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FACING THE PAST IN SERBIA AFTER 2000

Introduction

Following the collapse of the Eastern Bloc, The Socialist Federal Republic of Yugoslavia took what was probably one of the most eerie paths into transition. It disintegrated by way of what was basically a civil war, which generated the most appalling atrocities committed in Europe since the Second World War. The seventh successor state, Serbia, in the 1990s, undertook its transition fully laden with this war's legacy, one being transposed in a *mélange* of war crimes, ethnic nationalism, corruption and propaganda¹. The broad criminalization of the society has additionally damaged the outlook of a post-socialist juridical system, one that already had a shady track record. All the round tables and debates taking place in other countries – lustration, condemning the former communist leaders, opening the archives of the communist secret services, any other means of dealing with the past², were consistently avoided in the post-Yugoslav landscape in the light of a bigger injustice – that of the war crimes³. The inability or incapacity in dealing with this issue still holds the region in quasi-isolation in spite of both the European Union's free line signal for integration and the publicly assumed willingness of the successor states to pursue this goal. A certain number of juridical institutions, both national and international⁴, do have the capacity of investigating and judging war perpetrated crimes, thus eliminating this obstacle from the European future of this region. However, their precise impact in bringing back trust in the political order still has yet to be fully assessed⁵.

The overall purpose of the article is to interpret the framework inherent in such a concept as "transitional justice".⁶ The term in itself designates a set of policies concerning the administration of the past from a double perspective: committing the act of justice and the consolidation of the newly gained democratic order. The precise policies can be categorized

according to the nature of the juridical means at stake: penal or civil ones (see Claus Offe⁷). Although the most spectacular ones are those penal actions embodied in trials against the agents of the former regime, there are still other means. I am referring to the acts of “juridical remission”: amnesty laws, reprieve decrees, anticipated prescription of deeds, restrictive laws limiting the indictments and so on and so forth. Other mechanisms, civil or administrative, may include purging the state’s apparatus, juridical rehabilitations, property restitutions, remedies for the victims, truth (or reconciliation) commissions, historical research institutes, museums, memorials and so on.

Still, implementing transitional justice policies tremendously depends on the nature of a particular transition but above that, on the former regime’s repressive nature. When talking about Milošević’s regime (generically), it appears clearer that transitional justice in the Serbian Republic after 2000 is highly connected with and dependent on the international community’s pressure towards the implementation and practice of human rights. The newly empowered political establishment also depends on the policies of justice to be applied. They determine the magnitude and the nature of such consequential measures.

Significance

The collapse of communism and the subsequent transition to democracy of the Central and South-East European countries have been characterized by a dynamic approach towards their recent past⁸. In the countries that pursued some legal and extra-legal remedies (ranging from criminal trials and truth commissions to lustrations, parliamentary inquiries, compensations, restitutions or governmental based investigations), the transitional dynamic generated a massive amount of academic literature. Such clear “signs” as carried out measures and their nature are the sheer evidence of some shaken order and of the attempt on re-establishing social trust. The juridical paths of confronting the past in the former Yugoslavia are undoubtedly part of this trend. Former Yugoslavia shows up as an atypical case of a complete collapse of the social order brought about by the regime’s breakdown, the state’s dismantlement and by the atrocities of war. Both authority and social trust were questioned through the extensive ability of committing evil, wide spread denial, political temporization and distrust in the juridical actions within successor states. In this context, the

acknowledgement of past crimes became highly important for annealing those societies and their position into the global community. The analysis of the legal aspect of social change potentially reveals alternative concepts that are used in the juridical reading of the past. The article will thus shed light on the tension between global and local legal perspectives, thus underlining the reconstruction of authority and of social trust.

Ultimately, the role of the International Criminal Tribunal for the Former Yugoslavia in making transitional justice work within the Serbian Republic is a crucial point for any analysis. If it was Nuremberg enshrining for the first time the fact that national legislation cannot be used as an excuse for government committed abuses over its own citizens, it is not less meaningful that the crimes against humanity began being legally invoked and trailed regardless of the fact that they were “working or not as violations of the national legislation in the countries where they were committed”⁹. Since Nuremberg to present, national legislation does not protect anymore individuals who are committing gross violations of the human rights regulated by international conventions or agreements. Subsequently, international humanitarian law outweighs national laws and policies. The excuse that national legislation did not ban or even encourage the crime does not hold anymore. The same applies with the argument of “obeying an order” of a hierarchical superior¹⁰. However, a universal jurisdiction towards condemning any violation of the human rights remained more an ideal during the Cold War. After 1990, by establishing the International Tribunals for the former Yugoslavia and Rwanda (including the apprehension of Augusto Pinochet in London, in 2002), it became possible to pursue with this essential transition towards a universal jurisdiction on the violation of human rights. Although still sluggish, the work of the International Tribunals for the former Yugoslavia and Rwanda took Nuremberg as a precedent and decreed upon the idea that human rights are a fundamental and intangible principle of the civilized world. In this regard, one might argue that the international penal justice can be an answer to the political interference in the national justice concerning former totalitarian or authoritarian leaders.

The article’s brief excursion into the inland of those mechanisms of dealing with the past it is at a pinch a refinement and an improvement of this research question. No matter whether it is about reassembling in a historical context the atrocities of the Nineties and the contextualization of the “facing the past” process after 2000, or about defining such process and describing/naming the international and national actors who

participate in it, or even about the avatars of the classical means in doing transitional justice, all of these produce one common conclusion. That is, the international criminal justice is the only existing mechanism by which the past of the Serbian Republic can be settled on some objective grounds, both from a theoretical/academic and an effective transitional perspective.

Facing the past

With this fundamental political change in mind (in 2000) and the new democratic path that the Serbian Republic has taken ever since, everyone is talking nowadays about the necessity of “facing the past”. Nonetheless, this is a very broad concept that has explanatory roots in many areas and fields of expertise (from political science to psychology and so on). In the present article, we will use the terminology “facing the past” without neglecting, however, other related idioms (such as “dealing with the past”, “mastering the past”, “coming to terms with the past”). We believe that this terminology is more comprehensive and meaningful due to its vast semantic content and its important psychological facet. Within this perspective, the *social body* is seen as an *individual body*, sort of a patient willing to confess to some psychoanalyst doctor: “Nations, like individuals, need to **face up to** and understand traumatic past events before they can put them aside and move on to a normal life.”¹¹ The motivation behind such an approach is a consequence of an apparently simple observation. The Serbian Republic is a country in transition, coming out of a belligerent decade, an authoritarian government, and an implicit international reluctance. Therefore it is presumably correct to assume that it will carry on political based action programs towards its recent past. The primary logic assumes that such a country, whether a candidate for the “post-conflict” or “post-authoritarian” category, must necessarily address its troubled past in order to progress and build a European future. This kind of “addressing” is usually recognized in the literature as the “facing the past process”. In other countries, facing the past took the form of legal tribunals or of “truth commissions.” Both these types of institutionalized past addressing have operated in Serbia but none of them managed to involve the Serbian public opinion so deep in a self reevaluating process. This is something that will be detailed along the project altogether with highlighting possible interpretations for the failure of the afore-mentioned administrative “tools”.

Once the choice of terminology accomplished, one would naturally ask 'Why is the task of facing the past so vital in a transition period from an oppressive rule?' There are many answers, most of them plausible, but I am stressing one in particular: for sustainable peace! Such a long-term commitment to peace cannot function without a deep process of reconciliation based on **justice** and **healing**. Seen as a mechanism to create a single historical narrative about the past and for clarifying collective responsibility and the leaders' individual guilt, justice can be done through finding out the truth (correcting the officially manipulated history), through the punishment of perpetrators (retributive justice), the rehabilitation and compensation of the victims and through means of restorative justice. Furthermore, to avoid the reoccurrence of human rights violations, educational measures, reforming political institutions and consolidating the democratic culture are all of maximum importance. It is also highly significant to succeed at all levels because human rights violations may occur even in a democratic political system (due to the differentiation between a *democratic culture* and a *democratic set of rules*).

What does facing the past really mean?

German is the only language with a specific expression for the sophisticated phenomenon of the so-called "facing the past process": a composite word *Vergangenheit* – past and *Bewältigung* – management, coming to terms with, mastering → *Vergangenheitsbewältigung*! The best translation of this German expression into English would probably be "struggle to come to terms with the past". At its origins, the term refers both to the responsibility of the German state and that of simple German individuals for what happened during the Third Reich. In this respect, the term focuses on the process of learning, or on, in philosopher George Santayana's words, "those who forget the past are condemned to repeat it". The term effectively came into being as a natural evolution from denazification (firstly under the Allied Occupation of Germany and then through the Christian Democratic Union government of Konrad Adenauer). In the Fifties and Sixties the aim of liberal Germans was to deal with and learn from their recent past. *Vergangenheitsbewältigung* implies the admission of the fact that a particular vicious episode of the past did exist and therefore, acknowledging it and learning from it, one (a group) can step forward into the future.

At the same time, Theodor Adorno discussed in his famous essay (Was bedeutet die Aufarbeitung der Vergangenheit? *What does coming to terms with the past mean?*¹²) about the term “aufarbeitung,” by which he meant: a). the personal and painful character of the consciousness that must emerge from Germany’s “Zero Hour”; b). the psychoanalytic effort in confronting and “working through” the memory of offence and catastrophe; c). the convergence (however distinctly) of “Aufarbeitung” and “Aufklärung” (enlightenment, clarification); d). a critique of the parallel notion of “mastering the past” (Vergangenheitsbewältigung), which seems to be tainted (at least verbally) by the idea of some ultimate repression¹³. Adorno was of course referring to national-socialism and he was ascertaining the fact that its legacy lingered long after the Nazi regime. He questioned whether the latter was just a ghost of past’s abomination that never died along with Hitler himself or it never really died, or if the people’s inclination for indescribable actions persisted in themselves and in the surrounding social conditions. He also noted that “democracy” was just a “working proposition” in post-war Germany. Collective narcissism never ceased to exist after the formal collapse of National Socialism and subconsciously the defeat was as much admitted as the one in 1918¹⁴. Adorno also assumed that the recognition of what happened in the past must work against an oblivion which readily accompanied justifications about what had been forgotten. Parents for instance, those who have to cope with their children’s uncomfortable questions about Hitler and then to exculpate themselves from, were talking about the good side and how it had not been so bad after all.

There is a broader conclusion here: for mastering the past in a proper manner, turning it into some efficient political education capable to facilitate the transition and the implementation of new democratic values, it is absolutely imperative to *educate the educators!* Coming to terms with the past in a way that aims towards its cognizance consists essentially in the particular way of turning one’s face to the subject: supporting self-consciousness and thus a meaning of the self. This should be accompanied by the good knowledge of some immutable propagandistic practices (?) which are familiar particularly to that psychological predisposition resting inside people (since these artifices are so rigid and numerically limited there is no insurmountable burden in isolating them, making them well known and using them as sort of a vaccine). Theodor Adorno concluded by inciting people to remember the most basic things, namely that open or hidden re-emergences of fascisms would led to war, suffering, poverty

under a coercive rule (such examples could have a more profound impact over people than say simply referring to ideals or even to the ordeals of others).

Facing the past also implies the acknowledgement of the historical episodes that marked a particularly society. Many key words are of most relevance to this *acknowledgement function* – among them: understanding¹⁵, assuming¹⁶, confronting¹⁷, reconciliation¹⁸, responsibility.¹⁹

Once the necessity of facing the past settled, it becomes even more important to understand **who is conducting this process**, which institutions or actors. Societies regularly tend to produce two kinds of frameworks in order to deal with their recent violent history. First, a *court system* that tries those responsible for committed crimes and a truth commission (or any other denomination involving the *truth*) and renders both the perpetrators and victims' side of the story. Post Milošević's Serbia has it all! But these – the Tribunal and the Truth Commission – did not manage to provoke any wide discussion about the recent past. And second, the NGOs²⁰ that have some relevance when talking about giving a profound meaning to civic responsibility. The NGOs' weapons were mainly the documents they published and comprehensive, open, public debates that they organized. And they even started to bring some new perspective on the Serbian's conscience as early as the 1990s. We will discuss below these ultimately converging paths in distinct sections.

The issue of willingness in the process of facing the past

It is of maximum importance to know who has exactly the *willingness* to engage in facing the past no matter the chosen paths. So we come to another relevant actor for the facing the past process in former Yugoslavia, that is the International Criminal Tribunal for the former Yugoslavia. Suggested by the ex German foreign minister (Klaus Kinkel) and officialized through the *Resolution 827* of the United Nations' Security Council (25 May, 1993), the International Criminal Tribunal for former Yugoslavia (ICTY) has been a major achievement of the international perspective over the violence against civilians during war times. The Geneva Convention (1949), for instance, did not foresee any international coercion mechanism. The Helsinki Treaty in 1975 was only a coercion mechanism on paper. Until 1990, those judicial acts could not be used to condemn crimes

against civilians in countries such as Cambodia, Vietnam, Uganda, Argentine, East Timor, Iraq, or El Salvador. The creation in 1992 of the court and prison systems to enforce humanitarian law was thus a serious advance of the legal ideal. It was the first significant return to the post-World War II norm that violence against civilians in the context of war is criminal. Therefore, the Yugoslav wars of secession (as of 1992) existed within a relatively new international frame.

It may be true that the issue of “willingness” is of maximum relevance when it comes to facing the past. It seemed not always the case when the Serbian state did prove the willingness in dealing with its recent history and in spite of all the delusive struggles or even meretricious attempts in doing something still, a real facing the past process yet has to come on the surface and be conducted with full support. One of the so-called hard-line advocates who are directly dealing with this everyday struggle for making truth about the past accessible – Sonja Biserko (head of The Helsinki Committee for Human Rights in Serbia) expressed his personal position on the matter:

I think Serbia at this moment doesn't show any willingness nor has the political consensus to face the past. On the contrary, there is... how should I say... a strategy promoted by political, intellectual and cultural elites to relatives responsibility... and this has been very skillfully – how should I say – operated on different levels by them. The Tribunal [ICTY, a. n.] is also used as an instrument. As you know, the anti-Tribunal sentiments here are rather great and especially Milošević's trial was also an instrument to this because Milošević represented himself (not legally, rather politically). And through his witnesses, the chosen witnesses – the academicians who apparently... wrote the contemporary national program that was promoted by them. They have defended the program by the same arguments in the court, the program that was transmitted, as you know, in 1992. None of the commentators of media ever argued or made a comment against such interpretation. In fact, this is some kind of cementing the interpretation of the wars behind us and introduction into this strategy or in a way confirmation of the strategy which is going on for 7-8 years... this is our democratic government which more or less shares the same position and this is something which is now official and informalized as well. So it's not about the facts because the facts are displayed in front of this Court [ICTY, a. n.] but it's rather about the interpretation and deep denial. And I could say also that the more evidence is, the wider denial is in a way. So I think there is... it would be very difficult to make Serbia come to reconcile, to read this past... first of all it is a very small society... they still live with

*the illusion of the unification of Serbian lands, hoping that international constellations will change. And the more it is so, the potential for facing the past decreases. And what is the biggest problem of all is that the young generations are growing up with this interpretation and it's very hard to have their own interpretations. In ten years we will have a completely new generation, which will more or less rely on this interpretation, which has been organized, by the state.*²¹

On the matter of answering the question of expansive should this past that is up for debate be, exactly which period of time should be apprehended, the same source gives some coordinates:

In my view, I think it is not possible to understand what happened if you only begin with the 1990s. I think it's extremely important to understand the background and the political context in which Serbian leadership and intellectual cultural elite started the project, exactly as I said, refusing the idea of transformation of Yugoslavia along federal lines. And this – I would say – has started in the 1970s when apparently they were preparing for Tito's legacy and, the moment he died, they started to promote this project. They usually start analyses from 1991 or 1987 when Milošević was installed... he was installed by people that are still on the scene (see the Academy, churches and so on – they didn't change the course)... so it takes at least 20 years of analysis to understand what has happened. Otherwise what happened in the battlefield is not enough. So this is why the Serbs are trying to equal sides: they are saying: «Yes, we have committed crimes but the others as well. And the Tribunal is anti-Serbian because there are mostly Serbs in there». So it is important to understand why the Serbs were choosing this program that brought Serbia here.²²

The aspect of the deep continuities at the level of elites belonging to the former and new regime is also brought into discussion. This element is an additional explanatory reason for the slow progress of the current process of facing the past process in the Serbian Republic:

I think what is important at this point is how we feel as a group, first of all to compile documentation and public books which give different highlight of what has happened and also help to create a nucleus of young intellectuals and young elites, we'll be able to initiate such a process later on. I think to expect bigger results is too early... you know all those people who are now involved in the political life or in any other segment of the public life were mostly involved in the project, they are defending their own lives,

careers, positions and in a way I think we missed the opportunity to start the process of lustration. Koštunica apparently continues the Milošević's policies [interview from November 2007, a. n.]; Đinđić's short excursion into policies oriented toward the past was brutally stopped. Đinđić's case will be more and more important because it shows that Serbia is not ready for this kind of reform. Because it's not simply an assassination, it really illustrates this deep anti-western and anti-reform ashtray. We still deal with the same people. It's only Milošević who is out and a few guys are in Hague, but the rest are here.²³

From this point of view it seems that the Serbian state (including here all the representative institutions, whether economic, cultural or just political) is expected to be the least cooperating actor in dealing with the past, given its cadres and their personal links with the complicated unsolved past. Turning back to the concept of "willingness" it appears that most of the significant and valuable actions in the field of facing the past are highly dependent and related to political will. In the absence of it, there will only be defeatist views to describe the Serbian public interest in such matters²⁴. So if the facing the past process does not seem to be a political approach, what is it then? What kind of approach is necessary to fulfill the huge task that is before the Serbian society as a whole? The head of The Helsinki Committee for Human Rights in Serbia concludes by raising this issue:

I think is both moral and psychological [approaches, a. n.] because without this approach of a long run Serbia will not be able to re-establish the value system, which will recommend it to the European family. I understand that EU and European states want to see Serbia in a way attached to the European family because Serbia as it is now doesn't... hasn't reached the political consensus on the European option... it's EU which is mobilizing on this option with support of certain segments in the society. Most of the citizens when being asked about Europe they are pro (70% of them) and which reflects their hope that their life standards will change (economically). But on the other side we have this resistance to hard work, discipline and certain standards...²⁵ things that I also think will be hard to achieve in a society which is morally devastated. And of course one has to remember that Serbian anti-European crusade started in the eighties in a moment when Yugoslavia was one of the countries which was expected to have most of the transitional perspectives of all these post-communist countries.²⁶

Ivana Dobrivojević from the Institute for Contemporary History advocates a slightly different approach²⁷:

When you are looking things from Belgrade they can be a little different because you don't have access to full documents about the court in The Hague. And then all you can use is press and it's quite hard to have an objective view. As a historian it is probably too early to deal with such topics because you don't have relevant sources; but then again, you have to start someday, so this is just like a starting point and then within ten-fifteen years we would have better perspective on that.²⁸

She also stressed the fact that there is a difference between people who are interested in political sciences and war... but when one is a historian, somehow s/he does not deal with the present. Concerning the Serbian state's efforts towards revealing the truth of the nineties, the same source admits that there was a proposal for a Truth Commission, which should have brought together several experts who would somehow investigate what happened during the 1990s. And she also says that for the last four or five years she has not heard anything about it so she was unsure if the Commission still exists. As about the Serbian people's willingness, Ivana Dobrivojević thinks that most of the people were supporting NATO²⁹ until two or three months ago (date of interview: November 2007) and then the Kosovo crisis broke out.

Furthermore she believes there is a consensus that all war criminals (like Ratko Mladić and many others) should go to The Hague. But still there are some people who think they (the Serbs) should do it just because they have to do it and that is it. According to the same source there are about 30-40% of people who believe that those are war criminals and they should be trialed accordingly. Although there are still many who think that maybe it would be better if they could trial the perpetrators in Belgrade. Finally, Ivana Dobrivojević confesses that it has never been officially *their war*. Yes, they had UN embargo and economic depression and so on and times had been really harsh in Belgrade (when everyone was suffering from an economic perspective). But she thinks they did not really feel the war (wars before the NATO bombing in 1999) and for that matter people did not really care about it during the 1990s. They had queues in front of the supermarkets, they had Slobodan Milošević in power, and they just did not care what was going on outside the capital. She also admits that they did not know much about the events because of the strong censorship but

then again there were several independent media. The latter themselves, according to the same opinion, were not much interested in the events either. The subject tried to emphasize the fact that this does not mean the society did not have any empathy with the war's victims. But everyone thought of it as a civil war in which all sides were suffering and in this respect it is a tough task measuring the amount of suffering on each side (the Bosnians might think it was Serbian aggression but from the Serbian perspective it was merely a civil war based on arguments like "how can anyone be an aggressor toward parts of his own country?").

At the same time, the Serbian media at the start of the new millennium was bringing into the open all of these sensitive issues, once Milošević had been disembarked:

[...] there is a difference between ethnification of criminals and ethnification of crimes. [...] and if you think that Serbs should apologize to Croats/Bosniaks/Albanians, then you forget that it would be tantamount to smearing blood from hands of criminals onto the whole nation. Thus you perpetuate the thesis of Slobodan Milošević that his war was in fact an all-out popular war. [...] I don't contest the assertion that S. Milošević, R. Mladic and R. Karadžic are Serbs (even they don't deny that) but they still don't represent all Serbs.³⁰

The features of victimization within the process of facing the past

Among these important hot topics there was also the one of the "guilt" and of the many "features of victimization". Debating around such sensitive topics was not only the appendage to the work of the Truth Commission but also of the general public debate carried out through the media after the year 2000. For instance, one of the Commission's members (former coordinator for the Yugoslav Truth and Reconciliation Commission) was publicly assuming his personal guilt, a responsibility of consciousness sort of speaking, for not acting against a war and atrocities that he was presumably against all the way:

[...] speaking as coordinator of the Commission [the Truth Commission] at the opening of a round table on the program of the Commission, by mere coincidence – as if I have anticipated this polemic and its topics – I had expressed my opinion on all the topics which have been touched in

this polemic. Today, only for the purpose of illustration, I will say that on the topic of collective guilt and collective responsibility I said that Serbian collective guilt and responsibility, (of course not in the meaning of criminal law but in the same meaning as Srdja Popovic is speaking about it – moral and political responsibility), is the starting ground of the work of the Commission, the main topic that the Commission is dealing with. Furthermore, I am of the opinion that we have the duty to speak about civil law responsibility of our state for compensation of damages to the victims of Milošević-Seselj regime, the topic which has been totally ignored so far. I was also speaking about my personal feeling of my own guilt and responsibility, that I am facing with every day since 1991, when I emigrated from Serbia because I have decided not to get involved in a war which I was against, with all my being: “Therefore, I think that our collective non-interest for long lasting suffering of Sarajevo, or non-sufficient engagement on preventing this, is the darkest spot of consciousness of each of us individually. Nothing can be compared with Sarajevo sufferings and nothing can wash this huge dark spot of our conscience that is something I am convinced of”.³¹

Of course, this sort of positioning was made as a personal statement but it could not remain so as long as it dealt with collective responsibility and overall assumptions. The retort to mister Lojpur’s confession was therefore not only an isolated polemic within a newspaper but it did stress out in fact the discomfort and burden in dealing with susceptible matters such as “victimization” and “responsibility”:

Mr. Lojpur mentions one of his speeches in the Commission for Truth in which he said that the suffering of Sarajevo is a blemish on conscience of all of us. I disagree with him. I don’t deny the terrible fate of Sarajevo but don’t understand why it should constitute a blemish on conscience of us all, I assume, of all Serbs? The fact is that the FRY helped Republika Srpska, and that some individuals from Serbia and Montenegro of their volition took part in fighting on the RS side, but why it would taint our conscience. In early 90’s Yugoslavia fell apart because its ethnic components did not want any more the joint Yugoslav identity, but were bent on having their own identities. In the light of those developments it was only natural for Serbs to help their own, notably civilian Serb population in Republika Srpska. Other communities also value solidarity and manifest it both towards members of their own tribes or religion, and also towards foreign countries which they found congenial.³²

The process of facing the past has many aspects to be taken into account. But one of the major issues is that of the features of victimization at the level of collective conscience. As a Serbian researcher argues³³ (and we shall subscribe to this objective opinion and its pertinent content), such features are indispensable to a further reconciliation process in the area:

1. "Many people were victimized by different perpetrators, who belong to different communities and ethnic groups (e.g. Serbian refugees from Croatia, who were later living in Bosnia and then Kosovo)";
2. "Many people are multiple victims, even with memory of victimization in previous wars, or with war trauma passed to them by their parents or other relatives (e.g. Serbs from Croatia and Bosnia, now living in Serbia whose family members were killed by members of other ethnic groups during second world war, or Serbs whose family members were killed during and after second world war by other Serbs who belonged to different political/military group)";
3. "There are conflicts and divisions among Serbs themselves which are connected to their belonging to different political and other social groups, differences in their war victimization and other factors (for example, between communists and anti-communists, between supporters of Milošević/other nationalist leaders and their opponents, between Serbs from Serbia and Serbs from other parts of the former Yugoslavia, between refugees and local population, war participants and those who did not participate in war etc.)";
4. "A large part of men were forced to participate in wars as soldiers or their national sentiments and their families traumatic experiences from earlier wars were abused and manipulated to convince them to fight, so that victimization of this part of population is important to be considered in truth and reconciliation process as well";
5. "Wide structural victimization".

So, there are two types of violence that have to be confronted: the violence among Serbs themselves and that of the Serbs against other ethnic groups. Furthermore, the denying discourse is similarly two-directional: the denial of the Serbian committed crimes and the denial of the Serbian suffered crimes.³⁴ Both perspectives being well represented in contemporary media, political and civic statements were driving the main task of facing the past in some no man's land. Someone could have hardly found a more moderate position in this Manicheist scenario. But the main issue still remained. We believe that the proper approach is to encompass all the victimization features presented above and not to talk further about any particular denial or specific responsibility. That is because the image is so much heterogeneous for someone to choose

a perspective or another. Just the complexity of truth and an objective narrative on recent history – that should be enough to avoid unidirectional approaches. Acknowledging the fact that there were victims, perpetrators and circumstances of great variety could help the Serbian society step into the future. After 2000, part of the Serbian civil society took as a given the international community's message about the so-called truth: the Serbian atrocities³⁵. But the other side of the coin was quite neglected: the Serbs as victims of a political violent system.³⁶

When the willingness in facing the past seems bleak something else intervenes

According to the Dayton Agreement (also known as *The General Framework Agreement for Peace in Bosnia and Herzegovina* – 1995), “all countries of former Yugoslavia are duty-bound to cooperate with the ICTY and should for example collect and keep evidence, conduct investigations and forensic work, hear and transfer witnesses, and arrest and detain war crimes suspects”³⁷. So the *process of facing the past* seems to be an external imposition, at least to a certain extent. Bosnia and Herzegovina was the first to respond to the ICTY's indictments by extraditing Bosnian Muslims in May 1996. Croatia followed the same path in 1997. Meanwhile, the Serbian Republic has been extremely reluctant to the ICTY even though a recent popular movement (starting with 2000) successfully brought into power a new government a coalition of entirely different political character compared to the previous regime. Though the new government would fully cooperate with the ICTY without jeopardizing any of its members, the question of whether or not to extradite the indicted former president Slobodan Milošević to The Hague entangled Serbian politics for about one year (between 2000-2001). The failure to deliver Milošević was at the beginning surprising to the Western policymakers, who in the end forced Belgrade to deliver Milošević by conditioning monetary aid on cooperation with ICTY demands³⁸. The decision of such a delivery in June 2001 became a hot “potato” for the Serbian coalition government and it turned out to be a harsh dispute between the President Vojislav Koštunica and Serbian Prime Minister Zoran Đinđić. The main bone of contention was not Milošević's extradition itself. Rather, the issue rested on the legal requirement to go through the country's Constitutional Court (dominated by Milošević appointees) to achieve an extradition order,

as against an argument that delivery to a United Nations body does not require true extradition. So at the level of “willingness” it seems that the process of facing the past appears more as an imposed imperative within any kind of contacts and negotiations between successor states of the former Yugoslavia and Euro-Atlantic institutions or parties.

Facing the past through courts: domestic or international?

Another debatable point unveils itself this time on the ground of the legal philosophy. What kind of prosecution is more desirable: domestic or international? One juridical concept is decisive in this matter: *bona fide*! Thus, the ICC (the International Criminal Court, governed by the Rome Statute which was ratified on 1st July 2002) seems to fulfill this hiatus by preferring domestic courts only if they develop procedures in a *bona fide* way.³⁹ At the end of World War II, domestic courts did not prosecute perpetrators even when the Tokyo and Nuremberg Tribunals were coming to a close. The history was the same until the ICTY and ICTR were created. Until that particular moment, everyone thought that international courts were the victors’ justice. The African courts seem nowadays to have fallen back onto this idea. ICTY and ICTR are probably “responsible” for the new development in criminal law (by their statutes, rules and judgment). The result is a substantial jurisprudence that was lacking in the past.⁴⁰ It is supposed that the collaboration between recently added ICC and local prosecutors will go on a mutual agreement – whether the national courts would want to try it domestically, or would want to go forward before the ICC, if the situation might seem too hard for a local solution.⁴¹ A sort of a *complementarily rule*!

Legal scholar Jonathan Charney argued: “in most situations states find it more desirable to resolve a matter domestically than to surrender responsibility to an international body.”⁴² It is an almost clear future perspective that states will try to carry out criminal procedures in *bona fide* way just not to be subject of ICC jurisdiction, so the ICC would serve mainly “as a monitoring and supporting institution”⁴³. And according to the same author, “this is perhaps the best outcome, for the purpose of establishing the ICC is to eliminate impunity for international crimes.”⁴⁴ The fact is that the ICTY and the ICTR are still restrained in their work by a limited jurisdiction. The ICC was conceived as the embodiment of the idea that domestic courts will prosecute crimes against humanity

under national law⁴⁵. But things are not that clear as we might think. Let us take for instance the “Mejakic case”, a perpetrator initially indicted by the ICTY and then transferred to the Bosnian courts. On a side note, one needs to specify that the ICTY retained primacy over national courts. Nevertheless, the Tribunal through its prosecutor requests periodic reports on the progress of the investigation within domestic courts. In spite of this, it turned out that the Bosnian court was composed of national and international judges working with both international and domestic law instruments⁴⁶ (article 180/para. 2 of the BiH Criminal Code provides for command responsibility in the same form as article 7(3) of the ICTY Statute⁴⁷). It seems that the end result is a process of continuous negotiation between international and national level of law whilst the field has not fully redefined its boundaries yet.

Trial ethics in the name of facing the past

In spite of being a piecemeal approach into dealing with the problem of the role of criminal trials in social engineering, we thought Mark Osiel’s work⁴⁸ would be a good starting point for encompassing the diversity of the Serbian way of facing the past. According to the author the main goal of this kind of trials is to develop a coherent collective memory about the painful past and therefore, by doing so, the whole society can be oriented to a more liberal and open paradigm. Although Osiel’s approach is an eclectic one, using moral and political philosophy allusions, historiography, law, sociology and even literature and theatre, we shall use only his preliminary concerns about the possibility of using the criminal legal prosecutions in shaping collective memory:

1. “... such efforts can easily sacrifice the rights of defendants on the altar of social solidarity”⁴⁹

Many scholars furnish the field with suggestive examples for this sort of assertion: Eichman’s trial for instance – seen as a one-way purpose of rendering the Jewish voice. In this scenario the defendant does not really count, he only stands there as a puppet within a show. But let’s take for one second the easiest and non-dubitative idea of the victor’s trial perspective of the Nuremberg and Tokyo trials. Is it a similar case in

nowadays' Serbian Republic? Whether we speak about ICTY or Serbian national Courts, are these embodiments of victor's justice?

We need to consider two major perspectives. First, the one of the Serbian public opinion: it is commonly recognized that the Serbs (in their overwhelming majority) still see ICTY through anti-western, anti-liberal glasses, whether we speak about media, political, economical and cultural elite or any other symbolic and relevant societal players (we shall take the above mentioned NG actors⁵⁰ as the notable exception). From this point of view the ICTY acts as a victor's instrument (e.g. the suspension of different international financial aids for non cooperation with the Tribunal⁵¹). Various international actors – whether states or institutions (represented mainly by United States), are forcing Serbia⁵² to cope with this kind of criminal prosecution by using economical and political imperatives/arguments. The second perspective is that of the international institutions and states dealing with international justice. For these players, the ICTY and the ICTR (and others) are just embodiments of the rule of law (in this case – the international criminal law). Normally, an objective mind not being biased in any way should notice that the law confined in the “rule of law” is not a matter of privileges for some and punishment for others. The law acts as a generally against any transgression against forbidden limits. Then why the same *law*, in an axiological neutral perspective, is seen different from these two perspectives? The defendant's story certainly makes compelling reading. The society's healing would only progress on the basis of a shared understanding of what went wrong. And there might be the case in here (with the Serbian Republic) of a deep lack in this kind of *sharing*. There is not a mutual collective agreement between Serbs that certain individuals should be *defendants* in the law's idiom. For all above mentioned, the defendant's rights seem more as a moral expression⁵³, because only the *morality behind indictments* can be debated and not that of the *indictments* themselves.

2. “...they [the legal attempts, a. n.] can unwittingly distort historical understanding of the nation's recent past”⁵⁴

The general apprehension nowadays is that criminal judgment and historical interpretation cannot be reconciled or, at the very best, these two distinct attempts can only produce “poor justice or poor history, probably both”.⁵⁵ Moreover, the truth is that within every transgression from an oppressive rule to a more liberal one, everyone expects “a new

Nuremberg”, sort of a “trial of the century” to signal out the true criminal nature of the old regime and to delegitimize it for good. But one shouldn’t expect too much from the legal attempts to pedal on the historical understanding and fulfill some kind of a master narrative about the recent history. The real vocation of the trials is to render proper punishments for those responsible of all the abuses of the former regime, to restore justice, and to prevent the re-ignition of such deeds. Even if the legal perspective does provide a more or less objective narrative about the recent past, this is more like a secondary effect and one that is also implicit. The adversaries (?) of these legal mechanisms acknowledge the fact that because it is such a harsh task that of objectively establishing the hierarchy and the causal chain in transmitting orders, the legal approach inevitably operates with a selection of defendants and facts. Important scholars such as Bruce Ackerman or Jon Elster resent this second category of scholars who consider legal anatomy arbitrary and unjust.⁵⁶ In other words, if not all the guilty ones can be trialed then every attempt should be aborted (this view has been accused of “moral perfectionism” by authors like Eric Posner or Adrian Vermeule,⁵⁷ whereas they consider the transitional processes as simple ordinary trials). We consider that both angles can be pertinent with the only difference that instead of not doing anything at all based on ethical principles, it is preferable to do something at least, no matter how imperfect and selective that is. The degree of distortion in transitional justice’s attempts is something less harmful than a propagandistic wrangle over the past.

As related to the concept of “historical distortion”, things can get even more complicated:

The notion that memory can be «distorted» assumes that there is a standard by which we can judge or measure what a veridical memory must be. If this is difficult with individual memory, it is even more complex with collective memory where the past event or experience remembered was truly a different event or experience for its different participants. Moreover, where we can accept with little question that biography or the lifetime is the appropriate or «natural» frame for individual memory, there is no such evident frame for cultural memories. Neither national boundaries nor linguistic ones are as self-evidently the right containers for collective memory as the person is for individual memory...⁵⁸

The historian's conclusions therefore determine how the story about that certain collectivity is configured. The same author reasonably concludes that memory is distortion indeed and remembering is also a way of forgetting.⁵⁹ For other authors dealing with the topic of "memory", the latter is constituted at the interaction between *deleting* and *preserving*. Once settled that no one can absolutely recompose the past in its entirety, it becomes obvious that memory equals selection (no one questioned the way Nazism or Stalinism engaged some elements of the past to the injury of some others, but the way they took total control over the selected elements)!⁶⁰ Sometimes inquiry in the past is displaced by the agreement of the majority. Obviously, not all past references are being deleted, but it is allowed to contest tradition in the name of the general will.

Science is a good example of how the gradually absolution from memory's fosterage has been achieved (the sequential waiving of the Antiquity's acquisitions *versus* the scientific boom). Memory is rejected to the detriment of observation, experience, and rationality. Still, when it is embraced, memory is rather tamed, de-energized and set aside. However, memories can be misused. One of the Serbs justifications for their aggression against the other Balkan Slavs made reference to suffering in the past (World War II, the battles with the Ottomans and so on...) ⁶¹ In Jacques Le Goff's words, "commemorating the past reaches its climax in the Nazi Germany and fascist Italy" (plus in the Stalinist Russia).

At the end of this short elucidation, one could rightly wonder which are the *good* usages of memory and which are the *bad* ones? Which are the criteria employed to discriminate? Todorov offers us a useful approach: a). questioning the outcomes: **peace** vs. **war**; b). there are many forms of remembering: **literal** or **exemplary**! Of course, it is preferable to encompass exemplarity, filtering this memory through analogy and making it an **exemplum** that can be applied to some new actors, circumstances and so on. The literal utilization of this practice enslaves the present to the past. Another example of exemplarity is to hyperbolize your own victimization. "If nobody wants to be a victim, all instead want to have been without really being one; they aspire to the victim status".⁶² The allegation is even stronger for groups. This reality can provide them with special rights, inexhaustible advantages (e.g.: "Others have suffered, and me, due to the fact that I was their descendent I took all the moral benefits [...] My ascending line made me the concessionaire of genocide, the witness and almost its victim [...] By contrast to such an investiture, any other honor seemed to me deplorable or derisory"⁶³).

In the end, almost anything can unwittingly distort historical understanding. We shall only take a last variable into consideration and draw a line. To be able **to influence** (a broader sense of distortion), “prosecutors must discover how to couch the trial’s doctrinal narrative within «genre conventions» already in place within a particularly society”.⁶⁴ That is also probably and instinctively why facts should be disputed in domestic courts.⁶⁵ If there is an inextricable distortion within transitional justice, no matter the paths to be followed, then let us make it acceptable!⁶⁶

3. “...they may foster delusions of purity and grandeur by encouraging faulty analogies between past and future controversies, readings of the precedent that are often too broad, sometimes too narrow”⁶⁷

There are several questions arising from this assessment. How do past representations influence the present (policies, everyday life, everything...), whether in good or bad? And, how exactly could the future be addressed starting with the experience of the past and its legal interpretation? There are voices contesting the exemplarity of a memorial episode, saying that the particular event is singular (e.g. the Soah). However, how can anyone suggest the uniqueness of an event if it was never compared with anything else? Comparing means **resemblances** and **differences**, not to mention that comparison does not mean “to explain” (or “to excuse”).⁶⁸ This is indeed the gist of the precedent in legal approaches towards the past’s violent episodes. The ICTY for instance, as shown earlier, took the Nuremberg trial as a precedent and decreed upon the fact that human rights are an intangible principle. In brief and in accordance to the *827 Resolution* (through which the ICTY was established), the main goals of the Tribunal were:

- To bring to justice persons responsible for violating international humanitarian law
- To provide justice for victims
- To discourage further perpetration of crimes
- To prevent revisionism, contribute to establishing peace anew and encourage reconciliation in the region of the former Yugoslavia⁶⁹

“Fostering delusions of purity and grandeur” is absolutely something not stipulated in the Tribunal’s Statute, but nevertheless there are just

people behind the overall transitional process – those conducting the trials and prosecutions or even those composing the new regime or political elite – and of course that “in deciding how to deal with wrongdoers and victims from the earlier regime, the leaders of the incoming regime are often influenced by their ideas about what is required by justice”⁷⁰ and “the normative conceptions of justice held by the agents of transitional justice can enter into the explanation of the decisions they reach”.⁷¹ Instead, the only abstract criteria to distinguish between just concern and any other opaque motivations, is represented by the concepts of **impartiality** and **universality**. Elster, for instance, refers to this set of criteria as **reason**.⁷² So when debating about what stays behind a “too broad or too narrow reading of the precedent” we might as well appeal to another concept: **motivations**! As there is and always was a hierarchy of such motivations, it is only the order that varies.⁷³ Are there such motivations behind the prosecutors of the ICTY as in the ancient Greece? Are there any within the domestic tribunals? These are questions that cannot be answered decisively. It may not be the case with the jurisdiction of the international courts but the interpreters (judges) might have certain motivations (and there is nothing pejorative behind this assertion). All in all, we believe that the analogies with past examples (precedents) are sought mainly to create jurisprudence, and secondly, to assert that the only *motivation* is the *universality* of the principles that are about to be applied and fostered.

4. “...they may fail by requiring more extensive admissions of guilt, and more repentance, than most nations are prepared to undertake. This is because efforts at employing law to instill shared memories sometimes require substantial segments of a society to accept responsibility for colossal wrongs and to break completely with cherished aspects of its past”⁷⁴

It is generally assumed that condemning yesterday’s oppressors does not only serve the purpose of the rule of law but also to publicly admit the perpetrated facts and assuage the victims’ distress.⁷⁵ This should remain the main goal and task of the criminal prosecutions as related to the concept of responsibility. We believe that if it would be such a harsh task for a society to accept responsibility for colossal wrongs then that society must have pertained at least to its leader’s volition and thoughts in farthest degree. That is really something one cannot evaluate as such. Statements like that of Stacy Sullivan from *The New Republic* are eloquent for the issue in stake – “Whatever else we do in Kosovo, we must face the fact

that, to all intents and purposes, many ordinary Serbs are – to paraphrase Daniel Jonah Goldhagen – Milošević’s willing executioners.”⁷⁶ Only if we accept this picture as being true we could fear about the great task that lies ahead as criminal proceedings might produce some outcomes for which the Serbian society is not well prepared.

Furthermore, those who do indeed talk about the Serbs’ *collective denial* (e.g. *collective guilt*) are also using ordinary Serbs’ opinion on certain events (thru polls and so on): “As one illustration, according to research by the Strategic Marketing and Media Research Institute in Belgrade in April 2005, 74 % of the 1,205 respondents said that the Serbs had carried out fewer crimes than the Croats, Albanians and Muslims during the wars in the former Yugoslavia, of whom 24 % also thought that Serbs had perpetrated fewer crimes than the Slovenes.”⁷⁷ And thus, those who bend their opinion to pointing out the Serbian deep denial and opacity are satisfied to some certain extent. Still, the criminal prosecutions are not going to commit an act of justice for a society that is not yet prepared to cope with the past, because as we previously ascertained, within the *criminal frame*, particular agents cause all problems. No one in The Hague will ever conclude that all the Serbs are guilty and they should recognize it as such, although “so many international magazines, from «Time» to «Nouvelle Observateur», in order to bring war to their customers, set up «the Serbs», far and near, large and small, as the evildoers and «the Muslims» in general as the good ones.”⁷⁸ If we make an appeal to Sigmund Freud’s “screen memory,” we might as well infer that people are rather willing to raze traumatic experiences from their minds.⁷⁹ Nevertheless, no matter the society’s demands or needs, there will always be someone else to pursue with the meta-narratives of that particular polity. But if we read the big-picture in psychoanalytic terms, then it might be preferable for a society to directly face the past experiences and thus move forth.⁸⁰

I will conclude this section by arguing that it always depends on which framework one society would resonate to. For instance, and according to some meaningful liberal principles, the national story should always encompass the harm that the nation had done to others.⁸¹ In contrast, the communitarians argue that the significance of such a narrative matters more for its tellers and listeners.⁸² Liberal constitutional patriotism holds that “states should be composed of equal citizens whose ties to one another are purely «civic» in the sense that each acknowledges the authority of a common set of laws and political institutions” and this civic notion would “bracket off questions about shared history and common culture and...

claim that the basis on which citizens associate is purely political.”⁸³ Whether the “newly refreshed” Serbian Republic would follow a liberal path or, alternatively a communitarian approach, it is something that has yet to be estimated and evaluated as such.

5. “...legal efforts to influence collective memory may fail because such memory – almost by nature – arises only incidentally; it cannot be constructed intentionally”⁸⁴

For Michel Foucault, whoever controls people’s memory basically controls and administrates their societal dynamics.⁸⁵ This assumption must not be taken *ad litteram* but it should suggest a link between memory and its source or creator⁸⁶. But at the interface with any distorting idea about criminal proceedings we consider that another risk is at stake. Mark Osiel’s trial hypotheses do indeed have some relevance but in a flawed way. The memory of administrative massacre can really turn out to sometimes be a strategy of electoral legitimacy for the newly installed power⁸⁷ or even vindictive acts perpetrated under the smokescreen of a legal trial⁸⁸. So often these breaking up rituals are intended just to obscure guilty continuities between representatives of the former and new regime, not to mention the rigid ties between the past and the present. It always depends on the perspective one might prefer or not. For instance, French historian Henry Rousso sees this memory (i.e. result of transitional justice) as simply the product of propagandistic twists and turns, political instruments intended to legitimize some or by the contrary delegitimize their opponents in a purely emotional, Manicheistic way.⁸⁹

Sometimes this memory can indeed be constructed intentionally (the history of transitions has offered many examples). And even if it is not always the case, the role of criminal investigation over the past atrocities should be sought after somewhere else. As previously stated and following Tzvetan Todorov’s narrative, *memory* is a complex process in which *selection* plays a highly significant role. Being an *act of selection*, it can also refer to the subjective pattern of the one (whether human, institution, or court) who is doing the selection. Who decides which elements will become public remembrance and which should be discarded? That the memory of some particular aspect and shape may arise from this “laboratory” without being consistently intended as such by the creator is something also possible. In the process, things can be both intentional⁹⁰ and unintentional, whereas some “vernacular memories” of major events

could remain quite different from the official historical commemoration.⁹¹ No matter the perspective, memory becomes ever clearer and sustainable as “international memory” of major events. The aftermath could be that facing the past in the Republic of Serbia, as a foreign driven experience (thru ICTY at least), can become such an international story. Still troubles erupt when one has to overlap these international narratives with the local perception over a particular episode. That is why, more than ever, “trialing at home” is a “message” that deserves more consideration and thought in respect to all those afore mentioned.

6. “...even if collective memory can be created deliberately, perhaps it can be done only dishonestly, that is, by concealing this very deliberateness from the intended audience”⁹²

We concluded before that the criminal approaches towards a troubled past can or cannot deliberately create a collective memory or the constituent elements of it. This process depends on a variety of factors from the newly empowered elites’ willingness and purposes to a more administrative endeavor of those dealing with the effectiveness of trialing. We also concluded that the element of “deliberativeness” can or cannot occur on a background of dishonesty. The intentionality of an act could have something to deal with ethics only when it is presumed that an universal set of rules or values are to be applied on a particular case of transitional justice. Instead, this set of ultimate rules is constantly fluctuating and changing, especially when talking about international criminal law and the use of precedents. In more philosophical terms, “a trial in the aftermath of mass atrocity, then, should mark an effort between vengeance and forgiveness. It transfers the individuals’ desires for revenge to the state or official bodies. The transfer cools vengeance into retribution, slows judgment with procedure, and interrupts, with documents, cross-examination, and the presumption of innocence, the vicious cycle of blame and feud.”⁹³ So at least within this perspective, criminal prosecutions tend more to alleviate the Jacobin tendencies existing in any spin-offs of major political upheavals.

Nevertheless, “admitting the influence of power and self-interest upon how a story is being told undermines its persuasiveness, its asserted claim to represent impartial truth, its «truth-effect» in postmodern idiom. It was sheer power, after all, that permitted the Allies to narrow the narrative frame of the Tokyo and Nuremberg trials, excluding the substantial record

of war crimes by the accusers as legally irrelevant. And it was precisely the recognition of this power, of how it thus shaped the story, that led to the lingering charge that the trials were no more than «victors' justice»⁹⁴ In this respect, is the ICTY an instrument of the victors' justice? Will these international prosecutions be recognized as a historical episode imposed by power and political indictments? This is something yet to be considered but there is still some evidence about public perception on this issue: a significant percent of the Serbs (might) show aversion towards the ICTY. By 2002, the Strategic Marketing agency presented the following results: four-fifths of the public surveyed felt that the Tribunal was biased against Serbs in general (and nearly forty percent believed that Milošević was acting in defense of Serbia and the Serbian people at his trial in The Hague).⁹⁵

Facing the past remains a complex pattern of different strategies. Its impact on a society and upon the latter's collective narratives is still something to be reconsidered at any point. The present article was an attempt to evaluate such impact in relation with the case of Serbia. The ICTY will conclude its activity by the end of 2014, thus the overall process of transitional justice will be considered closed and complete. In this scenario it seems solely up to the Serbian society whether it chooses a continuation of the internationally triggered facing of the past or it will fall back on more or less comfortable international narratives. In this context, the process appears as an open work in Umberto Eco's coinage, meaning that it allows multiple explanations. However, future researches and publications upon this particular topic should at least rekindle a bit more some healthy impartial debate about this still blurry past of the region...

NOTES

- ¹ Mary KALDOR, *New and Old Wars: Organized Violence in a Global Era*, Stanford, Calif.: Stanford University Press, 1999.
- ² Tina ROSENBERG, *The Haunted Land*, New York: Vintage Books, 1995; John BORNEMAN, *Settling Accounts. Violence, Justice and Accountability in Postsocialist Europe*, Princeton, N.J.: Princeton University Press, 1997.
- ³ Aleksandar JOKIC, *War Crimes and Collective Wrongdoing*, Malden, Mass.: Blackwell, 2001.
- ⁴ Rachel KERR, *The International Criminal Tribunal for the Former Yugoslavia. An Exercise in Law, Politics and Democracy*, Oxford: Oxford University Press, 2004.
- ⁵ Aleksandar FATIĆ, *Reconciliation via The War Crime Tribunal?*, Brookfield: Ashgate, 2000; Iavor RANGELOV, "International Law and local ideology in Serbia," in *Peace Review*, 16:3, September 2004, 331-337.
- ⁶ The field of transitional justice is still under expansion, especially after 1990, once the communist regimes of Eastern Europe have collapsed. Coming up in the 1980s, this literature began developing, especially under the task of some normative recommendations encompassed in the reports belonging to several international organizations – such as Amnesty International or Human Rights Watch –, which were evaluating the transitions in Latin America. In the Nineties, this issue is explored as public policies in *transitological studies* which established typologies and made predictions based on some general criteria: Samuel HUNTINGTON, *The Third Wave: Democratization in the Late Twentieth Century*, Norman, Okla.: University of Oklahoma Press, 1991; Juan L. LINZ & Alfred STEPAN, *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe*, Baltimore & London: Johns Hopkins University Press, 1996; John ELSTER, "Coming to terms with the past. A framework for the study of justice in the transition to democracy," in *Archives européennes de sociologie*, nr. 39/1998; John MORAN, "The Communist Torturers of Eastern Europe: Prosecute and Punish or Forgive and Forget?," in *Communist and Post-Communist Studies*, nr. 27/1994; Herbert KITSCHELT, Zdenka MANSFELDOVA, Gabor TOKA, *Post-Communist Party Systems: Competition, Representation and Inter-Party Competition*, Cambridge: Cambridge University Press, 1999. During the whole period, the term of "transitional justice" is consecrated in various works, such as the ones of Neil KRITZ (*Transitional Justice*, Washington, D.C.: United States Institute of Peace Press, 1995) or Ruti TEITEL (*Transitional Justice*, Oxford: Oxford University Press, 2000). Starting with 2000, the transitological approach towards transitional justice lost ground in favour of detailed studying of each and every country, the specific factors of each transition being considered more relevant than the transitological categories.

- 7 Claus OFFE, "Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Transitions," in *Journal of Political Philosophy*, vol. 1, nr. 1/1993.
- 8 See also Vladimir PETROVIĆ, "Gaining Trust Through Facing the Past? Prosecuting War Crimes Committed in the Former Yugoslavia in National and International Legal Context," in *CAS Working Paper Series* No. 4/ 2011.
- 9 *The Statute of the International Military Tribunal – London Convention* from 8th of August 1945, Art. 6, lett. C.
- 10 *Ibidem*, Art. 8.
- 11 Tina ROSENBERG, *The Haunted Land: Facing Europe's Ghosts after Communism*, New York: Vintage Books, 1996, p. xviii.
- 12 Working with the English translation from Theodor Adorno('s), *Gesammelte Schriften*, vol. 10, pt. 2, Frankfurt am Main: Suhrkamp Verlag, 1977, pp. 555-572. This original essay was firstly published in 1959. The translation copyright belongs to Geoffrey Hartman (1986).
- 13 Editor's notes, *Ibidem*.
- 14 See the Serbian superiority complex amongst the other Slavs in the Balkans.
- 15 It involves the willingness to inform upon and the objectiveness (some kind of axiological neutrality) in rationing the information.
- 16 It implies choosing the perspective of criminal framework, which is one of the two responsibility patterns: Within the criminal frame, problems are all caused by particular agents, acting in either international or neglectful ways to produce certain outcomes. Or, in the context of war, problems can be ascribed to such extra-agent factors as ancient ethnic hatreds, economic crisis, crowd madness, or irrational bloodlust. The natural consequence would be that most individuals (besides those that are directly involved in the international justice prosecutions) might prefer the criminal framework, the only one that allows exoneration at a collective level. Still, the Serbian case seems to produce, by opposite, precisely the rejection of the criminal interpretation.
- 17 The lack in confronting the past's atrocities made the Yugoslavs nurture and mythologize these horrors, "so much so that when the deadly calls of nationalism were sounded in the early 1990s, people responded". See Elizabeth NEUFFER, *The Key to My Neighbor's House: Seeking Justice in Bosnia and Rwanda*, New York: Picador, 2001, pp. 364 – 365.
- 18 "Most truth commissions are created at a point of political transition within a country, used either to demonstrate or underscore a break with the past record of human rights abuses, to promote national reconciliation". See Priscilla HAYNER, "Fifteen Truth Commissions – 1974 to 1994: A comparative Study," in *Human Rights Quarterly*, November 1994, vol. 16, no. 4, John Hopkins University Press, pp. 597 – 655.
- 19 It goes complementary with the assuming process.

- 20 The oldest Serbian NGOs are the Humanitarian Law Center (HLC – founded in 1992: www.hlc-rdc.org) and the Helsinki Committee for Human Rights in Serbia (HCHRS – founded in 1994: <http://www.helsinki.org.rs/>). Although younger, other relevant NGOs are: Belgrade Center for Human Rights (Belgrade Center – founded in 1995: <http://www.bgcentar.org.yu>), the Lawyers Committee for Human Rights (Yucom – founded in 1997: www.yucom.org.rs) and Youth Initiative (YIHR – founded in 2003: www.yihr.org). These are the most important civic players but this not excludes the existence of some other NGOs: The Documentation Center (a project of Serbian media package B92: radio, internet, TV) – it's more like an archive institution about de 1990s events; the Center for Cultural Decontamination (it's not quite a human rights NGO) and so on. These two and many others are acting more as cultural activists. Here are some representative public figures leading the activity of these non-governmental bodies: Nataša Kandić (HLC), Sonja Biserko (HCHRS), Vojin Dimitrijevic (Belgrade Center), Biljana Kovačević-Vučo - (Yucom), and Andrej Nosov (YIHR).
- 21 Sonja BISERKO, interview by author, (Belgrade: November 25, 2007, tape recording).
- 22 *Ibidem.*
- 23 *Ibidem.*
- 24 “In the answer to the question of «Who is supposed to look after the documentation linked to the wars in the 1990's», the voice from Serbia is sharp, warning and decisive: «Not the state, by no means! Exclusively the non-governmental sector». The gap between human rights organizations in Serbia and the post- Đinđić Serbia is huge, confidence in the institutions of state (unchanged since Milošević's rule) is nonexistent” – see Goran BOŽIČEVIĆ, “Is Dealing with the Past Slow and Difficult in Our Regions?,” in Helena Rill, Tamara Šmidling, Ana Bitoljanu (eds.), *20 Pieces of Encouragement for Awakening and Change*, Belgrade-Sarajevo: Centre for Nonviolent Action, 2007, p. 131.
- 25 To grasp what really is the “European family” and the “required standards”, Zbigniew Brzezinski maybe found the most telling formulation: “House has architectural implications. Home has relational implications. The first implies a structure; the second implies a family” (it's all about such concepts like “European house” and “European home”). The first implies the “hard” task of the “catching up” process (frameworks in the economic, legislative, administrative etc. areas) whilst the second one implies the “soft” imponderables (interpersonal bounds, loyalties, values, networking). Sonja Biserko seems to be referring to this particular aspect. This one is much more problematic and harder to be achieved – for further considerations on the compounding elements of the “European home” (*enterprise culture, civic culture, discursive culture, everyday culture*), see Piotr Sztompka,

- “Civilizational Incompetence: The Trap of Post-Communist Societies,” in *Zeitschrift für Soziologie*, Vol. 22, 1993: 85-95.
- 26 Sonja BISERKO, interview by author, (Belgrade: November 25, 2007, tape recording).
- 27 This is an institution founded in the 1960s, dealing with the modern history research (twentieth century); in 1960s and 1970s the emphasis was mostly on the WWII period; In 1980s a new generation of historians appeared and since then the Institute’s researchers have focused on various topics: history from 1918 and the unification of Yugoslavia to 1990s recent history (still the 1990s were not that prolific since there have been problems with sources and so on and so forth). At the moment, basically, researchers from this Institute are dealing with the socialist period. The Serbs also have *the archive rule of thirty years* (for classified documents).
- 28 Ivana DOBRIVOJEVIĆ, interview by author, (Belgrade: November 02, 2007, tape recording).
- 29 The subject talks about a poll (2007) where 50-60% of the Serbs thought that Serbian should join NATO.
- 30 Aleksander VASILJEVIĆ, “Two Important Letters” – Letter to the Editor, in *Vreme*, Belgrade, November 21, 2002.
- 31 Aleksandar LOJPUR, “Kostunica’s Commission” – Letter to the Editor, in *Vreme*, Belgrade, October 10, 2002.
- 32 I. LUKAČEVIĆ, “Who Should Be Ashamed” – Letter to the Editor, in *Vreme*, Belgrade, October 17, 2002.
- 33 Vesna NIKOLIC-RISTANOVIC, “Specificities of socio-historical context and victimization in Serbia and their impact for the creation of the model of truth and reconciliation”, in *Temida*, 4, 2002; Vesna NIKOLIC-RISTANOVIC, “Possibilities for Restorative Justice in Serbia”, in L. Woldgrave (ed.), *Positioning Restorative Justice*, Devon: Villain Publishers, 2003.
- 34 Vesna NIKOLIC-RISTANOVIC, “Truth, reconciliation and victims in Serbia: the process so far,” in Paper presented at the New Horizons for Victimology, XI th International Symposium on Victimology, Stellenbosch, South Africa, 13 – 18 July 2003.
- 35 *Ibidem*.
- 36 “The largest criticism Serbs have of Facing the Past is that it is too absolute in its condemnation of the nation, particularly in comparison to its treatment of other post-Yugoslav and Western states. Serbs also suffered during the conflicts, and the critics resent that Facing the Past does not acknowledge this. The project is seen as a unilateral, one-sided condemnation of the Serbs, which places the entire blame for the wars on Serbs shoulders (Dacić). Serbs must be counted as victims too, and «as much as victims as are Muslims of Srebrenica, citizens of Sarajevo, Albanians and Serbs in Kosovo» (Dacić). Facing the Past seems to its critics as a black-and-white exercise in which the Serbs are always located in the black, though many deserve sympathy

- much more than condemnation” – Margaret DARIN HAGAN, *Facing the Past in Post-Milošević Serbia. The Public Relations of Post-Conflict Human Rights Activism*, Master of Arts thesis, Budapest: CEU, 2004, Chapter V, note 5; with quotes from Dr. Živojin Dacić, “Legitimate Denial” – Letter to the Editor, in *Vreme*, Belgrade, September 19, 2002.
- 37 Natascha ZUPAN, “Facing the Past and Transitional Justice in Countries of Former Yugoslavia,” in Martina Fischer (ed.), *Peacebuilding and Civil Society in Bosnia-Herzegovina. Ten Years after Dayton*, Münster: Lit Verlag, 2006, p. 328.
- 38 In 2002 ICTY has already indicted thirty-two persons of which almost half were believed to live in FRY. The cooperation with ICTY, taking steps with the Dayton Accords concerning the end of Serbian support to Republika Srpska and respecting human rights and the rule of law, were the major conditions in order to get any financial support from the U.S. Thus, in April 2002 “the FRY Parliament passed a law allowing extradition of indictees to the ICTY [...] On May 21, Secretary of State [Colin] Powell certified that the FRY was cooperating with the ICTY, principally «on the basis of new laws that have been passed in Belgrade, voluntary surrenders that have taken place, and indictments that have been issued to those who remain still outside the jurisdiction of the tribunal»” – “U.S. Pressure on Serbia to Transfer ICTY Indictees,” in *The American Journal of International Law*, Vol. 96, No. 3 (Jul., 2002), pp. 729-730.
- Such monetary conditionings were being used quite often to compel Belgrade on permanent cooperation with ICTY. For example, “on March 31 [2004], Secretary [Colin] Powell declined to certify that Serbia and Montenegro had met its obligations with respect to the ICTY, thus blocking the disbursal of about \$26 million (the sanction does not apply to certain kinds of assistance, such as that for humanitarian purposes or to promote democracy in municipalities). In particular, the State Department called upon Serbia and Montenegro to arrest and transfer to the ICTY Ratko Mladić, the former Bosnian Serb army commander.” – “Suspension of U.S. Aid to Serbia and Montenegro for Noncooperation with ICTY,” in *The American Journal of International Law*, Vol. 98, No. 4 (Oct., 2004), pp. 850-851.
- 39 Jonathan I. CHARNEY, “International Criminal Law and the Role of Domestic Courts,” in *The American Journal of International Law*, Vol. 95, No. 1 (Jan., 2001), p. 120.
- 40 *Ibidem*, p. 122.
- 41 *Ibidem*.
- 42 *Ibidem*.
- 43 *Ibidem*, p. 123.
- 44 *Ibidem*.
- 45 Gerry SIMPSON, *Law, War and Crime. War Crimes Trials and the Reinvention of International Law*, Cambridge: Polity Press, 2007, p. 50.

- 46 *Ibidem*, p. 53.
- 47 *Ibidem*, note 20 (Chapter 2), p. 183.
- 48 Mark OSIEL, *Mass Atrocity, Collective Memory, and the Law*, New Brunswick, NJ: Transaction Publ., 1997.
- 49 *Ibidem*, p. 7.
- 50 See note 27.
- 51 See note 47.
- 52 By “Serbia” we understand the Serbian political leadership – as a national decision-making corpus. In this perspective even if the rest of the Serbian polity would have been – let’s say, pro-Western, still the political leadership should be entitled to be referred to when talking about the Republic of Serbia (as the agents of an independent state in the international arena). No one should see Serbia apart from its leaders. That is because they act in the name of Serbia and even more they were elected through legal democratic procedures. So, more or less, they represent the will of Serbian people (how Serbs are being manipulated by media, how their perceptions are constructed in a more complex network of different variables – this is the concern of a distinct analysis).
- 53 Both the ICTY and the ICTR are operating with the *presumption of innocence* and the representatives of the same institutions are willing and impelled to take into account even those illegally apprehended indictees (see “Todorovic” or “Barayagwiza” cases: Thomas HENQUET, “Accountability for Arrests: The Relationship between the ICTY and NATO’s NAC and SFOR,” in Gideon Boas & William A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, The Netherlands: Brill Academic Publishers, 2003, pp. 113-155). So these two courts are not acting in a Jacobin spirit or manner. Everything is about procedures, documentation, proofs and so on. Therefore defendants have juridical rights as in common courts.
- 54 Mark Osiel, *Ibidem*, p. 7.
- 55 *Ibidem*, p. 80.
- 56 Bruce ACKERMAN, *The Future of Liberal Revolution*, New Haven: Yale University Press, 1992, pp. 69-99; Jon ELSTER, “Moral Dilemmas of Transitional Justice,” in Peter Baumann & Monika Betzler (eds.), *Practical Conflicts: New Philosophical Essays*, Cambridge University Press, 2004, p. 302.
- 57 Eric Posner & Adrian Vermeule, “Transitional Justice as Ordinary Justice,” in *Working Paper nr. 40*, University of Chicago Law School, March 2003, p. 40, apud.....
- 58 Michael SCHUDSON, “Dynamics of Distortion in Collective Memory,” in Daniel L. Schacter (ed.), *Memory Distortion: How Minds, Brains, and Societies Reconstruct the Past*, Cambridge, Mass.: Harvard University Press, 1995, p. 347, apud. Mark Osiel, *Ibidem*, p. 83.
- 59 SCHUDSON, *Ibidem*, p. 348.

- 60 Tzvetan TODOROV, *Abuzurile memoriei*, Timișoara: Amarcord, 1999, passim.
- 61 *Ibidem*.
- 62 *Ibidem*, p. 55.
- 63 Alain FINKIELKRAUT, *Le Juif imaginaire*, Paris : Seuil, 1980, p. 18.
- 64 Mark OSIEL, *Ibidem*, p. 85.
- 65 See note 51.
- 66 "Every society... has its own stock of substantive narratives, which represent typical human behavior patterns known and understood... This is the form in which social knowledge is acquired and stored, and which provides the framework for understanding particular stories presented to us in discourse" – see Bernard S. JACKSON, "Narrative Theories and Legal Discourse," in Christopher Nash (ed.), *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy and Literature*, Routledge, 1990, pp. 23, 30.
- 67 Mark Osiel, p. 7.
- 68 Tzvetan TODOROV, *Ibidem*.
- 69 Nenad VUKOSAVLJEVIĆ, "One Injustice cannot be Made by Causing a New One," in Helena Rill, Tamara Šmidling, Ana Bitoljanu, *20 Pieces of Encouragement for Awakening and Change*, Belgrade-Sarajevo: Centre for Nonviolent Action, 2007, pp. 149-150.
- 70 Jon ELSTER, *Closing the Books. Transitional Justice in Historical Perspective*, Cambridge: Cambridge University Press, 2004, p. 80.
- 71 *Ibidem*.
- 72 *Ibidem*.
- 73 E.g. "motives" in ancient Greece: the good of the *polis*; taking revenge on an enemy; pursuing the self-interest; envy...
- 74 Mark OSIEL, p. 7.
- 75 Frédéric GROS, "Les quatre foyers de sens de la peine," in Antoine Garapon & Frédéric Gros & Thierry Pech, *Et ce sera justice: punir en démocratie*, Paris: Odile Jacob, 2001, p. 107.
- 76 Stacy SULLIVAN, "Milošević's Willing Executioners," in *The New Republic*, 220:19(1999): 28.
- 77 Janine Natalya CLARK, "Collective Guilt, Collective Responsibility and the Serbs," in *East European Politics & Societies*, Vol. 22, No. 3, 2008, pp. 671-672.
- 78 Peter HANDKE, *A Journey to the Rivers: Justice for Serbia*, New York: Viking, 1997, p. 76.
- 79 Mark OSIEL, *op. cit.*, p. 172.
- 80 See the note XIX.
- 81 Mark OSIEL, *op. cit.*, p. 179.
- 82 *Ibidem*.

- 83 David MILLER, *On Nationality*, Oxford: Clarendon Press, 1995 (p. 189),
apud. Mark OSIEL, *op. cit.*, p. 204.
- 84 Mark OSIEL, p. 7.
- 85 *Ibidem*, p. 210.
- 86 *Ibidem*, p. 212 – Note 13 (Chapter 7): “Fifteen U.S. states, including
California, New York, Illinois, Pennsylvania, and Florida, have legislation
mandating or strongly recommending instruction concerning the Holocaust
in their public schools”.
- 87 See the Romanian transitional case – Ceaușescu’s almost sketchily retribution
to death penalty!
- 88 Claus OFFE, *op. cit.*, p. 19.
- 89 Henry ROUSSO, *The Haunting Past: History, Memory and Justice in
Contemporary France*, Philadelphia: University of Pennsylvania Press, 2002,
p. 38.
- 90 See also the case German Democratic Republic where the communist
officials had constantly and progressively affirmed that their citizens bore
no responsibility for the Holocaust (whilst capitalism and fascism are to be
blamed).
- 91 Mark OSIEL, *op. cit.*, pp. 221-222.
- 92 *Ibidem*, pp. 7-8.
- 93 Martha MINOW, *Between Vengeance and Forgiveness*, Boston: Beacon
Press, 1998, p. 26.
- 94 Mark OSIEL, *op. cit.*, p. 245.
- 95 Bojan TONCIC, “Serbia: Milosevic Trial Grips Nation,” in *IWPR Balkan
Crisis Report # 318*, 15 February 2002.