

**The Politics of Memory: Truth, Healing
and Social Justice**

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Truth in a Box: The Limits of Justice through Judicial Mechanisms

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The problem with the war crimes tribunals for the former Yugoslavia and Rwanda is that they are war crimes tribunals. The stuff of law – the elements of the crimes, the rules of procedure, the dance of witness, lawyer, judge – can only do so much. And the closer one is to the crime, the less likely it is that ‘so much’ is enough.

Tribunal justice may be meaningful to lawyers drafting pleonastic legal documents in The Hague, diplomats declaring success at stabilizing conflicts, and local politicians staking their claims to power amid the smouldering embers of destroyed communities. But little satisfaction will come to survivors. Genocide, mass murder, rape, torture and other crimes may be tried, and a small percentage of the perpetrators may be convicted. International principles will triumph or fail; respect for international law will expand or diminish. The new governments arising out of conflict will be legitimized or de-legitimized. In any case, the voices of survivors will remain largely unheard and unaddressed.

For survivors, storytelling is not a luxury. War serves to strip survivors of control over their lives and to erase all sense of a volitional past and future. As Elaine Scarry observes in *The Body in Pain*, the discourse of torture, rape, murder and other forms of violence teach their targets that they are nothing but objects (Scarry 1985). The process of telling and observing one’s story being heard allows survivors to become subjects again, to retrieve and resurrect their individual and group identities. From voice comes hope.

In August 1994, tucked away in a refugee camp in Pakistan, a dozen Bosnian Muslim refugees sat in a circle on the cement floor and, taking turns, wrote the following poem:

I used to believe that the world was full of many colors,
now I know it’s just black.

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I used to believe that all people are kind,
now I know only some of them are.

I used to believe that my friends would be with me all of my life,
now I know that none of them would give any part of their body for me.

I used to believe that I could trust people,
now I know that I should be careful.

I used to believe that I would have a good life with my neighbors,
but now I know it is easy for them to kill in war.

I used to believe that no one could force me away from my homeland,
but now I know this isn’t a dream.

I couldn’t believe that my generation could be worse than the older
generation,
but now I know they are.

I used to believe in everything,
but now I believe in nothing.

I used to believe in happiness,
but now I cannot even believe my eyes.

I used to believe that I would live by my wishes,
but now I know I will live by other people’s wishes.

What I couldn’t believe, I now believe.

(A ‘Group Poem’, one line each told by Adisa, Nasir, Hajra, Muriz, Mirsada, Remzija, Melisa, Senid, Aziz, Uzeir, Mevlida, Sahza, aged 13 to about 54, refugees from Sarajevo, Jajce and Donji Vakuf in Islamabad, Pakistan, August 1994. Reprinted from *The Suitcase: Refugees’ Voices from Bosnia and Croatia* (University of California Press 1997).

When first asked to contribute to the poem, many had difficulties in answering, not because they did not have ideas, but because, in the words of one man who participated: ‘No one has asked us what we think in such a long time.’ They had been treated as mere objects, first by their tormentors, then by the refugee camp handlers, government spokespeople, asylum officers, visiting journalists. They had been denied their complex selves and stamped with unitary identities: enemy, victim, refugee, the ‘ethnically cleansed’, asylum-seeker, spectacle. The telling of the poem helped many of the Bosnians in Pakistan to reclaim a part of their identity. The war crimes tribunal, however, threatens to retard or even reverse this process.

For the war crimes tribunal, survivors of war wear the stamp of potential witness; they become conduits through which investigators and prosecutors can make their case. Despite their good intentions, investigators and prosecutors – the agents of law – must focus on piecing together facts

to prove the crime. Even if they avoid putting the personal suffering of survivors on trial, they cannot return the survivors' rightful claim to subject-hood. The legal process is inherently counter-narrative; it opens and closes, letting in only enough information to prove the issue at hand.

Victims can testify about the hand that beat them, confirm the size of the room, the colour of the door, the width of the wooden table on which bodies were broken. But they cannot talk about how their child's face looked when the paramilitary troops dragged her away, they cannot remember what they ate for dinner on the last day the entire family was alive and together, they cannot cry about their dog who was left behind or reminisce about their long walks through their old town square. No one will see the stories, poems, pictures, jokes, coffees, gossip, walks around the refugee camp yard – no one will know the little things that helped them survive. A war crimes tribunal is, after all, only a war crimes tribunal. That a tribunal holds great utility for lawyers and history writers is unquestionable. That it alone can address the concerns of survivors is questionable.

The refugee woman who listened to the asylum officer calmly inform her that her application was rejected because she was *only* threatened with rape and was not *actually* raped or tortured in a concentration camp; the newly-wed doctors who escaped Bosnia by paying the aid convoy 4,000 Deutschmarks each and who somehow made it across borders to Germany where they disappeared into the ranks of the shadow labour force; the teenage girl who carries in her rucksack the poetry of her dead soldier boyfriend; the four-year-old boy who wants to become a plane so he can fly his family back home; the elderly couple who lived four months in their basement before a sympathetic *enemy* neighbour found them and arranged for their safe exit. The tribunal may fulfil many functions, but it cannot serve the needs of these and other survivors.

We do not yet know all of the mechanisms necessary to promote in war-torn societies truth, healing and transformative social change. Witness the deep division within Chile over the appropriate response to bringing General Pinochet to justice for violations of human rights during his dictatorship. We do know, however, that formal tribunals serve only limited functions. This chapter outlines these functions and suggests additional alternatives that may address more fully the interests of survivors.

A Paradigm of Functions and Interests

Like cases before domestic criminal courts, even-handed investigations and fair prosecutions before a war crimes tribunal can fulfil certain discrete functions. Six of the main functions are as follows:

1. *naming* crimes;
2. *blaming* individual perpetrators;
3. *punishing* the guilty and *detering* potential perpetrators;
4. *delivering reparations* to survivors;
5. *reforming* lawless societies; and
6. *recording* what happened for history. (For alternative distillations of goals of tribunals, see ASIL 1994.)

The problem is not that the war crimes tribunals will utterly fail to address these functions. It is rather that their success in doing so will be measured differently according to one's particular interest. To be sure, everyone has some interest in 'justice' being served. Justice, however, is frequently related to *position*. We can locate four elements of position:

1. *location and placement*: relative proximity to the crimes, the conflict, the region and the issues;
2. *attitude and disposition*: assessment of the origins of conflict, the accountability of various actors for crimes and their continuation and the need to remember or the desire to forget;
3. *job*: role and responsibility as an international, regional, national, community or family leader, and;
4. *Status C* position inside or outside international, regional, national and community power structures, and worth accorded to one's existence according to that position.

When measured by these attributes, most survivors, close to the crime, are far from achieving their vision of justice.

Table 8.1 below illustrates some of the intersections between *functions* and *position*. It lists the interests served by each function for three main groups of actors: the epistemic 'international community' (see Roht-Arraiza 1995) – international and regional institutions and organizations, states and individual actors outside Rwanda and the former Yugoslavia; local power-brokers, including both *de facto* and *de jure* leaders and the states, territories and communities arising out of the conflicts and their opposition; and individual survivors, victims and bystanders including both those who stayed in the area in conflict and those who fled for safer ground (but excluding those who previously or presently held positions of power). These groups are not mutually exclusive: linkages exist among groups and, additionally, actors may shift from group to group. Significantly, the table does not include a category for 'perpetrators' in recognition that perpetrators may, either through self-definition or definition by others, fall within all of the categories.

Within each of these groups, interests can vary further according to the

TABLE 8.1 Intersections between functions and position

Functions	International community	Local power-brokers	Survivors, victims and bystanders
Naming crime	<ul style="list-style-type: none"> • set and enforce boundaries of international law • express moral condemnation • save face for failures 	<ul style="list-style-type: none"> • absolve (or blame) current leaders of responsibility • (de)legitimize new states 	<ul style="list-style-type: none"> • receive public acknowledgement of what happened • discover way to talk about personal suffering
Blaming individual perpetrators	<ul style="list-style-type: none"> • stabilize successor states by individualizing guilt • pave way for normalization of international economic and political relations 	<ul style="list-style-type: none"> • (de)stabilize successor politics by individualizing guilt • enable new power-brokers to assert their authority over violators • pave way for support from international community 	<ul style="list-style-type: none"> • achieve revenge • save face among neighbours and international community
Punishing guilty and deterring potential perpetrators	<ul style="list-style-type: none"> • demonstrate the existence and force of international law • deter potential perpetrators worldwide 	<ul style="list-style-type: none"> • displace threats of personal revenge • legitimize local efforts to try crimes • deter potential perpetrators locally 	<ul style="list-style-type: none"> • achieve revenge • achieve retribution • force expiation of guilt • give significance to suffering • prevent recurrence of suffering
Delivering reparations to survivors	<ul style="list-style-type: none"> • demonstrate the existence and force of international law • deter potential perpetrators worldwide 	<ul style="list-style-type: none"> • address needs of survivors • displace threats of revenge 	<ul style="list-style-type: none"> • receive partial remedy for suffering • improve welfare for self and other survivors • receive public acknowledgment of guilt
Reforming lawlessness	<ul style="list-style-type: none"> • (re)establish the position of international law in a lawless world 	<ul style="list-style-type: none"> • (re)establish the rule of law in lawless societies 	<ul style="list-style-type: none"> • (re)establish the principle that law exists above power and force
Recording for history	<ul style="list-style-type: none"> • establish official record of the efficiency and efficacy of international institutions • use record to warn potential perpetrators worldwide • educate globally 	<ul style="list-style-type: none"> • establish official record of (i)legitimacy of government • use record to warn potential perpetrators locally • educate locally 	<ul style="list-style-type: none"> • establish authoritative 'living record' of what happened • retrieve and record a collective memory and identity • expose the truth • remember or forget • educate within families and communities

nuances of *position* – that is, proximity, attitude, job and social status. This chapter examines the ways in which each function of the war crimes tribunals serve the needs of each of the three groups of actors, remembering that not all actors within each group are the same. In sum, the thesis is that for each of its potential functions, a tribunal is most likely to address the interests of the international community, and least likely to hear the interests of survivors. Tribunals should therefore be understood as a necessary – although insufficient – response to the aftermath of conflict and the need for healing.

Naming crimes The naming of crimes can serve important, though vastly different, interests of the three groups of actors. For the international community, the naming provides a historical opportunity to establish, refine and/or enforce the boundaries of international law. For example, by naming the crime of genocide, the tribunals are the first international criminal tribunals to define the meaning and application of the Genocide Convention, a post-Second World War treaty. By naming the crime of rape as a ‘crime against humanity’, they are the first international criminal courts to refine when and how rape in war can be prosecuted as such (although rape in conflict has been prosecuted previously as torture, inhumane treatment, crimes against personal dignity, and other national or international criminal offences – Blatt 1992). By naming superior officers’ actions as criminal, the tribunals are defining the limits of command responsibility; by naming foot soldiers’ actions as criminal, they are setting the limits of the defence of ‘superior orders’. Who is most interested in the potential of the war crimes tribunals to fulfil this function? Those who have made it their profession to promote the existence and enforcement of international law – lawyers, scholars, judges, activists and diplomats.

The naming process and the content it brings to international law is ‘shaped by the requirements of the international community’ (Roht-Arriaza 1995: 5). At this juncture in history international war crimes tribunals present, as Carlos Nino has noted, opportunities for ‘collective examination of the moral values of public institutions’ (Nino 1996: 131; see also Franck 1997: 140) and, in this vein, for the building and assessment of international institutions, including trans-sovereign courts (see Helfer and Slaughter 1997). The post-war era has opened a space in which ‘universal’ values can be discussed and (re)examined (cf. Gordon 1998). Where no consensus exists as to what constitutes ‘justice’, a tribunal may present a ‘transformative opportunity’ for the development of international norms (Osiel 1997: 2). Where consensus already exists, such as in the case of non-derogable clauses in international treaties, a tribunal may be an occasion to renew adherence to a particular norm and to re-educate the public as to

its importance. The tribunal for the former Yugoslavia has worked particularly well in this regard, generating ‘unprecedented interest in humanitarian law’ (Meron 1997: 7) and in directing new generations to focus on the enduring importance of these principles.

The naming of crimes, even without the trials themselves, also provides the international community with a stage from which to express its moral condemnation. International leaders can thus reaffirm by words, if not by deeds, a vision of a just world in which violations of human rights are not met with impunity. Such naming can serve the international community’s interest in saving face, in explaining its own failure to take early, decisive action to stop the slaughter, or later steps to minimize the carnage once it had begun. ‘At least we are doing something now,’ the powerful countries behind the tribunal can declare. Those who were troubled by the equivocal response of their country or institution to the bloodshed may find solace in these words.

Local power-brokers have their own interest in saving face, in explaining their present and past actions to their own constituents and to the international community at large. Those currently in government are interested in using the naming of crimes to absolve current leaders of responsibility; those outside government seek to use the naming of crimes to discredit and undermine the present leadership. Depending on one’s attitude towards the accused and the current leadership, the naming of crimes can either legitimize or de-legitimize the new governments or states arising out of conflict. While local leaders care little about international law and institutions, they do have an interest in (re)establishing their own legitimacy and authority.

The naming of crimes carries an entirely different meaning for survivors. Individual survivors are searching for a way to be whole again. Some want to forget what is too painful to remember. For them, the war crimes tribunal is a show to avoid. Others want never to forget. They need to hear their stories told aloud, and to see others hearing their stories. For them, the naming of crimes may suffice as public acknowledgement of what happened. Without such acknowledgement, survivors feel invisible, erased, forgotten.

The language of the tribunal can provide victims with a way to speak about the unspeakable. ‘Language and culture encode ways of seeing the world that facilitate common understanding of experience’ (Senehi 1996; see also Narayan 1989). Without a language to express themselves, many survivors play out their feelings through the ‘hidden transcripts’ of anger, aggression and disguised discourses of dignity, such as gossip, rumour and creation of autonomous, private spaces for assertion of dignity (Scott 1990). The legitimized, distant words of law open a door for some to remembering,