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Same Old (Macro-) Securitization? A Comparison of Political Reactions to Major Terrorist Attacks in the United States and France

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Abstract

After the November 2015 terror attacks in Paris, the French government reacted swiftly by declaring a state of emergency. This state of emergency remained in place for over two years before it was ended in November 2017, only after being replaced by the new anti-terror legislation. The attacks as well as the government's reactions evoked parallels to 9/11 and its aftermath. This is a puzzling observation when taking into consideration that the Bush administration's reactions have been criticized harshly and that the US 'War on Terror' (WoT) was initially considered a serious failure in France. We can assume that this adaption of the discourse and practices stems from a successful establishment of the WoT macro-securitization. By using Securitization Theory, we outline the development of this macro-securitization by comparing its current manifestation in France against the backdrop of its origins in the US after 9/11. We analysed securitizing moves in the discourses, as well as domestic and international emergency measure policies. We find extensive similarities with view of both; yet there are differing degrees of securitizing terrorism and the institutionalisation of the WoT in the two states. This suggests that the WoT narrative is still dominant internationally to frame the risk of terrorism as an existential threat, thus enabling repressive actions and the obstruction of a meaningful debate about the underlying problems causing terrorism in the first place.

Key words:
macro-securitization; securitization; terrorism; Global War on Terror; France.

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Introduction

The beginning of 2015 was overshadowed by terror in France, as two Al-Qaeda linked gunmen killed twelve people in an attack on the French satire magazine "Charlie Hebdo" on 7 January in Paris. The following day, another attacker murdered four people and held fifteen hostages in a Jewish supermarket. That same year in November, the French capital was struck again: 130 people were killed and 350 injured as a result of bombings and shootings taking place across Paris. The French government reacted swiftly by declaring a state of emergency, which was renewed five times before it was replaced by new anti-terror legislation in November 2017. The day after the terrorist acts, President Hollande announced that he considered the attacks not as crimes, but as acts of war (Hollande 2015_a).

The reactions evoked parallels to 11 September 2001 and its aftermath. The discourse of 'a French 9/11' (cf. Libération 2015) was picked up by the media, as well as by academic analysts such as Christian Lequesne, who claimed that "[s]imilar to the 9/11 events in the USA, the Paris terrorist attacks [...] have changed the relationship between French society and security" (2016: 306). Especially the drastic restriction of civil liberties in the state of emergency is remindful of the "USA PARTIOT Act". Moreover, the increased number of airstrikes in Syria invokes parallels to the US global 'War on Terror' (WoT), as does President Hollande's rhetoric. This indicates the establishment of a shared understanding of (global) threat and how to deal with it, or in analytical terms, macro-securitization.

Drawing on the assumption that "danger is not an objective condition" (Campbell 1992: 2), but rather an interpretation of risk allowing for certain actions to be taken; neither the reading of, nor the measures taken after a "terrorist" attack are universally predetermined. Thus, the reactions that we can observe in the US and France are the result of linking and interpreting the events as an essential threat to their own imagined community, i.e. the state. However, alternative interpretations and actions would have been possible. One such alternative would have been criminal prosecution, instead of taking the path of the so-called WoT. Buzan (2008: 560) comments on this alternative, stating that "[i]f the response to terrorism is constructed in terms of criminality rather than war, then open civil societies

will have to adjust to terrorism by accepting a certain level of disruption and casualties as the price of freedom[1]. Moreover, the US and its allies' reactions to 9/11 are widely regarded as a military failure. Thus, one should expect the French reactions to differ from those of the US regarding the attacks on 9/11 particularly with the hindsight of over a decade. While these similarities seem puzzling at first, our hypothesis is that they are the result of the acceptance of the WoT as macro-securitization: a global framework and "overarching conflict" (Buzan and Waever 2009: 253) which structures international as well as domestic security. Initially, France contested the establishment of the WoT as a macro-securitization, especially in the case of the Iraq War 2003. However, it has since started to link its own security issues to the WoT securitization. This encompasses the characterisation of terrorist attacks as 'acts of war' and the willingness to accept them as legitimisation for military action abroad. Moreover, political challenges, such as the integration of migrants from former colonies and their descents, are moved into the realm of security. In contrast to the US, France's securitizing actors will have to address their countries security within the EU framework, potentially leading to a spill-over of security measures to other EU countries. To examine this hypothesis and explore the reactions in a focused and structured manner, we apply the Securitization Theory, analysing speech acts and emergency measures. This allows us to uncover linkages between state-level and macro-level securitization, thus shedding light on the interpretations and practices that follow from linking the attacks to the WoT. The article's emphasis is placed on securitizing moves, identified by employing a discourse analysis, and emergency measures, analysed through the screening of new legal prescriptions (domestic level) as well as foreign policy decisions.

Methodology and structure of the article

Based on our theoretical framework, we conducted a discourse analysis (cf. Buzan et al. 1998: 176). The selection of texts as primary sources for our analysis follows Buzan et al.'s requirements, which state that "if a security discourse is operative in this community, it should be expected to materialize in this text because this occasion is sufficiently

1 A concrete example of a government 'resisting' a politically tempting macro-securitization is demonstrated by Watson (2013).

important" (1998: 177). Texts were selected based on our heuristic judgment concerning the importance of each text for the public discourse. We define the US and the French government as the securitizing actors. Dealing with a presidential and a semi-presidential system in our cases, we prioritized presidential statements by George W. Bush and Francois Hollande. Furthermore, in the US case, we focused on statements by Vice President Dick Cheney, Secretary of State Colin Powell and Secretary of Defence Donald Rumsfeld. Accordingly, in the case of France we included speeches by Prime Minister Manuel Valls, Foreign Minister Laurent Fabius and Minister of Defence Jean-Yves Le Drian. The period of analysis encompasses 14 November 2015 to 15 July 2016. The cited passages represent only a sample of the analysed material, i.e. illustrations of arguments made in the texts. In light of the well-documented case of the Bush administration, we drew on the existing literature (cf. Jackson 2005; Buzan 2006; Hodges 2011; Donnelly 2013; Oren and Solomon 2015; van Rythoven 2016), whereas in the French case we used mostly primary sources.

The texts were read, scanned and coded for security moves. We looked at each case separately and, rather than creating categories a priori, we chose an inductive approach to avoid the reproduction of preformed ideas of how 'securitization' would unfold in the cases at hand. In doing so, we avoided co-determining the results by using deductive categories or by applying the categories derived in one case to the other. Thus, we generated independent results for each case, which we compared afterwards. In the subsequent section, we provide an overview of our theoretical framework. We then move on to the empirical part of this paper, firstly addressing the case of the US, secondly the French one, which is followed by a discussion of our findings. We chose to compare the Paris attacks and the attacks on 9/11, as we see the later one as the hour of birth of the current macro-securitization of the WoT[2]. Therefore, we used it as a methodological anchor point against which to assess the adaptation of the macro-securitization in the recent case of France.

2 During the last 17 years, the US WoT securitization itself has shifted, as the Obama administration promised a new approach to counterterrorism. However, research suggests that the WoT priorities and practices remained in place (or were even intensified, like targeted killings with drones) (cf. Cutler 2017) and so did the main frameworks and narratives of the WoT (cf. McCrisken 2011; Jackson 2013; Hodges 2013).

Securitization and macro-securitization

Since the theory's explicit composition in *Buzan et al. 1998*, the model has been continuously applied and further developed. The subject of terrorism, in particular the so-called WoT, (e.g. Buzan 2006; Roe 2008; Salter 2011, Aradau and van Munster 2009; Bright 2012) and the topic of migration (e,g. Bigo 2002; Huysmans 2006) formed the empirical centre of the securitization debate. Apart from the concrete application of the theory, there are numerous works concerned with the theoretical framework and the theory's development (e.g.: Williams 2011; Stritzel 2011; Roe 2008; Huysmans 2011; Albert and Buzan 2011; Wæver 1995, 1999, 2011; Floyd 2016).

Buzan et al. define issues as *politicised* if they are part of regular public policy and debate and require actions by the government. Issues are defined as *securitized* if they are depicted and accepted as posing an existential threat requiring emergency measures (Buzan et al. 1998: 21). Following the logic of existential threats and survival, every other problem loses its significance if this issue cannot be solved first and foremost (Buzan et al. 1998: 24). The *referent objects* are the collectives that can be depicted as being existentially threatened (Buzan et al. 1998: 21). While states or nations are the most common, the theory allows for a variety of potential referent objects (Buzan et al 1998: 21). *Securitizing actors* are those entities who declare a referent object as existentially threatened:

> *A securitizing actor is s.o., or a group, who performs the securitizing speech act. Common players in this role are political leaders, bureaucracies, governments, lobbyists, and pressure groups. (Buzan et al 1998: 21)*

The *audience* is the entity at whom the securitizing move is directed. While the role of audience acceptance for a successful securitization is a much-debated subject (cf. Balzacq 2011: 8; Bright 2012; Floyd 2016), we assume that in order for a securitization to be successful, the audience has to at least partially accept the security measures, i.e. "it is accepted that some rules must be broken" (Bright 2012: 871). Roe (2008: 620) convincingly makes the case of a duality of the audience. In addition to the 'standard'-audience of the general public,

governmental securitizing moves are, in many cases, also directed at national representatives of the parliament. If only one of the audiences can be convinced, this process of partial securitization is coined as "rhetorical securitization" (Roe 2008: 633), full approval of the threat as well as the emergency measures poses an "active securitization" (Roe 2008:633).

Having successfully securitized an issue, the securitizing actor can take extraordinary measures. Examples are the absence of democratic rules and procedures and the restriction of certain rights. Following Bright, we assume that securitization measures might also be channelled into the legislative process, hence altering "the very structure of the legal system in the country" (Bright 2012: 875). The laws and legal structures (such as the new anti-terror legislation and the Department of Homeland Security) emerging from this channelling is what we refer to as the institutionalisation of securitization. Even though they were introduced following the formal rules, their material content would not be imaginable without the 'exceptional threat' (cf. Aradau and van Munster 2009: 698). Besides, these legal institutions also lead to everyday practices, such as policing certain individuals (Aradau and van Munster 2009), which would formerly have been considered exceptional.

The speech act constitutes the *securitizing move*. "'[S]peech acts' [...] do not 'report on things,' but rather 'do things'" (Léonard and Kaunert 2011: 57). Thus, the "performative nature of language" (Huysmans 2011: 372) is the important characteristic of the act. It is the "specific rhetorical structure (survival, priority of action 'because if the problem is not handled now it will be too late, and we will not exist to remedy our failure')" (Buzan et al. 1998: 26) that distinguishes regular political talk from securitizing moves. Balzacq (2011: 9) notes that the specific language used by securitizing actors is adjusted to the audience's experience of the particular issue. One thing all speech acts have in common is "a plot that includes existential threat, point of no return, and a possible way out" (Buzan et al. 1998: 33). In order to assess the success of securitizing moves, the analysis needs to take into account both the audience(s) and the *facilitating conditions*. "Facilitating conditions are the conditions under which the speech act works, in contrast to cases in which the act misfires or is abused" (Buzan et al. 1998: 32). After all, the centrality of the speech act for securitization "does not mean a study of the features of the threat itself is irrelevant. On the contrary, these

features rank high among the 'facilitating conditions' of the security speech act" (1998: 32).

Macro- vs. micro-securitization

The idea of the so-called *macro-securitization*, presented by Buzan (2006; 2008; see also Buzan and Waever 2009), argues that there are securitizations on the international level, as opposed to the classic case of securitizations on the state level, that have an umbrella-like function. They can 'structure' international security (Buzan 2006: 1102) by enabling securitizing actors on lower levels to fit their securitizing moves into the larger picture painted by the overarching macro-securitization. Actors can "link their own local problems" (Buzan 2006: 1104) to the prevailing macro-securitization. The prime example, according to Buzan, is the Cold War, when several national and regional securitizations took place within the larger framework of the macro-securitizations of capitalism and communism.

As macro-securitizations work on the international and the state level, there are

> *permanent tensions across the levels, and [the macro-securitisations] are vulnerable to breakdowns not just by desecuritisation of the macro-threat (or referent object) [...], but also by the middle level securitisation becoming disaffected with, or pulling away from, subordination to the higher level one [...] (Buzan and Waever 2009: 257).*

For instance, the WoT macro-securitization could be destabilised if other states came to perceive that the alleged joint fight against terrorism has more to do with particular US interests than with some global concern (Buzan and Waever 2009: 257).

While macro-securitizations in general proceed like state-level ones and should thus be studied "in terms of actors, audiences, speech acts and synergy with other actors and their securitisations [...] (Buzan and Waever 2009: 257), they benefit from a certain vagueness. This allows them to function as an empty signifier. Hence, they can tie together various lower level and niche securitizations more easily.

Their referent objects are broader in nature than those of lower-level securitizations, thus they are suitable for a variety of audiences. In our case, while in a micro-securitization the nation is a common referent object, in the WoT macro-securitization civilisation itself is threatened. Accordingly, in this case, the security move might be directed at a regional or global audience, not just at a national one.

We propose looking at the two empirical cases of 9/11 and the terrorist attacks in France as part of a continuum. Can we regard the French reactions as continuation of the WoT? Buzan claims:

> *The explicit 'long war' framing of the GWoT [Global War on Terror] is a securitizing move of potentially great significance. If it succeeds as a widely accepted, world-organizing macro-securitization it could structure global security for some decades, in the process helping to legitimize US primacy. (Buzan 2006: 1102).*

While the latter assertion must be questioned (the WoT has probably hurt 'US primacy' more than it helped to sustain it), the argument that a global anti-terror-securitization has an all-encompassing quality is still valid. Under the 'umbrella' of the macro-securitization, numerous governments all over the world have defended 'anti-terror' measures by resorting to the logic and rhetoric that has been at work in the US since 9/11. Thus, it seems that the idea has indeed 'succeeded'.

One more argument stands out with view to the US *and* the French case, as will be shown in the analysis below: the WoT "is mainly about the state versus *un*civil society" (Buzan 2006: 1116). In a globalized world, the "traditional Hobbesian domestic security agenda gets pushed up to the international level" (Buzan 2006: 1116). Buzan claims that, due to the nature of the threat and of liberal society; every possible reaction to counter this threat necessarily constitutes a securitization. "In each case, the necessary action requires serious compromising of liberal values" (Buzan 2006: 1116.). Our analysis contributes to answering the question of whether the anti-terror-narrative "is pervasive and dynamic enough and whether the other necessary factors are in place to make the GWoT a durable macro-securitisation" (Buzan and Wæver 2009: 266).

Securitization in the US after 9/11

The securitization that took place in the US in the aftermath of the 9/11 terror attacks (is widely accepted as a prime example of the Copenhagen School's approach (cf. Buzan 2006; Donnelly 2013; Oren and Solomon 2015; van Rythoven 2016). A range of emergency actions were enacted in the subsequent weeks and months after the attacks, which had been carried out by 19 hijackers (among them 15 Saudi-Arabians) and cost the lives of 2,977 people. On the legislative level, the USA PATRIOT Act was adopted by an overwhelming majority in the US Congress. It was signed into law by President Bush on 26 October 2001, just three days after it had been introduced at the House of Representatives. This anti-terror legislative package included measures to restrict civil liberties, introduce additional surveillance, increase border controls, as well as measures for a widely increased authority for intelligence agencies. It also enabled the US to detain suspects of terrorism without due process at the US military's Guantanamo Bay camp. The creation of the Department of Homeland Security, under which several domestic anti-terror authorities were bundled, is directly linked to the events of 9/11 and constitutes an important element of the Bush administration's institutionalization of the WoT. The department still exists and, as of 2016, employs 240.000 people (Department of Homeland Security 2016).

In view of the securitizing moves there are four distinct types stand out. Firstly, the Bush administration categorized the *terrorist attacks as acts of war.* On 15 September 2001, President Bush, at Camp David, declared:

> *I am going to describe to our leadership what I saw: the wreckage of New York City, the signs of the first battle of war. Make no mistake about it: underneath our tears is the strong determination of America to win this war. [...] We're at war. There has been an act of war declared upon America by terrorists, and we will respond accordingly. (Bush 2001$_a$).*

On 9 October 2001, the President stated, "[t]he first shot of the new war of the 21st century was fired September the 11th. The first battle is being waged; but it's only one of a long series of battles" (Bush 2001$_b$). On another occasion, he noted that the WoT would not be a war in the common meaning of the term: "[t]

he mind-set of war must change. It is a different type of battle. It's a different type of battlefield. It's a different type of war" (Bush 2001$_c$). Secretary of Defence, Donald H. Rumsfeld, picked up on this argument in an Op-Ed in the New York Times on 27 September 2001, noting that "this will be a war like none other our nation has faced. [...] Even the vocabulary of this war will be different" (Rumsfeld 2001). The domestic consequences of such a war were foreshadowed by Bush, when he declared:

> *This is a different war from any our nation has ever faced, a war on many fronts, against terrorists who operate in more than 60 different countries. And this is a war that must be fought not only overseas, but also here at home. [...] We've added a new era, and this new era requires new responsibilities, both for the government and for our people. (Bush 2001$_d$)*

This classification has far-reaching consequences. During times of war, everything is subordinate to the goal of prevailing over the enemy. In the domestic field, the rally-round-the-flag effect often closes the ranks between the opposition and the government in power. After the 9/11, Bush benefited enormously from this effect, as well as from the omnipresent call for presidential leadership (Rudolf 2005: 10). On an administrative level, the focus of anti-terrorism measures shifted from the predominantly civilian sphere to primarily military means.

The second strand of argument concerns the *orientation towards worst-case scenarios*. On 26 October 2001, Secretary of State Colin Powell, in remarks to NGO leaders at a conference hosted at the State Department, described the danger resulting from global terrorism as a "threat to civilization" and as a "threat to the very essence of what you do" (Powell 2001). President Bush, in his special address to Congress on 20 September 2001, spoke of a "threat to our way of life" (Bush 2001$_e$). On 8 November 2001, he declared in a speech that "[w]e are the target of enemies who boast they want to kill, kill all Americans, kill all Jews and kill all Christians" (Bush 2001$_d$). The terrorists are, thus, not only fighting against America, but also against Judaism and Christianity. As Jackson points out, Colin Powell on several occasions called Osama Bin Laden "unfaithful" (Powell 2001, cited from Jackson 2005: 65) and even went as far as claiming that the terrorists "[...] believe in no faith. They have adherence to no religion" (Powell 2001, cited from Jackson 2005: 65). Jackson

also highlights the parallel between this element of the WoT and the Cold War (Jackson 2005: 65.), in which the communists were depicted as godless atheists. Hence, well established elements from the old macro-securitization are reused to build the new one.

Furthermore, Bush alleged that "[t]housands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, are now spread throughout the world like ticking time bombs, set to go off without warning" (Bush 2002_a). Vice President Cheney (2003), in referring to the 'weapons' used on 9/11, explained:

> *The attack on our country forced us to come to grips with the possibility that the next time terrorists strike, they may well be armed with more than just plane tickets and box cutters. The next time, they might direct chemical agents or diseases at our population or attempt to detonate a nuclear weapon in one of our cities. These are not abstract matters to ponder. They are very real dangers that we must guard against and confront before it's too late. (Cheney 2003)*

The uncertainty which was connected to the alleged threats and to what might happen if these menaces were not eliminated, contributed to the elevation of the threat perception. In the case of the WoT, some points stood out in that regard: one argument claims that terrorists would destroy liberty and the (Western) 'way of living'; another mentioned the fear of the use of weapons of mass destruction (WMD), which could have devastating consequences; and the third strand of argument, prevalent in the discourse of the Bush administration post-9/11, is the *construction of a link between terrorism and so-called "rogue states"*. Even asymmetric conflicts take place in the territories of states; whether the training of fighters or suicide killers in so-called terror camps, as was the case in Afghanistan and Pakistan, or the planning and execution of terror plots. Establishing a link between terrorist organizations and their 'host' countries, was one way to justify the missions conducted by the US in these countries.

Already on 11 September 2001, Bush declared in his address to the nation, "[w]e will make no distinction between the terrorists who committed these acts and those who harbour them" (Bush 2001_f). At a press conference on 11 October 2001, Bush made

clear that the WoT would also be targeted at the governments of other states, a "war against all those who seek to export terror and a war against those governments that support or shelter them" (Bush 2001_g). The argument culminated in the assertion of the Bush administration that certain countries formed the "axis of evil" by supporting terrorism and striving for WMD (Bush 2002_a). This served as a major securitizing move in the securitization of Iraq as an existential threat and was crucial for justifying the Iraq War of 2003.

A fourth strand of argument constitutes the *assertion of the necessity for 'pre-emptive strikes';* menaces must be countered before they materialize because the gravity of the threat does not allow for a wait-and-see approach. Especially in conjunction with the argument on the potential use of WMD by terrorists or states forming the "axis of evil," this strand of argument, which became known as the "Bush Doctrine", served to further justify the invasion of Iraq. In a speech at the West Point military academy on 1 June 2002, Bush declared that:

> *[d]eterrence [...] means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies (Bush 2002_b).*

In summary, the Bush administrations' securitizing moves were characterised by the classification of the attacks as acts of war, the orientation towards worst case scenarios, a link between terrorism and so-called rouge states and the necessity for pre-emptive strikes. At the same time, terrorists were depicted as uncivilised, unfaithful barbarians. We now turn to the French case to analyse similarities and discontinuities of this case of securitizing terrorism.

Securitization in France after the November 2015 terror attacks

In a series of terrorist attacks in Paris on 13 and 14 November 2015, 130 people were killed, while 350 more were injured (FIDH 2016). The nine perpetrators belonged to a terrorist cell in Brussels; they were EU citizens with either French or Belgian nationality.

In addition to some instant measures, directed at the immediate threat during the attacks (i.a. closing of the airport Paris-Orly, shut-down of parts of the Paris subway system), President Hollande declared the state of emergency by decree in the whole country (cf. Legifrance 2015). This happened for the first time in this all-encompassing form since the Algerian War over 50 years ago, constituting a historic event. The state of emergency became active at midnight, merely two and a half hours after the first detonations at the football stadium *Stade de France* (cf. Reuters 2015). Historically, the French state of emergency was envisioned to have an option between the normal state and the state of siege. It needs to be upheld by parliament if it is in place for more than 12 days (cf. Le Monde 2015) and is intended in case of an 'immediate threat resulting from severe attacks on the public order, which due to their nature and their severity, can be characterized as public imminence'[3] (Loi n° 55-385 1955). The promulgation of the state of emergency granted the authorities extraordinary rights to restrict certain civil liberties.

Overall, the state of emergency was prolonged by the parliament five times, before it finally ended in November 2017 and was replaced by new anti-terrorism legislation. Facilitating conditions for the continuous prolongation were the terror attack in Nice on 14 July 2015 and the presidential elections in 2016. The new bill transferred parts of the extended executive rights during the state of emergency into regular legislation.

During the state of emergency, the government had advocated for a law that would have made it possible to take away French citizenship from "people with dual citizenship who have been convicted of terrorism-related crimes" (The New York Times 2016). However, the attempt was strongly contested in the legislative process and ultimately abandoned. However, new laws that were adopted grant police and other law enforcement more competences including: the use of deadly force when encountering terror suspects; the possibility to put suspects under house arrest after their return from conflict areas in Syria and Iraq; and additional use of surveillance technology "that had been available only to intelligence agencies" (The New York Times 2016). A human rights report conducted by

3 "L'état d'urgence peut être déclaré sur tout ou partie du territoire métropolitain, des départements d'outre-mer, des collectivités d'outre-mer régies par l'article 74 de la Constitution et en Nouvelle-Calédonie, soit en cas de péril imminent résultant d'atteintes graves à l'ordre public, soit en cas d'événements présentant, par leur nature et leur gravité, le caractère de calamité publique " (Loi n° 55-385).

international experts on the practices of the state of emergency for the period between 14 November and 13 May 2016, found that the authorities heavily used their extended scope (cf. FIDH 2016). Albeit, the effects were meagre; "some 3,600 warrantless searches and 400 house arrests have resulted in a mere six terrorism-related criminal investigations" (The New York Times 2016). Only one of them resulted in a prosecution (cf. The New York Times 2016). Nevertheless, the new legislation adopted the possibility of preventive house searches and interrogations (cf. Rescan 2017).

Under the new law, authorities can declare certain places or events 'security areas', as well as frisk individuals and their belongings. House arrests based on executive demand are no longer legal, but suspects can be ordered to stay within their community. Finally, executive authorities can shut down religious institutions for up to six months if hate, violence or discrimination is encouraged in those places. The law is applicable until 2020, when parliament will decide anew about the expanded executive competences. (cf. Le Monde 2017). Critics of the new law see it as a 'permanent state of emergency'[4] (Le Monde 2017).

Further emergency measures included the temporal reintroduction of border controls; in accordance with the Schengen agreement which grants the possibility to do so in emergency situations. In April 2018, the border controls were prolonged and are now to end in October 2018. Besides, on 17 November 2015, France was the first EU member state to requested support by invoking the mutual assistance clause of the EU treaty which states that "[i]f a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power [...]" (Treaty on the European Union, Art. 42: 7). Thus, the terrorist attacks were defined as an armed aggression on its territory. Answering this call for EU solidarity does not have to come in form of direct military assistance. In this way, the EU treaty gives more leeway than NATO's Article 5. Rather than triggering an automated response, the affected country can request aid in bilateral negations. France was granted support from its European partners in other missions to free the resources, deemed necessary to fight the terrorist

4 "L'état d'urgence permanent".

threat. Germany, for instance, pledged to increase its military presence in Mali in order to disburden France.

On the foreign policy level, France intensified its military commitment against ISIS in Syria and Iraq, escalating its air campaign to Syrian targets and striking the terrorist organization's capital, Raqqa (cf. The Guardian 2015). In his speech to both houses of parliament on 16 November 2015, President Hollande announced that "France will step up its operations in Syria. [...]" (Hollande 2015$_c$).

The range and scope of measures adopted and enacted since the Paris terror attacks constitute extraordinary measures in the understanding of the Securitization Theory. The condition of substance is thus met. It must be acknowledged that, apart from the very first declaration of the state of emergency, all emergency measures were duly approved by democratic means through the *Assemblée nationale* and the French Senate. However, the speed and unanimity in which new laws and the state of emergency were adopted indicates that securitization took place. For instance, the prolongation of the *état d'urgence* after the attack in Nice only took five days (cf. Reuters 2016). This clearly poses a case of "actions outside the normal bounds of political procedure" (Buzan et al. 1998: 24). The fact that the decision was taken with vast majority in both chambers of parliament suggests strong political will or even pressure to affirm the executive's standpoint. Strong parallels between the French and the US case can be observed in regard to this point (see above, adoption of the USA PATRIOT Act). Yet, the fact that the government's plans to change the constitution ultimately failed, due to resistance in parliament, shows that the government was not handed a *carte blanche* to do whatever it deemed appropriate. The interpretation of the parliament's role in granting emergency measures is further complicated by the fact that the country's major opposition party, *Les Républicains*, is generally regarded as more hawkish with view to national security than the socialists. For example, former President and contender for the presidential elections 2017 Nicolas Sarkozy made headlines in 2016 by calling for even more drastic counter-terrorism measures, such as mandatory electronic tags for "anyone showing signs of being radicalized" (The Guardian 2016). The measures were not uncontested and subjected to international criticism in the media. The *New York Times* editorial board stated that "[t]hese changes will

do nothing to help France fight terrorism — it already has sweeping counterterrorism laws — and may do permanent damage to the very things the Islamic State wishes to destroy: France's democratic freedoms and its social cohesion" (The New York Times 2016). The newspaper was also concerned by the alleged misuse of police authority, as "[t]he state of emergency has been abusively used to put environmental and labor-law activists under house arrest" (The New York Times 2016.).

Nevertheless, the French public seems to have widely accepted the measures taken by the government. Two months after the first proclamation of the state of emergency, 77 percent of the French agreed that it was justified (cf. Clavel 2016). In a different study published in June 2016, only 14 percent were in favour of ending the state of emergency, while 48 percent supported *tightening* it (cf. Institut d'Études Opinion et Marketing en France et à l'International 2016: 9). The military commitment in Syria was supported by the French public even before the attacks in November 2015. In a poll published in September 2015, 56 percent of the respondents were in favour of deploying ground troops (cf. L´express 2015). After the attacks, 62 percent of the respondents in a different poll approved the military intervention in Syria (cf. Le Parisien 2015). However, the form of the intervention (ground troops or airstrikes) was not specified and the respondents were most likely referring to the airstrikes that Hollande had announced.

With view to Roe's classification, the French case amounts to a full "active securitization" (2008: 633), which is supported by both the public as well as the legislative. Moreover, in the case of macro-securitization, one also has to consider the international audience. The fact that security acts, such as the reintroduction of border controls, were approved by the other members of the European Union indicates that the WoT framing was accepted, hence legitimatising the measures. In the subsequent section, we will illustrate how the dual audience's acceptance has been obtained discursively.

Securitizing moves in the French discourse

The analysis of the French discourse, after the Paris attacks of November 2015, reveals a clear attempt by the French government to securitize the issue. All in all, the speech acts communicate an extreme urgency that is stressed many times.

The "way out" (Buzan et al. 1998: 33) is presented in detail by the various concrete emergency measures that are announced in the statements. A few strands of arguments stand out when we take a closer look at the securitizing moves performed by the French securitizing actors. The first one is the striking presentation of the terrorist attacks as acts of war (see also Bogain 2017). President Hollande went on national TV the first time while the attacks were still on-going. When he informed the public about the state of emergency, on this occasion, he spoke of the terrorists as "criminals" (Hollande 2015b).

In a statement issued just one day after the attacks, President Hollande introduced the WoT rhetoric:

> *...what happened yesterday in Paris at Stain-Denis near the Stade de France is an act of war and faced with war, the country has to take the appropriate action. It's an act of war committed by a terrorist army, Daesh, a jihadist army, against France, against the values that we defend in the entire world, against who we are, a free country that speaks to the whole world. It's an act of war that was prepared, organised, planned from the exterior, with internal collusion. (Hollande 2015$_a$).*

In his speech before both houses of parliament two days later, Hollande (2015b) repeated this claim, which Prime Minister Valls also supported in a TV interview the day after the attacks (cf. Valls 2015$_a$).

Faced with these "acts of war," President Hollande (2015$_c$) as well as Foreign Minister Laurent Fabius (2015) called for unity and calm ("sang-froid"). Like Bush in 2001, Hollande draws the conclusion that France is facing a new type of war and enemy and calls for new ways of dealing with this "emergency":

> *But this is a different kind of war; we are facing a new kind of adversary. A constitutional scheme is needed to deal with this emergency. (Hollande 2015$_c$)*

However, it remains unclear how this "war" is different from the one that — purportedly — started fourteen years ago, with 11 September 2001. Even though France had not been struck by terror on such a large scale before, the phenomenon of Islamic Terrorism is hardly new, considering France experienced

different forms of Islamic terrorism from the 1980s onward (cf. Rieker 2017: 134). It is, therefore, remarkable that the French president chose to describe it in such a way.

The second strand of argument is related to the depiction of the securitizing subject, the entity that (allegedly) poses an existential threat to the referent object. Unlike in the WoT discourse surrounding the Bush administration', in which the enemy remained diffuse, the French administration explicitly and repeatedly names ISIS as the enemy that needs to be fought and eliminated (cf. Hollande 2015c; Valls 2015b). On the one hand, the state-like qualities of ISIS are stressed when speaking about a "jihadist army" (Hollande 2015c). The terrorist threat is linked to certain regions such as Iraq and Syria, which Hollande calls "the largest breeding ground for terrorists that the world has ever known" (Hollande 2015c; see also Valls 2015b), but also to the Sahel and Central Africa (cf. Le Drian 2016). Yet, the states themselves are *not* described as 'rogue states', but as victims of terrorism themselves. Thus, terrorism can be interpreted as the enemy of statehood itself. Therefore, according to Hollande, the interventions in Mali and Iraq became necessary to fight the terrorists' destruction of state sovereignty (cf. Hollande 2015c). On the other hand, analogous to the US discourse following 9/11, the enemy is described as essentially barbaric and uncivilised, thus fundamentally different from the Self. This essentialisation is represented in Hollande's statement that "[i]t cannot be said that we are engaged in a war of civilizations, for these assassins do not represent one" (Hollande 2015c). The terrorists are contemptuously depicted as "coward murderers" and "barbarians" (Hollande 2015c).

While Hollande portrayed France as existentially threatened, he added a global dimension by declaring: "[w]e are in a war against jihadist terrorism that threatens the entire world, not just France (Hollande 2015c.; see also Fabius 2015). The reactions to the attacks, such as the illumination of many European landmarks in the colour of the French flag as well as the statements of world leader, highlighted the (perceived) international dimension of the attacks. US President Obama strengthened this perception on an international level by stating:

> *This is an attack not just on Paris, it's an attack not just on the people of France, but this is an attack on all of humanity*

> *and the universal values that we share. (Obama 2015)*

This notion was repeated by President Hollande three days later, with a stronger emphasis on France's exceptionalism:

> *And the 'Tricolor' of the French flag has adorned the most famous landmarks, reminding us that France has always been a beacon of humankind. And that when it is attacked, the whole world is thrown for a while into a shadow. (Hollande 2015c)*

France has been attacked because it embodies certain values, "[w]hat we are defending is our homeland, but it's much more than that. It's the values of humanity" (Hollande 2015a); France and its whole way of life, its *l'art de vivre*, its love of culture, sport and celebrations, its diversity, are at stake:

> *On Friday, the terrorists' target was France as a whole. France, which values life, culture, sports, celebrations. France, which makes no distinction as to color, origin, background, religion. The France that the assassins wanted to kill was that of its young people in all their diversity. [...] What the terrorists were attacking was the France that is open to the world. Among the victims were several dozen of our foreign friends, representing 19 different nationalities. (Hollande 2015c)*

Prime Minister Manuel Valls used the same rhetorical patterns when he addressed the French Senat on 20 November 2015 and the parliament on 25 November 2015. His statement also repeated other strands of arguments described above, as he called the conflict a 'war' the terrorists 'barbarians' (Valls 2015c).

The rhetoric and argumentation used by the French actors fits perfectly into the macro-securitization of the WoT: No country is alone in the war against jihadist terrorism. Moreover, "the GWoT tries to embrace in its self-understanding 99.9 per cent of the global population: all civilised or wanting-to-be-civilised people (all but the terrorists themselves)" (Buzan and Wæver 2009: 264-265). The young, open-minded and sophisticated France described by Hollande and Valls is the complete opposite of the uncivilised barbarism which is ascribed to the terrorists. The assassins are linked to ISIS, which itself is described as being centred in Syria, and can, thus, be characterized as an

external threat. Nevertheless, Hollande concedes that at least some of the perpetrators were French nationals: "It hurts to say it, but we know that these were French people who killed other French people on Friday" (Hollande 2015c). However, the French President did not use this remark as a starting point to dwell on political or social reasons (such as the failed integration policy in France) or structures that might lead to the radicalisation of young French citizens, instead depicting them as isolated cases of criminal minds who do not really belong to France. "Living here in our land are individuals who start out by committing crimes, become radicalized, and go on to become terrorists" (Hollande 2015c). Consequently, Hollande called for the possibility to strip terrorists of their French nationality, even if they were born in France. While the description of the enemy as a well-organised army on the one hand and uncivilised on the other seems contradictory, in the context of securitization it permits the construction of a highly dangerous foe which needs to be eliminated at all costs (cf. Jackson 2005: 67). The construction of ISIS as a "foreign other" paves the way for counterterror measures on foreign territory with military means. The ascribed high degree of organisation multiplies the threat, and the term "army" perfectly fits into the narrative of the WoT; the depiction of the enemy as "barbaric" and devoid of any culture is necessary to fundamentally separate the enemy from the referent object that represents liberal values. In this context, the proclaimed necessity for *total destruction of the foe* (and far-reaching emergency measures) in order to ensure the survival of the referent object becomes clear. In his address to both chambers of the French parliament on 16 November 2015, Hollande made use of this kind of argument in a very pronounced manner. Several times during his speech, he spoke of the necessity "to destroy ISIS" (Hollande 2015c). Renouncing the possibility to contain ISIS, he declared "[t]here is no question of containing it. This organization must be destroyed" (Hollande 2015c). This resembles Bush's argument that containment is not an option in the WoT. In the following section, we will summarise our findings and discuss the similarities and differences between the US and the French case.

Discussion

Overall, we note that there is indeed a list of measures taken by France that can be subsumed under the Copenhagen School's theoretical term of 'emergency or extraordinary measures'. With regard to the French discourse after the November 2015 attacks in Paris, there are various speech acts that constitute securitizing moves. Thus, like the Bush administration, the French government defined the situation as a '*war*' and points to the conflict as posing a new, unprecedented kind of war.

This result indicates that the element of 'war' is adopted from the macro-securitization. However, even though the total destruction of the enemy is announced in both cases, there is little orientation toward 'worst-case scenarios' in the French case. While the enemy is still portrayed as foreign, with a clear geographical centre in the war zones of Syria and Iraq, the foes of the Bush administration are more diffuse, but also more broad, encompassing 'terrorists' as well as 'rogue states' in different world regions. While both governments proclaim to 'destroy' the enemies and thus eliminate all danger emanating from them, the Bush administration's securitizing moves go further by extremely dramatizing the situation, mostly by way of using worst-case scenarios that function to elevate the perceived level of threat. Correspondingly, the enacted emergency measures that are justified through each securitization differ in a substantial way: while Bush conducts a foreign policy of 'regime change' (the Iraq War 2003), the French military actions enacted in the process of the securitization in France amount to little more than symbolic bombings in Syria and Iraq. Moreover, the strengthening of the executive power at the expense of the legislative is much more profound in the US than in France. While the (institutionally much stronger) US Congress relinquished its power early on with the "use of force resolution" in 2002 and handed the Bush administration a *carte blanche* to break international law by starting the Iraq war, the French *Assemblée nationale* (which is usually weaker) held its own by opposing the constitutional changes that might have damaged international law.

Regarding the institutionalisation of securitizations, the repeatedly extended state of emergency and the new anti-terror laws in France show a parallel development to the US. The

institutionalisation, however, is not as far reaching as in the US, where securitization became permanent by way of creating the Department of Homeland Security. France's new law, in contrast, has a built-in 'expiration date', thus showing more reluctance to completely institutionalise its state of emergency.

On a macro-level, it shows that, against all odds, politicians in 2015, 14 years after 9/11, still proclaim to 'destroy' their terrorist enemies once and for all. Overall, the temptation of using the WoT narrative in order to stabilize the own identity and to justify violence against the out-group is strong (cf. Podvornaia 2013:78). Reacting in this way to Islamist terrorism is not limited to a particular country or bound to a particular national culture, but rather widespread. The narrative draws on well-established conceptions of the other, thus making the logic of the narrative easily accessible for a broad audience. By witnessing the events of 9/11 and the reactions in its aftermath, audiences seem to have been primed and new instances of terrorism can initiate a cascade all too familiar from past occasions; successful securitizing moves and emergency measures in the area of domestic politics as well as with view to security and foreign policies. The institutionalisation of the WoT and the embedment of national and/or regional securitizations of different forms of terrorism that can be observed today fit quite well into the macro-securitization framework that has been outlined above.

However, comparing the two cases also shows shifts in the macro-securitization itself. While the 'original' war on terror was also coined in religious terms and emphasized violent foreign policy actions, the French securitization did not include a dominant depiction of terrorists as unfaithful, nor was the foreign policy response as strong as in the US case. The debate focused less on pre-emptive strikes and more on dealing with the alien terrorist within and, hence, the surveillance inside the country. This shows the adaption, as well as, the re-interpretation and re-construction of the macro-framework in the specific French circumstances. While one can observe these adaptations to the domestic context on the one hand, on the other hand, the findings indicate that given the facilitating conditions of the attacks in the own country, it was easy to link them to the macro-framework of the WoT. This indicates a strong, international allure of this specific macro-securitization.

Conclusion

What follows from these findings? First of all, it shows the dangers of securitizing terrorism on the domestic level. The use of the narrative allows denying certain individuals to be "real French citizens" and, in the end, of being fully human (cf. Podvornaia 2013: 89). The self-other relations are reinforced and due to the ongoing state of emergency, racist practices resulting from this discourse are facilitated. Thus, a meaningful debate about underlying problems leading to terrorist actions (as well as about structural violence that might precede the terrorist one) is made impossible. The French case adds to the dangerous precedents of blurring the sensitive line between 'emergency measures' and 'normal politics'.

On a theoretical level, it shows that the macro-securitization framework disposes over certain flexibility, as it allows linking other securitizations, such as migration and open boarders in the French case, to the macro-level. Further research on macro-securitization should focus on which domestic securitizations are linked to the macro-framework of the WoT, and how. Similarly, investigation into the translation of the macro- to the micro-level framework would be fruitful. One aspect that could be especially productive in this context is; how dependent on historical domestic securitizations and concepts of terrorism is the successful implementation of the WoT? In other words, could the fact the terrorism in France has been seen as a threat stemming from Northern Africa, since the Algerian War, act as a facilitating condition in the adaption of the macro-securitization of the WoT? Furthermore, are countries that have established different narratives about what terrorism is (like German with the Red Army Fraction or Spain with ETA), more resilient to this framing? We think that investigating and comparing the European reactions to attacks in these ways might produce benefits on two levels. On the empirical level, it will add to our insight of the different securitization and hence reactions of European states to 'terrorist' attacks. On the theoretical level, it allows for further integrating more recent theoretical approaches, such as Stritzel (2011), with the Copenhagen School, contributing to our understanding of securitization on the domestic, as well as, on the international level.

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ISDS Regimes and Democratic Practice: Creating Conflict of Interests between Governments, Investors and Local Populations

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Abstract

The recent debate over the Investor-State Dispute Settlement (ISDS) regimes of international arbitration has resulted in concerted efforts aimed mainly at protecting the rights of states to regulate, improving transparency of proceedings and eliminating inconsistency in decision making of the tribunals. While the existing scholarly work frequently addresses issues of the relationship between the existing investment regimes and good governance in general, increased attention is rarely paid to the effects that investment arbitration has on democratic practice. The article applies an "action-based" approach to democracy, in order to analyse the role that the ISDS regimes play in exacerbating conflicts between the local populations, foreign investors and governments. The analysis leads to a conclusion that the ISDS regimes create incentives for the governments and foreign investors to disregard sound democratic practice. The article represents an attempt to move the discussion about the ISDS regimes away from the question of legitimacy of the regimes to the question of the impacts that the regimes have in practice.

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Introduction

Investor-state dispute settlement (ISDS) is a mechanism of international arbitration that enables foreign investors to sue host countries in front of an international tribunal in cases where an international investment agreement has been breached. The rationalization for these regimes is based on the following two assumptions: (1) the neoliberal theory of development, which states that foreign direct investment (FDI) is the main driver of development; and (2) the so-called "home bias" hypothesis, which claims that the domestic court systems will disproportionately favour the home governments against foreign investors. The ISDS regimes are a logical consequence of these two assumptions. The home bias of the courts is eliminated by allowing the foreign investors to bring claims against states in front of an international tribunal and the foreign investment is stimulated by eliminating the fear of arbitrary expropriation.

This system of investment arbitration has recently come under challenge. In the last decade, we have seen a growing amount of scholarly work focusing on investor-state dispute settlement. This surge of interest in regimes of international investment arbitration has been a result of several high-profile cases[1] and explicit concerns of some countries related to the issues of sovereignty, transparency, and inconsistency (Brocková 2016) of the tribunal decisions. In the case of some countries[2], these concerns have led as far as withdrawing from the International Centre for Settlement of Investment Disputes (ICSID) and terminating or renegotiating many of their investment agreements. While most other countries (and trading blocs) have not gone as far, they have nonetheless revaluated their positions towards investment arbitration in the last decade, typically leading to efforts at modernizing their stock of investment treaties by adopting a new generation of bilateral investment treaties (BITs). This emerging debate focused on the reform of the ISDS regimes and bolstering their legitimacy has concentrated mainly on the relationship between the states and the investors, sometimes ignoring the impact that the ISDS regimes can have on democratic practice.

1 Such as *Occidental v. Ecuador, Vattenfall v. Germany, Metalclad v. Mexico*, or the so-called "Argentinian cases" like *CMS v. Argentina and Enron v. Argentina*.

2 This applies in various degrees to Ecuador, Bolivia, Venezuela, South Africa and Indonesia.

This article will be using Cotula´s (2017) framework for analysing interactions between the regimes of investment arbitration and democratic practice. This theoretical framework differentiates between the "rules-based" and "action-based" approach to democracy. The "rules-based" approach is mostly concerned with democratic institutions. It is focused on representative organs and democratic procedures within institutions and their functioning. This approach sees any action taken by a representative organ within a given legal framework as democratic (Cotula 2017: 355-358). The second approach is broader and involves an element of popular pressure and local democracy. Democratic practice in this framework involves a pattern of conflict and compromise between the government and the local populations of the country. This approach to democracy is sometimes called "action-based" and focuses more on practice (Cotula 2017: 355-358). The existing scholarly literature can be most often placed within the framework of the "rules-based" approach. I, however, will be analysing the effects of investment arbitration on democratic practice within the "action-based" framework.

The approach of the article towards the subject is utilitarian, in the sense that I will not be looking at whether the ISDS regimes are democratic in themselves, but rather trying to establish whether some of the results it produces conform to democratic theory. The approach represents an attempt to move the ISDS discussion away from the complicated debate over the legitimacy of the regimes, towards an analysis of their real-life impact. The goal of the article is to show that the current system of ISDS contributes to the defects in democratic practice, while at the same time presents an opportunity to address these defects.

In order to accomplish the goal stated in the previous paragraph, I will first review the existing scholarly literature concerned explicitly or implicitly with the issue of democracy, in relation to the ISDS regimes within the "rules-based" approach. In the second part of the article, I will apply the "action-based" approach to democracy to several mining conflicts in Colombia, which resulted in investment arbitration, in order to demonstrate the role of investment arbitration in democratic practice. This part will show two ways, in which investment arbitration has an influence on democratic practice. Firstly, it lacks incentives for the investor to conduct their activity in line with the interests of local populations. Secondly, it creates disincentives for the

state to regulate foreign investment in line with the interests of local populations. Within the "action-based" approach to democracy, terms "defects in democratic practice" or "negative impact on democratic practice" are to be understood as any outcomes that do not conform to the expressed positions of the local populations, or situations where the local populations are shut out from the decision-making process in matters that directly concern them.

Review of invesment arbitration research dealing with democracy

In this part of the article, I will take a closer look at how the issue of democracy is being dealt with in the existing academic and policy-oriented texts focused on the ISDS regimes. Dominant framework that informs most of the research into ISDS regimes sees states and the investors as the main actors. These two actors come into conflict on the level of investment arbitration in cases where the actions of the nation-states in regulating their investment environment are perceived by a foreign investor to be outside the scope of the powers accorded to states by international investment agreements.

This dominant framework of understanding centred on the dichotomy of states and investors is generally expressed in statements such as: "whereas some sing its praises as a method of protecting private property interests against improper government interference, others decry investment treaty arbitration (ITA) as biased against states" (Franck 2014: 12). When it comes to policy-oriented texts, this framework can be made visible in UNCTAD´s 2017 World Investment Report, which identifies "Promoting and Facilitating Investment" and "Safeguarding the Right to Regulate while Providing Protection" as two of the main areas of the IIA Reform effort (UNCTAD 2017: 126). On the level of states, a joint declaration of Bolivia, Venezuela and Nicaragua on the occasion of announcement of plans to withdraw from the ICSID Convention stated: "(We) emphatically reject the legal, media and diplomatic pressure of some multinationals that ... resist the sovereign rulings of countries, making threats and initiating suits in international arbitration" (quoted in Anderson: 2007).

This framework, which is present in most political writing

on the ISDS regimes does not lend itself to explicit analysis of the relationship between ISDS and democracy within the action-based framework. Most of the scholarly work on the topic is therefore done within the rules-based approach, which focuses on democratic institutions and their interaction with the regimes of investment arbitration. The concept that is central for these authors is the concept of the "right to regulate", as evidenced by its prominent place in academic research and policy-oriented texts. It is related to the issue of internal democratic deficit of the ISDS regimes, in so far as the states in question can be viewed as democratic. The research of the ISDS and the right of states to regulate is focused on the question of whether the ISDS regimes enable investors to block government regulatory measures. The right to regulate has been extensively addressed both in the academic texts (Henckels 2017, Korzun 2016, Giannakopoulos 2017) and policy-oriented texts (UNCTAD 2016, 2017). The research has led to a conclusion there the protection of the state's "right to regulate" needs to be made explicit in the IIAs, especially in areas such as environmental and consumer protection. This has led to tangible results in recent years, with the IIA treaties of the new generation[3] typically including explicit mentions of the "right to regulate" in public interest.

Within the framework of the right to regulate, the existing scholarly litereature is also concerned with the so-called "regulatory chill" phenomenon, which can also be seen in terms of the effects of investment arbitration on democratic practice. Regulatory chill represents an extension of the "right to regulate" concept. However, it is no longer concerned with the comparatively simple issue of *ability* of the state to regulate its investment environment, but rather with its *willingness* to regulate its investment environment in public interest. The question is not whether ISDS enables the investors to prevent government regulation through legal means, but whether the investors are able to use the threat of litigation to block such regulation. This represents an issue of democracy to the extent that the governments are democratically elected and, therefore, represent the population to a certain degree. Any negative impact that the ISDS regimes have on the willingness of the government to regulate can be seen as a negative impact on democratic practice.

3 See for example the EU-Canada Comprehensive Economic and Trade Agreement, China-Australia Free Trade Agreement, or the new United States-Mexico-Canada Agreement.

The most widely used definition of the regulatory chill is the one put forward by Tietjem and Baetens in their study of the impact of ISDS in TTIP for the Ministry of Foreign Affairs of Netherlands. They define regulatory chill as a situation in which "a state actor will fail to enact or enforce *bona fide* regulatory measures because of a perceived or actual threat of investment arbitration" (Tietjem, Baetens 2014: 68). Furthermore, they distinguish between (1) not drafting particular legislation in anticipation of arbitration, (2) chilling legislation upon awareness of arbitration risks, and (3) chilling legislation after the outcome of a specific dispute (Tietjem, Baetens 2014: 68). In other words, the ISDS can work as a deterrent against government regulation, including in the case of legitimate public interest measures.

Although the regulatory chill hypothesis is internally consistent and intellectually appealing, it is problematic on scientific grounds. The sciences simply don´t have reliable methodology to prove causes for absence of a phenomenon. The only way to confirm the hypothesis is to make careful and detailed case studies (Gros 2003). The conditions that need to be met for the hypothesis to be valid are: (1) the governments and the relevant government officials dealing with regulation need to be sufficiently aware of and familiar with the ISDS regimes and their implications; and (2) the governments and the relevant government officials need to take these considerations into account when regulating. Further research on this topic is undoubtedly necessary, but rests outside the scope of this paper.

There is one more element of democratic deficit of the ISDS regimes that the existent research addresses, namely the issue of transparency of the ISDS proceedings. The issue of transparency relates to democracy in the context of public oversight of the government policies. On the level of academic scholarship, it is widely recognized in the arena of international investment policy-making. UNCTAD cites transparency among the main issues of the ISDS regimes in all its major publications (UNCTAD 2016, 2017). The EU has already introduced full mandatory transparency of the arbitration process within the Comprehensive Economic and Trade Agreement (CETA) and is expected to push for the same in the case of the Transatlantic Trade and Investment Partnership (TTIP) (EU 2015). Some progress has also been made on the level of the investment courts, especially the ICSID. In 2008, the ICSID

Arbitration Rules have been amended to improve transparency of the proceedings among other things (Wong, Yackee 2010: 259-260). However, many cases remain subject to confidentiality, especially in cases of discontinued proceedings, where the transparency is subject to agreement of the parties. Both the governments and the investors often have good reasons to keep the details of the ISDS cases confidential. It is illustrative in this regard that when UNCTAD publishes the yearly World Investment Report, they always report the number of *known cases* (UNCTAD 2017:125) (italics mine).

This brief review of research concerned with the relationship between the ISDS and democracy shows that the existing literature deals in significant detail mainly with the "right to regulate" of democratic states applying a rules-based approach to democracy. In comparison, there has been less attention paid by the scholars to the effects that the ISDS regimes have on local democracy within the action-based approach to democracy. The following chapters aim expand the discussion on the relationship between ISDS and democracy to focus more on the aspect of local democracy.

ISDS regimes as a problem: local democracy

In this chapter, I will be analysing the ISDS regimes within the "action-based" approach to democracy. I will be therefore interested in how do the ISDS regimes affect the ability of population to influence the conduct of foreign investors and their governments. Between 2016-2018, Colombia has been subject of five new cases of ISDS having been filed by foreign mining companies against its government. What all five cases have in common is a strong element of local democracy at the beginning of the conflict that led to the foreign investor opting for ISDS arbitration. In the following paragraphs, I will use these cases to create a pattern of conflict that leads to ISDS cases. This pattern shows two ways in which the ISDS regimes create barriers for local populations to control their investment environment: (1) it creates a disincentive for the government to accede to demands of the local populations; and (2) it creates an insurance for the investors for activities that the local populations often view negatively. What we want to achieve with these cases is to highlight the interplay between local democracy, government action and investors filing for ISDS

arbitration. The paradox of the ISDS cases that will be presented here is that these are cases where the democratic practice is observed and the local populations manage to at least partly push through their demands. However, these cases highlight that observance of democratic practice results in punishing ISDS cases and the ability of investors to file these cases on an international level works as a partial disincentive for the investor to seek local support.

While there is existing research into the way the ISDS regimes affect processes on the level of the government in the case of the regulatory chill, there has been considerably less interest in what impact the ISDS regimes have on the way that the local democracy functions. We will demonstrate that the ISDS regimes create a rift between the interests of local populations and their governments in cases where the local populations come into conflict with foreign investors.

The five recent cases we will be looking at here are: (1) Cosigo Resources gold mine in Colombia[4]; (2) Glencore coal mine in Colombia[5]; (3) Eco Oro gold and silver mining concession in Páramos[6]; (4) Galway Gold operation in Páramos[7]; and (5) Red Eagle mine in Páramos[8]. These cases were filed between 2016-2018, and are currently pending.This is not problematic for this article, since we are not concerned with the results of these cases, rather with the interaction of the ability of investors to file these cases under current regimes and conditions, in particular the local democracy.

In 2001, Colombia implemented the Mining Code, which opened the door for foreign investors to develop massive mining projects in Colombia. This has brought a large amount of investment into Colombia, but also created an unprecedented amount of socio-environmental conflicts connected to activities of the mining companies. These conflicts are most often caused by the concerns of indigenous populations over the environmental impact of mining. In the subsequent years, these local populations have created a pressure on local and state authorities to stop mining in many regions of the country,

4 See *Cosigo Resources and others v. Colombia, 2016*. UNCITRAL.

5 See *Glencore International and C.I. Prodeco v. Colombia,* 2016. ICSID Case No. ARB/16/6.

6 See *Eco Oro v. Colombia*, 2016. ICSID Case No. ARB/16/41.

7 See *Galway Gold Inc. v. Republic of Colombia,* 2018. ICSID Case No. ARB/18/13.

8 See *Red Eagle Exploration Limited v. Republic of Colombia,* 2018. ICSID Case No. ARB/18/12.

going as far as organizing local referenda[9] against the mining projects[10]. In several cases, this pressure has resulted in halting of mining projects, either through local municipal decisions, or environmental legislation from the state. This has resulted in an increasing number of ISDS cases being filed against Colombia in relation to mining regulation. In some regions, the situation is more complicated. In Segovia for example, the local economy is based on traditional mining, which is disrupted by big mining companies. The opposition to foreign miners in these regions is based not on environmental, but more on economic and social grounds. These conflicts have been exarcebated by the government´s ban on traditional mining, which has resulted in strikes and violence in affected regions. However, I will not be attempting a holistic analysis of the mining conflicts, I will merely be constructing a base for creating a pattern, which will enable me to make relevant observations on the role of investment arbitration in these conflicts.

Since the early 2000s, the Canadian mining corporation Cosigo Resources has been prospecting the area of Yaigojé in the south eastern part of Colombia for mining potential. The company has also mounted a public relations campaign in order to gain the support of the local population for their mining activities. However, most of the local communities, associated on the ACIYA (Association of Indigenous Leaders of Yaigojé Apaporis) are against mining in the rainforest area, mostly on environmental grounds (Castro 2013). They managed to convince the Colombian government to declare the region a national park, which makes mining prohibited. The national park was established on 27th October 2009. However, two days later, the national geological authority issued a gold mining license for Cosigo. In 2011, the General Prosecutor's Office demanded that the mining concessions for the national park be annulled and in 2013, the National Mining Agency declared Cosigo's mining license to be expired and the mining concessions suspended. The miners then filed for injunction against the establishment of the national park area at the Constitutional Court, but the court ruled against the injunction in 2015 (Corte Constitucional 2015). This prompted Cosigo to file an ISDS case against the government based on the US-Colombia Trade Promotion

9 For example in relation to „La Colosa" mining project in Cajamarca.

10 These popular consultations have been restricted as a means to stop extractive projects by the ruling of the Constitutional Court from the 11th October 2018.

Agreement[11]. The argument of Cosigo is that the annulment of mining concessions amounts to indirect expropriation on the part of the Colombian government and thus constitutes a breach of the US-Colombia Trade Promotion Agreement. The award sought by Cosigo is 1,6 billion dollars mostly as compensation for future profits.[12] Without considering the legal merits of the case here, the filing of the ISDS case demonstrates how the environmentally motivated actions of the Colombian government, petitioned by local communities on sustainable development grounds, clashes with the investment activities of the foreign investors, leading to an ISDS case.

The second case is related to activities of the Glencore conglomerate in the coal mining industry in Colombia. The coal mining has been a major source of pollution in the Cesar region of Colombia for the last twenty years, having severe environmental impacts, most notably leading to forced resettlement of Boquerón, Plan Bonito, and El Hatillo communities in 2010 (Tan, Faundez 2017: 67). The Boqueron community has since been vocal in their opposition to coal mining in Cesar. (Torres et al. 2015). This particular case relates to the expansion of a mine in Calenturias owned by Prodeco, a subsidiary of Glencore. Although the expansion was authorised in 2016, on the back of the public opposition, the government sought to revoke parts of the concession for the mine in question, which led to Glencore filing for ISDS arbitration for an alleged breach of the Colombia-Switzerland BIT[13]. The claims arise out of the government's alleged unlawful interference with the coal concession contract.[14]

The last three cases are all related to mining activities of multinational mining companies in the Santander region in the protected area known as Páramo. The miners were able to secure a controversial exemption to mine silver and gold in parts of the Santurban Páramo during the 1990s. Since the beginning of the projects, a coalition of grassroots activists and local communities has been campaigning against mining in the Páramo on environmental grounds (Rodríguez-Salah

11 Colombia-US Trade Promotion Agreement, Col.-US, 2006. ratified in 2012, avialable at https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text.

12 For details, see http://investmentpolicyhub.unctad.org/ISDS/Details/726

13 Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Col.-Sw., 2006. ratified in 2009.

14 For details on the case see http://investmentpolicyhub.unctad.org/ISDS/Details/705

2018). The main concerns were related to water pollution and biodiversity. On the back of the popular opposition to mining in the previously protected areas, the Ministry of Environment and Sustainable Development adopted a resolution delineating the Santurban páramo as an area of special protection in 2014 (Ministerio de Ambiente 2014). In 2016, the Constitutional court definitively declared as illegal the mining activities in the Páramo of Colombia (Corte Constitucional 2016). The reaction of Eco Oro was to file a case with the ICSID in Washington. Eco Oro is claiming 764 million dollars in damages, and the main charges are once again related to indirect expropriation of the mining concession as a result of the decision of the constitutional court, with the aim of recuperating the losses and potential future profits. The case was filed under the Canada-Colombia FTA[15][16]. Galway Gold and Red Eagle, also Canadian miners, followed suit in 2018 with the same claims.

While the role of investment arbitration is not the main driver of the dynamics of these socio-environmental conflicts, these cases offer a good illustration of the relationship between investment arbitration and local democracy. By analysing these cases, it becomes clear that the relationship between investment arbitration and local democracy is conflictual. Based on these three cases, the following pattern of environmental conflict related to a mining related activity takes place (1) economic activity of a foreign investor is initiated; (2) the local communities perceive the activity as damaging on environmental ground consistent with sustainable development paradigm; (3) the local communities organize in order to achieve goals that are generally consistent with sustainable development; (4) the government bows to the popular pressure and enacts measures that limit or stop the investment activity; and (5) the transnational company sues the government for breach of the ISDS regime. Other cases (not limited to mining related conflicts in Colombia) that follow the same pattern, but are outside the scope of this article include *Occidental v. Ecuador*[17], *Metalclad v. Mexico*[18], *Dominion Minerals v. Panama*[19], *Glencore v. Bolivia*[20], and other.

15 For details, see http://investmentpolicyhub.unctad.org/ISDS/Details/756

16 Free Trade Agreement between Canada and the Republic of Colombia, Can.-Col., 2008. ratified in 2011.

17 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador,* 2006. (II) ICSID Case No. ARB/06/11.

18 *Metalclad Corporation v. The United Mexican States,* 1997. ICSID Case No. ARB(AF)/97/1.

19 *Dominion Minerals Corp. v. Republic of Panama,* 2016. ICSID Case No. ARB/16/13.

20 *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, 2016. PCA Case No. 2016-39.

The role of the ISDS regimes with regard to local democracy that these cases highlight is twofold: (1) they represent a potential punishment for governments when they put interests of the local populations ahead of the interests of the investors; and (2) they represent an insurance policy for the investors in cases where their interests are opposed by the local populations. The obvious paradox here is that in the analysed cases, local democracy was unltimately not hindered, since the local population was able to push through their demands. However, the pattern developed in the previous paragraph shows that the role that investment arbitration puts the arbitration regime in direct opposition to processes of direct democracy, effectively punishing the state for observing sound democratic practice. Moreover, the arbitration is a burde for the states irrespective of the result of the arbitration, with the costs of arbitration and legal representation rising steadily in the past decade.

It is important to stress that the ISDS regimes are not necessarily the main forces in environmental and social conflicts related to foreign investment. Indeed, the responsibility to assure that the investors conduct their activity in a way that is not opposed by the local populations rests on the shoulders of the government, who draft the investment contracts. Although the contracts usually include provisions requiring the investor to publish a sustainable development report and acquire local support for the project, this process is usually flawed, as shown by the 2017 report on the operations of Glencore in Latin America,[21] and as evidenced in the cases analysed previously. At the same time, the current architecture of the ISDS regimes is demonstrably conductive to the conflicts described in this chapter. While investment arbitration is clearly not the main factor in decision-making of the main actors, the role of investment arbitration as a threat to the government against acceding to demands of local populations opposed to investment activities and as an insurance for the investors is clear.

ISDS regimes as a solution: corporate responsibility standards

The last part of this chapter will be dedicated to an analysis of ways to mitigate these negative effects of the ISDS regimes in relation to local democracy. In other words, the question that

21 For details, see http://observadoresglencore.com/blog/informe-sombra/.

the next paragraphs will focus on is: how can the ISDS regimes change from being a part of the problem, to being a part of the solution?

The cases analysed in the previous chapter show that the base of the problem rests in the unwillingness or inability of the governments of democratic countries to bring the conduct of foreign investors in line with the interests of the local populations and the legal framework does not offer strong enough incentives for the investors to conduct their operations in concert with local populations. This is facilitated by the ISDS regimes through punishing the states when acting against the interests of investors and providing a way for the investors to seek compensation when they clash with the local populations. However, at the same time as being a part of the problem in the context of local democracy conflict, the ISDS also presents a potential platform for mitigating the local conflicts described in this and the previous chapter.

The way that the ISDS regimes can contribute to mitigating local conflicts between populations and investors is through a reform of the investment treaties that provide a basis for ISDS. More specifically, the reform effort needs to implement the concept of responsible investment. This concept actually represents one of the pillars of the UNCTAD´s IIA reform plan (UNCTAD 2017: 126), although it is not developed in detail. The concept of responsible investment is also central to the UNASUR efforts in establishing a new ISDS regimes for the Latin America with a permanent court (Patino 2017). The concept of responsible investment consists of incorporating into the IIAs a number of provisions and conditions that the investor needs to meet to have access to ISDS. These conditions would generally relate to sustainable development and democratic participation, since these often represent a basis for the local conflicts that these measures seek to mitigate. These provisions have the advantage of being a part of an international treaty and therefore would take precedence over the government contracts in terms of access to ISDS.

The problem that the concept of the responsible investment faces is the question of whether the structure of international investment regimes allows for the incorporating of such measures, while at same time retaining or increasing the levels of investment. It seems unrealistic to expect that this concept

could be established on the level of the BITs, because of the prevailing narrative of neoliberal development and the need to create as favourable conditions for the investors as possible, which creates a competitive framework that can often result in governments compromising on the level of regulation in an attempt to attract foreign investment.

However, this competitive framework is largely absent in multilateral negotiations. Since these treaties often include all regional players, the government do not face the problem of losing out on investment to their neighbours by applying the admittedly strict concept of corporate responsibility. Therefore, regional and supra-regional free trade agreements represent a platform where the concept of responsible investment can be successfully developed. Indeed, some regional treaties, such as the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol[22] already contain the so-called 'corporate responsibility' provision, which tasks foreign investors with conforming their investment activities with standards of sustainable development. This ought to bring the activities of investors more in line with interests of local populations by creating an added incentive for the investors to pay attention to the issues of local democracy and, therefore, limit the number of local conflicts which can result in ISDS litigation, as shown before.

We can therefore conclude that the best way to mitigate the negative effects of ISDS regimes on local democracy described previously is to incorporate the concept of responsible investment into multilateral investment treaties.

Conclusion

Recent decade has seen a large amount of work focused on legitimacy of the ISDS regimes. Comparatively, a significantly smaller portion of academic texts have been dedicated to the question of the impact that the ISDS regimes have on democratic practice outside the legal ramifications of the system.

Analysis of this impact within the "action-based" approach to democracy shows that cases of socio-environmental conflict, which can trigger investment arbitration proceedings, follow

22 Intra-MERCOSUR Cooperation and Facilitation Investment Protocol, 2017. available at https://investmentpolicyhub.unctad.org/Download/TreatyFile/5548.

a uniform pattern. This pattern shows that ISDS regimes can contribute to defect in democratic practice. This manifests itself in the form of an incentive for the executive power to disregard popular pressures, and a disincentive for the investors to consider the interests of local populations.

The analysis also shows that the possibilities to mitigate the effects of ISDS regimes on the willingness of the governments to regulate in public interest in the face of a potential litigation are limited. However, when it comes to limiting the negative impacts of the ISDS regimes on the ability of the local populations to push through their interests in relation to conduct of foreign investors, the concept of responsible investment applied to multilateral investment treaties offers the best opportunity.

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Reconciling after Transitional Justice: When Prosecutions are not Enough, the Case of Bosnia and Herzegovina

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Abstract

The concept and study of transitional justice has grown exponentially over the last decades. Since the Nuremberg and Tokyo trials after the end of the Second World War, there have been a number of attempts made across the globe to achieve justice for human rights violations (International Peace Institute 2013: 10). How these attempts at achieving justice impact whether or not societies reconcile, continues to be one of the key discussions taking place in a transitional justice discourse. One particular context where this debate continues to rage on is in Bosnia and Herzegovina, many scholars argue that the transitional justice process and mechanism employed in Bosnia and Herzegovina have not fostered inter-group reconciliation, but in fact caused more divisions. To this end, this article explores the context of transitional justice in Bosnia and Herzegovina from a unique perspective that focuses on the need for reconciliation and healing after transitional justice processes like war crime prosecutions. This article explores why the prosecuting of war criminals has not fostered reconciliation in Bosnia and Herzegovina and how the processes have divided Bosnian society further. Additionally, this article presents the idea of state-sponsored dialog sessions as a way of dealing with the past and moving beyond the divisions of retributive justice.

Key words:
justice; reconciliation; transitional justice; Bosnia and Herzegovina; trials; retributive justice; International Criminal Court for the Former Yugoslavia.

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Introduction

Societies emerging from a period of conflict have the arduous tasks of rebuilding damaged infrastructure, maintaining security, developing new institutions, and figuring how to deal with past atrocities. Dealing with the past is not only a legal question, but it is also a philosophical one as well. One of the mechanisms that have been used, in both international and domestic contexts to deal with past human rights abuses and atrocities, has been prosecutions. Some positive aspects of prosecutions are that they punish perpetrators, vindicate victims, extract the forensic truth, and help to establish the rule of law and respect for human rights in transitioning societies.

However, one major negative aspect of prosecutions is that they can also cause further divides in societies where there was violence along ethnic cleavages. Who to prosecute and for what becomes political, especially when there is competing narratives about how the atrocities began and why. This has been the case surrounding prosecutions following the 1992-1995 Bosnian War by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and domestic prosecutions in Bosnia and Herzegovina. For many in Bosnia and Herzegovina the path to justice and reconciliation has been a long and overwhelmingly exhaustive process. Regardless of the prosecutions in The Hague or the country's war crimes chamber many Bosnians feel disillusioned, angry, and cheated by the outcome. Now that the ICTY has officially closed, prosecuting war crimes did not bring healing or reconciliation to the Bosnian society and it actually had a negative impact on fostering better inter-ethnic relations. Prosecutions have left some Bosnians (Serbs in particular) feeling that their ethnic group has been treated unfairly or that crimes committed against their ethnic group did not receive equal justice compared to cases from other ethnic groups. On the other hand, some feel that the sentences handed down in The Hague or in the domestic courts were not long enough in relation to the crimes committed and not everyone who participated in the wartime atrocities has been brought to justice.

Needless to say, the current process of prosecuting former war criminals alone has not been enough to move Bosnia and Herzegovina forward from its daunting past and accomplish

inter-group reconciliation. There must be additional non-judicial processes used. I argue that state sponsored dialogue sessions are a mechanism that would be an effective way to deal with the past and help foster a new post-war narrative that is representative of all Bosnians and their wartime experiences. To explicate this topic further, this article first explores the notion of post-conflict societal reconciliation, then the nexus between reconciliation and retributive justices. After which, I then discuss the two primary processes that have been used to prosecute war crimes, the ICTY and the War Crimes Chamber of the Prosecutors Office of Bosnia and Herzegovina, and why they particularly have not fostered senses of reconciliation in Bosnian society. Finally, I will discuss and ruminate on the concept of state-sponsored dialogue sessions and they can best serve as an instrument to move Bosnia and Herzegovina forward.

Understanding the concept of reconciliation

In the aftermath of conflict or communal violence, societies often aim to address the wounds and issues of the past that led to conflict in the first place. This is what practitioners and peace scholars have come to term as reconciliation. Reconciliation is a complex term that has no one singular definition, it is pluralistic in meaning and varies from one society to the next. For instance, according to Clark (quoted in Bell: 2018) reconciliation largely involves the rebuilding of broken individual and communal relationships after conflict, that orients toward meaningful interaction and cooperation between former enemies. Reconciliation also means parties coming up with ways of how and what to remember from the past, and how these memories will impact the future of society. Similarly, Lederach (1997) explains that the process of reconciliation represents a place or a point of encounter where the concerns of both the past and the future meet. He further asserts that reconciliation, as an encounter, suggests that space for the acknowledgement of the past and envisioning the future is a necessary ingredient for reconfiguring the present. Some scholars argue that this process allows citizens with former hostilities to begin to trust each other again and commit to rebuilding relationships that foster positive interactions between them. However, some scholars see reconciliation as a means of former enemies living amongst each other without

hot conflict or violence. In this way Gibson (quoted in Chapman: 2009) offers a different sentimentality than the other authors earlier by asserting that reconciliation does not require that people accept and embrace one another, but only that they be willing to put up with whom they oppose. Put simply, members of society only need to co-exist with one another.

Bloomfield, Barnes and Huyseis (2003: 12) add to this discussion by explaining that it applies to everyone and not just a process for direct victims and perpetrators. The authors further assert that "the attitudes and beliefs that underpin violent conflict spread much more generally through a community and must be addressed at that broad level. So, while there is a crucial individual element to reconciliation, there is also a community-wide element that demands a questioning of the attitudes, prejudices and negative stereotypes that are developed about "the enemy during violent conflict". (Bloomfield, Barnes and Huyseis 2003: 12).

Under the guise of the community element that is mentioned above, I will focus my analysis in this paper on inter-group dynamics of reconciliation. What does the notion of inter-group reconciliation grapple with exactly? According to Stover and Weinstein (2004), inter-group level reconciliation involves the reconfiguration of identity, the revisiting of prior social roles, the search for a common identity, agreement about unifying memories and not myths, and development of collaborative relationships that allow for differences. In order to create some sort of common identity, there must first be a discussion about which narratives make it into a post-conflict society's national psyche. The stories of the once conflicting parties have to match and make sense collectively.

Along these lines, Auerbach (2009: 300) suggests that the process of reconciliation will only be completed if adversarial groups communicate their stories and publically form a common history. He further argues that the public narrative needs to consider positive and negative behaviors of both sides of the conflict and incorporate them into a common narrative for all (Auerbach 2009: 300). While processes at the ICTY and the Court of Bosnia and Herzegovina have yielded a plethora of facts and figures about the war, very few of them have made it into the common national narrative. This is quite evident in the rampant genocide denial that is often used by Bosnian Serb

politicians for political fodder. This rampant genocide denial continues to anger and vex Bosnian Muslims and Croats, which in turn fuels more distrust and anger.

Furthermore, to get a bit deeper, I would argue that for inter-group reconciliation to take place in Bosnia and Herzegovina there must be a process dedicated to socio-emotional reconciliation. Nadler and Nurit (2015: 98) maintain that this process focuses on the removal of threats posed to the conflict parties' identities due to their involvement in the conflict. The authors further posit that social psychological research on the role of emotions such as guilt, shame, hatred, humiliation, and vengeance in maintaining and escalating conflict and on the positive effects of defusing these feelings on ending conflicts members' sense of adequate identity can block or, if removed, facilitate reconciliation. In Bosnia at a national and collective level this has never happened; the processes dedicated to dealing with the past, have unfortunately only enforced feelings of guilt, hatred, shame, and resentment, fuelling competing narratives. According to Vukosavljević (2007), there is a strong need for deconstructing enemy images and overcoming "victimisation", which is a widespread (self-) perception in Bosnia and other Western Balkan countries where societies tend to label whole groups (nations) as either victims or perpetrators of violence. This is why I argue that a process like dialogue sessions can be helpful in understanding currently held images and identities, and how they can be shifted.

Connecting reconciliation and retributive justice: the pros and cons

Before moving forward to discuss the ICTY and Domestic Trials and their impacts on inter-group reconciliation in Bosnia and Herzegovina, I believe it is pertinent to have a general discussion on reconciliation and its links to retributive justice. When we consider the concept of reconciliation, we see it does not stand alone and often largely hinges upon notions of justice. Justice, like reconciliation, has different dimensions that happen in different time frames and developments across post-conflict societal contexts. Malek (2013) furthers these sentiments by arguing that reconciliation is a process that draws on truth, justice, and mercy to turn temporary peace into a lasting end to a conflict. These elements are representative as

to what transitional justice and their processes are designed for. Transitional justice is a field that has emerged within the last 35 years as a process and mechanism to help societies that were once in conflict establish a new social, political, and legal order that redresses the wrongs of the past and lays the foundation for the rule of law.

Transitional justice processes also serve as a means of aiding reconciliation processes by helping to establish the truth, assure justice, and help victims gain closure from the wrongs committed against them through state-sanctioned or communal violence. Seils (2017) adds to this discussion by noting that despite the complexity of reconciliation, transitional justice processes are capable of contributing to reconciliation through the outcomes and processes of discourse and participation. Additionally, Kriesberg (2007: 3) states that in post-conflict situations those who have suffered oppression and atrocities in the course of an intense struggle seek redress for the injustices they endured. He further maintains that justice like reconciliation is not a simple matter, since justice itself is multifaceted. Justice means different things to different people and often times societies have a difficult time trying to establish a means and method of justice agreed by everyone.

Another particular question that has arisen in transitional discourse also closely related to reconciliation is whether, or not, societies should seek peace or justice. The peace versus justice paradigm maintains that often times in post-conflict settings justice processes can be controversial and undermine peace. Proponents of the peace side of the debate claim that pursuing justice and accountability in an already tense environment may exacerbate inter-group conflict and undermine peace, while their opponents on the side for justice and accountability argue that long term peace is not sustainable without justice and accountability. Rigby (2001) notes that the peace versus justice debate comes down to a matter of "forgive and forget" past crimes or "persecute and punish" the perpetrators who committed the crimes.

One of the key debates that follow the peace versus justice debate is what type of mechanism and method of justice is appropriate to redress massive human rights crimes. One of the key methods that has been utilized across the world has been retributive justice. The paradigm of retributive justice

maintains that those who have committed crimes or who have again unfair advantages through their behavior should be punished. Maise (2004: para.4) similarly argues that retributive justice is backward-looking and that punishment is warranted as a response to a past event of injustice or wrongdoing. The author also maintains that it acts to reinforce rules that have been broken and balance the scales of justice (Maise 2004: para.4). Two of the key mechanisms of retributive justice used in transitional settings are trials and tribunals. "Trials and/or tribunals can take place on a domestic level or at an international level, they are designed to prosecute and punish perpetrators for their crimes" (Bell 2015: 4).

Some scholars support trials and tribunals as the primary way for post-conflict societies to move beyond that the dark shadows of conflict. It is often believed that one major pro concerning retributive justice and reconciliation is that punishing individuals helps in not blaming an entire group for committing atrocities. For instance, Kriesberg (2007: 4) maintains that for advancing reconciliation, punishing individuals for past violations of human rights is a way of identifying individual responsibility and avoiding attributing collective guilt, which may create new injustices and be a source of new resentments. This can be a major factor in helping to improve inter-group relations, when one group no longer sees another group as entirely responsible for their loss and suffering.

Another major benefit often attributed to retributive justice is that it allows for post-conflict societies to face the past, punish those involved, and lay the foundations for societies to move on with no "unfinished" business. Along these lines, Moghalu (as cited in Clark 2008: 332) maintains that "when justice is done, and seen to be done, it provides a catharsis for those physically or psychologically scarred by violations of international humanitarian law. In this regard, retributive justice can foster better inter-group relations, as deep-seated resentments — which are often key obstacles to reconciliation — are removed and people on different sides of the divide can feel that a clean slate has been provided for. Another major pro ascribed to retributive methods such as tribunals and trials is that they provided victims' families and communities an opportunity to feel in control and regain a sense of power that may have been lost as victims of war crimes and other atrocities

(McMorran 2003: para.6). McMorran (2003: para.6) argues that it is empowering for victims to stand up in a court of law and identify those who wronged them. The author further notes that a war crimes tribunal can also reveal forgotten or hidden atrocities to be retold by survivors, as well as a key way to hold war criminals to account for their crimes (McMorran 2003: para.6).

Now that the pros have been discussed concerning retributive justice what are some of the cons? One key weakness of retributive justice processes is that there is no guarantee that trials and tribunals will actually foster reconciliation. As noted above, it is hoped that these methods of retributive justice may help societies comes to grips with the past, but nothing can be assured. Just because the truth has been established forensically, it does not mean that it will defeat competing narratives of a conflict. For instance, currently the Bosnian Serbs, as a group, will not recognize the murdering of 8,000 men and boys in Srebrenica as an act of genocide committed by the Bosnian Serb forces. On the other hand, Bosnian Muslims do recognise it and seek to memorialize these murders as such. As will be discussed later, there is also continuous debate about what ethnic group played what role during the war, as to who was the aggressor and who was the defendant. To reiterate what I said earlier, facts do not always translate into a shared or common history, especially amongst groups with competing tales of victimization.

Another major con is that it is impossible for trials and tribunals, whether held domestically or internationally, to prosecute all those who participated in major human rights violations. Today in Bosnia and Herzegovina, many victims live beside those who committed atrocities during the war and have never been prosecuted. The notion that a trial or tribunal can address all post-conflict justice issues is a misguided one, because they simply cannot. Any such notion, sold by domestic or international tribunal officials may lead to victims feeling unsatisfied with the processes of justice and leave them feeling cheated. Mobekk (2005: 271) explains that reconciliation cannot be obtained by one transitional mechanism alone; and the process takes more time and effort than any time-restricted trial can achieve.

Another major con (arguably the key one) attributed to war crimes trials and tribunals is that they do not alleviate the

root causes of the conflict (McMorran 2003). The seemingly just punish the perpetrators for their crimes, but this does not always transform societies. McMorran (2003) argues that tribunals can fuel conflict, especially in multi-ethnic societies. Especially, cases of genocide, where those accused of war crimes are usually all from one particular ethnic group. To this specific group, a war crimes tribunal can appear to be an indictment on their whole ethnicity, not just those responsible (McMorran 2003). It is common to hear discussions from some in Bosnia and Herzegovina where blanket accusations about wartime atrocities were placed upon a whole group and not the individuals who have committed them.

Moreover, within the same vein Skaar (2013: 16) maintains that some scholars suggest that prosecuting perpetrators of human rights after periods of conflict may undermine peace and lead to renewed violence or an increase in repression. The author further maintains that many scholars also argue that "digging up the past in post conflict settings can trigger new tensions by provoking a backlash on the part of those to be prosecuted — and hence limit the possibilities for reconciliation" (Skaar 2013: 16). In addition, trials and tribunals there may not actually impact both individuals and groups the same way. Stover and Weinstein (2004: 18) argue that reconciliation must take place at the group level as well as at the individual level. The outcome of trials and tribunals may not translate into reconciliation on for an entire group, and definitely not between groups. Some individuals across groups may be gratified or feel vindicated, but that does not mean that a whole ethnic, political, or social group may feel the same.

Another key question that arises in transitional justice discourse, as it relates to trials and tribunals, is whether tribunals held outside of the particular context in which the crimes were committed can actually be effective in promoting reconciliation. Some scholars point to the cases of Bosnia and Herzegovina and the ICTY and argue that international justice has its limitations within domestic contexts. Clark (2008: 333) suggests that when mass crimes are committed, they impact whole societies. She also argues that it is whole societies who therefore must be involved as much as possible in the reconciliation process (Clark 2008: 333). Staub (As cited in Clark 2008: 33) maintains that "effective reconciliation requires engaging with and changes in a whole range of actors in a

society, from members of the population whose psychological orientation is the core to reconciliation, to national leaders who can shape policies, practices and institutions". Another major aspect to consider is that for transitional justice processes to be effective in fostering healing and reconciliation, there must be a sense of local ownership among the local population. Haider (2016: 9) maintains that for transitional justice initiatives to be effective local ownership of the processes are essential. For the reasons mentioned above, international trials and tribunals do not exactly afford local populations a sense of ownership over the processes. Haider (2016: 9) also argues that while considering universal standards for justice is important, local perceptions of just must also be considered. She further notes that while legal trials may honour the victims of gross human rights violations in neo-liberal/Western terms, it may not appropriate for all settings and cultures. I would argue that there is an important connection to what Haider says immediately above and that of what Nadler and Nurit (2015) mention concerning the socio-emotional aspects of different groups after a conflict, trials may stand as a way to hold perpetrators accountable, but they do not necessarily deal with the socio-emotional remnants of conflict in a way that helps different groups confront their negative images of one another. Trials can reinforce the shame, hurt, and bitterness. Additionally, after conflict, many groups that have been impacted by gross human rights violations or communal violence carry collective traumas and memories that trials or tribunals simply may not be able to address.

Complicated justice: the ICTY and domestic war crimes trials in Bosnia and Herzegovina their impacts on reconciliation

The war from 1992 to 1995 in Bosnia and Herzegovina undoubtedly changed the lives of many Bosnians forever. Fellow citizens of all ethnicities, religions, and creeds who had lived as neighbours and friends for decades became enemies as nationalist rhetoric from within and outside the country sought to tear relations apart. It has been estimated that more than 100,000 people perished, while millions of others had to flee their homes during the Bosnian War between 1992 to 1995. It has also been estimated that 20,000 to 50,000 women were brutally and systematically raped across Bosnia and Herzegovina (Turton 2017), while concentration camps were established for civilians on all sides of the conflict where they

were mistreated, starved, and beaten. Additionally, one of the worst atrocities that Europe had seen since the Holocaust occurred in early July of 1995, when more than 8,000 Bosnian Muslim men and boys were murdered by Bosnian Serb forces in act of genocide designed to cleanse Eastern Bosnia of all Muslims. These heinous crimes and atrocities committed in the name of this nationalistic rhetoric has rendered Bosnia and Herzegovina and its people wounded physically and emotionally. Twenty-three years after the war has ended, despite the information that gathered through the ICTY, domestic war crime trials, and a variety of other *ad hoc* locally based initiatives; Bosnia and Herzegovina is still struggling to come to grips with what happen and to develop a narrative of the war that all Bosnians can live with.

The topic of transitional justice in Bosnia and Herzegovina has been discussed to a point of *ad nauseam* for many of its citizens. Bell (2018b: 3) maintains that "many Bosnians are disillusioned by talk of justice and reconciliation and have lost faith, especially in the government to foster any form of transitional justice". The author further explains that in a country where many of the same political factions who jockeyed for war some 20 years ago are still relatively in power and where a plethora of development and economic issues exist, the possibility of any post-conflict justice and reconciliation seems improbable to most. As Bosnians continue to live with the past, while trying to move on with their lives, it is important to consider how the aforementioned processes of both international and domestic war crime trials have had on the process of inter group reconciliation. I would argue that the impact has been minimal and actually, as noted earlier has done more damage to ethnic relations than good. To this end, I will first discuss the international trials based at the ICTY in The Hague, Netherlands and then I will discuss the domestic trials prosecuted by the War Crimes Chamber of the Court of Bosnia and Herzegovina.

ICTY

The ICTY was a United Nations devised tribunal that was in operation from 1993-2017. The ICTY was the first international tribunal to be devised after World War II. The main goals of the ICTY were to try those individuals most responsible for heinous acts such as murder, torture, rape, enslavement, destruction

of property and other crimes listed in the Tribunal's Statute (United Nations International Criminal Tribunal for the Former Yugoslavia 2017a: para.15). By bringing perpetrators to trial, the Tribunal aimed to deter future crimes and yield justice to thousands of victims and their families, thereby contributing peace in Bosnia and Herzegovina and other Yugoslav States (UNICTY 2017a: para.15). Over its 24-year period the ICTY indicted 162 and sentenced 84 individuals, this process heard over 4,650 witness testimonies and yielded 2.5 million pages of transcript (UNICTY 2017b). I believe, as will be discussed further in this chapter, that while the ICTY's legacy is mixed, it can be said that there are clear achievements that should be celebrated. The main achievement is that justice was rendered justice on behalf of thousands of people, who without the process at the ICTY would have likely not had it. Along these lines, Zylber and Pernik "assert that the activity of the tribunal has contributed considerably to promoting and strengthening the rule of law and in ensuring individual accountability for mass atrocity crimes, both at the international level and domestically" (2016: 7).

However, despite these facts, the ICTY and its processes remain controversial for many Bosnians. Many Bosnians are unsure as to whether or not the processes rendered justice, let alone contributed towards reconciliation among amongst the three different ethnic groups. Stover and Weinstein (as cited in Bell 2018b) also offer some insight into the question of the justice and the legitimacy of the ICTY. The authors note that although the vast majority of witnesses they had interviewed supported war crimes trials, they were far less certain about whether justice had been rendered in the cases in which they testified. In addressing the witnesses, Stover and Weinstein (as cited in Bell 2018b: 57) write that, "Tribunal Justice, they said, was capricious, unpredictable, and inevitably incomplete: defendants could be acquitted; sentences could be trifling, even laughable, given the enormity of the crimes; and verdicts could be overturned". Beyond, this there are many scholars who argue that the ICTY's main purpose was not designed to promote reconciliation processes for all post-Yugoslav societies. As I noted earlier, it is extremely impossible for the war crime trials or tribunals to try all individuals, especially within an international context. The ICTY tried the most high-profile cases and the key individuals who orchestrated or executed war crimes, genocide, and crimes against humanity. The ICTY also was implicit in revealing facts about the war, which many victims, their families, and people

across that globe would have never otherwise known.

However, despite these aspects, this has not led to fostering domestic reconciliation within the local context in Bosnia and Herzegovina. There remains competing versions of victimhood and narratives surrounding the war. Kostić (2012) conducted a study in 2005 and 2010 that asked respondents about their views on transitional justice and whether or not they found their particular ethnic group responsible for the brunt of the war. His results were intriguing. For instance, when asked in 2005 if they agreed with the statement, "my people have fought only 'defensive wars,'" an overwhelming majority of Bosniaks (85.3%), Serbs (76.2%), and Croats (75.9%) strongly agreed (Kostić 2011: 655). Although the number of those participants strongly agreeing with this statement fell in 2010, especially among Bosnian Serb population where 54.7% agreed, the sentiment that members of their own community fought a defensive war remained consistent across the three ethnicities.

Kostić (2012) also maintains that during the hearings, there was a tendency for individuals to express interest in the trials dealing with war crimes against members of their own group, while choosing to ignore the trials where individuals belonging to their own groups were being prosecuted. These tendencies have reinforced ethnocentric narratives about the war that continue to persist today. When respondents in the same aforementioned study were asked whether or not the proceedings of the ICTY were completely fair, 30 percent of Muslims felt they totally agreed, compared to 11 percent of Croats and 4 percent of Serbs.

These sentiments expressed in Kostić's study are still entrenched in Bosnian social and political life today. Due to a lack of shared narrative and competing victimhood, the ICTY has left a bitter feud in Bosnian society that ethno-political elites have gladly taken advantage of and used for their own political gains. We can see this from the sentencing of wartime general Ratko Mladić in November of 2017, who personally oversaw the extermination of more than 8,000 Muslim boys and men in Srebrenica. Many Bosnian Serbs support still Mladić and even consider him a hero, whom they feel had been arrested on trumped up charges by The Hague. Mladić and others have recently been celebrated in public ways, for instance in the fall of 2018 a 3.5-metre-high mural monument depicting Ratko

Mladić uniformed and saluting, was installed in his Bosnian hometown Kalinovik (Makić 2018). The Serbian handball player Vlada Mandić, who erected the mural, told press outlets that he considered Mladić, who was convicted of genocide by The Hague Tribunal, to be a "Serb hero" (Makić 2018). In another instance, the former wartime president of the Republika Srpska (Bosnia and Herzegovina's Serb-dominated entity) Radovan Karadžić, who is also currently serving time in The Hague as well for his role in the 1995 genocide and other crimes, had a dorm dedicated to him in his honour in early 2016. Other leaders have held concerts, parades, and other public events, concerts in support of war criminals across Bosnia and Herzegovina as well. Each glorification serves as micro-aggression that further entrenches distrust and undermines the inter-group reconciliation process.

As noted above, the conception that international trials and tribunals can foster reconciliation is limited and is evident in the Bosnian context. Not only did the Tribunal not foster reconciliation, it fueled competing narratives and victimhood. Some of the key failures of this are also attributed to the lack of engagement with the local population in Bosnia and Herzegovina. Clark (2012) highlights some of these key failures by highlighting that by noting that one of the key issues was that there was not enough communication with local people, which left the ICTY as a poorly understood institution. Along these lines Gordy (cited in Ahmetašević 2015) maintains the tribunal and local courts never developed a clear idea of who their clientele never took enough of an interest in articulating or addressing the concerns of victims, or explaining to the local public what was being established and what it meant. This, according to her, then allowed local press junkets and media outlets to put their own spin on what was happening in The Hague. Media outlets in Bosnia and Herzegovina are largely ethno-politicized, so the information that many people were receiving was biased and reportedly favourable towards their particular ethnic group and their sentences. Some Bosnian political elites argued that the process in The Hague was forced by the international community and not something locally conceived of by Bosnians, therefore its rulings and mandate were illegitimate. Now that the ICTY mandate has ended, a lot of damage still remains in the fact everyday Bosnians remain distrustful of war crime trials in general. Many of the same sentiments that were present during the ICTY process were

mirrored in the domestic trials taking place on a daily basis. There remains a lingering mistrust for transitional justice processes.

Domestic courts

One of the tools that have led to war crime prosecutions in Bosnia and Herzegovina has been the War Crimes Chamber. The War Crimes Chamber in Bosnia and Herzegovina and the Special Department for War Crimes in the Prosecutor's Office was established in 2003, but did not become operational until 2005. The War Crimes Chamber was designed as part of the State court to try some of the most egregious crimes committed during the 1992-1995 Bosnian War. In 2008, a War Crimes strategy was also adopted; the overall aim of the strategy was to lay out a comprehensive process to prosecute the most complex and high-level cases within a seven-year time frame. However, war crime prosecutions have not kept pace within the time frame laid out in the strategy, leaving an already doubtful and sceptical nation as to whether or not it can trust its institutions to render justice where international courts have not.

One key issue has been that many Bosnians do not trust or respect their domestic institutions to render justice. The ongoing corruption and disrespect for the rule of law has played a major role in lessening the institutions credibility for fostering reconciliation. Not to mention that war crime cases are extremely backlogged with a Prosecutor's office that is ultimately unequipped to deal with them. According to a report released in 2013 by the United Nations Development Programme of Bosnia and Herzegovina some 60.3% of Bosnians did not trust their judicial system. Moreover, the Court of Bosnia and Herzegovina has been repeatedly attacked by politicians from the Republika Srpska that claim the Court proceedings single out Serbs, while Croats and Bosnian suspects go free. Bell (2018a: 3) explains that "the Republika Srpska administration continues to regularly question the authority of federal judicial institutions, including the country's Constitutional Court, State Court and Prosecutor's Office, and HJPC. He further presents that some political leaders publicly support war criminals, denying that genocidal conduct took place, and attending public events that rally for war criminals. It is these actions that collectively continue to display to the Bosnian public that there

is no interest in joint cooperation among its country's political elites to prosecute war crimes effectively so that victims may have access to equal and fair justice (Bell 2018a: 3). These actions by Bosnian political elites continue to undermine the process of justice in Bosnia and Herzegovina, and reinforce harmful inter-group narratives that perpetuate divisions.

Considering justice and reconciliation beyond retribution: the need for dialogue

Since it has been established that the retributive measures utilized have not worked, I believe that the only way for Bosnians to move forward is to utilize other processes that actually do bring people together to talk about the past and decide on a shared narrative about the war and a collective. Moreover, this is not to say that war crime trials should cease, because they should not. War crime trials remain an important part of reconciliation, in terms of establishing truth, holding perpetrators accountable and developing facts, but as I noted earlier, one mechanism is not enough to foster reconciliation in many post-conflict societies. The ultimate goal of transitional justice mechanism and the discussions at the heart of the reconciliation process are change. In the same vein, Fischer (2011: 419) explains that the notion of change depends on long-term processes that combine factual truth, narrative and dialogical truth in order to overcome polarized, one-sided and selective views on the past.

Moving on, non-judicial mechanisms have been attempted in Bosnia and Herzegovina, but largely by civil society actors and not the state. Mallinder (2013) points out that non-judicial transitional mechanisms have been attempted by civil society actors (ranging from establishing truth commissions to memorialization projects) have largely failed. This is largely due to the fact that there is little coordination among actors, including the State and very few resources to mobilize the public. Some projects have been led by organizations such as the Post Conflict Research Center, The Centre for Nonviolent Action based in Sarajevo and Belgrade, and the Youth for Human Rights Initiative. While these organizations have committed to fostering dialog and discussions about the war and justice, they are limited in their scope and outreach. For instance, one current initiative conducted by the Centre for Nonviolent

Action has been to bring veterans from all sides of the conflict into schools to discuss their stories, their opinions on justice, and reveal the value of putting your differences behind you in order to move forward (Foden 2018: 5). This largely came about as a result of a fear that continued prejudice and intergroup animosity could lead to an eventual return to conflict. The hope is that these sessions in schools help transform the attitudes of future generations about the war (Foden 2018: 5).

To address issues that the courts and the ICTY did not address, in 2010 Bosnian authorities commissioned a National Transitional Justice Strategy tasked with addressing any unfinished business from the war. The Strategy aimed to focus on five key non-judicial mechanisms: truth and fact-finding, reparations, rehabilitation, memorialisation, and institutional reform. From what has been discussed throughout this paper, it is clear that many of these processes are needed to move Bosnia and Herzegovina forward. However, the implementation of the Strategy failed due to lack of political will from both elected officials and the general public. Like the ICTY or the domestic trials, there was not enough outreach to inform citizens about the purpose and importance of implementing the strategy's measure.

Moreover, I would argue that the ultimate measures needed to move Bosnia and Herzegovina forward are truth-seeking ones. I do not necessarily mean that Bosnia and Herzegovina should have a truth commission, but I believe that establishing a concrete truth that moves outside of the area of forensics and more into the realm of narrative is important for the country to move on. While one could argue that truth commissions have great merit, I would argue that an established state-wide truth commission would not somehow yield more facts than the ICTY has or that which will effectively change Bosnians' current narratives from the war. Activists, journalists, and academics alike have come together to create a regional truth Commission called the Initiative for RECOM that aims to uncover all aspects of the Yugoslav Wars in a collective manner. While RECOM leaders and participants have garnered thousands of supporters across several Former Yugoslav states and have developed a Statue for the project, there seemingly has not been enough political and financial support to make it a reality.

Additionally, there is currently an initiative underway to

establish another truth commission in the Republika Srpska to establish additional facts and figures about the war and in particular about the abuse of Serbs in Sarajevo. This is the second commission established by leaders in the Serb-led entity; the first was established in 2004 to generate facts about what happened in Srebrenica in July of 1995. However, the report from these proceedings was rejected by the Republika Srpska Parliament because it was argued that the coverage of the atrocities was not comprehensive enough. According to a report by the Srpska Times (2018: para.1) "the Republika Srpska Parliament is of the opinion that for the sake of a comprehensive and truthful assessment of the events in and around Srebrenica in the period 1992-1995 and for the sake of strengthening mutual trust and tolerance between the peoples in BiH, it is necessary to form an independent international commission which would determine facts about sufferings of all peoples in that area and during that period of time in an objective and impartial manner." However, the new commission soon to be established in 2019 has been condemned within Bosnia and Herzegovina and by international experts. Rudić (2019: para.2) explains notes that thirty-one international experts on the conflicts in the former Yugoslavia have written an open letter arguing that the commissions set up by Republika Srpska to investigate war crimes in Srebrenica and abuses against Serbs in Sarajevo during the 1990s conflict resemble revisionism rather than a genuine effort to establish truth or facts.

Beyond a truth commission, I would argue that a key way to change narratives is a measure that focuses on rebuilding inter-group relationships,such-as community conferencing in the form of structured dialogue sessions. The notion of community conferencing and dialog sessions is a form of restorative justice. The concept of restorative justice at its core is designed to rebuild relationships and communities. While is dialog projects are happening in more unofficial capacities around Bosnia and Herzegovina, I argue that they may carry more weight if they were state-supported and state-sanctioned. While civil society can continue to work on these projects their resources and outreach is limited, as I have noted before. I also would argue that having the state at the centre of the process helps to show that governing institutions are also supporting the reconciliation and healing amongst the different groups. Moreover, I further argue that such mechanisms can be in the form of community conference or structured dialogue sessions,

which will allow citizens to come together and discuss their perceptions of the war, individualize guilt to those who have committed the crimes, decided on how and what to memorialize from the war, and what the future should look like. However, more importantly this is a process that allows citizens to take charge of their own healing process and to recreate narratives that go beyond the scope of the political wrangling and inter-group victimisation.

Dialogue expressly encourages and lays the foundations for inter-group reconciliation; it is not just about sitting around and talking about the past, it is also about challenging the way people talk, think, and communicate with one another. Dialogue requires self-reflection, spirit of inquiry and personal change to be present. In dialogue, there are no winners and losers. The aim of dialogue is to bridge communities, share perspectives, discover new ideas, and to challenge myths and half-truths (United Nations Development Programme 2009: 2-3). In this sense, one can argue that dialogue lays the foundations for socio-emotional reconciliation by bringing groups together to deal with the issues they have not dealt with due to being blocked by conflicting perspectives and narratives. Moreover, Pruitt and Kim (2004: 181) offer some great insight into how dialogue can change how former antagonists see one another. The authors assert that one key benefit of being in contact and dialoguing helps lift the veil of dehumanization. The authors additionally maintain that rather than seeing each other as evil and as one who enjoys inflicting pain upon one another, parties begin to see each other as fellow human beings who also suffers from the atrocities of the conflict (Pruitt and Kim 2004: 181). This "humanization" fosters each party's own empathy toward the other, creating an opportunity to include each other in both their moral communities; finally, the authors explain that contact and communication contributes to interpersonal attraction, and hence to the development of positive bonds (Pruitt and Kim 2004: 181).

One unique aspect of utilizing dialogue sessions is that they can be creatively and loosely designed to fit a more general context in Bosnia, whereas other mechanisms like a truth commissions are more formalised. As far as a design for such a project, there are many examples that can be employed from across the globe. For instance, following civil war in Sierrea Leone, a superordinate goals approach (SGA) that included dialogue

sessions to address and help community members focus on achieving common goals (Post 2019: 93). These approaches particularly aim to build social capital between disparate groups in a community (Post 2019: 93). These dialogue sessions brought together between 4-5 neighbouring villages, who elected representatives from each community to participate in the dialogues (Post2019: 93). The dialogues focused on how Sierra Leoneans are one people that can unite in common goals. Meetings particularly focus on to uniting people, reducing community tensions, and lay foundation for later talks and cooperation (Post 2019: 93). A model such as this is feasible to be develop by state actors in Bosnia and Herzegovina and promoted in both the Federation of Bosnia and Herzegovina and the Republika Srpska. This model would be cost effective, less complicated and not as politically controversial as designing a national truth commission. This model would also be an efficient way to promote national identity and challenge divisive ethno-political narratives. Additionally, this model could also be a unique way to collect information about attitudes and ideas concerning reconciliation from smaller communities across Bosnia and Herzegovina.

Another key example we can look to for fostering dialog are the community based Gacaca Courts in Rwanda following the 1994 genocide, their main task was to create dialogue and bring victims, perpetrators, and fellow citizens together to confront the past so that they could move on. In this way, I believe that dialogue can open the door to new understandings that move beyond the biases of media portrayals and the musings of political elites' the events surrounding the 1992-1995 war, the crimes committed, and the trials that have taken place. The Gacaca Courts brought everyday citizens who suffered together and let them air their grievances and tell their stories. Often times in Bosnia this has been the exact opposite; stories of victims across ethnic (groups)are told by NGOs and or Victim groups that may have an ethnic and political stance or as noted earlier high jacked by political elites. A process like Gacaca in Bosnia and Herzegovina would allow victims to tell their own stories in raw and genuine ways without being politicised.

However, one key aspect to consider is that if these open dialogue and community sessions would actively transform the way everyday citizens in Bosnia and Herzegovina thought about the war, and both the media and political elites would

have to shift their stances. Therefore, it begs the question as to whether or not Bosnian political elites and members of the media would ever support such an initiative. If one stops to consider the possibilities, the inter-ethnic squabbling over competing victimhood and the fairness of post- conflict justice remains a key issue that keeps the citizens of Bosnia and Herzegovina divided?Which therefore gives political elites and the media legitimacy and in turn keeps both groups employed and empowered; so where exactly is the incentive to create and support projects that aim to reduce inter-group hostilities and finally push for a national narrative regarding the 1992-1995 war?

Conclusion

This article aimed to explore to the concept of retributive justice and inter-group reconciliation through the context of Bosnia and Herzegovina. Throughout this article it was discussed that both the ICTY and the domestic trials — while necessary to individualize guilt, punish perpetrators, and establish the truth — did not foster reconciliation in the way of rebuilding relationships or even establishing a shared vision of the war and the war crime sentences that followed. The trials have led to more ethnic divisions furthered by political elites and media outlets. Finally, I propose that a key way to foster reconciliation is to move beyond the realm of retributive justice. It was noted that there have been attempts from civil society organisations to further non-judicial transitional justice mechanisms, but they have largely failed and so has the government National Transitional Justice Strategy. I argue that state-sanctioned dialogue sessions should be utilized, in order to help foster inter-group reconciliation by bringing people together to discuss the socio-emotional issues that that were not addressed through the tribunals in The Hague and domestic courts in Bosnia and Herzegovina. Bringing everyday citizens together to tackle issues surrounding the 1992-1995 war is important for creating ownership in the journey towards reconciliation that goes beyond the realm of retributive justice, it allows everyday citizens to create a new reality and narrative that is designed and driven by them and for them.

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