



# IJMRRS

**International Journal for Multidisciplinary  
Research, Review and Studies**

**Volume 1 - Issue 1**

2024

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# The Story of International Transitional Justice Mechanisms and Their Performance in the Former Yugoslavia

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Transitional justice mechanisms are regarded as key elements of post-conflict rebuilding and reconciliation. They are defined as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with the legacy of large-scale past abuses in order to ensure accountability, serve justice, and achieve reconciliation.”<sup>1</sup> Transitional justice mechanisms take on a variety of forms, such as criminal prosecution by international or national courts, civil cases pursued by victims, truth commissions, etc.<sup>2</sup> One major instance of implementing transitional justice mechanisms was following the Yugoslav Wars of the 1990s. Following the end of conflict, the newly-independent countries implemented a range of transitional justice mechanisms, such as domestic criminal courts, truth commissions, and reparations, alongside the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>3</sup>. But even this plethora of mechanisms did not fully serve the purposes of justice. The victims whose interests are ostensibly served by transitional justice mechanisms are a heterogenous group - in terms of gender, ethnicity etc. In this paper, we shall argue that the transitional justice mechanisms in the former Yugoslavia failed to recognise this heterogeneity, through errors of both omission and commission. Thus, many victims were not adequately served justice.

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<sup>1</sup>Susanne Karstedt, “From Absence to Presence, from Silence to Voice: Victims in International and Transitional Justice since the Nuremberg Trials,” *International Review of Victimology* 17, no. 1 (January 2010): 9–30, <https://doi.org/10.1177/026975801001700102>, 11.

<sup>2</sup>Ibid.

<sup>3</sup>“Transitional Justice in the former Yugoslavia”, (New York: ICTJ 2009), [www.ictj.org](http://www.ictj.org), 1-2.

We shall examine two forms of transitional justice: the ICTY, and reparations provided by each state government to citizens. We shall look at how the interaction of reparations mechanisms with the categories of gender, ethnicity, and combatant status resulted in many victims being marginalised. Furthermore, popular perceptions of the ICTY's necessity and effectiveness were mostly mediated by one's ethnicity, further hampering the goal of reconciliation.

### Case Study.

During the Yugoslav Wars, massive violence occurred along ethno-nationalist lines, as the Serbian state, supported by ethnic Serb paramilitaries in Bosnia and Croatia, fought against independence movements in these two regions<sup>4</sup>. From the earliest stages of the war, there was highly systematic ethnic cleansing of Croats and Bosniaks by the Bosnian Serb Army (BSA) and Yugoslav People's Army (JNA i.e., the Serbian state's army)<sup>5</sup>. Women were targeted for sexual torture, adult males were killed on the spot, and the population in general was either deported or forced to flee<sup>6</sup>.

Even as the conflict was raging, the International Criminal Tribunal for the former Yugoslavia was formed in May 1993 by the UN Security Council.<sup>7</sup> Following the conclusion of the wars, which saw the successful secession of Croatia and Bosnia, each country implemented its own internal transitional justice mechanisms, including domestic criminal courts and systems of

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<sup>4</sup>Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York, NY: Open Society Institute, 2010), 23.

<sup>5</sup>R. Charli Carpenter, "Women and Children First": Gender, Norms, and Humanitarian Evacuation in the Balkans 1991–95," *International Organization* 57, no. 4 (2003): 661–94, <https://doi.org/10.1017/s002081830357401x>, 664.

<sup>6</sup>Ibid.

<sup>7</sup>Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York, NY: Open Society Institute, 2010), 23.

reparations<sup>8</sup>. In Bosnia, the Dayton Peace Agreements which brought the war to an end institutionalised an awkward division of power along ethnic lines. 49% of the territory of the new state of Bosnia and Herzegovina was assigned to a largely self-governing, Serb-dominated entity termed the Republica Srpska, while the remainder came under the Bosniak and Croat-dominated Federation of Bosnia and Herzegovina<sup>9</sup>. Each entity implemented its own framework of transitional justice; this had particularly pernicious effects in the case of reparations laws, as we shall see in this paper.

With respect to the involvement of victims, the transitional justice mechanisms that were implemented were hailed as part of an era of improved cognisance of the needs of victims in transitional justice<sup>10</sup>. When internationalised transitional justice was first implemented at the Nuremberg Trials, the voices of victims were rarely heard. Most proceedings were based on the documents prepared by the perpetrators and the principal witnesses were the perpetrators themselves<sup>11</sup>. In contrast, the ICTY provided for ample testimony of the victims as well as compensation<sup>12</sup>. A non-official document by the ICTY even stated that it “guarantees that the suffering of victims is acknowledged and not ignored”<sup>13</sup>.

However, as we will demonstrate in this paper, various groups of victims continue to live in marginalised conditions in the former Yugoslavia. This is due to the intentional marginalisation

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<sup>8</sup>“Transitional Justice in the former Yugoslavia”, (New York: ICTJ 2009), [www.ictj.org](http://www.ictj.org), 1-2.

<sup>9</sup> Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York, NY: Open Society Institute, 2010), 27.

<sup>10</sup>Susanne Karstedt, “From Absence to Presence, from Silence to Voice: Victims in International and Transitional Justice since the Nuremberg Trials,” *International Review of Victimology* 17, no. 1 (January 2010): 9–30, <https://doi.org/10.1177/026975801001700102>, 20.

<sup>11</sup>Ibid, 10.

<sup>12</sup>Ibid, 19.

<sup>13</sup>Ibid, 27.

of many victims due to the promotion of militarised, masculine, ethno-nationalist narratives about the wars. In fact, the promotion of such narratives has seriously influenced perceptions of the ICTY amongst distinct victim categories. We shall first analyse the functioning of the ICTY concerning victims of different genders and its perceptions among different groups. We shall then examine the discriminatory nature of reparations legislation across the former Yugoslavia.

### Perceptions of the ICTY

Here we shall examine victims belonging to various ethnicities—Bosniaks, Serbs, and Croats—and their differing perceptions of the ICTY. This is not to say that these perceptions hold close to the truth of the actual functioning of the ICTY but they matter insofar as we judge a transitional justice mechanism for how it actually reaches the people it is set up for. Understanding the perceptions of different individuals about the outcome of armed conflict is important to assessing the genuine quality of peace<sup>14</sup>. Even if there are substantive changes implemented to the political system and its institutions, reconciliation will not occur if some citizens feel that they are being unfairly treated, even if such feelings are objectively unfounded<sup>15</sup>. Thus, the threat of an outbreak of renewed violence will persist<sup>16</sup>.

Internationalised transitional justice mechanisms are particularly prone to creating divergent perceptions. As Nicola Henry points out in her analysis of the Tokyo Trials, war crimes trials can produce an authoritative legal record, but cannot create a general consensus about the past<sup>17</sup>. She

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<sup>14</sup>Sabine C. Carey, Belén González, and Christian Gläbel, “Divergent Perceptions of Peace in Post-Conflict Societies: Insights from Sri Lanka,” *Journal of Conflict Resolution* 66, no. 9 (June 6, 2022): 1589–1618, <https://doi.org/10.1177/00220027221104719>, 1592.

<sup>15</sup>Ibid.

<sup>16</sup>Ibid.

argues that legal institutions fail to fully right historical wrongs because they do not address the wider context in which the atrocities occurred, such as systems of ethnic and racial subjugation (which formed the foundation of much of the violence in the Yugoslav wars).<sup>18</sup>

Former prosecutors have recorded some common perceptions of the ICTY in the former Yugoslavia. First, there was no formal judicial system in the Former Yugoslavia; thus most people viewed it as an institution imposed by the West<sup>19</sup>. Secondly, all ethnicities viewed themselves as victims and not perpetrators following the wars<sup>20</sup>. Third, trials are long and technical; and not easily comprehensible to the public<sup>21</sup>. This gives political leaders a chance to distort information. Thus not many people from the region have actually followed or understood the proceedings<sup>22</sup>. In most cases, good sentiments towards the ICTY have a tendency to be positively correlated with the extent to which the ICTY has brought charges against those who committed crimes against members of the ethnic communities of the survey respondents, and negatively correlated with the extent to which the suspects the ICTY has brought charges against are members of the respondents' ethnic group<sup>23</sup>.

More specifically, the Croat's perception of the ICTY was coloured by hyper-nationalism. As the ICTY prosecuted Croatian army leaders, it led to increasingly hostile relations with the Croats.

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<sup>17</sup>Nicola Henry, "Memory of an Injustice: The 'Comfort Women' and the Legacy of the Tokyo Trial," *Asian Studies Review* 37, no. 3 (September 2013): 362–80, <https://doi.org/10.1080/10357823.2013.771770>, 371.

<sup>18</sup> *Ibid.*, 372.

<sup>19</sup>Dan Saxon, "Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia," *Journal of Human Rights* 4, no. 4 (October 2005): 559–72, <https://doi.org/10.1080/14754830500332837>, 562.

<sup>20</sup>*Ibid.*

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.*

<sup>23</sup>R. David, "International Criminal Tribunals and the Perception of Justice: The Effect of the ICTY in Croatia," *International Journal of Transitional Justice* 8, no. 3 (August 14, 2014): 476–95, <https://doi.org/10.1093/ijtj/iju012>, 478.

They believed their leaders to be national heroes or ‘Homeland War Heroes’ and after the nationalist Tudjman regime this animosity with the ICTY increased<sup>24</sup>. Many thought their guilt was being ‘equalised’ with the Serbs who they thought to be the graver perpetrators of the war, whereas Croats were ‘heroic victims’ of the Homeland War<sup>25</sup>. International participation also influenced the Croats’ perspective as they thought Western intervention only sought to criminalise the war heroes and collectively blame the Croats<sup>26</sup>. The majority of respondents (53%) in a survey in 2008 with over 1000 Croatian adults said that the ICTY was a key factor in the continuance of regional conflict<sup>27</sup>. In another survey of 1017 respondents that asked whether trials should be conducted domestically or with the ICTY, 62% Croats responded that they wanted matters to be dealt with domestically<sup>28</sup>.

The case of the Serbs is similar with a variation in degree. Despite being the biggest group of perpetrators, they too have their version of victimisation. Muslims and Croats were systematically the ‘out-group’ as far as the state narrative went before and during the war<sup>29</sup>. The post-war Milosevic government was also successful in creating resentment against the ICTY using nationalist propaganda<sup>30</sup>. Many Serbs also believed in as late as 2006 that the ICTY was specifically set up to prosecute the Serbs in their case selections and were thus resentful that the

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<sup>24</sup>Dan Saxon, “Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia,” *Journal of Human Rights* 4, no. 4 (October 2005): 559–72, <https://doi.org/10.1080/14754830500332837>, 564-565.

<sup>25</sup>Ibid.

<sup>26</sup>Ibid.

<sup>27</sup>R. David, “International Criminal Tribunals and the Perception of Justice: The Effect of the ICTY in Croatia,” *International Journal of Transitional Justice* 8, no. 3 (August 14, 2014): 476–95, <https://doi.org/10.1093/ijtj/iju012>, 486.

<sup>28</sup>Ibid.

<sup>29</sup>Dan Saxon, “Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia,” *Journal of Human Rights* 4, no. 4 (October 2005): 559–72, <https://doi.org/10.1080/14754830500332837>, 566.

<sup>30</sup>Ibid.

ICTY ‘wasn’t dealing with crimes against Serb victims’<sup>31</sup>. Ironically, it was the Serbs that often co-opted the ICTY’s ideal that accountability should be taken individually and individual guilt should be persecuted as a means to ‘equalise’ the impact of ethnic blame<sup>32</sup>. There is also a lot of peer pressure involved in the way Serbs perceive the ICTY<sup>33</sup>.

Negative attitudes amongst Serbs towards the ICTY extended to the Republica Srpska as well. A survey by Biro et. al. found that as of 2001-2, the Serbian inhabitants of Prijedor (a city in the Republica Srpska) displayed the greatest resentment towards the ICTY out of all the ethnicities surveyed, and were convinced that the Tribunal was deeply biased against them<sup>34</sup>. Almost half of Prijedor Serbs in fact refused to acknowledge that war crimes had been committed by their co-ethnics<sup>35</sup>.

Muslim perceptions of the ICTY remain a mixture of satisfaction and subsequent disappointment. Earlier seen as a major achievement among the Bosniak community, the ICTY was widely seen as the body that would persecute the perpetrators of violence against the Bosniaks, namely the Serbs<sup>36</sup>. But since the ICTY’s focus was on individual guilt and accountability, it indicted members of the Bosniak community for crimes against Serbs and this marked a significant change in their perceptions<sup>37</sup>. They believed themselves to be the biggest

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<sup>31</sup>Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York, NY: Open Society Institute, 2010), 91.

<sup>32</sup>Ibid, 91-92.

<sup>33</sup>Ibid.

<sup>34</sup>Miklos Biro et al., “Attitudes toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia,” *My Neighbor, My Enemy*, December 2, 2004, 183–205, <https://doi.org/10.1017/cbo9780511720352.013>, 193.

<sup>35</sup>Ibid., 194.

<sup>36</sup>Dan Saxon, “Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia,” *Journal of Human Rights* 4, no. 4 (October 2005): 559–72, <https://doi.org/10.1080/14754830500332837>, 563.

<sup>37</sup>Ibid.



victim group of the war and thus it was unfathomable to them that their leaders would be arrested<sup>38</sup>. It is also studied that the unapproachability and highly technical nature of the proceedings also led to their alienation from the ICTY and its aims<sup>39</sup>. The perception of the Bosniaks of the ICTY was negative also because for them, the NATO forces operating in Bosnia avoided prosecuting the masterminds of the genocide, namely Ratko Mladic and Radovan Karadzic<sup>40</sup>. Many were also unhappy with the sentencing of the perpetrators that were punished. Overall, the perceptions of the Muslim community are a product of both their largely held victim status and their expectations to be treated as such.

### The Case of Reparations

It is in the case of material reparations provided by each state government to the individuals affected by the war that the glaring difference in treatment accorded to various categories becomes apparent. In this regard, the valorisation of the narrative of the armed defence of the ethnic homeland, with the concurrent invisibilisation of other categories of war-affected individuals, becomes apparent. Thus, it becomes clear that the focus of the post-Yugoslav states is not on achieving genuine inter-ethnic reconciliation and coming to terms with the trauma of the wars, but rather on reinforcing the hegemonic ethnic identities that led to the war in the first place.

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<sup>38</sup>Ibid.

<sup>39</sup>Ibid, 564.

<sup>40</sup>Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York, NY: Open Society Institute, 2010), 39.

Reparations broadly come in two forms - collective symbolic reparations, and support to individual victims. The first category of reparations includes official apologies and memorialisation, while the latter consists of financial support, restitution of stolen property, preferential access to medical care, etc. The implementation of both these forms of reparations across the former Yugoslavia has been characterised by systemic discrimination based on combatant status, ethnicity, and gender. In all countries, and even within the different constituent entities of Bosnia and Herzegovina, reparations have heavily tended to favour combatants, members of the dominant ethnic group, and males respectively.

When it comes to reparations for individuals, the differences become even starker. The first category we shall study is that of combatants versus civilians. In all countries, reparations laws are significantly more favourable to ex-combatants than civilians<sup>41</sup>. In Serbia, for example, the allowance for a spouse and two children of a fallen soldier is six times higher than the monthly income received by a civilian victim's family of the same size<sup>42</sup>. To qualify for recognition as an invalid (who is thus entitled to a higher level of reparations), a soldier has to prove twenty percent bodily infirmity, while a civilian has to demonstrate fifty percent.<sup>43</sup> In Bosnia, as of 2009, a civilian with a 100% bodily infirmity would receive a payment from the state of BAM375 (Bosnia-Herzegovina Convertible Marka) in the Republica Srpska and 514 in the Federation of Bosnia and Herzegovina, as opposed to BAM650 and 734 respectively in the case of a military invalid<sup>44</sup>. As in Serbia, civilians have to demonstrate a much higher threshold of disability compared to veterans to receive benefits in the first place: 60% compared to 20%.<sup>45</sup> Finally in

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<sup>41</sup>“Transitional Justice in the former Yugoslavia”, (New York: ICTJ 2009), [www.ictj.org](http://www.ictj.org), 2.

<sup>42</sup>“International Center for Transitional Justice Serbia”, (New York: ICTJ 2008), [www.ictj.org](http://www.ictj.org), 4.

<sup>43</sup>Ibid.

<sup>44</sup>Oliwia Berdak, “Reintegrating Veterans in Bosnia and Herzegovina and Croatia: Citizenship and Gender Effects,” *Women's Studies International Forum* 49 (March 2015): 48–56, <https://doi.org/10.1016/j.wsif.2014.07.001>, 53.

Croatia, civilian war victims receive on average 15% less in monetary support from the state, and can access only 14 rehabilitation programmes as against 25 for ex-soldiers.<sup>46</sup>

This valorisation of the soldier has deep roots in Yugoslav culture, going back to the Second World War<sup>47</sup>. In the aftermath of the wars of the '90s, politicians in the newly formed countries were eager to draw upon the support of the large numbers of ex-combatants, who were thus granted the bulk of state resources at the cost of other groups<sup>48</sup>. Thus in Croatia, for example, which has 489,407 registered veterans out of a population of 4.4 million, many veterans associations are linked to the HDZ party (which has ruled the country for 26 of the 34 years since independence), and are frequently mobilised for political purposes<sup>49</sup>. Similarly in Bosnia, with between 400,00 to 500,000 ex-soldiers, veterans' associations form powerful interest groups that spring into action whenever their benefits are threatened.<sup>50</sup>

From this evidence, it is clear that for the governments of the former Yugoslavia, the primary motivation when it comes to dealing with those affected by war is not justice and the redressal of damages, but the consolidation of existing political narratives and buying the support of certain interest groups. This analysis is only strengthened when we look at how reparations policies are affected by ethnicity and gender.

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<sup>45</sup>Ibid.

<sup>46</sup>Ibid.

<sup>47</sup>Ibid., 50.

<sup>48</sup>Ibid., 51.

<sup>49</sup>Ibid.

<sup>50</sup>Ibid., 52.

Discrimination based on ethnicity is blatant in Serbia, which lacks any kind of systematic program for reparations to victims of war crimes and human rights abuses<sup>51</sup>. Existing legislation holds that only those who suffered at the hands of “enemy formations” can be compensated; those victimised by Serbian units are ignored<sup>52</sup>. This obviously disproportionately affects non-Serb individuals. This systemic refusal to acknowledge those victimised by their own armed forces highlights the Serbian government's priorities: the perpetuation of a narrative that reflects well on them politically, rather than meting out genuine justice.

A similar situation prevails in the Serb-dominated Republica Srpska. There, Bosniaks as victims of forced displacement, terror, torture, and rape as a weapon of war, are not recognized by a legislation as a protected class entitled to state support<sup>53</sup>. In Croatia, the situation is reversed; ethnic Serbs who fought against the Croatian independence movement are denied reparations.<sup>54</sup>

At the confluence of the categories of combatant status and gender lies a special group of the marginalised: victims of sexual violence. There were numerous cases of sexual violence against males in the Yugoslav wars, as recorded by the ICTY, which issued indictments in at least eight criminal cases involving male victims of sexual violence<sup>55</sup>. But, the overwhelming majority of victims were still female. Estimates vary widely, but the number of female victims has been calculated by the ICTY as anywhere between 20,000 to 50,000. The number of male victims on the other hand has been estimated at around 3,000<sup>56</sup>.

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<sup>51</sup>“International Center for Transitional Justice Serbia”, (New York: ICTJ 2008), [www.ictj.org](http://www.ictj.org), 3.

<sup>52</sup>Ibid.

<sup>53</sup>Alma Begicevic, “Law, Political Economy and War Reparation: The Case of Bosnia and Herzegovina,” *Law & Policy* 46, no. 2 (January 30, 2024): 170–96, <https://doi.org/10.1111/lapo.12235>, 187.

<sup>54</sup>Oliwia Berdak, “Reintegrating Veterans in Bosnia and Herzegovina and Croatia: Citizenship and Gender Effects,” *Women’s Studies International Forum* 49 (March 2015): 48–56, <https://doi.org/10.1016/j.wsif.2014.07.001>, 52.

<sup>55</sup>Mischowski and Mlinarevic, 7.

Being a victim of sexual violence is also closely linked to combatant status. Sexual violence, especially against women, occurred in camps, houses, brothels etc.<sup>57</sup> Due to legislation that favours reparations for those injured in conflict, and has strict definitions for what constitutes “conflict”, many victims of sexual violence are thus prevented from accessing reparations. In Serbia, for example, laws that restrict reparations to victims of armed conflict exclude victims of sexual violence unless they can demonstrate bodily infirmity above a certain high threshold.<sup>58</sup> In Bosnia and Herzegovina, the Republica Srpska and the District of Brcko lump in female victims of sexual violence with other civilian victims of war, subject to all the aforementioned disadvantages faced by such civilian victims as compared to ex-soldiers, such as proving a 60% level of bodily infirmity<sup>59</sup>. In the Federation of Bosnia and Herzegovina, female victims were granted distinct legal status in 2006 and do not have to meet the 60% threshold, but as a result they are only entitled to a pension and not the additional benefits enjoyed by civilian victims of war, such as housing, psychological aid etc.; just a pension is not enough to enjoy a decent life<sup>60</sup>.

### Conclusion

As we have demonstrated in this paper, the transitional justice mechanisms in the former Yugoslavia have not brought justice to all victims. The mechanisms have failed to treat all victims with equal concern but have rather served as means of perpetuating militarised ethno-

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<sup>56</sup> All Survivors Project and UCLA School of Law, *Legacies and Lessons: Sexual Violence against Men and Boys in Sri Lanka and Bosnia & Herzegovina*, (Los Angeles: UCLA School of Law, 2017), <https://allurvivorsproject.org/legacies-and-lessons-sexual-violence-against-men-and-boys-in-sri-lanka-and-bosnia-herzegovina/>.

<sup>57</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yugoslavia* (December 2009), 7.

<sup>58</sup> “International Center for Transitional Justice Serbia”, (New York: ICTJ 2008), [www.ictj.org](http://www.ictj.org), 3.

<sup>59</sup> Medica Mondiale, *The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yugoslavia* (December 2009), 90.

<sup>60</sup> *Ibid.*, 91.

nationalist narratives in the service of political interests. These narratives have even poisoned the minds of individuals against internationalised transitional justice institutions like the ICTY. Thus true reconciliation remains a distant prospect.

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