

# Truth and Reconciliation in Bosnia and Herzegovina

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# 1 Introduction

In the past century there have been numerous examples of gross state violations of human rights and there are many domestic conflicts that illustrate this. For example, the situations in Chile, Guatemala, Argentina, Uruguay, Rwanda and South Africa, this list is dramatically understated and by no means complete. But how do these societies resume normal life, move on, often with perpetrators and victims living in the same community? Countries that have had civil wars, oppressive dictators or militaries have used different means to deal with their past or not to deal with it. Some have chosen to ignore or forget it, while others have engaged in criminal prosecutions that have resulted in public executions of the perpetrators of the gross violations of human rights. For example, in Chile the Pinochet government proclaimed an amnesty law for itself to ensure protection from prosecution for the violations they had committed during their reign of power, this was also the case in Uruguay and Argentina. Romania as recently as 1989 executed the former dictator and his wife, Ethiopia is in the process of trying thousands of individuals and in Rwanda there are criminal prosecutions that have resulted in the execution of those found guilty.

These are a few examples of what societies have previously done, but what will be the reactions in the cases of the most recent conflicts. One of the most publicised conflicts of the last decade is the break up of the Former Yugoslavia. The conflict began as early as 1989, escalated with the succession of Slovenia and Croatia in 1991 and has resulted recently with the war in Kosovo. In the midst of this timeline is the conflict between the Croats, Muslims and Serbs of Bosnia and Herzegovina. In 1992 the war began in Bosnia and Herzegovina and culminated in December 1995 with the signing of the Dayton peace agreement. Now that the war is over, what is being done in the context of Bosnians dealing with their past, resolving conflict and ethnic tension? The following discussion will look at the post-war society in Bosnia and Herzegovina to assess the implications of current measures in sustaining democracy and peace. It is within this context the possible implementation of a truth and reconciliation commission will be discussed.

The following discussion is structured into six parts. It consists of an initial starting point of a general discussion of gross violations of human rights and options for dealing with perpetrators of human rights in order to facilitate societal transition to maintaining democracy. The next section discusses specifically the historical context of the conflict in Bosnia and Herzegovina. In order to have a complete perspective of the current situation it is necessary to discuss the contribution of the existing institution of the International

Criminal Tribunal for the Former Yugoslavia and the implications of criminal prosecution. At this point the establishment of a truth commission will be discussed highlighting the perceived relevant issues. Finally it is necessary to discuss the role of international and non-governmental organisations (NGOs) and subsequently conclude the discussion. The research for this paper consists of extensive literature reviews, internet research, and discussions and correspondence with various sources including representatives of the Human Rights Chamber, the Organisation for Security and Cooperation in Europe (OSCE), Office of the High Representative (OHR), United States Institute of Peace (USIP), University of Sarajevo and numerous other foundations and organisations working in relation to Bosnia and Herzegovina.

## **1.1 Gross Violations of Human Rights**

An initial starting point for the discussion is to define the concept of gross violations of human rights. Generally there are different terms for this same concept. These violations are commonly referred to as gross, grave or massive violations of human rights. For the purpose of this paper the term gross violations of human rights will be used. One aspect of the concept to be considered is the legal context of the definition. There can be a distinction made between gross violations of human rights and violations of international law because they are not necessarily the same thing. Some of the violations that states commit against citizens may be legal under the particular state's national constitution. If citizens cannot be protected by their government what other means do they have for protection? Within the domain of international law there are several international conventions that do specifically refer to gross violations of human rights, for example the Convention on the Prevention and Punishment of the Crime of Genocide (Roht-Arriazza, 1999). One can also define state violations of human rights as mass atrocities organised by the state that are committed against citizens. These violations consist of torture, rape, murder, et cetera. There are many countries that have experienced these crimes on a massive scale under a repressive government and transformed into a democratic and more peaceful society. As states that have experienced gross violations of human rights emerge into a newly democratic state there must be some form of political instrument used to deal with the perpetrators of the violations and contribute to sustaining a peaceful society.

## **1.2 Reactions to Gross Violations of Human Rights**

How can a newly emerging democratic society deal with the human rights abuses committed and allow the society to confront its past? A variety of

mechanisms have been used by newly formed democratic governments and in certain cases the international community to deal with the crimes of former governments. These means have included implementing amnesty laws into national legislation, truth and reconciliation commissions or investigatory commissions and most recently under the auspices of the United Nations (UN) the International Tribunals for the former Yugoslavia and Rwanda and the ongoing implementation of the International Criminal Court. There are several factors that are relevant in determining in what means a society deals with their past. These factors include the type of abuses committed, the length of time constituting the past, what remains of the legal culture and the level of governmental power, to name a few (Huyse, 1998). What impact these factors have in relation to the reaction or mechanism applied will be directly dependent on the specific context of the societal and political conditions.

### **1.2.1 Amnesty**

Amnesty is one of the concepts within the realm of transitional justice and one of the means used by a government to deal with previous repressive regimes in order to protect the transitional state. One of the factors that may affect whether or not a state invokes amnesty is the level of power and influence the former repressive government retains as it is replaced. An example is that some governments have proclaimed amnesty for themselves to ensure they cannot be prosecuted before the new state power has taken over. For example this is the case in Chile where the Pinochet government proclaimed an amnesty law for itself to ensure its protection for the violations they had committed during their reign of power. Also the new government may enact amnesty laws on its own for the reason the power they have in the first place is fragile because the military or security forces still retain prominent power. The amnesty granted to the previous perpetrators both helped ensure transition and will help maintain the society.

This transitional concept is often criticised as it may be perceived by the public as forgetting about the past and the suffering of the victims, the erasing of history or enacting of amnesia. Even though it may ensure the least amount of conflict and can lead to a peaceful transition, it is important that the process of remembering is observed (Huyse, 1998). If a society perceives that the loss and trauma that has been suffered is not recognised and is repressed then this may cause the society further harm.

### 1.2.2 Lustration

Another form of dealing with perpetrators that has been most notably used in the Eastern European states after the fall of the 'iron curtain' is lustration (Huyse, 1998). This involves purging the civil society of those involved with the previous regime. The danger involved in lustration is it may require depleting an intelligent and knowledgeable group of people that are needed to progress the viability of the state. It is for this reason that some states have not participated in the process of lustration. Another criticism is that lustration continues the cycle of vengeance and a "psychology of vengeance and hatred develops" (Minow, 1998, p. 11). Lustration may have the advantage of punishing the offender to a certain degree but does not invoke healing or resolution of conflict for the society. It may inadvertently cause more damage by perpetuating the cycle of violence.

### 1.2.3 Criminal Prosecution

Criminal prosecution is another mechanism a state or the international community can invoke to deal with perpetrators of gross human rights violations. This response can be considered to be at the opposite end of the continuum of responses, in comparison to enacting amnesty. Some would argue that if repeat violators are not prosecuted it is a violation of customary or international law (Orentlicher, 1991). The most recent examples of criminal prosecutions at an international level are the International Criminal Tribunals organised for Rwanda and the former Yugoslavia. These tribunals operate under the auspices of the United Nations, and the implications of the Tribunal for the former Yugoslavia will be discussed in-depth at a later point. A further step at the level of criminal prosecution is the establishment of the International Criminal Court established by the Rome Statute of July 17, 1998. The statute needs to be ratified by 60 members of the United Nations in order to be implemented, 14 countries have currently ratified it.<sup>1</sup> Although the International Criminal Court has the opportunity to be a viable mechanism for dealing with human rights violations, it will not be operational for some time.

It is often felt that gross violations of human rights should be dealt with in a formal criminal prosecution procedure for the following reasons (Landsman, 1997). Criminal prosecution may formalise the state's justice system by establishing a valid rule of law establishing an example for society that no individual is above the law. Also it sets an example for the society in order

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<sup>1</sup>As of July 17, 2000. For the most recent updates see <http://www.un.org/law/icc/statute/status.htm>.



that citizens may avoid the situations that lead to conflict and also to deter future violators. It is also argued that the court process will identify the victims and this will establish a register and victim compensation can be facilitated serving both the public and victim's interest. Another point raised is criminal prosecution will in effect punish the violators for their behaviour, stigmatising them in the society and possibly providing vengeance for the survivors.

-Although there are many seemingly good reasons to prosecute, there are many instances when this option is not possible for a variety of reasons. The newly established democratic government and the idea of democracy may be too weak to support prosecutions, it is not feasible for the nation's justice system to adequately process the many cases, and the accused cannot be apprehended, et cetera. It is in these situations where alternate means may be a more viable option for dealing with the past. Situations where the state may not be able or willing to prosecute perpetrators at the national level may indicate an obligation of the international community to initiate prosecutions at the international level. In effect the purpose of these prosecutions is to ensure that the perpetrators are being prosecuted and it also illustrates the international community will not tolerate gross violations of human rights. Several advantages of prosecution at the international level include having the resources to provide experts in a system that is not able to prosecute on its own and bringing impartiality to the process.

#### **1.2.4 Truth Commissions**

A middle ground between the option of amnesty and criminal prosecution is that of a truth commission, although in the past this body has been referred to as a "clarification commission" (Guatemala), a "commission of the disappearance of persons" (Argentina) and in other countries a "commission of inquiry" (Hayner, 1996). Truth commissions are specifically defined by Hayner as "bodies set up to investigate a past history of violations of human rights in a particular country — which can include violations by the military or other government forces or by armed opposition forces," (Hayner, 1994, p. 600). Another definition of a truth and reconciliation commission is, "official temporary bodies established to investigate into a pattern of past human rights abuses or violations of international humanitarian law, are tasked to investigate, report and recommend reforms, and in the process serve to formally acknowledge past wrongs that were silenced and denied." (Hayner, 1996, p. 19).

There are four elements that are specific to a truth commission as well, it is to focus on the past, cover a broad range of abuses over a certain period of

time (certain abuses may be highlighted as examples), it has a specific time limit which concludes by establishing a written report, and it is officially “sanctioned” or endorsed by the state to investigate the past (Hayner, 1994, p. 600). This last point is important as it may affect the legitimacy of the commission in the eyes of the public. Also according to Hayner it will give the commission more power, the authority to investigate, greater access to information and the conclusions and recommendations of the final report may achieve a greater degree of legitimacy.

Previous commissions have been set up by the new governments, non-governmental organisations or the United Nations. There also can be a combination of amnesty and criminal prosecution used in conjunction with the truth commission. In South Africa amnesty was implemented into the national law, perpetrators applied for amnesty to the truth and reconciliation commission in exchange for revealing the full truth about the acts they committed. In the Latin American situations where truth commissions were implemented in Argentina, Chile, El Salvador, and Guatemala the process ensured that there was not just strictly a blanket amnesty. In cases where the accountable parties retained power the truth commission was at least some recognition of the gross violations of human rights in the absence of criminal prosecution.

There are several differences, besides their legal nature, between a truth commission and criminal prosecution. The goal of a truth commission is to establish a broader range of facts, and to record the abuses in a wider context. The goal of a truth commission is not to establish guilt and punish but to seek truth, (Huyse, 1998) and to serve justice to a larger population in a way that may initiate a move to reconciliation and forgiveness. But this does not mean that perpetrators will not be punished in a criminal context if there is a truth commission. Some truth commissions, the commissions in Argentina and Chile for example, were conducted and then prosecutions followed based on information attained by the commission. (Kritz, 1996). Another example is the South African Truth and Reconciliation Commission (TRC) denied perpetrators amnesty and now they can face criminal prosecution. In Argentina criminal prosecutions of members of the military junta followed the truth commission. In general, a truth commission process avoids the problems that are associated with amnesty and prosecution (Pokin and Roht-Arriaza, 1995).

What can be learned from these approaches in application to the situation in Bosnia? First it is necessary to discuss the making of the conflict in Bosnia and Herzegovina.

## 2 The Conflict in Bosnia and Herzegovina

### 2.1 The History of the Conflict

It is difficult to recount in less than a few volumes the events that precipitated the wars in the former Yugoslavia and explicitly in Bosnia and Herzegovina. The following is a brief discussion of some of the relevant events.

The conflict in the Balkans is not a newly emerging phenomenon and can be traced for centuries. In the same sense Bosnia and Herzegovina is no stranger to war, the start of World War I was precipitated when the Austrian archduke Francis Ferdinand and his wife were assassinated on the streets of Sarajevo on June 28, 1914. There is evidence of the long-standing conflict between the ethnic groups specific to Bosnia and Herzegovina, Serbs, Croats and Muslims (Bosniacs)<sup>2</sup> from the beginning of the Twentieth Century (Crampton, 1994). Although there is evidence of historical conflict, they had lived together as neighbours and friends during the rule of Josip Broz Tito and after his death in 1980. It is the events and actions after 1980 that led to the most recent violent conflict between the groups (Ignatieff, 1999). Tito was a powerful leader that for decades ruled Yugoslavia with strict communism, and was intent on preserving its sovereignty and treating each state within it equally. At this time it was comprised of the six states Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia, which contained the distinctly autonomous entities of Kosovo and Vojvodina<sup>3</sup>. A large Serbian population was ensured in each state in order to reduce the influence of any one ethnic group on the central government. Tito's policy to ensure that all states were treated equally in all aspects created a decentralised authority, and when he died the system fell apart without leadership. Economically Croatia and Slovenia were the wealthier states and money was taken from those regions and transferred to the less wealthy regions, especially to Kosovo (the most disadvantaged region). Also there was a rotating Presidency between the six states as an effort to ensure that each state would have equal participation in the government. Even with the measures that Tito had taken Yugoslavia was not prepared to stay together after the death of its leader. It is contended that the conflict that ensued after Tito's death was a direct result of the creation of a system that was unable to deal with the countries problems in the mid 1980's, mainly high economic debt and increasing uncertainty with the financial and political institutions (Crampton, 1994; Malcolm, 1994). The people of Yugoslavia grew increasingly incensed

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<sup>2</sup>The term Bosniak or Bosniac has emerged as Bosnia and Herzegovina has claimed their independence and refers specifically to Muslims of Bosnia and Herzegovina.

<sup>3</sup>These six states were established in 1945, with Kosovo and Vojvodina.

with the government as poverty spread and those impoverished were asked to endure (austerity measures) while the privileged seemingly became more corrupt (Crampton, 1994). The expanding foreign debt is one of the basis' for the downfall of Yugoslavia that contributed to the increasingly strained relations between the ethnic groups.

With the decentralised nature of the organisation of the states, the political structure of the country fragmented creating intense nationalism among the individual states. The political arrangement of a rotating presidency weakened the Yugoslav political nation state to the extent that it was very easy for an individual such as Slobodon Milosevic to take control with no central political power to stop him (Crampton, 1994). The communist system had also contributed to suppressing nationalism and identifying with an ethnic or religious identity to the extent that there was a massive insurgency of nationalism and ethnicity among the people (Malcolm, 1994). In Tito's efforts to create a harmonious and equal union of states he provided the political situation which Milosevic could take advantage of, and in reality the state of political affairs set the stage for Milosevic to begin his attempted take-over of the country. In the mid to late 1980's Milosevic began his rise to power and he became leader of the Serbian Communist Party in December 1986 (Lucarelli, 1995). It was a combination of many different factors that created the economic, political and social dissidence in Yugoslavia, at the same time Milosevic was gaining power (by 1989 he controlled 4 of the 8 votes of the states) (Malcolm, 1994).

The political, economic and social situation was conducive to Milosevic gaining more power over the country and after becoming Serbian Communist Party leader he used a variety of techniques that resulted in creating more tension among the ethnic groups. Preceding his leadership of the Communist party, there was an action that would foreshadow the Serbian philosophy. A memorandum was issued by the Serb Academy of Arts and Sciences implying that the other ethnic groups in Yugoslavia were systematically repressing Serbs (Ignatieff, 1999; Little and Silber, 1998; Lucarelli, 1996). This would in fact become the manifesto of the Serb Nationalist opposition (Lucarelli, 1996). Milosevic used a variety of means to increase the ethnic tension that was beginning to build. One strategy was to create insecurity among the Serbs that were outside of Serbia, for example in 1988 creating the Committee for Protection of Kosovo Serbs and Montenegrins. By this time he also had control of the state radio and television stations and was able to use this medium to spread Serbian propaganda (Malcolm, 1994). The political actions following this in late 1988 and early 1989 would indeed slowly reveal his plot to control the country, the outright anti-ethnic sentiments were becoming apparent in public speeches and policy (Nowak, 1999a). At this time

Kosovo and Vojvodina would lose their status of special autonomy, both governments resigned and Milosevic announced that the highest court of appeal for these two states would be the Supreme Court of Serbia, sealing their loss of autonomy. Also at this time Serbian relations with Slovenia and Croatia were growing increasingly strained. The stages of succession for these two countries were beginning; in fall of 1989 the Slovenian government amended their constitution allowing succession.

At the same time that this was happening in Yugoslavia, the world was watching the fall of communism in the rest of Eastern Europe. This is reflected in the corresponding events in Yugoslavia. In January of 1990 both Slovenia and Croatia abandoned the Congress of the League of Communists and in multi-party elections the same year these two countries, as well as Bosnia and Herzegovina elected non-communist parties to government. In Macedonia the communist party was a minority and Milosevic won the elections in Serbia and transformed the party into the Socialist Party of Serbia (SPS). Slovenia then altered their constitution in order to allow succession with legislative autonomy, thereby removing it from the authority of the federal state. The states of Slovenia and Croatia were willing to remain loosely affiliated with the main Yugoslav republic, but when it became apparent that Yugoslavia would not accept this Slovenia and Croatia both declared their independence on June 25, 1991. These actions left Bosnia and Herzegovina caught in a tug of war; they could declare independence or stay in what remained of Yugoslavia. Both situations had their consequences, and forced to make a choice neither was an attractive option.

Bosnia and Herzegovina declared Member States of the European Union (EU) were squabbling about how to react to the conflict. Germany wanted to recognise the dependence of the states, while Britain and France were adamant to treat the situation as an internal conflict and to preserve the borders at all costs. This reaction, or better stated lack of reaction signalled to Yugoslavia that the rest of Europe was not prepared to intervene at this point, and Yugoslavia continued with the onslaught (Ignatieff, 1999). The intention to preserve the borders of Yugoslavia allowed the Yugoslav National Army (JNA), which was Serb dominated, to move into the other states to defend essentially Serbian interests. The lack of unity among the EU member states virtually rendered the attempts by the EU representative and the Conference for Security and Cooperation in Europe (CSCE)<sup>4</sup> at peace negotiations with paralysis. If the member states could not agree on common policy among themselves, how could Europe proceed with negotiations?

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<sup>4</sup>The CSCE officially became the Organisation for Security and Cooperation in Europe (OSCE) on January 1, 1995.

The lack of progress by the EU representative prompted the UN to become involved. At one point the three ethnic groups were presented with three different peace approaches; the EU approach where the groups could choose their level of sovereignty and involvement in institutions, the UN approach to commit troops to Croatia (the other republics were not mentioned), and the intervention of Germany to recognise independence (Little and Silber, 1998). How was there to be peace achieved with this chaos at the level of the international community? Another issue was the arms embargo that was imposed on the whole of Yugoslavia, but mostly affected the Bosnian Muslims, as the Bosnian Serbs were armed by the Yugoslav National Army and the Bosnian Croats by neighbouring Croatia. Any sovereign state has the right to defend itself with arms; the Bosnian Muslims were denied this right and suffered greatly because of it.

The UN involvement in the Bosnian war has also been greatly criticised, not only for the arms embargo. The several areas that were declared a “UN safe haven” were not protected and became the areas that were most comprehensively “ethnic cleansed”. The most notable Srebrenica needed to have 30,000 to 34,000 peacekeepers to secure it, in reality there were only 3,500 to 7,000 peacekeepers in total in Bosnia and only a few hundred to protect Srebrenica. UN peacekeepers were only able to standby when Bosnian Serbs ethnically cleansed Srebrenica of the Bosnian Muslims on July 11, 1995 (Gutman, 1993; Ignatieff, 1999; Little and Silber, 1998; Nowak, 1999).<sup>5</sup> The Serbs also used the UN and other NGOs as a tool in their ethnic cleansing. For example the Bosnian Serbs would attack a specific region, the UN and NGOs fearing for the safety of the inhabitants would evacuate the area, accomplishing the goal for the Serbs.

Throughout the duration of the war several peace plans were presented to all sides, and rejected at various stages. There was increasing tension between the Bosnian Muslims and Bosnian Croats as the two groups, as a result of the Serbian ethnic cleansing, were moved into smaller territory and made the ethnic conflict more likely. The conflict between the Bosnian Muslims and Bosnian Croats ebbed and flowed throughout the war. The Croatian president Franjo Tudjman would be negotiating and making deals with both the Serbs and Muslims (Little and Silber, 1998). The final formal alliance of Croatia would be with the Bosnian Muslims in the formation of the Muslim-Croat Federation. In the summer of 1995 the dynamics of the war began to change, and the Croats began to participate in their own ethnic cleansing policy in the Knin region of Croatia.<sup>6</sup> Before the war in

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<sup>5</sup>It should be noted that these figures vary slightly in different literature.

<sup>6</sup>It should be noted that some believe the West, mainly the United States supported

1991 there were approximately 600,000 Serbs living in Croatia and at the end of 1995 there were just over 100,000 remaining. This is an indication of the massive property transfer that occurred as a result of ethnic cleansing. The increased power of the Croatian forces also helped the Bosnian Muslims in Bosnia gain more ground. The Bosnian Serbs had been cut off from Milosevic and with the fall of Krajina the Bosnian Serbs weakened. There were several events that lead to the Bosnian Serbs losing ground in the war. After the fall of Srebrenica and a mortar attack on a Sarajevo market that killed 37 and wounded 88 people, the North Atlantic Treaty Organisation (NATO) in September 1995 initiated air attacks against the Bosnian Serbs for two weeks. The Bosnian Serb position was weakened by the attacks on their communication centres, air defences and military and ammunition compounds (Nowak, 1999a). The political strength of the Serbs also began to weaken with the abandonment by Milosevic and disagreements between Radovan Karadzic (President of Republika Srpska) and Ratko Mladic (Leader of the Bosnian Serb Army). This weakening led to a different political power balance when all three sides were taken to Dayton Ohio to negotiate for peace. Karadzic was not involved in the negotiations as he had been indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and would face arrest outside of Bosnia. This meant Milosevic as the President of Serbia was now representing the Bosnian Serbs. All three parties entered this round of negotiations under strong pressure from the United States to come to an agreement.

In November 1995 the three sides finally signed the General Framework Agreement for Peace in Bosnia and Herzegovina at Dayton, Ohio (commonly referred to as the Dayton peace agreement,<sup>7</sup>) as negotiated by American Richard Holbrooke. The final result of the division of territory was a 51-49 percent split for the Muslim-Croat Federation and the Republika Srpska respectively. Dayton also began the largest peacekeeping force of UN and NATO troops in history, 60,000 NATO troops and 1,700 UN civilian police troops. The agreement consisted of the 'General Framework Agreement for Peace in Bosnia and Herzegovina' and 11 Annexes in addition. The agreement is now what shapes the politics in Bosnia (or what is supposed to). In effect the Dayton peace agreement put an end to the armed war, but the conflict still continues. Bosnian Muslims, Serbs and Croats live in relative isolation of one another and thousands are not in their original homes or land. The policy of ethnic cleansing resulted in thousands of murders but

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this offensive, Little and Silber, 1998.

<sup>7</sup>General Framework Agreement for Peace in Bosnia and Herzegovina, initialled Dayton, Ohio, November 21, 1995

also in ethnical divisions of land that were previously multi- ethnic, multi-cultural and multi-religious. The goal of conflict resolution in Bosnia and Herzegovina is to bring peace to the citizens to enable all races, religions and cultures to live together and to rebuild a functional society on a foundation of human rights.

## **2.2 The Current Situation in Bosnia and Herzegovina**

The Dayton peace agreement was signed almost 5 years ago, and the peace that was envisioned in Dayton has not been achieved. The ethnic boundaries that were drawn in the war remain and there is little movement across borders. Bosnian Muslims, Serbs and Croats live in relative isolation of one another and many not on their original land or original homes. The policy of ethnic cleansing resulted in thousands of murders but also in ethnical divisions of land that were previously multi-ethnic, multi-cultural and multi-religious. Property and displacement of persons is an important issue and Dayton has mandated a property reparation claims committee to address this. To address human rights, there is the human rights commission, and there are several other bodies working. One of the problems is the many provisions in Dayton aimed at facilitating peace building are often criticised for consisting of a human rights system too complex to implement. Another issue is that Bosnia is a country that is under administration of the international community. The Office of the High Representative (OHR) is the highest legislative power, and even has the ability to remove political leaders, which it has done by removing the President of Republika Srpska, for obstructing the implementation of Dayton. The OHR is also the co-ordinator of the several other international actors involved in administration such as the UN, OSCE, and EU. The international community under Dayton is mandated with the administration of Bosnia until the end of December 2000 when the state would take over complete governance. The feeling at this time is that Bosnia is not ready to have the international community leave and this will contribute to escalating tensions. The state is not functioning compatibly among the entities, few refugees are returning and there are still widespread violations of human rights. It has been stated that the democracy, rule of law and protection for human rights that was achieved was only done so under the pressure of the international community (Nowak, 1999). It does not appear that Bosnia and Herzegovina can function as an independent state. The current state of affairs in Bosnia suggests there needs to be further measures taken to reduce the conflict and promote peace building to overcome the ethnic conflict that still remains. The following discussion will look at the measures that are being taken at this point to determine accountability



and serve justice and provide impetus for society to move on. It is important to note in order to determine if a truth commission would be beneficial to Bosnian society, one must look at the existing structures that are operating to determine their merits and drawbacks in order to obtain a holistic view of the current situation in Bosnia and Herzegovina. The following is an evaluation of the International Criminal Tribunal for the Former Yugoslavia as a means of providing justice through the process of criminal prosecution.

### 3 The International Criminal Tribunal for the Former Yugoslavia

In order to assess the positive and negative benefits of implementing a truth commission in Bosnia and Herzegovina it is important to determine if such a commission would be beneficial to Bosnian society at this point and if there is a current need for it. To determine this it is necessary to look at the existing transitional justice means being used to see the merits and drawbacks in order to obtain a holistic view of the current situation in Bosnia and Herzegovina.

The United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in May 1993.<sup>8</sup> As of April 26, 2000 the Tribunal has concluded ten cases.<sup>9</sup> The most sought after individuals, Radovan Karadzic and Ratko Mladic, that have been indicted for genocide, crimes against humanity and war crimes by the Tribunal, still remain at large.

The Tribunal was established as the international community's reaction to the atrocities that were being committed in the former Yugoslavia.<sup>10</sup> It is the first time since the Nuremberg Military Tribunal was established in 1945 that individuals have been tried for war crimes under international law. It is necessary to establish what effect the International Tribunal has on the post-war situation in Bosnia and Herzegovina in order to determine if it is accomplishing positive elements attributed to the criminal prosecution of perpetrators of gross human rights violations. In order to do this one can evaluate several different aspects of the operation of the Tribunal in respect to the support of member states of the United Nations and the states of the former Yugoslavia, victim issues and the relationship with the national legal system.

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<sup>8</sup>Security Council Resolution 827, United Nations Security Council, 48th Session, 3217th meeting at 1, U.N. Doc. S/RES/827 (1993) (Approving statute for the Yugoslav Tribunal.) [hereinafter referred to as the Tribunal.]

<sup>9</sup>For comprehensive information on the statistics of the court the see website <http://www.un.org/icty>.

<sup>10</sup>For an extensive history of the International Criminal Tribunal for the Former Yugoslavia see Lescure, K. and Trintignac, F. (1996). *International justice for former Yugoslavia: The working of the International Criminal Tribunal of The Hague*. The Hague: Kluwer Law International.

### **3.1 Criticism of the Tribunal**

The International Tribunal for the former Yugoslavia in The Hague has experienced difficulties and criticism since its implementation. The Tribunal was initially the incentive of the UN Security Council, but after the resolution was passed the organisational time frame was staggeringly slow. Now that the court has been operational for several years much of the criticism is based on the low number of perpetrators that have been put on trial in The Hague. There have been ten persons accused of war crimes tried as of late, and this has been attributed to the lack of assistance in apprehending those indicted. A result of these circumstances was in 1996 the President of the Tribunal threatening resignation if there was not increased assistance in apprehending indicted individuals (Kritz, 1996). One of the reasons the Tribunal gives for the few number of trials is the lack of co-operation by different parties, mainly the member states of the UN and the states of the Former Yugoslavia. The two main areas in which these states impede the mandate of the Tribunal is the lack of financial support from the member states and the lack of assistance in arresting those accused, both by the member states and the states of the former Yugoslavia.

### **3.2 Influence of Member States and the Former Yugoslavia**

In order for the Tribunal to work effectively it is essential it has the full support of all member states of the United Nations. One of the criticisms is that this has not been the case. The Tribunal has a difficult mandate to accomplish if they are not able to apprehend the accused in order to try them. As there is no international police force in this sense to actively seek the accused, other actors must come into play. This raises the issue of the lack of effort by the NATO military forces, initially called Implementation Force (IFOR) and then renamed Stabilisation Force (SFOR), when it was decreased by troops. There were few arrests by SFOR over the last half of the 1990's, although they have the power to arrest under the Security Council resolution. SFOR did not actively arrest, possible reasons may be the member states did not want to endanger their military troops, which are generally under the command of their nation state. This attitude may be changing though in recent months there have been an increased number of arrests including the significant arrests of individuals that were considered high ranking in the line of command during the war. The increase of the arrests of indicted individuals constitutes an important step in gaining credibility for the Tribunal. It is important to note, not only is the support of

the member states needed, but also the support of the states of the former Yugoslavia where many of the individuals that have been indicted are living, this has proven to be problematic as well.

The Federal Republic of Yugoslavia (FRY) and Republika Srpska have openly denied jurisdiction of the Tribunal since its inception, and Croatia and Bosnia and Herzegovina in initial stages were not any better (Petrovic, 1998). To begin with, Bosnia and Herzegovina was eager to comply with the Tribunal as long as it was not Bosniacs that were apprehended. Croatia only began to comply under American pressure to apprehend indicted individuals that were living in Croatia. It should be noted at this time there were several Croatians that turned themselves in to the Tribunal (it is thought mainly as a result of pressure from the Croatian President Franjo Tudjman.) The Federation authorities have had a better record of compliance than the Republika Srpska, as there is a high level of co-operation with investigations. On the other hand, there are instances reported where authorities in the Republika Srpska have hidden indicted individuals and even provided them with false identification (Matscher and Amigo, 1999). As of late many indicted individuals still remain at large,<sup>11</sup> mostly in Republika Srpska and the Human Rights Co-ordination Centre stated they were “unsatisfied” by the co-operation of both entities of BiH with the Tribunal (Human Rights Coordination Centre, 2000). The position of the Republika Srpska may be changing though, recently the president of RS has asked for Bosnian Serb Radovan Karadzic to turn himself in to the Tribunal. Also there have been positive interviews commending NATO for the arrests, given to the media by the Bosnian Serb Justice Minister regarding the recent arrests.<sup>12</sup> The positive change in support for the Tribunal has not been replicated by the FRY and there is still extreme outward hostility from the Serbian politicians towards the Tribunal. Of course many of them have been indicted by the Tribunal undoubtedly contributing to this antagonism.<sup>13</sup>

Another issue to be mentioned is the role Russia effects in international affairs related to the Former Yugoslavia. Traditionally Russia has supported Milosevic and this was emphasised when ties to the west were increasingly strained because of the NATO bombing campaign against Serbia throughout

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<sup>11</sup>The most recent update on the Tribunal website was March 21, 2000, which indicated twenty seven indicted individuals remain at large. <http://www.un.org/icty>.

<sup>12</sup>See [http://www.news.bbc.co.uk/hi/english/world/europe/newsid\\_666000/666890.stm](http://www.news.bbc.co.uk/hi/english/world/europe/newsid_666000/666890.stm).

<sup>13</sup>The Serbian Justice minister is reported to have sent an “unprecedented verbal attack laced with obscenities” to Carla de Ponte, the current Prosecutor from Switzerland, denouncing her and the Tribunal. <http://www.cnn.com/2000/WORLD/europe/05/24/yugo.warcrimes.ap/index.html>.

the Kosovo war. Although Russia as a member of the Security Council must do their utmost to support the Tribunal, this has not been the case. As recently as May 2000 the Russian Federation hosted the Yugoslav Defence Minister General Dragoljub Ojdanic who has been indicted by the Tribunal for war crimes. Dragoljub was not arrested and the international community has condemned Russia for their lack of reaction. Russia supports the Tribunal but feels it has become too political and consists mostly of American and western representatives.<sup>14</sup> If one is to look at the assembly of judges and personnel of the Tribunal it must be noted there is a strong representation from all continents.<sup>15</sup> Although Russia's support of the current Yugoslav leaders may be wavering, as the opposition leaders will be travelling to Russia in the near future. If there is increased international support for the arrest of the influential politicians wanted by the Tribunal and in effect Russia supports this as well, there may be new life breathed into the Tribunal. There may have been some measures that could have been taken sooner to ensure the co-operation of states, and maybe they can still be taken now. One of these issues is the repercussion for not complying with the Tribunal. It should be pointed out that there are no automatic sanctions that are imposed if a state does not comply with the Tribunal. Sanctions can only be implemented if the presiding judge to the Tribunal notifies the Security Council the state has not complied (Lescure and Trintignac, 1996; Petrovic, 1998). It is possible that if automatic sanctions could be imposed there would be more compliance with the Tribunal by the states. Another way of increasing the states effort to comply may be withholding donor money to areas that not only do not comply with the Dayton agreement but also those that do not comply with the Tribunal (Nowak, 1999). Although with these arrests the Tribunal may be closer to accomplishing its mandate it is difficult to see how the ethnic conflict that fuelled the war is being resolved. In effect it may contribute to the tensions and it is possible that as the individuals responsible for the atrocities of the war are brought to The Hague, each side counts how many persons of each ethnic group are tried. Although there may be an initial sense of justice there are still the feelings of anger, hatred and bitterness that remain. These feelings do not make it any easier to work or associate or merely live in the same city as the 'other'. One needs to consider for this reason that, the people of Bosnia and Herzegovina need to have a way to confront their past, resolve conflict and move forward. It is important

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<sup>14</sup>Article on Russia and NATO, comments made by Russian Foreign Minister Igor Ivanov. For article see <http://www.cnn.com/2000/WORLD/europe/05/24/nato.fm/index.html>.

<sup>15</sup>For a list of Judges and Prosecutors and their nationalities see <http://www.un.org/icty/glance/keyfig.html>.

to look at the effect the Tribunal has on the victims of the war in Bosnia and Herzegovina.

### **3.3 The Victim's Perspective**

One of the benefits attributed to the criminal prosecution process is that justice is served for the victim. One must note there are circumstances in which criminal prosecution may produce negative consequences for victims. In the specific circumstances of the Yugoslav Tribunal, the prolonged implementation date and lack of progress may have provided a false sense of hope resulting in frustration and anger for the victims and their families. It may be more damaging to know there is a court that has the potential to hold perpetrators responsible for the crimes, but is unable to do so. Also as it has been made evident the Tribunal can only prosecute a minimal number of the war criminals, which means there are several thousand war criminals and tens of thousands of victims not "addressed" by the Tribunal. Are the criminal prosecutions in The Hague affecting all Bosnians at the societal level? These abuses need to be recognised and resolved. Another issue is the Tribunal may pose a danger to a victim that is testifying in a criminal proceeding against his or her perpetrator. The perpetrator or his supporters may seek retribution and this may result in harm to the victim or in the least an increase in stress for the victim.

One of the attributes of criminal prosecution is that it establishes a record in order to facilitate compensation or restitution for the victim. This is difficult in the Bosnian situation because there is a lack of compensation for victims awarded by the court. This is a matter that is left for the national courts to deal with. This is problematic because of the length of time a victim will have to wait to receive compensation. The Tribunal will have to arrest, try and find the accused guilty in order for the victim to apply for compensation. Also the national court is only functioning at a minimal level and it is doubtful if it would be able to handle a large number of claims for compensation. This is an issue that may become very important when Bosnia accedes to the Council of Europe, as there is an individual mechanism for dealing with human rights complaints at the Council level. There has been a suggestion by the Danish Helsinki Committee to establish a tribunal that would deal with the civil claims (Lescure and Trintignac, 1996). Obviously there are problems with this idea. First, it is difficult to justify the establishment of another tribunal when the Criminal Tribunal is not fulfilling its potential. Secondly if the victim is awarded reparation where does this money come from? The property reparation committee already has the experience of making judgements and not being able to pay compensation.

Lastly, the states of the former Yugoslavia barely work with the Criminal Tribunal. It is necessary to have one fully operational tribunal before establishing another, although every effort to help victims should be made at the international and national level.

### **3.4 Relationship to the National legal system**

One of the benefits of the process of criminal prosecution is to reinforce a societal moral order and to strengthen the rule of law in order to maintain democracy and peace (Huyse, 1998). In this sense the Tribunal plays an important role, but essentially the national legal system needs to be the primary enforcement of the rule of law. At the national level this has proven to be a continuing struggle for the Republika Srpska and the Federation. There are prosecutions being conducted in the national courts of both entities, but reportedly there are often biased rulings (Neussl, 1999). The most problematic issue is the separation of the two entities, each has their own national court. This is problematic because with the ethnical divisions still existing, it is confusing as to who should try whom and it is also difficult to guarantee fair and proper trials. It is often the case that witnesses will not cross the ethnic boundaries to testify at trials, and judges refuse as well in order to obtain testimony from the witnesses (Nowak, 1999). At this point it is still unlikely that the Republika Srpska would participate in the prosecution of Bosnian Serbs and this is likewise for the Federation (Kritz, 1996). In effect a positive aspect is the Tribunal does establish some sense of a rule of law, where the national justice system may fail to do so.

### **3.5 Practical Issues**

As a result of examining some more specific issues one must also look at what practical issues may hinder the amount of justice served by the Tribunal and the effect on Bosnian society. One of the reasons may be the location of the Tribunal in The Hague. The prosecutions may have a greater impact on the society if the Tribunal was located in the Former Yugoslavia (as the tribunals for Nuremberg and Tokyo were located in the respective countries). Obviously there are problems with this as when the Tribunal was established in 1993 the territory was in the throes of war, and now it would be difficult to decide in which entity or state the Tribunal could be located. Also it may be perceived the Tribunal is not accomplishing very much, as a consequence of this the Bosnian people have lost interest in the proceedings. The Tribunal has been operational for seven years and a criticism has been that it is difficult to see the justice it has provided for Bosnians and it

has been suggested it may have provided more hardship by creating a false sense of hope of justice for victims. For example Minow cites the story of two Bosnian women who are survivors of rape committed as an act of war. They compiled information from women raped during the war, in order to provide information to further the prosecution of those accused. Eventually most of the charges were dropped and as of July 2000 there has only been one individual tried<sup>16</sup> under the charge of sexual offences and this case is still pending. Essentially this experience created the expectation of a false sense of justice for the victims. Another issue may be the ad hoc characteristic of the Tribunal. The Tribunal was established to specifically deal with the circumstances of the Former Yugoslavia and is therefore limited by specific circumstances and time (Petrovic, 1998). It may not be as effective as if it were a court established by the nation itself and not the international community. Another point to be made is that it is essential the Tribunal is not equated with the Nuremberg and Tokyo Tribunals in the sense of only seeking victor's justice. In some cases this may be perceived (Minow, 1998).

In order for the court to be effective there needs to be support from all actors. SFOR must actively seek the accused and bring them to The Hague, states that are harbouring the accused must voluntarily turn them over to the court, and there must be finances available for the court to adequately meet their needs. The Tribunal needs to be supported by the international community if it is to serve the functions it was established for and to ensure it fulfils any benefits that are attributed to the criminal prosecution process for dealing with gross violations of human rights.

Although many theorists argue that prosecution is the only acceptable response to perpetrators of gross violations of human rights (Landsman, 1996; Orentlicher, 1991) there are situations where criminal prosecution is not a viable option, or is only one of the options for transitional justice. In light of the existing Tribunal, although it has taken advantage of its mandate as of late with a number of important arrests; does it have a substantial impact on Bosnian society? Are Bosnian Muslims, Serbs, Croats, dealing with their past? Considering there is still wide spread reports of human rights abuses, no clearly established rule of law, and firmly established ethnic divisions resulting in continuing conflict, this does not seem to be the case. In light of this it is necessary to discuss the option of a truth commission for Bosnia and Herzegovina. One of the most important issues to discuss when looking at a truth commission in Bosnia and Herzegovina is how it will work concurrently with the International Criminal Tribunal for the Former Yugoslavia. This issue will be discussed in depth in a future section. But first it is necessary

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<sup>16</sup>Accused indicted for sexual offences: 19; see <http://www.un.org/icty>.



to assess the other circumstances that will play a role in the establishment of a truth commission.

It has been over 5 years since the war has ended, (or at least the Dayton Peace Accords were signed) and the ethnic conflict that emerged before and escalated during the war still exists among the three ethnic groups.<sup>17</sup> The previous discussion of the Tribunal illustrates that the International Criminal Tribunal for the former Yugoslavia has experienced difficulties that have limited its potential. Although it has increased its resolve giving harsher sentences and now having the opportunity to try several high-ranking figures; this may secure justice for some people. But there seems to be more that can be done in the terms of transitional justice. The following discussion will look at the role a truth commission can play in light of the operating Tribunal and also in the context of the current political and societal circumstances in Bosnia and Herzegovina.

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<sup>17</sup>Commission on Human Rights, Report of the Special Rapporteur, the mandate of the Special Rapporteur (SR) on the situation of human rights in the former Yugoslavia was established by the Commission at its August 1992 special session. Mr. Jiri Dienstbier was SR for 1999. <http://www.hri.ca/fortherecord1999/vol5/bosniachr.htm>.

## 4 Truth and Reconciliation in Bosnia and Herzegovina?

The previous discussion has analysed the existing International Criminal Tribunal for the Former Yugoslavia in the purpose of illustrating the need for further justice measures. It is in this context that one can examine if there is a positive role for a truth commission. The following discussion will examine the relevant issues associated with truth commissions and the specific issues that will be relevant to the case of Bosnia and Herzegovina.

The Dayton peace agreement makes a specific reference to the establishment of a commission of inquiry with the mandate to engage specifically in the process of “fact- finding and other necessary studies into the causes, conduct and consequences of the recent conflict on as broad and objective a basis as possible, and to issue a report thereon, to be made available to all interested countries and organisations.” (Gisvold, 1998).<sup>18</sup> It should also be noted that all parties signed the Dayton peace agreement, also agreeing to the establishment of a commission of inquiry. Although this was implemented into the initial peace agreement as of yet there has not been an official commission of inquiry established.

### 4.1 Why is Truth Needed?

The past examples of truth commissions that have been used in Central and South America and Africa have dealt with different conflicts from the situation in Bosnia and Herzegovina. For example in many of the former cases the commissions were used to uncover the truth about disappearances, actions of security forces and actions of the government. The situation in Bosnia differs in the respect the violations were not committed on a general scale with the intent of secrecy; there was a full-fledged war waged and it was widely reported by the media. There is a need for truth to be uncovered though. It is felt that Bosnians are in the process of creating three different forms of history from a Serbian, Muslim and Croatian perspective. The danger in this is if these different histories are created they may form the basis for further conflict in the future. As cited by Kritz (1998, p.3), the Bosnian leader of a war crimes commission stated “that he and his counterparts are in the process of creating three conflicting versions of the truth, and if we keep going along this path, fifty years from now our grandchildren will fight again over which one is correct.” Bosnians will create their truth

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<sup>18</sup>Excerpt from the Side Letters to the Dayton peace agreement, which can be found in 35 ILM 75, 160-162.

from their own experiences, and also reports from media that may be biased and the continued nationalist propaganda from the nationalist leaders and supporters. In this sense it is essential the people of Bosnia are exposed to the “different truths” and to the “real truths” in order to create a “common truth.” By hearing the different stories individuals will be exposed to other experiences, suffering and hardships and maybe a common ground can be achieved to create a single truth. A truth commission will potentially create the opportunity to encourage change at the societal level. The truth commission will create an opportunity for dialogue within the community, and facilitate agreement on a single history in the hope that future conflict will be avoided. Although there are several issues that may encourage resolve, it is also these same issues that could hinder the operation of a truth commission. It will be a precarious balance required in order to optimise the circumstances for a truth commission. The following discussion will look at these issues that constitute the positive and negative aspects of a truth commission under these circumstances. First it is necessary to look at the status of implementation of a truth commission.

## **4.2 The Status of a Truth Commission in Bosnia and Herzegovina**

The status of the project has been somewhat difficult to determine. Some people seem to be well informed and very positive about the initiative, others think it is not possible and openly criticise it. The discussions of a truth and reconciliation commission initially emerged at a roundtable discussion on justice and reconciliation in Bosnia and Herzegovina held in Strasbourg, France in July 1997 (USIP, 1997a). This session was sponsored by the United States Institute of Peace (USIP), the OSCE for Democratic Institutions and Human Rights and the Council of Europe and it involved twenty-one justice officials from Bosnia and Herzegovina (Kurspahic, 1998). It is reported the representatives at this meeting supported the idea of a truth commission and asked the USIP to assist in developing the concept. Following this there have been several meetings held on the topic and the establishment of a National Coordinating Committee, which is now responsible for the coordination of the project. It has been this committee that has been criticised by some as not representing all of the people of Bosnia and Herzegovina.<sup>19</sup> Also one of the objections voiced by a representative of the International Criminal Tribunal is that it was felt the truth commission was being imposed on

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<sup>19</sup>Discussion with Prof. M. Kreso, of the University of Sarajevo, August 9, 2000.

Bosnia and Herzegovina by the United States Institute of Peace.<sup>20</sup> On the other hand there have been over one hundred and twenty non- governmental organisations of Bosnia and Herzegovina voice support for the initiative.<sup>21</sup> Initially the USIP perceived that a truth commission could be implemented as early as 1997 (Kritz, 1998), obviously this has not been the case. Over the last four years the reports have varied on the probable implementation date for a commission, each article emanating from the USIP and proclaiming the implementation date to be a few months after the date of the article. Currently the National Coordinating Committee is determined to see the statute for a commission adopted by the Bosnian national government by the end of the year.<sup>22</sup> Whether or not the legislation is adopted by the end of the year or sometime after, the advantages of having a truth commission in Bosnia need to be considered.

### **4.3 Advantages of a truth commission**

#### **4.3.1 Effects of a Broad Mandate**

There are several advantages the truth commission process may provide above and beyond the justice that the Tribunal or other institutions are able to serve. The broad mandate of a truth commission may allow it more access to contribute to conflict resolution and societal healing at the community level. It will allow all individuals in Bosnia and Herzegovina to have the opportunity to become involved in the process. For example in South Africa it was not only victims that benefited, but also those indirectly affected (all individuals were able to submit a statement to the commission, everyone in society could have the opportunity to participate.) In this aspect the criminal prosecution process is much more limited and can be accused of representing victor's justice (as considered by many the same as the Nuremberg and Tokyo Tribunals)(Minow, 1998). The truth commission by its nature will try to avoid this, and give equal representation to all of society. Specifically it will give the chance for Serbs to be heard as victims, while the Tribunal condemns them mainly as perpetrators. The purpose of this is to assign guilt to the responsible parties not to the ethnic groups or society as a whole. Not only will the truth commission be able to address more people but it will also be able to address more issues. The Tribunal considers the most serious

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<sup>20</sup>Gavin Ruxton, Representative of International Criminal Tribunal for the Former Yugoslavia, Roundtable held in Sarajevo, February 4, 2000. (Citizens Alternative Parliament, 2000).

<sup>21</sup>Correspondence by e-mail with Jakob Finci, President of Circle 99, June 6, 2000.

<sup>22</sup>Correspondence by e-mail with Dr. William Stuebner, USIP, May 5, 2000.

offences that were committed. The truth commission will be able to address multiple issues, and the issues that contributed to engaging the conflict are the same ones that are maintaining it (Gisvold, 1998). The time frame of the commission may also allow it to cover a wider area; it may address issues that happened before or after the war, whereas the Tribunal is restricted to specific crimes that occurred during the war. Other issues that are being considered by other institutions that have not been resolved, for example property claims, may have the chance to be included here. As a result of these issues the scope of the commission will potentially affect a wider range of society.

### 4.3.2 The Victim's Perspective

One of the most important roles of the truth commission will be to address the needs of the victim and even more so in this case as the truth commission in Bosnia and Herzegovina will be strictly victim-oriented. The role of the victim in the truth commission process is what differentiates the truth commissions from other attempts to deal with conflicts. Generally the role of the victim has been behind the scenes in the justice process and this is true as well in regard to human rights violations. But in the truth and reconciliation process there is a role for the victim that is not evident in other accountability mechanisms. Although it is fair to recognise the mandates of the International Criminal Tribunal for the Former Yugoslavia<sup>23</sup> and the International Criminal Court<sup>24</sup> to represent victim rights, it is possible that the truth process provides the victim with more personal satisfaction than the court process. For example if one looks at the restorative justice process that is being implemented in national criminal justice systems the underlying premise is that the victim receives more satisfaction from a restorative process, than through the traditional justice means. Some authors have criticised the truth and reconciliation process as “a form of justice for the victim, although victims are being denied full justice because the criminals are not tried and punished.”<sup>25</sup> This is a bold statement and does not consider the benefits a victim can receive from the truth commission process. Although a perpetrator may not be punished in the traditional justice perspective, there are different benefits from this process. Victims seek retribution and must

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<sup>23</sup>Van Boven, Theo, “The position of the victim.” Quoting Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia in the Hague.

<sup>24</sup>Cited by Van Boven; Proposals made by UK NGO Redress to have reparation for survivors of torture awarded by the Court.

<sup>25</sup>Goldstone, Richard. In response to the question of Bert van Roermund.

feel some vindication when their offender is punished but how does this experience compare to a victim testifying to a truth commission, hearing the offender admit publicly the crimes he or she committed against them, and then possibly receive a request for forgiveness. In the concept of restorative justice this process is more beneficial and rewarding for some victims. But it might not be a satisfactory experience for every victim. For example Simpson has put forward that the South Africa TRC resulted in a form of secondary victimisation for the victim.<sup>26</sup> It is important that the truth commission process is not seen as providing a restorative process for all victims in light of this. Also it is essential that further research is done in this area to determine the long term effects for the victims. Another issue to look at is the dual role an individual may have as a victim and perpetrator in a conflict such as this. What are the mechanisms for dealing with individuals that are both victims and offenders — when there is a thin red line are some mechanisms more capable? For example how does the Tribunal deal with an offender who is also a victim — try and punish them, and then offer victim support? Is an individual that has carried out the orders of a commanding officer a perpetrator, on the one hand they did commit the crime, but was it of their own free will or under duress? Are they merely a victim themselves of state propaganda and manipulation? Now the purpose of the tribunal is to hold accountable the greatest perpetrators of the war crimes, but this has not been the case. Milosevic, Karadzic and Mladic all remain elusive to the Tribunal, while others being tried protest that they had no other choice but to execute their duties or else be killed.

It may be the case the victim's voice is not heard because of politics, legal issues et cetera. Bosnians are searching for a forum to tell their story, this is what is important to them, there is healing when a victim can tell their story. Criminal prosecution may provide a false hope for victims, for example in the case of the women that worked to compile information on the men responsible for rape. The perpetrators how many years later have not yet been charged and brought to justice. Criminal prosecution if it works well may provide the victim with more satisfaction, but what are the repercussions if it does not work well, maybe the victims are more traumatised? Is there less faith or belief in the justice system and what does this do to the perception of the rule of law in the country, if justice cannot be achieved for the individuals what are the implications for the big picture of society.

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<sup>26</sup>Graeme Simpson, Executive Director of the Centre for the Study of Violence and Reconciliation discussed this in his plenary session address at the X International Victimology Symposium, August 8, 2000. Montreal, QC, Canada.

### 4.3.3 Missing Persons

It is foreseen that one of greatest contributions made by a truth commission could be in the area of disappearances and misplaced persons. It is estimated by Dr. Manfred Nowak (the expert on the UN commission of Human Rights established to investigate the disappearances and missing persons of the former Yugoslavia from 1994-1997)<sup>27</sup> that there are over 20,000 missing persons, mostly Muslim men. The commission was terminated after the resignation of Dr. Nowak in 1997, because there was no “clear political will” from any of the sides, a lack of financial and technical assistance, and poor coordination among the international community in the field (Nowak, 1998). Although there are various other projects working in this area such as the International Commission on Missing Persons in the Former Yugoslavia (ICMP) initiated by the United States government, there has not been sufficient headway made in this field. It is felt that a truth commission can provide the means by which “individuals who are missing will be declared dead based on the preponderance of the evidence thereby allowing families for the first time to apply for pensions.”<sup>28</sup> If the whereabouts of missing persons can be declared, it will give the family and friends the opportunity for closure, there will be no need for them to wonder if the person will return. As was said by the president of the Association of Families of the Imprisoned and Missing Persons from Heregovina-Neretva Canton in Mostar, “children have a right to know about their parents, as well as parents about their children.” (Citizens Alternative Parliament, 2000, p.65).

These issues are arguments in favour of implementing a truth commission. There are also several arguments against the establishment of a commission. The following is a discussion of some of these issues.

## 4.4 Potential Pitfalls for a Truth Commission in Bosnia and Herzegovina

### 4.4.1 Relationship with the Tribunal

There are several criticisms of having a truth commission implemented in Bosnia and Herzegovina. One of the main criticisms is that a truth commission will undermine the operation of the International Criminal Tribunal for the Former Yugoslavia (Nowak, 2000). Since the initial proposal of a truth

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<sup>27</sup>Dr. Manfred Nowak of the University of Vienna is currently a Judge and former Vice-President of the Human Rights Chamber.

<sup>28</sup>Email to author, Dr. William Stuebner states this is the viewpoint of Jakob Finci, Vice-President of Circle

commission there has been adamant opposition from those working with the Tribunal and specifically from the Tribunal chief Prosecutors.<sup>29</sup> Initially it was the former Prosecutor Louise Arbour to strongly oppose the initiative to the degree that no revision of the proposed legislation would be acceptable<sup>30</sup> and the current Prosecutor Carla Del Ponte has maintained this position.<sup>31</sup> The final result has been that although there has been discussion with the representatives of the Tribunal they are still concerned about several issues and cannot be fully supportive. The following are some of the concerns that have been voiced. One of the issues is the overlapping area of the mandates of each institution. A concern is the mandate of a truth commission could jeopardise the legitimacy of the Tribunal by infringing on its role in sustaining peace and justice. This is not necessarily the case. The criminal prosecution process and the truth commission process represent different forms of justice. The role of the Tribunal is to prosecute the perpetrators of the crimes. There is a limited capacity to this in the number the Tribunal will prosecute therefore possibly affecting the amount of justice. The roles that criminal prosecution and truth commissions play differ and it is in this effect that the truth commission can be a beneficial process to the work of the Tribunal (Hayner, 1998). Further specific criticisms that have been voiced by the representatives of the Tribunals Prosecutor as of late, is an operational concern regarding the primacy the Tribunal has in conducting investigations and gathering evidence (Citizens Alternative Parliament, 2000). There may be a conflict if there are two institutions in the field conducting investigations on the same event creating competition between the two. For example what would be the result if the investigation by the truth commission would determine contradictory results to the Tribunal investigation. A concern is this may occur as a result of different investigation techniques and standards. As stated by Gavin Ruxton,<sup>32</sup> (Citizens Alternative Parliament, 2000, p. 42) representative of the Tribunal, regarding simultaneous investigation by the Tribunal and a truth commission:

“that’s something that we are very keen to avoid if possible, because there are many risks of complicating the work of our inves-

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<sup>29</sup>In addition to the Prosecutors (former and present) opposition is also expressed by President McDonald of the Tribunal. Report by Gavin Ruxton, February 4, 2000, Sarajevo in Citizens Alternative Parliament (2000).

<sup>30</sup>Email to author from Dr. Bill Stuebner, United States Institute of Peace, May 23, 2000.

<sup>31</sup>The prosecutor was represented by Gavin Ruxton and James Stewart at the most recent roundtable discussion convened February 4, 2000 in Sarajevo. (Citizens Alternative Parliament, 2000).

<sup>32</sup>Statement made at Roundtable discussion in Sarajevo on February 4, 2000.



tigators, when others are interviewing witnesses, creating statements and doing a same kind of work. We are also conscious that there will be different standards used, the criminal standard is one thing, a truth commission might use different standards of evidence and materials to reach its conclusions. Contradictory results would be undesirable if the truth commission were to come out during the life of the Tribunal with one particular analysis of events that might, although not bind, complicate the work of the ICTY.”

This is a valid concern; it could be problematic if two different investigation units would determine differing results. An issue to consider is the Tribunal investigates genocide, crimes against humanity and war crimes. A truth commission will not be dealing with specific cases such as these, but looking in a broader sense at societal conditions that allowed these crimes to occur. A truth commission will not have any judicial functions in this sense. Also the way evidence is gathered and investigation techniques will likely be different from those of the Tribunal because their aims and goals are different. In order for problems to be avoided in this regard it is possible some form of cooperation can be organised that does not jeopardise either institutions mandates. In South Africa there was a cooperative relationship between the Truth and Reconciliation Commission and the criminal prosecution investigation (Citizens Alternative Parliament, 2000).<sup>33</sup> The TRC had the ability to access a widespread source of information and reach many individuals, and they were able to share this with the criminal prosecutors. Richard Goldstone has stated that the Truth and Reconciliation Commission in South Africa in effect contributed to strengthening the criminal prosecution cases (Partridge, 1999).<sup>34</sup> Although it has not been detailed how this has been done and how effective the relationship was. Another point to note is that previous commissions have been used for the purpose of strengthening prosecutions that occur after the duration of the truth commission (Hayner, 1998). In this sense it seems quite plausible that a relationship between a truth commission and the Tribunal can be fruitful for both institutions.

Further specific concerns of the Tribunal are that a truth commissions independence could be compromised, as it may be perceived as merely an investigative appendage of the Tribunal. As the Tribunal has been operating for many years and a truth commission is newly established it should be stressed that they are separate institutions. A part of the truth commission process is to educate people about its functions through public awareness, the

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<sup>33</sup>Statement made by Paul van Zyl at the Roundtable in Sarajevo, February 4, 2000.

<sup>34</sup>Interview with Richard Goldstone, 15 January 1999.

independence of the Tribunal and truth commission would need to be highlighted. As the Tribunal is the highest legal body in Bosnia and Herzegovina, one would conceive a truth commission would be responsible for giving the Tribunal any information it obtains.

Another concern is that individuals may perceive cooperation with the truth commission as an alternative to cooperating with the Tribunal. Once again if the relationship between the two institutions is made clear and the public awareness of the commissions work is distributed, there is no reason the roles of the two institutions should be confused. The focus of the truth commission will be victims; it must be made clear that involvement with the truth commission does not absolve one of their duties to cooperate with the Tribunal.

And finally that there may be an issue of a fair right to trial raised in the context of a truth commission publishing a final report. For example, Gavin Ruxton (Citizens Alternative Parliament, 2000) gave the example that when the commission would publish the results in its final report, an accused individual may have his right to a fair and impartial trial compromised. One way to avoid this is to delay implementation of the truth commission until the Tribunal has completed its mandate. As the Tribunal has no end date in sight this is an option that would not see a truth commission any time soon. A more practical solution may be to establish a cooperation agreement and to agree to possibly keep some parts of the truth commissions hearings in private. Even though transparency is an essential part of the truth commission, there may be some situations where it is not possible.

The issues raised by the Tribunal are all valid concerns but it is essential to keep in mind the differences between the truth commission and criminal prosecution process. The truth commission will not be an institution that is convened for the same purpose of investigating crimes, as it will be a commission that is victim focussed it will be providing a forum for victims to tell their stories and not condemning perpetrators. Although one of the greatest challenges of the truth commission will be to work with the Tribunal, there is a complementary role to be played to each other by the Tribunal and a truth commission. There will need to be explicit details drawn out to state the roles and relationship between the two. As was seen in the South African situation there is an opportunity for the two institutions to work together but to keep their separate mandates. The support for a truth commission comes from many different groups and individuals within and outside of Bosnia and Herzegovina, and in many cases because of the perceived lack of success of the Tribunal. One of the most important things to keep in mind is that a truth commission can be designed to the specific country to adapt to the specific circumstances of that countrys conflict and to reach all of society,

including policy makers, the media, and members of civil society. This is flexibility and creativity that criminal prosecution does not have (Hayner, 1998).

#### **4.4.2 Political and Social Conditions.**

In order to assess the current political and social conditions one must look at them together as they are directly dependent on one another. The continued conflict as a result of ensuing ethnic tensions impedes property and refugee returns, and results in unstable institutions and stagnation of implementation of the rule of law. Some feel the Dayton Peace Agreement has created a decentralised state that gives the entities of the Federation and Republika Srpska too much power so they can impede the peace process, and along with this a human rights system too complex to see viable results (Nowak, 1999). Others argue that Dayton provides the essential tools to attain its goals of a peaceful reconstructed society but it is Bosnians themselves that must use these tools (Neussl, 1999). Irrespective of these opinions the fact remains that political and societal conditions have not progressed to the extent expected following the cessation of the war and these are factors that may impede the successfulness of a truth commission.

**4.4.2.1 Return of Refugees and Displaced Persons** It is felt the main impediment to the peace process is the slow rate of the return of refugees and displaced persons (Matscher and Amigo, 1999). As of August 31, 1999 less than five percent of the total number of refugees and internally displaced persons has returned to their homes (International Crisis Group, 1999). There is a strong obstruction by authorities in the community and by the community itself to the return of refugees. The displaced person or refugee is reluctant to return to their property as they now constitute part of the minority and also in many cases there is someone occupying their property because that person has no where to go (International Crisis Group, 1999). Many people displaced by the ethnic cleansing are not able to return because they fear it is not safe. The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) was established to deal with the needs of those displaced and even though the CRPC has received over two hundred thousand applications and delivered judgements on over fifty thousand cases, few judgements have been implemented (Van Houtte, 1999). The difficulty this commission experiences may be an argument against establishing a truth commission, it may be felt the existing institutions should be operational before new institutions are established. The CRPC has a limited perspective and objective, mainly to make decisions about property. The

truth commission process covers a wide spectrum with the aim to encourage societal rebuilding and reconciliation in order to facilitate and contribute to the expedient operation of institutions like the CRPC. One of the criticisms of all the institutions that are operating is that there needs to be “constructive appraisal” in the form of “public scrutiny” and “analysis” and the “benefit of hard criticism.” (O’Flaherty, 1998, p. 95). It is possible the truth commission can provide an opportunity for the Bosnian public to achieve some of these points. On an encouraging note the International Crisis Group has recently reported that refugee and displaced returns the first four months of 2000, have exceeded four times as many returns as 1999 (International Crisis Group, 1999). There are several reasons cited for this, “refugee impatience, a change in psychology of the majority and minority populations, Bosnian government policies, and increased international community willingness to use the powers vested in the Office of the High Representative to remove obstructionist officials and implement property laws.” (International Crisis Group, 2000). These factors may indicate the changing post-war society in Bosnia, as time passes there seems to be slow headway made in different areas. The progression at these levels in regard to refugee returns may be a positive indication of political and societal conditions that could affect the successfulness of a truth commission.

**4.4.2.2 Institutions** It will be essential that each government (Republika Srpska and the Federation) support the truth commission. This may be difficult because it seems the politicians tend to continue the nationalist rhetoric that existed during and throughout the war. The state of Bosnia and Herzegovina has little power, as the ethnic groups are able to block the common institutions of the state at their own discretion. For example the Replika Srpska did this in early 1999 when the Office of the High Representative dismissed the President and the NATO bombing in the Kosovo war began. The point is that the political situation is not stable and barely operational even at this point. Many of the advancements that have been made in the area of human rights, the rule of law, and democracy have been under the pressure of the international community and “forced upon the Bosnian politicians against their will.” (Nowak, 1999, p. 287). It is no surprise then that parliament has not and does not seem to be able to agree to create a truth commission, and as an effect the legislation has not been passed. The establishment of a truth commission was put on hold in 1997 after the Bosnian Presidency reviewed it and gave their opinions. The Bosnian Serb representative of the Presidency, Momcilo Krajisnik would only accept the conditions of the truth commission if he would have final say over whether

or not the final report would be published and if he chose the commissioners. These conditions were unacceptable (Citizens Alternative Parliament, 2000). Under these circumstances the political situation will hinder the support that the commission will need to work successfully, but even to have it implemented there needs to be political consensus. Krajisnik has been recently arrested by SFOR and is now on trial by the Tribunal, and no longer an obstacle to a truth commission. As previously stated it is reported that the Bosnian Presidency will be able to approve the legislation for implementation by the end of this year.<sup>35</sup>

Another issue to consider is the danger of having an unstable government establish a truth commission. It is possible if the government lacks legitimacy and if it does create a truth commission, the people will not trust it. For example the Ombudsperson for the Federation stated, "The parliament is not able to create that Commission, but even if it were, nobody would trust it." (Citizens Alternative Parliament, 2000, p. 46). Another point that has been raised is that citizens of formerly communist countries are not used to trusting their government (Gisvold, 1998). It will be difficult to lend an institution credibility if the government is viewed in this way. The encouraging points to be made are that as time passes it is hopeful the political parties are becoming less nationalistic (this has been illustrated marginally from the latest elections), and that the involvement of the international community will also add credibility to the process. The process of the truth commission may in fact be able to strengthen the credibility of the government. It is essential that the truth commission is not associated with national politics and individuals are prevented from using it as a tool to further their own nationalist interests.

There are many indications that the current political and social situation is not effectively changing. It is important to note that "truth commissions do not bring about transitions to democracy but instead are most useful after such transitions are well underway — once there is considerable consensus on the need to break with the past." (Pokin and Roht-Arriaza, 1995, p. 289). As a country that has newly encountered democracy there are areas that it appears weak. At this point it seems that the democracy is very fragile and it is the international community that is holding it together. It is essential to establish the rule of law, strengthen the government and democratic institutions, and bring the entities closer together; in order to renew faith in the government for the Bosnian people.

An argument has been made the time is not right for a truth commission in Bosnia, that the problems are too complex for a truth commission, for

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<sup>35</sup>Email to author from Dr. William Stuebner, USIP, May 5, 2000.

example Gisvold states “whether and how a body conceived in response to violations of civil and political rights can begin to address deprivations on a massive scale of economic, social and political rights.” This is an important question as the abuses that occurred in Bosnia may have been on a more massive scale, and this is why The Hague is conducting criminal trials for violations of international law. There is no denying the issue that war crimes need to be conceived of in a different sense. But as The Hague continues to try the perpetrators of war crimes, it is obvious it is not possible to try everyone, so there is still a nation that is struggling at the societal level to come to terms with the atrocities. A truth commission is a viable mechanism if established properly under the right circumstances will be able to make a contribution to the society.

It is important that one does not perceive the truth commission process in seeking truth and healing as saving a nation and providing the only solutions to a society that has suffered mass atrocities. Not only does Bosnia and Herzegovina have to deal with the atrocities committed it also has to deal with a society that is in continual conflict. Martha Minow states “Healing and justice seem most compatible for groups poised to reclaim or restart a nation under terms conducive to democracy. They are less compatible where the victimized group has been expelled or so decimated that it has no nation in which to reconcile and rebuild.” (Minow, 1998, p. 63). Is there a nation to rebuild in Bosnia and Herzegovina? One can look at this issue from the possibility that Republika Srpska would seek alliance with Serbia and the Bosnian Croats would seek alliance with Croatia. Can there be conflict resolution and reconciliation if ethnic groups do not want to be part of the country, what impetus is there for them to become involved? Maybe Bosnian society is not able to find truth because ethnic hatred is so deeply entrenched in society; a commission may just be a political tool to fuel ethnic tension. One needs to consider if a truth commission will negatively affect the political and social situation and contribute to intensified conflict. One cannot know this answer ahead of time, but if we look at previous commissions Hayner states “no truth commission to date has caused a situation to become worse.” (Hayner, 1994). Although this should not be an argument in favour of establishing a truth commission it is an indication that it may be an opportunity that needs to be chanced.

Another issue that needs to be considered is the role of military and police cooperation. These are institutions that will be identified with wartime alliances and if either of them attempts to use the truth commission to promote their own self-interest there will be problems. Currently the International Police Task Force (IPTF) comprised of international members are currently retraining police in Bosnia, any applicants found to be ethnically biased are

dismissed (O'Flaherty, 1998). Also there is pressure for Cantons to ensure that police forces are ethnically balanced. The military is under the redirection of Stabilisation Force (SFOR) in the Train and Equip program; the Federation army is now comprised of the former Bosniac and Croat Armies and the program may be expanded to the Republika Srpska if they are willing.<sup>36</sup> These are all steps forward to have the military and police viewed as neutral forces, and it will be important that this be the case in order to have the support for the truth commission. If the military and police are identified in the same way as they were during the war, this will be problematic to a truth commission. It may be there has not been a long enough break with the past to have police and military involvement.

**4.4.2.3 Experiences of Previous Commissions** What has been the experience of previous truth commissions in the context of societal and political motivations? For example the government in South Africa transformed into a democracy as a new regime emerged, the new government wholly supported and promoted the truth and reconciliation commission. They hoped the acknowledgement that all sides were capable of the human rights violations, and the investigation and recognition of this would provide a means for reconciliation. Many of the South American countries emerged with new leaders but with the perpetrators still holding influential positions, in several of the countries the truth commission was implemented by the Presidency, in El Salvador by the United Nations, and in Rwanda by non- governmental organisations. In Bosnia the country is divided into two distinctively separate entities with the Serbs controlling Republika Srpska and the Bosnian Muslims and Croats comprising the Federation. The conflict and fighting occurred between all three ethnic groups not only the entities of the state. A political difficulty is the government of Bosnia is not functioning at the national level. If there is no co-operation and distrust at the political level, this will have an effect on the truth commission. As has been previously stated there needs to be a desire for a commission from all parties. It is also important that the commission is not seen as a political tool and used to blame others or gain support or anything else that would compromise the process and reputation of the commission. The political situation raises important questions for the implementation of a truth commission. In order for a truth commission to operate successfully in Bosnia and Herzegovina it is essential the political situation is stable and supportive (Citizens Alternative

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<sup>36</sup>Briefing with President Kresimir Zubak, Bosnia and Herzegovina, at the United States Institute of Peace, July 24, 1998, See <http://www.usip.org>.

Parliament, 2000)<sup>37</sup>. At the social level in Bosnia there is also little communication between the ethnic groups. The tension that exists is fostered by high unemployment rates, a slow rebuilding process and frustration. The result is ongoing violence in Bosnia. One must consider what effect these conditions will have on a truth commission. An indication may be the experiences of the commissions in the Philippines, Sri Lanka and Rwanda that operated while abuses continued to be committed (Hayner, 1994). These commissions did not complete a successful mandate, the Philippines saw all but one of the commissioners resign, in Sri Lanka the commission was not able to operate because of the resumed fighting and in Rwanda several hundred people were killed before and after the commissioners arrived. Another indication of the lack of success of these commissions is the current state of affairs in each of these countries. All exhibit some of the most serious conflicts that are occurring in the world at this moment. The greatest failure of a truth commission being implemented in Bosnia would be to contribute to and increase the conflict.

## 4.5 Dynamics of a Truth Commission

In order for a truth commission to be successful in Bosnia the model adopted will have to be specific to the characteristics of the conflict. It will be strictly victim-oriented truth commission in this situation, how will this affect the issues or subject matter that will be addressed, for example does this mean only victims will give testimony to the commission or will there be a role for perpetrators? As a platform for victims the dynamics needed for forgiveness and reconciliation may be missing if there is no participation by alleged perpetrators. These are the kind of issues that will have to be clarified. It must also be considered what effect specific operational procedures will have on the final outcome of the commission, and the eventual effect it will have on the society. The following is a discussion of some of these issues.

### 4.5.1 Legal Issues

It is important to discuss the legal basis of the truth and reconciliation process. A commission does not have the same powers as a court of law and therefore cannot determine criminal responsibility in this respect. In the South African Truth and Reconciliation Commission the purpose was not to determine legal accountability but to allow the perpetrators to express personal accountability for their actions, by granting amnesty in exchange for

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<sup>37</sup>Richard Goldstone, Roundtable, Sarajevo February 4, 2000.



testimony and revealing the truth. An argument against amnesty is that the perpetrator is getting away with his crimes and that the victim's rights are being sacrificed. The amnesty committee in South Africa did have discretion when granting amnesty and amnesty was denied in cases where the committee felt the individual did not reveal the full truth. One of the legal issues to be considered is if the concept of amnesty will play a role.<sup>38</sup> It is noted that amnesty cannot be used in conjunction with the truth commission in this instance, as war crimes must be tried under international law. Although amnesty was part of the mandate of the South African TRC, this was the only commission that used amnesty in conjunction with its fact-finding and truth-telling mission. All other previous commissions have operated without amnesty. But is the reason the South African commission considered to be successful because of the prospect of amnesty granted to perpetrators in exchange for the truth? This may raise the question though will the incentive of perpetrators to speak in front of a commission be reduced if they are faced with the threat of prosecution? This also raises the issue of the right to a fair trial for the so-called perpetrator. If an individual gives evidence to the truth commission, can this testimony then be used either in a trial by the Tribunal or by a national court? And if a criminal trial is held can there still be a civil liability for the individual. Will perpetrators be able to address the commission after the court case and will they want to? These are valid concerns and it will be important to determine how the commission would deal with this. These are some of the issues that were mentioned in discussing the relationship between the Tribunal and a truth commission and they will have to be elaborated in order to ensure the protection of legal rights for all actors involved, and also to ensure the rule of law is upheld and the position of the Tribunal is not compromised. The issue of the balance between the truth commission process and criminal prosecution of the Tribunal will be the most difficult and important issue that needs to be addressed before establishing a truth commission as has been mentioned previously. The truth commission has been criticised for its legal basis and has been referred to as having a 'quasi legal character' of activities.<sup>39</sup> In the sense that "a commission that hears witnesses to gross human rights violations, while at the same time it does not allow cross-examination of witnesses. Here is a commission that decides on legal consequences, such as amnesty to its verdict about, for instance, the political nature of certain acts or violations, while at the same time there is no precise and pre-set legal language or language

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<sup>38</sup>This was one of the main objections made by Dr. Manfred Nowak at the session "Promoting a Dialogue: The Case of Bosnia and Herzegovina." Vienna, April 14, 2000.

<sup>39</sup>Question posed by Bert van Roermund, in the debate honouring Richard Goldstone at the University of Tilburg, December 4, 1997.

frame.”<sup>40</sup> The legal basis of the South African TRC was widely debated in the constitutional court and in the public. One of the special qualities of the truth commission process is that it is not concrete and there is flexibility to be creative, innovative, and maybe more productive. There also obviously needs to be clearly defined guidelines established before operation.

#### **4.5.2 Special Features**

A special feature that has been brought forward by the United States Institute of Peace to be part of a Bosnian truth commission is to give special recognition to “heroes of conscience.”<sup>41</sup> In order to recognise that not all persons in Bosnia participated in the genocide and the war; there were those that did resist the chaos and transcended the ethnic divides. For example Stuebner cites the story of a Serbian soldier that claimed an elderly Muslim couple was his aunt and uncle and found them shelter (USIP, 1998, p. 2). Undoubtedly there are more stories that show not all individuals participated in the extreme nationalist violence and brutality. This is why the USIP in their 1998 outline for a truth commissions has proposed to include that the heroic acts of citizens that transcended ethnic borders be recognised and recorded by the commission. It is probable this will remain one of the unique features of a commission for Bosnia and Herzegovina.

### **4.6 Operational Issues**

If there is a truth commission established for Bosnia and Herzegovina it might helpful to look at some of the operational issues that will be relevant. In this sense it is helpful to consider models and techniques that have been used in the past. The following is a discussion of some issues relevant to the implementation of a truth commission in Bosnia and Herzegovina drawing from the experiences of previous commissions.

#### **4.6.1 Source of Implementation.**

The truth commissions that have been implemented in the past have been supported by different bodies, although the new governments in these countries have implemented the majority. There are a few exceptions; the commission in El Salvador was supported by the United Nations whereas the commission in Rwanda in 1993 was supported by four different non-governmental organisations. Having the state sanction the truth commission can lend the

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<sup>40</sup>Question posed by Bert van Roermund, page 30 of the transcripts.

<sup>41</sup>Email to author from Dr. William Stuebner, USIP, May 23, 2000.

commission more validation (Hayner, 1996). The difficulties that may be encountered with the government of Bosnia and Herzegovina sanctioning a truth commission have been discussed previously. But it is the goal of the National Coordinating Committee in Bosnia to have the truth commission legislation passed by the government and it is felt it is essential for the truth commission to come from within Bosnia and Herzegovina (Hayner, 1998). It was also one of the reasons the Tribunal objects to the establishment of the commission is they feel it is being imposed by the United States Institute of Peace (Citizens Alternative Parliament, 2000).

#### **4.6.2 Time Frame**

There are several elements of time to consider in relation to the operation of a commission. It is important to determine at what point the commission is established (how long after the conflict), how long it will operate, and what time frame the commissions inquiry will span. All of these factors can affect the success of the commission. When a commission is implemented will depend on the current political, social and cultural situations of the particular state as previously discussed. It can be reiterated here again that timing is important for a commission's success.

It is necessary for the commission to have a defined duration as there are implications for too short and too long time frames. In the past the commissions have varied in their time frames, but most have lasted between six and nine months (Hayner, 1994). Although this may seem like a short amount of time, it specifically demands that intensive work is done. It is important that the time can be extended if there are difficulties and the commission cannot complete its work in the allotted time. Although it is essential that this is not taken advantage of, as it will have some affect on the commission. The example of the Commission of Inquiry into Violations of Human Rights in Uganda illustrates the danger of unlimited time. The Ugandan commissions mandate transgressed over almost a decade. The significance of the commission findings and recommendations diminished over this long time span. The extreme opposite of this situation is a commission that does not have enough time to complete its mandate. For example the Guatemalan Clarification Commission was mandated to operate within a six- month time frame with a possible extension of six months to cover a thirty-six year period of conflict (Kritz, 1996). It is difficult to imagine the amount of work that needed to be done in this strict time frame. It is essential the dates of the commission are firmly established and not changed. This was an issue in the South African TRC that caused controversy because the date to cover offences was extended. It is essential the dates of the commission be firmly

established. So in this sense a Bosnian commission would need to establish an initial start date which may mean likely dates such as March 1, 1993 (the day of the referendum) or April 5, 1993 (the day the European Community officially recognised Bosnia and Herzegovina as an independent state), but are there offences that were committed before this that should be applicable for a hearing by a commission? A solution to this may be to use the same guidelines as the Tribunal which prosecutes crimes from 1991. This will also be an issue when establishing a cut-off date, an obvious choice may be signing of the Dayton peace agreement. There have been many ethnic offences that have occurred after this date, is it fair for a commission not to hear them or does a commission extend its time frame to include the five years following Dayton. In either situation the duration of a commission established for Bosnia and Herzegovina would span a much shorter time in relation to the Guatemalan or South African experience but this does not mean it would have any fewer cases to deal with.

#### **4.6.3 Composition of the Commission**

The composition of the members of the commission is an important aspect to consider. There will be positive and negative aspects attached to both an international commission and a national commission composition.<sup>42</sup> There are previous examples of both, the most recent example is the South African TRC composed of nationals of South Africa (South African Government, 1998). There are possible advantages to a national commission, the commissioners will have more insight and feel connected to the situation, which may enable them to ask specific questions that a non-national would not see as meaningful. On the other hand commissioners on a commission that is internationally composed may have the advantages of being impartial and more objective. Of the commissions that have operated thus far only one was composed internationally, the Salvadoran commission was operated under a UN mandate and was comprised of commissioners from Colombia, Venezuela and the United States. There are several advantages stated by Popkin and Roht-Arriaza (1995, p.269-270) regarding an international commission distance from domestic political squabbles, a claim to greater objectivity and disinterestedness, a higher degree of protection from reprisals, the clout to publicise its recommendations internationally and to use international pressure to see them implemented. These are all valuable contributions to a truth commission. It will be a difficult decision to decide if a commission in Bosnia and Herzegovina will be international or national or maybe both. The insti-

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<sup>42</sup>Debate at the University of Tilburg December 4, 1997, question posed by Peter Baehr.

tutions that are currently operating in Bosnia have a mixed composition, for example the property claims commission is composed of three international members and two representatives from each ethnic group of Serb, Croat and Muslim (Van Houtte, 1999). The same is true for the Human Rights Chamber, and the Presidency consists of one member of each ethnic group. The mixed composition may set a precedent for a truth commission; also the involvement of the international community is inherent to most of the happenings in Bosnia. It is important that Bosnians are involved and the commission is not just another body implemented by the international community, there needs to be personal involvement. It is essential that “Finding the truth cannot come from abroad, that is to say: one can send external experts, but their finding will also have to be accepted internally.”<sup>43</sup> It is an important point that is raised about not having three or multiples of three commissioners. The Dayton peace agreement did this to the extreme, thereby almost creating a situation where it is impossible for those involved not to act nationalistic. In effect nationalist identities were reinforced through this process. Now the difficulty will be to deal with this aspect, it may be a catch twenty-two situation, if you have an equal number of representative from each group you are following what Dayton has done, but if there is an unequal number then it will be deemed bias and more so because Dayton regiments the balance of the ethnic groups. Will it be possible to find Bosnians to serve as commissioners that do not identify with a specific ethnic entity or who are respected by all three entities? Is it an option not to have Bosnians as commissioners? The Tribunal does not have Bosnians as judges. If it is a completely international process Bosnians may see it as just another way of taking over the functioning of the country.

#### 4.6.4 Other Issues

It is important that in order for a truth commission to be successful there needs to be public support for the establishment and operation of a commission. It is the people of Bosnia that will need to provide information to the commission and it is also these people that will need to deal with the past. In previous commissions a public mandate has not been an important part of the mandate except for South Africa. In the establishment of the South African TRC proposals, suggestions and comments were sought from the public, organisations, et cetera and submitted to the government before the legislation was implemented (Hayner, 1994). Although at this point there is an indication of extensive support from the non-governmental organisation

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<sup>43</sup>Statement made by Van Genugten, University of Tilburg debate, December 4. 1997, p.32-33 of transcript

community it is essential to have support from all individuals in the community. Another issue will be the concept of information sharing, and this is particularly important in the situation of Bosnia and Herzegovina. As there are so many institutions that are in operation, it is essential there is a high level of coordination between them to ensure there is no confusion, and that resources are optimised and duplicate work is not being done. Essentially as this has been one of the main criticisms of the human rights monitoring system established by Dayton, it will be essential to minimise the confusion at the level of the truth commission. A final issue will be the production of the final report. This is an important part of the truth commission process as it ensures the history of the conflict is preserved for future generations. The Bosnian situation may differ in this sense as the time frame is shorter than what some previous commissions have dealt with. Of course the time frame could span the last 50 years, but for practical reasons it is probably best to deal with the past decade. Another one of the operational issues that will need to be addressed is how is the truth commissions mandate be defined, for example what offences will be addressed by the commission and how will they be defined, political crimes, war crimes et cetera.

By no means is this list of operational measures exhaustive, it may merely serve as an indication of some of the policy choices that will have to be made in order to ensure a truth commission model that will be the most effective for Bosnia and Herzegovina.

#### **4.7 The Role of International and Non-governmental Organisations**

The international community has played a large role in the conflict in Bosnia and Herzegovina and plays an even larger role in the post-war society. The OHR is completely responsible for the administration of the country, with other organisations such as the OSCE, UNMiBH and IPTF play supporting roles in specific areas. If there is a truth commission implemented in Bosnia and Herzegovina it is certain the international community will have a role to play. This is already evidenced from the incentive and drive of the United States Institute of Peace to initiate the commission and also the probable funding by an international foundation. It is an important role the international community plays, although it has been criticised for its extensive involvement in certain situations. For a truth commission international organisations can play an essential role by providing finances, external expertise and impartiality to the process. The external support of the international organisations is important and at this point seemingly essential. There is

an opposite position that can be argued though and it is that the continued interference by western states that has previously resulted in undermining the democratisation process (in some aspects) will adversely affect the legitimisation of the truth commission process. This interference was evidenced in the 1996 election process, where it was perceived by many the country was not ready for elections (O'Flaherty, 1998). It is felt there was more time needed to ensure the elections would be purely democratic, but U.S. President Clinton insisted that the elections take place as scheduled in order to remove Bosnia-Herzegovina from the political agenda, because of the upcoming U.S. presidential elections. The OSCE, in charge of monitoring and ensuring fair and democratic procedures on the basis of the Dayton Peace Agreements, has been highly criticised for the lack of democratic integrity associated with these elections. There has been criticism from OSCE officials as well, Goldston writes "1996 offered a textbook example of how the domestic agendas of powerful individual governments can distort and dominate the international aims of a mission." (1997, 14). If the international community would not have rushed the elections it is possible that more time would have resulted in a fairer and more legitimate process and elected government. It is with this in mind that one has to look at a truth commission and consider hidden agendas by organisations and the international community involved. It is important the mistakes of previous endeavors of the international community are not repeated and that the role of international involvement in dealing with gross violations should be balanced with the involvement of the domestic reactions (Kritz, 1996). At the same time that it is essential at this point for the involvement of the international community it is equally, if not more important that Bosnian civil society becomes involved in the process.

There are currently more than one thousand non-governmental organisations that are operating in Bosnia and Herzegovina (Demichelis, 1998). It will be essential a truth commission will have the support of the international and national NGOs, as they have been fundamental to previous commissions. They can aid in gathering support for establishing a commission, facilitate public education about why a truth commission is needed and what it does, collect information to assist the commission, and to aid in the organisation and operation of a commission (Kritz and Finci, 2000). The presence of non-governmental organisations has been extensive in Bosnia, and heavily involved in rebuilding society, but will this support continue. The South African truth commission required a magnitude of financial support and had the support of many organisations, but will this carry over to the Bosnia experience, or has the international community become bored with truth commissions and Bosnia? Also in the past the media has played an extensive

role in immobilising the public or creating a “moral conscience”<sup>44</sup> among western society (Ignatieff, 1999). Will this moral conscience continue or was the war in Bosnia just the flavour of the month? As well as the support of international organisations, the role of non-governmental organisations will be an important factor in gathering support and interest in the operation of a truth commission in Bosnia.

In the same sense that one has to consider the personal agenda of different governments, one also has to consider this factor in relation to non-governmental organisations that are involved in peace building relations. This will be an important factor in the truth and reconciliation commission process, as competing agendas have the capability of undermining the specific goals and aims of the process. In order to control this there needs to be uniformity and synchronicity among organisations and facilitating bodies. In other projects there has been criticism that with the large number of NGOs involved, each organisation operates in the framework of it’s own self-interest and this is not necessarily the best interest for Bosnia. It is important that in the establishment of a truth commissions specific roles are defined, goals and aims must be aligned or synchronised in order to facilitate positive results for the interest of Bosnian society as a whole. There is one agreement among the advocates and critics of a truth commission for Bosnia. If there is to be a truth commission established it must be because the Bosnian people want it to be, it must come from within Bosnia and Herzegovina.<sup>45</sup>

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<sup>44</sup>Ignatieff describes the moral conscience as the feeling that a person has when seeing pictures of horror or hearing graphic stories, the need the individual feels to do something.

<sup>45</sup>All authors agree there must be a strong impetus from within Bosni and Herzegovina to establish a truth commission, This is supported by Hayner, Kritz, Kritz and Finci, Stuebner, Citizens Alternative Parliament, Goldstone.



## 5 Conclusions

In order for a society to come to terms with the harm they have suffered it is necessary for some form of mechanism to be used to deal with gross violations of human rights. The danger in not dealing with the past may result in more violations being committed, ongoing conflict and a society that has not healed its wounds and allows ethnic hatred to continue to fester. It is also essential in this sense the nation is in charge of deciding what mechanism and how to implement it.

The current situation in Bosnia and Herzegovina is a society that is still suffering the aftermath of a war. Not only does there need to be political change and legal change but there needs to be societal change. If the political and legal culture is changing under the effects of the international community the approach cannot only be top-down. There would be a lot more accomplished if there was a bottom-up approach with the hope that when these approaches would meet the lasting effect would be a society that could live together and a country with the ability to function on its own.

It is essential the International Criminal Tribunal for the Former Yugoslavia was established as an indication of the unwillingness of the international community to accept these acts by any state. In the future the establishment of the International Criminal Court will be able to step in and fill the role of accountability of perpetrators of gross violations of human rights. The difficulty of the Tribunal lies in the fact of the problems it has had in fulfilling its mandate and effecting societal change at the community level. It is for this reason the establishment of a truth and reconciliation commission will be beneficial for Bosnia and Herzegovina. It is evident the organisers of a truth commission will not have an easy time of it. It will be essential to involve all actors in society, including local and international non-governmental organisations, international organisations, et cetera. As the international community has played a large role in the affairs of Bosnia and Herzegovina this is likely not to change as long as the conflict ensues. It will be necessary to enable the organisations to empower the people of Bosnia and Herzegovina so they are able to move past the conflict and ethnic tension that has entrenched itself in Bosnian society. A truth and reconciliation commission can provide a forum for victims, and not just the perceived victims, but victims of all sides. It will not place the blame on a populace as whole but reveal the suffering of people differential of ethnicity. The concept of recognising “heroes of war” will also lend affirmation to the idea that not all individuals belonging to an ethnic group are guilty of genocide or ethnic cleansing.

But it needs to be taken into consideration that one of the differences in

regard to Bosnia that may have an effect on the truth commission process is that Bosnians do not any influence in the administration their own country. The involvement of the international community has been so great that a truth commission may not have legitimacy for the people of Bosnia and it may be viewed as another quest by the international community. If a truth commission is not legitimised by Bosnians themselves the aims and objectives of the commission may not be validly realised. What Bosnia needs is the impetus to move on and deal with their past. To hear the truth about Srebrenica and Omarska and the other heinous crimes that were committed may provide a starting point for some. To know the fate of husbands, fathers, brothers et cetera may provide Bosnians with some sense of closure, to enable society to remember but not to forget. In another sense though if the pain, bitterness and hatred is deeply entrenched, the people may not be ready to accept a truth commission. Bosnian people need to want to move on, if this is not the case there are many dangers involved with having a truth commission. Firstly, the commission may end up being just another body that is established by the international community trying to involve the local community but in the end operating above it, as we have seen with the human rights chamber and other bodies. There does need to be involvement of the international community, for example in monitoring, support et cetera, it is important the commission is not used by the ethnic groups to blame each other on a collective scale, to fuel ethnic tension and generally to achieve their overall nationalistic goals.

An example of international monitoring is the requirement of the OSCE to facilitate the elections in Bosnia. This example also illustrates the difficulties with the involvement of an international organisation in this context. The state of Bosnia and Herzegovina does not only have to deal with the politics of their own governments but also the many other governments of the international community.

It is essential that in order for Bosnia to restore their society there needs to be changes and progress made at several levels. At the political level it is necessary there are democratic elections, but also if the political situation is to change it will be essential to have politicians that are not about nationalism. At the economic level there has been a donor society created in Bosnia and it has become dependent on the revenue generated from hosting the international community. The economic sector needs to be invigorated and there needs to be sustainable development. At the societal level there needs to be renewed strength and positivity, the people need to move on. With time and progress at all of these levels Bosnia and Herzegovina.

To say that a truth commission is a process to deal with every case of gross violations of human rights is not correct. It may be that a truth commission

is not beneficial to every society, but I think there are several reasons why a commission would be beneficial to Bosnia and Herzegovina. I recognise the difficulties that are raised of a commission operating concurrently with the International Criminal Tribunal and these are foremost the issues that need to be considered. It does seem probable a commission will be implemented and in order for it to be successful it will be essential those in opposition to the commission do not undermine the mandate, in the same sense it will be essential a commission does not undermine the mandate of the International Criminal Tribunal for the Former Yugoslavia. Does a truth commission help a society to deal with its past. One cannot say for sure as each commission that has operated previously has operated under unique circumstances. How can success be measured? Some of the commissions must be judged unsuccessful, for example Rwanda, the genocide of 1994 occurred after a commission and the South African Truth and Reconciliation Commission is seemingly the most successful commission to date. It would be naive to think that a truth commission will be a positive experience for everyone, but there is testimony the experience has been rewarding for many. What is obvious is there is further research needed to determine the after-effects of the truth commission process.

This is not to say a truth and reconciliation commission will provide all the answers to the problems of a society in conflict, or that every victim will receive an even satisfactory or adequate response to their needs. But previous truth commissions have shown there are positive contributions made to the society to some degree. The most recent example of South Africa's truth and reconciliation commission has illustrated this by exhibiting the greatest degree of success thus far (although some would not agree). It is important that a truth commission is not giving the burden of rectifying a country's problems, there still needs to be steps taken at all levels to aid in the strengthening of democratic society, and a truth commission should be viewed as one of the instruments in this process. There needs to be work done to strengthen the rule of law, facilitate property returns and minority integration and hopefully the truth commission process can aid in supporting all aspects of the healing of Bosnia and Herzegovina.

In conclusion it is important to say that in a world where domestic conflicts are still ensuing in many countries, truth commissions as a form of transitional justice are becoming a more viable option, somewhat like restorative justice to the retributive criminal justice system. There are dangers with this; it is naïve to think a truth commission can solve any and all problems. The current situation of the country needs to be assessed and political, social and transitional circumstances evaluated. From this a truth commission model may be adopted to ensure the needs of society are met through careful

consideration of all factors. This is also not to say that criminal prosecution is no longer needed. It is essential individuals are held accountable for mass violations of human rights, but it is necessary as well to recognise the contribution a truth commission can make to a society in transition. It is essential the people of Bosnia and Herzegovina can resolve their conflict and possibly a truth commission may aid this. But it is important that the truth about Bosnia and Herzegovina and the former Yugoslavia is established for the people but also for the international community. The most important thing that can be said is that a truth commission should only be implemented if the people of Bosnia and Herzegovina want it to be.

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