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Protecting National Interests through Non-Standard Institutional Frameworks: The Case of the International Commission on Missing Persons (ICMP)

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Abstract: This paper explores the success factors behind the International Commission on Missing Persons (ICMP), established in 1996 to address the issue of missing persons from the conflicts in the former Yugoslavia. The ICMP's mission has expanded to foster state cooperation and provide expert assistance in locating missing persons due to conflicts, human rights abuses, and disasters. This study hypothesises that the ICMP's success stems from the interplay of exogenous factors, such as shifts in international law and humanitarian paradigms, and endogenous factors, including its flexible institutional design and expert-driven approach. By dissecting the ICMP's structure and functions, this research underscores the importance of adaptability and expertise in the effective operation of international organisations. The ICMP's engagement in the Republic of Serbia and the territory of Kosovo provides insight into how non-standard institutional frameworks can navigate political intricacies to achieve significant humanitarian outcomes, demonstrating the crucial balance between national interests and global humanitarian commitments.

Keywords: missing persons, humanitarianism, sovereignty, international law, international organisations, Republic of Serbia, Kosovo, transitional justice, institutional design, financing of international organisations.

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Introduction

The International Commission on Missing Persons (ICMP) is an international organisation, albeit not the most well-known nor one that neatly fits into the traditional concept of an international organisation. Established in 1996 to account for the missing persons from the conflicts in former Yugoslavia, its tasks today are to enable the cooperation of states and other authorities in addressing the missing persons issue worldwide and to provide professional and expert assistance in searching for and identifying the missing persons in the contexts of armed conflict, human rights abuses, or other natural or man-made disasters (ICMP n.d.).

The 2014 Agreement on the Status and Functions of the International Commission on Missing Persons, Statute of the ICMP, counts ten signatory parties, including the Republic of Serbia and Kosovo[3]: Serbia ratified the Agreement in July 2017 (Official Gazette of the Republic of Serbia – International Treaties, n. 4/2017), and Priština accessed it in July 2023.[4] The matter of missing persons is one of the issues burdening relations between the Republic of Serbia and the territory of Kosovo. This particular issue is part of the EU-led negotiations between Belgrade and Priština, one of the latest achievements in that process being the Vučić-Kurti Declaration on Missing Persons from May 2023 (EEAS 2023).[5] Despite its significance, the missing persons issue often takes a backseat to the more prominent political debates regarding the legal position of Kosovo. Moreover, the membership of Priština in this international organisation has not stirred public debate, unlike the application for membership in the Council of Europe. Considering the joint membership of Belgrade and Priština in the ICMP, the gravity of the missing persons issue, and the EU's insistence on its resolution in the process of Serbia's accession to the EU, it is crucial to shed light on the nature and functions of the ICMP.

The impetus for this research lies in the fact that the success of international organisations such as the ICMP is not guaranteed and may not even be expected.[6]

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[3] This designation is without prejudice to positions on status and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence. This disclaimer is valid throughout the paper.

[4] Other parties to the Agreement are Afghanistan, Chile, Cyprus, Germany, Luxembourg, the Netherlands, Sweden, and the United Kingdom.

[5] For an overview of the negotiations between the Republic of Serbia and the territory of Kosovo under EU auspices, consult: Đukanović Dragan. 2013. "Odnosi između Beograda i Prištine: od tehničkog do političkog dijaloga". International Problems 65 (3): 365-385.

[6] It was as early as 2004 that Henry Schermers observed that "a certain aversion developed against the creation of new international organisations" (Schermers 2004, 7).

In the atmosphere of distrust towards international organisations (IO), when they "are no longer seen as the good guys of global governance that produce global public goods that states alone cannot furnish" because of the lack of accountability[7] and legitimacy crises (Peters 2016, 41; Collins and White 2010, 2), the ICMP managed to become a successful story marked by slow but constant progress. This success is even more intriguing, considering that the ICMP operates in the troublesome waters of emergencies with the central goal of providing humanitarian relief pertaining to the field of missing persons.[8]

This research hypothesises that the success of the ICMP is the result of the interplay between exogenous and endogenous factors. While the line of division between the two is not easily discerned in practice, we will rely on it for the sake of research precision. The relevant exogenous factor present at the time of establishing the ICMP in 1996 was the shift in the sovereignty paradigm. That shift produced a conversion in the understanding of international law and humanitarianism. These motions proved fertile ground for establishing new actors to implement a new set of values, with the ICMP being one of these actors. On the other hand, the ICMP was established as a soft international organisation, and its endogenous structure was flexible enough to accommodate the new paradigms. The push of the exogenous factors and the endogenous structure's flexibility enabled this organisation's success.

The article will be structured as follows: The second section will distil the elements of the ICMP's nascent period and present the exogenous factors that facilitated the establishment of the ICMP. The third section will explain endogenous elements of the ICMP (its institutional design and funding) to showcase how they

[7] Collins and White noted the "lack of accountability within particular institutions and regimes, normative and jurisdictional conflicts causing a fragmentation of the international legal order, and a growing awareness of the internal pathologies and ideological biases of the most dominant international institutions" (Collins and White 2010, 2). For an opposite opinion, see Daugirdas, Kristina, and Katerina Linos. 2023. "Are International Organisations Obsolete?". International Organisations Law Review 20 (3): 263–267.

[8] On the occasion of the International Conference "The Missing: An Agenda for the Future", held in the Hague in 2013, US Ambassador to OSCE Daniel Baer staunchly reiterated that the success of ICMP was not expected: "it could be easy to forget that most organisations don't make it this far, that organisational success doesn't come as a matter of course—it's not inevitable… the success of the organisation and its work couldn't have been predicted in the mid-90's." In Ambassador's words, this success materialised because of ICMP's dedicated leadership and staff; because of its effectiveness and its useful results that prompted further demand for its work; and because of the necessary support by States. In Ambassador's words, it was the "combination of people, purpose, and impact that has delivered such an impressive track record." (Ambassador Daniel Baer, 2013, 1)

affect the successful functioning of the ICMP. The fourth part concludes by returning to relations between the Republic of Serbia and the territory of Kosovo within the ambit of the ICMP.

Exogenous elements relevant to the establishment of the ICMP

Sovereignty revisited

Faith in the Organisation of the United Nations, founded to replace the defunct League of Nations and ensure world peace, security, and stability, started to decline very soon after its establishment.[9] The Cold War rivalry between the US and the USSR precluded effective collaboration in the Security Council (SC), the UN body primarily responsible for "maintaining international peace and security". Even more, it paralysed the Security Council for decades. The UN member states tried to remedy or at least ameliorate the situation by redistributing tasks and powers once accorded to the Security Council in favour of the General Assembly[10] and the Secretary-General.[11] These had a limited impact, and only the end of the Cold War enabled more substantive international cooperation. The end of the Cold War promised to be a turning point in the history of international relations. This end (or the new beginning?) is marked by different important factors, of which topical for this research are the shift in the understanding of the sovereignty of states and the pertinent revival of the activities of the Security Council.

The dominant position in the doctrine reveals that the shift from pre- to post-Cold War concepts has been heralded with the launch of "the negative vs. positive sovereignty theory". The leading characteristic of negative or Westphalian sovereignty is considered to be the protection of internal matters from external, international interference. On the other hand, positive sovereignty rests on the

[9] For the modern interpretation of the prohibition of the use of force see, e.g., Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, Nikolai Wessendorf, ed. The Charter of the United Nations: A Commentary, Volume I, II (3rdEdition). See also Corten, Olivier, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*. London: Hart Publishing, 2010. v–vi. *Bloomsbury Collections*. Web. 21 Sep. 2021.

[10] See, e.g., Christina Binder, Uniting for Peace Resolution (1950), Oxford Public International Law.

[11] See, e.g., Brian E. Urquhart, The Evolution of the Secretary General, pp. 15-32, James Cockayne, David M. Malone, Relations with the Security Council, 69-86 in Simon Chester ed. Secretary or General, The UN Secretary-General in World Politics, Cambridge University Press, 2007.

existence and respect of democratic principles and the rule of law in a state. In other words, sovereignty can no longer be used as an excuse for the violation of human rights in the territory of a state and cannot preclude external intervention, including a forcible one (Jackson 1990, 29).

In a nutshell, the concept of sovereignty has been reframed. Instead of being considered a state's right, it has been redefined in terms of responsibility towards its population in the first place and then towards the international community. When a state is unable or unwilling to fulfil its obligation, the international community has to step in and comply with its own responsibility.[12] In the climate of deep distrust towards military intervention without SC approval, and to balance the newborn concepts of sovereignty with external intervention, the concept of Responsibility to Protect was born.[13] Five years later, in 2010, the Secretary-General announced a New International Law "with four pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law".[14]

This shift in the sovereignty paradigm happened in parallel to the revival of the UN Security Council. However, as already presented, the landscape for Security

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[12] The humanitarian intervention, the concept of military action to save human lives, well known in classical writings and often used in the second half of the 19th century, was not acceptable for the great majority of states. They considered it to be in obvious contradiction to the principles enshrined in the Charter of the United Nations, inter alia, the principle of non-use of force.

[13] Under the heading "Responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity", UN member states unanimously approved the 2005 World Summit Outcome Document's following paragraphs:

"138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity." (UNGA Res. 60/01)

[14] Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, United Nations, March 2010, p. 3.

Council operations has been substantially transformed. New challenges to international peace and security have been born, such as terrorism, drug trafficking, and human trafficking. The old challenges have changed as well, the most dramatic being the change in the prevailing nature of armed conflicts (ICRC 2016a, 194).[15]

As a corollary, the situations that may, or even have to, trigger international intervention to protect peace and security had to be redefined (Blokker and Wessel 2005). The starting point was Article 39 of the Charter, which contains a threshold requirement for adopting binding measures under Chapter VII. Although neither of the concepts from Article 39 have been defined by the Charter—threat to the peace, breach of the peace, or act of aggression—the first one proved to be most eligible for the extensive interpretation in practice of the Security Council. Using the flexibility of the black letter, the Security Council expanded the concept of "threat to peace" to include, *inter alia*, the internal situations confined to a single territory or state, mostly internal armed conflicts, but also the situation of internal tensions and disturbances. Besides genocide, war crimes, ethnic cleansing, and crimes against humanity, other situations emerged that were considered a just cause to trigger intervention: "international terrorism, including a refusal to hand over terrorist suspects, proliferation of weapons of mass destruction and their means of delivery, violations of human rights law and violations of humanitarian law, piracy, organised crime, illicit trafficking in small arms and light weapons, and overturning of democratic" (De Wett and Wood 2022, para. 9; see also Paige 2019).

The shift from the consequences to the deep roots of threats to peace was obvious. In that context, it seemed logical, even natural, to make a radical shift in the international effort's purpose. Instead of keeping the peace, the main goal became much more ambitious: to provide peace by establishing or re-establishing a modern, positive sovereign state based on democratic principles, the rule of law, and respect for human rights in the once-war-torn and post-conflict societies.[16] To prevent crises' recurrence, this New Humanitarianism addresses, inter alia, ending impunity, providing recognition and redress to victims, fostering trust, and contributing to reconciliation.[17] Driven by inherently political goals, international

[15] At the time when the Security Council was established, 90% of world conflicts were international, i.e., conflicts fought between states. In the 1990s, 85% of all armed conflicts were intrastate wars, i.e., armed conflicts fought in the territory of one state (Themne and Wallensteen 2011).

[16] For the United Nation's "enormous and imprecise experiment in societal rehabilitation" see, e.g., Roland Paris, "Peacebuilding" pp. 479-507, in Tomas G. Weis, Sam Dawis ed., The Oxford Handbook on the United Nations.

[17] The whole new concept of transitional justice has been created in order to explain and define principles and guidelines for the (re)construction of war-torn societies. See, e.g., The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary

actors expanded their competence in various fields far beyond what was once considered the internal domain of the state, deeply encroaching on constitutional design, security issues, justice, and criminal justice in particular.[18] A full range of applicable tools was developed to cope with myriad deficits, among which are the lack of institutional independence within the justice sector, lack of domestic technical capacity, lack of material and financial resources, lack of official respect for human rights, and lack of security. Among the tools emerged international and internationalised courts empowered with a critical task: to end impunity for the atrocities committed and to bring the perpetrators to justice.

New Humanitarianism and Humanitarian Organisations

The position of and expectations from humanitarian organisations changed as well. The transformation began in the late 1980s and early 1990s under the moniker of new, political, or military humanitarianism and challenged their traditional goals and operating principles. Namely, the traditional goal of humanitarian organisations was to protect victims of armed conflict, both belligerents and civilian victims, and provide them relief. With New Humanitarianism, the focus from emergency relief has been shifted to coping with post-conflict building.

Humanitarian organisations were expected to play their part in the newly created humanitarian landscape and policies, including fighting impunity. Providing food, blankets, tents, water, sanitation, and medical care was considered even more

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General, (S/2011/634), available at https://reliefweb.int/report/world/rule-law-and-transitional-justice-conflict-and-post-conflict-societies-report-secreta-0 See also The EU's Policy Framework on support to transitional justice, 2015, https://www.coe-civ.eu/kh/the-eus-policy-framework-on-support-to-transitional-justice?tx_felogin_login%5Baction%5D=login&tx_felogin_login%5Bcontroller%5D=Login&cHash=446bf63cccabb23a727b5e260489bf08

[18] Responsibility to rebuild, envisaged as the third element of responsibility to protect in the report of the International Commission on State Intervention and Sovereignty, was not included in the paragraphs of the 2005 World Summit Outcome Document. The peacebuilding process was decoupled, and the Peacebuilding Commission was established with the aim to "propose integrated strategies for post-conflict peacebuilding and recovery" [...] and "focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict" (United Nations 2005). Nevertheless, the concept of responsibility to rebuild is highly debated in the theory, sometimes as a part of *jus post bellum*. See, e.g., Athanasios Strathopoulos, Post-Intervention Reconstruction and the Responsibility to Rebuild, Social Science, 2022, 11, 368. https://doi.org/ 10.3390/socsci11080368; Lary May, Responsibility to Rebuild and collective responsibility, in Jan Klabbers, Touko Piiparinen ed., Normative Pluralism and International Law, Exploring Global Governance, Cambridge University Press, 2013, pp. 323-339.

senseless if it was not preceded or followed by other measures, including robust, forceful ones (Barnett and Weiss 2008; Reiff 2002). Humanitarian organisations are expected to simultaneously implement humanitarian and development activities to be multi-functional, or "double-hatted".[19] However, this was far beyond the role provided by international humanitarian law for the so-called classical traditional Dunant's humanitarian organisations.

IHL humanitarian organisations are defined as "entities with a mission to prevent and/or alleviate human suffering in armed conflicts. They are usually involved in searching for, collecting, and transporting the wounded and sick, missing and dead; providing medical treatment to the wounded and sick; assisting prisoners of war; and assisting the civilian population through the provision of humanitarian relief" (Sassoli et al., n.d.). The relevant legal framework for the functioning of traditional humanitarian organisations can be found in the 1949 Geneva Convention. Common Article 3 to the 1949 Geneva Conventions and Article 9, common to the first three conventions, and Article 10 to Convention IV explicitly recognise that humanitarian organisations are legally entitled to offer to the warring parties of the conflict humanitarian activities known as the right of humanitarian initiative. According to *travaux préparatoires*, the founders of the Geneva Convention deliberately omitted to specify the concept of a humanitarian organisation entitled to the right of humanitarian initiative, apart from explicitly mentioning the International Committee of the Red Cross (ICRC).[20] They also wanted to leave open doors for international, national, non-governmental, and governmental organisations.

The liberal approach rooted in the Geneva Conventions regarding the legal status of humanitarian organisations entitled to the right of humanitarian initiative is followed by a more restrictive attitude regarding the right to humanitarian access to the victims and their *modus operandi* in the field. The right of humanitarian organisations to provide humanitarian relief and protection is, therefore, subject to the consent of the party concerned. Since 1949, the concept of consent has considerably evolved. Nowadays, it is considered that "where a Party is unable or unwilling to address the humanitarian need of such persons, international law requires it to respond positively to an offer by an impartial humanitarian organisation to do so in its place" (ICRC 2016b, 1173). The Geneva Conventions also require a humanitarian organisation offering humanitarian assistance to be

[19] IRRC, 2021, p.3.

[20] For the roots of the ICRC in the 1864 Geneva Convention, consult: Knežević-Predić Vesna. 2015. "Zaštita žrtava oružanih sukoba: 150 godina Ženevkse konvencije za poboljšanje sudbine ranjenika na bojnom polju". *Zbornik radova Pravnog fakulteta u Nišu* 54 (70): 59-79.

impartial. Humanitarian organisations are expected not to make any discrimination "as to nationality, race, religious beliefs, class, or political opinions. They should endeavour only to "relieve suffering, giving priority to the most urgent cases of distress" of potential beneficiaries (Pictet, 1979). Although it is not explicitly mentioned in Articles 9 and 10 of the Geneva Conventions, the principle of neutrality is implied in the concept of humanitarian organisations authorised with the right to humanitarian initiative. Neutrality refers to the attitude to be adopted vis-à-vis the parties to the armed conflict: "In order to continue to enjoy the confidence of all,… may not take sides in hostilities or engage at any time in controversies of a political, racial, religious, or ideological nature" (Pictet, 1979).

Humanitarian organisations are authorised to provide protection and assistance to the victims of armed conflict. Although conventions do not provide the definition of the terms used or the exhaustive list of activities that are covered by them, it is broadly accepted that the "concept of 'protection' encompasses all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant body of law, including international humanitarian law, international human rights law, and refugee law" (European Commission 2016, 5). Commentaries to the Geneva Conventions further specify that "in the context of humanitarian law, 'protection activities' refer to all activities that seek to ensure that the authorities and other relevant actors fulfil their obligations to uphold the rights of individuals affected by the armed conflict (beyond their mere survival)" (ICRC 2016b, 1143, 1144). Assistance activities encompass "all activities, services, and delivery of goods, carried out primarily in the fields of health, water, habitat (the creation of a sustainably living environment), and economic security (defined by the ICRC as "the condition of an individual, household, or community that is able to cover its essential needs and unavoidable expenditures in a sustainable manner, according to its cultural standards") (ICRC 2016b, 1149). One of the explicitly mentioned activities in legal texts pertains to the missing persons, or, in the words of Additional Protocol I, the right of the families to know the fate of their relatives (Henckaerts and Doswald-Beck 2005). Undoubtedly, the primary responsibility for implementing these international obligations lies with the parties to the conflict, and only the auxiliary role has been reserved for international organisations. However, this turns out to be the starting point for the search for a new kind of humanitarian organisation.

Through their work in the midst of conflict areas and the people they engaged, they were likely to witness brutal crimes. Their testimony and the information they collect might be necessary for ending impunity and bringing the perpetrators to justice. Such expectations and the new landscape challenged their traditional operating principles as they are provided in international humanitarian law:

consent of the state concerned, impartiality, neutrality, and independence. Some traditional humanitarian organisations, such as the quintessential International Committee of the Red Cross, found themselves in a complicated situation. If humanitarian organisations must dismantle those principles firmly embedded in international law and created based on more than a century-long experience, they risk not being perceived as neutral. Consequently, they will become targets of attack by warring parties and lose their ability to provide humanitarian protection to the victims of armed conflict. The dilemma had to be solved. The opportunity to be solved was offered by the bloody wars on the territory of ex-Yugoslavia.

Endogenous elements relevant to the establishment of the ICMP

ICMP between accountability and (new) humanitarianism

The ICMP was created in the immediate aftermath of the conflicts in former Yugoslavia in 1996. US President Bill Clinton proposed the formation of an international Blue-Ribbon Commission on the Missing in the Former Yugoslavia to ensure cooperation between the ex-warring parties regarding the issue of missing persons in Bosnia and Herzegovina. The Commission should have added momentum to addressing the issue of missing persons and pushed forward the already existing initiatives by the ICRC and the International Criminal Tribunal for the Former Yugoslavia (ICTY), the actors who were already involved in the missing persons' issue, albeit from different standpoints (Clinton Digital Library 1996).

As already noted, the ICRC is considered a traditional humanitarian organisation. It provided substantial support during the conflicts in former Yugoslavia. It acted as the mediator between the warring parties (IRRC 1991b) and called on them to respect International Humanitarian Law (IHL) (IRRC 1991a, IRRC 1992b). The ICRC also provided material support (ICRC 1996), conducted visits to persons who were detained (Young 2001, 784), and facilitated the release and repatriation of prisoners (IRRC 1992a). Moreover, the ICRC undertook various activities to shed light on the fate of missing persons in conflicts. For example, it launched a campaign to reach the public to provide information on the missing and led the expert group that was to provide standards for the exhumation and forensic examination of remains (Clinton Digital Library, 1996). The prominent role of the ICRC in the case of missing persons was recognised in the Dayton Peace Agreement.[21]

[21] Dayton Peace Agreement, Article V, Annex 7: "The Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also

On the other hand, the ICTY was established as an accountability mechanism. In the atmosphere of newly defined threats and reconceptualised sovereignty, the UNSC needed to tackle the situation of armed conflicts in the former Yugoslavia. Deeply aware that the warring parties were not willing or able to provide justice for the victims of international humanitarian law violations in Yugoslav crises, the UN Security Council decided to establish the first international criminal court after the Second World War.[22] It was designed to "achieve peace through justice" and to collect data and relevant evidence on the crimes committed. In that regard, the search for missing persons was of great importance.

While actively involved in the search for the missing throughout the entire conflict, the ICRC could not assist the ICTY. The intrinsic limitation stemming from the ICRC's humanitarian character hindered its participation in judicial proceedings. In the words of Stahn, the ICRC "adopted a cautious approach towards international criminal law practice and judicial proceedings" (2016, 166). Bearing in mind the limitations of the ICRC and the needs of the ICTY, it became apparent that the "market" of humanitarianism as well as accountability needed newcomers. That is how the ICMP came to the fore "to help meet the Tribunal's needs in the former Yugoslavia, as well as the humanitarian ones" (Cordner and Tidball-Binz 2017, 67). Wagner notices that the transitional justice efforts in post-war Bosnia and Herzegovina are marked by "the proceedings at the ICTY (…), and the identification process led by the ICMP" (Wagner, 2010, p. 28).

From the outset, the ICMP pursued both accountability and humanitarian missions, which explains how it outshined its "improbable beginnings" (Ambassador Daniel Baer 2013). On the one hand, the work of the ICMP proved indispensable for the accountability process, as the ICRC's role in that regard was limited because of its purely humanitarian character. The DNA-orientated approach of the ICMP complemented the work of the ICTY, especially in the cases of Haradinaj et al., Popović et al., Tolimir, Mladić, and Karadžić (Vanderpuye and

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cooperate fully with the ICRC in its efforts to determine the identities, whereabouts, and fate of the unaccounted for".

[22] It was in 2002 that Eric Myjer and Nigel White stated that the council's 'competence in criminal justice matters is designed to achieve peace through justice, while its military component is designed to achieve peace through force'. In "The Twin Towers Attack: an Unlimited Right to Self-Defence?" (2002) 7(1) *JCSL* 5 at 6–7. See also, e.g., M. Cherif Bassiouni, The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, The American Journal of International Law, Vol. 88, No. 4 (Oct. 1994), pp. 784-805: Theodor Meron, The Case for War Crimes Trials in Yugoslavia, Foreign Affairs, Vol. 72, No. 3 (Summer, 1993), pp. 122-135, Rachel Kerr, The International Criminal Tribunal for the Former Yugoslavia, *An Exercise in Law, Politics, and Diplomacy,* 2004.

Mitchell, 2020, pp. 215-218; Fournet, 2020). On the other hand, the success of the accountability process was of great importance to the newly discovered mission of the UN and the Security Council. Therefore, it needed to be rooted in some greater goal, overcoming the determination of individual criminal responsibility and including the notions of justice, truth, and care for the victims. This is where the ICMP's humanitarian character was recognised.

In IHL, humanitarian organisations are defined as entities with a mission to alleviate human suffering in armed conflicts, including searching for the missing (Sassoli et al., n.d.). The mission of the ICMP was from the beginning conceptualised as the humanitarian one: in the 1996 Concept Paper it was stated that the "identification of the missing in Bosnia and Herzegovina is an integral part of creating the conditions for peace, stability, and reconciliation in the region" (Clinton Digital Library 1996); the 1998 Headquarters Agreement with Bosnia and Herzegovina referred in the preamble to "the work done by the ICMP in providing assistance to the families of missing persons and its contribution to find answers to the fate of the missing persons" (Headquarters Agreement 1998) and the 2014 Agreement in the preamble underlines that the parties are "aware of the cost to societies and families resulting from a failure to locate the missing, including the anguish suffered as a consequence of not knowing a loved one's whereabouts or the circumstances of their disappearance" and noted "that predominantly men go missing, particularly as a result of armed conflicts and human rights abuses, and that those left behind, women and children, are especially vulnerable" (ICMP Agreement 2014).

The ICMP's functions were constructed to deliver its humanitarian mission, which was understood in terms of new humanitarianism. They revolved around two segments: the enablement of cooperation between the states and the development of appropriate expressions of commemoration and tribute to the missing (ICMP Agreement 2014, Article II). Driven by its humanitarian mission, the ICMP expanded its operations beyond Bosnia and Herzegovina and the former Yugoslavia, as well as beyond armed conflict scenarios, to extend relief where needs arose. As early as 2002, the US Secretary of State, Collin Powel, stated at the Board of Commissioners' meeting in Washington that "The Commission has created a capacity that goes well beyond Bosnia and Herzegovina (…). Our challenge now is to translate that progress into a lasting change in the Balkans and throughout the world" (GlobeNewswire 2002). The global potential was soon proven. In 2004, the ICMP helped identify the 2004 Asian tsunami victims and stated that "the mandate of the ICMP is to assist in the identification of persons missing as a result of conflicts or human rights abuses, but as a humanitarian

measure, it has offered assistance in other situations, such as the identification of tsunami victims" (ICMP 2005).

ICMP's internal structure and funding

The transformation in the ICMP's operational approach necessitated a corresponding evolution in its legal standing. This transformation became imperative because, despite functioning as an international organisation, the ICMP lacked conventional attributes associated with international organisations; it was not established by an international treaty and did not possess explicit international legal personality. The first attempt in 2004 to constitutionalise the ICMP as a full-fledged international organisation failed (Knežević-Predić and Simentić Popović 2022). In 2013, success was realised through the joint efforts of the Netherlands and the United Kingdom. The initiative was solemnly perpetuated at the high-level conference "The Missing: An Agenda for the Future" held in the Hague at the end of October 2013.[23] The outcome of this initiative was the adoption of the Commission's constitutive document, *the Agreement on the Status and Functions of the International Commission on Missing Persons (the ICMP Agreement)*, and the relocation of its headquarters from Sarajevo, Bosnia and Herzegovina, to the Hague, the Netherlands.

Even though the main goal of the Agreement was to "establish a clear legal status for the ICMP as an international organisation in order to better enable it to carry out its functions internationally" (ICMP Agreement 2014, preamble), the institutional structure and the funding of the ICMP do not align neatly with the conventional design of an international organisation. Traditional international organisations are established by states with interconnected rights, duties, and benefits stemming from their membership. Regarding rights, states are represented in the organ(s) of the organisation. The correlative duty is to "participate in the organisation's work by sending delegations to the meetings of its organs" as well as to "pay part of its expenses and to fulfil the specific obligations enumerated in the constitution or laid down in decisions taken by organs of the organisation" (Schermers and Blokker 2008, 13). The benefits stemming from membership are reflected in the exclusive possibility for the members to exploit the organisation's knowledge, skills, and resources (financial and expert) to achieve certain goals and outcomes.

[23] Available at: https://www.icmp.int/wp-content/uploads/2014/07/ICMP-Conference-Report-1.pdf

The ICMP Agreement provides for the following institutional structure: the Board of Commissioners (BoC), Director General and Staff (Agreement, Article III), Conference of State Parties (CSP), and optional subsidiary bodies (Article III 5).[24] The Director General and the staff could be considered the administrative organs of the organisation, while the BoC could be equated with the decision-making organ, composed of experts. The website of the ICMP states that it is run by a Director-General and governed by the BoC (ICMP n.d.a.). Notably, the organisation's management is not entrusted to members' representatives but to the experts. Members, parties to the ICMP Agreement, are represented in the CSP, whose powers are limited and do not include approval of the budget nor the election of any key official; its role remains to consider reports, propose policy directives, and recommend measures. These roles are, in essence, advisory and not governing. Therefore, this organ can only be considered the rudimentary form of the assembly-like plenary decision-making organ (Karns 2016: 779). This peculiar institutional design indicates that the ICMP is not conceived as a traditional international organisation.

Another indicator of the ICMP's non-traditional structure is its funding. The financing of the ICMP is purely voluntary. The state parties to the ICMP Agreement are not obligated to finance the ICMP operations; in practice, most of them do not make contributions. Namely, out of the current ten parties to the ICPM Agreements, only five (Luxembourg, the Netherlands, Sweden, the UK, and Germany) contribute to the organisation's budget. Other stakeholders, such as states and intergovernmental organisations, contribute to the budget despite not being state parties to the Agreement. These are, in alphabetical order: Canada, Chile, the Czech Republic, Denmark, the European Union, Finland, France, Greece, the Holy See, Iceland, Ireland, Italy, Norway, Poland, Slovakia, Spain, Switzerland, Thailand, The City of The Hague, Turkey, and the United States of America (ICMP n.d.a.). This mismatch between the members of the ICMP and the stakeholders that fund the ICMP further demonstrates the deviation of the ICMP from the conventional structure of international organisations.

The internal structure of the ICMP propelled its success as well. In the words of one of the ICMP Commissioners, HM Queen Noor of Jordan, the ICMP

[24] The Inter-Agency Committee (IAC) brings together international and other organisations with a public mandate concerned with the issue of the missing; The Panel of Experts (PE) provides advice to the Director General on issues pertaining to the Organisation's current or future work program and compiles the Global Report on Missing Persons; The Global Forum providing an agora comprising the BoC, PE, and IAC, plus civil society organisations and representatives of families of the missing. The GF is currently a virtual space. (Programme and Budget 2021-2026).

constitutionalisation aimed to create a "light but efficient modern international organisation" (ICMP 2015). Our research shows that the lightness of the organisation is expressed through the absence of a traditional membership structure, which is evident in the peculiar institutional design and financing of the ICMP. Although it does not conform to the traditional model of an international organisation, the ICMP plays a crucial role in delivering public goods within the humanitarian sphere. In Droesse's words, public goods "need to be used where they are most needed and not based on formal criteria relating to the association of a country with a specific organisation." (2020, 142) In that sense, it is evident that the traditional membership structure, which provides exclusive benefits to its members, would impede the ICMP's humanitarian mission of providing public goods. This hindrance is regarded as a rationale for the organisation's loose membership structure.

The role of the ICMP does not boil down to the commensurate interests of states, which can sometimes be conflicting; instead, it provides expert knowledge rooted in factual information to provide global public goods such as "justice, truth, or relief to families". The ICMP strives to "resolve the fate of the missing in a manner that is commensurate with human rights and the rule of law" (ICMP n.d.b.). This objective is also linked with the right to truth and the mission to counter the sense of impunity. The ICMP navigates towards attaining peace, with the Director General emphasising on various occasions that "accounting for the missing is an investment in peace" (ICMP 2018). To provide these public goods, the ICMP provides stakeholders with expert services, which are a public good on their own. The ICMP provides for capacity building (through strengthening the domestic capacities of the states in the field; providing access to information on the whereabouts of the missing; assisting the role of the judiciary, in particular of the criminal justice system; and pursuing legislative measures as part of domestic legislation to implement these principles) and technical assistance (DNA identifications, forensic archaeology, and anthropological location and examination of remains; the Integrated Data Management System (IDMS) (ICMP n.d.b.).

Conclusion

The ICMP was established in a turbulent era. The period was characterised both by the new post-Cold War paradigms of sovereignty and restructuring of international (legal) order and by New Humanitarianism, which emerged in response to armed conflicts of a new type. These external dynamics heavily

influenced the formation and success of the ICMP. The ICMP was established as the expression of New Humanitarianism. It proves that international organisations can act successfully despite their loose approach to traditional humanitarian principles. The flexible internal structure enabled the ICMP to efficiently provide public goods by disseminating its humanitarian mission to account for the missing. The ICMP seeks the truth about the missing persons to attain justice and provide relief to families of the missing by using scientifically purported facts. Therefore, the key to its success is its expert-rooted functioning and reliable (financial) support from relevant actors.

This expert and support-driven success is why the ICMP emerged as an acceptable model of cooperation between Belgrade and Priština. The 2021 Report of the Commission on Missing Persons of the Republic of Serbia states that 9.925 persons are still missing from the conflicts in former Yugoslavia: 1.621 in Kosovo and Metohija, 1.964 in the Republic of Croatia, and 6.340 in Bosnia and Herzegovina (CMPRS 2021). It is also stated that Serbia has a legitimate interest in resolving the fate of 1.315 persons, mostly of Serbian nationality (CMPRS 2021, 6-7). The issue of missing persons cannot be addressed or resolved without Serbia's cooperation with other parties. We claim that it is in the national interest of Serbia to resolve the issue of the missing and, in that process, to collaborate with the relevant stakeholders, including Priština.[25]

First, accounting for the missing persons from armed conflicts is a national interest *per se*. It is part of the achievement of the rule of law, respect for human rights and international humanitarian law, care for the victims of armed conflict, regional cooperation, transitional justice, and reconciliation. Secondly, resolving the fate of the missing persons is part of Serbia's national interest in acceding to the European Union. The EU monitors the issue of missing persons under Cluster

[25] For other examples of instances in which Serbia relied on international law to promote its national interests, consult Knežević-Predić Vesna. 2024. "Protecting and promoting national interests through domestic implementation measures" and Simentić Popović Janja, Hrnjaz Miloš, "The Legal Nature of Agreements Concluded During Belgrade-Priština Negotiations: Pursuing National Interests Through International Law Mechanisms". Forthcoming in: Proceedings from the International Scientific Conference "National Interest(s) in World Politics", edited by Dragan Đukanović, Saša Mišić, and Nikola Jović. Belgrade: Faculty of Political Science; Knežević-Predić Vesna, Simentić Janja. 2015. "Serbia and International Law at the Crossroads of Centuries – Serbian Approach to International Law until the beginning of the First World War". In: Zbornik radova sa konferencije Politički Identitet Srbije u globalnom i regionalnom kontekstu, uredila Vesna Knežević-Predić, 181-201. Beograd: Fakultet političkih nauka.

1 of the European Commission Country Report (EC 2023, 30-31, 92, 95).[26] Finally, resolving the missing persons issue is an international obligation of the Republic of Serbia that stems from the IHL (Geneva Conventions) and Serbia's membership in the ICMP.

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[26] The EU is consistently monitoring the advancement in the issue of missing persons through its Annual Country Reports. While the methodology for the assessment of progress was changed in 2020, the monitoring of the missing persons issue remained. For the change in the EU Enlargement Methodology consult 2022 Thematic Issue of International Problems 74 (3), 411–432.

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ZAŠTITA NACIONALNIH INTERESA PUTEM NESTANDARDNIH INSTITUCIONALNIH OKVIRA: SLUČAJ MEĐUNARODNE KOMISIJE ZA NESTALA LICA

Apstrakt: Ovaj rad istražuje faktore koji su doprineli uspehu Međunarodne komisije za nestala lica koja je osnovana 1996. godine kako bi se rešilo pitanje nestalih osoba iz sukoba na prostoru bivše Jugoslavije. Misija Međunarodne komisije se kasnije proširila i na podsticanje saradnje među državama i pružanje stručne pomoći u pronalaženju nestalih osoba usled sukoba, kršenja ljudskih prava i katastrofa. Ovo istraživanje se zasniva na hipotezi da uspeh Međunarodne komisije proizilazi iz sadejstva egzogenih faktora, kao što su promene u međunarodnom pravu i humanitarnim paradigmama, i endogenih faktora, uključujući fleksibilan institucionalni dizajn Komisije i pristup radu koji je zasnovan na stručnosti. Putem analize strukture i funkcija Međunarodne komisije ovo istraživanje naglašava značaj prilagodljivosti i stručnosti u efikasnom radu međunarodnih organizacija. Delovanje Međunarodne komisije za nestala lica u Republici Srbiji i na teritoriji Kosova pruža uvid u to kako nestandardni institucionalni okviri mogu zaobići političke složenosti kako bi se postigli značajni humanitarni rezultati, ostvarujući neophodnu ravnotežu između nacionalnih interesa i međunarodnih obaveza humanitarne prirode.

Ključne reči: nestala lica, humanitarizam, međunarodno pravo, međunarodne organizacije, Republika Srbija, Kosovo, tranziciona pravda, institucionalni dizajn, finansiranje međunarodnih organizacija.