Facing Up to the Past: Bystanders and Transitional Justice

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Indifference enables evil to spread and history has been witness to the bloody results of inaction. While over the last twenty years the transitional justice movement has taken enormous strides in addressing the consequences of mass violence and repression, it has largely failed to confront bystanders with the tragic consequences of their passivity. Bystanders are those who lived through a violent or repressive period, but who were neither perpetrators nor victims of crimes. They constitute the likely majority in post-conflict societies and their views of the past are critical to long-lasting peace. Trials, truth commissions, and other forms of transitional justice, like lustration, aim to acknowledge victims and stigmatize if not punish wrongdoers. Commissions of historical record may chastise particular social sectors (e.g. industrialists or landowners) for the role they played in maintaining a repressive regime. Yet transitional justice mechanisms do not engage bystanders directly—they are the audience for, but not the subjects of, courts and commissions.

Theories of transitional justice essentially assume that bystanders are aware of the work of war crimes trials or truth commissions, will be suitably horrified in learning "the truth" of the crimes committed in their name, and will adjust their political sensibilities accordingly to ensure that history will not be repeated. Transitional justice mechanisms, however, ignore the role of bystanders, leaving them without an official response to their role in the past horrors. But doing *nothing* in the context of genocide, ethnic cleansing, and other forms of mass violence is doing *something*. The promise of transitional justice to inaugurate a state's commitment to addressing past violence will not be fully realized unless we innovate the transitional justice tool kit in order to directly engage this overlooked but critical population.

I began to appreciate the importance of bystanders as a distinct subject of transitional justice while participating in a project at the Human Rights Center at the University of California, Berkeley. Almost four years after the 1995 Dayton Peace Accords ended the conflict in Bosnia and Herzegovina, our U.S.-based researchers joined our Bosnian colleagues in the Balkans to learn what Bosnian judges and prosecutors thought of the International Criminal Tribunal for the Former Yugoslavia and its war-crimes prosecutions. Yet my keenest appreciation for the complexities of rebuilding communities after war came not from the judges and prosecutors, but from

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watching the way a Bosnian Serb researcher, Natasha,[1] grappled with these issues and with her fellow Bosnian Muslim (Bosniak) and Bosnian Croat researchers.

All the Bosnian researchers were innocent bystanders. None had served in the armed forces, nor had they belonged to organized political groups. Yet there were tensions among them about the war and deep disagreements about how communities—their own and others—should address the past.

Natasha's responses in particular challenged many common ideas and expectations about war and its aftermath. Many scholars, advocates, and diplomats who endorse international war-crimes prosecutions believe that trials foster reconciliation. They assume that individual political and military leaders—rather than a "people"—are responsible for causing war atrocities. From this perspective, criminal trials not only remove the bad leaders from power, but also avoid collective punishment of the general population on the aggressor's side. In the case of the Balkans conflict, the trials of Bosnian Serb war criminals were supposed to enable both victims of Bosnian Serb atrocities and innocent Bosnian Serb bystanders to embrace a collective future. Instead, Natasha taught me several lessons that shed new light on the conditions that foster reconciliation between bystanders and victims, and the role that international criminal trials may play in this process.

Even bystanders who are protected by aggressor forces experience war as profoundly destabilizing and disempowering

Natasha was the first Bosnian Serb I met who had spent the war in a Bosnian Serb zone. Her city had not been attacked. I presumed that she had enjoyed a relatively easy, somewhat insulated, few years compared to most Bosniaks, who bore the brunt of both Bosnian Serb and Bosnian Croat assaults. I asked what it was like for her during the war. In a moment, she seemed to be reliving the past; her eyes filled with tears and she stared at a spot on the table, her voice quiet as she spoke.

"The first year, we all thought the war would end tomorrow. The second year we thought it would never end. The third year, we stopped thinking. We just went numb."

I asked how she coped.

"I played the piano in the dark."

Natasha and her family felt trapped. There was no organized internal opposition to Bosnian Serb leader Radovan Karadizic and his army. Anyone who spoke up risked arrest or attack. Her family, like many others, hated the war, but felt powerless to change the regime or to escape it. They chose to remain in their homes and wait for better times, even if that meant that her father was conscripted into Karadizic's forces.

1. The names and identifying details of the individuals have been changed. I have endeavored to preserve the substance of Natasha's story as she related it to me.

All of our researchers—and the bystander legal professionals they interviewed—shared a perception of the war as senseless. Their common perspective may offer a basis upon which to rebuild relationships in divided communities, yet capitalizing on this commonality is a process fraught with difficulties that threaten to deepen, rather than reduce, divisions. The German philosopher Karl Jaspers noted that everyone experiences war as a deprivation, but not all deprivations are the same.[2] This means that, in order to avoid the type of moral equivocation for atrocities that will doom efforts at community repair, victims and bystanders alike need to acknowledge the real differences in the nature and quality of their suffering.

The challenge for reintegration is to enable victims to acknowledge the suffering of bystanders who were compatriots of the aggressor forces and for those bystanders to acknowledge the still greater atrocities inflicted by forces acting in their name

Bringing about the latter may prove the much more difficult challenge. I mistook Natasha's interest in forging ties with Bosniaks and Bosnian Croats as a commitment to recreating a multinational state. Natasha, however, had no desire to live in an integrated country.

"I don't think we can all live together again," she explained. "The war was terrible and did terrible things, but now it's over. Maybe, after all the fighting and war, it's better to leave things the way they are. Maybe I think it's better if we are all separate."

Such attitudes pose an ominous threat to prospects for peace. Justice demands that victims expelled from their homes be allowed to return. The longer families remain displaced, the deeper the wounds and the more likely that a narrative of betrayal and justice denied will grow and take hold, nurturing calls for revenge. Bosnian Serbs who do not embrace integration exacerbate tensions between victims and bystanders, reinforcing divisions between perceived winners and losers. What accounts for their reluctance to speak out?

Reintegration poses a host of questions that Bosnian Serb bystanders are ill-prepared to address. Within our U.S.-Bosnian research team, the question of what responsibility those like Natasha and her family should bear for the war hung in the air, posed but unspoken. What would have happened if her father and all "good" Bosnian Serbs had refused to participate in Karadizic's madness? Primo Levi, in his essay "The Grey Zone," writes that we all confront power and that our relation to it under authoritarian regimes of terror leaves us all, to varying degrees, morally compromised.[3] Natasha could not own up to this. She never expressed any acknowledgment that she enjoyed the privileges of victory—that her family's property,

2. Karl Jaspers, The Question of German Guilt 14–15 (E.B Ashton trans., Fordham University Press 2000) (1947).

3. *See* Primo Levi, *The Grey Zone*, *in* The Drowned and the Saved 22–51 (Raymond Rosenthal trans., Abacus 1989) (1988).

for example, was intact and undamaged. Nor did she see herself as an agent who could participate in and actively create ways to repair relationships and communities that would in turn create a new social fabric and allow both the persecuted and the "good Serbs" to live together again.

Acknowledging one's agency is a very tricky business. It becomes impossible to talk about what one might do in the present without raising questions about what one could have done in the past. Though the research team gathered on neutral ground, at Berkeley, to discuss the research findings, even there it quickly became evident that one's context during the horrors—as a Bosniak, Bosnian Serb, or Bosnian Croat—colored how our interview subjects and team members discussed the violence. When comparing the answers of members of each national group to the question, "Did genocide occur during the war, and if so, against whom?" we found that Bosniaks invariably replied that Bosniaks were victims of genocide carried out by Bosnian Serb forces. Bosnian Croats were more equivocal, some acknowledging genocide against Bosniaks, others quick to point out that Bosnian Croats, too, were victims. Bosnian Serbs gave vague answers, many stating that, to their personal knowledge, "nothing like that" occurred where they lived. My Berkeley colleague and I asked the Bosnian researchers what they made of this.

A Bosniak researcher spoke first and quickly, pointing out that it was clear the Bosnian Croats and Bosnian Serbs were biased, since the truth was that the Bosniaks were victims of a genocide instigated by the Bosnian Serb forces. He looked pointedly at his non-Bosniak counterparts, ready for a challenge. Instead, one of the Bosnian Croat researchers asserted that the situation was more complicated. After all, while it was true that Bosnian Croat forces massacred Bosniaks, they, too, had been victims of war crimes committed by Bosniaks, but no Bosniaks had acknowledged this. This response seemed to soften the Bosniak researcher's stance. Yes, he agreed, it was significant that no Bosniaks had acknowledged that war crimes or genocide had been committed by the armed forces that had acted in *their* name.

But these two Bosnians—belonging to different national groups—just had. For the first time since we began working together, the simmering tension between the Bosniak and Bosnian Croat researchers eased. Their mutual acknowledgment signaled trust—and the chance for a deeper inspection of the war's causes and of their hopes for the future. Everyone waited for Natasha or another Bosnian Serb to speak, anxious to hear one of them acknowledge the atrocities carried out in their name. The war ricocheted from past to present and back again, leaving no statement or judgment to stand in isolation. Whatever Natasha, or any Bosnian Serb researcher, said could not be separated from who they were and what they represented, but they bowed their heads and remained silent. The discussion moved on.

Acknowledgment by bystanders of the violence committed in their names must be publicly supported by civil and political leaders

Able to condemn the war in general terms, but unable to acknowledge her place in it—even as an unwilling beneficiary of the brutal Bosnian Serb war machine—Natasha could not take the critical first step to build trust: to define contemporary relationships *beyond* the roles each national group had been handed in the war. Privately, I asked her why she could not acknowledge Bosnian Serb atrocities. She was not, after all, personally involved.

"It's easy for you to say," she admonished. "You didn't live through the war."

In subsequent weeks, months, and years I have reflected much upon that last conversation. Perhaps I had assumed unfairly that Natasha would be able to articulate shame for the horrors perpetrated in her name when no one in her immediate circle of friends and family could. In fact, there were mortal risks to public acknowledgment of war atrocities; when I confronted her in Berkeley, Natasha reminded me that, just a few weeks before her California trip, a Bosnian Serb journalist had been attacked and nearly killed after reporting on a wartime massacre. In order to nurture and enable the (re)building of relationships across former enemy lines, there must be a political climate in which political and civic leaders—those who were "good Serbs" or other "innocent bystanders" *and* those who actively opposed the war—publicly acknowledge and repudiate the atrocities carried out in their names.

Such acknowledgment helps create political space for public and private discussion of the complex roles and identities that proliferate during conflicts. Not everyone is a criminal or a victim, but no one is "innocent." There is no privileged vantage point that absolves bystanders. Everyone is implicated: Natasha, you, me.

Over the last two decades, transitional justice mechanisms have proliferated and gained acceptance as appropriate moral, if not legal, responses to address the harms of the past. Yet, for all the progress made, there is more work to be done. The international criminal trials at the Hague provide a critical first step: they establish a record of the atrocities committed by the worst perpetrators on all sides, so both victims and bystanders have a shared history that reflects the multiple categories and experiences of victims. But in order to stimulate public and private communication and some kind of reckoning process among victims and bystanders—particularly those bystanders who were compatriots of the aggressors—such trials need to be supported by broader, nonlegal interventions. Truth commissions, memorials, and public commemorations acknowledge the harms done to the victims. But public education is needed as well: radio and television programs, newspaper commentaries, and school-based activities that directly allow in-

dividuals to confront their role as bystanders in the conflict—and face the impact of their choices upon victims and perpetrators.

Lawyers are not central to this work, at least not in the way that lawyers have been central to staffing criminal tribunals or truth commissions, or serving as representatives of human rights NGOs advocating on behalf of victims. The challenge for transitional justice lawyers is to expand their understanding of the web of interventions and activities needed to rebuild countries emerging from repressive regimes or mass violence and to grasp the location and the role of law and lawyers within this system. Human rights lawyers can help create the climate and opportunities for bystanders to confront their relationship to the past, but they need to work with the spectrum of professionals and public leaders—social scientists, psychologists, physicians, teachers, social workers, religious and community leaders, and so on—to promote this goal.

The Balkans remains a region deeply scarred by violence. Yet communities are not frozen in time, fixed in and transfixed by the carnage of the war. My hope at Berkeley was that by fostering an environment in which Natasha and other Bosnian bystanders could begin to acknowledge and explore their complex experiences of the war, they would discover ways to reconcile. Natasha, despite her hesitation about social integration, had taken important steps to reach out and forge relationships with those from other national groups. What Natasha taught me is that reconciliation—or what might more accurately be described as social reconstruction (after all, acknowledgement rather than forgiveness may be what is necessary for peace)—is not an edict issued by a court, but rather an opportunity offered to those determined to live together again. The trick is to seize it and to make the most of it.