

Introduction

This book considers relationships between contemporary practices of international and national war crime tribunals, and the ways in which competing histories, politics and discourses on law and justice are being re-imagined and re-constructed, both within and outside of the courtrooms. We take discourses and practices of several international tribunals for war crimes as our starting point, and then focus on the struggles with and for justice in the aftermath of the Yugoslav wars, in three countries: Bosnia, Serbia and the Netherlands.

Practice-oriented scholars of transitional justice have tended to analyze international criminal courts, such as the International Criminal Tribunal for Yugoslavia (ICTY) and Rwanda (ICTR), in terms of their success or failure in establishing the facts of war crimes, and achieving the ‘liberal normative goods’ of retribution, accountability, deterrence, ending impunity and reconciliation. These analyses tend to focus on intended effects of international criminal justice on societies. In this book we try to depart from this usual way of addressing the topic. We do not treat either ‘international-legal’ or ‘local-cultural’ understandings of violence, justice or history as given, essential or static. Instead, the contributions focus on the *dynamic* relation between international criminal courts and lived realities of the war-affected societies and the global world, and go beyond *intended* or *proclaimed* effects.

International criminal law and its courts generate both less and more than they set out to do. They create a symbolic space within which competing narratives of crimes, perpetrators and victims are produced, circulated and contested, and intimately related to the narratives of justice, responsibility and guilt. In other words, international criminal law and the courts gather, and in turn produce, knowledge about societies in war, their histories and identities, and their relations to the wider world. But the knowledge produced within the courts does not go hand-in-hand with that of the wider society. There, individual people and groups, institutions and organizations, and ingrained power structures produce their own versions of history, their own facts and figures. What interests us are both the narratives within and outside of the courts, but also the relationship between them—the ways they co-produce each other, the ways different narratives compete and contest, and different truths are constructed.

Thus, this book takes as its underlying assumption that, whilst the courts and court cases are ostensibly only concerned with establishing the legal guilt or innocence of the accused, the very establishment of the courts and the specific trials become

another occasion to produce new or utilize existing narratives about past and present conflicts and violence and the role of various actors within them. In addressing those issues, the editors and contributors assume no single position towards the international criminal law, criminal courts in general, or the ICTY in particular. Rather, we take them all as contested terrains, showing what theoretical and geo-political influences leave their mark on specific dynamics in court and in the region, as well as on the specific perspectives of the contributors.

The diversity of those positions is meant, first, to emphasize the constructed nature of the meanings of justice, as well as to stress the political and symbolic significance of those struggles. Second, we emphasize that the production of knowledge is the ultimate objective of those struggles: knowledge that allows or disallows political, social and symbolic solidarities for building a peaceful future in the post-Yugoslav region, and far beyond it.

The first set of contributions, in the section *Narratives of Law and Justice in the International Courtrooms*, situates the narratives and knowledge production around the ICTY within a larger historical and geo-political perspective, analyzing the ICTY within contemporary discourses and practices of international criminal law, as well as a theoretical and normative set of questions about international criminal law and justice and its engagement with different cultural, political and geographical environments. It situates the war in the former Yugoslavia and the practices of the ICTY within international political and legal debates, and compares ICTY practices and narratives with those of other tribunals, most notably the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, as well as the historic example of the International Military Tribunal in Nuremberg. Those contributions show that production of *legal knowledge* is highly entangled with geo-political relations—both in terms of the histories of global and regional political affairs, and in terms of contemporary political struggles over legitimacy.

The contribution by Dubravka Zarkov sets the scene with a theoretical reflection on how international criminal tribunals have been part of a larger shift in thinking about war, violence and justice, which produces and reinforces knowledge about, and ontological distinctions between, ‘local’ victims and perpetrators on the one side and the ‘international community’ on the other side. The next three articles each focus on a different element of the knowledge-producing character of the tribunals. The article by Doris Buss traces the relation between the use of expert witnesses and the aspiration by prosecutors and judges to understand and narrate historical causes and contexts of large scale violence, using the International Criminal Tribunal for Rwanda (ICTR) as a case in point. Buss shows, with specific reference to the cases before the Rwanda Tribunal, how the initially strong reliance on expert testimony and explicit aspiration to write the history of Rwandan genocide gave way to much more contestation of the authority of the same experts in the court, and a more narrow legal understanding of the court’s remit in the verdict promulgated by the judges.

Marlies Glasius considers the handling of a crime the defining element of which is supposed to lie not in its physical manifestation, but in the underlying intent of the perpetrator: the crime of spreading terror among civilians. She highlights the interpretive risk judges take upon themselves by aspiring to evaluate intent. Analyzing the transcripts of the trials of Radovan Karadzic before the ICTY and Charles Taylor

before the Special Court for Sierra Leone, Glasius shows how the contestation of the crime of terror in particular has in fact served the defendants in delegitimizing the trial itself. She then places the move from prohibition to criminalization of such 'acts of terror' in the context of a shift in understanding the nature of war, from an ugly form of politics that cannot be prevented but can be constrained, to the intended outcome of criminal plans of a small set of ruthless conflict-entrepreneurs. She finally considers that the International Criminal Court (ICC) has not chosen to criminalize 'terror', but sketches an unresolved tension between retributive desire to punish the intention to instill fear and recognition of the interpretive limitations of legal professionals.

Predrag Dojčinović contribution similarly concerns criminalization of things that go beyond physical violence as such. He discusses the status of grand narratives such as pan-Germanism, 'Greater Serbia' or 'Greater Croatia' in international criminal trials. Dojčinović argues that in all major international war crimes trials, grand narratives constitute part of the conceptual and evidentiary foundation of the prosecution, but before the ICTY in particular, they have gone beyond 'background information' and have acquired the status of clear-cut forensic evidence. The prosecution in the Seselj case, currently awaiting a verdict, has gone the furthest in arguing for criminalization of propaganda as such. Unlike the contributions by Buss and Glasius that stress contingencies of judicial interpretation of political acts and intentions, Dojčinović holds that acts of propaganda and incitement, and the production of grand narratives that carry the seeds of criminal acts, can and should be put on trial.

The section on *Narratives of Law and Justice after Yugoslav Wars* examines 'effects' rather than the 'effectiveness' of international criminal justice on the region, with a specific focus on three countries: the Netherlands, Bosnia and Serbia. As we analyze meanings of justice and production of narratives on war crimes in those three countries, we are faced with contingencies produced by the specific social-political contexts in each state. The contributors analyze processes pertaining to the diverse struggles about guilt, responsibility, trauma and justice. In all five contributions, the 'local', the 'regional' and the 'international' are constituted as sites of struggles with victimisation, trauma, resistance and denial, in which both reliance upon and battles against specific meanings of violence and their social, political and symbolic implications are at play.

Vladimir Petrovic' chapter connects the first four chapters, focused on the production of knowledge in the courts, to the second set of chapters, with a chapter that illuminates the interplay between a piece of visual material introduced in the Milosevic trial, the infamous *Scorpions* video, and the impact of the same video footage on politics and society in Serbia immediately after its introduction in court. Petrovic considers the circumstances of the video's creation, its circulation and the role it has played both in public debates in Serbia and in the international and national courtroom. He eventually dispels the idea of an "immediate redemptive effect of visual evidence", documenting the forensic meaning attached to the video by the ICTY, its initial accusatory function in Serbia, but also the multiple forms of denial that have accompanied it.

Eric Gordy pans out from here, contextualising the reception of the *Scorpions* video in a broader consideration of how 'the Serbian public' has dealt with the

memory of the war, and how the workings of the ICTY have intersected with the formation and reformation of collective discourses about the war and war crimes. He traces the nature of the public debate at three constitutive post-war ‘moments’ that (could) have opened up the discussion about recognition of Serbian responsibility for war crimes in Bosnia. The three moments are the arrest of Slobodan Milošević in 2001, the murder of prime minister Zoran Djindjić in 2003, and the broadcast of the *Scorpions* video showing the execution of civilian prisoners in Bosnia by a Serbian paramilitary unit in 2005. In reflecting on the politics of denial in Serbia, Gordy concludes, not that denial has turned into recognition, but that the discourses of denial have changed—from denying the facts of the crimes, to reinterpreting their meanings.

Erna Rijdsdijk’s chapter considers the concept of ‘trauma’ as constitutive not just of an individual, personal experience, but of the social order and national self-imagination, as well as national positioning within the international world order. She uses several examples regarding the inability of the Netherlands as a polity and society to accept responsibility for the Srebrenica massacre. These include the political rehabilitation of Dutchbat, the description of the Srebrenica episode within the context of an officially sanctioned ‘canon’ of Dutch national history, and the official reaction to the European Parliament’s Resolution on Srebrenica commemoration day. She ends with a discussion of a recent national court case in which the responsibility of both the state as such and the military stationed in Srebrenica is officially recognized, illustrating that the political and indeed legal struggle within the Netherlands over the role of Dutch peacekeepers in Srebrenica genocide is far from over.

Jasmina Husanović’s contribution challenges the ‘transitional justice’ paradigm as a regime of knowledge and power and the practices and discourses surrounding the politics of witnessing trauma in Bosnia. She makes visible some of the emergent ways of resistance in the form of critical knowledge production at public platforms, in classrooms and in artistic expressions.

The chapter by Frederiek De Vlaming and Kate Clark examines international and national reparation mechanisms, arguing against the strict division between individual and collective forms of reparation, that is typically made in current transitional justice literature. They argue that, in Bosnia, the micro level—classically pertaining to the reparations to individual victims—has hardly ever been about individuals only. Reflecting on specific cases, they show that, for the victims, individual claims for reparation have always had larger ‘public good’ objectives: the recognition of the war crime, of the wrongdoing and of its effects on the specific people to whom the individual or the group belongs.

In bringing these chapters together, we hope to contribute to the growing body of knowledge that examines international criminal law beyond its legal applications and engages with discourses on war crimes and post-war justice as situated in multiple (geo-)political, social, symbolic and legal domains. We hope to draw attention to the contingent and contested nature of the meanings of war crimes and of post-war justice.

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