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The Politics of Memory: Truth, Healing and Social Justice

edited by Ifi Amadiume and Abdullahi An-Na'im

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

Julie Mertus

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What I couldn't believe, I now believe.

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

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

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

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

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

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

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

A Paradigm of Functions and Interests

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

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

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

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

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

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

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

TABLE 8.1 Intersections between functions and position

Functions	International community	Local power-brokers	Survivors, victims and bystanders
Naming crime	• set and enforce boundaries of international law • express moral condemnation • save face for failures	• absolve (or blame) current leaders of responsibility • (de)legitimize new states	• receive public acknowledgement of what happened • discover way to talk about personal suffering
Blaming individual perpetrators	• stabilize successor states by individualizing guilt • pave way for normalization of international economic and political relations	• (de)stabilize successor politics by individualizing guilt • enable new power-brokers to assert their authority over violators • pave way for support from international community	• achieve revenge • save face among neighbours and international community
Punishing guilty and deterring potential perpetrators	• demonstrate the existence and force of international law • deter potential perpetrators worldwide	• displace threats of personal revenge • legitimize local efforts to try crimes • deter potential perpetrators locally	• achieve revenge • achieve retribution • force expiation of guilt • give significance to suffering • prevent recurrence of suffering
Delivering reparations to survivors	• demonstrate the existence and force of international law • deter potential perpetrators worldwide	• address needs of survivors • displace threats of revenge	• receive partial remedy for suffering • improve welfare for self and other survivors • receive public acknowledgment of guilt
Reforming lawlessness	• (re)establish the position of international law in a lawless world	• (re)establish the rule of law in lawless societies	• (re)establish the principle that law exists above power and force
Recording for history	• establish official record of the efficiency and efficacy of international institutions • use record to warn potential perpetrators worldwide • educate globally	• establish official record of (il)legitimacy of government • use record to warn potential perpetrators locally • educate locally	• establish authoritative 'living record' of what happened • retrieve and record a collective memory and identity • expose the truth • remember or forget • educate within families and communities

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

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

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

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

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

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

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

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

providing words to talk about personal suffering. The naming may help survivors redefine themselves 'as a collective self engaged in common struggle' (Gugelberger and Kearney 1991).

Most survivors, however, do not see themselves in the work of judicial processes. Their individual situations do not find their way into a legal case, either because there are too many crimes to try, or because their experiences, although horrible and morally reprehensible, do not constitute crimes under international law. There is no crime of destruction of souls, deprivation of childhood, erasure of dreams. There are crimes of murder, torture and inhumane treatment, but there is no crime of being forced to watch helplessly while one's loved one suffers – the injury many survivors swear is most severe (see Mertus et al. 1997).

Even when the tribunal does name their crime, the survivor may barely recognize it as the process and language of law transmutes individual experiences into a categorically neat something else. Law does not permit a single witness to tell their own coherent narrative; it chops their stories into digestible parts, selects a handful of parts, and sorts and refines them to create a new narrative – the legal anti-narrative. Women who have survived rape and sexual assault, for example, describe the harm committed in words far different from the sterile language and performance of law, no matter how the crime of rape is configured (see Lusby 1995; Ray 1997). So too, the Convention on Torture and the legal steps necessary to prove abuses under its provisions tell a different story from the one concentration camp victims would choose to reveal. The law at times limits examination of such witnesses in order to protect them and to ensure that their suffering is not put on trial (see Chinkin 1995; Ni Aolain 1997; see also *Rules of Evidence and Procedure*, especially Rules 70 and 75). Yet some witnesses long for the opportunity to finish their story, to name the crimes for themselves. To do so, they must look beyond the legal system.

Even in the rare cases in which survivors see themselves in the formal legal process, the naming is unlikely to result in a satisfactory public acknowledgement of the crime. While the international community and the prosecutorial staff may recognize the crime, the accused and his or her supporters are unlikely to do so. For example, Dusko Tadic, the first man tried before the Ad Hoc Tribunal for the Former Yugoslavia, failed to acknowledge these most egregious crimes for which he was charged; his supporters denied and continue to deny them as well.

Blaming individual perpetrators The function of blaming individual perpetrators serves varied interests that may directly conflict. While the international community seeks stability (defined narrowly as the continuation of the present government and the absence of war), local

power-brokers and survivors may have something very different in mind.

In order to maintain its own credibility, the international community needs to secure peace and maintain stability in the former Yugoslavia and Rwanda. The blaming of individual perpetrators, the international community hopes, will help the people of Rwanda and the former Yugoslavia to stop 'cry[ing] out for justice against the [enemy] group' (Tetreault 1997: 197). Without individualized guilt, the injustice of the past may go on for ever, as a cycle of vengeance perpetuates itself, and the new emerging states will never have the chance to make the transition to democracy, which requires, at the very least, the absence of conflict and, as asserted below further, the establishment of the rule of law (Malamud-Goti 1989; Tobin 1990; Meron 1997: 2–3). Only through a fair investigation of the accused and equitable adjudication of the charges against them can a society teach the general populace about the rule of law and the notion that even state actors can be held accountable (Orentlicher 1990: 2544).

Politically charged trials may backfire and undermine the establishment of the rule of law (Orentlicher 1990: 2544). The populace may view such trials as unfairly selective and biased. The entire institutional framework in which the justice system operates may be deemed illegitimate, thereby eroding acceptance for any democratic institutions (Symposium 1990: 1024). Censure by an international tribunal instead of a national court, however, is thought to be less susceptible to accusations of national bias and therefore more likely to be accepted locally and internationally as legitimate (O'Shea 1996). The success of the tribunal for the former Yugoslavia, for example, has depended upon whether the prosecutor's decisions are based on available evidence and whether the judges refrain from doing anything that detracts from the appearance of impartiality (Schrag 1997: 21).

The naming of individuals also serves to pave the way for normalization of international economic and political relations. When individual perpetrators have been named and the accused are not among those in power, members of the international community can feel that it is legitimate to resume business as usual. This interest is particularly acute among leaders and states possessing a strong economic interest in resuming or beginning relations with successor leaders and/or successor states. For example, Germany has strong and growing economic interests in Croatia, Bosnia and Serbia: Croatia because of trade and investments; Croatia, Bosnia and Serbia because of a desire to return refugees and undocumented arrivals from the former Yugoslavia. Germany's interest in securing the absence of war in the Balkans may be coloured by these economic interests.

Like the international power-brokers, local leaders have an interest in securing peace and maintaining stability, so as not to interfere in seemingly

more important matters like reconstructing communities, building governments and amassing new power and wealth. Conversely, some local power-brokers have an interest in undermining peace, re-cementing the dividing line between foes and friends, preparing for the next phase of war. Depending on their ultimate goal, local power-brokers may view the blaming of individuals as a component of forgetting and moving on, or remembering and fighting onward. The blaming will stabilize successor governments only if those currently in government are not among the blamed. If they are blamed, instead of supporting the process of blaming, the successor regimes may seek broad amnesties and deals in exchange for offering up sacrificial lambs.

The blaming process of the tribunals will also enable local leaders to claim and assert their authority over the violators. This step can be stabilizing or destabilizing, according to whether the blamed are inside or outside the present government, and the degree to which the blaming conflicts with popular will (see Weschler 1990). When the accused are identified with the old power structure, the blaming can underscore the discontinuity between the old and new regimes and promote confidence in the new leadership (Zalaquett 1989). When those blamed are inside the present government or when the blaming conflicts strongly with popular will, those on the outside can seize the opportunity for destabilization, pushing instead their own agendas. This phenomenon is complicated when popular will is itself conflictual as, for example, in Chile, where the public disagrees as to whether and how Pinochet should be held accountable for the atrocities committed during his regime.

Blaming plays a much different role for survivors. Although they may long to feel secure, many survivors have long since stopped believing in their own governments and, perhaps, in governmental authority in general. The stability of the newly emerging state is not at the top of their wish list. When the war crimes tribunals make public their indictments, some refugee camps erupt in celebration – not because their leaders have won a victory, but because one of their tormentors is receiving his due. For them, the individualizing of guilt meets their desire for revenge. (For the need for revenge in Rwanda, see Destexhe 1996.) The problem, as noted above, is that the tribunals will never be able to spread their net wide enough to catch every crime, to quiet every call for vengeance; they will be able to try only a small fraction of the cases. Many survivors worry about the failure of the tribunals to arrest the 'big fish', those most responsible for planning and orchestrating the violence. The desire for revenge thus remains strong, threatening to perpetuate the cycle of conflict.

For the survivors who are part of groups that have been accused of crimes, blaming serves another distinct purpose: helping them save face

among neighbours and the international community. It is not me, the individualized indictments will allow them to say, it is someone else. In this manner, the tribunals will help the enormous population of bystanders to regain their own sense of identity and worth (Staub 1989). As with survivors, bystanders can regain subject-hood and identity by telling their stories. Their stories are important then as a hearing of history as 'experience' and 'myth', even if they are not factually true (See Rushdie 1990; Cohen 1997). However, like survivors, bystanders cannot rely on the tribunals alone for the telling. Since the list of potential defendants is short, bystanders need to rely on other tellings if they are to argue persuasively 'It was not me' and to tell their own experiences remembered, that is, their own version of history.

Punishing the guilty The function of punishment could potentially serve the parties' divergent interests. Given the circumstances and nature of the war crimes tribunals and life on the ground in emerging societies, it is unlikely that punishment will entirely serve anyone's interests.

In addition to demonstrating the existence and force of international law, the international community sees tribunals as essential for general deterrence of war crimes (see Orentlicher 1990: 2542). There are two strands to the general deterrence argument. The first is that the existence and operation of international tribunals will deter potential perpetrators worldwide, as they will know that they could be held accountable for violations of international law. The second is that establishment of fair legal institutions and the adjudication of abuses of prior regimes assists nations in making the transition to democracy (Malamud-Goti 1989: 89) and, the argument implies, democracies are less likely to commit gross human rights abuses. As Diane Orentlicher asks:

> If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter. This may be tolerable when the law or crime is of marginal consequence, but there can be no scope for eviscerating wholesale laws that forbid violence that has been violated on a massive scale. (Orentlicher, 1990: 2542)

If violators are not tried, Orentlicher contends, the absence of trials may 'undermine the legitimacy of a new government and breed cynicism toward civilian institutions' (ibid.).

The last strand of the general deterrence argument enjoys greater acceptance (see generally Symposium 1990). Democratization programmes throughout Central and Eastern Europe and Latin America, for example, view as a centrepiece of their operations the establishment of the rule of

law over brute force and mechanisms to hold prior regimes accountable (see e.g. Stephan, 1986; Mertus 1999). Whether the application of international law to conflict has any deterrent effect generally is open to debate. While formal states may respect international law in order to retain the respect and cooperation of other states and of international bodies, paramilitary troops and rebel regimes do not usually care much about popular opinion – particularly not during the heat of battle. On the contrary, paramilitary groups may be interested in creating an image of law-breaker instead of that of law-abider. Nevertheless, the argument for the deterrence function contends that consistent and fair application of international law in conflict situations, accompanied by credible threats of international investigations, trials and punishments, may provide some deterrent effect. As the tribunals now stand as *ad hoc* bodies, with no authority to publish crimes anywhere except for Rwanda and the former Yugoslavia, their ability to deter crimes in war elsewhere is particularly limited (this argument has been used to promote the creation of a permanent international criminal court; see Sadat Wexler 1996: 707–13; McCormack 1997: 682).

Local power-brokers are more interested in specific deterrence – that is, preventing perpetrators from repeating their acts. Those who are in power hope that punishment will displace threats of personal revenge, build confidence among the citizenry and legitimize local efforts to try crimes. At the same time, they do not want the punishment to become too complete, lest it interfere with the objective of 'national reconstruction' and 'national pacification' (and, for some, even result in their own arrest) (Zalaquett 1989). Thus they are willing to support the trials superficially, as long as the international busy-bodies do not dig too deep. The international community is cognizant of the potential of punishment to destabilize the emerging governments, and thus it has held back from supporting prosecutions against some of the 'biggest fish' responsible for the conflicts. As a result, the deterrent effect of the tribunals within the countries themselves is circumscribed.

Survivors have little interest in deterrence. Instead, they see the punitive function of war crimes tribunals as a means to achieve revenge and retribution, to force expiation of guilt. Although many survivors do not advocate group blame and do not seek revenge against the entire group called the 'enemy', many survivors confess a desire for vengeance against the particular individual(s) who harmed family members and other members of their communities (see Mertus et al. 1997). That the punishment they demand may destabilize their homeland is of little concern.

Apart from mere vengeance, which may seem an illegitimate interest, punishment can substantiate the suffering of victims, aiding the process of reclaiming an entitlement to subject-hood. Punishment itself serves as

important public recognition of the crime. Yet the tribunals can try relatively few cases and thus the process can result in few instances of punishment. Tribunals can never try the many cases in which the harm has no name as a crime – the harm of lost time, dreams shattered, the suffering that comes from endless waiting, the humiliation of asking for the help of someone else. The limited reach of the tribunals will leave survivors still longing for revenge and meaning. Stories of sexual abuse are not only particularly difficult to tell, they are difficult to hear as well (see generally Herman 1992). Not only did Dusko Tadic deny the accusations of rape made against him, the prosecutorial team faced a very difficult task in asserting such charges. Ultimately, the charges of rape failed (for an overview of the defence, see Scharf 1997a: 175–206).

Delivering reparations to survivors Very little effort has been made to use tribunals as means of delivering reparations for survivors. The international community has paid lip-service to reparations. As criminal courts of limited jurisdiction, the war crimes tribunals for Rwanda and the former Yugoslavia do not have authority to issue what are normally seen as civil remedies. Should they have the power and will to do so, reparations would, like punishment, demonstrate the existence and force of international law. Moreover, reparations in the form of economic penalties against responsible individuals and governments – to be turned over in the form of compensation to survivors – may be at least as effective as deterrent as criminal punishments (perhaps more effective, as the international community may have more success in enforcing economic measures against commanding officers and governments that supported war criminals than in enforcing penal measures).

Neither have local power-brokers emphasized the issue of reparations. As long as they are not held responsible for reparations, emerging leaders would have much to gain from them. Reparations would, like punishment, displace threats of revenge. Monetary reparations could also improve the welfare of survivors, thereby alleviating the pressure on local governments to provide for their needs. Reparations have the potential to benefit the entire community, freeing resources to be used for other aspects of reconstruction. A family that receives reparations would no longer seek state assistance for minimal needs and, perhaps, would be able to use the reparations to rebuild their own home and contribute to community reconstruction.

Survivors in Rwanda and the former Yugoslavia have a great interest in reparations. Although nothing can compensate for the loss of loved ones, dreams destroyed and days lost, reparations serve to dignify survivors with a partial remedy for their suffering. Practically speaking, reparations may

mean an improvement in living conditions and general welfare. Above all, however, reparations constitute a public acknowledgement by the violator of guilt. A violator's admission of guilt, more than punishment of the violator itself, can mark a turning point in survivors' search for meaning and closure.

After some fifty years, the Japanese government in 1993 admitted to enslaving Korean, Chinese and Filipina women as prostitutes during the Second World War (the so-called Comfort Women). The living survivors refused Japan's offer of a lump sum of compensation for their suffering, instead pressing Japan for individual compensation. Individual compensation is important, the survivors and their advocates argued, because it signals recognition of guilt for each individual act. To date, survivors in Rwanda and the former Yugoslavia have not demanded similar compensation, although they may in the future.

The full potential for reparations thus has not been explored. The Inter-American Court of Human Rights, among other international bodies, has set a useful precedent in approaching the question of reparations. These experiences should be utilized in developing compensation mechanisms as an adjunct to the war crimes tribunal.

Reforming lawlessness International war crimes tribunals have been widely trumpeted as important components in re-establishing the rule of law. As José Alvarez explains:

> International conventions and particularly the judgments are said to provide 'cathartic group therapy' to reestablish lost national and international consensus. The contrast between the rules of law by which the defendants are judged and the shocking barbarity of what they are shown to have done is said to encourage a unified sense of outrage against the guilty, accompanied by satisfaction in the civilized process that brands criminals. (Alvarez 1998)

The international community, local power-brokers and survivors have an interest in (re)establishing the principle that law exists above power and force. The international community is most interested in (re)establishing the force of international law in a lawless world; local power-brokers want to (re)establish the force of law in their own lawless societies. Survivors, for their part, acutely sceptical about anything called law, do not care what is (re)established where, as long as they do not have to live through another conflict (unless, some will concede, it is a conflict of their own choosing – a 'just' war).

The adjudication of war crimes based on principles of international law may take small steps towards (re)forming global lawlessness. Although their *ad hoc* nature undercuts the call for universal lawfulness, the very existence

of these tribunals helps to (re)establish the rule of international law. It sends a message to the world that some international norms exist above brute power.

Still, justice before the tribunals will not necessarily trickle down to local law. In other words, just because the international community seems to be getting its act together on justice, this does not mean that the domestic courts and other institutions within Rwanda and the former Yugoslavia are willing and/or able to follow suit. Although local indictments have been issued and trials for war crimes have been held in many of the new states of the former Yugoslavia and in Rwanda, observers note the numerous obstacles that exist for local courts to hold fair trials (see e.g. Human Rights Watch/Helsinki 1997).

Survivors continue to pay bribes to local authorities for their daily needs; local syndicates continue to control the markets for many goods; illegal trade in weapons continues to flow across borders; the media continue to be dominated by one-sided propaganda and free speech belongs to the brave few who risk community (and, in some cases, state-condoned) harassment. While calling for justice against war criminals, many governments act with intransigence or, some survivors feel, conspire with the principal war criminals, failing to arrest and even harbouring them within their own borders. In such a world, survivors are discovering that the principle of lawfulness exists somewhere 'out there', far away from their lives. Tribunals are a necessary but not sufficient step to reforming lawlessness.

Recording for history The recording function of the tribunals is important for the international community and local power-brokers; for survivors, it is imperative. The record that will emerge from the trials, however, will be of the form and substance that best serve the interests of the international elite. If the tribunals are regarded as a success, the efficiency and force of international institutions will be applauded by the international community. Beyond the mere verdicts, the tribunals will showcase the accomplishments of international law. A positive record could be used to warn potential perpetrators of the force of international law. It may serve to build a global citizenry, teaching about the limits of evil and the triumph of international humanitarian and human rights principles. Finally, war crimes trials that successfully litigate international human rights principles may be said to provide – in Mark Osiel's words – a 'model of closure' based upon 'Durkenheimian veneration of settled consensus over moral fundamentals' (Osiel, 1997: 53).

Those in government locally will use the record to prove the legitimacy of their rule and the illegitimacy of their predecessors. Local history will underscore the extent to which the new governments cooperated with the

tribunal and advanced justice. (Conversely, those outside government may try to use the record to prove the illegitimacy of the present regime.) The record could become the backbone of a call for national healing and a warning to potential perpetrators. Schools texts could be rewritten to educate future generations about the evils of the past, and to prepare them for a better future. Of course, there is no guarantee that the local histories will ring of reconciliation – they could just as well warn young people of the enemy 'other' and emphasize the need to fortify the collective identity against future attack.

No matter how even-handedly a tribunal record is compiled, it is likely to suffer from gaps that no judicial proceeding can fill: 'The courtroom's demands for the drawing of bright lines that skilled historians usually avoid, along with the perpetrator-driven nature of the rules of evidence, the requirements of substantive law, and the respective roles, as traditionally conceived, of prosecutor, defense attorney, and judge, all undermine the goal of rendering a nuanced history that [local or international] academics might respect' (Alvarez 1998: 43), or that locals might follow as their own Truth. The handling of the first case before the Ad Hoc Tribunal for the Former Yugoslavia, that against Dusko Tadic, illustrates the awkward nature of using a court hearing to tell history (Dusko Tadic, Case No. IT-94–I-T). The judgment from that case begins with a hodge-podge of incomplete renderings of the historical and geographic background of Bosnia and the break-up of the Socialist Republic of Yugoslavia. All sides are likely to find something missing or mis-reported in this history and, thus, it is unlikely to serve as an unbiased historical account for any audience.

Survivors have the greatest need for a record. Investigations and trials can 'reveal the extent of repression, restore the reputation of innocent victims, and confer an official authority-conferring imprimatur to state-sanctioned abuses, thereby making repetition of past mistakes less likely and permitting those societies to re-define themselves in light of real, and not falsified history' (Alvarez, 1998: 8, n. 24, citing Roht-Arriaza 1995: 7–8). According to Naomi Roht-Arriaza, the prosecutorial process and the record it provides may help survivors to put 'the past at rest' (Roht-Arriaza, 1995: 8). Yet the kind of record most survivors need to put the past at rest is one that a tribunal cannot provide.

The few survivors that will be called before the tribunals may be too afraid to testify as they are not assured of being provided with adequate protection once they leave The Hague. Survivors of all crimes – and, in particular, survivors of rape and sexual abuse – have a pressing need for protection of their identity (Chinkin 1994). In some cases, the entire family of the survivor must be assured long-term protection (including relocation and change of identity) if the survivor is to be safe to speak. So far, the

tribunals for the former Yugoslavia and Rwanda fall short of respecting these needs (Richter-Lynotte 1996). In the case of both tribunals, a debate continues to fester over the proper balance between protection for witnesses and fairness to the accused (see Ellis 1997; Scharf 1997).

Above all, witnesses need a full and public account of what happened – an account in which they see their own memories, an account that exposes the Truths. These Truths have taken on a life of their own. They are so thick with history, power and fear that the actual truth does not matter any more. Allowing competing Truths to float through the air in the same space, unjudged and unquestioned, can be a revolutionary act. The Truths may always exist. But the telling can narrow the gap between Truths, creating a common bridge towards something else – towards an existence beyond these Truths. Since legal institutions attempt to discover truth, they are incapable of fulfilling the need to hear competing Truths.

Survivors need to feel a part of whatever record is created. Only then will they feel that others hear and acknowledge their suffering. Only then can they begin to remember or start to forget. Their record may be used to educate future generations, but its greatest utility lies in the telling. The court record, however, merely presses the words of survivors into the language of law. The adjudicatory process does not fulfil the kind of participatory function that facilitates healing for survivors.

Conclusion

The tribunals may serve important functions and address the interests of many parties. They will stop short, however, of addressing the concerns of survivors. The tribunals cannot be 'fixed' to address the missing, but instead additional avenues must be created to address the concerns of survivors. Public truth commissions in which witnesses and survivors speak, memory projects that collect and publish without judging the accounts of survivors, popular education campaigns that encourage survivors to test their voices – these and other such efforts are needed to supplement the work of the tribunals. Channelling all resources in the direction of the tribunal alone disserves the people of Rwanda and the former Yugoslavia. War crimes tribunals can, at best, generate incomplete truth. More is needed to promote long-term healing and transformative social change.

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