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THE PROBLEM OF TRUTH IN WAR CRIMES TRIALS

ABSTRACT

The author discusses the relationship between the truth and criminal trial in general, with a special focus on war crimes trials and their consequences for the fragile processes of consolidation of violated collective identities in post-conflict states. The authors challenge the idea that a criminal trial is a search for the truth, and present a philosophical argument to the effect that the trial is in fact an event conforming to the model of what the author calls “quasi-epistemological games”, rather than the model of an epistemological engine. The purpose of the trial is quasi-epistemological, because the model of an epistemological engine entails that the trial is primarily a search for the truth, while this is not the case with criminal trials in general, and especially with war crimes trials. He argues that, while the criminal trial readily invites the truth of the events if it is discovered, it can be and often is both valid and valuable regardless of whether “the truth, the full truth, and nothing but the truth” is discovered in its course.

Keywords: Search for the truth, quasi-epistemological games, legitimacy, war crimes, trials, collective identities.

TRUTH AND LEGITIMACY OF CRIMINAL TRIALS AS AN ISSUE

Relatively extensive discussions of the relationship between the truth and the outcome of a criminal trial have been led in legal theory over the past several decades. Most have acknowledged that the truth, while undoubtedly a legitimate goal, is not the only goal of a criminal trial,

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and that the trial may KOLwell satisfy the procedural requirements of a democratic legal system and still fail to reach the truth.² In other words, legitimate trials may and do sometimes reach decisions that are procedurally correct, yet they are substantively wrong, because they do not establish the truth of the events under consideration. Whether or not such trials are unjust simply because their conclusions are untruthful is the large issue behind most of these debates; it is, however, not an issue that this paper can address. My contention here is to establish that any controversies *vis-à-vis* the justice of criminal trials that arise from their ability to retain procedural legitimacy and still fail to find out the truth obtain in an amplified form in war crimes trials. This is due to the specific set of circumstances that makes some aspects of criminal responsibility for war crimes a more complicated issue than is the case with most other criminal trials. Additionally, the contention of the paper is that criminal trials remain valid and valuable despite these epistemological deficiencies, because their primary goal, contrary to what is widely believed, is not to establish the truth, but to perform a socially optimizing function for the victims and victim communities. Again, this, in my view, holds for any criminal trial, but especially so for war crimes trials.

The traditional view of criminal trials that has recently been summed up by Larry Laudan, who writes that “a criminal trial is first and foremost an epistemic engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators.”³ This is a view contrasted with the reality of criminal law, which contains both procedural elements and outcomes that all parties to the process are aware are neither true, nor conducive to the truth. Perhaps the most common way to criticize the view that criminal trials are predominantly epistemological engines is to point out the elements of a criminal trial that militate against a quest for the truth. Restrictions on the judicial admissibility of evidence that is known to

2 See, for example, Jenny McEwan, “Ritual, Fairness and Truth: the Adversarial and Inquisitorial Models of Criminal Trial”, in: Antony Duff et al. (eds), *The Trial on Trial: Volume One — The Truth and Due Process*, Hart Publishing, Oxford and Portland, Oregon, 2004, pp. 51–70; Heike Jung, “Nothing but the Truth? Some Facts, Impressions and Confessions About Truth in Criminal Procedure”, in: Antony Duff et al. (eds), *The Trial on Trial: Volume One — The Truth and Due Process*, Hart Publishing, Oxford and Portland, Oregon, 2004, pp. 147–156; Robert Hochman, “Brady vs. Maryland and the Search for Truth in Criminal Trials”, *The University of Chicago Law Review*, 63 (4), 1996, pp. 1673–1705.

3 Larry Laudan, *Truth, Error and Criminal Trial: An Essay in Legal Epistemology*, Cambridge University Press, Cambridge, 2006, p. 2.

be true, because of the way in which it was obtained safeguards rights and values that are perhaps no less important than the right to the truth in a criminal trial. The attorneys' privilege to refrain from telling the truth, even in situations when public interest or taste clearly demand such disclosure, testify to the observance of rights of the defendant which the right to the truth clearly does not over-ride in a criminal trial.

Ideally, the trial climaxes in a verdict that is both true and optimally satisfying for the procedural rights of all the parties involved, including both the offender and the victim (if there is an identifiable victim). However, a trial may achieve the latter without reaching the former — the truth, and can still be considered valid, despite its untruthfulness. In such a case, the trial is valid, but the procedural correctness does not by itself make the trial valuable to either the victim or the community that is directly or indirectly victimized by the crime. In order for a trial to be valuable, in addition to conforming to procedural requirements, it must play a social role that allows victims to achieve closure.

The organization of a criminal trial in modern adversarial systems provides ample evidence that the truth is not a necessary goal. The focus here in on the adversarial systems, however this is not meant to suggest that the so-called "inquisitorial" systems are factually any more truth-conducive. While the general picture of the two systems is that the adversarial trial is a game based on the idea that "if each side fought hard to present its own arguments, the truth would emerge from the collision of truth and error" and the inquisitorial trial allows the judge to play the lead role and both hear witnesses and find out the facts in search of the truth, the practical outcomes of inquisitorial trials do not necessarily contain more truth than those of the adversarial systems. In addition to the prerogative to hide the truth in legal representation, the criminal trial compromises the value of truthfulness on a deeper level, through the presumption of innocence that is one of the landmarks of a democratic criminal justice system. While the presumption of innocence entails that the entire burden of proof is on the prosecution, on an epistemological level this conceptual setting entails that the verdict is not necessarily based on the truth. Namely, the presumption of innocence means that the defendant is found "not guilty" if the guilt cannot be proven beyond reasonable doubt; however the fact that the guilt cannot be proven does not entail that factual innocence is proven: one may be factually guilty and legally "not guilty", the latter entailing that sufficient evidence of guilt is lacking, but not entailing that the offender did not commit the crime. "Just as,

in the clinical trial of a drug, the failure to prove a drug's efficacy is not proof that the drug is non-efficacious, so the failure to prove a defendant's guilt is not proof that he did not commit the crime".⁴

The presumption of innocence is there to address the absence of equality of arms between the state and the accused in a criminal trial, taking account of the fact that the state is overwhelmingly superior in resources and power when compared to the individual. However, protecting the individual by placing the burden of proof on the state does not necessarily serve the goal of discovering the truth.

One could argue, of course, that all the procedural restraints on the prosecution and the police, as well as the seemingly broad rights conferred on the defense to hide or circumvent the truth serve a broader epistemological goal, that is to prevent excesses in the pursuit of a conviction by the state. While in some cases such excesses might lead to the truth more directly, in other instances they could make the truth hopelessly unattainable. In other words, one may argue that the current procedural regulation of the criminal trial in the adversarial system is a useful balance that aims to achieve an optimum in truth-seeking, while not being able to find out the truth in every trial. The utilitarian argument would thus suggest that the current system is geared to making sure that „on balance” the trials tend to produce truthful outcomes, while the price for this is the epistemological game that, admittedly, leads to some untruthful judicial outcomes. In other words, crudely put, the system aims to provide justice in most cases, while necessarily including some legitimate trials where factually innocent people will be found guilty and some factually guilty people will be found innocent.

Clearly the adversarial system allows some guilty people to walk free, and this is not what concerns us the most; one is taught to be much more concerned about those innocent people who may be found guilty. The crux of the argument, however, is in the acknowledgement that the truth in a criminal trial, while certainly desirable, is sometimes unattainable, and that trials are held as the best known way for society to address crime, against the awareness that some trials will be fair, but will not result in the truth being found out. The justification of imperfect criminal trials may be sought in their broader social mission, be it social control alone, or a desire to mete out justice between the offender and society or the offender and the victim.

4 Ibid.

The complexity of the relationship between the truth and other values in a criminal trial is well illustrated by the role played by the presumption of innocence. The history of jury trials shows that until the end of the eighteenth century jurors were sworn to deliver “a *true* verdict”, rather than to judge based on a balance of doubts (“beyond reasonable doubt”), as has been the case later. The former was changed not because the latter would enhance the truth-seeking in a trial, but because it addressed the issue of rights that were quite separate from, and additional to, the quest for the truth. In the former context (“delivering a true verdict”), the jurors could reach a materially true verdict in a particular trial, but could easily harm the rights of the accused and fail to uphold a standard of proof that would generally be thought to guarantee that in other cases an innocent person would not be condemned. Conversely, in the latter context (reasonable doubt), they could acquit based on the procedural considerations of right, while failing to deliver a true verdict. In both cases the truth and other values are balanced differently.

All of the above considerations apply with additional force to war crimes trials, because, quite apart from the procedural script of the judicial-epistemological game that the criminal trial generally is, war crimes trials involve issues of factual truth far beyond the scope of those characteristic of “ordinary” trials. One of the key elements in processing war crimes is intelligence; especially in high profile cases, intelligence places a crucial role in the trial, while the way in which it is collected, processed, selected and used to launch a war crime prosecution is potentially a highly epistemologically challenging aspects of the war crime trial itself that relates to a potentially critical vagueness of facts.

WAR CRIMES TRIALS AND THE VAGUENESS OF FACTS

Wars are essentially political affairs, and war crimes take place within a profoundly political context, where circumstances are so complex that no independent observer would be able to grasp the full truth of the events without assistance by the insiders. Lines of subordination help to an extent, and the principle of command responsibility that holds commanding officers liable for the crimes committed by the subordinates is designed to cast a semblance of order upon the often chaotic circumstances surrounding war crimes. Just as military operations are affairs opaque to the average member of the public, and can be neither successfully run, nor properly understood without valid intelligence, war crimes, which take place amid such operations, are also both facilitated and later explained by intelligence.

Intelligence data, once they become official reports, are treated as evidence in war crimes trials, yet such data are usually far from indubitable or comprehensive. The relationship between intelligence and the political leaders is a complex one, with both the provider of intelligence (the intelligence community) and its consumer (policy makers) influencing each other. With both partners in the intelligence relationship ultimately depending on each other, their animosities and mistrust (often due to politicians being unwilling to accept discouraging news, or intelligence analysts failing to recognize the politicians need for encouragement) are destined to be reconciled in a compromise relationship. In a working long term relationship between an intelligence agency and her consumers, both will have to act acceptably to the other side, and this means that politicians will have to heed the warning of the intelligence community in the most important cases, while the intelligence community will have to select and formulate its conclusions and reports in ways acceptable to the policy makers. The interpretation of such intelligence as evidence in war crimes trials is often extremely challenging.⁵

War crimes trials convey moral judgments that, while not perfect, do help stabilize the identities of those affected by the crimes. The experience of being a victim or belonging to a community victimized by a war crime is an identity-shattering one: without an external acknowledgement of the shattering nature of the crime and the appropriate moral judgment of the perpetrators, identities may remain unstable for the rest of a lifetime. Punishing war criminals is thus more a ritual that helps those affected re-assert themselves than a quest for the full truth: this is what “closure” means for most victims of war crimes. The vagueness of facts that plagues most war crimes trials does not significantly affect this moral function of the punishment meted out at such trials.

War crimes trials also assist the outside observers in re-asserting their moral high ground and consolidating their self-perceptions, especially after policy failure. This certainly applies to situations such as that in Rwanda, where “about 800,000 Tutsi were killed in a four-month period between April and July 1994; distant powers did next to nothing while one of the worst genocides the world had seen in five decades was carried out”.⁶

5 Richard K. Betts, “Two Faces of Intelligence Failure: September 11 and Iraq’s Missing WMD”, *Political Science Quarterly*, 122 (4), Winter 2007–8, pp. 585–606.

6 Michael Brown & al., “Introduction”, *The International Dimensions of Internal Conflict*, MIT Press, Massachusetts, Cambridge, 1996, p. 11.

In the post-genocide Rwandan society polls were conducted to assess the attitudes to the International Criminal Tribunal for Rwanda (ICTR) and the trials launched by it: the results were highly critical of the international justice achieved through ICTR in spite of the fact that this was a society where wives married to Tutsi husbands had to watch their husbands being massacred and proceed to remarry so as to sever any ties to the Tutsi. The trauma of the genocide did not mean that people supported the ICTR, with most respondents suggesting that the Tribunal ‘try to avoid corruption by resisting influences by the powerful states.’⁷ Rwanda was not the only case where the perceptions of the international involvement cast serious doubts even among the victims who were allegedly protected:

“Multilateral actions were taken in Bosnia and Somalia, but they failed to bring the armed conflicts in these countries to a speedy end. More than three years of slaughter in Bosnia made a mockery of international efforts through the EU, NATO, and the United Nations to bring fighting to an end. The UN force in Somalia was withdrawn in March 1995—the struggle for power among warlords continued. The credibility of the world’s major powers, the multilateral organizations through which they often operate, and the international community in general has suffered.”⁸

Outside perceptions tend to isolate places and contexts so as to exclude the responsibility of the outside observers, and often take place in a mental setting painted vividly by Richard Cohen when he describes Bosnia: “Bosnia is a formidable, scary place of high mountains, brutish people, and tribal grievances noted in history and myth born of boozy nights by the fire. It’s the place where World War I began and where the wars of Europe persist, an ember of hate still glowing for reasons that defy reason itself.”⁹ The trials of the Bosnian killers take place in a global context of such perceptions, and indeed they serve their purpose by primarily catering to the needs of destabilized self-image and sense of clear identity by the international community, which had largely failed in preventing the genocide in Bosnia,

7 Anastas Shyaka, “Justice and Reconciliation in Post-Genocide Rwanda: Assessing the Impact of the International Criminal Tribunal for Rwanda”, *Review of International Affairs*, LVIII (1130–1131), 2008, pp. 15–25.

8 Op. cit., Michael Brown & al., “Introduction”, *The International Dimensions of Internal Conflict*, MIT Press, p. 11.

9 Richard Cohen, “Bosnia’s Cause is Lost and so, probably, is NATO”, *International Herald Tribune*, 30 November 1994, p. 4.

while having troops on the ground. The very context and the perceptions often bend the truth. However, what matters to the victims and their families is not whether or not Bosnia is a brutish place, for they know that it is not; what they want to see is a clear moral judgment passed on those who had destroyed their lives and those of their close ones. Such a purpose, while it can be served by the war crimes trials, does not necessarily require the trials to yield the truth of the facts, let alone the “full truth”. Trials can serve this purpose and be “valid” in allowing the victims and their families to consolidate their own self-image and ability to believe in a future life in their communities, without necessarily painting a fully accurate picture of the events. Imperfect justice, it seems, serves important goals just as well as a perfect one might.

RIGHTS VIOLATIONS AND RIGHTS RECTIFICATION

In an important sense, a crime violates essential rights of the victim and those close to the victim; addressing such rights violations is at least as important from a social and moral point of view as to establish the truth of the events. Even when a criminal trial establishes the truth, it is often what could be considered a “minimal truth”: a set of basic facts that point to one’s guilt for the crime, without detailed contextual considerations. Such “minimal” truth tends to be sufficient for addressing rights violations. In fact, rights may well be seen as systematically more important than the material truth in a trial, when broader considerations are taken into account, first all the point of view and interests of the victims. If, as is well known, breaking into one’s house violates one’s sense of security and privacy, it is easy to imagine just what type of consequences for one’s personal integrity a rape or a murder generates. Punishing the perpetrators conveys to the victim the support of the society and a strong moral judgment of the perpetrator, saying to the victim in an important sense that she is right and the perpetrator is wrong in a sense important to the community. This “semantic” aspect of the message is essential for the preservation of self-respect and psychological stability in most victims of violent crime.

If an “ordinary” crime violates rights and threatens integrity, a war crime violates many more rights, much more massively. The pressure to address the rights violations, primarily those of the victims and their communities, and secondarily those relating to a general moral order that is offended by the war crimes, goes beyond and is hierarchically above the need to establish the full

truth. Those punished for war crimes may not be the decision-makers, and often they are not the most responsible for the crimes, but that does not significantly reduce the moral appeal of the convictions. Some such offenders may not have been able to act otherwise given all the facts of the situation on the ground; still a reasonable moral observer would find them guilty because they did not choose to sacrifice their own lives rather than taking those of so many others.

The M'Naughton Rules has been the main standard of criminal culpability for mentally disordered offenders in common law since its adoption in Great Britain in 1843. The general structure of the culpability test includes the cognitive and the volitional criterion, in the form that, in order to be fully criminally responsible for an offence, the offender “must have known that what he was doing was wrong” (the cognitive test), and “must have been able to act otherwise” (the volitional test). The point of the test is that insanity consists of either a lack of understanding of the meaning and significance of one’s actions, or an inability to fully control one’s behaviour. This test has remain the key standard for forensic psychiatry till today. The M'Naughton Rules have been the standard common law test of culpability where issues of mental competence have been involved since 1843, entail that for the offender to be culpable a cognitive criterion of responsibility must apply, so that “the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.”¹⁰

The *cognitive* criterion requires that “the offender knew that what he was doing was wrong”. However, it is at least intuitive to ask whether a supplemental volitional criterion is also required so to make sure that the offender who knew that he was doing what was wrong was also able to act otherwise, or to resist acting out of “irresistible impulse”. A defence based on the idea that some crimes committed by mentally compromised individuals

10 Daniel M'Naughten’s Case, House of Lords, Mews’ Dig. i. 349; iv. 1112. S.C. 8 Scott N.R. 595; 1 C. and K. 130; 4 St. Tr. N.S. 847 May 26, June 19, 1843. stable internet address: <http://wings.buffalo.edu/law/bclc/web/mnaghten.htm>.

were a product of their illness on a volitional level was tested by the so-called “Durham Rule” in 1953. The Rule was eventually overturned by the US federal courts on the grounds that it allowed too much legal leeway to offenders suffering from various addictions. In 1972 the American Law Institute designed a composite rule, combining the cognitive and volitional criteria, which stipulated that an offender could not be considered fully culpable if one lacked “substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law”¹¹ “(...) a time when the criteria for determining criminal insanity were still flexible and before doctors were so commonly used as “expert witnesses” (...) it is not surprising that the dominant figure was the judge, who could sum up the evidence and instruct the jury in such a way as to make the verdict virtually a forgone conclusion”.¹² Given both the cognitive and volitional criteria for full culpability, one wonders whether in many war crimes trials the offenders satisfied the volitional criterion and could have realistically wished to have acted otherwise, while they were caught in a frenzy of peer-pressure and faced implicit or explicit threats to their lives if they deviated from the prevailing views and behaviour of the other troops.

Although the M'Naughton Rules and the subsequent codification of criminal insanity are not invoked unless mental illness is an issue, they bring into play profoundly intuitive criteria that are assumed to be satisfied in any criminal trial. While in the great majority of war crimes trials sanity has never become an issue, one wonders how many of the offenders would have fared should their volitional competence according to the M'Naughton Rules have been challenged. More about this is said in the following discussion of plea-bargaining and defence based on duress in the Dražen Erdemović case before ICTY. While the Erdemović verdict opens many questions with regard to the validity of duress in the commission of the most serious war crimes, the principle that the Trial Chamber upheld can easily be broadened to many

11 See: Alexander Walk & Donald J. West, (eds), *Daniel M'Naughton: His Trial and the Aftermath*, The Royal College of Psychiatrists, London, 1977, pp. 74–81; Richard H. Kuh, ‘The Insanity Defense: An Effort to Combine Law and Reason’, *University of Pennsylvania Law Review*, 110 (6), 1962, pp. 771; Paul H. Robinson & Marcus D. Dubber ‘An Introduction to the Model Penal Code’, 2010, p. 15, stable Internet address: www.law.upenn.edu/fac/phrobins/intromodpencode.pdf.

12 William F. Bynum, Roy Porter & Michael Shepherd (eds), ‘Introduction’, *The Anatomy of Madness: Essays in the History of Psychiatry*, vol. II: *Institutions and Society*, Tavistock Publications, London & New York, 1985, p. 9.

perpetrators of war crimes who had operated in the same circumstances as Erdemović had.

Every intimate observer of the civil war in the former Yugoslavia knew that ordinary military officers had no real say in areas factually controlled by the criminalized paramilitaries who were linked directly to the very top of the political establishments of Serbia, and to some extent Croatia, in the 1990s. In disintegrating states ravaged by ethnic warfare, local or paramilitary leaders easily become warlords who do not recognize the official military hierarchy. One of the Yugoslav Army officers tried before the International Criminal Tribunal for the former Yugoslavia (ICTY), Colonel Veselin Šljivančanin, was convicted for the killing of prisoners of war captured in the Vukovar hospital, because this had been his zone of military responsibility and he was filmed telling an International Red Cross worker away from the hospital, just prior to the killings. The indictment does not imply that Šljivančanin gave the order to shoot the prisoners, or that any of the regular soldiers were involved. The paramilitaries commanded by the notorious Željko Ražnatović Arkan, who were allegedly at the scene, wielded such political power during the wars of disintegration of the former Yugoslavia that they could have, and almost certainly would have, executed anyone, including Šljivančanin, had he stood in their way. The truth of the events is that Šljivančanin was at the scene, that he was formally responsible for controlling the situation, and that prisoners of war were murdered in his immediate zone of responsibility, possibly under his very gaze. Legally speaking, the conviction is valid; but this may well not be the whole truth about the events. While the true circumstances might not absolve Šljivančanin of responsibility, the partiality of the truth that the trial can grasp makes it impossible to fully understand the causal chain of events leading to the tragedy and to prevent them in the future.

PLEA-BARGAINING

Plea-bargaining is another well known aspect of the criminal trial that shows that the trial is not primarily about the truth. The practice of plea-bargaining can be said to compromise both the truth of the criminal proceedings and justice, especially when it is applied, directly or indirectly, in a war crimes trial. People who enter plea bargains typically receive dramatically lower sentences in exchange for incriminating other perpetrators. This means that those entering a plea bargain have every incentive to provide information of significant criminal activity, whether it is true for the particular

accused or not. They have an incentive to incriminate at a maximum given the circumstances, and in many cases the greater the guilt of others that they help prove, the greater the reduction of their own sentence. While agreements between such witnesses and the prosecution are not publicly revealed, the logic of plea bargaining implies that more convictions are traded for greater lenience to the cooperative witnesses. In war crimes trials, plea bargaining involves particularly dramatic accusations in exchange for a reduction of the sentence, because all such crimes tend to be especially offensive to public moral, so that any leniency to the offender must be justified by particularly large gains for the prosecution. This means that a war criminal who enters a plea bargain will typically incriminate others for the most serious crimes, and this will clearly have political implications for the silent parts, namely the states in whose name the crimes might have been committed.

An interesting case in the recent Yugoslav war crimes trials was in fact the first trial, that of Dražen Erdemović. A Bosnian Croat who had fought in the Croatian Army, and then defected to the Bosnian Serb Army, Erdemović had been caught taking bribes from refugees to escort them across the border and was sent to a special regiment of the Bosnian Serb Army, where he participated in an execution squad at Srebrenica in 1995. According to his own admission, he was directly responsible for the murder of around 100 people, whilst participating in the collective executions of “hundreds” (ICTY). Erdemović entered a plea bargain, claiming that he had been acting under duress. He provided evidence against others, and was eventually sentenced to 5 years. He received an early release from the Norwegian prison in 1999. After leaving the prison, Erdemović immediately entered ICTY’s witness protection programme. The Tribunal’s explanation of the verdict reads:

“The Trial Chamber first considered *“the personal circumstances”* of the accused, namely his age (*“he is now 26 years old...he is reformable...”*), his family situation (*“the accused has a wife, who is of different ethnic origin, and the couple have a young child who was born on 21 October 1994...”*), his background (*“...he was a mere footsoldier whose lack of commitment to any ethnic group in the conflict is demonstrated by the fact that he was by turns a reluctant participant”* in the armed forces of the various parties to the conflict), and his character (*“the accused is of an honest disposition; this is supported by his confession and consistent admission of guilt...”*) (ICTY).”¹³

13 Dražen Erdemović, Case Information Sheet (accessed 10 August 2010), www.icty.org/x/cases/erdemovic/cis/en/cis_erdemovic_en.pdf.

Clearly the fact that Erdemović had been involved in extortion from the refugees and had already been punished for this by being sent to the 10th Sabotage Detachment of the Bosnian Serb Army, does not testify to his „honest disposition“. Yet, the court found him “sincere” and “reformable”, even „a reluctant participant“. The facts that he received what must be considered an extremely lenient sentence, and served only a part of it, in one of the most liberal prison systems available to ICTY, seems to violate a sense of justice for the magnitude of the crimes for which he pleaded guilty. One might wonder just how reliable is the incriminating evidence that a person of such “honest” disposition provides against others under circumstances where he has to gain or lose literally everything. While little compassion may indeed be due to those incriminated by Erdemović for the Srebrenica massacre, in light of the magnitude of the crime and the level of offence, it is at least reasonable to wonder about the quality of the “truth” provided by Erdemović, and consequently about the capacity of such trials to establish truthful insights into what had happened immediately before, during and after the massacre. Without such insights, it seems impossible to adequately gauge the relative guilt of the various perpetrators and their superiors, or to understand the circumstances that led to the murders. Again, Erdemović’s treatment appears to fly in the face of both justice and the truth when what he had admitted to having done is taken into account, and the circumstances of his testimonies make one doubtful as to how far he should be trusted. However, his testimonies helped convict numerous others whose role in the massacre may not have been elucidated within a full context of the events, but whose responsibility for the murder of prisoners of war and civilians could be established as a “minimal truth” necessary to punish. This value of Erdemović’s testimony was clearly treated by the court as more important than the doubts with regard to the truth of the events that such testimonies necessarily invited during the trial (ICTY).

PROTECTED WITNESSES

The role of protected or anonymous witnesses is equally problematic in the war crimes trials. One of the leaders of the Rwandan 1994 genocide, Colonel Theoneste Bagosora, who received a life sentence for genocide and crimes against humanity, was tried based on testimonies by over 50 protected witnesses, most of whom had been members of the units that had participated in the genocide. For example, the 56th witness in the proceedings, codenamed “KJ”, had been a gendarme in a unit directly under the command of Bagosora, and could thus provide direct information on his actions and the

orders Bagosora had given.¹⁴ Witnesses came from the ranks of the immediate perpetrators of the genocide, and remained at large in exchange for providing testimonies. Similarly to the Erdemović case, and given the scope of the crimes committed in Rwanda in 1994, it is clear that any of the perpetrators who was given the opportunity to testify against others would have had every incentive to maximise the crimes of others, while minimising their own offences.

Bagosora was arrested and accused based on reliable intelligence, and given the nature of the genocide and its internal operational dynamics, such information would have been a combined product of Electronic Intelligence (Elint), Signals Intelligence (Sigint) and Human Intelligence (Humint). Especially Elint and Sigint are types of intelligence-collection that are not selective: electronic or signals intercepts result in massive information that includes not just selected data on specific individuals, but complete sequences of data allowing a more complete picture of the truth. If such intelligence were revealed it would have likely contributed more to creating a complete picture of the events than did the trial of Bagosora or the other leaders of the genocide. Similarly to the Srebrenica tragedy, intelligence could paint a picture of which the trials could only establish fragments at best. It was the frustration by the inability of the trials before the International War Crimes Tribunal for Rwanda (ICTR) to establish useful truths about what had happened that led to the establishment of “truth-commissions” in several post-conflict societies, including, for example, both Rwanda and the Northern Ireland.¹⁵

THE SOCIAL FUNCTIONALITY OF WAR CRIMES TRIALS

While criminal trials are traditionally thought to relate more or less exclusively to individual guilt, and were thus initially hoped to preclude the assignment of collective blame for war time atrocities to nations and states,

14 See stable internet address: <http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/eea9364f4188dcc0c12571b500379d39/b466e88e448f6c79c12571fe004fa52a?OpenDocument>.

15 See: Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, Routledge, New York, 2002; Teresa G. Phelps, *Shattered Voices: Language, Violence, and the Work of Truth Commissions*, University of Pennsylvania Press, Philadelphia, 2004; Robert I. Rotberg & Dennis F. Thompson, *Truth v. Justice: The Morality of Truth Commissions*, Princeton University Press, Princeton, 2000; Patricia Lundy, ‘Commissioning the Past in Northern Ireland’, *Review of International Affairs*, LXI (1138–1139), 2010, pp. 101–133.

their factual social impact is primarily on the level of collective perceptions and meanings.¹⁶

It is important for the victim communities of war crimes that the offences are called by their real names, that words such as “genocide” or “extermination of population” are used in legal documents, at least as much as that some of the actual killers are tried and convicted. After the trauma of the war crime, responsibility needs to be mapped out and located in a relevant collective: people need to understand that it was not their community that was at fault, but the policies of those who perpetrated the crimes. If trials are not conducted and crimes are not properly labeled victims are additionally harmed, because confusion in the names used and in explaining the chains of responsibility will often lead to the survivors and their close ones blaming themselves for what had happened to them. This principle is identical to the psychological processes in many victims of ordinary crime.¹⁷

War crimes, even when they are committed against individuals, are never solely individual: they tend to bear a collective motive: either a hatred of the enemy that goes beyond what is allowed in war, or the intention to destroy the enemy community “in whole or in part”. Thus the expectation of the war crimes trials is that blame is apportioned collectively, as well as individually. While it is usually clear that such trials, due to factual exigencies and the typical chaos of circumstances that obtain in wars “on the ground”, can rarely conduce to a full, proportionally presented and credible truth of all of the relevant events, their social function includes the need to indicate where the predominant fault for the crimes lies. This point goes beyond the well-recognized one that “one problem is to reconcile the requirements of justice with the requirements of peace”.¹⁸

The discussion of the instrumental value of war crimes trials is easily misunderstood. If trials are seen in the light of leading to reconciliation and peace, then they must perform a political function and, rather obviously, must be politically balanced, albeit as subtly as possible.

16 Klaus Bachmann, “Measuring Reconciliation after Violent Ethnic Conflict”, *Review of International Affairs*, LVIII (1130–1131), 2008, pp. 5–14.

17 For more see: William Ryan, *Blaming the Victim*, Vintage Books, New York, 1971; Ofer Zur (accessed 8 August 2010), Rethinking “Don’t Blame the Victim”: Psychology of Victimhood’, Zur Institute, www.zurinstitute.com/victimhood.html.

18 Peter Malanczuk & Michael B. Akehurst, *Akehurst’s Modern Introduction to International Law*, 7th Edition, Routledge, London, 1997, p. 359.

Another level of instrumental discussion of war crimes trials relates not to the political, but to the social function of such trials, and it is common to all criminal trials. The only difference between such social function in ordinary and in war crimes trials is that in the former case the blaming sought is individual, and in the latter primarily collective. This is the logical outcome of the motivation and nature of the crimes: ordinary crimes tend to be individual, while war crimes tend to be collectively targeted. It is easy to confuse the political and social instrumentality of war crimes proceedings, and that is why some of the commentators tend to disparage the discussions of the former: to say that war crimes trials ought to be politically opportunistic in one sense, does not imply that trials do not have other functions that are not political and are closer to the common intuitions of justice, in another sense.¹⁹

The collective reprimand that war crimes trials inevitably conduce to allows communities to consolidate their self-perceptions after being victimized; they also allow the perpetrators' communities to conduct soul-searching on the social dynamics that had precipitated the events leading to war crimes. The more diffuse the blame is and the more dispersed the causes of the war and war crimes are, the more difficult it is for the victims and their immediate communities to socially and psychologically heal. Crimes such as that of Nazi Germany against the Jews in World War II are encapsulated in war crimes verdicts at Nuremberg, and consequently in the official history, in such an unequivocal and singularly condemning way that it was, semantically and psychologically speaking, possible for the German and Jewish nations to position themselves in this historical situation: Jews were the victims, and Germans were the perpetrators. The former could build their view of history based on this unequivocally established fact, and the latter needed to repent, reform and go along a different political and ideological path into the future. The outcome of such clear-cut reprimand has been a success: both the perpetrators' and the victims' communities have recovered and achieved closure, leading to constructive mutual relations. Given the extent of the historical burden, this has been an incredibly optimistic outcome.

Unlike the Nuremberg and Tokyo Tribunals' legacy, the inheritance of the international war crimes tribunals for the former Yugoslavia and for Rwanda is more nuanced and less capable to apportion singular guilt.

19 Ibid.

In complex circumstances such as those of the Yugoslav 1991–1995 wars, and to some extent the Rwandan 1994 genocide, trials play out “social quarrels” between the communities in conflict (the post-armed conflict phase being a part of the extended structural conflict between them).²⁰ Such quarrels must run their course until mutual perceptions and self-perceptions are sufficiently stabilized to allow a functional approach to the future. They may not be particularly economical in time, energy and resources; they may mete out justice only to a select group of perpetrators who did not necessarily play the key roles in the crimes; they may or may not establish a sense of responsibility among the national and group leaderships in the context of future conflicts. Above all, trials may not achieve an optimum of the truth, and indeed often they do not. Still, they remain not only valid, but fundamentally necessary in the same way as quarrels are: some issues would be resolved in time without a quarrel, but in order to achieve the plain of discussion where solutions are imminent, communities and individuals must sometimes go through the quarrelling process so as to stabilize their own sense of identity and reach in the conflict. Once this social function of shifting blame and delimiting the bounds of one’s role in the disturbingly intimate relationship that underlies murder and extermination has reached its exhaustion point, the future becomes open for the communities caught in the mental and moral impasse created by the crimes and their consequences.

LITERATURE

1. Bachmann, Klaus, “Measuring Reconciliation After Violent Ethnic Conflict”, *Review of International Affairs*, LVIII (1130–1131), 2008, pp. 5–14.
2. Betts, Richard K., “Two Faces of Intelligence Failure: September 11 and Iraq’s Missing WMD”, *Political Science Quarterly*, 122 (4), Winter 2007–8, pp. 585–606.
3. Brown, Michael & al., “Introduction”, *The International Dimensions of Internal Conflict*, MIT Press, Massachusetts, Cambridge, 1996.
4. Bynum, William F., Porter Roy & Shepherd Michael (eds), “Introduction”, *The Anatomy of Madness: Essays in the History of Psychiatry, vol. II: Institutions and Society*, Tavistock Publications, London & New York, 1985.
5. Cohen, Richard, “Bosnia’s Cause is Lost and so, probably, is NATO”, *International Herald Tribune*, 30 November 1994, p. 4.

20 Anastas Shyaka, “Justice and Reconciliation in Post-Genocide Rwanda: Assessing the Impact of the International Criminal Tribunal for Rwanda”, *Review of International Affairs*, LVIII (1130–1131), 2008, pp. 15–25.

6. Daniel McNaghten's Case, House of Lords, Mews' Dig. i. 349; iv. 1112. S.C. 8 Scott N.R. 595; 1 C. and K. 130; 4 St. Tr. N.S. 847 May 26, June 19, 1843. stable internet address: <http://wings.buffalo.edu/law/bclc/web/mnaghten.htm>.
7. Dražen Erdemović Case Information Sheet (accessed 10 August 2010), www.icty.org/x/cases/erdemovic/cis/en/cis_erdemovic_en.pdf.
8. Eigen, Joel Peter, *Witnessing insanity: madness and mad-doctors in the English court*, Yale University Press, New Haven & London, 1995.
9. Hayner, Priscilla B., *Unspeakable Truths: Facing the Challenge of Truth Commissions*, Routledge, New York, 2002.
10. Hochman, Robert, "Brady vs. Maryland and the Search for Truth in Criminal Trials", *The University of Chicago Law Review*, 63 (4), 1996, pp. 1673–1705.
11. Jung, Heike, "Nothing but the Truth? Some Facts, Impressions and Confessions About Truth in Criminal Procedure", in Duff, Antony et al. (eds), *The Trial on Trial: Volume One — The Truth and Due Process*, Hart Publishing, Oxford and Portland, Oregon, 2004, pp. 147–156.
12. Keen, Sam, *Faces of the Enemy*, Harper and Row, New York, 1986.
13. Kipnis, Kenneth, "Professional Responsibility and the Distribution of Legal Services", in Kipnis Kenneth & Meyers Diana T. (eds), *Economic Justice: Private Rights and Public Responsibilities*, Towman & Allanheld, Totowa, New Jersey, 1985, pp. 130–142.
14. Kuh, Richard H., "The Insanity Defense: An Effort to Combine Law and Reason", *University of Pennsylvania Law Review*, 110 (6), 1962, pp. 771.
15. Laudan, Larry, *Truth, Error and Criminal Trial: An Essay in Legal Epistemology*, Cambridge University Press, Cambridge, 2006.
16. Lundy, Patricia, "Commissioning the Past in Northern Ireland", *Review of International Affairs*, LXI (1138–1139), 2010, pp. 101–133.
17. Malanczuk, Peter & Akehurst, Michael B., *Akehurst's Modern Introduction to International Law*, 7th Edition, Routledge, London, 1997.
18. McEwan, Jenny, "Ritual, Fairness and Truth: the Adversarial and Inquisitorial Models of Criminal Trial", in: Antony Duff et al. (eds), *The Trial on Trial: Volume One — The Truth and Due Process*, Hart Publishing, Oxford and Portland, Oregon, 2004. pp. 51–70.
19. Ofer Zur (accessed 8 August 2010), "Rethinking "Don't Blame the Victim": Psychology of Victimhood", Zur Institute, www.zurinstitute.com/victimhood.html.
20. Phelps, Teresa G., *Shattered Voices: Language, Violence, and the Work of Truth Commissions*, University of Pennsylvania Press, Philadelphia, 2004.
21. Robinson, Paul H. & Dubber Marcus D., "An Introduction to the Model Penal Code", 2010, p. 15, stable Internet address: www.law.upenn.edu/fac/phrobins/intromodpencode.pdf.

22. Rotberg, Robert I., & Thompson, Dennis F., *Truth v. Justice: The Morality of Truth Commissions*, Princeton University Press, Princeton, 2000.
23. Ryan, William, *Blaming the Victim*, Vintage Books, New York, 1971.
24. Shyaka, Anastas, “Justice and Reconciliation in Post-Genocide Rwanda: Assessing the Impact of the International Criminal Tribunal for Rwanda”, *Review of International Affairs*, LVIII (1130–1131), 2008, pp. 15–25.
25. Walk, Alexander & West, Donald J. (eds), *Daniel McNaughton: His Trial and the Aftermath*, The Royal College of Psychiatrists, London, 1977.

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PROBLEM ISTINE U SUĐENJIMA ZA RATNE ZLOČINE

APSTRAKT

Tekst se bavi razmatranjem odnosa između istine i krivičnog postupka uopšte, sa posebnim naglaskom na suđenja za ratne zločine i njihove posledice za osetljive procese konsolidacije narušenih kolektivnih identiteta u post-konfliktnim državama. Autori dovode u pitanje ideju da je krivični postupak isključivo traganje za istinom, i razvijaju filozofsku argumentaciju kojom pokazuju da se konkretno krivično suđenje rukovodi modelom koji autori nazivaju “kvazi-epistemološkim igrama”, a ne modelom „epistemološkog motora”. Svrha suđenja je kvazi-epistemološka zbog toga što model „epistemološkog motora” podrazumeva da se suđenjem pre svega traga za istinom, što gotovo nikada nije slučaj kada je reč osuđenima za ratne zločine. U tekstu se argumentiše da dok, s jedne strane, krivično suđenje rado i prirodno inkorporira istinu o događajima ako ju je moguće otkriti, ono može biti vredno i procesno validno bez obzira na to da li je celovita istina u njemu otkrivena. *Ključne reči*: potraga za istinom, kvazi-epistemološke igre, legitimnost, ratni zločini, suđenja, kolektivni identitet.