

Balkan Yearbook of Human Rights

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Consequences for the Future

Editors:

Dino Abazović

Branko Todorović

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KNOWLEDGE AND RESPECT FOR HUMAN RIGHTS WIDESPREAD IN ALL SPHERES OF SOCIETY



Sergio Painsi, MA

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Conclusion**Introduction**

"I believe that the English and the Americans are happy that we are exterminating the Jewish riff-raff"¹

Joseph Goebbels, 13 December 1942

What makes a democracy strong enough to be an effective antidote against mass murder? Who are the enemies of civil society? These two questions point immediately at the main topic of my paper: the political and social opposition to genocide.

Unfortunately, during the post-communist transition of former Yugoslavia, the lack of democratic culture and institutions paved the way for genocide in Bosnia. At the same time Western liberal democracies did very little to prevent it. In both contexts civil society proved to be too weak to make politics stop the bloodshed.

My research wants to show how fragile democratic virtues are. Democracy itself can be just a mechanism that legitimates decisions taken by majority. Its positive meaning is given by added values which usually go together: pluralism, the balance and check of power, the role of free associations, tolerance and the respect of human rights.² When the citizens are not interested in the state's activities and are not involved in society, democracy is at danger. When the rule of law is discredited by the use of violence, democracy disappears and genocide is at ease.

The methodology of this paper consists first in giving a sociological insight of the idea of democracy, and then in examining its possible decay from an historical perspective.

After having explained the concept of "civil society" and illustrated the process of "democide"³, I am going to take the German experience between

¹ In TAYLOR, Fred. *Goebbels' Diaries, 1933-1941*. New York: G. P. Putnam's Sons, 1983.

² Although democracy and human rights should be conceived as an organic unity, "it is often said that democracy is the system of government 'most likely' to defend human rights, while on the other hand democracy itself is said to need 'supplementing' by human rights". BEETHAM, David. *Democracy and Human Rights*. Cambridge: Polity Press, 1999, p. 90.

³ Democide is a term suggested by Rudolph J. Rummel: it means "mass murder of civilians by governments or quasi-governmental organizations". BAUER, Yehuda. "Comparison of Genocides" in CHORBAJIAN, Levon and SHIRINIAN George, eds.

1918 and 1945 as an example of corruption of democracy (the Nazi rise to power) and escalation of genocide (the extermination of the Jews). Then I am going to verify the real concern of Western established democracies about moral issues which challenge the world order. Finally I am going to analyse the political sources of war and genocide in Bosnia-Herzegovina (1992-1995) and the role that civil society played there.

For my bibliography, I am going to rely mostly on the works of scholars and experts in the fields of civil society (e.g. Kaldor, Putnam, Tocqueville) and genocide (e.g. Falk, Kressel, Staub). These two main topics will be related to the contexts of democracy, Nazism and former Yugoslavia.

My approach will be analytical in the first part (about possible degeneration of democracy) and polemical in the second one (about compliance with genocide).

1.1 Civic Resistance

"The concept of "civil society" has played a central role in the recent global debate about the preconditions for democracy and democratization. In the newer democracies this phrase has properly focused attention on the need to foster a vibrant civic life in soils traditionally inhospitable to self-government. In the established democracies, ironically, growing numbers of citizens are questioning the effectiveness of their public institutions at the very moment when liberal democracy has swept the battlefield, both ideologically and geopolitically".⁴

The quality of a country's democracy is revealed in the character of its civil society as well as its political institutions. The contemporary meaning of democracy goes far beyond the competence of the state: it is not just management of power, but much more a set of values shared by the citizens.

The concept of civil society refers to "civility" and goes back to the Enlightenment period. "Civil society meant respect for individual autonomy, based on security and trust among people who had perhaps never met. It

Studies in Comparative Genocide. Houndmills, Basingstoke, Hampshire, and London: Macmillan Press, 1999, p. 38.

⁴ PUTNAM, Robert D. "Bowling Alone: America's Declining Social Capital". In DIAMOND, Larry and PLATTNER, Marc F., eds. *Journal of Democracy* 6(1), Baltimore, MD: The Johns Hopkins University Press, 1995, p. 77.

required regularity of behaviour, rules of conduct, respect for law and control of violence".⁵

Alexis de Toqueville was the first to define civil society as a system of citizens' voluntary associations.⁶ He regarded it as a needed balance for the "tyranny of the majority" in a democratic system and as a valuable check for the possible intrusion of the state in private life.⁷ Through the tragic experiences of the 20th century (World Wars and totalitarian states), the concept of civil society regained importance: nowadays it is generally referred to as a network of "self-organised groups and individuals independent from the state and political society".⁸ Their role is very important in contrasting apathy and in keeping democratic culture alive. According to Toqueville, a civil society is constantly being undermined even by some fundamental features of liberal democratic, capitalist societies. Among them the individualizing pressure, the process of centralization and the division of labour and specialization that occurs in competitive markets.

Public passivity and lack of commitment (as, for example, low voting turnout at the elections) is at the moment a serious threat for Western democracies, where the state is going too far from the citizens' control.⁹ Active

⁵ KALDOR, Mary in DUNNE, Tim and WHEELER, Nicholas J., eds. *Human Rights in Global Politics*. Cambridge: University Press, 1999, p. 196.

⁶ Writing about America in the early 19th Century, Alexis de Tocqueville was struck by public involvement in organization building. "Americans of all ages, all stations in life and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types - religious, moral, serious, futile, very general and very limited..." In TOQUEVILLE de, Alexis. *Democracy in America*. New York: Harper & Row, 1969, p. 513.

⁷ "A key component of the concept of civil society was the existence of a plurality of citizens' free organizations through which the individual could express and make effective his own concerns and which constituted a countervailing pressure on the state". KALDOR, Mary in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 197.

⁸ *Ibid.*, p. 198.

⁹ "To those concerned with the weakness of civil societies in the developing or post communist world, the advanced Western democracies and above all the United States have typically been taken as models to be emulated. There is striking evidence, however, that the vibrancy of American civil society has notably declined over the past several decades". PUTNAM, Robert D. 1995, p. 65.

citizenship requires participation, but it is inclusive¹⁰ and it is definitely the best available antidote against despotism.

Until now, time has shown that "no democracy has ever made war on another democracy. Even nondemocratic states fight less frequently if their leaders are subject to some restraints on their power".¹¹ In established democracies, the different elements of civil society (trade unions, corporations, youth groups, churches, free media and all other kinds of voluntary associations) watch over the government, while fighting to protect their interests. Horizontal interactions among equals practice self-government and oppose the vertical hierarchy of the state. They form a "social capital" which facilitates coordination and cooperation for mutual benefit.¹² Of course, difficult life conditions can occur in democracies as well, but political disappointment can always be expressed through legitimized protest and electoral contests.¹³

Problems start when the use of violence prevails over the rule of law.¹⁴ Societies which yield to mass hatred are generally familiar with violent behaviour, an aspect which - on the contrary - is alien to a long-term democratic

¹⁰ "The republican component of citizenship is completely separated from membership of a pre-political community in which integration is achieved through descent, tradition and a common language. The identity of a nation made up of citizens is not constituted by ethnic or cultural affinities, but by the practice of the citizens themselves, actively exercising their rights of participation and communication". HABERMAS, Jürgen. "Cittadinanza e identità nazionale", *Micromega*, 6:5, 1991, p.127, in ZOLO, Danilo. "Citizenship in a Post-Communist Era", in HELD, David. *Prospects for Democracy. North, South, East, West*. Cambridge: Polity Press, 1993, p. 260.

¹¹ KRESSEL, Neil Jeffrey. *Mass Hate. The Global Rise of Genocide and Terror*. New York: Westview Press, 2002, p. 217.

¹² See PUTNAM, Robert D. *Making Democracy Work: Civic Traditions in Modern Italy*. Princeton, NJ: Princeton University Press, 1993, p.157: "Economics does not predict civics, but civics does predict economics, better than economics itself". In his study of Italian politics, Putnam shows that the quality of governance is determined by longstanding regional traditions of civic engagement (or its absence).

¹³ "In a democracy, the power to control policy does not belong to any single person or group. Even the most charismatic leaders are severely restrained in their ability to mobilize followers down a path of fanaticism" KRESSEL, Neil Jeffrey. 2002, p. 219.

¹⁴ "In democracies as well as dictatorships, the greatest abuses of legality and human rights occur during wartime. Thus, Roosevelt authorized internment of Japanese-American citizens during World War II and Lincoln suspended various constitutional protections during the Civil War. But, compared to other forms of government, democracies have shown considerably greater reluctance to kill civilians and otherwise violate human rights, even in wartime". *Ibid.*, pp. 217-218.

political culture. Rudolph J. Rummel, a political scientist from the University of Hawaii, has argued:

"The more power a government has, the more it can act arbitrarily according to the whims and desires of the elite, the more it will make war on others and murder its foreign and domestic subjects. The more constrained the power of governments, the more it is diffused, checked and balanced, the less it will aggress on others and commit democide. At the extremes of power, totalitarian governments have slaughtered their people by the tens of millions, while many democracies can barely bring themselves to execute even serial murderers".¹⁵

As Rummel puts it: "Power kills, absolute power kills absolutely".¹⁶

As you can see, the organization of society plays a key role in the development of genocide: it is a matter of fact that it is much more likely to happen in monolithic societies and authoritarian or totalitarian states, where the institutions feel free to discriminate and are capable of carrying out mistreatment.

"The basis of democracy rests on an equal treatment of all individuals irrespective of their ethnic or other origin, while the creation of national states is based on exclusivist principles such as the legalization of national segregation and rejection of pluralism".¹⁷ Nationalism is an enemy to democracy and a strong drive for the polarization of society: when it gets to power, the civic nation turns into an ethnic one. There is little space left for civil society, since there are no more equal citizens, but just a privileged group against a discriminated minority. In case of genocide the latter turns to victims, while the first splits into perpetrators and bystanders.

Motivations for hostility often arise from greed, threat, frustration or difficult life conditions (e.g. economic problems, widespread violence, rapid

¹⁵ RUMMEL, R. J. "Democracy in Totalitarian States: Mortocracies and Megamurderers" in CHARNY, Israel W. *The Widening Circle of Genocide*. New Brunswick, NJ: Transaction, 1994, p. 7.

¹⁶ *Ibid.*, p. 7.

¹⁷ JANJIC, Dusan. "Resurgence of Ethnic Conflict in Yugoslavia: the Demise of Communism and the Rise of the 'New Elites' of Nationalism" in AKHAVAN, Payam and HOWSE, Robert. *Yugoslavia, the Former and Future: Reflections by Scholars from the Region*. Geneva: The United Nations Research Institute for Social Development (UNRISD), 1995, p. 42.

changes in social structures and way of life). Perpetrators are normal people¹⁸: genocide is not madness, but commonplace in human history. Great evil is neither banal nor incomprehensible: it comes "out of ordinary psychological processes that evolve, usually with a progression along the continuum of destruction"¹⁹ Perpetrators are only too affected by the propaganda or ideology used to justify discrimination and persecution.

"In the twentieth century, major democide, and most genocidal attempts, have accompanied utopian, pseudo-messianic movements - extreme Nationalism, Fascism, Nazism, Communism. The desire to destroy the old world and build a new, wonderful society from scratch has everywhere led to mass murder and destruction. One can therefore define the major source of the danger: ideologies, mainly the utopian one, providing the motor for tyrannies and dictatorships. Democracies, with all their faults, as Rummel has shown, do not engage in mass murder on any significant scale".²⁰

The role of bystanders is crucial in order to stop the degeneration of democracy into totalitarianism. By definition, bystanders are passive and silent: "Individuals and groups, preoccupied by their own immediate needs and pressing goals are inclined to ignore others' need and pain".²¹ Bystanders (individuals, groups, other governments) can strongly affect the behaviour of perpetrators, but by ignoring the reality they confirm them in the rightness of their cause. Only the legacy of a strong and independent civil society can try to activate bystanders and turn them into opponents.²² When this process succeeds, it can exert an extraordinary power. Caring is contagious: during World War II, for example, all the inhabitants of the Huguenot village of Chambon in Vichy

¹⁸ People who participated in mass murders were normal by conventional standards of mental health: "interviews and psychological testing found no evidence of mental illness or psychological dysfunction in the Nuremberg defendants and SS criminals". STAUB, Ervin. *The Roots of Evil. The Origins of Genocide and Other Group Violence*. New York: Cambridge University Press, 1989, p. 91.

¹⁹ Ibid., p. 126.

²⁰ BAUER, Yehuda in CHORBAJIAN, Levon and SHIRINIAN George, eds. 1999, p. 42.

²¹ STAUB, Ervin. 1989, p. 157.

²² "The assumption here is that the human wrong of genocide needs to be addressed, to the greatest extent possible, by preventive modes, including education, and through the inclusion of tolerance as an integral element of democratic theory and practice". FALK, Richard in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 188.

France cooperated in saving several thousand Jews, despite penalties of deportation or death.²³

Every time they faced substantial opposition, the Nazis backed away. There are other examples: they did not persist when Bulgaria (where the people protested in the streets) refused to hand over its Jewish population or when, within Germany, relatives and some institutions protested the killing of the handicapped and others regarded as genetically inferior. On the contrary, a lack of reaction can confirm the perpetrators' faith in what they are doing: "Hitler saw the lack of response both in Germany and in the outside world to the persecution of Jews as evidence that the whole world wanted what only he had the courage to do".²⁴

The Nazi experience is probably the most tragic example of a destructive descent from democracy all down to genocide. In the next part I am going to examine how it was possible that the great majority of people in a civilized country like Germany chose Hitler and kept faith with him till the extreme consequences.

1.2 Democide in Nazi Germany

"The German enigma is not Hitler. Nor is it the behaviour of either frauds or police-sadists. The real enigma is the honest, unsadistic German majority that unleashes them rather than throwing them in jail. Hitler's shoddy day-dreams are not interesting. What is interesting is that an outstanding educated nation crusades for them".²⁵ The most famous example in history of a dangerous relation between democratic legitimacy and genocide is the one of Nazi Germany. Hitler regularly won the elections before becoming a dictator and devoting himself to the extermination of Jews, Gypsies etc. By doing that, he has always enjoyed the support of the great majority of the Germans.

His rise to power benefited from general dissatisfaction. Germany had lost World War I and the Peace Treaty of Versailles had humiliated it, taking away territories, demanding substantial reparation and a huge reduction of its national army. A big part of the German population (and most of the veterans) could not cope with the disappointment of the military defeat and then

²³ STAUB, Ervin. 1989, pp. 165-166.

²⁴ Ibid., p. 87

²⁵ VIERECK, Peter *Metapolitics: The Roots of the Nazi Mind*. New York: Capricorn 1965, p. 317.

perceived it as the result of a betrayal, a "stab in the back" by internal enemies: Jews, communists, republicans.²⁶

The following French occupation of the Ruhr industrial district, the severe inflation, the increasing unemployment spread further insecurity among the population. The Communist threat against the parliamentary system was strong. The unstable democracy of the 1920s was about to collapse. The Nazis promised law and order, jobs and ideals to live by: in 1932 they emerged as the largest party in the German parliament (*Reichstag*). In January 1933 Hitler was appointed chancellor. From then on it was easy for him to ban and destroy the political opposition, establish a totalitarian state and use propaganda to impose Nazi ideology.²⁷

Ideology plays a very important role in the decline of a pluralistic democracy: it manipulates ideals, strengthens the bonds of a group, finds scapegoats and creates enemies to be blamed for problems. Ideology was necessary for endorsing the *Fuehrerprinzip* (leadership principle), which required unquestionable obedience to Hitler. In his book "Mein Kampf" (written in prison in 1924), Hitler advocated a higher spirit based on racial purity. Two basic points of his theory were anti-Semitism and nationalism: Jews had to be destroyed in order to preserve Aryan culture; Aryans (i.e. ethnic groups belonging to the Nordic race) had the right to claim land from racially inferior peoples in order to provide Germany with its necessary living space (*Lebensraum*).²⁸

The killing of Jews and others was highly irrational from any social perspective, except the ideological one.²⁹ It was an easy task for Hitler to attack

²⁶ This is the basis of the so-called *Dolchstoßlegende*: "The new liberal regime was opposed on all sides and was openly considered to be a *Judenrepublik*. For the ultra-conservative circles the burning question arose: How was the sudden cruel defeat and its consequences to be interpreted? The answer was quickly found: by a stab in the back". GIRARD, P. "Historical foundations of anti-Semitism", in DIMSDALE, Joel, ed. *Survivors, Victims and Perpetrators: Essays on the Nazi Holocaust*. New York: Hemisphere Publishing Co., 1980, p. 75.

²⁷ Terror alone might have produced only mass compliance, not the enthusiastic support that is so evident in the historical record: "The Nazis, despite intimidation and propaganda, garnered fewer than half the votes cast - 43.9 percent in the March 1933 Reichstag elections. But when 95.7 percent of Germany's voters went to the polls seventeen months later, nearly 90 percent said *Jawohl* to Hitler and his assumption of dictatorial powers". KRESSEL, Neil Jeffrey. 2002, p. 129.

²⁸ See STAUB, Ervin. 1989, pp. 94-106.

²⁹ According to the American psychologist Gordon Allport, "Hitler created the Jewish menace not so much to demolish Jews as to cement the Nazi hold over Germany".

the Jews. Their devaluation in Germany traced back to ancient times: from early Christian stereotypes to the legends about the great plague in 1348, from Martin Luther's hostile writings till the resistance against their process of assimilation.³⁰ Prejudice and hatred went hand-in-hand with a sense of unfulfilled political greatness and the overestimation of German culture, regarded as a sign of superiority. After having been divided for centuries into many little states, united Germany had put a strong emphasis on the Prussian military tradition and the organization of the state. Through the works of major German philosophers (mainly Fichte and Hegel), the state came to be seen as an organic entity, superior to the individual.³¹ Since obedience to authority was regarded as a trademark in their national history, many Germans perceived the liberal Weimar Republic as betraying the true virtues of the nation.³² Once in power, the Nazis created stability and material well-being. By forming youth groups and paramilitary units, they restored the sense of community and the German glory. Nazism gave a new, strong, common identity to all the pure Germans. Now they could feel secure and comfortable as a group. The majority of them considered accomplishments of the regime more important than its evil deeds or injustices committed on minorities or strangers.

"The Holocaust was the culmination of many choices by millions of Germans. Tens of millions made a Faustian bargain when they gave their votes to Hitler; he made no secret of his hostility to the Jews or his willingness to launch a new war. Whatever their support derived from misguided patriotism, political anger, or economic self-interest, they cast their ballots willingly. (...) Eichmann was correct that millions could have replaced him. They would, no doubt, have chosen the devotion to career, duty, and authority over the moral injunction against murdering innocents, especially innocent Jews".³³

ALLPORT, Gordon *The Nature of Prejudice*. Reading, Mass.: Addison-Wesley, 1954, p. 40.

³⁰ See STAUB, Ervin. 1989, pp. 102-103.

³¹ "At the time the Anglo-Americans and French were starting to define the state as the servant of the people, Germans were accepting definition of the people as servants of the state". KREN, George M. and RAPPOPORT, Leon *The Holocaust and the Crisis of Human Behaviour*. New York: Holmes & Meier, 1980, p. 24.

³² "Black marketeering and loose sexual morality were supplanting traditional German respect for public order and the family". STAUB, Ervin. 1989, p. 114.

³³ KRESSEL, Neil Jeffrey. 2002, p. 143.

After all, chaos was overcome... at the expense of democracy and human rights. Everybody knows what came afterwards: World War II and the death camps.

Democracy in Germany had disappeared, but at the same time its evident destruction had not urged free countries to intervene and stop the incipient genocide. Germany organised the Olympics in Berlin in 1936 and there was no boycott; Swiss banks accepted the gold confiscated from victims of Nazi persecution; Western liberal democracies imposed restrictive immigration policies for Jewish refugees. Though the "Final Solution" became clear and world-known already in 1942, the plea of Jewish organizations to bomb the gas chambers or railroads leading to Auschwitz was never seriously considered. Although the Allies knew, "munitions were not 'wasted' in an effort to destroy the tracks that carried Jews and others to the death camps".³⁴ I am going to explain the reasons of this neglect in the second part of this essay.

2.1 Western *Realpolitik*

"Despite the relative resistance of Western democracies to policies based on mass hatred, many scholars have accused democratic countries of complicity in genocidal, quasi-genocidal, or terrorist behaviour. For example, America has been blamed for its refusal to take in refugees fleeing Hitler and for its failure to bomb the Nazi death camps. More recently, the United States has been accused of callous neglect for its failure to intervene strategically at an early stage in the dissolution of Yugoslavia and for its lack of concern about Rwanda and other parts of Africa".³⁵

This statement is immediately leading us into the ongoing debate between two opposite conceptions of international relations and democracy. The progressive emphasizes a cosmopolitan view and a serious concern about human rights. The conservative starts from the acceptance of the state sovereignty and focuses on national interests.³⁶

³⁴ FALK, Richard in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 183.

³⁵ KRESSEL, Neil Jeffrey. 2002, p. 221.

³⁶ "A sense of responsibility for human wrongs was weakened by two widely shared features of the Westphalian orientation as it evolved. First, the exclusion of religion from the affairs of state. This opened the way for political conceptions of community which were exclusivist, based on race, nation, civilisation, secular ideology, but which did not relate to humanity as a whole (...) Secondly, the impact of the Enlightenment,

History as well the current situation in world politics demonstrate that governments are generally indifferent to moral questions. They do not want to interfere in the "internal affairs" of other countries. They restrain themselves to the so-called *Realpolitik*: they rely on force to defend or promote national goals, and only if their self-interest is endangered they decide to protest or act against a mistreatment.³⁷ This orientation has been reinforced by two strategic geopolitical results of the 20th century: the failure of appeasement and idealism before the outbreak of World War II and the success of deterrence and containment in the Cold War.

Human rights activists do not agree and argue that this is not only a selfish view, but also a short-sighted one. The past has often proved that governments committed to genocidal politics end up with bothering outsiders as well, by creating conflicts that involve the formerly passive or even friendly bystander nations.³⁸ There are different examples that show how the West was eventually forced to wage war against governments previously involved in mass crimes: World War II (Nazi Germany was persecuting Jews even before attacking Poland), Gulf War (Iraq had gassed Kurds before invading Kuwait), bombing campaign in Kosovo (Serbia was already responsible for genocide in Bosnia). However, this lesson is still to be learnt and *Realpolitik* remains the main trend in international affairs.³⁹ Although the Genocide Convention has been widely ratified, states usually do not make any specific commitment to

especially in the aftermath of the Industrial Revolution, gave rise to a civilisational consensus that modernity was synonymous with human material progress". FALK, Richard in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 180.

³⁷ "Nations remain passive because they define national interest in term of wealth, power and influence and do not see themselves as moral agents responsible for the welfare of those outside their borders". STAUB, Ervin "Preventing Genocide: Activating Bystanders, Helping Victims Heal, Helping Groups Overcome Hostility" in CHORBAJIAN, Levon and SHIRINIAN George, eds. 1999, p. 252.

³⁸ "The fundamental ordering arrangements of international society and prevailing realist mentality seem unable and unwilling to protect vulnerable people. Of course, the root cause of such abusive behaviour is often local or national, with deep historical roots, and the responsibility of international society is primarily associated with the failure to provide an effective, mitigating response". FALK, Richard in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 182.

³⁹ "The best, and only hope, is the deepening and expansion of democratising tendencies, making leaders more consistently receptive to the constraints embedded in international law, and spelt out in the main human rights instruments". Ibid., p. 188.

take actions in response.⁴⁰ The reluctance of the US towards the establishment of an International Criminal Court is another effect of this traditionally sceptic foreign policy.

Even some achievements like the success of human rights pressures on the Communist regimes in Eastern Europe or the victory of the anti-apartheid movement may be read in two different ways. Those protests proved to be politically effective, but benefited from very specific conditions: the American geopolitical project to oppose Soviet Union in the former case, the mobilization of African-Americans that forced the US government to impose sanctions on South Africa in the latter one. As you can see, transnational civil society can play a very important role in a globalised world, if just the statist structure does not hinder it and the realist ideology is willing to accept the result of its action.

In order to give a higher priority to the moral dimensions of foreign policy, human rights activists cannot help but looking forward to "establishing a stronger power under a financially independent UN, activating an international criminal court with competence to address genocide, increasing transnational civic society, public reaction and media concern".⁴¹ Without these conditions, even humanitarian interventions may evoke recent memories of colonial abuse and effectively they are often the result of a generally geopolitically motivated undertaking.⁴²

The present situation in Chechnya is paradigmatic: Russia is committing mass murder there⁴³, but Western governments (and media!) prefer to ignore the issue. Good relationships with Moscow are more important than human rights.⁴⁴ Transnational civil society is almost silent, while the majority of

⁴⁰ See Art. 4 and 9 in the Convention on the Prevention and Punishment of the Crime of Genocide (1948). In <http://www.tufts.edu/departments/fletcher/multi/texts/BH225.txt>, 11/02/2003.

⁴¹ FALK, Richard in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 187.

⁴² "To call it 'geopolitical' is not necessarily to condemn it for making evaluations depending on a mix of circumstances and effects. But such a labelling at least discourages 'false advertising', and the tendency of politicians to exaggerate the strength of genuine humanitarian concerns". Ibid., p. 188.

⁴³ "Another genocide is taking place: from 1995 until these very days the Russian armed forces have killed over 100,000 Chechen civilians, a real decimation of the entire Chechen people". In <http://coranet.radicalparty.org>, 11/02/2003.

⁴⁴ "Russia's ongoing record of serious human rights abuse in Chechnya impugns its claim that the war there contributes to the international campaign against terrorism. (...) At the same time, the Russian government has persistently tried to curtail outside monitoring of the situation in Chechnya. For several years in a row, it has stopped key United Nations human rights monitors from visiting the region, and on December 31,

the Russians support Vladimir Putin's military repression. In this way the West is paralyzed by lack of interest (in society) and opportunism (in politics)⁴⁵, while Russia's post-communist democracy proves to exist just in the political institutions.

Unfortunately the list of serious human rights failures is very long. There are states which are too powerful and therefore immune to external pressure (Russia in Chechnya, but also China in Tibet). There are dictatorships which are able to turn international sanctions into an excuse for disregarding human rights (Iraq). There are, eventually, "powerful states which have undertaken a surrogate UN role of policing human rights performance through so-called aid conditionality (USA, UK), where the conditions are dropped as soon as they conflict with significant trading or strategic interests (in China, Nigeria)".⁴⁶ The impartiality of the United Nations is then compromised by acting as a fig-leaf for particular interests.

I am going to consider three other examples of UN and Western *Realpolitik* applied to genocide or post-genocide situations: Cambodia (or Kampuchea), Rwanda and Bosnia-Herzegovina.

In Cambodia the Khmer Rouge (responsible for the "social" killing of about 2 million people)⁴⁷ were backed by Western allies and got diplomatic credential by the UN even after their collapse through an essentially liberating intervention by neighbouring Vietnam.⁴⁸ The West showed indeed much more concern about the extension of Vietnamese influence (since it wanted to support China's regional policies against the Soviet Union) than about controlling the practice of genocide.⁴⁹

2002, it effectively ended the operation of OSCE Assistance Group in Chechnya". <http://www.hrw.org>, "Russia: Abuses in Chechnya Continue to Cause Human Suffering", 29/01/2003.

⁴⁵ "Out of consideration for Moscow's shrill cries of protest against alleged interference in its internal affairs the democratic world has made no effort to restore stability in Chechnya and contain the influence of Islamic extremists". <http://www.gfbv.de>, "Chechnya: Russia is committing war crimes and genocide", 18/11/1999.

⁴⁶ BEETHAM, David. 1999, p. 142.

⁴⁷ See STAUB, Ervin. 1989, p. 8.

⁴⁸ "The Vietnamese seem to have been primarily motivated by security concerns and secondarily by the desire to protect the Vietnamese minority in Cambodia, but the effects of their intervention were generally positive". FALK Richard in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 183.

⁴⁹ "Even the golden propaganda opportunity to emphasise the cruelty of a Communist elite during the Colé War was subordinated to the strategic assessment that 'containing'

In Rwanda only France got involved and sent troops to restore peace. The rest of the West did not care. There were no strategic interests at stake and refugees were far away, not knocking at the door.⁵⁰

In Bosnia UN, US and EU expressed humanitarian concern, but were not willing to stop the Serbian operations and to prevent the genocide against the Bosniaks.⁵¹ By claiming an impossible impartiality between the contending parties, they imposed an arms embargo that essentially victimised the legitimate government in Sarajevo.⁵² Then "a series of marginal initiatives were taken with the objective of disguising the extent of strategic indifference: sanctions, medical and humanitarian assistance, food drops by air to beleaguered communities, pin-prick NATO bombing, ill-defended safe havens, and an under-funded war crimes tribunal".⁵³ Only after three-and-a-half years of war and "ethnic cleansing", US president Bill Clinton felt pressured to look for a solution and succeeded in imposing 'peace' in the form of the 1995 Dayton Agreement, which essentially ratified the results of genocidal politics.⁵⁴ *De facto* Bosnia was left ethnically divided, but the American diplomatic initiative had accomplished its mission: put an end to the fighting in the dangerous

Vietnam and accommodating China took precedence over protecting the Cambodian people against genocide". Ibid., p. 184.

⁵⁰ "Shashi Tharoor, a special assistant to Kofi Annan, currently the UN Secretary-General, has recently referred to 'that dreadful summer of 1994' when the Security Council wanted to send 5,500 soldiers to Rwanda with the hope of saving many civilians from the genocidal onslaught. All nineteen governments that had previously pledged a total of 31,000 troops for peace-keeping missions refused to take part on this occasion, and no strengthened UN response was forthcoming". Ibid., p. 185.

⁵¹ "The principal victims in Bosnia were Muslim, and even if unacknowledged, this factor undoubtedly eroded the moral and political response to the evidence of massive ethnic cleansing" Ibid., p. 184.

⁵² "If one examines the rhetoric of the Western press, a very clear pattern emerges. The conflict is seen as a situation in which all sides are equally guilty and are getting what they deserve: these nations are acting in a way which is tribal, irrational, and uncivilized". CUSHMAN, Thomas. "Collective Punishment and Forgiveness. Judgements of Post-communist National Identities by the 'Civilized' West" in MESTROVIC, Stjepan. *Genocide after Emotion*. London: Routledge, 1996, p. 185.

⁵³ FALK Richard in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 184.

⁵⁴ "The US position hardened after the shift to the right of the US Congress following the November 1994 elections, resulting in the June 1995 statement that the US would lift its embargo on arms sales to the Bosnian Muslims. This also helps to explain the start of the NATO bombing campaign against the Bosnian Serbs (Operation Deliberate Force) at the end of August 1995". HOLMES, Leslie. *Post-communism*. Durham, NC: Duke University Press, 1997, p. 313.

Balkan area and stop the flow of refugees towards Western countries. *Realpolitik* had succeeded once again⁵⁵, after it had preferred to turn a blind eye in front of the massacres in order to have a straighter frontline on the ground. Srebrenica and Zepa, two besieged towns under the "protection" of UN forces, were overrun by the Serbs in July 1995. More than 7,000 Bosniaks were executed. Tadeusz Mazowiecki, formerly a Solidarity leader and Polish prime minister who became the United Nations' Special Rapporteur for Human Rights, was the only official to resign.⁵⁶ It was both a moral act and a political protest against inaction and inconsistency of the international community in the former Yugoslavia.⁵⁷ He was disgusted and defined the Serbian attack against civilians as "a terrible violation of human rights".⁵⁸ Mazowiecki had been a dissident in Communist time and an activist for democratic change in the 1980s. In Bosnia he had strongly advocated a military intervention to control the violence, but the cynicism and passivity of the West finally prevailed.⁵⁹ According to the international policymakers, democracy and civil society could not face "balkanization", that means (in Western political vocabulary) the bloody split of a territory into smaller units that are hostile to each other.⁶⁰ In the last subchapter I am going to verify if they were right.

⁵⁵ "One reason why the West (...) was for long so indecisive about the Bosnian issue was that it preferred not to antagonize the Russians, who often claim to be traditionally close to the Serbs. Several Western experts advised policy-makers that isolating the Russians by actively countering the Serbs in Bosnia would only play into the hands of Russian extremists". Ibid., pp. 313-314.

⁵⁶ See <http://www.haverford.edu/relg/sells/reports/mazowiecki.html>, 11/02/2003.

⁵⁷ "Shortly before the resignation, I was in Tuzla and spoke to refugees from Srebrenica. They felt betrayed rightfully. I thought that somebody finally had to speak up, in a sharp tone, and demonstrate with a personal, radical, example that such politics should not continue infinitely". MAZOWIECKI, Tadeusz "UNprotecting the Protected" in <http://www.haverford.edu/relg/sells/reports/mazinterview.htm>, 17/11/1995.

⁵⁸ MALCOLM, Noel. *Storia della Bosnia. Dalle origini ai giorni nostri*. Milano: Bompiani, 1996, p. 339.

⁵⁹ "Pressure from transnational public opinion - the international media and many NGOs and campaigning groups active in Bosnia - did lead to a series of innovative Security Council resolutions for safe havens, humanitarian corridors, the prosecution of war criminals, a no-fly zone, etc. which had the potential through a step-by-step approach to restore order. But none of them were ever effectively implemented". FALK Richard in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 206.

⁶⁰ Even the choice of the term "balkanization" to convey a sense of political dissolution reveals the West's view: "in the act of constructing the Balkan other as 'uncivilized', the nations of the West construct their own cultural essence as 'civilized' and 'rational'". CUSHMAN, Thomas. "Collective Punishment and Forgiveness. Judgements of Post-

2.2 Nationalism in Bosnia-Herzegovina

"The war in Bosnia-Herzegovina can be interpreted not as a war between national groups but as a war *against* civil society. The victors of this war are nationalist extremists on all sides. (...) Above all, it was a war against the values of tolerance, mutual respect, and individual autonomy that were the centrepiece of the original eighteenth-century conception of civil society. The war was designed to instil fear, hate and insecurity".⁶¹

This statement contradicts Western prejudices, but it is a matter of fact that between 1992 and 1995 the real target of both Serbian and Croatian aggressors were Bosnian civilians⁶²: Muslims (Bosniaks), but also all those who could not or did not want to define themselves exclusively by nationality. They would call themselves just "Bosnians" and felt like citizens of the new independent state of Bosnia-Herzegovina. Before the break-up of Yugoslavia, most of them used to be registered in the census as "Yugoslavs". In the whole Socialist Federal Republic of Yugoslavia the number of "Yugoslavs" was on the rise. It had impressively increased between 1971 and 1981: from 273,000 (1,3%) to 1,219,000 (5,4%). In Bosnia-Herzegovina in 1981 they were 326,316 out of a population of 4,124,256: that is 7,91%.⁶³ Their concentration was bigger in towns. At that time, 18% of the marriages in Bosnia were of ethnically-mixed origin⁶⁴, in Sarajevo 35%!⁶⁵

After the collapse of Communism in all Eastern Europe, new nations were born and others were recreating themselves. Chaos and turmoil

communist National Identities by the 'Civilized' West" in MESTROVIC, Stjepan. 1996, p. 185.

⁶¹ KALDOR, Mary in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 204.

⁶² "There were almost no battle and very little fighting between the warring factions except at certain key strategic points such as Brcko; rather the violence was mainly directed against the villages and besieged towns. The vast majority of educated young people, who represented the future hopes of civil society, left the country. Many of those who remained were killed. In the towns and villages that were ethnically cleansed, the 'intellectuals' were the first targets, slated for execution and not merely detention or rape". Ibid., p. 204.

⁶³ See BIANCHINI, Stefano. *Sarajevo, le radici dell'odio*. Milano: Edizioni Associate, 1993, p. 38.

⁶⁴ See KRULIC, Josip. *Storia della Jugoslavia*. Milano: Bompiani, 1999, p. 113.

⁶⁵ See DIDI, Cristiano e PIATTELLI, Valentina. *Dal Mito alla pulizia etnica. La guerra contro i civili nei Balcani*. Firenze: ECP, 1995, p. 26.

characterised this first transition phase. Difficult life conditions (in the form of political disorganization, economic problems and great social change) could easily lead to group violence in multiethnic states. "Yugoslavia's turning point was in 1989. That year witnessed and revealed the state's economic collapse and the bankruptcy of the identifying values of socialism, self-management, and Yugoslavia as a confederation under communist rule. Socialist ideology made way for nationalist ideology, homogenization, and hegemony. Since then, all political, social, and other conflicts have been expressed exclusively in nationalist terms".⁶⁶ In 1992 all the "Yugoslavs" in Bosnia-Herzegovina lost their previous country and had to fight for a new one. They would have played a key role in a democratic country, but Bosnia passed directly from communism to nationalism, from one-party-system to war.⁶⁷ "Nationalism no less than communism legitimates the exercise of absolute power by an elite or vanguard in the name of a unifying myth that suppresses the diversity of individual interests and identities and justifies endless sacrifice of both prosperity and personal freedom in the name of a collective struggle against an absolute 'other'".⁶⁸ During this rapid process, they were marginalised.

"In the early stages of the war, there was in both Belgrade and Bosnia-Herzegovina, a very active civil society in the 1980s sense of the term (i.e. advocacy groups, challenging and checking state activities)".⁶⁹ In Belgrade, students and peace groups (like "Women in Black") protested against the military mobilisation. In Bosnia-Herzegovina, hundreds of thousands demonstrated for peace.⁷⁰ On 5 April 1992, 200,000 Bosnian citizens challenged the barricades erected by paramilitary groups and marched through Sarajevo. Serbian snipers fired on the peaceful crowd and killed the first victim: Suada Dilberovic, a medical student from Dubrovnik.⁷¹ That shot marked the beginning of a bloody war which then lasted three-and-a-half years and caused the death of more than 200,000 people. Bosnian civil society was shocked, but could not react "because there was no rule of law; there was no public control of

⁶⁶ JANJIC, Dusan in AKHAVAN, Payam and HOWSE, Robert. 1995, p. 44.

⁶⁷ Nationalism was confirmed as no acceptance of a liberal-democratic culture, procedures, and institutions. Ibid., p. 43.

⁶⁸ HOWSE, Robert. "A Horizon beyond Hatred? Introductory Reflections" in AKHAVAN, Payam and HOWSE, Robert. 1995, p. 3.

⁶⁹ KALDOR, Mary in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 203.

⁷⁰ "In Mostar, people of different nationalities created a chain across every single bridge. In Sarajevo, together with European peace activists, a human chain linked the mosque, the Catholic church, the Orthodox church and the synagogue. The different faiths prayed together to prevent a war". Ibid., pp. 203-204.

⁷¹ Ibid., p. 204.

violence".⁷² At that stage the Bosnian state had already been internationally recognized, but it still had to be organized and therefore there was a vacuum of power. Immediately after the breakdown of authority, Serbian terrorists spread fear and anger among the population. They started genocide and civil society had to retreat: civic values cannot survive if not legally protected. They were kept alive only in the works of some intellectuals who went on to support the values of civility (above all multicultural coexistence).⁷³

The only municipality in Bosnia which succeeded in sustaining a civil society throughout and after the war was Tuzla, an industrial town which was constantly under Serb shelling. Both the political forces in power (a "civic" coalition of multiethnic parties) and the citizens chose democracy as the best answer to nationalism. They also extended the concept to the economic field, in order to prove that civil society can better suit people's needs: they developed local contacts with international networks and managed to maintain production throughout the war.

The sharp contrast between civic and nationalist supporters deepened even after the end of the war. "In the aftermath of Dayton, none of the commitments to civic decency, such as return of refugees, prosecution of war criminals, freedom of the media, etc., have been honoured. Instead, the nationalists have tightened their authoritarian control over their fiefdoms, harassing and intimidating those who dare to stand for civic values".⁷⁴

In Bosnia civil society has now a precise political connotation: it means fighting against nationalisms for the defence of democratic values like tolerance, multiculturalism and secularity. Hence, the term civic resistance is increasingly used. "In Tuzla the concept also acquired the character of a forward-looking project that could offer hope for a better future, in contrast to the backward-looking nostalgic projects of the nationalists who had no answers to individual or social problems".⁷⁵ The destiny of civil society in Bosnia is strictly connected with the uncertain future of the country. To be united respecting differences is the difficult aim of the "Bosnians", but also the only basis for effective democratization and human rights protection. If this is not

⁷² Ibid., p. 204.

⁷³ "People kept writing even after gulag, Hiroshima, Auschwitz. Will we be able to write after Sarajevo? To write after or during the war, you must have faith in the power of literature. You must believe that writing can make the tragedy understandable. Good literature has always been a form of resistance". COLIC, Velibor. *Croire en la littérature*. 1994. In *CONVERGENCES BOSNIE HERZEGOVINE n° 23 juillet / août 1998*, http://aec.nantes.free.fr/converge/conv0498/c0498_1.html, 11/02/2003.

⁷⁴ Ibid., p. 206.

⁷⁵ Ibid., p. 206.

going to happen, there will not be any "Bosnians" more, but just Bosniaks, Serbs and Croats.

Conclusion

In the previous chapters I have often emphasized the importance of a strong and active civil society for the consolidation of democracy. The more active are the citizens, the stronger is a democracy. This relationship underlines the vital role played by civic engagement in modern political systems: controlling the power of the state and keeping people on the alert for possible abuses.

I have showed that the mechanism of democracy has no ethical dimension: it is not a guarantee for just decisions. In order to avoid encroachment and mistreatment, it is necessary to promote critical thought and the ideal of effort and sacrifice on behalf of people in extreme need or danger. Individual judgement, sense of responsibility and moral courage are required to make democracy work under difficult circumstances. Social organization must provide this kind of education if it really wants to reject genocidal practice.

History has demonstrated that the worst enemies of an active civil society are violence and exclusive, absolute power. Totalitarian structures may also come out as a result of democratic elections, but they find their ultimate legitimacy in ideology. When they are responsible of mass crimes, they destroy social connectedness: they use propaganda to shut up any opposition, to make bystanders at ease with their passivity and to praise perpetrators for their commitment.

I have argued that genocide is both an exam and a challenge for the morality of world politics and the health of established democracies. "Despite decades of hand wringing, the pattern of international response to Hitler's Germany unfortunately remains paradigmatic. As long as the Nazi persecution of the Jews (and others) was differentiated from an expansive German foreign policy, the leading governments and authority structures practised a diplomacy that was a compromise between denial and indifference, and included elements of accommodation".⁷⁶ Western liberal democracies are not generally the source of the mass hatred that leads to terrorism or massacres, but at the same time I have proved that Western states traditionally are not willing to interfere with another country's internal affairs in order to stop genocide. They react only if they are forced to get involved or (more often) if they have some interests to

⁷⁶FALK Richard in DUNNE, Tim and WHEELER, Nicholas J., eds. 1999, p. 182.

protect. A sincere concern for human rights seems to be a prerogative only for civil society.

Realpolitik is the most common rule in international relations, but it is not the solution. There is little basis for short-term optimism, but it is clear that only the establishment of superior legal, political, and cultural institutions provides the best protection for any nation against degeneration into genocide. "Without such institutions firmly in place, many people give way to the purveyors of hate, whether opportunists or fanatics. Once democratic laws, procedures, and cultural values have been established, they should be recognized and respected for the pillars they are".⁷⁷

Genocide in Bosnia-Herzegovina has been continuing for years with the indirect complicity of democratic states. I have examined their bewilderment in front of extreme evil: "ethnic cleansing" was not a "side effect" of the war, but contrary, its objective.⁷⁸

Anyhow, the origins of genocide in Bosnia can also be found in the local lack of democratic culture (more in the political institutions than in the society)⁷⁹ that made ethnic self-assertion degenerate into aggressive nationalism. The war has prevented the country from following the path of other Eastern European states towards a peaceful transition to democracy. Bosnian civil society keeps having a hard time, but it can provide the only way to get back on the road. "Liberal democratic revolution entails an assumption of responsibility through citizenship. This means viewing one's own and one's community's future as something other than an externally imposed fate".⁸⁰ As I have shown, civic engagement is the necessary precondition for democratization.

⁷⁷ KRESSEL, Neil Jeffrey. 2002, p. 244.

⁷⁸ "Massive violations of human rights and international humanitarian law are not simply features of the war in Bosnia and Herzegovina. They are being used deliberately to achieve ethnically homogenous areas". In MazowieckiReport/10Feb93 E/CN.4/1993/50 (<http://www.haverford.edu/relg/sells/reports/mazowiecki.html>, 11/02/2003)

⁷⁹ In socialist Yugoslavia the middle class could enjoy a certain degree of personal freedom but without civic or personal responsibility. "We traded our freedom for Italian shoes. (...) We didn't build a political underground of people with liberal, democratic values ready to take over the government; not because it was impossible, but on the contrary, because the repression was not hard enough to produce the need for it".

DRAKULIC Slavenka. *The Balkan Express: Fragments from the other side of War*. Norton, 1993, pp. 135-136.

⁸⁰ HOWSE, Robert in AKHAVAN, Payam and HOWSE, Robert. 1995, p. 8.

"The collapse of communist regimes under popular pressure has revealed democracy, along with human rights, to be a universal aspiration, rather than a merely localized form of government. And the record of human rights abuses under all kind of dictatorship, whether of Left or Right, has shown that the type of political system within a country is far from irrelevant to the standard of human rights its citizens enjoy. Democracy and human rights, we now acknowledge, belong firmly together".⁸¹

In spite of all the disappointments, this remains the only hope and the only option to work on.

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⁸¹ BEETHAM, David. 1999, p. 90.

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Marko Milanović

Srebrenica – Judicial search for the truth*

1. Introduction

The massacre of more than 7.000 Bosnian Muslim men and boys at the hands of the Army of Republika Srpska in July 1995 is widely regarded as being the single worst atrocity committed in Europe after the Second World War, and has been qualified as genocide by the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹ This is of course the year of the tenth anniversary of the genocide, the year in which the victims should receive our outmost respect and hopefully some sense of closure resulting from the apprehension of the suspected perpetrators, first of all Ratko Mladić.

Yet, as with all major crimes, Srebrenica itself is still a subject of two differing points of view. From the perspective of Bosnian Muslims (and the overwhelming majority of global opinion) it is seen as the most grievous crime committed during the Bosnian war and a symbol of Serbian aggression, while for many Serbs, both in Bosnia and in Serbia, the crime itself is either completely fabricated or at the very least blown out of proportions. As could be heard at a recent gathering at the Belgrade University Faculty of Law, Srebrenica was in fact 'liberated' and the Muslims should remove their fake graveyard from Serbian land which could be put to some good use.²

This duality of truths is a product of the nature of guilt and victimhood. Guilt and sense of victimhood invariably lead to rationalization – the only way to suppress the guilt for Srebrenica is to invoke crimes committed against Serbs, either the ones in the vicinity of Srebrenica itself perpetrated by Naser Orić³ and his henchmen, the Croatian military operations "Bljesak" and "Oluja", or going

* By Marko Milanović, Legal Researcher, Belgrade Centre for Human Rights; LL.M candidate, University of Michigan. Please e-mail any comments to mmmm@umich.edu

¹ See the Trial Chamber judgment in *Prosecutor v. Krstić*, IT-98-33-T, 2 August 2001 and the judgment of the Appeals Chamber in the same case of 19 April 2004, as well as the recent Trial Chamber judgment in *Prosecutor v. Blagojević*, IT-02-60-T, 17 January 2005.

² See e.g. at http://www.b92.net/info/vesti/index.php?yyyy=2005&mm=05&dd=17&nav_id=168589 (in Serbian).

³ For which he is currently on trial before the ICTY.

as far as the extermination camp at Jasenovac. The rationale of this justification is very simple – how can one be a criminal if he is himself a victim? This glorification of victimhood was one of the primary instruments for the waging of all of the wars in the former Yugoslavia. For example, it can still be seen from the inability of the Serbian Parliament to pass a resolution condemning the Srebrenica massacre on its own, without evoking the crimes against the Serbian people, even after the shocking video footage of the execution of several Bosniak young men from Srebrenica by the paramilitary Scorpions unit was shown on Serbian TV. Unfortunately, it can also be seen on the example of the victims of Srebrenica – it is precisely the Association of the mothers of Srebrenica, to whom we pay homage on this anniversary of the massacre, who protested the arrest of Naser Orić for crimes perpetrated against Serbs.⁴

This was a war in which all sides claimed that they were defending themselves. This was a war in which one side's villain was the other side's hero. This was a war in which all sides committed horrible crimes, yet Srebrenica has and will always stand out. It is a crime without an equivalent, a crime so ruthless, an evil so organized that it has been qualified as the worst crime of all, as genocide. Even so, as I have already stated, deliberate and systematic attempts to obscure the truth of the massacre have led to differing perceptions of the crime. What then is the best way to establish the truth, but not only in such a way as for it to correspond to what actually happened, but also for it to be *believed* by those concerned, and thus further the process of reconciliation in Bosnia?

Many societies have found themselves in a similar position, and have adopted several different approaches regarding the so-called phenomenon of transitional justice – the Truth and Reconciliation Commission in South Africa is a notable example. The focus of this paper, however, is the *judicial* response to the Srebrenica massacre, and the search for *judicial* truth regarding the crimes committed in the Srebrenica enclave in July 1995. Three major courts have ruled or are about to rule on the subject of Srebrenica – the ICTY, the Human Rights Chamber for Bosnia and Herzegovina and the International Court of Justice (ICJ).⁵ This paper will attempt to analyze the proceedings before these courts, and assess the impact they will have on the process of reconciliation in Bosnia and the Balkans.

⁴ See e.g. <http://www.unmikonline.org/press/2003/wire/Apr/imm130403.htm>, <http://www.danas.org/programi/haaska/2003/04/20030412121551.asp>.

⁵ Dutch courts are also hearing cases regarding the responsibility of the Netherlands for the failure of the UNPROFOR Dutch battalion present in Srebrenica to prevent the atrocities.

2. Proceedings before the International Criminal Tribunal for the Former Yugoslavia

The ICTY is of course the most competent court to decide on Srebrenica, as its mission is precisely to establish individual criminal responsibility for the wartime atrocities and as it is equipped with a formidable investigative apparatus and has considerable resources at its disposal. The Prosecutor of the ICTY has indicted 20 persons for crimes related to the Srebrenica massacre; 3 final judgments have been rendered, while 2 cases are pending appeal; 2 trials are currently in progress while 7 cases are in the pre-trial stage.⁶ Three indictees are still at large – Radovan Karadžić, Ratko Mladić and Zdravko Tolimir. The majority of the indictees were high officers of the Army of the Republika Srpska (VRS), particularly the Zvornik and Bratunac brigades, the Drina corps and the General Staff, though Momčilo Perišić, the former Chief of Staff of the Yugoslav Army and Slobodan Milošević, the former president of Serbia and Yugoslavia, are also indicted.

Even though the ICTY's mandate and Statute included jurisdiction for the prosecution of genocide, unlike its counterpart for Rwanda the ICTY struggled to reach its first conviction on genocide. Most of the Prosecutor's attempts to obtain a genocide conviction failed – notably in the Prijedor camp cases, as well as in the *Jelisić* case – because the Tribunal was not able to establish beyond reasonable doubt that the crimes committed amounted to genocide.⁷ This is of course a consequence of the very peculiar nature of the crime of genocide, which can only be distinguished from crimes against humanity as a *genus* by the specific, genocidal intent of the perpetrators – the intent to physically or biologically destroy a racial, ethnic, national or religious group as such. This type of specific intent is inherently difficult to prove, and in the case of Bosnia this probative difficulty was further exacerbated by the fact that most of the crimes committed during the Bosnian war – unlike in Rwanda – were not crimes of genocide, but of ethnic cleansing, i.e. crimes against humanity. Also, those who have pleaded guilty for the Srebrenica massacre, like Dražen Erdemović, Dragan Obrenović and Momir Nikolić, confessed their guilt for crimes against humanity, while the Prosecutor dropped the genocide charges. The first case in which the ICTY reached a genocide conviction was *Prosecutor v. Krstić*, which is of course the most important Srebrenica case,

⁶ See more at <http://www.un.org/icty/cases/indictindex-e.htm>.

⁷ See William A. Schabas, 'Was Genocide Committed in Bosnia and Herzegovina?', *Fordham International Law Journal*, Vol. 25, 23-53, 2001.

especially for its factual findings and the extensive investigative work which preceded it.

The Tribunal established that between 11 and 19 July the VRS forces killed more than 7.000 Bosnian Muslim men and boys in Srebrenica. Most of the concentration and extermination sites have been identified, and more than 20 primary and secondary mass graves – the result of a massive cover-up effort – have been exhumed. The systematic and organized character of the killing was what led the Trial Chamber to find the accused, general Radislav Krstić, former commander of the VRS Drina corps, guilty of genocide as a perpetrator, and sentenced him to 46 years imprisonment. However, the Appeals Chamber found that the Prosecution has not proven beyond reasonable doubt that the accused possessed genocidal intent, but that he did possess knowledge of the crimes, and that he was therefore guilty of aiding and abetting genocide. His sentence was reduced to 35 years in prison. The Appeals Chamber unanimously affirmed that the crimes committed in Srebrenica amounted to genocide. The Trial Chamber in the *Blagojević* case also recently upheld the finding of genocide in Srebrenica, and convicted the accused of aiding and abetting genocide. This judgment is currently pending appeal.

Now that the genocide in Srebrenica is a judicially established fact, it remains to be seen whether the judgments of the ICTY can help the process of reconciliation in the Balkans. This is for the most part dependent on the credibility of the ICTY itself, on the trust the people of the former Yugoslavia have in the veracity of its decision and in its capacity to provide a fair and impartial trial to the accused and justice to the victims. This is also dependent on the ability of the Tribunal to make its findings, as well as the most compelling evidence that support it, as public and as available as possible. Both the mission of the Tribunal and the process of reconciliation are long-term, and it is not possible to analyze their final impact at this time. However, it should prove useful to present some findings of the 2001, 2004 and 2005 surveys conducted in Serbia by the Belgrade Centre for Human Rights and Strategic Marketing.⁸ For example, in the 2005 survey only 6% of citizens state that they are familiar with the organization and work of the ICTY, while 72% of people polled state that they know little or very little. The 2004 survey shows that only 22% of people in Serbia think that the purpose of war crimes trials before the ICTY is to end impunity and bring justice, while 74% of people adhere to one sort of conspiracy theory against the Serbian people or another. Most enlightening is the comparison between 2001, 2004 and 2005 surveys regarding popular knowledge of specific crimes, which shows a very interesting

⁸ Available at <http://www.bgcentar.org.yu/incex.php?p=215>.

phenomenon – that such general knowledge is decreasing instead of increasing. For instance, in 2001 70% of people interviewed have *heard* that Sarajevo was under siege for one thousand days, while in 2005 only 55% had such knowledge. In 2001 57% of people heard that Kosovo Albanians were expelled en masse from Kosovo during the 1999 NATO bombing campaign, while in 2005 only 45% of people had such knowledge. The situation is far more serious when those who have heard of the crimes answered whether they *believe* that the crimes actually happened – in 2001 53% of people believed that Sarajevo was under siege, while in 2005 40% share this belief; in 2001 31% of people believed that Kosovo Albanians were deported, while in 2005 only 18% share this belief.

This type of collective amnesia is simply appalling, but again, because of its notoriety as the worst crime of the war(s), Srebrenica is a somewhat different story. In 2001 77% heard of the massacre in Srebrenica, while in 2005 72% of people heard of this crime; in 2001 48% believed that this crime happened, while in 2005 50% of people shared this belief. The graphic video of the executions in Srebrenica may have altered these figures somewhat – a survey conducted by the Faktor Plus agency (with a methodology different from the surveys shown earlier) found that 43,2% of those polled felt anger towards the perpetrators, 30,2% felt compassion toward the victims, while 16,3% felt guilt.⁹

When faced with these figures (which probably apply *mutatis mutandis* for most of the countries of the former Yugoslavia), it could be far too easy to say that the Tribunal's attempt to reach to the people of these states and induce some sort of catharsis is an abject failure. Even though the ICTY has conducted several trials which have been fair and impartial according to international standards, very few people have actually seen the evidence with their own eyes, very few people have listened to the compelling statements of Dražen Erdemović, Dragan Obrenović or witness "O" at the Krstić trial, and very few people have paid attention to the suffering of the victims who belong to the "other people". Yet, when faced with deliberate campaigns of misinformation conducted for years by the Balkan warlords it is no wonder that the ICTY has met such obstacles. Of course, it remains to be seen what the effect of the Tribunal's judgments will be in the decades to come, how they will influence history and posterity, and whether other courts can also contribute to the process of transitional justice.

⁹ See at

http://www.b92.net/info/vesti/index.php?yyyy=2005&mm=06&dd=21&nav_id=171007 (in Serbian).

3. Proceedings before the Human Rights Chamber for Bosnia and Herzegovina

The proceedings before the Human Rights Chamber for Bosnia and Herzegovina ('the Chamber')¹⁰ are not important because of their factual findings, as the Chamber mostly relied on the work of the ICTY. Their importance lies in the fact that the Chamber is a domestic, though internationalized court, in the legal reasoning of the Chamber's decision, in the remedies it awarded, and most of all, in the actual results of these remedies. This is precisely the reason why the decision of the Chamber will be extensively presented and analyzed in this paper.

The case before the Chamber originated in 49 applications against the Republika Srpska, submitted to the Chamber in 2001 and 2002, while the Chamber delivered its decision in March 2003.¹¹ The applicants were all immediate family members of Bosniak men presumed to be victims of the

¹⁰ The Chamber was established under Annex 6 to the 1995 Dayton Peace Agreement. The Chamber was in essence a human rights court, with jurisdiction to decide primarily on the violations of the European Convention on Human Rights (ECHR), but also several other human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and, notably, the International Covenant on Economic, Social and Cultural Rights (ICESCR). This makes the Chamber the first human rights court which could also adjudicate on a wide variety of economic and social rights. All of these treaties have been incorporated into the domestic law of Bosnia, and are directly applicable. The mandate of the Chamber expired in 2003, and all of its pending cases have been transferred to the Constitutional Court of Bosnia and Herzegovina.

It is important to note that the Chamber was not an international, but an *internationalized* municipal court of the State of Bosnia and Herzegovina, though it was established within the framework of a treaty. Six of the judges of the Chamber were citizens of Bosnia, but eight of the judges, a majority, were foreign nationals, appointed by the Committee of Ministers of the Council of Europe. As a domestic court, the Chamber had jurisdiction to examine applications against the State of Bosnia and Herzegovina (rarely, as it has few original competencies), and its two constituent. Because of its status as a domestic court, the Chamber had considerable powers in respect of the remedies it could award. This is especially true when compared to the European Court, which can only determine on violations and award monetary compensation for material and moral damages.

Up until its dissolution, the Chamber has received 15,169 applications, and decided on 6,243 cases (see at <http://www.hrc.ba/ENGLISH/GRAPHS/chartYear03.pdf>). The decisions of the Chamber can be found at <http://www.hrc.ba/database/searchForm.asp>.

¹¹ *Ferida Selimović et al. v. the Republika Srpska*, Decision on Admissibility and the Merits, 7 March 2003, 'the Decision'.

Srebrenica events occurring during the period of 10-19 July 1995. They alleged, either directly or indirectly, that, as close family members, they are themselves victims of alleged or apparent human rights violations resulting from the lack of specific information on the fate and whereabouts of their loved ones last seen in Srebrenica in July 1995. They sought to know the truth. They requested the authorities to bring the perpetrators to justice. Most also sought compensation for their suffering in an unspecified amount.¹² The applicants raised issues under Articles 3, 8 and 13 of the European Convention on Human Rights (ECHR), as well as discrimination regarding the enjoyment of these rights, and the Convention on the Prevention and Punishment of the Crime of Genocide.

3.1. The Decision of the Chamber

In order to establish the facts of the case, the Chamber extensively relied on the *Krstić* judgment of the ICTY. The Chamber then established the facts regarding the individual applicants, and found that their family members all missing as a consequence of the attack on the Srebrenica enclave. The Chamber then cited the 2002 Report of the Republika Srpska Government, which denied responsibility for the atrocities, and even denied that mass executions have taken place.¹³ The Report also described the figures of missing persons as evidently inflated.

Republika Srpska, as the respondent, submitted its observations on the admissibility, but not on the merits of the applications, though it contested all of the applicants factual submissions. The respondent claimed that the applications were inadmissible because, *inter alia*, the applicants have failed to exhaust all available domestic remedies, and that they were inadmissible *ratione temporis* as that pertained to events which have occurred before the entry into force of the Dayton Peace Agreement, which is the starting point of the Chamber's jurisdiction.

The Chamber defined the scope of its decision as following:¹⁴

146. As described more fully below, due to its jurisdiction under the Agreement, the Chamber may only consider violations or continuing violations of human rights occurring after 14 December 1995, the date when the Agreement entered into force. Thus, the Chamber is not competent to consider any possible violations of the human rights of the Bosniak men

¹² *Decision*, para. 135.

¹³ *Decision*, paras. 84- 97.

¹⁴ *Decision*, para. 146.

missing as a result of the Srebrenica events, as those violations necessarily would have occurred during the period of 10-19 July 1995. Consequently, in the context of the present applications, the Chamber is considering only whether or not the authorities of the Republika Srpska have violated the human rights of the family members of the missing persons of the Srebrenica events by failing to inform them, since 14 December 1995, about the fate and whereabouts of their missing loved ones.

The Chamber rejected the inadmissibility argument raised by the Republika Srpska, relying on its previous decisions in the *Matanović* and *Unković* cases. As the applicant were the alleged victims of a continuing violation of their human rights, in spite of several different procedures they initiated before the competent authorities, the application were found to be compatible *ratione temporis* with the jurisdiction of the Chamber. The Chamber then proceeded to decide on the merits of the case, first dealing with the violation of Article 8 of the ECHR:

178. From these underlying facts the Chamber concludes that the authorities of the respondent

Party had within their possession or control information about the Bosniak men from Srebrenica who were captured and then executed. Despite attempts by the RS Army to cover up or to destroy information about the Srebrenica events, there still must have been some information accessible after 14 December 1995 for the authorities of the Republika Srpska to draw upon to respond to the requests for information from the families of the missing Bosniak men from Srebrenica ... And in any event, the fact that members of the RS Army may have destroyed this evidence and information does not relieve the respondent Party of its positive obligations under Article 8 of the European Convention. *Rather, it appears that the authorities of the Republika Srpska arbitrarily and without justification failed to take any action whatsoever to locate, discover, or disclose information sought by the applicants about their missing loved ones.* There is no evidence, for example, that the authorities of the Republika Srpska have interviewed any of the members of the RS Army who were involved in the Srebrenica events, interviewed any other possible witnesses, disclosed any physical evidence still in its possession, or disclosed any information about the locations of the mass gravesites with a view to making the requested information available to the families of the victims of the Srebrenica events in July 1995. Such inaction or passivity is a breach of the Republika

Srpska's responsibilities due under Annex 7 to the General Framework Agreement and the Process for tracing persons unaccounted for.

179. The Chamber further notes that the respondent Party has not conducted any meaningful

investigation into the Srebrenica events. In making this statement, the Chamber is fully cognisant of the existence of the RS Srebrenica Report (summarised at paragraphs 84-97 above). However, although the RS Srebrenica Report says that it present[s] the whole truth about crimes committed in Srebrenica region regardless [of] nationality of perpetrators [sic] of crimes and time when they were committed, in fact, a careful reading of the Report shows that it addresses two primary concerns of the authorities of the Republika Srpska. Firstly, the Report documents in detail the atrocities and crimes committed against civilian Serbs living in the vicinity of Srebrenica during the period of 1992 to 1995 by members of the RBiH Army.

Secondly, the Report refutes evidence of wrongdoing against Bosniaks from Srebrenica by members of the RS Army. *In this manner, the RS Srebrenica Report presents an exclusively one-sided view of the Srebrenica events, and it in no way clarifies the fate and whereabouts of the thousands of missing Bosniaks from Srebrenica.* Rather, in the face of the Krstić judgment in which the ICTY found, after an extensive trial conducted in adversarial proceedings, that thousands of Bosniak men from Srebrenica were killed in careful and methodical mass executions by Bosnian Serb forces (see paragraph 26 above), the RS Srebrenica Report concludes that the number of Muslim soldiers who were executed by Bosnian Serb forces for personal revenge or simple ignorance of the international law would probably stand less than 100. (see paragraph 94 above). Therefore, the RS Srebrenica Report cannot be considered the result of an effective investigation into the Srebrenica events that satisfies the respondent Party's positive obligations owed to the family members of Bosniak men missing from Srebrenica since 10-19 July 1995.

180. In the context of the claims of an interference with the right to respect for private and family life, the Chamber takes particular note of the 'catastrophic' impact of the Srebrenica events on the lives of the surviving family members of the missing persons, a group that includes the applicants in the present cases. Because the fate of their loved ones is still not officially known, many are unable to achieve any sense of closure, to recover psychologically, or to move forward with their lives (see paragraph 28 above). In light of the exceptionally high level of trauma caused in part by the lack of information concerning the fate of their loved ones, *the respondent Party's failure to take any action aimed at making the*

requested information available to the families of the victims of the Srebrenica events of July 1995 is particularly egregious.

181. Therefore, the Chamber concludes that the respondent Party has breached its positive

obligations to secure respect for the applicants' rights protected by Article 8 of the European

Convention in that it has failed to make accessible and disclose information requested about the applicants' missing loved ones.

(italics added)

The Chamber then turned to the 'right to know the truth' under Article 3 of the ECHR, and relying on the jurisprudence of the European Court, as well as the Inter-American Court of Human Rights, the Chamber ruled as following:

191. Taking all of the applicable factors into account, both with respect to the applicants and the respondent Party, the Chamber concludes that the respondent Party has violated the rights of the applicants to be free from inhuman and degrading treatment, as guaranteed by Article 3 of the European Convention, in that it has failed to inform the applicants about the truth of the fate and whereabouts of their missing loved ones. The Chamber considers the failure of the respondent Party to in any way clarify the fate and whereabouts of the Bosniak men missing from Srebrenica during the period of 10-19 July 1995 through a meaningful and effective investigation and a full statement of disclosure of all relevant facts, made known to the public, a particularly egregious violation of the rights of the applicants protected under Article 3 of the European Convention.

The Chamber decided that an examination of a separate violation of Article 13 was not necessary, but it did find that the applicants were victims of discrimination as to their rights from Articles 3 and 8 of the ECHR, as the authorities of Republika Srpska failed to conduct a proper investigation as to the fate of their loved ones precisely because of their Bosniak ethnicity. The Chamber concluded on the merits that:

202. In summary, the Chamber concludes that the respondent Party's failure to make accessible and disclose information requested by the applicants about their missing loved ones constitutes a violation of its positive obligations to secure respect for their rights to private and family life, as guaranteed by Article 8 of the European Convention. In addition, the respondent Party's failure to inform the applicants about the truth of the

fate and whereabouts of their missing loved ones, including conducting a meaningful and effective investigation into the massacre at Srebrenica in July 1995, violates their rights to be free from inhuman and degrading treatment, as guaranteed by Article 3 of the European Convention. Lastly, the

Chamber concludes that in failing to fulfill its obligations owed to the applicants under the European Convention, the respondent Party has discriminated against the applicants due to their Bosniak origin. In the context of the Srebrenica cases, these violations are particularly egregious since this event resulted in the largest and most horrific mass execution of civilians in Europe in the second half of the twentieth century. Moreover, the violations reflect a total indifference by the authorities of the Republika Srpska to the suffering of the Bosniak community.

The Chamber was then faced with the delicate issue of ordering an appropriate remedy – obviously, any restitution of the *status quo ante* was impossible. After analyzing the relevant international jurisprudence, especially that of the Inter-American Court, and particularly relying on the *Barrios Altos* case¹⁵, the Chamber ordered the Republika Srpska, firstly, to disclose any information it had on the fate of the applicants' loved ones; secondly, to release any missing persons it had in custody; thirdly, to conduct a full and meaningful investigation of the role of its authorities and armed forces in the Srebrenica massacre, its efforts to cover up the crime, and the fate of the missing persons, and to publish this report within six months of the decision; fourthly, to publish the decision of the Chamber in the Serbian language in its Official Gazette; and finally, to make a total donation of 4,000,000 Convertible Marks to the Srebrenica-Potočari Memorial and Cemetery. The Chamber did not make any individual awards of compensation. It did consider that a further appropriate remedy would be for the Republika Srpska to make a public acknowledgement of responsibility for the Srebrenica events and issue a public apology to the victims' relatives and the Bosniak community of Bosnia and Herzegovina as a

¹⁵ For an overview of the Court's jurisprudence on torture see Richard J. Wilson and Jan Perlin, 'The Inter-American Human Rights System: Activities from Late 2000 Through October 2002', 18 *Am. U. Int'l L. Rev.* 651; Julie Lantrip, 'Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights', 5 *ILSA J Int'l & Comp L* 551; also see Christina M. Cerna, 'The Inter-American System for the Protection of Human Rights', 16 *Fla. J. Int'l L.* 195; Thomas Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court', 79 *Am. J. Int'l L.* 1, 25; Jo M. Pasqualucci, 'Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law', 38 *Stan. J Int'l L.* 241.

whole. It did not, however, order the authorities of the Republika Srpska to do so, as it considered that only a genuine and sincere apology would have any purpose, but expressed its hope that such an apology would be forthcoming from the Republika Srpska on its own initiative.¹⁶

3.2. Analysis

The decision of the Chamber in the *Srebrenica* cases is important for several reasons. Firstly, it has expanded upon the existing international case law on the 'right to know the truth' and the prohibition of torture. Secondly, the violation of this right has occurred and has been adjudicated on an unprecedented scale, dealing with a case of mass killings which are tantamount to genocide. Thirdly, the remedies ordered by the Chamber provide an excellent example of the role courts and human rights law can have in situations of transitional, post-conflict justice.

The European Court and the Inter-American Court of Human Rights did the truly pioneering work in respect to the 'right to know the truth' of the family members of the victims of enforced disappearances.¹⁷ The Chamber's contribution is in distinguishing between the right to family life and the prohibition of torture and inhuman or degrading treatment regarding the right to know the truth, especially as to the scope and extent of positive obligations of states.

By establishing through the work of the ICTY that the forces of Republika Srpska captured or killed the men from Srebrenica, even though it could not decide on Republika Srpska's responsibility for the crime, it being out of its temporal competence, the Chamber could find that the authorities of Republika Srpska had some information or still had some of the men in custody. The violation of Article 8 of the ECHR exists because of the Republika Srpska's failure to discharge even its minimal obligations, by disclosing this information it already had or releasing the men from custody – and this is what the Chamber ordered as an appropriate remedy.¹⁸

¹⁶ All of the findings of violation were delivered by 12 votes to 2.

¹⁷ See e.g. *Kurt v. Turkey*, App. no. 24276/94, judgment of 25 May 1998; *Timurtas v. Turkey*, App. no. 23531/94, judgment of 13 June 2000; *Bámaca Velásquez Case* [2000] IACHR 7, judgment of 25 November 2000, paras. 145-166. For more on the phenomenon of 'disappearances' see Nigel Rodley, *op.cit.*, pp. 243-276.

¹⁸ The rights enshrined in Article 8 are by their nature residual, the one area of private life in which the state should not interfere, but which it also must not impede. There are

The Article 3 violation is of more import, as the scope of the positive obligations it entails is more extensive. The primary aspect of the violation is that the family members of Srebrenica victims are being inhumanely treated by the fact that the Republika Srpska has not done all that it could to provide them with information on the fate of their loved ones. The duty to undertake a proper investigation is the core positive obligation from Article 3, and the Republika Srpska has not only not conducted such an investigation, but has tried to blur the facts and escape and relativize its responsibility. That is why the appropriate remedy was to order the respondent to conduct such an investigation.

The value of this decision is not only in its legal reasoning, but also in the Chamber's attempt to somehow rectifying the injustice of Srebrenica, by finding the remedies most suited to relieve the victims' anguish, and trying to improve the process of truth and reconciliation in Bosnia and Herzegovina. One of the remedies ordered sparked some controversy – that the Republika Srpska should donate about 2 million euros to the Srebrenica-Potocari Memorial and Cemetery. On the side of the applicants and a part of the Bosniak community, the amount of money was considered to be too small, and it should have been paid as compensation to the families. On the side of the Serb community, the order on paying compensation was viewed as one-sided, as there were many victims of other atrocities during the Bosnian war that got nothing, and as the crimes against the Serbs of Srebrenica which preceded the genocide were ignored. The controversy was further heightened by the Chamber decision¹⁹ to strike out 1805 applications against the Republika Srpska regarding Srebrenica and posing the same issues, as it has felt that it has provided all the remedies it could in the previous case, and that these remedies apply equally for families of all the Srebrenica victims. It is again necessary to distinguish between the responsibility and compensation for the crime of genocide itself and the violation of human rights of the victims of the genocide, and the compensation and responsibility for the violation of the victims' families right to know the truth. The former was not, and probably should not have been, within the jurisdiction of the Chamber – it is a matter for criminal courts, though the International Court of Justice may decide on the issue of state responsibility of Serbia and Montenegro. The latter was the only subject within the purview of the Chamber, and it in my view wisely decided to allow the families to bury

positive obligations stemming from Article 8 – the enjoyment of this right must also be secured by the state, and this is what the Republika Srpska failed to do.

¹⁹ The case is *Ibišević et al. v. Republika Srpska*, case no. CH/01/7604 et al., Decision to Strike Out, 3 June 2003, see para. 14.

their loved ones when they are found, and to have their memories and the memory of the horrors of Srebrenica live on.

One of other remedies was certainly a success. In June 2004 the Republika Srpska's Commission on Srebrenica issued its final report²⁰, in which the responsibility for and the extent of the atrocity was acknowledged – although the word 'genocide' was avoided. On June 22, 2004 the President of Republika Srpska, Dragan Čavić, appeared in a television broadcast and issued an apology to the victims of Srebrenica and to the Bosniak community, saying that "the atrocities in Srebrenica are a black page in the history of the Serbian people", and adding that "there is no excuse for the perpetrators".²¹ An apology was also issued by the Government: "the Government of the Republic of Srpska commiserates with pain of the relatives of the perished people of Srebrenica, and truly regrets and apologizes for the tragedy they have suffered."

These certainly were the rights steps towards reconciliation in Bosnia and coming to terms with the past. But the success of this story must not be exaggerated. It was the intense pressure of the international community, and especially its High Representative in Bosnia and Herzegovina which caused the Chamber's decision to be enforced. Also, according to the 2005 survey by the Belgrade Centre for Human Rights cited earlier, only 28% of the citizens of Serbia have heard about the report of the Republika Srpska's Commission on Srebrenica, and less than half of these people believe that the report is truthful and not a product of international pressure. The author of this paper was not able to find an equivalent survey regarding Republika Srpska itself. Still, at first glance it would seem that the public opinion in Serbia proper is much more resistant to acknowledging responsibility for crimes perpetrated during the Bosnian war than the people of the land where the war was actually fought.

1. Proceedings before the International Court of Justice

The International Court of Justice (ICJ) is a much different animal than either the ICTY or the Human Rights Chamber. It is a court almost a century

²⁰ The report, an addendum to the report and the conclusions of the Government of Republika Srpska can be found at its official web page, both in Serbian at <http://www.vladars.net/pdf/srebr.pdf>, http://www.vladars.net/pdf/srebr_final_s_1.pdf, http://www.vladars.net/pdf/srebr_zakljucak.pdf and in English, though the quality of the translation is poor, at <http://www.vladars.net/pdf/srebrenicajun2004engl.pdf>, http://www.vladars.net/pdf/srebr_final_e.pdf, http://www.vladars.net/pdf/srbren_zaklj_e.pdf.

²¹ See at http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200406_hr_1_eng.txt

old, before which no individual person has standing; it is a court made exclusively for states, as a means of pacific settlement of their disputes. In 1993 Bosnia and Herzegovina instituted proceedings before the ICJ against the then Federal Republic of Yugoslavia (FRY) pursuant to the 1948 Genocide Convention. In 1996 the Court rendered a judgment on preliminary objections filed by the FRY, finding that it had jurisdiction to hear the case according to Article XI of the Genocide Convention. After the fall of Milošević the new authorities of the FRY (Serbia and Montenegro) applied for revision of the 1996 judgment, claiming that in 1996 the FRY was not a member of the United Nations (as was recently found by the Court itself in the NATO cases; this objection was not raised by the Milošević government), and that therefore the ICJ manifestly lacked jurisdiction. In 2003 the Court rejected the request for revision of its earlier judgment, primarily because of procedural issues. However, a similar application by Croatia against Serbia and Montenegro will almost certainly be rejected by the Court, as it had not yet ruled on its jurisdiction, unlike in the Bosnian case. There have been several attempts of reaching an amicable solution; in the absence of one, and in the event nothing changes on the jurisdiction front, the oral hearing on the merits of the case will be held in February 2006.

There are many misconceptions about this case in the general public, both in Serbia and in Bosnia. This case is not about the character of the war, whether it was a civil war or a war of Serbian aggression; this is not a case about responsibility or the compensation of damages for the war itself, or for all crimes against international law committed during the war. The ICJ only has jurisdiction to rule on state responsibility for acts of *genocide*, and compensation of damages resulting from that genocide. Bearing in mind the enormous difficulties of proving genocide, as well as the jurisprudence of the ICTY which conclusively shows that the overwhelming majority of crimes committed during the Bosnian war were either war crimes or crimes against humanity and not genocide, it would appear that the entire case will by default focus on Srebrenica. In essence, the entire case will rest on whether (a) the massacre in Srebrenica can be qualified as genocide and (b) whether Serbia and Montenegro is responsible for that act of genocide, according to the rules of customary international law on state responsibility.

As to the first point, it is highly unlikely that the ICJ would overturn the qualification of Srebrenica as genocide made by the ICTY, even if the respondent government has the gall to dispute such a finding. The second point is far more complex, as this is a case of state responsibility without precedent. It is indisputable that the genocide in Srebrenica was perpetrated by the forces of the VRS and other organs of the Republika Srpska, itself a parastatal entity.

However, the problem is whether Serbia and Montenegro can be held responsible for the acts of the VRS in Srebrenica. The rules of international customary law are not clear on this subject, simply because of the lack of jurisprudence on the responsibility of states for international crimes. The most relevant case of the ICJ is *Nicaragua v. United States*²², in which the Court found, *inter alia*, that the US is not responsible for the crimes of the *contras* in Nicaragua, even though it provided ample financial and logistics support, as well as arms and training. Similarly, Serbia and Montenegro could be held accountable for the genocide in Srebrenica, i.e. the acts of the VRS forces would be attributable as its own, if (a) it could be proven that the Republika Srpska itself was under total control of Serbia, without any independence or freedom of action, in effect under the same type of control that Serbia exercises over its own territory, or (b) if it could be proven that the genocide in Srebrenica was carried out under the direct command of Belgrade and with oversight and control by Serbian forces.

The burden of proving either of these two relationships lies heavily on Bosnia, and it will be seen whether it will be able to discharge it. The principal arguments in favor of the Bosnian position would be the enormous amount of support given to the Republika Srpska by Serbia, the fact that most of the higher officers of the VRS – foremost Ratko Mladic – were at the same time officers of the Yugoslav Army, the fact that they later retired in Serbia proper, and even the evidence of the recent video, which shows a paramilitary unit from Serbia involved in the Srebrenica massacre. All of these facts are enough to establish the *criminal* responsibility of many officials and officers of both the Republika Srpska and Serbia; they are enough to establish the moral and historical responsibility of the Serbian people; they are even enough to establish the *state* responsibility of Serbia for acts of aiding and abetting the perpetration of international crimes. However, the outcome of the case concerning the state responsibility of Serbia for the act of *genocide* itself is by no means certain.

In any case, it remains to be seen what, if any, will be the influence of a decision of the ICJ on the matter of Srebrenica on the process of transitional justice. Unfortunately, it could be said that, no matter which way the judgment goes, it will do very little good for reconciling the people of the former Yugoslavia. If the Court finds that Serbia and Montenegro is not responsible, this will be seen by many in Bosnia as a decision negating the crime of Srebrenica and their immense suffering. If the Court finds that Serbia is responsible, this decision will provoke widespread resentment in Serbia, where

²² *Military and Paramilitary Activities in and Against Nicaragua*, available at http://www.icj-cij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_toc.htm.

it will be seen as a one-sided interpretation of the entire Bosnian conflict, as a rebuke to the Serbian victims of the war, and last but not least, as an unfair ruling affecting even those who have fought Milosevic and his war machinery for more than ten years. Simply put, the finer points of public international law will be lost in the translation.

5. Conclusions

The path towards justice and truth is always a long one, and it is time that is needed the most in order for the wounds caused by the wars in the former Yugoslavia to heal. The courts, both domestic and international ones, can contribute to this process, and the judicial search for the truth is an important factor in transitional justice. Srebrenica, the single worst crime of the war has now been the subject of several judicial proceedings. However, the task itself is so momentous, and the obstacles are so great, that the results of these proceedings have still not produced a widespread cathartic effect. Both the courts, and the motives of those admitting guilt for Srebrenica are under constant suspicion by a large part of the general public as to their true motives and purposes. The ICTY's Outreach program has not produced much success, and the judges and the Prosecutor of the Tribunal must make much more effort to make their work as public as possible, and pay attention not just the proceedings in the courtroom, but also to the appearance of these proceedings out of court. As is often said, justice must not only be done, but be *seen* to be done.

The work of the Human Rights Chamber and especially the Commission of the Government of Republika Srpska and the apology issued by its authorities may also prove to have lasting effect. It is well known that people tend to believe their compatriots much more than a group of intruding foreigners. In this regard, the process of transferring cases from the Tribunal to domestic courts may also be useful. It must be borne in mind that the twenty high-ranking indictees before the Tribunal are only the tip of the iceberg. It takes much more than twenty people to kill eight thousand, and only domestic courts can bring justice to the immediate perpetrators. Hopefully, this whole process will in several years time result in the universal acceptance of Srebrenica for what it is – genocide, the crime of crimes.