Serb Leader Says Srebrenica Genocide a Lie*, YAHOO NEWS (July 4, 2015), <http://news.yahoo.com/bosnian-serb-leader-says-srebrenica-genocide-lie-191425555.html>.

⁵⁶ *Bosnian Serb Lawmakers Reject 2004 Srebrenica Report, Call For New Probe*, RADIO FREE EUROPE RADIO LIBERTY (AUG. 15, 2018) <https://www.rferl.org/a/bosnian-serb-lawmakers-reject-2004-srebrenica-report-call-for-new-probe/29435079.html>.

⁵⁷ *Id.*

acknowledge the Srebrenica genocide.⁵⁸

In addition to the explicit denial of the Srebrenica genocide, there is an ongoing glorification of convicted war criminals, through memorials, commemorative plaques, and the dedication of buildings. A number of examples spanning 2016 and 2017 can be briefly mentioned. On March 20, 2016, a student dormitory in Pale was dedicated to Radovan Karadžić, several days before he was to be convicted of genocide.⁵⁹ That same week, billboards appeared in East Sarajevo (Republika Srpska) bearing the images of Radovan Karadžić and Vojislav Šešelj and declaring them to be “Serbian Heroes.”⁶⁰ On October 24, 2016, during the 25th anniversary of the founding of the National Assembly of Republika Srpska, Nedeljko Čubrilović, President of the National Assembly of Republika Srpska, presented certificates of appreciation to convicted war criminals Radovan Karadžić, Biljana Plavšić, and Momčilo Krajišnik.⁶¹ On April 12, 2017, a Russian cross was erected on a hill in Višegrad to commemorate the Russian volunteers who had served in the Army of Republika Srpska, the very troops who committed atrocities in Višegrad and across the territory of Republika Srpska, 1992–1995.⁶² The glorification of war criminals continues unabated in Republika Srpska.⁶³

58 *Serbian PM Ana Brnabic on Conflict Zone*, DEUTSCHE WELLE (Nov. 18, 2019) <https://www.dw.com/en/serbian-pm-ana-brnabic-on-conflict-zone/av-46299156>.

59 Daria Sito-Sucic, *Defiant Bosnian Serbs honor Karadzic before Hague genocide verdict*, REUTERS (March 20, 2016), <http://www.reuters.com/article/us-warcrimes-karadzic-idUSKCN0WMOSH>.

60 Charles Maccarty, *Before war crimes verdict, Serbian radicals hail Karadzic*, VIDEONEWS (Mar. 24, 2016), <https://news.videonews.us/before-war-crimes-verdict-serbian-radicals-hail-karadzic-2450605.html>.

61 *Bosnia's Serb Republika honors convicted war criminal Karadzic*, DAILY SABAH (Oct. 24, 2016), <https://www.dailysabah.com/balkans/2016/10/24/bosnias-serb-republika-honors-convicted-war-criminal-karadzic>.

62 Danijel Kovacevic, *Bosnian Serbs Unveil Monument to Russian War Volunteers*, BALKANINSIGHT (Apr. 12, 2017), <http://www.balkaninsight.com/en/article/bosnian-serbs-unveil-monument-to-russian-war-volunteers-04-12-2017>.

63 In November 2019, a bust for Nikola Koljević was unveiled in Banja Luka, the capital of Republika Srpska. Koljević was identified in the Karadžić judgement as part of the “overarching Joint Criminal Enterprise,” an enterprise that sought “to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in BiH” (¶ 2627 and 2628). See “*U Banjoj Luci otkrivena bista ratnom zločincu Nikoli Koljeviću*,” OSLOBODENJE (Nov. 14, 2019),

In addition to memorials to the convicted perpetrators, the authorities in Republika Srpska are particularly cruel in their prohibition or suppression of memorials for the victims, since such memorials for the victims would formally inscribe the narrative of war crimes and guilt within the territory of Republika Srpska. Survivors of the Omarska and Trnopolje concentration camps in Prijedor municipality within Republika Srpska have not been permitted to install memorials on the sites of the former camps. Survivors are allowed to visit the site of the Omarska camp, located then and now on the grounds of a private mining company, one day each year, on August 6, which is the symbolic date for the closing the camp in 1992, following the discovery of the camp by journalists. Survivors are permitted to gather at the site of the camp from approximately 9:00 a.m. to 1:00 p.m. to commemorate the camp and remember the victims. The survivors, family members, and supporters are monitored closely by guards and are not permitted to install a memorial in the camp. The survivors and their supporters release white balloons to which the names of the victims attached. This prohibition of a memorial in Prijedor is discriminatory since there is a memorial for the perpetrators that has been installed at the site of the former Trnopolje concentration camp, but there is no memorial for the victims.⁶⁴ The Trnopolje community center, which was one of the camp buildings, has been renovated and a memorial to the perpetrators has been installed.⁶⁵ In August 2019, it was reported that the mayor of the Prijedor Municipality signed a contract with a shoe factory allowing the latter to occupy the

<https://www.oslobodjenje.ba/vijesti/bih/foto-u-banjoj-luci-otkrivena-bista-ratnom-zlocincu-nikoli-koljevicu-507048>. Also see Dragan Bursać, *Mrtve oči 102 ubijena prijedorska djeteta gledaju spomenike svojim ubicama*, ALJAZEERA BALKANS (Nov. 16, 2019), <http://balkans.aljazeera.net/vijesti/mrtve-oci-102-ubijena-prijedorska-djeteta-gledaju-spomenike-svojim-ubicama>.

⁶⁴ I addressed the discriminatory prohibition of memorials for the victims in my chapter. See David Pettigrew, *The Suppression of Cultural Memory and Identity in Bosnia and Herzegovina*, in MULTIDISCIPLINARY PERSPECTIVES ON GENOCIDE AND MEMORY, 187, (Jutta Lindert & Armen Marsoobian, eds., 2018).

⁶⁵ *Prijedor: U Trnopolju otvorena spomen soba vojnicima VRS-a, bivši logoraši razočarani*, KLIXKLIX (Mar. 22, 2016), <https://www.klix.ba/vijesti/bih/prijedor-u-trnopolju-otvorena-spomen-soba-vojnica-vrs-a-bivsi-logorasi-razocarani/160321114>.

community center building as well.⁶⁶ Hence the camp building has been repurposed in a way that effectively erases the memory of the concentration camp.

In High Representative Valentin Inzko's moving comments at the July 11, 2018 commemoration of the Srebrenica genocide, he stated that "a dignified funeral is the oldest right of humans – the oldest human right of every human, of every victim."⁶⁷ He suggested that such a practice is an expression of our very humanity. This "oldest human right"⁶⁸ has been challenged by the practice of hiding the evidence of the crimes that were committed in mass graves within the territory of Republika Srpska. In the case of Srebrenica, Prijedor, and elsewhere, some victims' human remains have still not been located or identified, so the installation of a memorial or memorials is profoundly important for the grieving relatives, as it would be the only possible social alternative to a proper burial.

The leadership of Republika Srpska consistently reaffirms the genocidal intention of the founding members of Republika Srpska by demeaning the survivors, and even by accusing the refugees of "re-occupying" the homes from which they were forcibly expelled.⁶⁹ These political and rhetorical strategies are aimed at continuing to achieve the goal of the 1990s in Republika Srpska, namely, the goal of ethnic homogeneity at the cost of the future of multicultural Bosnia. Through

⁶⁶ *Travnička fabrika obuće pokreće poslovanje u Prijedoru*, NEZAVISNE (Aug. 15, 2019), <https://www.nezavisne.com/ekonomija/privreda/Travnicka-fabrika-obuce-pokrece-poslovanje-u-Prijedoru/553612>.

⁶⁷ *Address of the High Representative at the Commemoration for victims of Srebrenica genocide*, OHR Office of the High Representative (July 11, 2018), <http://www.ohr.int/?p=99761>. The High Representative is the lead United Nations Diplomat in Bosnia who is responsible for overseeing the peace: "The position of High Representative was created under the General Framework Agreement for Peace in Bosnia and Herzegovina, usually referred to as the Dayton Peace Agreement, that was negotiated in Dayton, Ohio, and signed in Paris on 14 December 1995. The High Representative is working with the people and institutions of Bosnia and Herzegovina and the international community to ensure that Bosnia and Herzegovina evolves into a peaceful and viable democracy on course for integration in Euro-Atlantic institutions." http://www.ohr.int/?page_id=1139.

⁶⁸ *Id.*

⁶⁹ "Tužilaštvo BiH formiralo predmet protiv Dodika na osnovu Izetbegovićeve prijave," KLIX (July 17, 2017), <https://www.klix.ba/vijesti/bih/tuzilastvo-bih-formiralo-predmet-protiv-dodika-na-osnovu-izetbegoviceve-prijave/170717091>.

various methods of psychological intimidation and re-traumatization, the authorities of Republika Srpska seek to prevent non-Serbs from returning to their homes in Republika Srpska. In his speech in Andrićgrad on June 28, 2018, in a rhetorical effort to re-enact the myth of a "Greater Serbia," former President of Republika Srpska, spoke of Serb victimization and the need for ethnic homogeneity and autonomy.⁷⁰ Then, on July 11, 2018, SNSD Party leader Rajko Vasić denied the genocide and threatened a new genocide.⁷¹ Vasić's hate speech was condemned by the High Representative, who asserted:

The statement made by Rajko Vasic, SNSD Main Board member, on the Srebrenica genocide – on the day of the burial of Srebrenica genocide victims and the day of commemoration – goes far beyond a denial. Apart from being deplorable, hurtful and offensive, it threatens violence. And not any violence. It threatens genocide. This is a criminal offence. The Federation Criminal Code contains a specific incrimination, and the Federation Criminal Code is for such offences applicable wherever they are committed. The High Representative urges the competent judicial bodies to promptly react.⁷²

The leadership of Republika Srpska has failed to take responsibility for genocide and other war crimes, and that failure, through denial and the glorification of convicted war criminals has contributed to an increasingly exclusionary culture of inhumane cruelty toward survivors.

In his report to the U.N. Security Council, on April 17, 2019, the

⁷⁰ *Milorad Dodik Speech at Andrićgrad*, WWW.RTRS.TV (June 28, 2018), <https://www.youtube.com/watch?v=fu177uENh0M>.

⁷¹ SNSD: Alliance of Independent Social Democrats, is a Bosnian Serb political party. Vasić tweeted on July 10, 2018: "Nešto mislim, ako toliko volite taj genocid nad vama, sačekajte sljedeću priliku." ["... if you love that genocide that was committed against you so much, just wait for the next one."] See, e.g., *U RS bez komentara na stavove Rajka Vasića o genocidu*, N1 (July 10, 2018), <http://ba.n1info.com/a272250/Vijesti/Vijesti/U-RS-bez-komentara-na-stavove-Rajka-Vasica-o-genocidu.html>. See also, *Prosecutors checking statement by Bosnian Serb politician*, N1 (July 12, 2018), <http://ba.n1info.com/a272409/English/NEWS/Prosecutors-checking-statement-by-Bosnian-Serb-politician.html>.

⁷² *Inzko: Denying of Genocide is Absolutely Unacceptable*, OHR Office of the High Representative (July 12, 2018), <http://www.ohr.int/?p=99748>.

High Representative expressed concern about a number of negative developments, including challenges to "the sovereignty and territorial integrity of Bosnia and Herzegovina, the Bosnia and Herzegovina Presidency member Milorad Dodik being again the most frequent exponent of such proclamations."⁷³ The High Representative further specified that "certain officials from the Republika Srpska continued to make frequent statements denying the statehood of Bosnia and Herzegovina, while advocating for the secession of the Republika Srpska and a union with Serbia, saying for instance that the Republika Srpska is 'already separated'.⁷⁴ The High Representative referred ominously in his report to changes to the Law on Police and Internal Affairs in Republika Srpska that creates a reserve police force: "In April, the Republika Srpska National Assembly moved forward with legislation to create a reserve police force...This move, interpreted by some as an attempt to build an alternative military force, raised grave concerns in the Federation. ...The issue has also been seen in the light of the previous controversy over the disproportionate purchases of long-barrel weapons by the RS police."⁷⁵ The High Representative emphasized that the situation "does not contribute to peace and stability in Bosnia and Herzegovina."⁷⁶ He expressed concern

73 *55th Report of the High Representative for Implementation of the Peace Agreement on BiH to the Secretary-General of the United Nations*, OHR Office of the High Representative (May 8, 2019) <http://www.ohr.int/?p=100919>. It was Mr. Inzko's "21st regular report to the UN Secretary-General since assuming the post of High Representative for BiH in 2009."

74 *55th Report of the High Representative for Implementation of the Peace Agreement on BiH to the Secretary-General of the United Nations: Summary*, OHR Office of the High Representative (May 8, 2019), <http://www.ohr.int/?p=100919>.

75 *Detailed Report Presented by the High Representative Valentin Inzko to the UN Security Council*, SARAJEVOTIMES (May 10, 2019), <http://www.sarajevotimes.com/detailed-report-presented-by-the-high-representative-valentin-inzko-to-the-un-security-council>. Also see, *Remarks by High Representative Valentin Inzko to the United Nations Security Council*, OHR Office of the High Representative (May 8 2019), <http://www.ohr.int/?p=100943>. The Steering Board of the Peace Implementation Council also expressed its concern: "The disproportionate purchases of long-barrelled weapons by some law enforcement agencies has raised concern." See *Communiqué of the Steering Board of the Peace Implementation Council* OHR Office of the High Representative (June 6, 2018), <http://www.ohr.int/?p=99545>.

76 *Remarks by High Representative Valentin Inzko to the United Nations Security Council*, OHR Office of the High Representative (May 8, 2019), <http://www.ohr.int/?p=100943>

that, in spite of the fact that Annex 7 of the Peace Agreement guarantees the right of return, "Recent incidents have undermined the confidence of returnees to areas where their ethnic group represents a numerical minority." He was recalling the fact that on March 10, 2019 "the Ravna Gora Serb ultra-nationalist Chetnik movement ...held its annual gathering in the Višegrad area, most wearing black uniforms and insignia similar to uniforms worn by Serb paramilitaries in the 1990s."⁷⁷ The High Representative's sobering report bearing on the range of threats to the peace in Bosnia and Herzegovina calls the ICTY's contribution to "the restoration and maintenance of peace" into question.⁷⁸

V. RESTORATIVE JUSTICE AND THE POSSIBILITY OF A FUTURE

As the ICTY has pursued its "completion strategy," as part of which some cases have been transferred to national jurisdictions, and the Mechanism for International Criminal Tribunals has been established "to continue the jurisdiction, rights and obligations and essential functions of the ICTY," as well as "to maintain the Tribunal's legacy,"⁷⁹ divisive nationalist rhetoric and threats to peace and stability in Bosnia and Herzegovina, as detailed by the report of the High Representative, as well as in reports in the media, have been on the rise. This essay has suggested that such nationalist rhetoric, including genocide denial, the glorification of war criminals, challenges to Bosnia's sovereignty, and threats of secession, has, arguably, been emboldened by the ICTY's failure to establish a narrative that accurately identifies the "perpetrator" and the "victim". In this sense, the ICTY has failed to shape public discourse in a way that would contribute to reconciliation and peace in Bosnia and Herzegovina, and in the region. It should not escape our attention that the

⁷⁷ *55th Report of the High Representative for Implementation of the Peace Agreement on BiH to the Secretary-General of the United Nations*, IX. Return of Refugees and Displaced Persons, OHR Office of the High Representative (May 8, 2019), <http://www.ohr.int/?p=100919>.

⁷⁸ United Nations International Criminal Tribunal for the former Yugoslavia, *Mandate and Crimes under ICTY Jurisdiction*, <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>.

⁷⁹ *United Nations International Criminal Tribunal for the former Yugoslavia, Completion Strategy*, <https://www.icty.org/en/about/tribunal/completion-strategy>

ICTY's failure to contribute to the restoration and maintenance of peace has had implications for the rise of ultra-nationalism and anti-Muslim hate crimes in Europe and beyond. The current glorification of war criminals in Republika Srpska and the public gatherings of the Ravna Gora Serb ultra-nationalist Chetnik association wearing Serb paramilitary uniforms has ensured the legacy of convicted war criminals Radovan Karadžić and Ratko Mladić, as Serb nationalism and hate speech continue unabated in Bosnia.⁸⁰ However, this glorification of Serb nationalism has also "inspired" anti-Muslim and anti-immigrant terrorists in Europe and New Zealand. The terrorist who murdered 77 people in Norway in 2011, and the terrorist who murdered at least 50 people and wounded 49 others in shootings at two mosques in Christchurch New Zealand, indicated in their utterances, actions and manifestos that they were modeling themselves after their hero Radovan Karadžić and his Serb nationalism.⁸¹ As the ICTY has failed to effectively address Serb nationalism at its source, nationalism has resurged in Republika Srpska and in Europe. In their article in *Foreign Policy*, May 24, 2019, Azeem Ibrahim and Hikmet Karčić put it this way: "The war marked a pivotal point in European history. Murderers and fascists were not only let off the hook but also glorified—live on television. With that precedent burned into the collective memory of a generation, the resurgence of European fascism writ large was only a matter of time."⁸²

Such a grim assessment of the legacy of the ICTY, as its work comes to an end, and in spite of the virtues to which it lays claim, calls out for ways to respond to the propagation of such divisive rhetoric. One

80 Albina Sorguc, *Serbs' Noisy Christmas Convoy Through Srebrenica Causes Fear*, BALKANINSIGHT (Jan. 7, 2020), <https://balkaninsight.com/2020/01/07/serbs-noisy-christmas-convoy-through-srebrenica-causes-fear>.

81 See, e.g., Helen Pidd, *Anders Behring Breivik attacks inspired by Serbian nationalists, court hears*, THE GUARDIAN (April 8 2012), <https://www.theguardian.com/world/2012/apr/18/anders-behring-breivik-serb-nationalists>. See also *Mosque shooter brandished material glorifying Serb nationalism*, ALJAZEERA NEWS, (March 19, 2018), <https://www.aljazeera.com/news/2019/03/zealand-mosque-gunman-inspired-serb-nationalism-190315141305756.html>.

82 Azeem Ibrahim and Hikmet Karčić, *The Balkan Wars Created a Generation of Christian Terrorists: War radicalized the far-right—and nobody stopped them at home*, FOREIGN POLICY (May 24, 2019), <https://foreignpolicy.com/2019/05/24/the-balkan-wars-created-a-generation-of-christian-terrorists>.

possibility would be to think in terms of a restorative justice model, as an alternative to traditional judicial processes, in order to find a way forward. Restorative justice involves an effort "to right the wrong" that was committed.⁸³ The effort must respond to the needs of the victims and also involve the assumption of responsibility by the perpetrator.⁸⁴ At a minimum, an effort to seek restorative or reparative justice would include a public statement of the acceptance of responsibility, by the leadership of Republika Srpska, for the war crimes committed in its name.⁸⁵ The government of Republika Srpska would need to authorize the installation and protection of memorials for the victims in Foča, Prijedor, Višegrad, and elsewhere, memorials that would contribute to a sense of justice for the victims and advance the possibility of local reconciliation. A genuine commitment to restorative justice would also include the removal of memorials glorifying convicted war criminals. The current leadership of Republika Srpska should formally disassociate itself from the founding members of Republika Srpska, almost all of whom have been convicted of war crimes, including genocide. National laws would need to be implemented that would prohibit genocide denial and the glorification of war criminals. Finally, a national commitment would need to be made to offer compensation and support to victims of sexual violence. A genuine effort at restorative justice would need, most importantly, to "right the wrong" of the crimes that were committed by addressing the very cause of the crimes.⁸⁶ Republika Srpska was founded with the intent to create an ethnically homogeneous entity. In the Karadžić verdict, it was determined that he and his Joint Criminal Enterprise sought "to permanently remove the Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory."⁸⁷ This "Bosnian Serb claimed territory" was the entity known today as "Republika Srpska". After the commission of war crimes designed to create an ethnically homogeneous entity, the Dayton Peace

83 Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* 17 (2014).

84 *Id.* at 19 and 21.

85 *Id.* at 7 and 22.

86 *Id.* at 27 - 28.

87 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 3447 (Int'l Crim. Trib. for the former Yugoslavia March 24, 2016), http://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf.

Accords recognized Republika Srpska as an entity within Bosnia. This recognition was nothing less than a reward for a successful genocide. In other words, the fundamental work at hand is to "right the wrong" of the recognition and legitimization of Republika Srpska by the Dayton Peace Accords. This can only be accomplished through the reunification of Bosnia and Herzegovina as a multicultural, democratic nation. Only the reunification of Bosnia and Herzegovina would provide the possibility of genuinely restorative justice for the victims of the genocide because it would effectively address *the cause* of the atrocities and the trauma.⁸⁸ Yet such efforts to repair the social fabric and to restore a sense of community seem increasingly unlikely. Republika Srpska refuses to accept responsibility for the crimes committed in its name. When Bosnia's SDA party (the Party for Democratic Action, historically a Bosniak political party), proposed constitutional reform that would reunify Bosnia as a republic and would determine nationality on the basis of citizenship rather than ethnicity,⁸⁹ the Bosnian Serb member of the Presidency, Milorad Dodik, and leader of the SNSD party (Alliance of Independent Social Democrats, a Bosnian Serb political party) dismissed the proposal as an essentially Islamic plot.⁹⁰ Mr. Dodik's inflammatory reaction included Islamophobic fear-mongering as he predicted that, if the resolution were to come to pass, Bosnia would risk falling under the rule of Sharia law.⁹¹

It seems that, as the ICTY's has fallen short of its mandate, it has emboldened nationalist hate speech and Islamophobia, and it has all but foreclosed the possibility of restorative justice for the victims of the genocide in Bosnia. Perhaps the extent to which the ICTY failed to contribute to the restoration and maintenance of peace in Bosnia and the

88 Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* 21 (2014).

89 *Pročitajte kako SDA zamišlja buduće ustrojstvo države: Jedan predsjednik, Vlada Republika BiH...*, KLIX (Sept 14, 2019), <https://www.klix.ba/vijesti/bih/procitajte-kako-sda-zamislja-buduce-ustrojstvo-drzave-jedan-predsjednik-vlada-republike-bih/190914004>.

90 *Milorad Dodik: Deklaracija SDA je nastavak Islamske deklaracije Alije Izetbegovića. Republika Srpska ima spreman odgovor*, OSLOBODENJE (September 19, 2019), <https://www.oslobodjenje.ba/vijesti/bih/milorad-dodik-deklaracija-sda-je-nastavak-islamske-deklaracije-alije-izetbegovica-republika-srpska-ima-spreman-odgovor-490692>.

91 *Id.*

region can be discerned in the decision of Nobel Committee for Literature to award the Nobel Prize to an author, Peter Handke, who has denied the Srebrenica genocide and who has been identified for his support for Serbian nationalism and for Slobodan Milošević.⁹² Željko Komšić, Chairperson of the Presidency of Bosnia and Herzegovina compared the Nobel Committee's selection of Mr. Handke, to giving the award to someone who denies the Holocaust, and stated that as such it is "completely inappropriate and contradicts all moral norms."⁹³ Yet the Nobel Committee's selection indicates that the work of the ICTY has failed to establish a decisive narrative regarding the truth of the genocidal aggression, a narrative that could well have prevented the Nobel Committee from making its choice.

In the wake of the problematic legacy of the ICTY with respect to its mandate, threats to the peace are accelerating at an alarming pace.⁹⁴ The persistence of genocide denial and the glorification of war criminals in Republika Srpska are practices that condone and even celebrate the war crimes that were committed. Hariz Halilović has written that such a celebration of genocide is a new stage of genocide that he refers to as "triumphalism."⁹⁵ Such "triumphalism" in Republika Srpska celebrates the genocide with posters, banners, and t-shirts depicting Karadžić, Mladić,

92 See, e.g., Ed Vulliamy, *Peter Handke's Nobel prize dishonours the victims of genocide*, THE GUARDIAN (Oct. 12, 2019), <https://www.theguardian.com/commentisfree/2019/oct/12/a-nobel-prize-that-dishonours-the-victims-of-genocide-peter-handke>. See also Ian Traynor, *Stand Up If You Support the Serbs*, THE GUARDIAN (April 20, 1999), <https://www.theguardian.com/theguardian/1999/apr/21/features11.g28>.

93 Komšić: *Poslaćemo protestnu notu Nobelovom komitetu*, VIJESTI.BA/N1 (Oct. 11, 2019), <https://vijesti.ba/clanak/464177/komsic-poslacemo-protestnu-notu-nobelovom-komitetu>.

94 Danijel Kovacevic, *Dodik Unveils Fresh Threat of Bosnian Serb Secession*, BALKANINSIGHT (Feb. 13, 2020), <https://balkaninsight.com/2020/02/13/dodik-unveils-fresh-threat-of-bosnian-serb-secession/> Also see, the APNEWS report that Bosnian Serb member of the Presidency "has reiterated his calls for secession of the Bosnian Serb lands so they could join neighboring Serbia": Sabina Niksic, *Bosnian Serb leader calls for dissolution of Bosnia*, APNEWS (Feb. 20, 2020), <https://apnews.com/14663362ce4801d69dd2cf73c9429918>.

95 See Hariz Halilovich, *Globalization and Genocide*, in *Global Encyclopedia of Public Administration, Public Policy, and Governance*, 6 -7 (A. Faraymand ed., 2017). See *Ten Stages of Genocide* by Gregory Stanton, GENOCIDE WATCH, <https://www.genocidewatch.com/ten-stages-of-genocide>. See, e.g., *What Are the Ten Stages of Genocide*, ALJAZEERA (July 11, 2019), <https://www.aljazeera.com/news/europe/2019/07/10-stages-genocide-190710112516344.html> (highlighting "Triumphalism," the 11th stage of genocide proposed by Hariz Halilovich.).

and Šešelj, for example, as heroes.⁹⁶ Such a celebration condones the violence and suggests that the crimes could be repeated. The international community has a responsibility, then, to respond to the rise of destabilizing rhetoric, including the blatant challenges to the sovereignty and territorial integrity of Bosnia and Herzegovina, in order to preserve the peace.⁹⁷

⁹⁶ Aida Hadžimušić, *Folklorno Veličanje: Internet Preplavljen Pjesmana o Genocidu, Genocid u Srebrenici: Zločin Koji Traje*, ALJAZEERA BALKANS YOUTUBE (July 11, 2019), <https://www.youtube.com/watch?v=v9ntS8Hn1Co>.

⁹⁷ *Bosnian Serb leader: Bosnia is a disfigured state and should never have survived*, N1 (Sept. 13, 2019), <http://ba.n1info.com/English/NEWS/a378066/Bosnian-Serb-leader-Bosnia-is-a-disfigured-state-and-should-never-have-survived.html>.