

Bosnian Society on the Path to Justice, Truth and Reconciliation

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1. Introduction

Peace without justice is only symbolic peace.

(Rigoberta Menchu, Nobel Prize Laureate)

Dealing with the past in a war-torn, deeply victimised and traumatised society is one of the key prerequisites for the achievement of lasting peace and a safe future free from violent conflict. In the light of fragile peace and fragile democracies established in the immediate aftermath of conflict, though, it often appears to be more logical to forget about the past and move on towards a more promising future. However, scholars of conflict transformation have identified at least three distinct rationales why countries on the path to overcoming their violent past should adopt some sort of strategy to address it.¹ And they argue that it is, indeed, better to confront the past and the traumas arising out of it, rather than leave them un-addressed. The renewal of unfinished history from World War II contributed to the development of conflict in the former Yugoslavia in the early nineties. It is a well-known fact that in the course of the Second World War members of different ethnic groups committed terrible crimes and atrocities against each other. However, in the aftermath of the conflict the socialist regime under Tito prohibited any kind of public debate pertaining to the war crimes

357

¹ At the very basic psychological level there is the need to understand and heal the trauma of victims stemming from the belief that traumatic events from the past always have certain emotional, even trans-generational consequences for an individual and for the society. At the legal level justice is served through the legal obligation of states to respect their international obligations and prosecute past abuses in the aftermath of conflict. And finally, at the political level, the need to address past injustices stems from the imperative to break the cycle of impunity, establish legitimacy of a new regime and strengthen the rule of law.

committed and the traumas inflicted. Instead of open discussion, a superficial sense of common belonging was created and imposed in the public sphere through the acknowledgement of the principles of “brotherhood” and “unity”. Yet, despite official suppression, the memory of the suffering prevailed and was transmitted further between family members and members of one’s own ethnic group. The disastrous results of such conspirative silence and imposed public amnesia have been seen during the recent war in Bosnia, as the underlying feelings of mutual hatred and mistrust were manipulated by ethnopolitical elites and leaders in order to inflict new divisions and new suffering along ethnic lines. The history of “ethnic blood-lust”, motivated by revenge for what had been done 50 years ago, was repeated in more horrible form: genocide, ethnic cleansing, concentration camps, mass rape and other severe crimes. Learning from the mistakes of the past, this time the Bosnian society should, by utilising diverse mechanisms of public processes of truth-finding, and by establishing justice and promoting reconciliation, undertake efforts to openly address its recent past in order to avoid another possible renewal of violence.

Up to now, the task of establishing criminal guilt and restoring justice has been carried out primarily through the work of the International Criminal Tribunal for the former Yugoslavia (subsequently referred to as “ICTY” or the “Hague Tribunal”). By prosecuting individuals responsible for genocide, ethnic cleansing, mass killings, systematic detention and other serious breaches of humanitarian law, its founders claimed that the ICTY would contribute to the “restoration and maintenance of peace” in the war-torn country and finally lead to national reconciliation. There has been extensive emphasis placed on the role of this Tribunal and on individual accountability, while neglecting other dimensions of guilt.

The primary objective of this article is to answer the question, “What contributions have criminal tribunals and other domestic processes for dealing with the past made to the peacebuilding process in BiH?” In what sense do these processes contribute to the overall aim of achieving a society that sustains peace and respects human rights?

I argue that, although unchallenged and irreplaceable in its enormous effort to contribute to peace, justice delivered by the Hague Tribunal is not sufficient to change the political climate of ethnic mistrust and hatred. There is no potential risk of relapse into new conflict as long as international troops are in some form present in the region, and with the prospect of joining European regional and political institutions. But the long-lasting situation of deep ethnic divisions is threatening to develop into an everlasting and fatal destiny for the ethnic communities in BiH. Therefore, in addition to the approach of retributive justice²

by the Hague Tribunal, other mechanisms appear necessary, aimed at fostering interethnic dialogue about past violence, public acknowledgement of the wrongs done and official recognition for victims, leading finally to a reconstruction of the ethnically fragmented BiH society. The parallel application of an approach of restorative justice, which creates a process and environment for the active transformation of mutual relationships, appears a viable supplement to juridical intervention. Accordingly, the prospect of the establishment of a national Truth and Reconciliation Commission is considered.

2. Establishment and Purpose of the ICTY: Justice, Peace and Deterrence through Punishment

This will be no victor's tribunal.

The only victor that will prevail in this endeavour is the truth.

(Richard Holbrooke, US Representative to the UN)

Although the concept of war crimes has a long history in international relations, the establishment of the ICTY was notable as the first body to be established since the end of World War II. Its historical predecessor – the Nuremberg Tribunal – was created in the aftermath of the Second World War by the victorious powers, and permitted the accusers to behave as prosecutors, judges, jury and executioners. Unlike Nuremberg, the Hague Tribunal came into existence through international will represented by the executive organ of the United Nations, the Security Council. However, it would be incorrect to perceive the creation of the ICTY as the victory of idealism in the sphere of international relations. Quite the contrary, as many authors have noted, the decision to introduce the norm of justice through the establishment of the Tribunal, tasked with prosecution of individuals who committed atrocities, was actually a response to the failure of other approaches and initiatives conducted by the international community.³ It represented a sign of frustration and discomfort on the part of the international community, which was sharply challenged by its inability to successfully intervene in the Yugoslav wars (still rejecting the possible option to intervene yet under enormous public pressure to do something). Thus, such

² Retributive justice concentrates on punishment of offenders, whereas restorative justice is aimed at moving away from criminal verdicts toward the needs of victims and reconciliation. See also Little 1999, Neier 1998 and Huyse 2001.

³ Prominent commentators of the ICTY, such as Rudolph 2001, Schuett 1997, Robinson 2003 and Williams/Scharf 2002 share this view. The annotated bibliography provides more detailed insight into literature consulted.

an application of the norm of justice seemed to be a way to do something about Bosnia that would have the least possible costs domestically.

The establishment of the Hague Tribunal is based on UN Security Council Resolution 764 of 13 July 1992, which clearly stated that persons who committed violations of international humanitarian law in the former Yugoslavia would be held individually responsible.⁴ However, this had no effect on the aggressors. In their mindsets, its words were not worth the paper they were written on. And although reports and images of horrible violence, rape and concentration camps continued to plague the consciences of major international decision-makers and press them to take some action, they were still unwilling to run the risk of a military intervention.

Therefore new resolutions were passed. Resolutions 771 and 780 further condemned violations of international humanitarian law and provided for the creation of an impartial five-member commission of experts tasked with collecting evidence of war crimes in the former Yugoslavia and performing their own field investigations. The commission submitted its interim report in February 1993, lobbying publicly for the creation of a Nuremberg-like tribunal to try persons suspected of having committed atrocities. Two months later, France drafted a Security Council Resolution calling for the creation of a Yugoslav war crimes tribunal and proposing a two-step approach to its establishment: firstly, adoption of an adequate resolution and secondly, approval of its statute.

360

Finally, on 22 February 1993, Resolution 808 was adopted unanimously by the Security Council, providing for the creation of the International Criminal Tribunal for the former Yugoslavia for the purpose of prosecuting “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”. Recognising that “continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killing and the continuance of the practice of ‘ethnic cleansing’” constitute “a threat to international peace and security”, the ICTY was designed to “put an end to such crimes and ... bring to justice the persons who are responsible for them”, thus contributing to the restoration and maintenance of peace.⁵

The Secretary-General then prepared a report on the statute of the ICTY, following which the Security Council adopted Resolution 827 on 25 May 1993, formally approving the statute of the Tribunal. According to the statute, based on findings of the Commission of Experts and other relevant bodies, the ICTY

4 Resolution 764, UN Security Council S/RES/764, 13 July 1992, www.un.org/icty.

5 Resolution 808, UN Security Council S/RES/808, 22 February 1993, www.un.org/icty.

is empowered to try four clusters of offences arising out of the wars in the former Yugoslavia since 1991: (1) grave breaches of the Geneva Conventions⁶, (2) genocide⁷, (3) crimes against humanity⁸ and (4) violations of the laws and customs of war⁹.

3. The ICTY as an Operating System – Serving Justice?

The (UN war crimes) tribunal was established to get to the very heart of evil, not only to punish but to eradicate and purify; to rip out the root and ensure those responsible are brought to justice and it does not happen again.

(Judge Claude Jorda, President of the Hague Tribunal)

In their thorough analyses of the international concept of justice utilised in the case of former Yugoslavia, Williams and Scharf (2002) developed a framework within which to assess the role of justice, identifying five major functions which justice should fulfil in order to achieve the overall goal of successfully contributing to the peacebuilding process. In this context they mentioned: establishment of individual responsibility, dismantling institutions and discrediting leaders responsible for atrocities, establishing an accurate historical record, providing victim catharsis and promoting deterrence. In this section I will analyse the manner in which the Hague Tribunal seeks to bridge the gap between its proclaimed intentions and their actual realisation. The core aim is to explore the effectiveness of the Tribunal as a mechanism of justice, and

361

6 According to Art. 2 of its Statute, grave breaches include, among others, “wilful killing; causing great suffering or serious injury; extensive destruction and appropriation of property, not justified by military necessity; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; depriving a POW or a civilian of the rights of fair and regular trial; unlawful deportation; and taking civilians as hostages”. See www.un.org/icty/basic/statut/stat2000.htm#1.

7 According to Art. 4 of the Statute, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct or public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.

8 Crimes against humanity, according to Art. 5 of the Statute, include: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhumane acts.

9 Such violations include, but are not limited to, employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; wanton destruction of cities, towns and villages, or devastation not justified by military necessity; attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property.

its actual ability to infuse the norm of justice into the process of peacebuilding, by analysing the extent to which the Tribunal has succeeded in serving the above functions.

3.1. Individual Responsibility

The first and foremost function of justice aimed at assisting a peacebuilding process is the increased focus upon individual responsibility. Theodor Meron, the President of the Hague Tribunal, best articulated this aim in stating that: “the great hope of the tribunal advocates was that the individualisation of guilt would help bring about peace and reconciliation” (Rudolph 2001:684). The underlying assumption derives from the criminal justice system, which acknowledges that if there is a crime, there also must be single individuals who committed it and therefore might be made accountable for it.

Therefore, the primary function of the Hague Tribunal should have been to disclose the way the Yugoslav ethnic groups were manipulated by their leaders to commit such mass atrocities, by issuing indictments against those leaders. As indicated, in order to meet the objectives of justice and in order to effectively influence the process of peacebuilding, the Tribunal was to focus on those in high-level positions suspected of being culpable. The Nuremberg Tribunal that prosecuted imprisoned members of the Nazi military and political leadership implemented a similar approach.

362

However, the practice of the Hague Tribunal in its initial phase pointed in another direction. The indictments of those most responsible for genocide, Bosnian Serb political leader Radovan Karadzic and Bosnian Serb military commander General Ratko Mladic, were issued late in 1995, almost two years after the Tribunal was established. A decade later, the two indictees are still free, partially due to the lack of political will to bring them to justice among the international community and partially due to strong political back-up by the political and military elites of Republika Srpska (RS) and Serbia. This lends some weight to the widespread rumours that Karadzic was promised some kind of immunity in exchange for his political retirement after Dayton; Mladic, for his part, enjoys enormous support among the Serbian political and military leadership. However, recent months brought a change in the political attitudes toward the policy of refusal and non-cooperation with the Hague Tribunal on the part of the governing bodies of Republika Srpska. The prospective integration of Bosnia-Herzegovina within the NATO alliance “Partnership for Peace” has been made conditional on the arrest of Karadzic and Mladic and their surrender to the Tribunal. There is now significant international pressure urging the Bosnian Serb leadership to finally undertake concrete steps and arrest these men, who

are considered two of the world's most infamous war criminals. Up to now, this pressure, regrettably, has proven insufficient. However, notwithstanding the fact that those key war criminals have not been arrested, the mere existence of the ICTY's indictments has already had a positive effect: the existence of the international indictments made them pariahs constantly fearing arrest. This might be considered as a form of punishment even before being brought to trial.

The necessity to concentrate exclusively on the trials of those most responsible for atrocities committed, i.e. the politico-military leadership, raises two other controversial concerns. The first issue relates to the question of what should happen with several thousand other war criminals, either direct executioners or bystanders, whereas the second one refers to the question of ethnic parity.

Some estimates suggest that there are eight to twelve thousand war criminals from the Bosnian conflict.¹⁰ The Hague Tribunal has indicted less than one hundred. The question remains: what should happen to the thousands of others, including direct executioners, willing bystanders and collaborators engaged in the complicity of evil? Admittedly it is clear that such massive atrocities involving vast numbers of perpetrators would overwhelm the capacity of a legal institution. But what justice is served by letting them off? In this light the Tribunal's justice is only a symbolic one: a small number of the most responsible individuals stands for a larger group. Then the issue of individual or collective guilt becomes unclear: where should the line be drawn between individual and collective guilt? It seems as if, for now, we can only agree with Jonathan Bass, who argued that the premise that a criminal tribunal would dissolve collective guilt into individual guilt is a highly ambiguous one (Bass 2001:301). Practically, the political and logistical obstacles spare a great number of perpetrators, bystanders and collaborators from justice. Even if this can be justified by the fear of nationalist backlash in the perpetrators' societies, this justification has less value from the perspective of victims. Therefore some other mechanism should be employed in order to alleviate the shortcomings of this narrowed focus on individual war criminals.

Furthermore, insisting on the imperative of individual accountability leads us also to the issue of ethnic parity and the treatment of the conflict itself. Unlike the "victors' justice" at Nuremberg, the Hague Tribunal was repeatedly praised as providing "victims' justice". This clearly highlights its intended victim-centred orientation. However, the issue of how to do justice to the victims

¹⁰ These data have been published by the Federal Commission on War Crimes, and confirmed by the Office of Prosecutor as reliable.

becomes much less clear and much more complex if we recall that the conflict in Bosnia-Herzegovina involved three ethnic groups and was backed and inflicted by two ethno-nationalist projects in neighbouring states. The question arises: should then all parties be deemed equally guilty? Up to this date, the Office of the Prosecutor has done its best in strictly applying the rationale of ethnic parity in order to avoid being perceived as not neutral or not impartial, as was and still is often claimed by either Serb or Croat authorities. However, if the conflict erupted and was further exacerbated by political ethno-nationalist elites from Belgrade and Zagreb striving for territorial disintegration and the partition of Bosnia-Herzegovina, then how can we decide where and when the imperative of ethnic purity distorts rather than represents the truth?

For now it might be concluded that the pragmatic, politically motivated application of the principle of ethnic parity, without taking into account the necessity of piecing together a broader picture of the underlying causes of the conflict and its consequences, might to a significant extent undermine public belief in the Hague Tribunal's justice. A clear legal classification of crimes committed must be publicly announced. The Office of the Prosecutor should try to resist any attempts, on the part of the international community or parties involved in the conflict, aimed at relativisation of the guilt. For this would hamper justice being done, causing further victimisation of the victims, this time by the institution tasked with doing justice to them, and limit the establishment of factual truth and accurate historical records of the conflict.

3.2. Dismantling Institutions and Discrediting Responsible Leaders

I have discussed above the immense efforts made by the Hague Tribunal to substitute individual accountability for collective responsibility. Yet in order to contribute to the peacebuilding process in the sense of creating a just, secure society, the Hague Tribunal's efforts should not end with this. On the contrary, mere insistence on individual accountability, as shown, does not suffice and therefore the attempts should be made to achieve and strengthen denunciation of the very nature of the previous regimes which caused and inflicted such enormous suffering. Here also the message of Nuremberg is very instructive: on trial were neither the German people nor merely a collection of war criminals. The first accused at Nuremberg was the Nazi regime itself, which was indicted through a selection of individuals who enacted its mode of government.

The crime of genocide, euphemised as "ethnic cleansing", was hardly a manifestation of uncontrolled ethnic violence committed in blood-lust by a crowd of criminals. Instead it constituted the systematic implementation of two political projects conceived, designed and monitored by two acting governments:

Milosevic's plan for an ethnically pure "Greater Serbia" and Tudjman's version of a similar political project for Croatia.

For the time being, the Hague Tribunal has completely failed to use its powers in order to dismantle the institutions which implemented those projects. As rational acts they required huge ideological, political, economic, military, media and other preparations. Therefore full disclosure of the facts regarding the role and public condemnation of those regimes seems necessary for justice to prevail. So far, the Hague Tribunal has focused on substituting individual guilt for collective responsibility. Reallocation of responsibility from the group to certain criminal individuals makes the conflict appear less ethnic and widespread by suggesting that it was not caused by relations between groups, but by bad and selfish individuals and their corresponding ethnopolitical elites.

The main message of the Tribunal's rulings is thus that crimes can never be attributed to a people, be it the Serbs, the Croats or the Bosniaks. Responsibility for crimes can only be attached to individual persons. This clearly implies that massive violations of human rights committed in the name of Greater Serbia or Croatia are expressions of a primitive mentality that has to be overcome. However, if we acknowledge these crimes to be what they really are – the systematic and rigorous implementation of specific political projects – then justice to their victims can only be done by the official repudiation of the regimes that advocated and translated into practice the idea of ethnic purity and the policy of "blood and soil".

365

If the Hague Tribunal is to achieve its aim of assisting and contributing to peace efforts and national reconciliation, then the precondition for this to happen is the official repudiation of the regimes that politically advocated ethnic purity and systematically implemented such political projects. Thus, the mission of the ICTY consists not only of prosecuting particular crimes and convicting individual perpetrators, but also of using these specific cases to stigmatise the political regimes that promoted ethnic hatred and prescribed ethnic violence. Up to now, the Tribunal has made no significant use of this powerful tool.

3.3. Creating an Accurate Historical Record

Among the major functions of justice done in the Hague is the establishment of an accurate historical record of the conflict. Public disclosure of the facts in the context of the Bosnian conflict can serve at least two important goals. First, truth telling will provide a space for victims of crimes to tell and see their stories told in an officially recognised way before the international community. Public recognition and acknowledgement of the evil that befell them are the most important prerequisite if justice is to be done and long-lasting peace

and reconciliation achieved. Second, the accurate historical record provided by the institution tasked with establishing truth and doing justice would prevent any possible attempts to deny or re-write the conflict to suit the needs of the political calculations or/and national aspirations. Indeed, many authors have argued that the denial of atrocity is in fact part of committing atrocity.¹¹

Therefore, as Williams and Scharf rightly noted, “to accomplish the objective of establishing the truth and creating an accurate and comprehensive historical record, it is incumbent upon institutions of justice to ensure that they investigate and make public at the appropriate time all relevant information concerning the nature of the conflict and the atrocities or war crimes committed during the conflict” (Williams/Scharf 2002:121).

In order to be viable, full and comprehensive, the historical record of the conflict in Bosnia-Herzegovina should include the nature, causes and extent of genocide and other crimes committed; the full truth and public disclosure of the ways they were planned and realised; the responsibility of the politico-military leadership involved; and the names of the final executors and their victims. The role of the Tribunal with respect to this is a prominent one for the reason that it is a UN-backed institution, with access to the most relevant documents and the most responsible people in custody.

There were several instruments at the disposal of the Tribunal assisting the achievement of this aim. The most powerful among them was so-called Rule 61.¹² The purpose of this rule is to broaden public awareness of perpetrators’ actions without violating the mandate forbidding trials *in absentia*. It allows the indictment and all supporting evidence to be submitted to the Tribunal in an open court session. Under the provisions of Rule 61, the prosecution may present highlights of the case in the absence of the accused, essentially for the media. The Tribunal regrettably has made only limited use of its powers and responsibilities under this Rule. It has held only one major Rule 61 hearing – that of Radovan Karadzic and Ratko Mladic.

The policy of dismissing cases when the accused died prior to the issuance of the judgement, or was killed before being brought to trial, represents another

11 Reflecting upon the patterns of genocide as a process, Gregory H. Stanton proposed an 8-staged scheme of how genocide develops. These stages are: classification, symbolisation, dehumanisation, organisation, polarisation, preparation, extermination and denial. Denial is thus the final stage of genocide and can serve as an indicator of genocidal massacres. In this stage, so Stanton argues, perpetrators dig up mass graves, burn the bodies and try to cover up evidence and intimidate the witnesses. They deny that they committed any crime and put the blame for what happened on the victims. See www.genocidewatch.org/documentspage.htm.

12 Rule 61 is established under Art. 15 of the Tribunal’s Statute providing for a “super-indictment” in certain instances. It was crafted as a compromise to avoid conducting trials *in absentia* when the Tribunal is unable to acquire custody of the accused.

shortcoming of the Tribunal, which to a great extent inhibits the establishment of the truth and creation of an accurate historical record. Following the death of some indictees¹³, the Office of the Prosecutor failed to release for public review information upon which the indictments were based. However, public disclosure of the events in which they and many others who escaped trials were involved or played a major part would have contributed to piecing together a painful but complex and comprehensive picture of the evil that befell Bosnia's citizens in the early 90s.

Intrinsically interlinked with the establishment of the truth is the issue of interpretation: how is this truth being perceived and publicly presented, and how is it integrated in a broader politico-social relation to one's own ethnic group and former adversaries who suffered?¹⁴

Regrettably, it must be noted that even such restricted knowledge acquired by the Tribunal has been subject to ruthless political manipulation by local ethnopolitical elites. It could hardly be said that its findings contributed positively to bringing closer the contradictory conceptions of "truth" about the past war as it is currently written and taught within ethnic communities in BiH. Comparing the manner in which the recent past of the country and the region as a whole is being addressed in history textbooks for secondary schools, one can only conclude that there is a sharp and profound disagreement with regard to this issue that both reflects and cements former ethnic divisions.

367

To illustrate, regarding the nature of the conflict three explanatory models are being used: in textbooks for Serb pupils there was a civil war, in history books for Bosniaks the same event is described as aggression, whereas in the textbooks for Croat pupils it was a defensive war.

¹³ As in the cases of D. Gagovic, Z. Rznatovic (Arkan), S. Meljkovic, M. Kovacevic. The most outstanding example of this failed policy is the Tribunal's failure to issue an indictment against Croatia's President Tudjman for his political and military support of the policy of ethnic cleansing in the so-called Croat community of "Herceg-Bosna".

¹⁴ Many authors have even contested the idea that there is only one viable, singular truth or something called an "objective" historical record, claiming instead that truth in its essence is simply the subjective collective memory that each victim group creates for its own purposes. Moreover, by distinguishing between factual and shared truth, they insist that shared truth about the past among rival ethnic groups is not possible. In this context Akhavan mentioned Ignatieff who argued that shared truth is not a compromise between two competing versions of events. Using the example of the siege of Sarajevo, he asserted that it was either a deliberate attempt to terrorise and subvert the elected government of an internationally recognised state or it was a legitimate pre-emptive defence of the Serbs' homeland from Muslim attack. It is either-or; it cannot be both. As both ethnic groups energetically defend their positions and versions of what happened and what it was, I will argue that it is in this context that the role of justice done in The Hague is indispensable: it should establish uncontested, undeniable facts which should then be translated into public discourse and thus inform public opinion.

3.4. Victims' Catharsis

Another important issue is the way in which the Tribunal addressed the needs of the victims. Montville (1993:112-127), who studied the psychological effects of political violence, has shown that persons who have suffered violence have an enduring fear of their trauma recurring. Such fear prohibits even the possibility of developing renewed trust in their victimisers and inhibits any true and real reintegration with them. Instead, pain and grievances associated with unacknowledged and unforgiven wounds remain, creating mutual fear and hatred, and increasing the likelihood of future victimisation. It is clear that past traumas have such severe, even transgenerational consequences that the satisfaction of victims' needs through public articulation and acknowledgement of their suffering represents not only a psychological but also a moral imperative in the post-war period.

But what mechanisms aimed at victims' catharsis are actually at the disposal of the Tribunal, which is primarily a judicial organ tasked with delivering justice through individual punishment and, in this sense, conviction-orientated, focusing on perpetrators rather than on their victims? From the start it must be admitted that the powers of the Tribunal in this sense are rather modest.

The opportunity to "tell their story" represents a very first step toward victims' catharsis. It is a basic psychological premise that every trauma-healing process begins with story-telling, with talking about what happened. This equally applies to individuals as to societies as a whole. Through the long-term peacebuilding process a public space must therefore be created through which individual testimonies can be channelled and past injustices publicly recognised. We might think that the Tribunal represents the best place for opening this process. It is tasked with punishing those responsible for atrocities and immense suffering, and in order to pass judgements the Tribunal must provide evidence. Direct survivors, the victims with their testimonies, provide the most compelling evidence. Ironically, the Tribunal failed to initiate a healing process by failing to interview very many victims. It dealt only with those victims who were indispensable for achieving convictions, thus largely neglecting its responsibility in assisting victims.

Another problem relates to the fact that, although the number of perpetrators is much larger, the Tribunal has up to now issued indictments against less than a hundred. In the absence of domestic trials for war crimes, this means that the great majority of war criminals live, and still exercise more or less power, within the communities in which they committed the crimes. They not only pose a significant obstacle to the return of their tortured and expelled victims, but also prevent a cathartic process from even beginning.

3.5. Deterrence Function

It is said that one of the most important functions of retributive justice is its supposed ability to act as a deterrent against future atrocities. This deterrence function is based upon an accepted belief that the mere existence of the Tribunal will act as a forcible threat of punishment and thus prevent any future attempts to commit similar crimes.

In this context it is instructive to look at the work of Payam Akhavan. Pointing to classical theory, according to which the primary function of criminal law is the deterrence of future criminal behaviour, he defines deterrence as “the ability of a legal system to discourage or prevent certain conduct through threats of punishment or other expression of disapproval” (Akhavan 1998:741). As such, according to Akhavan, deterrence operates at two levels: firstly, it is directed at those who have already committed crimes and secondly, at those who might commit them in the future. Therefore we can distinguish two forms of deterrence: specific and general. Specific deterrence is directed at specific perpetrators, who committed a crime and might be expected to repeat criminal behaviour, whereas general deterrence aims at the discouragement of potential criminal behaviour in the society in question as well as internationally.

Let us now look at the achievements of the Tribunal. If we assess the role of the Tribunal within the scope of specific deterrence, then it would be right to say that the Tribunal completely failed to act as a deterrent. There are certain cases of criminal behaviour that support this statement. Although it was created to “put an end to crimes ... that constitute a threat to international peace and security” by holding persons responsible for severe violations of the norms of humanitarian law by bringing them to justice, the existence of the Tribunal did not prevent Serb forces from committing the most severe crimes, including also the crime of genocide, against Bosniaks in the UN-protected zone of Srebrenica in July 1995, where several thousand men and boys were brutally exterminated within just three days. It indicates that the indictments issued against the political and military leaders most responsible, Karadzic and Mladic, did hardly anything to discourage them from writing one of the darkest pages of European history after World War II. The question must be posed: why did the threat of being held accountable not help prevent the genocide of Srebrenica or, correspondingly, the crimes of Kosovo?

According to Rudolph, for deterrence to be effective it must fulfil three elements: commitment, capability and credibility. He goes on to note that “US and European (NATO) officials failed to satisfy even the most basic strategic requirements of deterrence. These conditions include the definition of unacceptable behaviour, clear communication of a commitment to punish

transgression and demonstration of intent to carry out retaliation” (Rudolph 2001:684). None of those elements was present in the international community in the time of the Tribunal’s early existence, bringing us back to the question of the underlying reasons for its establishment in 1993. Previously it was argued that the Tribunal actually masked domestic political calculations and the unwillingness of the international community to take resolute action to suppress the policy of ethnic cleansing and genocide in Bosnia-Herzegovina. As such, it was seen more as an act of hypocrisy than as a moral triumph. Against this background, it is quite apparent that the mere existence of the Tribunal at The Hague, without a full and unconditional commitment to punish, could not have any deterrent effect, especially not in the context of an ongoing conflict and mass violence implicating a significant proportion of the population as perpetrators. With a dose of pessimism we can conclude that when mass violence has already erupted, the sole threats of punishment hardly can have any deterrent effect. The example given above clearly supports this. However, there is certain evidence that the outbreak of such violence can be inhibited and its resumption in post-conflict situations prevented.

In the light of general deterrence, the impact of the Tribunal looks much more promising. As already indicated, general deterrence aims at the discouragement of potential criminal behaviour in society, as well as internationally sending the message to possible future transgressors and their potential victims in ethnic minorities that such behaviour is wrong and unacceptable and thus will be adequately sanctioned. It is directed towards a transformation of the political culture of impunity and violence deeply seated within ex-Yugoslavian ethnic communities. Recent indictments against the former Croatian politico-military leadership in Bosnia-Herzegovina and investigations against top political and military leaders of the Bosnian Government can only be understood within this context.

As Akhavan observes “the ICTY will help internalise the expectations that individuals, irrespective of their official position, may be held liable for violations of international humanitarian law” (Akhavan 1998:748). The increased level of acceptance of fundamental respect for the rule of law and its gradual internalisation will inhibit perpetuation of ethnic cleansing and massive human rights abuses, contributing to deterrence through the transformation of the political culture. Therefore, the prosecution and punishment of particular individuals at all levels of responsibility becomes a mechanism through which respect for the rule of law might be instilled and strengthened in the popular consciousness. It seems as if the message is to be conveyed to all ethnic groups in Bosnia-Herzegovina and the region that mass atrocities will not be accepted,

and anyone who might for whatsoever reasons wage renewed violence, must take into account international condemnation and criminal sanctions. The possible goal behind this is to prevent future war crimes and also the planning of genocide.

3.6. The Work of the Tribunal Through the Lenses of BiH Peoples: Stories of Mistrust and Lack of Confidence

At this point we should reflect upon the local impact of the Tribunal's work by analysing whether the factual situation on the ground supports the idea that the trials of the most responsible help ethnic groups to identify, and distance themselves from, criminals. If this were the case, then it would follow that there is growing acceptance of the work of the ICTY among the three ethnic groups, as well as open and public distancing from the policies of crimes and atrocities. To this end it should, first, be noted that the controversy regarding the court and its mandate started immediately with its creation. Unlike Bosniaks, and to some extent Croats, who were largely in support of its establishment, Serb political elites were highly hostile to its creation, even questioning the ability of the Security Council to create such an *ad hoc* institution. Characteristically, the government of the Republika Srpska never complied with its international obligations to cooperate with the Tribunal or to arrest those on ICTY's public or sealed indictments.

371

At the local level, the work of the Tribunal was very distant to BiH citizens, in particular to those in the Republika Srpska. The Tribunal was mysterious and the subject of it was taboo. In the absence of viable and reliable background information on the Tribunal's work, the primary source of information became the local political parties and the media. By providing insufficient or selective information, or presenting events in a way that benefited their interests, people in power influenced and shaped local images of the Tribunal. In the same vein, media reporting on the ICTY was not intended simply to explain its tasks and efforts to BiH peoples. Rather, it was politically manipulated and ethnically coloured. Therefore, instead of providing information about the rules, structures and even the kind of crimes for which one can be indicted by the Tribunal, the media focused on isolated events about the ICTY, reinforcing biases and misconceptions about its work in the mindsets of their target groups. Often the reporting was on contentious events, such as arrests or sentencing, without providing at the same time any meaningful context to it. Similarly, if there was coverage of sentencing, the focus was on the length of punishment and not on the crimes for which the punishment was being delivered.

The first serious research on the impact of the Tribunal on BiH society was undertaken by Kristen Cibelli and Tamy Guberek (Cibelli/Guberek 2000). They investigated the attitudes and perceptions of the ICTY within local non-governmental organisations that work on a daily basis with issues related to the Tribunal. Their findings, unfortunately, showed that rather than being seen as bringing justice, the Tribunal is inadvertently reinforcing the same collective divisions that divided the country during the war. The research proved that the groups and organisations in Republika Srpska have a very negative view of the Tribunal and its work, while organisations in the Federation have generally positive perspectives. When the ICTY was created, the expectations in the Federation focused on its faster and more effective work. Groups in the RS expected “equal justice” in that it would try all war criminals regardless of their ethnicity. In both entities, however, the research implied that the Tribunal had not met their expectations. The same divisions characterise the way groups view the Tribunal’s work. Whereas NGOs in the Federation to a large extent view the ICTY as credible because it has authority to punish, NGOs in the RS see it as a “political institution” that disproportionately targets their side. They see the Tribunal as accusing all Serbs and only Serbs, and have asserted that it still has to prove that it is a court for everyone and not only a sword for punishing members of one nation.¹⁵

372

But dealing with Bosnia’s past constructively has to go beyond dealing with the question of truth and justice in international legal frameworks; the questions of truth and reconciliation have to be tackled in domestic forums. This standpoint, at least, is supported by civil society actors who brought up a proposal to establish a Truth and Reconciliation Commission.

4. The Prospect of a Bosnian Truth and Reconciliation Commission: Making the Impossible Possible?

The idea to create some sort of Truth and Reconciliation Commission (TRC) for Bosnia-Herzegovina came from the non-governmental sector. It was rooted in the conviction that despite the existence of the ICTY and its role in establishing the truth, contrasting, even contradictory, interpretations

¹⁵ Similar findings are published by the UNDP’s Early Warning System, Quarterly Report (January-March) 2004. Answers to the questions whether respondents approve of the work of the ICTY directly indicate the same division among ethnicities in BiH. In areas with Bosniak majorities, 93.78% support the work of the Tribunal; 61.28% of Bosnian Croats support it, whereas Bosnian Serbs were, to say the least, quite restrained with only 19.57% in support.

of the past being passed on to children threatened to lead to future atrocities and continuing intolerance among ethnic communities. Each ethnic group, be it Croat, Serb or Bosniak, has its own version of what happened, focusing on the interpretations of the past according to a widespread belief of one's own nation as a victim and the other two as conspirators. Kemal Kurspahic (former editor-in-chief of *Oslobodjenje*, a daily newspaper published in Sarajevo) explained the purposes of a TRC with these words: "Truth determined this way would mean that nobody, neither local politicians, nor authors of schoolbooks, neither self-appointed media owners of truth, could, by their own wish, abuse the past in order to instigate new tensions and conflicts whenever they deem them useful for their own narrow interests" (*Oslobodjenje*, 14 April 2001). But the socio-political environment in BiH was hostile to the creation of a truth commission. Its enactment was further complicated by the existence of the Hague Tribunal.

4.1. The Relationship to the ICTY: Contradictory or Complementary?

The leadership of the Tribunal was worried that such a truth commission would possibly weaken the Tribunal by creating a parallel structure with overlapping functions. Many concerns have been raised regarding the relationship between the ICTY and such a body. Notably, the Hague officials were afraid that a truth commission would undermine the Tribunal's efforts for several reasons.

373

The *first argument* was that generally timing was wrong, as Bosnia was still not ready for a TRC and it was not evident that the idea was supported by all sectors of Bosnian society nor that it enjoyed the commitment of political leaders. Creating a commission under such circumstances, they argued, might prove counterproductive. *Second*, regarding the possible mandate of a truth commission, the fear was expressed that there might be considerable overlap in the nature of investigation. This refers, for example, to the question of whether it would be a matter for a truth commission to determine whether or not there has been genocide committed in a course of conflict, which is a central issue to some of the Tribunal's cases and charges. The *third concern* pointed to the possibility of concurrent investigations where the Tribunal's investigators and commission staff would be interviewing the same witnesses and making related statements. With respect to this, the Tribunal officials were worried that the impression could be created in the public sphere that cooperation with a TRC might be an alternative to cooperation with the ICTY. *Fourth*, it was argued that the Tribunal and a commission might also clash over their diverging approach to standards of evidence and materials used to reach conclusions. In this context, there was a

fear that the ICTY and a TRC might arrive at contradictory findings, given the commission's lower standards of evidence.¹⁶

However, the proponents of a truth commission, gathered in the Association for Truth and Reconciliation, considered that the Tribunal did not possess a monopoly on justice or on truth, and that, in order to bear fruit, its efforts must and should be complemented by some sort of national process. Working closely with international experts on truth commissions and the Tribunal's officials, the National Coordinating Committee prepared a draft law on the establishment of the Truth and Reconciliation Commission in BiH.

Part IV of the proposed draft law addresses the relationship between the commission and the ICTY, providing for close cooperation and sharing of information between the two institutions. Article 8 of the draft law envisions that the TRC would be obliged to submit to the Tribunal any information or documentation that might be requested. It further foresees that the ICTY liaison officers would be allowed to attend the commission's proceedings. Apparently, the Office of the Prosecutor would be guaranteed access to the work of the TRC and its evidence whenever deemed necessary. On the other side, it should be noted that there is nothing said about whether the commission would be obliged to report to the Tribunal if it discovered evidence that charged certain persons with crimes against humanity, genocide or war crimes, in particular, if such evidence implicates persons already under investigation by the Tribunal.

4.2. Analysis of the Draft Law on TRC in BiH

According to the draft law on the Truth and Reconciliation Commission in BiH, the major purpose of the TRC is "to promote a feeling of friendship and reconciliation between peoples of BiH to overcome conflicts and past divisions" (Art. 2) by

- providing a forum where victims and persons with information on human rights abuses can be heard
- shedding light on the events which led to human rights violations
- offering its conclusions and recommendations in the form of a final report to Parliament regarding measures to be taken to respond to such violations and prevent their recurrence, and
- recommending symbolic reparations to victims.

In order to achieve this objective, the Truth and Reconciliation Commission, according to the draft law, would have a mandate to "examine events in Bosnia

¹⁶ The discussion of these reasons is based on thorough analyses of the speech given by Gavin Ruxton in his capacity as representative of the Office of the Prosecutor, delivered at the Round Table on "Truth and Reconciliation Commission – The Imperative of BiH's Future" held in Sarajevo in March 2001.

and Herzegovina and the former Yugoslavia during the period from the elections of November 1990 until conclusion of the General Framework Agreement for Peace signed on 14 December 1995 in order to shed light ... on the nature, causes and extent of human rights violations committed” (Art. 6). The mandate of the TRC, as proposed, covers, but is not limited to, circumstances that produced ethnic mistrust and lack of understanding, the role and responsibility of actors outside BiH, political and moral responsibility of individuals, organisations and institutions for human rights abuses, the roles of media, political parties, religious communities and other relevant sectors, as well as the existence of individuals who refused to get involved in committing human rights abuses against their former neighbours and took the risk of protecting them. Rather than investigating specific cases,¹⁷ the proposed Truth and Reconciliation Commission would adopt a structural approach to human rights violations. It would investigate how an environment was created that enabled, promoted and inflicted such enormous human suffering. And, ultimately, based on such analysis, it should develop appropriate recommendations regarding reforms that should be undertaken within society in order to ensure that such abuses never happen again. One way of complementing the limited efforts of the Tribunal in this regard, is, after having heard witness testimony, to produce detailed analyses of the historical, political, sociological and economic causes within Bosnian society which gave rise to the conflict.

It is also foreseen that the TRC will perform research and enquiry to establish the number of people who died, were killed, wounded, disappeared, tortured, raped, imprisoned without just cause and forcefully displaced, the number of damaged and destroyed religious objects, and the locations of mass graves. Its importance derives from the fact that previous research has focused on the victimisation of the fragments of Bosnian society where the focal point was the ethnic background of the victims. The consequence is that there are no unified statistical data on the number of victims for BiH as a whole. However, these numbers are highly important, not only in the context of the quantification of atrocities, but first of all in order to prevent misuse and manipulation over the suffering experienced by citizens.

Another reason why the completion of this work is important stems from specific features of the manner in which the Bosnian conflict unfolded and was conducted. This is best reflected in the number of 27,000 missing persons. If the TRC is to establish the truth about the past, then shedding light on the fate of all

¹⁷ Looking into specific cases is the prime task of the Tribunal and the same mandate of the TRC would mean overlapping work and mixing responsibilities.

missing persons, and uncovering the forensic truth about their eventual death and the causes of it, is necessary in order to address the needs of the family members of victims. The TRC should further the investigation into broader societal circumstances, which led to a practice of disappearances and its systematic employment.

The work of the commission could address the needs of this category of victims by assisting those who manage information regarding the fate of missing persons to make their knowledge accessible. By doing this, the commission could address the shortcomings of the Tribunal, whose mandate with regard to the fate of missing persons is very restricted, focusing instead on the directive that only those whose criminal responsibility could be established can be put on trial and punished. Although legally justified, bearing in mind the great number of those skilfully hiding the scaffolds of their victims, this approach closed the doors towards truth-finding about thousands of missing persons.

An important feature of the proposed Bosnian TRC that differentiates it from other truth commissions established in past decades is the fact that it will have no authority to grant amnesty to any individual offender (Art. 7, para. 2). However, although necessary in the given circumstances, this provision may also limit to a great extent the effectiveness of the commission in establishing the truth about what happened for the following reason: it is highly unrealistic to expect that any possible offender would decide to admit his role and responsibility for crimes committed, knowing that he might fear prosecution following his confession either by the Hague Tribunal or domestic courts. This is the reason why truth was traded for amnesty in South Africa. In turn, personal confession by the offender represents the first and necessary step on the path to reconciliation. It constitutes unequivocal proof of the fact that mass crimes were committed and represents a form of official acknowledgement of the victims' pain. Therefore confessions of such type may have important symbolic value and promote national reconciliation. It is still unclear how a TRC in Bosnia would create and promote a climate conducive to voluntary confessions in its search for truth.

The proposed draft law on the TRC in Bosnia also introduces an innovative provision. As part of its mandate to document human rights violations within the given period of time, the commission devotes itself to documenting and making public the stories of acts of humanity waged by individuals who resisted ethnic cleansing and protected victims of other ethnic groups. One important aspect is the suggested composition. If we stay with the South African example, then it should be recalled that at the operational level the commission was composed of three different committees, each of which addressed a specific issue. The Act on the Promotion of National Unity and Reconciliation, which provided for the

establishment of the commission, entailed a very detailed description of the tasks and the functions of each committee.

Comparing the draft law on the TRC, it must, regrettably, be noted that the proposed section on the organisation and work of the commission entails solely provisions regarding the number of commissioners and detailed descriptions of the requirements they must meet in order to be appointed to such positions. It might be counted as one of the shortcomings of the draft law that nothing is said on how the commission would operate in the field. This issue is touched upon in Article 7, which asserts the power of the commission to “appoint committees as needed to help the TRC on a voluntary basis in order to ensure maximum involvement of the public”. The Bosnian commission should, similarly to its South African precedent, have at least two separate committees, which would deal with the issues of human rights violations and reparations.

However, taking into account the complex ethnic and political circumstances under which the commission is supposed to act, additional safeguards would need to be installed. In this respect, it should be ensured that the TRC establishes a credible, efficient, flexible and operational investigation committee. The existence of such a powerful committee could, to a great extent, influence the final outcome of the commission’s efforts or, if not considered properly, contribute to its possible failure, with severe consequences for the future of interethnic relations in Bosnia. So the law must provide for minimal and sufficient safeguards that would prevent any misuse of the commission as a place where fabricated stories are produced in order to blacken other sides. It must be clearly established that witnesses who are ready to give testimony concerning their suffering and grievances caused during the time-mandate of the commission should also inform the TRC of the nature of the evidence they can supply, understanding that it would be investigated and checked before they are called to testify.

It is further determined that the commission should issue its final report to Parliament within 24 months of its official establishment. The report should include recommendations regarding appropriate legal, political and administrative measures to be taken in order to prevent conflict recurrence and, instead, promote reconciliation and mutual understanding, as well as appropriate measures addressing the needs of victims, such as acknowledgement and memorials and other forms of assistance. Upon the submission of the commission’s report, the Council of Ministers at state level would be obliged to implement the TRC’s recommendations, issuing semi-annual reports on progress in implementation for a period of five years.

4.3. Wider Perspectives for Dealing with the Past in the Post-Yugoslav Region

In order to be translated into practice, the idea of a truth commission must receive support, not only from a larger segment of the public, but also from Bosnian politicians. Parliamentary approval is essential. Politicians, however, have mostly been reluctant to adopt it. There are several reasons for such stubborn rejection of this idea on the part of Bosnia's political leadership. Two appear to be the most compelling. First, unlike other countries which have employed a truth commission in coming to terms with a past marked by gross human rights violations, BiH, even ten years after the conflict, has not made a clean break with its past. The partition of the country into two basically ethnic-dominated entities has, naturally, not generated a unity of viewpoint concerning the recent past. And second, the existence of multiple truths about what happened allows every ethnic group to claim exclusive ownership of the truth, excluding any dialogue about how the truths might be reconciled with each other. Otherwise, ethnic identities continue to be built on the notions of victims and victimisation. As long as this situation prevails, politicians have a free space in which to play these conceptions against each other, deepening the anger and hatred any time they feel they need it.

378

Although it is unlikely that the establishment of a TRC will gain broader acceptance and active support by representatives of the government or Parliament in the near future, it is important to maintain the idea and also to think about other mechanisms which could support truth-finding and reconciliation in the long run. Thus it is important to support initiatives which already exist in the field of research and data collection on past atrocities and human rights violations. Here, the work of the Institute for Crimes against Humanity and International Law, Sarajevo, and the Research and Documentation Center Sarajevo (RDC) should be mentioned.¹⁸ Initiatives for "Dealing with the Past" should be rooted in society, contribute to the awareness of society and include views from the wider post-Yugoslavian region.

One regional approach has been taken by three research and documentation centres based in Bosnia-Herzegovina, Serbia and Croatia. RDC in Sarajevo, the Humanitarian Law Center in Belgrade and the Documenta Center in Zagreb have

¹⁸ The Institute was established on 4 September 1992 by the BiH Presidency to scientifically investigate crimes against peace and humanity, genocide, war crimes and other violations of international humanitarian law committed on the territory of BiH in the course of conflict, including historical, legal, sociological, psychological, criminological, ecological and medical aspects. RDC was established in 2004, as a successor to the War Crimes Commission established by the BiH Presidency on 28 April 1992. Its main task, according to its statute, is to investigate and gather facts, documents and data on the above mentioned crimes, regardless of the ethnic, political, religious, social or racial affiliation of the victims.

been working on the documentation and remembrance of human rights violations, and have gained experience in advocacy work in each of the above-mentioned countries. They intensified cooperation in 2004 and now try to contribute to a shared approach on dealing with past atrocities and violence in order to contribute to transformation. On 6 April the three Centres signed the “Protocol for Regional Cooperation in Researching and Documenting War Crimes in Post-Yugoslavian Countries”, binding each organisation to the other and allowing for cooperation on various levels and activities related to the process of dealing with the past. While each Centre approaches this complex field of activity by means of its own methodology, all agree on one point “that truth, as a precondition of all forms of justice, can be attained only through the persistent pursuit of the facts”. One of the outcomes of this cooperation has been the call for a permanent regional summer school: a unique regional endeavour and the first enterprise of its kind in the field of transitional justice and dealing with the past in this region. The initiators hope that this school will “become a regional hotbed of analytical inquiry into the aspects and mechanisms enabling the successful development of the process of dealing with the past.”¹⁹

Another effort with a regional, cross-border focus on dealing with the past has been taken by the Centre for Nonviolent Action, providing training, public hearings and documentary films with former soldiers who actively participated in the Bosnian war on different sides (*see the article “Confronting the Past” by Martina Fischer in this book*).

5. Summary and Conclusions

Security Council Resolution 827 conferred on the Hague Tribunal the power to punish serious violations of human rights committed on the territory of the former Yugoslavia since 1991, so that it might contribute to restoring and maintaining peace. Through introducing the norm of justice in the context of post-conflict peacebuilding, it was expected that the trials conducted by the Tribunal would serve several important functions in assisting the process of peacebuilding and creating sustainable, peaceful relationships and outcomes.

¹⁹ The Summer School for Dealing with the Past is a one-week educational programme designed for university students and NGO activists (age 20-35), consisting of lectures, presentations and discussions with international and regional experts working in the field of transitional justice and dealing with the past. Topics to be discussed include retributive and restorative justice, truth-telling mechanisms, commissions for truth and reconciliation, collective memory, reparations, vetting and lustration, reconciliation, international tribunals for war crimes, international criminal law and the ICTY, domestic war crimes trials. For further information see www.seep.ceu.hu/balkans/.

In this article, it has been demonstrated that the ICTY has made a significant contribution to justice but a limited contribution to peace efforts in terms of creating more healthy and tolerant relationships between different ethnic groups. The most important function expected from retributive justice was that it would send a message that certain individuals, and not entire ethnic groups, committed atrocities and that they should be held accountable for what they have done. However, there is little support on the ground for the hypothesis that individual trials assisted ethnic communities in Bosnia to realise and distance themselves from what constituted evil within them. Even 12 years after its establishment, biased perceptions of the work of the Tribunal and further ethnic polarisations are the chief characteristics of Bosnian society. Individual accountability apparently does not suffice in order to contribute to mutual acceptance or a more tolerant and inclusive relationship between ethnic communities.

It was expected that public disclosure of all relevant available facts and findings on the conflict could contribute to piecing together the complex and comprehensive picture of the evil that was inflicted in the early 90s and help create space for a common, shared history. But the Tribunal is, in the first instance, a legal body entrusted with delivering justice and meting out punishment, and its truth is a legal truth. Therefore it is highly unrealistic to expect that the Tribunal alone could investigate the complex constellation of historical, political, sociological and economic causes that led to the conflict. This is especially true in the situation where its findings and verdicts are subject to manipulation and abuse by local ethnopolitical elites, who have developed three different, mutually exclusive and contradictory interpretations of what happened in the period 1991–1995.

Another expectation linked with the Tribunal was that it would assist in the process of healing and reconciliation by providing victims with a sense of justice. As shown in the present discussion, the prospect that the Tribunal alone could achieve this appears too ambitious for an exclusively legal institution. Conviction-oriented and tasked with delivering justice through individual punishment, the Tribunal can only make a limited contribution to victim catharsis. It could only hear a small portion of victims whose testimonies were considered necessary for the purpose of achieving conviction. The vast majority of those needing to tell their stories and attain official recognition and acknowledgement for their suffering would never have a chance to be heard.

The most promising function of criminal justice lies in its supposed ability to act as a deterrent against future atrocities both in terms of specific and general deterrence. The message has been conveyed to all ethnic groups in BiH

and in the region that mass atrocities will not be accepted and anyone who might wage new violence must take into consideration criminal sanctions.

Analysis has shown that the efforts made by the Tribunal alone, although necessary and irreplaceable in achieving minimal justice, breaking the cycle of violence and the culture of impunity, do not suffice to bridge the gap between the past, marked by ethnic hatred, intolerance and violence, and a future of peaceful coexistence, based on mutual acceptance and a human rights culture. Therefore, the pursuit of retributive justice must be supplemented with additional instruments directed toward societal healing and transformation of the relationships between ethnic groups. The application of the approach of restorative justice, which creates an environment where offenders are assisted to voluntarily acknowledge the wrongs they have done and engage in the process of changing their relationship instead of continuing to deny guilt until it is ultimately proven to them by the juridical process, appears as a viable supplement.

The major problem faced by Bosnian society originates in the fundamental difference in perceptions of the past. The establishment of a Truth and Reconciliation Commission could make a most valuable contribution to peace efforts and to overcoming mythologised and ideologised views of recent history. Its task would be to encourage interethnic dialogue about what happened and how to build peaceful coexistence in the future. That it is possible to reach such a shared understanding of past events in BiH is best proven by the recently established RS Government Commission on the events in and around Srebrenica in July 1995. This report officially acknowledged that the crime of genocide was committed by the RS army in Srebrenica.²⁰ Prior to this report the government(s) of Republika Srpska showed extreme reluctance to even admit that those atrocities had ever been committed, thus facilitating collective amnesia. After the report was issued, in his official address to the Bosnian public, broadcast by the public TV station of the RS on 22 June 2004, President Cavic acknowledged that the RS police and army were directly involved in the detention and execution of men in Srebrenica, causing the deaths of several thousand Bosniak victims. He characterised the massacre as “a black page in the history of the Serb people”, adding that “the perpetrators of this crime cannot justify it to anyone”. With this public acknowledgement of suffering by the highest ranking official of the entity responsible, given in a climate of tension and mutual mistrust, the first step to truth-finding and reconciliation has been made, proving that it is possible.

²⁰ On 15 December 2003 the RS government established the Commission on Srebrenica pursuant to the decision of the Human Rights Chamber which obliged it to disclose and release all information at its disposal with respect to the fate and whereabouts of the persons killed in Srebrenica.

Indeed, as Akhavan emphasised “if there can never be a shared truth, the notion of common humanity becomes a mere illusion” (Akhavan 1998:771). In the context of the current situation in BiH, the core of a shared truth should lie in empathy for human suffering regardless of ethnic or religious affiliation. By placing emphasis on this, a TRC could contribute to writing a moral and interpretative narrative of the conflict based on basic humanitarian values. In turn, this knowledge could then, through appropriate socio-educational programmes, create public awareness and contribute towards transformation of existing non-objective and biased views. In order to prevent the past from repeating itself in the future, such a process of self-examination should definitely aim first and foremost at individual learning processes. It is not enough to find only a mutual truth acceptable to everyone; it is also necessary to offer future generations a lesson in history and assist an internalisation of human rights standards that would enable them to live in a rights-respecting and humane environment.

But prior to the launch of a TRC or some other constructive mechanism for confronting the past, a broad public debate should take place on how Bosnian citizens, especially victims, see and feel about the need to deal with the past. In previous years this issue was largely ignored and neglected. However, that public consensus and public support are of paramount importance is best illustrated by the fact that the draft law failed when it was abandoned by the Bosnian Parliament. In fact, the proposal was always likely to fail because it was prepared and conducted in an elitist manner, with a top-down approach, without prior consultation and discussion with the parties most interested in the process – victims of the crimes. The consequence of such a limited approach was strong resistance to the TRC on the part of diverse victims’ associations throughout BiH, who expressed their fears that the commission would focus more on forgiving and forgetting, rather than on the establishment of truth and justice for victims.

In order to bear fruit, the identification and implementation of the most suitable model for addressing the past – finding truth, establishing justice and promoting reconciliation – requires the willingness, engagement and active participation of all sectors of society. At this stage of development, we can conclude that it is important to support initiatives which already exist in the field of research and data collection on the ways in which people suffered. Initiatives by civil society organisations to deal with the past in a regional framework can be very helpful in this process. It is also important to support the court procedures of the ICTY and to foster capacities for setting up domestic trials. At the same time it is necessary to initiate broad and inclusive public debate on the diverse models and mechanisms which would help reconcile conflicting perceptions of the past for the sake of a future that is free from violent conflict.

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