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"LOOKING BACK, LOOKING FORWARD"

Promoting Dialogue through Truth-Seeking in Bosnia and Herzegovina





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in Bosnia and Herzegovina**

Graeme Simpson
Edin Hodžić
Louis Bickford

Foreword

It is a pleasure for me to introduce “Looking Back, Looking Forward”: Promoting Dialogue through Truth-Seeking in Bosnia and Herzegovina by the esteemed authors; *Graeme Simpson, Edin Hodžić and Louis Bickford*.

With this publication, the United Nations Development Programme (UNDP), as the lead agency dealing with Transitional Justice in Bosnia and Herzegovina, launches a new series of documents and outreach activities related to transitional justice, its processes, mechanisms and the effective tools available to government authorities and civil society to assist in their efforts to address the country's violent past.

Directly linked to UNDP's project; “Access to Justice: Facing the Past and Building Confidence for the Future” that supports the adoption of a state-level Transitional Justice strategy, this publications is meant to develop a better understanding of the subject matter for a wider audience as well as to assist transitional administrations and civil society to better craft their responses to transitional justice needs which are necessary to move from a state of conflict to peace, from denial to reconciliation.

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Table of Contents

Foreword	3	Consensus Figures and the Importance of Credible Leadership	98
Introduction	7	"The Beginning of History": Time Frames and Mandate	104
Introductory remarks	7	Informed Consultation Indispensable to Credible Truth-Seeking	108
Methodology	36	Content and Thematic Issues: What?	114
Terminology	37	The Relationship between Truth-Seeking and Trials	114
Methodological challenges	38	The Importance of Acknowledgement	121
Chapter One	41	Bringing in the "Regional"	125
The Why, What and How of Truth-Telling	41	Connecting the Local to the Global	128
Defining Truth-Telling	42	Social Constituency Issues: Who?	133
Official and Unofficial Truth-Telling	46	Truth-telling: Victim-Centered Approach	133
Note on International Comparisons	49	Gender in Truth-Seeking: Primary Concern	139
Goals of Truth-Telling in BiH	53	The Importance of Addressing Youth and Children	146
The "Right to Truth"	59	Truth-Seeking at the Institutional Level	149
Timing, Sequencing and the Relationship between Truth-Seeking and Other Aspects of Transitional Justice	62	Chapter Four	155
Conclusion	63	Conclusions and Recommendations	155
Chapter Two	65	Proposed Approach	159
Truth-Telling in BiH: Situation Analysis, Illustrative Projects and Main Concerns	65	Some Pilot Programs	165
Background and Context	65	Pilot #1— Best Practices Evaluation in the Field of Disappearances	168
The Dominance of the Prosecutorial Paradigm in Dealing With the Past	67	Pilot #2—Youth-based Essay-writing Contest	168
Official Truth-Telling Efforts in BiH	71	Pilot #3—Mapping Concentration/Prison Camps	169
Unofficial Truth-Telling Projects: Mapping the BiH Cacophony	78	Pilot #4—Women as Storytellers: Oral History Project	169
Examples of a Different Approach	83	Pilot #5—Training/Capacity Building on Truth-seeking	170
Regional and International Initiatives	84	Pilot #6—Developing a Thesaurus	170
Problems, Gaps and Pertinent Issues in Unofficial Truth-Seeking in BiH	86	Final Word: A Historical Opportunity?	171
The Challenges of Institutional Truth-Seeking:		List of Abbreviations	172
The BiH Missing Persons Institute (MPI)	88		
Concluding Observations	90		
Chapter Three	93		
Criteria, Conditions and Challenges for Truth-Seeking in BiH	93		
Process and Strategy Issues: How?	94		
Truth-Seeking as "Fact-Finding": Forensic, Scientific Truth-Seeking and Psycho-Social Truth-Telling	94		



Introduction

This report was commissioned by the United Nations Development Programme (UNDP) as a contribution to discussions about transitional justice and more specifically about truth-seeking in Bosnia and Herzegovina (BiH). Three expert consultants were independently employed by UNDP, BiH and co-authored this report: Graeme Simpson (International Truth-Seeking Expert Coordinator), Louis Bickford (International Truth-Seeking Expert) and Edin Hodzic (National Expert).

Executive Summary

Introduction and Methodology

This report was commissioned by UNDP Bosnia and Herzegovina. Three expert consultants were independently employed by UNDP and co-authored this report. They are: Graeme Simpson, Louis Bickford (International Truth-Seeking experts) and Edin Hodzic (National expert). The report is based on a series of interviews and consultations across Bosnia and Herzegovina, mostly during a week-long mission throughout the country, as well as extensive desk research based on a wide range of documents on transitional justice and truth seeking in Bosnia and Herzegovina. All of the consultants drew on their extensive experience of truth seeking approaches and methodologies in other countries. This research and report writing process was, however, committed to providing a perspective rooted in the Bosnian realities and the specific context of Bosnia and Herzegovina. For this reason, the authors relied heavily on the inputs of local experts and practitioners as well on previous truth seeking and other transitional justice interventions in BiH.

This report is based on a short term research and consultation process. It does not claim to be exhaustive and the authors are determined not to be prescriptive in their views and recommendations, but rather to listen carefully and try to represent the view of local actors and stakeholders. A primary function of this report is to simultaneously stimulate and catalyze dialogue and discussion about the role and form of truth-seeking in BiH.



Chapter 1

THE WHY, WHAT AND HOW OF TRUTH-TELLING

This chapter looks at the rationale, forms, timing and challenges of truth-telling through international experiences and the on-going efforts in BiH. What remains elusive, but crucial, in BiH is a coherent approach to truth-telling. Because the demand for truth-telling in BiH is strong, but fragmented, it is therefore important to clarify what the goals of a truth-telling initiative could be.

DEFINING TRUTH-TELLING

For the purposes of this report, "truth-telling" refers to a process through which states and societies tell the stories of a past period of trauma to redress wrongs and build a better future. In Bosnia and Herzegovina, truth-telling includes three additional inter-related components:

- **Fact-finding:** the use of objective methods to produce forensic or evidentiary truths that are seen as impartial. In BiH, this includes strengthening the extant fact-finding efforts.
- **Voice:** the creation of spaces for victims to talk about their experiences and to be heard, while also facilitating a public debate. In BiH, this could refer to oral history projects, testimony gathering, municipal or local histories, or audio and video projects.
- **Compatible narratives:** the search for a constructive way to tell differing stories, so that groups can agree to disagree. After years of divisive rhetoric and mono-ethnic narratives, finding a forum for compatible narratives in BiH will be a challenge. Truth-telling efforts must engage in both cross-community and single-identity work to achieve this goal.

Lastly, it must be emphasized that truth-telling is not related to amnesty, indemnity, or pardon. This point is often misunderstood.

OFFICIAL AND UNOFFICIAL TRUTH-TELLING

Official truth-telling bodies are state-based. Although they have access to the state's resources and their final conclusions tend to carry the authority of the state, people might not trust the state or the state might be highly politicized. In comparison, unofficial truth-telling endeavors are civil society-based. As in BiH, truth-telling can combine these various formats. Indeed, the fundamental problem of truth-telling in BiH is less its absence (although there are arguably gaps) than its lack of consistent goals, methods, and results, in part, due to the degree of distrust in the state and BiH's fragmented social fabric.

A NOTE ON INTERNATIONAL COMPARISONS

While it is helpful to sift out analogies and lessons learned from international experiences, it must be emphasized that they should not shortchange a context-specific approach. There is no blueprint for truth-telling; it must respond to local conditions.

GOALS OF TRUTH-TELLING IN BOSNIA AND HERZEGOVINA

Understanding the goals of truth-telling that are relevant for a specific context is the most important step in developing a tailor-made truth-telling strategy, since different goals will produce different formats, structures, and processes. In the context of Bosnia and Herzegovina, our interviews suggested that goals of truth-telling might include some or all of the following:

- Honoring the victims and remembering them as individuals, as human beings, family members, and friends, and acknowledging their loss;
- Establishing a historical record about what happened in the past, and using the results of a truth-telling exercise to teach about the past in ways that will help future generations avoid mistakes made that led to conflict;

- Contributing to criminal accountability processes, either by painting a broader picture and context of the crimes examined by courts, or by generating additional evidence and facts to support trials of perpetrators;
- Complementing and building on the factual record generated by criminal trials in order to tell the broader story of what happened;
- Contributing to reconciliation and peacebuilding processes by humanizing the "other";
- Establishing that certain facts are impossible to deny;
- Filling in gaps in what is known;
- Contributing to, and drawing on, regional or international efforts;
- Analyzing the events of the past in a way that leads to concrete policy recommendations to prevent conflict in the future; and,
- Dialogue as foundation for democratic rule of law.

THE "RIGHT TO TRUTH"

The "right to truth" refers to an emerging norm that obligates a state to provide victims and family members with relevant factual information about human rights violations committed during conflict. In its narrowest form, it is an individual's right to know what happened to a loved one. In its most robust form, it is framed as a collective right to know and teach non-revisionist history as well as an individual's right to uncover the truth about all grave human rights violations in his/her own or his/her relative's past. BiH, therefore, may have an opportunity to help develop an innovative and important norm that has global implications.

WHEN TO TELL THE TRUTH? SEQUENCING AND RELATIONSHIPS WITH TRANSITIONAL JUSTICE

In transitional justice, the idea of a “holistic approach” that combines truth-telling, criminal accountability, memory, reparations, and institutional reform suggests that various strategies for dealing with the past interact with each other. Although a holistic approach seems to make sense, debates have arisen over the sequencing of transitional justice mechanisms. In BiH, there has been no official truth commission, although there have been court processes and some reparations initiatives (mostly focused on compensation for specific categories of victims). Thus, numerous non-state truth-telling efforts have emerged. The question of sequencing of transitional justice mechanisms, therefore, raises particular issues in BiH.

Chapter Two TRUTH-TELLING IN BOSNIA AND HERZEGOVINA: SITUATION ANALYSIS, ILLUSTRATIVE PROJECTS AND MAIN CONCERNS

BACKGROUND AND CONTEXT

Although the General Framework Agreement for Peace in BiH of 1995 (GFA) effectively brought an end to the war, it also institutionalized the ethnic divisions generated by the three-year conflict. It divided the country into two political entities: the Republika Srpska and the Federation of Bosnia and Herzegovina.

The resulting divided political and social structure has had direct implications for truth-telling. Each of the three separate societies shares its version of the truth about wartime experiences among its own people. The similarly divided media provides mostly one-sided content, the education systems are effectively divided into three ethnic programs, and divisive rhetoric remains the modus operandi for political parties. At the same time, there is a great need and desire for acknowledgment across ethnic and political lines, not only by the State, but also by victims' organizations and the public from each political entity and ethnic group in BiH. This demand remains one of the most important factors when contemplating a truth-telling project.

THE DOMINANCE OF THE PROSECUTORIAL PARADIGM OF DEALING WITH THE PAST

Transitional justice efforts in BiH are dominated by the criminal justice paradigm. Many in BiH believe that courts establish authoritative and comprehensive historical truths, even though this is generally not the function of courts, which merely ascertain guilt or innocence. At the same time, as noted in the UNDP survey of March 2010¹, there is massive mistrust of the ICTY and many people think that the relevant facts about the war have yet to be unequivocally established. Meaningful truth-telling involves working both with facts as well as with people's perceptions of the facts. This difference in public perceptions is thus an indicator of the need for an independent truth-telling enterprise.

¹ UNDP, Facing the Past and Access to Justice from a Public Perspective, Special Report (2010) p. 23.

Additionally, non-judicial truth-telling should complement the restricted role of the BiH courts. While ICTY judgments do not address many BiH localities in any detail, the Court of BiH and cantonal or district courts are more modest than the ICTY in their fact-finding reach and structural abilities. Some Court of BiH officials also believe that the Court is not a truth-telling institution and that promoting judgments is not its job. Recently, however, the BiH Prosecutor's Office began a catalogue of crimes project, which has some elements of a truth-seeking endeavor. While this effort acknowledges the need for truth-telling, the catalogue remains confidential and thus inaccessible to the public. Indeed, the ICTY's and Court of BiH outreach and public engagement programs do not effectively address fractured public opinion or minimize manipulation. While some NGOs have organized public presentations on the ICTY's and Court of BiH judgments, their efforts tend to lack the consistency and continuity to have a significant impact. A truth-telling program is needed to optimize the courts' contributions to truth-recovery and to fill the information gap produced by the courts' limited public engagement work.

OFFICIAL TRUTH-TELLING EFFORTS IN BOSNIA AND HERZEGOVINA

Two initiatives were launched in BiH to establish a truth and reconciliation commission (TRC); both were unsuccessful. In addition, three investigative bodies were set up: the Sarajevo and Bijeljina commissions simply stalled, while the Srebrenica Commission produced a report that received a weak reception.

Some claim that the two TRC initiatives failed because they were neither "locally owned" nor continuous consultative processes. In addition, opposition from some of the religious leaders, the ICTY's ambiguous stance, a sensitive political environment that included many wartime leaders, and the non-BiH specific nature of the proposed TRC contributed to the first initiative's demise. In comparison, the second initiative was led by a local NGO, had a greater degree of public support from the ICTY, and followed shortly after the success of the Srebrenica Commission. It was plagued, however, with problems. No serious transfer of knowledge took place between the two projects and no serious follow-up consultation or advocacy activities ensued. Since the failure of these two initiatives, moreover, little has been done to promote the potential benefits of truth-telling in BiH.

Similar problems undermined the work of the Sarajevo and Bijeljina commissions. The Sarajevo commission was formed under pressure, political manipulation, and heated debates over the Commission's mandate. Prominent wartime figures were also appointed as its members. The Bijeljina Commission suffered from its divisive members and the lack of transparency in appointing them. Both commissions were formed without significant civil society consultations and in a highly politicized environment. They testify to more failed top-down approaches to truth-telling in BiH.

Unlike the others, the Srebrenica Commission succeeded in publishing a final report. The Government of Republika Srpska had formed the Commission, which was mostly directed to the public in Republika Srpska and the Serb people. The Srebrenica Commission displayed a classical truth-commission algorithm: research and investigation, public report, and official recognition and apology. However, its report was not well promoted, in part because people were not completely happy with it. The weak reception of even successful official truth-seeking projects constitutes another reason for pursuing a consolidated truth-telling approach. VAGUE

UNOFFICIAL TRUTH-TELLING PROJECTS: MAPPING THE BOSNIAN CACOPHONY

According to recent estimates, there are approximately 12,189 NGOs in BiH, of which 6,620 are active.² Those focused on transitional justice are rare, geographically disparate, focused on one particular ethnic group and controlled by the political elites upon whom they rely for funds.

There are four broad categories of NGOs related to truth-telling: 1) grassroots victims' organizations, 2) organizations that treat victims as beneficiaries of their programs, 3) organizations devoted to truth-telling per se, and 4) innovative truth-telling projects, oral histories projects, and war veterans' initiatives. Truth-telling as a separate activity is not well developed. NGO databases are often not publicly available and their publications are neither thorough nor widely distributed. Their events are usually one-time endeavors,

2 See G. Zeravcic and E. Biscevic, 'Analysis of the State of Civil Society Sector in Bosnia and Herzegovina,' in Civil Society: Contributions to Devising a Strategy for Establishing a Stimulating Environment for the Development of Civil Society in Bosnia and Herzegovina, (HTSPE Ltd. UK and Kronauer Consulting, Sarajevo, 2009) pp. 79-81, <http://www.kronauer-consulting.com/index.asp?lang=e&id_meni=>, visited on 23 December 2010.

with no significant follow-up. Research-oriented NGOs sometimes use flawed methodologies that promote propaganda. While many NGOs have significant collections of primary documents and victim interviews, they suffer from inadequate resources, limited expert support, and insufficient space.

Civil society initiatives can be valuable if they contribute to a full understanding of the multiple truths about the war and engage in exchange. As evidenced by Northern Ireland, successful truth-telling in a divided society requires coordinated in-group and cross-community initiatives.

THE EXAMPLES OF A DIFFERENT APPROACH

The Centre for Nonviolent Action is a good example of an issue-specific and boundary-crossing truth-telling initiative. It works with war veterans from all armies and tries to "rehumaniz[e] the other."³ Its projects exhibit great sensitivity and aim to share with the public the motivations of each former combatant. Another good example is XY film production, which made more than 50 documentaries about war crimes and their aftermaths in communities throughout BiH. It distributed these films for free to various public and private broadcasters, who aired them, although sometimes not in primetime spots. The group aimed to build solidarity among victims of an ethnically divided public and to intertwine the different stories to make it difficult for them to be manipulated into mono-ethnic narratives. Although XY production no longer exists, its documentaries remain publicly available. Lastly, the Research and Documentation Center (RDC) is the only independent truth-seeking initiative in BiH focusing on the state as a whole. With its follow up activities, RDC tries to reach the public from both entities and from all ethnic groups.

REGIONAL AND INTERNATIONAL INITIATIVES

Regional partnerships can ease tensions and enable seemingly controversial projects to propagate. The work of the *Humanitarian Law Center* in Serbia and *Documenta – Center for facing the past* in Croatia are good examples. In addition, the Coalition for RECOM, the independent regional initiative for an inter-state truth commission, follows the basic premise that a regional

approach to truth-telling is necessary given the historical context and the regional dimension of the wartime violations.⁴ Following the unprecedented inclusive process of regional consultations, the coalition has received the support of over 1,000 organizations throughout the region. Although it might still face political and methodological obstacles, it is a potentially influential player whose activities should be taken into account by any truth-telling effort in BiH. Lastly, international expert research initiatives are a valuable source of unbiased historical interpretations. One such project is Purdue University's "The Scholars' Initiative: Confronting the Yugoslav Controversies," which has been well received by the public.

PROBLEMS, GAPS AND PERTINENT ISSUES IN UNOFFICIAL TRUTH-SEEKING IN BiH

Cross-community truth-telling initiatives are rare in BiH due to lack of confidence, limited awareness by both the public and the relevant state institutions, and insufficient publicity in the media. They tend to exist as parallel, ethnically defined universes that cannot easily be brought into dialogue. Actors who try to implement them are regarded by groups with suspicion, but seem to be accepted on the level of individual contacts. Cross-community initiatives, therefore, cannot alone change the ethnically divided social and media environment in which they operate.

THE CHALLENGES OF INSTITUTIONAL TRUTH-SEEKING: THE MISSING PERSONS INSTITUTE OF BOSNIA AND HERZEGOVINA

To date, the Missing Persons Institute (MPI) is the only joint, state-level truth-seeking initiative. Its goal is to coordinate the approaches on accounting for missing persons. It embodies ethnic parity and tries to avoid the ethnic divisions that dominated its predecessors at the level of the Entities. Yet although identifications take place without regard to ethnic origin, commemorations still do not. Despite the fact that MPI was formed by an agreement involving the State government and is relatively well equipped, adequately staffed and highly professional, it is nevertheless accused of being partial and unrepresentative. Clearly, the ethnic approach to truth-telling will not disappear simply by forming a joint institution. New creative strategies are needed.

³ See e.g. J. Halpern and H. M. Weinstein, "Re-humanizing the Other: Empathy and Reconciliation", 26 Human Rights Quarterly (2004), pp. 561-583.

⁴ See "Why RECOM", available at http://www.korekom.org/public/fck_files/Why%20RECOM_eng_memo.pdf, visited on 23 December 2010.

CONCLUDING OBSERVATIONS

- *Outreach:* Many people in BiH favor an objective, scientific fact-finding program, but the truth-seeking projects to date have not made public their methods or sources.
- *Deficit in meaningful truth-telling:* The work of the prior and current truth-seeking initiatives is not well promoted or discussed by the public or in cross-community settings.
- *Timing:* For the most part, those who think truth-telling conditions in BiH have worsened refer to political tensions and divisive rhetoric. Yet others believe that the time for truth-telling is now because former wartime leaders are no longer prominent politician; there is a trend towards official apologies; war crimes prosecutions have decreased taboos and contributed to the individualization of guilt; people are slowly understanding that perpetrators came from all sides of the conflict; and a new generation of Bosnian transitional justice experts bring hope that a BiH-specific model will emerge.
- *Victims are not tired.* Victims still want to tell their stories and have them recorded. The problem is the lack of a structured, victim-friendly, public forum in which they can do it.

Chapter Three CRITERIA, CONDITIONS AND CHALLENGES

PROCESS AND STRATEGY ISSUES: HOW?

Truth-seeking as “fact-finding”: Forensic, scientific truth-seeking and psycho-social truth-telling

This section takes note of the strong identification of Bosnians with judicial notions of ‘provable’/evidence-based truth-seeking and fact-finding that has been addressed in other sections of the report and highlights the forensic character and high expectations of the truth associated with such judicial or quasi-judicial processes. Often this is expressed as a quest for an objective or single truth that can be verified and is manifested in passionate competing claims? about the facts and numbers in relation to past conflict. On the other hand, this section also takes into account the extensive interest that those we spoke to had in the ability to tell their stories and be heard and notes the psycho-social nature of this notion of truth that is necessarily more subjective and which accommodates the idea of multiple truths. These two categories are not mutually exclusive and reflect the varying needs of communities in BiH and they coincide substantially with the notions of “fact-finding” and “voice” outlined in the introductory chapter.

Many truth commissions acknowledge their engagement with these different types of truth, some more self consciously than others. This section points out that the South African truth commission specifically addressed this in its report, and constantly ‘walked a tightrope’ between competing expectations of the truth seeking process. By way of example, it also highlights the comparative examples of juristically-oriented truth commissions such as the Chilean commission which held no victims hearings and the Ghanaian case which ran very much like a courtroom, as opposed to commissions that were less juristic in their form and content, such as the cases of Peru and East Timor which were more accommodating of psycho-social dimensions of truth. Although these approaches to truth-telling appear to sometimes compete with each other, it is crucial and possible that any truth seeking mechanism in BiH seeks to integrate these approaches, encouraging different methodologies as complementary rather than contradictory in crafting a complex truth and compatible narratives about the past.

Consensus Figures and the Importance of Credible Leadership

Truth-seeking in BiH must be championed by “consensus figures,” who possess the utmost integrity and independence, command respect and credibility across ethnic and sectarian divides, and are selected through a transparent and inclusive process. The experiences of Morocco, Sierra Leone, Timor Leste, South Africa and Liberia provide instructive guidelines on qualities “consensus figures” should have: impartiality, integrity, independence, freedom from bias or prejudice, high moral character, and commitment to human rights and to non-discrimination. In some cases with highly divided societies, neutrality and independence were deemed so important that internationals were included amongst the commissioners to increase perceptions of impartiality. Some mandates stipulate that commissioners should be drawn from diverse professional and disciplinary backgrounds, be broadly representative of the societies from which they are drawn, and include women. In addition, as evidenced by East Timor, Sierra Leone and South Africa, the commissioner selection process must be transparent and inclusive. In some cases, panels that included a range of actors vetted or short-listed candidates. By contrast, the cases of Ghana and the bi-national Indonesian/Timorese commission illustrate that when the process is not transparent or consultative, the commission may be seen as partial and divisive.

“The Beginning of History”: Time frames and Mandate:

One question that arises in BiH is whether the period to be examined should focus only on 1992–1995 or a longer period of time. In other contexts, truth-telling initiatives have grappled with the question of *temporal mandate*. In post-Colonial countries such as Kenya, for example, the designers of the truth commission had to consider whether to go back as far as colonial rule. One way to finesse this problem is to avoid the idea that there should be a single truth-telling body with a single temporal mandate, but rather different truth-telling initiatives that define temporal mandate in different ways. However, as the cases of the Solomon Islands and Guatemala demonstrate, narrowing in on a specific time period does not limit a truth-telling exercise from also examining prior patterns that contributed to the period under examination.

In BiH, there seems to be general agreement on the 1992–1995 period as the primary timeframe to be examined by truth-telling initiatives. What is important is that the question of temporal mandate be discussed in a neutral forum that

encourages discussion, as was achieved by the Healing Through Remembering project in Northern Ireland. Indeed, the discussion about timeframe can *itself* become a dialogic process that leads to a clearer understanding of the relationship between past, present, and future.

Informed Consultation Indispensable to Credible Truth-Seeking

Several early truth-seeking initiatives in BiH were unsuccessful, in part, because they failed to consult widely enough with key stakeholder groups. Broad-based consultations are a critical prerequisite for legitimate and credible truth-seeking processes and are *required* by international standards. Consultations should also be *informed* by the experiences of others. The ability of the full range of stakeholders to engage in these processes with a greater understanding of the options available is an invaluable investment in the success of truth-seeking in Bosnia and Herzegovina.

This prompts the question of *who* should be involved. Victims are one of the most important target groups. However, they are not always well-organized or institutionally articulate, and may be divided and politicized. The inclusion of other civil society groups is thus critical because they often provide access to a wider community of victims. Evidence also suggests that the earlier that these groups are substantively involved, the greater the prospects that the issues relating to their social constituencies will be addressed by the truth-seeking processes. Moreover, international experiences in Peru, Indonesia and East Timor, Liberia, Morocco and South Africa demonstrate that these groups frequently become critical partners and service providers in the preparation, promotion and activities of the truth-seeking enterprises.

Other questions which also arise are *when* and *how* these groups should be consulted. The selection of those who might lead, accompany, or facilitate the truth-seeking endeavor is one of the later steps in the process, but it requires much earlier consultation interventions. Thereafter, key stakeholders might be brought in on a wide range of issues and steps along the way. Northern Ireland, Peru, East Timor, and South Africa provide guidance on these issues.

CONTENT AND THEMATIC ISSUES: WHAT?

Relationship between Truth-Seeking and Trials:

The relationship between courts and truth-telling institutions is often seen as complementary; however, this mutually beneficial relationship is quite complex and not easily achieved. First, there may be unanticipated overlap or substantive and procedural conflicts between courts and truth-telling institutions. There are different ways to avoid this problem. Previous international truth-telling bodies have worked closely with court prosecutors. Others, like those in Sierra Leone and East Timor, found creative ways to minimize or avoid the divergences, or navigate the tensions between them. In Cambodia, an unofficial truth-seeking agency actively assisted the Court in securing evidence. Second, the truths produced by courts and truth-telling bodies might contradict each other. It is not necessary, however, for these two institutions to produce mirror images of the truth. Even the ICTY has produced conflicting findings of fact in different cases.⁵

After years of an active criminal justice paradigm in BiH, the potential for conflict between the two tracks of transitional justice is less likely. Criminal proceedings have contributed to a better overall environment for future truth-telling efforts and have produced substantial evidence.

The Importance of Acknowledgement

Truth-telling is essentially about allowing victims to be acknowledged and heard, while also offering society an opportunity to listen to and come to terms with the suffering that crosses ethnic and sectarian lines. In BiH, victims' groups, individual victims and stakeholders repeatedly expressed the need for acknowledgement, whether to recognize victims in their own communities and particular social sectors, to open a dialogue across the political, ethnic and sectarian divides, and to provide a supportive environment in which victims can speak. The international community was included as a target audience, either because it was seen as partly complicit or unaware of what had transpired. There was also a strong sentiment for recognition from power-holders inside Bosnia and Herzegovina, including the government of the day. Others expressed concern about potential politicization and political manipulation.

⁵ For example, in *Prosecutor v. Blaskić*, the ICTY Trial Chamber found that the shelling of Zenica, a city in central Bosnia and Herzegovina, could not be attributed to HVO (Croat Defence Council). In the later case of *Prosecutor v. Kordić*, the Chamber found, based on new evidence, that such shelling did take place.

Some of the creative methods used in international contexts might resonate in BiH. Chile, Peru, South Africa, and the Ardayne project in Northern Ireland compiled registries of victims' names. Commissions in East Timor, Sierra Leone, South Africa, Peru, Morocco and Australia recommended formal acknowledgement or public apologies. The power of public hearings in generating public dialogue, creating recognition and preventing denial was made clear by the commissions of South Africa, East Timor, Liberia and Peru.⁶ Another key truth-telling methodology is broad-based statement-taking from victims and witnesses, as was done in South Africa and Liberia. Further innovative forms of acknowledgement that have emerged are the establishment of memorials, commemoration days, museums and sites of conscience. Other critical aspects to acknowledgement are reparations, institutional reform and trials. It should be remembered that whilst governmental acknowledgement may be important, it is possible also to distinguish between governmental *ownership* of these processes, and governmental *acknowledgement* itself.

Bringing in the "Regional"

Some conflicts can be best understood as regional, even if most of the fighting took place in one country. Understanding the regional dimension is vital to fully grasping the story of the conflict as a whole. Determining the geographic boundaries and the role of external actors is complex.

There are at least three modes to include the regional aspect in BiH. First, truth-telling initiatives could develop separate areas of work that locate the BiH conflict in a broader historical and geographical context, similar to the unofficial truth-telling project *Uruguay Nunca Mas* (Never Again Uruguay) and reflected in the work of the South African TRC. Second, BiH truth-telling initiatives could establish partnerships with similar efforts in other countries, like Serbia and Croatia. A third possibility is to develop an explicitly regional truth-telling initiative. Decisions about this important question must be made through dialogue and discussion in a neutral forum.

⁶ Some truth commissions found it inappropriate to subject either children or women who were victims of sexual violence, to the bright lights of public scrutiny.

Connecting the local to the global

This section points out that truth-seeking initiatives vary widely in the extent to which they engage with the dynamics of local stories and the manifestations of violent conflict. Official truth commissions tend to focus their attention on the “meta-narrative” or the “big picture” story of the conflict. To varying degrees they seek to connect this global narrative to more local experiences, through having decentralized structures, holding sector hearings, examining events that took place in particular local communities, or by hearing stories from particular groups of people. This section of the report notes how truth commissions in Guatemala and South Africa and a disappearances commission in Sri Lanka attempted to address these issues through local hearings, decentralized structures and different regional operations based on a shared mandate. However, truth commissions are however often criticized for failing to adequately address the more local experience or because they don’t always penetrate to, or resonate with, the local experiences of conflict.

Local-level truth-seeking might instead suffer from the opposite effect: a range of more local-level initiatives – particularly unofficial truth telling initiatives – if not coordinated, integrated and connected to each other, may provide a discordant version of the past that does not adequately contribute to a broader process of dialogue or compatible narratives. This section points out that there is an important symbiotic relationship between the ‘local and the global’ and suggests that this can best be achieved through a combination of ‘top-down’ and ‘bottom-up’ truth seeking, that might also coincide with a creative blend of official and unofficial truth seeking. At very least, it is suggested that localized truth seeking which takes place in diverse sectors, communities and institutions, needs to be coordinated and connected. Moreover, any truth-seeking initiative in BiH will need to focus on achieving this if it is to benefit the wider society as opposed to merely reinforcing separate narratives of largely mono-ethnic and divided communities.

SOCIAL CONSTITUENCY ISSUES: WHO?

Truth-telling: A Victim-Centered Approach

The emerging global norm on the “Right to Truth” articulates a *right of victims* as both an *individual* and *collective* entitlement. On the one hand, victims must be the focus of the process, whilst ensuring that the needs of society to deal with the past are also addressed. On the other hand, of particular concern in Bosnia and Herzegovina, trust must be built within a fractured community and state.

There is some extraordinary victim-oriented work be done in BiH; however, serious deficiencies remain, including bitter divisions within the victims’ movements. One divisive issue is reparations. Another is the wider question of recognition that has become politicized in the differences between civilians and soldiers who lost their lives, prison camp torture victims versus those who were disabled or missing, and traumatized veterans as opposed to those who suffered at their hands. While similar dynamics have characterized victims’ movements in other contexts, they are not quite matched by the degree of sectarian and political manipulation as a result of a unique conflict and political settlement. That said, some in BiH understand that victims sometimes have more in common than the politics, ethnicity, gender and sectarianism that divide them.

Although there is not a lot of international comparative work on victim organizations, similar dynamics are found in the South African Khulumani Survivors Support Group and the Argentinean Mothers of the Plaza de Mayo. International experience also shows that the needs of victims must not be oversimplified, their common interests must not be romanticized, and their needs and wants may change over time. It is also important to distinguish between victimized communities and individual victims, between victim organizations and the wider community of victims who might not be part of these groups, and between victim groups that might have specific expectations, like women, the disabled, or children. In addition, while truth-telling may benefit society, it may also provoke more pain than it resolves for individual victims. There are not many useful rules on how each victim handles trauma.

Gender in Truth-Seeking: A Primary Concern

Women and men experience violent conflict in different ways. Any truth-telling initiative, therefore, must be sensitive to gender as it develops strategies for fact-finding, voice, and compatible narratives. This can take place at a few different levels.

First, truth-telling initiatives must determine the crimes or experiences on which they will focus. This is a selective process that inevitably distorts the fuller experience of both men and women. Many truth-telling exercises focus on human rights violations defined by international law, including crimes against humanity and sexual violence, at least since the decision in *Prosecutor v. Akayesu*⁷ clearly defined rape as a crime against humanity. Because crimes can be defined too narrowly, however, the other experiences of women may be left out, a critique of the South African TRC.

A second set of questions revolves around gender roles and ordinary violence and discrimination against women, as well as to what degree truth-telling should address these issues. This includes examining the ways in which masculine identities are constructed and maintained and distinguishing between public and private spheres. This insight is important in identifying the differences that may exist between a male version of accountability and a woman's perception.

A third consideration for truth-telling initiatives is the inclusion of women in its composition and activities. It is critical that staff receive training on gender awareness and sensitivity.

The Importance of addressing Youth and Children

A primary target constituency of truth-seeking is the "next generation". Some youth in BiH just want to get on with their lives, while others feel trapped by the version of the past handed down to them in an increasingly divided society. The next generation can either reproduce the divisions of the past, or can engage in an historical dialogue that produces an integrated identity. The lack of contact between young people across the ethnic and sectarian divides, reinforced by an essentially segregated education system, indicate

that truth-seeking must engage with young people. The goals of youth-focused truth-seeking should be to focus on how young people of *today* experience the conflicts of the past, as well as on how the conflicts impacted youth *at the time of the conflict*. With the exception of Sierra Leone, most truth commissions, like Peru and South Africa, only provided guidance on how to include young people in the process rather than how to engage all future generations.

Truth Telling at the Institutional Level

Reform of institutions, both inside and outside the State, is a critical component of transitional justice. So far, efforts at reforming institutions in BiH, undertaken with the significant role of the international community, have mostly been focused on two critical sectors: the judiciary and the police. These efforts focused particularly on the reform of the institutions' personnel, and are widely perceived as inefficient.

The Government of BiH will deal with the challenges of institutional reform in a separate segment of the BiH Transitional Justice Strategy. Although our mission did not encompass this aspect of the Strategy, we wanted to point out that institutional reform should also aim at the promotion of accountability and the independence of institutions, rather than just the accountability of the individuals within them. Focus on individuals is also often insufficient in itself: *specific* information on individual conduct is clearly important, but broader, *contextual* information is crucial as it provides a framework for interpreting specific findings.⁸ This is why some truth-telling bodies, such as the South African TRC, have engaged in specific sectoral and institutional investigations to elucidate the role of institutions in past wrongdoings. It is maintained that there is a significant potential in BiH for a synergetic effect of truth-seeking and institutional reform: a well-crafted truth-seeking process can go beyond vetting procedures not only to help provide the necessary contextual information, but also to make a potentially invaluable contribution to the scope and effectiveness of the government's efforts in the field.

⁷ Case No. ICTR-96-4-T, 37 I.L.M. 1399 (Sept. 2, 1998).

⁸ Cf. S. Rumin, 'Gathering and Managing Information in Vetting Processes,' in A. Mayer-Rieckh and P. De Greiff, *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, New York, 2007), pp. 428-429.



Chapter Four

CONCLUSION AND RECOMMENDATIONS

There are certain critical factors that any truth-seeking initiative in BiH will have to address:

- ▶ The importance of transparent, inclusive participation in a broad-based consultation process on the very form, nature and content of truth-seeking itself.
- ▶ Consultations must be *inclusive* and *informed*.
- ▶ Any truth-telling strategy will need to draw on, coordinate and connect the range of existing initiatives that are already taking place.
- ▶ The importance of “consensus figures”: truth-seeking mechanisms demands leadership that can traverse ethnic and sectarian divisions within the society and state. These figures must have no affiliation to any political party, no responsibility for past violence, and must be selected in an open and participatory process.
- ▶ Truth-seeking processes should optimize the acknowledgement of victims, giving particular attention to gender-differentiated experiences and the particular needs of children and youth, both during the war and as recipients of cross-generational memory in the wake of it. The state should play a contributing role.
- ▶ Any truth-seeking-strategy for BiH must be conceived of as a durable exercise that will take considerable time.

A PROPOSED APPROACH

An official truth commission is likely *not* the best option for BiH at this time (although this does not exclude the possibility at some future point) because:

- Sectarianism has politicized victims' movement and dominated state operations.
- An official truth commission might craft a new history that feeds the perspective on entrenched narratives and silence, rather than cultivate a dialogue about the past.
- There is already misunderstanding about the role of truth commissions and skepticism about the comparability of other truth commissions to the Bosnian context.
- Truth commissions traditionally operate on relatively short time frames and highly specific mandates. BiH requires a more durable engagement.
- Truth commissions tend to revolve around particular methodologies; BiH needs an institutional arrangement with a broader set of functions.
- Current truth-seeking approaches in BiH are decentralized and localized, which brings a great richness, but also demands coordination and coherence.

We therefore propose that a carefully designed alternative institutional arrangement – a kind of state-wide “*Truth-Seeking Forum*” – may be better positioned to overcome the likely limitations of any official truth commission. This “*Truth-Seeking Forum*” would foster diverse truth-seeking “from below.” It would also coordinate the various current initiatives, support new interventions and connect state-based and civil society programs into a coherent broad-based approach. In sum, it would endeavor to integrate the potentials and address the limitations of official and unofficial truth-seeking approaches and to meld “bottom-up” and “top-down” approaches.

In general terms, this alternative approach would best service truth-telling in BiH at this juncture:

- ✓ It would have a broad mandate to support, initiate and help to channel funding into truth-seeking as part of its wider responsibility to promote dialogue about the past;
- ✓ It would survey and identify all existing state and non-state truth-telling initiatives—even international ones—to link them together as a diverse network of initiatives;
- ✓ It would strengthen and support existing interventions by acting as a resource to them on expertise, information, access and connections to local and global networks on documentation, oral history, training opportunities, grants, fellowships, etc;
- ✓ It would have a strong base in Bosnian research and academic institutions and would facilitate or initiate research to address important gaps or misinformation;
- ✓ It would help develop needed projects, such as municipal oral histories, audio and video recording of victim experiences, testimony gathering and even victims advocacy;
- ✓ It would be a central repository and archive for any pertinent or sensitive materials relevant to its truth-seeking mandate, or that are in danger of being lost to damage;
- ✓ It would carry the primary responsibility for fostering and promoting dialogue about the past, particularly in respect of competing narratives or divergent truth-seeking results.

The “*Truth-Seeking Forum*” may also have some essential institutional characteristics:

- ✓ It would have a long-term or potentially a standing mandate, so that it could continue this work indefinitely, or for a substantial period;
- ✓ It would have State funding, be able to secure additional donor contributions, and would be guaranteed its independence from governmental control. At the same time, it would need to report regularly to the State parliament on its finances to ensure some oversight;
- ✓ It would be led by a panel of “consensus figures” that were transparently selected;
- ✓ It would need to be a publicly-accessible institution.

This innovative approach promotes a truth-seeking “umbrella organization” that addresses some of the limitations of a truth commission, overcomes the dilemmas of state oversight, resists the idea of a unitary truth or a state-sanctioned orthodoxy about the past, supplements what already exists, and catalyzes the much needed dialogue. It is inclusive and autonomous, yet accountable, and can transcend the fractured character of the Bosnian polity. In the realm of truth-seeking, it cultivates a sort of “public-private partnership” between government and civil society initiatives.

BiH can learn from international models without reproducing them. In fact, this customized approach would create a unique and customized model to truth-telling that could serve as an example for future international endeavors. It is important to recognize, however, that this approach is not entirely without precedent. The Consultative Group in Northern Ireland reached similar conclusions about the need to cultivate a “bottom-up” truth-seeking process, rather than a truth commission, but its recommendations stalled.

SOME PILOT PROGRAMS

We propose SIX initiatives as possible pilot projects to test the approaches discussed above. The pilots address key social constituencies with a particular stake in truth-seeking in BiH and who sometimes already model coordinated participation of diverse state and non-state stakeholders.

First, however, we would like to share an impressionistic overview of some of the ideas that emerged during our interviews in BiH. This list is meant to help facilitate discussion and is not exhaustive. Any or all of the following ideas could be constructive projects:

- Creating a historians’ “dialogue circle” on the historiography of the conflict and violence in BiH and the former Yugoslavia, keeping in mind the Historians Quarrel in Germany.
- Supporting projects like the RDC’s “Signals of the Heart” initiative, an oral history project that captures the stories of those who crossed the sectarian divide to try to save others during the conflicts.
- Developing an oral history and photographic project on “making the invisible visible” -- giving voice and visibility to the missing.

- Creating dialogic and pedagogic memorials, such as the Memory Park in Argentina or some of the memorials in Hiroshima, Japan.
- Considering the development of “a day of remembrance” for those who are missing.
- Developing a “trials as truth-seeking” project that transforms real legal cases and verdicts into radio and video stories of the conflict.
- Considering different formats of exhibits or museums to generate cross-community discussions about the past.
- Developing municipal-level, participatory, community histories, such as those done in Chile by Educación y Comunicación projects or the Ardoyne project in Northern Ireland.
- Developing a project similar to the National Vision Project in Sierra Leone, a competition on envisioning long-term peace through art, architecture, poetry, and writing.
- Considering international exposure visits (such as visits to Northern Ireland) to meet with civil society and state counterparts and discuss long-term truth-telling strategies.
- Connecting Bosnian organizations and practitioners with those in other countries that are engaged in memory, documentation and archive work to study options for digitizing, centralizing and coordinating archives and databases.
- Building a network of memorials, mapping, connecting and identifying them across the country.
- A “diasporas” project based on gathering testimony and memories of those who have been displaced or voluntarily left BiH, but who may have important reflections on the war. A similar endeavor was undertaken by the Liberian Truth Commission.

The preceding list is meant to inspire brainstorming on possible projects in addition to the following six pilot projects to be developed immediately:

Pilot #1— Best Practices Evaluation in the Field of Disappearances

This pilot recognizes the exceptional work that is being done, particularly by ICMP, MPI and local programs that address disappearances, a concern to people across ethnic boundaries. In partnership with ICMP and MPI, this pilot would conduct a “best practices evaluation” in the field of disappearances to distill lessons learned. This would be a supportive exercise, representing a model that a broad-based *Truth-Seeking Forum* would seek to emulate or stimulate.

Pilot #2—Youth-Based Essay-Writing Contest

We propose constituting a committee of consensus figures from the arts and letters to be “judges” for a state essay writing contest, targeting young people. This project would solicit essays or short videos on the topics of: “how young people understand the past conflict in Bosnia and Herzegovina” and “how can BiH best guarantee that future generations will live in peace?” This competition would have certain parameters (e.g. word limits, style, etc.) and clear criteria for judging. A website could be constructed to explain the competition and to announce winners. State prizes would need to be chosen carefully to generate the right incentives. This project would actively engage youth as a strategically critical sector and would also provide great insight into their perceptions of the past, the impact of the conflict on them, and their attitudes on peace.

Pilot #3—Mapping Concentration/Prison Camps

The definition of “concentration camp” or “prison camp” remains unclear and contested. This category of victims was also not adequately recognized. This pilot project would bring people together from all communities to define these categories, then to create a map of the camps that existed from 1992–1995, and lastly, to consider how to commemorate these sites, if at all.

Pilot #4—Women as Storytellers: Oral History Project

Women's organizations, victims associations, professional historians, and others would develop a “women as storytellers” oral history project that focuses on women's experiences of war from 1992–1995. Trauma experts should be actively involved in the design and implementation of this project. This pilot may be initiated at the local level and then developed to facilitate the interaction of women across ethnic divisions in society. The results could then be shared with the population more broadly, translated into public engagement and education campaigns, and used to foster discussion on shared experiences, gender, humanizing the other, and memory.

Pilot # 5—Training/Capacity Building on Truth-Seeking

There remains a fairly undeveloped understanding of truth-telling in BiH and a low level of capacity for engaging in these exercises. We propose, therefore, that a series of trainings and capacity building activities, like workshops, international exposure visits, and expert technical advice, be designed and undertaken with key stake-holders. These activities would look at voice, fact-finding, and compatible narratives, and include questions of truth, memory and memorialization, forensics, oral history, and accountability.

Pilot #6—Developing a Thesaurus

We propose that UNDP host meetings among selected participants from victim communities to draft a shared vocabulary that can be used to discuss the conflict. This pilot is modeled on the Vicaria de la Solidaridad in Chile, which organized a roundtable discussion in 1993–1994 and produced a thesaurus of an agreed-upon lexicon. What is important is the dialogue required to arrive at a shared definition of each term.

INTRODUCTORY REMARKS

Methodology

All of the consultants drew on their significant experience of truth-seeking approaches and the methodologies used in other countries. Additionally, we engaged in extensive research on comparative models of truth-seeking that we thought would be particularly useful for the BiH context, including some examples of official truth commissions, unofficial truth projects, documentation initiatives and memory projects in other regions of the world. We also closely examined previous proposals in BiH (including former proposals for truth commissions), previous UNDP and other reports about transitional justice in BiH, and scholarly and practitioner articles about transitional justice and related subjects in BiH.

Throughout the research and report writing process, we were committed to providing a perspective rooted in the BiH realities and its specific context. For this reason, we have consistently sought to reflect the ideas that emerged in conversations and interviews on the ground. Between September 27th and October 1st, 2010, we engaged in approximately 30 interviews and conversations throughout BiH, meeting with representatives of numerous victims' associations, civil society organizations (CSOs), and state bodies (see Appendix 1). Edin Hodžić further conducted ten additional interviews during October and November 2010. Out of respect for the confidentiality of the many people we interviewed or consulted, and because we appreciated the candor and openness with which they addressed us, we have not attributed any quotations in the text to specific individuals. We have nonetheless endeavored to make their voices audible within our report. We remain deeply appreciative of the patient and generous commitment of all those who took the time to meet and share their views with us.

This report, in sum, is based on a significant research and consultation process, although admittedly over a relatively short period of time. Its goal is to stimulate and catalyze dialogue and discussion about the role and form of truth-seeking in BiH. The report does not claim to be exhaustive, nor was the consultation/interview process that underpinned it. On the contrary, we recognize that it provides an illustrative rather than comprehensive portrait of a particular moment in the transitional justice discussion in BiH. Throughout the process,

we have been determined to listen carefully and try to represent the views of local actors and stakeholders. We have sought to stimulate a dialogue and facilitate a reflection on the options and challenges for truth-seeking, rather than being prescriptive in our views and recommendations.

Terminology

Throughout this report, we use "truth-telling" and "truth-seeking" interchangeably, although we recognize that these are subtly different ideas. The term "truth-seeking" suggests an ongoing quest for information, knowledge and investigation, as well as for facts to be sought out about the past. The notion of "truth-telling" implies the need to speak and be heard, to share the experiences of what happened, and conveys a particularly important sense of agency on the part of those most affected by the violent conflict. As we will demonstrate, the need for – and right to – truth, inherently incorporates both of these, both at the societal and at the community levels, as well as for individuals. Thus, these two concepts are profoundly complementary and both are important in the BiH context.

We have mostly used the term "victim" when we refer to those most affected by violence, in large part reflecting the self-identification of victims' groups and associations that we met within the country. Occasionally, we have referred to "survivors". We recognize that in many countries and contexts, as well as within the psychological literature, there are vibrant debates about the use of these terms and they have different inherent meanings⁹. We do not take a particular stand on those debates, but acknowledge that victim/survivor communities are not homogenous and recognize the value and perspective implicit in both terms. We do note that in our experience, "victim" has been the more commonly used term in BiH.

⁹ For some, the notion of "victim" is seen as creating a category that suggests a lack of agency, potentially entrenches a fixed identity, and denies the capacity for recovery and transformation of this identity. For others, the notion of "survivor" is equally viewed as problematic, is sometime seen to detach this category of persons from the rights and entitlements of victims, and is alternatively seen as patronizing or in some way as reducing the claims for accountability to this sector. See B. Hamber, *Transforming Societies After Political Violence: Truth, Reconciliation and Mental Health* (Springer, New York, 2009); M. Humphrey, *The Politics of Atrocity and Reconciliation: From terror to trauma* (Routledge, London, 2002); M. Morrissey and M. Smyth, *Northern Ireland After the Good Friday Agreement: Victims, Grievance and Blame* (Pluto Press, London, 2002); Consultative Group on the Past, *Report of the Consultative Group on the Past* (Ireland, 2009) pp. 65-70, <www.irishtimes.com/focus/2009/troubles/index.pdf>, visited on 18 December 2010; and J. Herman, *Trauma and Recovery: the Aftermath of Violence—from Domestic Abuse to Political Terror* (Basic Books, New York, 1992).

Methodological challenges

We have anchored the discussion of truth-telling in BiH in the broader context of transitional justice. However, the field is relatively new, emerging most clearly in the 1980s and gaining steam over the last decade and a half. During this time, much of the energy in the field has been focused on developing international standards and norms and achieving compliance with them in as many post-conflict societies as possible, and launching or supporting domestic initiatives such as truth commissions, courts or reparations policies. This important evolution does, however, present some risks of the creation of “templates” or “models” of dealing with the past that are too easily assumed to be transportable from one context to another. As the field enters a new stage of maturity, evaluation efforts aimed at answering the difficult questions of what examples of transitional justice and truth-seeking actually work, by what particular standards, in what contexts and under what conditions, have only recently begun to emerge.¹⁰ Still, we are aware that we do not have many clear measurement tools for determining the most “successful” forms of truth-telling. We sought to address this factor in the report by asking people in our interviews what they wanted to see happen through a truth-seeking initiative in BiH, and by drawing on an increasingly substantive literature that examines best practices of truth-telling approaches globally.

Secondly, most of the works in the field of truth-telling and truth-seeking in general, as well as case studies of particular transitional societies, focus on a particular type of institution – a “truth commission.”¹¹ Because we raised questions from the start of this project on whether at this time an official truth commission is the optimal approach for BiH – given the structural and political reasons and deep sectarian divisions inside and outside the country that are elaborated extensively in the report – we faced another problem of the lack of an obvious parallel we could use in our comparative approach.

Thirdly, in undertaking comparative analysis, we followed the usual wisdom of comparative research which urges caution when selecting countries as units of comparison. For example, although Northern Ireland has some important similarities with BiH (e.g. in terms of sectarianism as a dominant force in political and public life) and truth-seeking efforts there may coincide with those in BiH, we did not engage in a comparative analysis of the two cases as such. Instead, we focused on issues and problem areas and, whenever necessary and

possible, we identified examples and experiences from comparative practice which could be useful for analyzing the main categories of truth-telling in BiH while considering the options ahead. This approach provides a broad comparative pool and a significant number of points of reference. However, wanting to gain in breadth our analysis in this context, we have to sacrifice the depth of our engagement with other transitional contexts whose truth-seeking projects we deemed relevant as points of reference in developing the possible BiH policy options in this area. Our approach therefore simultaneously recognized the unique characteristics of the BiH context, whilst still seeking useful lessons (best practices as well as mistakes made) which may have relevance, or which may demonstrate that similar issues were in fact grappled with in other places too.¹²

Fourthly, we are very conscious of the fact that this examination of the options for truth-telling in BiH is but one aspect of a wider transitional justice strategy for the society. The BiH Council of Ministers Expert Working Group, UNDP and a range of other actors are actively engaged in other complementary aspects of dealing with the past. Although this report does discuss the clear connections between truth-seeking and trials, it only cursorily addresses the issue of reparations and institutional reform and only touches very briefly on memory and memorials. Yet, all of these are components of a wider transitional justice strategy which is – to a greater or lesser extent – being addressed in the country. To the extent that this report contemplates just one aspect of this broader set of activities, it should be seen in the context of this wider, cross-cutting strategy for dealing with the past.

In sum, we hope to provide useful analysis to BiH decision-makers and the wider public, and to provide them with a more solid basis for discussion and policy-making in this field. One commentator has suggested that policy determinations regarding truth-telling initiatives such as truth commissions “are usually based not on research but on instinct.”¹³ In contrast to that approach, however, we have sought to initiate a deeper discussion in BiH—a discussion rooted in the realities and uniqueness of BiH and based on a process of serious and relevant comparative research. We have avoided templates, one-size-fits-all approaches, or simple solutions, and have sought to trigger an inclusive and participatory process that focuses on creative options and new models, as well as their various requirements and implications. Fully aware of our responsibility and a momentous opportunity to engage in such a dialogue, we sincerely hope that this exploratory study will serve such a critical purpose.

¹⁰ A recent volume of the *International Journal of Transitional Justice* (IJTJ), guest edited by Colleen Duggan, was dedicated to this topic of evaluation in the transitional justice field (Vol. 4, Issue 3 (2010)). Also see e.g. Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, United States Institute of Peace (2009). And Tricia Olsen, Leigh Payne, and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace, Washington, DC, 2010).

¹¹ The most frequently cited source that defines a truth commission is P. Hayner, *Unspeakable Truths* (Routledge, London, 2010).

¹² See Chapter One, A Note on International Comparisons, *infra*.

¹³ N. Kritz, ‘Policy Implications of Empirical Research on Transitional Justice,’ in H. van der Merwe, V. Baxter and A. Chapman, *Assessing the Impact of Transitional Justice* (USIP Books, USA, 2009) p. 17.



Chapter One

The why, what and how of truth-telling

Can truth-telling contribute to sustainable peace, democracy, and the rule of law in BiH? In many societies recovering from periods of severe trauma and conflict, varied and diverse forms of truth-seeking, such as truth commissions and other state or civil society-based initiatives, have emerged in order to address the past and help those societies build the future. Given its own very specific and unique context, as well as an examination of these comparative experiences, what makes sense for BiH?

The goal of this report is to help imagine what a truly BiH truth-telling approach could or should look like. The report is meant to be used to help facilitate discussion on this question within the BiH Council of Ministers Expert Working Group tasked to draft the BiH Transitional Justice Strategy¹⁴ and among other stakeholders. In this section of the report, we examine the why, what, how, and when of truth-telling. We look simultaneously at both international comparative experience as well as the experience of BiH in an effort to help guide on-going discussions about the importance of truth-seeking as a component of post-conflict reconstruction, sustainable peace, and the development of the democratic rule of law.

Our most important source of inspiration is the diverse array of on-going efforts in BiH (as discussed at length in the next section of the report), as well as previous proposals and ideas that have surfaced since the early 1990s. Indeed, these various projects and institutions create a mosaic of different forms of truth-telling, both official and unofficial.

On the other hand, this abundance of initiatives are more cacophonous than melodic, as various communities, institutions, and organizations are engaged in truth-telling, but they are not necessarily speaking to each other about methodology and results. In this way, the situation in 2010 is similar to in 2005 when UNDP BiH determined that there were “many small organizations and individuals strongly committed to investigating and documenting past crimes” but that these initiatives “appear to need strengthening and to benefit from

¹⁴ The BiH Council of Ministers established the *Expert Working Group* on 21 January 2010, tasked to draft a Transitional Justice Strategy for Bosnia and Herzegovina. The aim of the strategy is to help BiH society deal with the grave legacy of past human rights violations and war crimes. Such a strategy is envisaged to cover non-judicial mechanisms (truth-telling/seeking initiatives, systematic reparations programmes and institutional reforms). Although it is normally part of transitional justice, the Strategy will not cover the criminal justice mechanisms and processes, since that area has already been dealt with through the War Crimes Strategy, adopted in December 2008.

each other's experiences" and that there was "an absence of a local network organized and structured enough" to establish a formal truth-telling process in BiH.¹⁵

What continues to remain undeveloped and elusive, we believe, is a **coherent truth-telling approach**—that is, a framework that links all of these various efforts together, provides an overarching logic for them, or unites them through a shared sense of mission and method. Our objective is to provide some guidance for how a coherent approach to truth-seeking might be forged.

Defining truth-telling

Before moving into these questions, however, the first task is to define what we mean by "truth-telling." For the purposes of this report, "truth-telling" refers to processes through which states and societies tell the stories of a past period of trauma, such as war or conflict, as part of a general approach to dealing with the past that is meant to contribute to redressing wrongs and building a better future.

With consideration of the BiH situation, moreover, we use the terms "truth-telling" or "truth-seeking" to include the following components, which we consider to be deeply integrated and connected to each other:

- (1) **Fact-finding:** is the search for and production of "forensic truth" or "evidentiary truth."¹⁶ This element of truth-telling must use the most objective and dispassionate methodologies available—borrowed and forged from journalism, history, law, and the social sciences—for determining the facts about what happened.

In BiH, fact-finding includes supporting and strengthening on-going efforts to identify human remains, mass graves, and the identity of victims; clarifying the numbers of people who died, suffered, or disappeared; and determining and reporting on the location,

¹⁵ UNDP, *Transitional Justice in Bosnia and Herzegovina: Situation Analysis and Strategic Options/Mission Report for UNDP* (August 2005).

¹⁶ A clear explanation of this approach can be found in the methodology of the National Commission on Truth and Reconciliation in Chile. In order to accomplish this goal, the Commission examined "the testimony of victims' relatives, of eyewitnesses to relevant events, of current and former government agents;... press reports; expert testimony and opinion; some visits to the places where events took place; documentation from human rights organizations; official documents and certificates such as birth certificates, death certificates, autopsy reports, voter registration rolls, criminal records, immigration service records... and many other official documents; copies of court records and responses to official requests that the commission sent to institutions." National Commission for Truth and Reconciliation, *Report of the Chilean National Commission on Truth and Reconciliation*, (University of Notre Dame Press, Notre Dame, Indiana, 1993) p. 41, <www.usip.org/publications/truth-commission-chile-90>, visited on 28 December 2010. Using a "rigorous" approach to investigation, the Commission sought to "establish the truth calmly and impartially" *Ibid.* p. 2. See also Chapter Three, Truth-Seeking as "Fact-Finding": Forensic, Scientific Truth-seeking and Psycho-social Truth-telling, *infra*.

population, and detailed accounts of prison camps or concentration camps, among other things. Throughout our interviews,¹⁷ we were repeatedly told that "fact-finding" is among the most important goals of any truth-telling initiative. As one person put it, any effort must be based "on scientific methods" so as to determine "truth that everyone will see and accept because of the methodology employed." Another person we interviewed stressed that any initiative must "be done with no ideology, without thinking of victimhood as political."

- (2) **Voice:** is the creation of spaces to allow people to listen to the stories of victims, witnesses, and observers to the conflict who want to tell their stories in their own words and be heard by their fellow citizens. Voice is the "telling" of truth—the ability of victims to describe and explain their own experiences in their own words, at their own pace, following their own narrative logic.¹⁸ And the "telling" of truth is deeply linked to being heard and acknowledged. In the words of the United Nations Secretary General, certain truth-telling initiatives can provide a "public platform for victims to address the nation directly with their personal stories and can facilitate public debate about how to come to terms with the past."¹⁹

Voice can also be seen through the lens of rendering audible those who are often marginalized in societies: whose voices have been heard, whose voices have been hidden? This also has particular relevance to a gendered perspective. Trials, for example, focus very narrowly on the criminal guilt of perpetrators for specific crimes committed. Since these perpetrators and their victims are very often men, the stories that are heard are frequently the stories of men. A truth-telling initiative can focus explicitly on the stories of women and their experiences during conflict.

Finally, as discussed below, voice is related to what some have called "psycho-social" truth: the ability of victims to tell subjective stories of loss, pain, and suffering and to be heard in ways that acknowledge their experiences, which eventually *might* contribute to some form of healing.²⁰

¹⁷ See Annex 1, List of Interviews, *infra*.

¹⁸ Teresa Godwin Phelps writes that voice and story enable a victim of violence and trauma to "move from passive victimization to being a morally responsible agent capable of choosing the shape of the narrative in which he or she is cast." See T.G. Phelps, *Shattered Voices: Language, Violence, and the Work of Truth Commissions* (University of Pennsylvania Press, USA, 2004) p. 59. See also H. Scheub, 'Now for a Story,' in K. Bilbija, J.E. Fair, C. Milton, and L. Payne, *The Art of Truth-telling About Authoritarian Rule* (University of Wisconsin Press, Madison, 2005).

¹⁹ Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (UN-S/2004/616) p.17, <daccess-ods.un.org/TMP/4492737.05482483.html>, visited on 26 December 2010.

²⁰ See Chapter Three, The Importance of Acknowledgement, *infra*; Truth-seeking as "Fact-finding": Forensic, Scientific Truth-seeking and Psycho-social Truth-telling, *infra*.

There are also many initiatives in BiH that seek to capture the voice of victims and their family members, as discussed below. This could refer to, for example, oral history projects,²¹ testimony gathering, municipal or local histories, or video, audio, memorials or film projects.

- (3) **Compatible narratives:** the search for the most constructive ways to tell the stories of the past. Truth-telling in this sense does not always seek a single unified narrative about the past upon which everyone must agree. On the contrary, we assume that different groups and different individuals will talk differently about the past. The challenge of truth-telling is to make sure that these differing accounts can be told in ways that "agree to disagree," even on major points of divergence. The notion of compatible narratives also suggests both *acknowledgement* and *dialogue* among people who would not necessarily tend to discuss or engage in dialogue: i.e. different groups acknowledge that the narrative being told by another group is a legitimate expression of their understanding of events and a willingness to exchange views. This idea of compatible narratives does not suggest value-free relativism. On the contrary, compatible narratives must be deeply interwoven with fact-finding and voice.²²

Finding a forum that encourages compatible narratives in BiH may be the single biggest challenge in terms of truth-telling. In order to achieve this goal, any serious truth-seeking initiative in BiH will need to engage in *both cross-community and single-identity* work.²³ In other words, a truth-telling initiative that looks at the victims of only one community ("single-identity" work) can be valuable; however, a coherent truth-telling approach will need to rely not only on these valuable initiatives but *also* (and arguably *more*) on creating forums for these initiatives to come into contact with each other in a way that promotes dialogue and discussion and—ideally—a final result that is closer to a fuller understanding of what happened and why.²⁴ As one of our interlocutors put it, any truth-telling initiative "must be open to all voices, all ideas" and to "compromise". If everyone is only "seeking their own truth, we will go nowhere." After 15 years of divisive rhetoric,

mono-ethnic narratives and frequent demonization of the "other," creating a forum for cross-community exchange will indeed be challenging.

What we call "compatible narratives" is similar to what one truth commission referred to as "social truth" or "dialogue truth" which is "established through interaction, discussion and debate." The South African Truth and Reconciliation Commission (TRC) explains:

In recognizing the importance of social or 'dialogue' truth, the Commission acknowledged the importance of participation and transparency. Its goal was to try to transcend the divisions of the past by listening carefully to the complex motives and perspectives of all those involved. It made a conscious effort to provide an environment in which all possible views could be considered and weighed People from all walks of life were invited to participate in the process.²⁵

This idea is also similar to what Gutman and Thompson call "reciprocity," which they see as the best moral argument in favor of truth-telling. As they put it:

[S]incere efforts on the part of citizens to offer an account of their political past closely resembles the most basic activities in the kind of democratic politics to which a healthy democracy aspires: sharing one's political point of view with one's fellow citizens in an effort to persuade them of its reasonableness and potentially its righteousness. The very activity of providing an account that other citizens can be expected to understand as reasonable (even if it is not right) indicates the willingness of citizens to acknowledge one another's membership in a common democratic enterprise.²⁶

21 Oral history is a methodology within the discipline of history, although the term "oral history" is often used more loosely. See A. Portelli, *The Death of Luigi Trastulli and Other Stories: Form and Meaning in Oral History* (State University of New York Press, Albany, 1991); R. J. Grele (ed.), *Envelopes of Sound: The Art of Oral History* (Praeger, New York, 1991).

22 A useful article by Nenad Dimitrijevic, for example, argues that one set of facts and one value judgment remain beyond any doubt in any analysis of mass crimes and any truth-seeking endeavor. First, the fact that mass killings and related crimes and criminal practices did occur. Secondly, at the level of interpretation, a general value judgment on such practices cannot be disputed: they were wrong and none of them can be justified. See N. Dimitrijevic, 'Criminal Regime, its Vassals and Mass Crimes,' 79/25 *Reč* (2009) p. 139.

23 This phrasing is borrowed from B. Gormally and K. McEvoy, *Dealing with the Past in Northern Ireland "from Below": An Evaluation*, The Community Foundation for Northern Ireland (2009) pp. 24-28.

24 See Chapter Three, Connecting the Local to the Global, *infra*.

25 See South African Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report, Volume 1* (South Africa, 2003) pp. 110-114, <www.info.gov.za/otherdocs/2003/trc/>, visited 20 December 2010.

26 A. Gutman and D. Thompson, 'The Moral Foundations of Truth Commissions,' in R. Rotberg and D. Thompson (eds.), *Truth v. Justice: the Morality of Truth Commissions* (Princeton University Press, Princeton, 2000) pp. 37-38.

These three components are intimately connected. *Compatible narratives*, for example, are most likely to emerge when *fact-finding* has been undertaken in ways that seem objective and when victims and others feel that their voice will be heard and acknowledged.

Finally, it is important to dispel a powerful myth about truth-telling that it is somehow related to *amnesty*, *indemnity*, *pardon*, or *forgiveness*. In fact, in a generic sense, truth-telling has *no necessary connection* to whether or not perpetrators of crimes should be prosecuted and sentenced through legal (criminal or civil) procedures. This is important to emphasize because we were told in numerous interviews that, in BiH, “a truth commission is still equated with amnesty for perpetrators.”²⁷

Official and Unofficial Truth-Telling

So far, we have made no distinction between official (state-based) and unofficial (civil society-based) truth-telling. In fact, although they overlap, these processes are different.²⁸ Official truth-telling processes, when they occur, can be called truth commissions, fact-finding bodies, TRCs, historical commissions, historical clarification initiatives, and truth and justice commissions, among other terms.²⁹ Alternatively, they can be national memory institutes and archives such as the *Gauck/Birthler Authority* in Germany or the *Institute of National Remembrance* in Poland. Courts—often seen as separate from truth-telling—are also truth-telling venues. Criminal and civil proceedings establish facts, elicit the voices of both victims and perpetrators and help develop narratives about the past that are difficult to deny, even if they might not tell the whole story. Finally, vetting processes—procedures aimed at “assessing an individual’s integrity as a means of determining his or her suitability for public employment”³⁰ can also be a venue for establishing facts, because they rely on the collection of documentation and the accumulation of sufficient evidence to administratively discharge, screen or otherwise sanction certain staff members who have committed serious human rights abuses.

27 The myth that truth-telling and amnesty are necessarily related to each other comes from the South African experience, where conditional amnesties were granted to some perpetrators in exchange for full disclosure of the facts about political crimes. During our interviews, however, we were told repeatedly that the amnesty provided by the South African Truth and Reconciliation Commission (TRC) “is inappropriate in the BiH context.” Furthermore, it is an impossible model for BiH, given the strength of the judicial paradigm, as outlined below. In the BiH context, therefore, it is best to disentangle these concepts, and to think of truth-seeking as defined above, and not associate it with the specific mandate of any particular truth commission elsewhere.

28 See K. McConnachie (ed.), ‘Truth Commissions and NGOs: The Essential Relationship: The ‘Frati Guidelines’ for NGOs Engaging With Truth Commissions,’ *International Center for Transitional Justice* (2004).

29 The difference among these different forms of official truth-telling is clearly explained in M. Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, Cambridge, 2006).

30 See R. Duthie, ‘Introduction,’ in A. Mayer-Rieckh and P. De Greiff, *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, New York, 2007) p. 17.

Furthermore, we consider state institutions such as the Missing Persons Institute (MPI) in BiH as a truth-telling institution—one, incidentally, that is dedicated to fact-finding, as described above. The International Commission for Missing Persons (ICMP) is an official truth-telling body as well, albeit one with international participation. These latter two institutions adhere to the highest methodological standards of fact-finding and collection of evidence, including DNA analysis and forensic archeology and anthropology. As such, they have inspired us to see what possibilities lie within BiH. At the same time, meeting with a variety of stakeholders, interested observers and staff members of these institutions has allowed us to see some of the great challenges that lie ahead, even for purely fact-finding institutions like MPI and ICMP.

Official truth-telling has its strengths. It can call on the resources of state to examine the past, can derive special powers that help to access important information (such as powers of search, seizure and subpoena, etc.) and its final conclusions and recommendations can potentially enjoy the authority of the state behind them. On the other hand, official truth-telling is not always easy to accomplish, given political conditions: the state might not be trusted or may be highly politicized or divided.

Although truth-telling can be an official, state-led activity, it does not need to be. Non-governmental associations and organizations can engage in truth-telling through documentation projects, oral history, investigative journalism and the testimony gathering. University-based projects can pursue research agendas aimed at understanding the past in ways that involve fact-finding, voice and compatible narratives. Large-scale initiatives like Guatemala’s Recuperation of Historical Memory project (REMHI) or smaller scale efforts such as the Ardoyne project in Northern Ireland—both examined in more depth below—are useful examples of rigorous unofficial truth-telling projects.³¹ Many of unofficial initiatives in BiH are outlined in the next section of this report. Again, we also were inspired by the dedication to fact and voice—and, in some cases, to compatible narratives—among several of the groups we met.

Unofficial truth-telling is a broad category, replete with creative and innovative examples. Documentation centers and archives like the *Vicaria de la Solidaridad* in Chile are civil society counterparts to national archival projects and facilitate access to vital documentation about the past. Also, the *Documentation Center of Cambodia* (DC-Cam) is extremely active in doing video interviews, oral history and audio recordings of survivors of the 1970–1979 period. A number of museum, memorial and memory projects that are driven by NGOs—such as the *Villa Grimaldi Peace Park* on the outskirts of Santiago (Chile) or the District

31 See P. Lundy and M. McGovern, ‘Action research, community ‘truth-telling’ and post-conflict transition in the North of Ireland,’ 4:1 *Action Research* (2006) pp. 49–64. See also L. Bickford, ‘Unofficial Truth Projects,’ 29:4 *Human Rights Quarterly* (2007) pp. 994–1035.

Six Museum in South Africa—also collect materials and seek to tell truth about specific episodes. Some of these are private, non-governmental efforts and some – like the *Memorial to the Murdered Jews of Europe* in Berlin –are state institutions, but also operate as independent museum/memorial spaces.

It is also worth mentioning here the role that CSOs can play in helping to foster conversations about truth-telling. In this regard, at least two organizations stick out as particularly useful examples. The first is *Healing Through Remembering* in Northern Ireland, which has produced numerous think-pieces, articles and other publications, as well as hosted seminars and workshops on how to best engage in truth-telling in Northern Ireland.³² A second is *Memoria Abierta* (Open Memory), an organization in Argentina that seeks to understand the truth about the past by focusing on identifying physical sites of atrocity, such as torture centers and prison camps. In South Africa, a coalition of CSOs, under the leadership of the *Centre for the Study of Violence and Reconciliation* (CSVR), constructed a database of more than 15,000 recorded violations of human rights abuses, which it subsequently handed over to the South African TRC.

Indeed, it is clear that truth-telling can combine all of these formats—state, non-state, court-based, NGO, investigative journalism, and university-based initiatives, not to mention regional or international efforts. In BiH, to some extent, truth-telling already does combine all of these formats. However, in our view, the fundamental problem of truth-seeking in BiH is less its absence (although there are significant gaps in what truths are being told) than its lack of consistency – in terms of goals, methods, and results –and its lack of integration, coordination and coherence.

One important contributing factor to this is that the degree of trust in the state is low in BiH; that “BiH’s social fabric is characterized by fragmentation and segmentation rather than cohesion and solidarity”; and that “achieving consensus at the state level is very difficult; even proposals made with good intentions are treated with mistrust, and purely technical issues are infused with ‘national interests.’”³³

This raises a “chicken and egg” question about official forms of truth-telling in BiH. On the one hand, it may be that a state widely considered legitimate is a necessary *precondition* to launching and overseeing a truth-seeking initiative. On the other hand, it may be possible that a state-based, official truth-telling

³² See e.g., K. McEvoy, ‘Making Peace with the Past: Options for Truth Recovery Regarding the Conflict in and About Northern Ireland,’ (Healing Through Remembering, Belfast, October 2006).

³³ United Nations Development Program (UNDP-BiH), *National Human Development Report: the Ties that Bind: Social Capital in Bosnia and Herzegovina*, (UNDP, Sarajevo, 2009) pp. 13-14. Our interviews also echo this problem.

initiative might itself contribute to the goal of building a consolidated, effective and trustworthy state.

Towards resolving this dilemma, we believe that the state must indeed play a role in truth-telling, primarily as a coordinator and facilitator of past, present and future initiatives, as well as initiatives at various levels. We also think that such a role can indeed help strengthen the effectiveness and legitimacy of the state.³⁴ Additionally, we are of the opinion that the ideal role for the state to play is to recognize the value of many different strands of truth-telling and, most of all, to seek to find an arena or venue for these initiatives to come into dialogue with each other. Finally, the ability of the state to support and establish a truly independent and autonomous capacity to facilitate truth-seeking through these diverse means would be a significant contribution to democratic governance, as well as to truth-telling itself.

Note on International Comparisons

International comparisons have limited usefulness. After all, BiH is entirely unique and no other country or society has a remotely similar history, culture or political system. As already mentioned, blanket comparisons on the nation-to-nation level with some distant countries make no sense. In this report, therefore, we avoid making this kind of country-level comparison. Instead, in this section, we outline some examples from Northern Ireland, Chile, Morocco, Peru, South Africa and Germany, as we believe that some components of truth-seeking in these countries might be relevant for BiH.

Over the past 25 years, there have been numerous official and unofficial truth-telling efforts in dozens of countries around the world, which could be used as lessons learnt in this regard. Comparative studies of truth commissions,³⁵ unofficial initiatives,³⁶ documentation centers,³⁷ oral history projects,³⁸ studies that examine certain elements of truth-telling (such as the relationships between truth commissions and NGOs,³⁹), as well as many works on specific

³⁴ The relationship between state legitimacy and effectively dealing with the past is apparent in the case of Argentina (1983) when a combination of truth commission, trials, and other agencies to deal with the past helped to re-establish a democratic state and make it clear that it was both viable and ethical. See C. S. Nino, *Radical Evil on Trial* (Yale University Press, New Haven, 1996).

³⁵ A compelling theoretical comparative analysis of truth commissions, although it is now quite old and focuses too much on the South African case, is Rotberg and Thompson, *supra*, note 26. Other comparative works include the often cited Hayner, *supra* note 11; and the comparative legal text by Freeman, *supra* note 29. See also A. Chapman and P. Ball, ‘The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala,’ 23:1 *Human Rights Quarterly* (2001) pp. 1-43.

³⁶ See Bickford, *supra* note 31.

³⁷ Human rights documentation centers have been involved in truth-seeking for many years, and have developed best practices for how best to collect, preserve, and disseminate critical documentation. See e.g., Affinity Group, ‘Documenting the Truth,’ International Center for Transitional Justice (2009), <www.ictj.org/static/Publications/ICTJ_DAG_DocumentingTruth_pa2009.pdf>, visited on 20 December 2010.

³⁸ E.g., Columbia University Oral History Research Office, <www.columbia.edu/cu/lweb/indiv/oral/>, visited on 20 December 2010.

³⁹ See. McConnachie, *supra* note 28.

cases⁴⁰ all make up the growing and impressive corpus of available work on truth-seeking and transitional justice. Not least amongst these are the final reports of some truth commissions, which are compelling in their own right.⁴¹ A further and significant development has been the evolution of the International Journal of Transitional Justice (IJTJ), published by Oxford University Press, which provides a publication platform for both practitioners and academics on truth-seeking, as well as other dimensions of transitional justice.⁴² It makes sense to examine some of this invaluable literature and these reflections on other experiences, not because they provide ready-made solutions for BiH, but because they provide illustrations and examples that may be helpful.

Moreover, at a certain level of abstraction, there are processes in other societies that may provide useful lessons for BiH. For example, although Northern Ireland is a very different case than BiH, the tensions between (ethnic/religious) identity groups, the political structure of the polity, and the lack of a formal truth commission, all provide some relevant similarities with the BiH case. In Northern Ireland, the truth-telling initiatives that have emerged, including the Report of the *Consultative Group on the Past*⁴³ (also known as the “Eames Bradley Report”) and the *Saville report*⁴⁴—not to mention unofficial truth-telling initiatives such as the *Ardayne Project*⁴⁵—may therefore represent useful analogies for the process in BiH. In other words, the approach taken to dealing with the past in Northern Ireland may suggest useful programs and activities in BiH. In fact, we find the *Consultative Group on the Past* to be an initiative worth examining closely in BiH as a comparative example that may have some resonance.

Similarly, while Chile has a very different history than BiH, the two different truth commissions in that country (one in 1990 and one in 2003) represent helpful examples of truth commissions whose focus has been on fact-finding and whose methodologies for determining facts have been widely recognized as thorough and objective. The relevance of the Chilean case in BiH can be seen

40 E.g., D. Posel and G. Simpson (eds.), *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Witwatersrand University Press, Johannesburg, 2002). See also K. Theidon, ‘The Mask and the Mirror: Facing Up to the Past in Peru’, 48:1 *Anthropologica: Journal of the Canadian Anthropology Society* (2006) pp. 87–100.

41 Many final reports are available on the United States Institute for Peace website. For a well-developed unofficial truth commission report, see Greensboro Truth and Reconciliation Commission, ‘Final Report’ (USA, 2006) <www.greensborotrc.org/>, visited on 28 December 2010.

42 The International Journal of Transitional Justice's website is: www.ijtj.oxfordjournals.org.

43 Consultative Group on the Past, *supra* note 9.

44 This report is also known as the “Bloody Sunday Inquiry Report.” In setting up the process, the British Prime Minister explained, “The facts that are undisputed are well known. On 30 January 1972, during a disturbance in Londonderry following a civil rights march, shots were fired by the British Army. Thirteen people were killed and another 13 were wounded, one of whom subsequently died . . . Let me make it clear that the aim of the inquiry is not to accuse individuals or institutions, or to invite fresh recriminations, but to establish the truth about what happened on that day . . . I believe that it is in everyone's interests that the truth be established and told.” ‘Inquiry Background, Prime Minister's Statement,’ *House of Commons Official Report* (29 January 1998) p. 1, <www.bloody-sunday-inquiry.org/inquiry-background/index.html>, visited on 28 December 2010. The Inquiry was expensive (£190.3 million) and time consuming (12 years), but the result was a report that is widely accepted to have produced a definitive account of the events of that day.

45 See The Ardayne Commemorative Project, *Ardayne: the Untold Truth* (Beyond the Pale Publications, Belfast, 2003).

in the fact that a rigorous focus on fact-finding emerged repeatedly during our interviews in BiH. Moreover, Chile offers another set of comparative lessons on the “unofficial” side of the equation. For example, municipal history projects by a group called *Educación y Comunicaciones (ECO)* that took place in the mid-1990s⁴⁶ brought professional historians into the service of small towns, where they sought to establish compatible narratives about the past. More recently, Chile has established a human rights museum that tries to capture the voices of victims by representing them in photographs, film clips and narrative stories that are displayed throughout the museum.

Morocco is another case we mention below, in large part because it was an innovative attempt—the first such effort in the Muslim or Arab worlds, and adapted to that context—to tell the truth about a period in which there were multiple and varied kinds of victim groups including students, leftists, royalist coup-plotters and Saharawi separatists. The truth commission in Morocco sought to examine victimization as a shared experience among these groups, looking closely at physical sites of torture, disappearance and killing. Furthermore, the Moroccan commission sought to integrate a gender analysis in creative ways. More precisely, one commissioner was especially tasked with drawing attention to a gender perspective. Similar approach was taken in Peru, where the commission also had a “Gender Unit” and sought to “mainstream” gender throughout its work. In both cases, this meant looking at the different ways that men and women experience conflict.⁴⁷

The South African example—in many ways different to the BiH case—provides some illumination around both the unofficial side of truth-telling (archives, NGOs, victims' associations, museums, memorials)⁴⁸ and some important innovations on the official side. In the latter sense, for example, we find the truth commission's decision to have public hearings in order to create dialogue and discussion about the past within South African society,⁴⁹ its process of

46 This group sent History PhD students from the University of Chile to small villages in Chile that had been disproportionately affected by the violence in the 1970s to write “municipal histories” of the villages, using oral history methodology. In the first stage, they interviewed as many people as they could in the village. They then compared these interviews to other sources, such as the truth commission report, criminal complaints and legal documents, journalistic articles, human rights reports by international and national institutions, and some selected interviews with other experts on the dictatorship. They next wrote the first draft of the municipal history, which they shared with the village. They subsequently convened as many people in the town as they could to comment on the draft, including correcting factual errors or misinterpretation. The students then did more interviews and wrote the final municipal history. They made enough copies for everyone in the town, the national archives, and a few hundred libraries in the world. In Paine, this municipal history is a widely-accepted definitive account of what happened there.

47 See Chapter Three, Gender in Truth-Seeking: A Primary Concern, *infra*.

48 South Africa has a robust cultural sphere that seeks to address the past, including museums (the Apartheid Museum, the Robben Island Museum, the District Six Museum, Constitution Hill, etc.), Memorials (the “Guguletu 7” memorial, the “Trojan Horse” memorial in Athlone, Freedom Park in Pretoria, amongst others), as well as strong victims' associations, such as the Khulumani Support Group.

49 See also Chapter Three, The Importance of Acknowledgement, *infra*. South Africa was the first truth commission to have widespread public hearings. Almost every truth commission since then has followed this example.

selecting commissioners⁵⁰ and its relationship to the media⁵¹ to be some of the areas that warrant examination.

The way that Germany dealt with its communist past seems to have little in common with BiH's experiences. And yet the Federal Commissioner for the Stasi Archives (the "*Gauk-Birthler Authority*") is a thought-provoking example of the way in which a state-led archive can collect vast amounts of material in order to apply the highest standards of the disciplines of History, Law, and Journalism to confronting a difficult period in the past. This famous archive was the site of the Stasi (secret service) files in Eastern Germany. After reunification, it became a federal structure dedicated to understanding and engaging with the past. The files are voluminous, and include notes and entries concerning thousands of cases. If a victim's name is in the files, he or she can arrange to see the files.

Moreover, in Germany, the various roles of memorials, museums, universities, and artists—both concerning World War II and the German Democratic Republic (GDR) period—can provide useful ideas for both official and unofficial truth-telling processes. For example, memorialization of the Holocaust has brought some of the country's best thinkers and artists into public discussion about how best to remember this period. It has led to the "counter monument" movement that calls into question the very nature of monuments.⁵² In terms of the GDR, the *Gauk/Birthler Archive*, books and films (such as *The Lives of Others*), small museums and innovative tourism tools (such as the recorded guided tour of the Berlin Wall), have helped German society examine this complicated period.

It is nevertheless important to underline once again that drawing on international comparison should never mean shortchanging a context-specific approach. Although important works summarizing "best practices" have emerged in recent years,⁵³ there is no blueprint for truth-telling, no recipe, or one-size-fits all. Instead, truth-telling must respond to local conditions.

50 This was a highly participatory and transparent process that involved soliciting nominations from civil society as a first step. The goal was to identify and select commissioners who, taken as a whole, would be seen as widely respected and objective. See Chapter Three, Consensus Figures and the Importance of Credible Leadership, *infra*.

51 Because of public hearings and the tone of transparency set by the Commission, the media engaged with the TRC in ways that contributed to generating a societal conversation about the past. The SABC (state television), for example, had a weekly summary of the truth commission's work that was widely watched.

52 This is examined in rich detail in J. E. Young, *The Texture of Memory* (Yale University Press, New Haven, 1993).

53 See e.g., Hayner, *supra* note 11; Freeman, *supra* note 29.

Goals of Truth-Telling in BiH

Our interviews with a broad array of stakeholders, experts and interested parties helped lead us to understand the possible goals of truth-telling in BiH. What follows in this section is a distillation of some of the goals presented to us during these conversations. Understanding the goals of truth-telling that are relevant for a specific context is the most important step in developing a tailor-made truth-telling strategy, since different goals will produce different formats, structures and processes.

In the context of BiH, our interviews suggested that goals of truth-telling might include some or all of the following:

- *Honoring the victims and remembering them as individuals, human beings, family members and friends, and acknowledging their loss.*

In BiH, we note that this goal is very important within specific communities. There is great sadness within each victim community, and its members feel that it is important to remember those from their own group who were killed or harmed during the conflict. In some cases, we also found that victims express solidarity with victims from other groups, noting that the suffering of a parent or sibling for a dead loved one transcends ethnic identities.

- *Establishing a historical record about what happened in the past, and using the results of truth-telling to educate future generations and help them build durable peace and avoid future violent conflict.*

This is a massive challenge in any context. Writing history, establishing history curricula and teaching history presents its own particular sets of challenges.⁵⁴ Moreover, in BiH, there are specific complications that need to be addressed. One such complication is the legacy of the policy of "two schools under one roof."⁵⁵ This policy, originally supported by the Organization for Security and Cooperation in Europe (OSCE) Mission to

54 "In deeply divided societies, contending groups' historical narratives—especially the official versions presented most often in state-run schools—are intimately connected to the groups' identities and sense of victimization. Such narratives are often contradictory and controversial. History taught in schools is highly susceptible to simplified and biased presentations, and this is even more likely after conflicts, such as the war in BiH, that end through international intervention. How schools navigate and promote historical narratives through history education partly determines the roles they and those who control the schools play in promoting conflict or social reconstruction." E. Cole and J. Barsalou, *Unite or Divide? The Challenges of Teaching History in Societies Emerging from Violent Conflict* (United States Institute of Peace, Washington, 2006), <www.usip.org/files/resources/sr163.pdf>, visited on 20 December 2010. See also E. Cole, *Teaching a Violent Past* (Rowan and Littlefield, New York, 2007). One of the best sources for how to teach history in the wake of violent conflict, is the organization: Facing History and Ourselves. Their website is: www.facinghistory.org/.

55 A. Alic, *Bosnia and Herzegovina: Teaching Intolerance* (Transitions Online, Open Society Institute, New York, 2008) p. 1, <www.soros.org/initiatives/esp/articles_publications/articles/bosnia_20080603>, visited on 20 December 2010.

BiH as a transition policy in practical terms (in schools) is described in the following way:

“Bosniak and Bosnian Croat children, as well as their teachers, have no mutual contact. Students often arrive at school via different entrances, they take separate breaks, and the teachers have separate common rooms. In some more ‘reformed’ schools, the classes are multi-ethnic, but when time comes for national subjects such as geography, history, and language, they separate.”⁵⁶

UNDP’s previous assessment of this question is that “school curricula, especially history, is a highly political question. Yet addressing this issue is crucial so as not to ignore this opportunity to influence the mindset of BiH’s future generations in the long term.”⁵⁷ Although challenging, this might be one of the primary goals of truth-seeking in BiH. In fact, in our many interviews, we consistently heard some version of this refrain, spoken by people who had lived through the conflict as adults, who stated that it was too late for their generation, but that it was not too late to teach future generations about the dangers of war. This apparently widely-held sentiment would suggest that *teaching history* could be an important goal in the BiH context. This is also one of the conclusions of the UNDP Fojnica consultation event of 2008.⁵⁸

- *Contributing to criminal accountability processes, either by painting a broader picture and context of the crimes examined by courts, or by generating additional evidence and facts to support trials of perpetrators*

For some actors in BiH, there is considerable ambivalence and even suspicion about the role of judicial authorities—domestic or international – and hence also about the role of courts in truth-seeking. For others, any serious truth-telling must have the goal of criminal accountability at its core. Thus, this fundamental disagreement about the purpose of truth-telling in BiH must be addressed. One way to move beyond this disagreement might be to recognize that truth-telling and prosecutions, while certainly potentially compatible, are nonetheless distinct processes.⁵⁹ Truth-telling

⁵⁶ *Ibid.* p. 6.

⁵⁷ UNDP, *supra* note 15, p. 30.

⁵⁸ Ministry of Justice of Bosnia and Herzegovina, UNDP BiH and Ministry for Human Rights and Refugees of Bosnia and Herzegovina, “Consultations on Transitional Justice of June 4-6 2008, Fojnica”, UNDP (2008), <www.undp.ba/download.aspx?id=1527>, visited on 20 December 2010.

⁵⁹ See Chapter Three, The Relationship Between Truth-seeking and Trials, *infra*.

can therefore have significant value as a societal process *in its own right* and not merely as a function of its relationship to prosecutions and criminal justice processes.

Although there are several examples globally where truth-seeking and criminal prosecutions have been substantially compatible and even mutually complementary,⁶⁰ our inclination is that entangling the objectives of truth-telling initiatives too directly with those of trials in BiH is potentially counter-productive. This is so not merely because of the divided opinions on the performance and objectivity of criminal trials, but also because it may mask the importance of truth-telling as an *independent process*, serving a different (albeit complementary) set of social objectives. The value of truth-telling, therefore, should not *primarily* be seen through its relation to trials, even if there may be an important connection between these processes.

- *Complementing and building on the factual record generated by criminal trials in order to tell the broader story of what happened*

Trials themselves represent a form of truth-telling. Trials are underway in BiH, both on the international level (the International Criminal Tribunal for the Former Yugoslavia, ICTY) and on the state level (War Crimes Chamber of the Court of BiH). The dramaturgy of public trials, the vast documentation produced, the communications materials created by some courts, the media reports about trials, the public statements of court officials and the legal findings of the case as it ends all constitute important forms of truth-telling.

However, since criminal trials necessarily only tell a thin slice of a complex and unwieldy story, truth-telling can use the evidentiary basis of trials as a starting point to tell a richer and more well-rounded history. In this sense, truth-telling can be seen as a complement to trials as a form of accountability, providing a “thicker” story of what transpired.

- *Contributing to reconciliation and peace-building processes by humanizing the ‘other’*

In BiH, as in many other countries emerging from violent conflict, the mere absence of violence in the “post-conflict” phase cannot be equated with “positive peace” or the notion of a deep and sustainable peace.⁶¹ The latter

⁶⁰ *Ibid.*

⁶¹ For example, in Lebanon, observers point to the fact that, although the conflict has ended formally, there is still great animosity, distrust, even hatred among different communities. Dealing with a context in which deep hostilities are just below the surface raises its own challenges.

depends on rebuilding relationships of trust and mutual respect in society and addressing the underlying causes of the violent conflict, so that future outbreaks of sectarian violence are less likely to occur. In this respect, we believe that BiH is a “post-conflict” society, but it is not clear that it is in the process of building a deep and sustainable peace.

Truth-telling is often (but not universally) linked to “reconciliation.”⁶² There is an assumption that seeking and telling the truth about the past may help to humanize victims and help create a sense of empathy and shared citizenship, contributing over time to social and political trust-building between groups who were previously engaged in violent conflict. We believe this is a plausible argument, although not a simplistic one. We share Juan Mendez’s skepticism about “false reconciliation”⁶³ and would warn against the idea that reconciliation without any form of accountability (defined broadly, to include criminal trials as well as truth-telling) may rest on shaky foundations.

However, because truth-telling, as it is normally understood, tends to prioritize the voice of victims, truth-telling initiatives can present an unusual opportunity to understand fellow citizens, to empathize with them and potentially to build mutual trust between them. In this sense, truth-seeking initiatives have the potential of helping to “humanize the other” by allowing some groups of people to see other groups as fully human, having their own sadness and grief and coping with the complex trauma of war as mothers, fathers and children.

We feel that this is among the most important aspects of truth-telling in BiH, considering the extent of *de facto* ethnic segregation and pervasive mistrust between different groups in the wider society, as well as the political mobilization of these exclusive ethnic identities.

This goal of truth-telling would lead to a specific set of design issues, such as how to present these voices in ways that do not add to the “cacophony” mentioned in this report, but instead create a kind of sober reflection on

the sufferings of others in a way that creates empathy and understanding among different communities and fosters compatible narratives.

- *Establishing that certain facts are impossible to deny*

Every society in the world crafts its own untruths, lies or distortions about the past, or omits key historical information about itself.⁶⁴ However, there also must be a set of agreed upon facts that, in Ignatieff’s words, help to “narrow the range of permissible lies”⁶⁵ in order to hold a society together as a single “imagined community.”⁶⁶ Truth-telling, especially with a formal imprimatur of a legitimate authority (such as the state), can help provide this.

In our interviews we were told that “false truths continue to multiply in this country” and that there is “a need to prevent false truths”. Indeed, we heard the complaint over and over again that truth is too often not based in fact but rather in politics.

Although limiting the range of permissible lies is an admirable goal, we are also aware that prior efforts to do so in BiH — particularly in the Srebrenica Commission, for example — have not had a lasting effect. The findings of the commission have not managed to establish undeniable facts that are universally accepted as part of a state-wide story. We explore this in greater depth below.

- *Filling Gaps in what is known and acknowledged*

Aryeh Neier once suggested that truth-seeking in BiH might be unnecessary, as the most heinous crimes have taken place in a relatively open way, without hiding traces or evidence⁶⁷. Moreover, trials have unearthed a great deal of evidence about the crimes and experiences.

We believe that this argument misses the point of truth-telling. Truth-telling is as much about the process of telling and the *acknowledgement* and *recognition*, as it is about what we know or do not know. *Knowing* that crimes took place is very different from widespread acceptance, public (or official) acknowledgement of the truth that crimes took place.

62 The combination of these two concepts—truth and reconciliation—is hardly inevitable. In fact, the first commission to be called a “Truth and Reconciliation” Commission—in Chile in 1990—was the result of very specific historical and political conditions, nicely outlined in the magisterial work by Loveman and Lira, mostly in Spanish, but summarized in B. Loveman and E. Lira, ‘Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile 1814-2006,’ 97 *Radical History Review* (2007) pp. 43-76. For more on the coupling of these two terms, see L. Bickford, ‘Truth and Reconciliation,’ in D. Philips (ed.), *International Reconciliation Models* (Istanbul Policy Center, Sabanci University, Istanbul, 2010). More broadly, there is a voluminous literature on the possible relationships between “truth” and “reconciliation” including a number of chapters in T. A. Borer (ed) *Telling the Truths: Truth Telling and Peace Building in Post- Conflict Societies* (University Of Notre Dame Press, South Bend, 2006). See also P. De Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, Oxford, 2006).

63 Mendez is a former Special Advisor to the UN Secretary General on the Prevention of Genocide, and also a former President of the International Center for Transitional Justice. See G. Mezarobba, ‘Interview with Juan Mendez,’ 7:167 *SUR—International Journal of Human Rights* (2007) pp. 6-12.

64 See e.g., J. Loewen, *Lies my Teacher Told Me* (Simon and Schuster, New York, 1995).

65 See M. Ignatieff, ‘Articles of faith,’ 25:5 *Index on Censorship* (Sept./Oct. 1996) pp. 110-22.

66 See B. R. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, London, 1991).

67 A. Neier, ‘Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda’ in D. Weissbrodt (ed.), *International Human Rights: Law, Policy, and Process* (Anderson Publishing, Ohio, 2001) pp.407-408.

Neier's argument also obscures the fact that in BiH some truths remain largely uninvestigated and untold. To name one of many examples, there seems to be no concerted effort to arrive at a clear definition—shared by all communities—of “concentration camp” or “prison camp”, to identify where these were during the conflict, who and how many people went through them and to find a way to map or mark their presence. A rigorous truth-telling effort could help to create such a shared definition and make it clear that such camps existed during the 1992–1995 period.

Similarly, truth-telling is, as mentioned above, a way to capture voice, the stories of victims, family members and others, framed by them in their own narrative format.

- *Analyzing the events of the past in a way that leads to concrete policy recommendations to prevent conflict in the future*

Truth-telling initiatives, and especially official truth commissions, have often produced reports that have been a source of creative recommendations about how to build a better future. For example, in its report, the Moroccan truth commission combines both pragmatic policy goals with big picture aspirations. Recommendations include, among others: (1) a diminution of executive powers (2) the strengthening of the legislature; (3) more independence of the judiciary; (4) reforms in the security sector; (5) changes in criminal law and policies, including the development of laws against sexual violence; (6) the creation of a national archive; (7) the establishment of “sites of memory” at former torture centers; and (8) new ways of teaching about the past.⁶⁸

- *Dialogue as foundation for democratic rule of law*

Finally, one of the most ambitious and complex goals of truth-telling is to facilitate and promote civic dialogue about both past and future. This idea is rooted in the notion of deliberative democracy which, as Gutman and Thompson put it, suggests that “when citizens disagree about public policy, they should deliberate with one another, seeking moral agreement when they can, and maintaining mutual respect when they cannot ... the fundamental value underlying this conception is reciprocity, which asks citizens to try to justify their political views to one another, and to treat with respect those who make good faith efforts to engage in this mutual enterprise even when they cannot resolve their disagreements.”

⁶⁸ Equity and Reconciliation Commission, *Recommendations, Final Report*, (Rabat, Morocco, 2005), <www.ier.ma/article.php3?id_article=1433>, visited on 28 December 2010.

For Gutman and Thompson, the dialogic aspect of truth-telling is its most reliable justification.⁶⁹

Of course, this notion also depends on the existence—or strengthening—of a shared and inclusive public sphere or civic arena in which disagreements can be subjected to dialogue. The alternative is single narratives that develop each in isolation and do not interact with each other. If creating dialogue is one of the primary goals of a truth-seeking process, then the resulting design will rely heavily on structures such as public hearings, direct and deep engagements with the media and an emphasis on developing communications strategies, amongst other mechanisms for fostering state-wide conversations about the past.

The “Right to Truth”

Truth-telling may be a legal obligation for post-conflict states or, at a minimum, an emerging norm to which BiH can contribute. Indeed, BiH may have an opportunity to help develop an innovative and important norm that has global implications. Stated simply, the question is whether victims (as individuals) and societies (as collectives) have a right under international law to know the truth about what happened to them or their loved ones. If so, this also implies a corresponding duty on the state to dedicate resources and political will to determining such a truth.

More specifically, the “right to truth” is usually invoked under international law as an obligation of the state to provide victims and family members relevant factual information about violations of human rights committed during conflict. In its narrowest form, this is invoked as an individual's right to know what happened to a loved one. In its most robust form, the right is framed as a collective right to know and teach non-revisionist history as well as an individual's right to uncover the truth about all grave human rights violations that occurred to his or her relatives' past.

Explicit acknowledgement of the right to truth first emerges in Article 32 of the Geneva Conventions' Additional Protocol 1, which grants the families of those missing in armed conflict the right to know what happened to their loved ones. More recently, the Inter-American Court has pushed the principle further through its jurisprudence, and the legal framework relevant for transitional justice has increasingly made it clear that victims have a right to know what

⁶⁹ A. Gutman and D. Thompson, *supra* note 26, pp. 35–39.

happened to their loved ones, beyond just in the case of disappearances during armed conflict.⁷⁰

Three key documents have helped develop the idea of a “right to truth” as an emerging norm. These are: (1) the Joinet Principles; (2) the Updated Joinet Principles (Orentlicher); and (3) the Human Rights Commission’s Resolution 2005/66.

Joinet develops the language of an “inalienable right to know the truth.” He explains the collective and individual nature of the right and adds that there are implied guarantees which place a duty on states to uphold the principle. Joinet mentions Truth Commissions and the creation of archives as actions appropriate to this, aside from the potential for prosecutions. In Joinet’s words, the principle is defined as follows:

Principle 17: This is not simply the right of any individual victim or his nearest and dearest to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember” on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism, for the history of its oppression is part of a people’s national heritage and as such must be preserved.⁷¹

Diane Orentlicher, charged with revising and updating the Joinet Report, submitted her report on protection against impunity to the Commission of Human Rights in 2005. The document describes “The Right to Know” within a general obligation of states to combat impunity. Orentlicher therefore links the right to know to a duty placed on the state to protect against repetition and impunity for grave violations. In Principle 2, building on Joinet, she discusses the “Inalienable Right to Know”:

⁷⁰ Part of the legal basis for transitional justice is the 1988 decision of the Inter-American Court of Human Rights in the case of *Vélez Rodríguez v. Honduras*, in which the Inter-American Court found that all states have the obligation, among others, to conduct a serious investigation of human rights violations when they occur. *Vélez Rodríguez v. Honduras*, Inter-Am. Ct. H.R., Ser. C, No. 7, 1990. As the International Center for Transitional Justice puts it, furthermore, “those principles have been explicitly affirmed by later decisions by the court and endorsed in decisions by the European Court of Human Rights and by UN treaty body decisions such as the Human Rights Committee. The 1998 creation of the International Criminal Court was also significant, as the Court’s statute enshrines state obligations of vital importance to the fight against impunity and respect for victims’ rights.” International Center for Transitional Justice, “What is Transitional Justice” <www.ictj.org/en/tj/>, visited on 28 December 2010.

⁷¹ L. Joinet, *Revised Final Report. Question of the Impunity of Perpetrators of Human Rights Violations* (Civil and Political) (E/CN.4/Sub.2/1997/20/Rev.1); D. Orentlicher, *Promotion and Protection of Human Rights: Impunity Report of the independent expert to update the Set of Principles to combat impunity* (E/CN.4/2005/102).

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systemic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against recurrence of violations.⁷²

Orentlicher includes an explicit mention of Truth Commissions and other commissions of inquiry as bodies suited to this role. The “Right to Know” depends upon the express guarantees to testify as a victim (principle 10), to provide commissions with adequate resources (principle 11), and to preserve and allow access to archives (principle 14 and principle 15). Further, Orentlicher’s report adds a state duty to “preserve memory.” The principle has the character of a collective right, protecting citizens against denial and negations. The “Duty to Preserve Memory” reads, essentially, as a collective right to complete and accurate history:

A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfillment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

Finally, the Human Rights Commission Resolution 2005/66 establishes a right to know by referring back to the Geneva Conventions in their mention of the right of families to know the fate of combatant relatives. The resolution also recalls the contribution of Orentlicher to building upon this notion. The Resolution reads:

⁷² *Ibid.*

[T]he Working Group on Enforced or Involuntary Disappearances (see E/CN.4/1999/62) have recognized the right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the facts that gave rise to such violations.

Although the precise status of the right to truth is still unsettled in international law, it is clear that at very least it is an emerging international norm. To some extent this provides both an obligation and an incentive to the government and people of BiH to pursue the objectives of truth-telling and truth-seeking, and thus to lead, rather than merely comply with this emerging norm.

Timing, Sequencing and the Relationship between Truth-Seeking and Other Aspects of Transitional Justice

Within the field of transitional justice, the idea of a “holistic approach” that combines truth-telling, criminal accountability, memory work, reparations, and guarantees of non-repetition (or institutional reform) suggests that various strategies for dealing with the past interact and complement each other. Although a holistic approach seems to make sense—because of the interrelationship among all these different strategies—debates have often arisen over the sequencing of transitional justice mechanisms. What, for example, is the optimal relationship among courts, truth commissions, and administrative reparations programs? There is no single answer to this, as it depends on context.

In the BiH case, there has been no formal or official truth commission. However, there have been various judicial processes related to the conflict: the establishment of the ICTY, the War Crimes Chamber of the Court of BiH, as well as the cantonal courts in the Federation of BiH and the district court in the RS and the Basic Court of Brcko District. In the meantime, in the absence of an official truth commission, there have been a range of unofficial or non-state truth-telling efforts. The question of sequencing of transitional justice mechanisms therefore raises particular issues in BiH.⁷³

⁷³ See also Chapter Three, The Relationship Between Truth-seeking and Trials, *infra*.

In terms of timing, there is also no optimal moment when a truth-telling initiative should be launched. For some in BiH, the need to launch truth-seeking activities was urgent and immediate. Others suggested that too many years had passed and that this might now be too difficult to achieve. There are, however, no hard and fast rules on when truth-seeking initiatives should take place. Many of the classic truth commissions have taken place during or shortly after a transition (e.g. Chile, South Africa) or peace agreement (e.g. Sierra Leone, Liberia). However, in Chile, a *second* truth commission emerged some 13 years after the formal transition, suggesting the on-going nature of dealing with the past. In Germany, there has never been a formal truth commission, but a second thrust to interrogate the past started in the 1980s.⁷⁴ In Spain, there was silence for almost two generations before a real attempt to understand the past began to emerge 70 years after the Spanish Civil War.⁷⁵ In short, while establishing a truth-telling process immediately after a transition makes sense in some contexts, in other contexts it might make the most sense to engage in such a process years later.

Ultimately, there are advantages and disadvantages to truth-telling that happens immediately after the end of the violent conflict. Clearly, the freshness of memory helps, but it might also mean that the wounds are still raw. On the other hand, a long gap between the war and the truth-telling process can make it harder to recover reliable information and even memory. But, with the passage of time, the evolution of other developments (including commissions, enquiry, trials etc.) can also provide some advantages and a greater willingness of those most affected to participate. Perhaps the most important point is precisely that truth-telling is a *process*—not an event—and that this process must be tailored to a specific context. In this regard, we see no reason that BiH cannot engage in a serious truth-telling effort today, even though a number of years have passed since the end of the conflict.

Conclusion

This section has outlined some of the possible goals of truth-telling with the idea that this list of goals would become part of a broader societal discussion in BiH. Because demand for truth-telling is strong but inchoate and fragmented, it is especially important to clarify what goals of a truth-telling initiative would or could be. Indeed, determining these goals will have the effect on influencing the design of any truth-telling initiative, official or unofficial, that emerges.

⁷⁴ See C. Maier, *The Unmasterable Past: History, Holocaust, and German National Identity* (Harvard University Press, Cambridge, 1997).

⁷⁵ See P. Aguilar, *Memory and Amnesia: the Role of the Spanish Civil War in the Transition to Democracy* (Berghahn Books, New York, 2002).



Chapter Two

Truth-Telling in BiH: Situation Analysis, Illustrative Projects and Main Concerns

Background and Context

The General Framework Agreement for Peace in BiH (GFA) of 1995 ended the devastating three-year conflict that left BiH with deep wounds, both in terms of war casualties and with regard to the fractured country's social tissue. The precise casualties are almost impossible to discern, as are the forensic facts related to the final numbers of dead, missing and sexually violated. All that currently exists are somewhat reliable estimates: approximately 100,000 people died,⁷⁶ between 8,000 and 10,000 people are still missing,⁷⁷ up to 50,000 victims suffered some form of wartime sexual violence,⁷⁸ around 2.2 million people became refugees and internally displaced persons.⁷⁹ Although uncertain and unofficial, these estimates vividly illustrate the gravity of the conflict, which included significant civilian casualties and material destruction, as well as horrific campaigns of "ethnic cleansing." They do not, however, reveal the complexity of the war's actors. As many as four different domestic armies were in conflict at different times from 1992 to 1995,⁸⁰ and neighboring countries were actively involved in the fighting.

The GFA institutionalized the deep ethnic divisions that had been generated by the three-year conflict. It divided the country into two political entities: (1) the Republika Srpska, which was set up as an unitary structure with only municipal authorities and no mid-level government; and (2) the Federation of BiH, which comprised 51 percent of the BiH territory and was a complex political entity divided into ten cantons, each with its own competencies in state activities, like policing and education. The war-induced "ethnic homogenization" still affects

⁷⁶ The report of the Research and Documentation Center drafted in the course of the Human Losses project, establishes the (incomplete) figure of 97,207 direct victims of the 1992-1995 conflict.

⁷⁷ See ICMP, 'ICMP transferred the presiding over the expert group to the Missing Persons Institute', September 8, 2009, www.ic-mp.org/BA/press-releases/icmp-hands-over-chairmanship-of-the-expert-group-to-the-missing-persons-institute-icmp-predao-predsjedavanje-ekspertnom-grupom-institutu-za-nestale-osobe-bih/, visited on 20 December 2010.

⁷⁸ Estimates in this regard range from "at least several thousands," to 20,000 in the documents of the Council of Europe, to 50,000 victims of sexual violence indicated in some reports by the Government. The latter figure is often judged as politicized and exaggerated. See Amnesty International, 'Bosnia and Herzegovina: Briefing to the UN Committee against Torture', *AI index* EUR 63/005/2010 (2010).

⁷⁹ Out of this number, around 1.2 million people are refugees, while another million are estimated to be displaced within Bosnia and Herzegovina. See e.g., Ministry of Human Rights and Refugees of Bosnia and Herzegovina, 'Framework Programme for Return of Refugees and Internally Displaced Persons 2009-2014', (2009) <www.unhcr.ba/images/stories/Spotlight/returnprogramfinalbos.pdf>, visited on 20 December 2010.

⁸⁰ Namely, the Croatian Defense Council, Army of Republika Srpska, Army of Bosnia and Herzegovina, and the People's Defense of the Autonomous Region of Western Bosnia.

these two political entities, the cantons (with a possible exception of two), and even the municipalities, which are overwhelmingly dominated by one of the three constituent peoples.⁸¹

The resulting divided constitutional state structure and social landscape has direct implications for truth-seeking and truth-telling. In essence, the GFA's ethnic power-sharing arrangements created a loose union of three separate societies in which people share their war experiences mostly, if not exclusively, "with like-minded people only."⁸² Each side in the war has thus been able to perpetuate its own version of the truth, without these versions being subject to scrutiny or contestation. The similarly divided media provides mostly one-sided content that sustains these exclusionary perspectives. Shared media programs, such as the Public Broadcasting Service of BiH, which are meant to encourage cooperation,⁸³ have had limited audiences and success.⁸⁴ Education systems are effectively segregated and divided into three different ethnic programs. "[T]wo schools under one roof" best describes the current state of education.⁸⁵ Significant progress in post-conflict reconstruction is confined mostly to the fields of security and the creation of joint political institutions at the state level. Divisive rhetoric remains the *modus operandi* for political parties in their efforts to ensure electoral success. Accordingly, the establishment of a truth-seeking body at the state level, as contemplated by the GFA's Side Letters,⁸⁶ has not been seriously contemplated in public debates on transitional justice.

At the same time, there is a great need for acknowledgment. During our field mission, the representatives of victims' organizations expressed their wish to be acknowledged, not only by the State, but also by victims' organizations and the public from the other political entity and other ethnic groups in BiH. Reasons for such a demand are certainly considerably different for different actors (political, status-related, sense of solidarity, etc.), but this desire for acknowledgment across ethnic and political lines remains one of the most important factors when contemplating a truth-telling project for BiH.⁸⁷

81 UNDP BiH, *National Human Development Report: Social Inclusion in Bosnia and Herzegovina* (2007) p. 49, <hdr.undp.org/en/reports/national/europethesis/bosniaherzegovina/name.3437/en.html>, visited on 23 December 2010. According to this estimate, there is almost no local community in which the percentage of those not belonging to the dominant group is higher than 10 percent.

82 On the nature of political and public life in divided societies, see e.g., C. Sunstein, 'The Law of Group Polarization,' 10 *Journal of Political Philosophy* 175 (2002).

83 See G. Wolsfeld, 'The News Media and Peace Processes: The Middle East and Northern Ireland' *Peaceworks* No. 37 (United States Institute of Peace, Washington DC, 2001).

84 See e.g., various audience measurement reports of Mareco Index Bosnia, 'Monitoring in B&H,' *Gallup International*, <www.mib.ba/02ae.asp?catid=102&subcatid=7>, visited on 20 December 2010.

85 For a comprehensive overview, see UNICEF, 'Divided Schools in Bosnia and Herzegovina' *UNICEF Bosnia and Herzegovina* (2009), <www.unicef.org/bih/media_14093.html>, visited on 20 December 2010. For earlier developments in the field, see V. Perry, 'Reading, Writing and Reconciliation: Education Reform in Bosnia and Herzegovina,' *ECMI Working Paper* No. 18 (2003).

86 See G. Gisvold, 'A Truth Commission for Bosnia and Herzegovina? Anticipating the Debate,' in M. O'Flaherty and G. Gisvold (eds.), *Post – War Protection of Human Rights in Bosnia and Herzegovina*, (Kluwer Law International, The Hague, 1998) p. 242.

87 See Chapter Three, The Importance of Acknowledgement, *infra*.

Some victims, in particular, want truth-telling accompanied by some kind of official state stamp. According to some, there should be "only one truth" and no dispute over it. They maintain that such a "minimum forensic truth" would allow future generations to be freed of a legacy of lies, stereotypes and hatred.⁸⁸ Even those who are opposed to the restoration of the pre-war multicultural society, nevertheless aspire to bringing up their children in a more tolerant society and see truth about the past violence as indispensable to that.

The Dominance of the Prosecutorial Paradigm in Dealing With the Past

It is usually postulated that the 15 years of transitional justice in BiH have been marked by the dominance – and almost the exclusivity – of the criminal justice paradigm in efforts to "address impunity." As the ICTY approaches the end of its mandate,⁸⁹ the Court of BiH and cantonal and district courts in the Federation of BiH and the Republika Srpska, respectively, continue to investigate and prosecute about 10,000 suspects accused of a wide range of crimes committed in the course of the 1992–1995 war.⁹⁰ The institutional – and indeed cultural – dominance of criminal accountability is also reflected in the public sphere, as the significant majority of BiH citizens still regard criminal justice proceedings as the most favorable mechanism for dealing with the past.⁹¹ This was also generally confirmed during our conversations with various actors in BiH. Even when criticizing the courts for slow progress or partial justice, our interlocutors mostly pointed to the importance of the judicial branch in dealing with past violations.

The expectations from trials are indeed high, despite the otherwise generally low levels of confidence in state institutions.⁹² Even the official projections of the relevant authorities on prosecutions in this area seem to be ambitious. Despite the slow overall progress of war crimes trials in general in BiH,⁹³ the state's National War Crimes Strategy envisions that the most complex and

88 See Chapter Three, Truth-seeking as "Fact-finding": Forensic, Scientific Truth-seeking and Psycho-social Truth-Telling, *infra*.

89 Security Council Resolution 1503 envisaged that the ICTY would complete all the remaining cases, including appeals, by 2010. See United Nations Security Council, *Resolution 1503*, (S/RES/1503), par. 7. However, the most recent estimates indicated in the ICTY completion strategy show that its trials will not be completed before 2012, while most appellate work will be finished by end 2013. See United Nations Security Council, *Assessment and Report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council Resolution 1534 (2004)* (S/2010/270).

90 See Ministry of Justice of Bosnia and Herzegovina, *The National War Crimes Strategy* (December 2008) p. 7, <www.mpr.gov.ba/userfiles/file/Projekti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf>, visited on 20 December 2010.

91 See e.g. Z. Pajic and D. Popovic, *Facing the Past and Access to Justice from A Public Perspective: Special Report*, (United Nations Development Programme, Bosnia and Herzegovina, 2010), <http://www.undp.ba/upload/News/Facing%20the%20Past%20and%20Access%20to%20Justice.pdf>, visited on 26 December 2010 [hereinafter Pajic and Popovic, "Facing the Past"].

92 See e.g., United Nations Development Programme, *Early Warning System Report 2009*, (United Nations Development Programme, Bosnia and Herzegovina 2010) pp. 24–31, <http://www.undp.ba/upload/publications/Early%20Warning%20System%202009.pdf>, visited on 10 December 2010.

93 On the plethora of practical, logistical and political problems with war crimes prosecutions in Federation of BiH and Republika Srpska, see e.g., *Human Rights Watch*, 'Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts,' *Human Rights Watch* (2008), <www.hrw.org/en/reports/2008/07/09/still-waiting-0>, visited on 23 December 2010.

highest priority cases could be completed in seven years (starting from December 2008, when the Strategy was adopted) and that it will take an additional eight years to complete domestic war crimes prosecutions in BiH.⁹⁴

In addition to their primary role as an institution of retributive justice, numerous actors in BiH believe that courts can, and indeed do, establish authoritative and comprehensive accounts of events from the violent past and, thus, write history⁹⁵ or, at least, establish undisputable and definite truths.⁹⁶ However, this is not generally a primary function of courts. They merely ascertain the guilt or innocence of individuals, thus symbolically re-instituting the rule of law.⁹⁷ Yet many people in BiH, including some of our interlocutors, believe that the ICTY might be an exception to this rule. As one commentator elaborated, in part, this is due to the very nature of the "core crimes" that the court has been mandated to prosecute. In addition, it is argued that the court's extensive use of expert witnesses, often including historians, have significantly influenced the ICTY's contribution to the historical record, impressively differentiating it from the workings of an average national court.⁹⁸ Some commentators further argue that historians might have a hard time disputing the "facts" established by the rulings of the ICTY.⁹⁹

However, the universality of these perspectives is belied by the levels of mistrust and suspicion of the ICTY's achievements, particularly by the Serbian population, in BiH.¹⁰⁰ This difference in public perceptions of the ICTY in fact provides an important underlying motivation for an independent truth-seeking enterprise that would help BiH citizens and communities to face the past.¹⁰¹ Some interview-based empirical studies conducted in BiH confirm that the often presumed functions of – and justifications for – the ICTY, such as dissipating calls for revenge, individualizing guilt in the midst of collective blame, or establishing an objective and reliable record of events, do not have

significant traction in the minds of ordinary people.¹⁰² In addition, the results of opinion polls suggest that most people, in either of the entities and in all three dominant ethnic groups, believe that the relevant facts about the war have not yet been unequivocally established. According to a recent poll, 84.7% of those in Republika Srpska hold this view, whilst this is also true for 59.7% across all groups in the BiH Federation. An ethnic breakdown of these figures across BiH as a whole reveals that 84.4% of Serbs, 57.9% of Bosniaks and 64.7% of Croats, share these doubts about whether the truth about the past has been established.¹⁰³ This is particularly important because meaningful truth-telling involves working both with facts as well as with people's perceptions of the facts.

The contextual evidence gathered by ICTY is largely inherited by the Court of BiH (including cases involving geographic regions already covered by ICTY proceedings).¹⁰⁴ However, ICTY judgments simply do not address many of the localities of BiH in any detail in the first place. Therefore, as all judgments of the Court of BiH, and especially those dealing with crimes and perpetrators from those "new" regions, vividly demonstrate, the Court of BiH is in fact much more modest than the ICTY in terms of its historical, fact-establishing reach.¹⁰⁵ So, quite apart from the ordinary limitations of criminal law, there are additional restrictions on the contributions of courts in BiH, based on more structural limitations as well: the Court of BiH (and even more so the cantonal and district courts, as well as Basic Court of Brcko District) do not have adequate research capacities, there are no historians in their ranks, and they are not in a position to hear historians as expert witnesses. This is an additional reason why non-judicial truth-telling is critically needed to complement the realistically restricted role of the courts at this stage of the BiH transition.

Recently, the Prosecutor's Office of BiH started its work on the catalogue of crimes project, which by its very nature has some elements of a separate truth-seeking endeavor. According to representatives of the Prosecutor's Office, this project seeks to catalogue all crimes committed from 1992–1995, detailing the victims and perpetrators (if they are known) of the crimes,

94 See Ministry of Justice of Bosnia and Herzegovina, *supra* note 90, p. 4.

95 See e.g., E. Suljagić, 'Truth and Reconciliation Commission (I): Reconciliation as Vicious Cynicism', *Pulsdemokratije* (2006) <www.pulsdemokratije.net/index.php?id=189&l=bs>, visited on 20 December 2010

96 See e.g., M. Tokaca, 'Truth and Reconciliation Commission (III): Truth as Admission and Compassion', *Pulsdemokratije* (2006) <www.pulsdemokratije.net/index.php?id=382&l=en>, visited on 20 December 2010

97 P. Hayner, *supra* note 11, p. 22; see also M. Prelec, 'Facing the Past (III): What Should We Expect from Court', *Pulsdemokratije* (2006), <www.pulsdemokratije.net/index.php?id=386&l=en>, visited on 20 December 2010

98 See R. Wilson, 'The Historical Record of the International Criminal Tribunal for the Former Yugoslavia', 27 *Human Rights Quarterly* (2005) pp. 908–942. See also P. Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 *Human Rights Quarterly* (1998) pp. 777–781.

99 See Wilson, *supra* note 98. For a more detailed elaboration of the relationship between courts and truth-telling initiatives, see Chapter Three, The Relationship Between Truth-seeking and Trials, *infra*.

100 See D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*, (Open Society Justice Initiative and International Center for Transitional Justice, 2010) ch. 5, <www.ictj.org/static/Publications/Orentlicher_BiH_OSJI-ICTJ_ThatSomeoneGuilty_pb2010.pdf>, visited on 20 December 2010. See also Pajic and Popovic, 'Facing the Past', *supra* note 91, pp. 22–23, where only a slight overall majority of citizens is reported to believe that the ICTY documentation should be used as a basis for future truth-telling activities. Ethnic distribution of trust in the ICTY as the basis of truth-telling is significantly different: 83.4 percent of Bosniak, 59.4 percent of Croat and 26.5 percent of Serb respondents believe ICTY and other international tribunals should have such a role.

101 Cf. J. Pejic, 'The Yugoslav Truth and Reconciliation Commission: A Shaky Start', 25 *Fordham International Law Journal* (2001) pp.4–5 (arguing that the low esteem in the ICTY in Serbia adds to the reasons for a national truth-telling project in that country).

102 See J. N. Clark, 'The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina', 7 *Journal of International Criminal Justice* (2009) pp. 463–487.

103 The poll was conducted through end January–early February 2010 by Prism Research Sarajevo. See Pajic and Popovic, 'Facing the Past', *supra* note 91, p. 16. Also see Fojnica Consultation Report, *supra* note 50.

104 In accordance with Article 4 of the Law on Transfer of Cases by the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Gathered by the ICTY before the Courts in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina No. 61/04, 46/06, 53/06 and 76/06, <www.sudbih.gov.ba/files/docs/zakoni/ba/Zakon_o_ustupanju_predmeta_-_precisceni_nezvanicni_tekst.pdf>, visited on 20 December 2010 (unified, unofficial version). OSCE observers, however, warn that this practice is not unified even at the Court of BiH, while cantonal and district courts rarely, if at all, accept facts adjudicated at the ICTY. See Capacity Building and Legacy Implementation Project of OSCE Mission to BiH, 'The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina: Reflection on Findings from five Years of OSCE Monitoring', OSCE Mission to BiH (2010) pp. 25–27, <www.oscebih.org/documents/16877-eng.pdf>, visited on 20 December 2010.

105 See e.g. Prosecutor v. Dragoje Paunovic, May 26, 2006, Court of Bosnia and Herzegovina Judgment (concerning crimes in Rogatica in eastern Bosnia), <www.sudbih.gov.ba/files/docs/presude/2006/000001F0.pdf>, visited on 26 December 2010.

which range from minor incidents to mass killings. The catalogue, which is updated continuously, outside of the realm of prosecutorial convenience and the imperatives of legal efficiency, shows the truth-telling ambition of the Prosecutor's Office. As the Prosecutor's Office representatives confirmed to us, the project is implemented on the assumption that it will have a significant historical role as an "indispensable and unavoidable source for future history writing." The Office, however, keeps the catalogue confidential and is of the opinion that the time for its opening to the public has not yet arrived.

Apart from the structural obstacles to truth-telling and dealing with the past that the judicial paradigm might exhibit, it also has to be noted that the outreach and public engagement programs of the ICTY and, to a lesser extent, the Court of BiH, remain limited. These strategies are simply not effective in addressing fractured public opinion in a way that minimizes distrust, manipulation, selectivity in presentation of their judgments, and the perception of bias – in particular in Republika Srpska.¹⁰⁶ Although some NGOs, such as the Humanitarian Law Center (HLC) in Serbia and Helsinki Board for Human Rights in Republika Srpska, have organized public presentations on the ICTY's judgments – and a network of NGOs throughout BiH similarly presented on the decisions of the Court of BiH – such efforts lacked the consistency and continuity to have a significant impact on radically uneven public perceptions of war crimes trials. Indeed, some officials of the Court of BiH still believe that the Court is not a truth-telling institution and that promoting judgments is not their job.¹⁰⁷ This is certainly another important motivating point for a truth-seeking program in BiH that seeks – among other things – to optimize the contribution of courts to truth-recovery and to fill the information gap produced by limited Court public engagement work.

¹⁰⁶ See e.g., K. Cibelli and T. Guberek, 'Justice Unseen, Justice Unsatisfied?: Bosnian NGOs Speak about the International Criminal Tribunal for the Former Yugoslavia,' *EPIIC, Tufts University* (2000), <www.hrdag.org/resources/publications/justicereport.pdf>, visited on 20 December 2010. See M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the former Yugoslavia,' *7 Journal of International Criminal Justice* (2009) pp. 89-96. See Documenta, 'Transitional Justice in Post-Yugoslav Countries: A Report for 2006,' *Humanitarian Law Center, and Research and Documentation Center* (2007) pp. 12-13, <www.hlc-rdc.org/uploads/editor/Transitiona-eng.pdf>, visited on 26 December 2010. See also B. Ivanisevic, 'The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court,' *International Center for Transitional Justice* (2008) pp. 33-37. Some more recent studies, however, document the continuity of low public knowledge of the Tribunal's procedures and purpose, but point to the more positive overall attitude towards the ICTY in Bosnia and Herzegovina. See L. Nettelheld, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge University Press, United Kingdom, 2010) ch. 5.

¹⁰⁷ Moreover, the representatives of the Court of BiH emphasized that the judges cannot comment on their judgments. Additionally, the Court is not in a position to invest significant resources in promotional and outreach activities. In the scarcity of resources they are faced with, they would always prefer to invest in hiring more legal officers. Interview of 29 September 2010.

Official Truth-Telling Efforts in BiH

This prevailing image of BiH transitional justice as dominated by the judicial paradigm since the end of the conflict needs to be somewhat refined. There were two initiatives launched in BiH (in 2000–2001 and in 2005–2006) to

establish an official truth commission. Both initiatives were unsuccessful. In addition, three investigative bodies, focusing on the local dimensions of the conflict, have also been established. The Sarajevo and Bijeljina Commissions simply stalled without delivering reports or even being officially terminated. Only the Srebrenica Commission established by the Republika Srpska, was able to finish its work and produced a report published in June 2004. None of the mandates of these three investigative bodies provided victims with an opportunity to speak in public about their suffering.¹⁰⁸

The draft TRC law, crafted in 2001 and amended in 2006, was mostly in-line with a classic truth commission mandate. It focused on the needs and fates of victims, had limited temporal jurisdiction (to investigate the events from the first multi-party elections in November 1990 to December 1995, when the GFA was signed), proposed the production of a non-binding report, and involved recommending symbolic reparations. It envisaged covering an examination of the broader context of events, including the conditions that contributed to the war, individual and institutional responsibility, and the role of institutional actors, such as the media, political parties and religious leadership. It also proposed to address the factual enquiry into the conflict, such as determining the number of dead, missing, sexually abused, etc., as well as the number of religious objects that were destroyed and the locations of mass graves.¹⁰⁹ In addition, the drafters contemplated a regional move towards establishing national TRCs in Croatia, Serbia and BiH, which would coordinate their activities.¹¹⁰

The first draft law was produced by a coalition of NGOs – headed by the Association of Citizens for Truth and Reconciliation, whereas the second initiative was promoted by representatives of parliamentary parties.¹¹¹ But the two drafts were very similar in nature and in content. Probably the most

¹⁰⁸ Cf. D. Popovic, 'Transitional Justice Guidebook for Bosnia and Herzegovina,' *United Nations Development Programme* (2009) pp. 27-44, <www.undp.ba/index.aspx?PID=36&RID=88>, visited on 18 December 2010.

¹⁰⁹ See the (Draft) Law on the Truth and Reconciliation Commission and the working draft of the TRC law developed by the Working Group on Truth Commission Legislation (both documents are in the UNDP archive).

¹¹⁰ Interview with two members of the first TRC initiative, October-November 2010.

¹¹¹ Eight parties with MPs in the Parliamentary Assembly of BiH were part of this second TRC initiative: Social Democratic Party (SDP), Party for BiH (SBIH), Croatian Democratic Union of Bosnia and Herzegovina (HDZ BiH), Socialist Party of Republika Srpska (SPRS), Party of Democratic Progress (PDP), Party of Democratic Action (SDA), Serb Democratic Party (SDS) and Alliance of Independent Social Democrats (SNSD).

significant difference was that the 2006 amended draft TRC law set out in detail the process for the selection and appointment of commissioners, including a Nomination Panel made up of diverse stakeholders, and proposed broad consultation with civil society.

Despite important and clear differences between the draft mandate for a TRC for BiH and the South African TRC,¹¹² critics of the proposal argued that the draft too closely resembled the latter model and that it was not specific enough to the BiH context.¹¹³ The founders of the first initiative believe this was partially due to the fact that the expert support came from people involved with the South African TRC, and also due to the lack of experience of domestic practitioners and activists with this mechanism of transitional justice. In any event, it was claimed that the intention was that this draft was not a final one, but was to be utilized as a discussion document.¹¹⁴

Simultaneously, although independently from the hopes and plans of the BiH TRC entrepreneurs, the President of the then Serbia and Montenegro, Vojislav Kostunica, issued a decree in March 2001 establishing a TRC.¹¹⁵ This TRC joined Sarajevo and Bijeljina commissions in that it was formed, but never finished its planned two year mandate, as it was disbanded soon after its establishment.

If the planned mandate of a TRC pushed for in the two BiH initiatives was deemed too “classical,” the characteristics of the Serbian and Montenegrin TRC’s mandate were anything but classical. Unlike the majority of truth commissions in the world, which covered mainly the horrifying consequences of the wars or dictatorial regimes they examined, and unlike the smaller number of such bodies which undertook investigations both into causes and consequences of grave violence (which was broadly the intention of the previous two draft laws in BiH), the Serbian and Montenegrin TRC was focused mainly – if not exclusively – on establishing an “account of social, inter-ethnic and political conflicts leading to the war and shedding light on the causal chain of these events.”¹¹⁶ This focus on causes is further illustrated by the fact that out of the six working groups contemplated by the commissioners, only one of them was supposed to examine “the violations

of human rights and violations of international public, humanitarian, and the law of war.”¹¹⁷ The composition of the TRC was a further problem: although the initial structure generally followed the theoretical advice and comparative experience according to which the commissioners should reflect the composition of the society, it soon lost its more liberal members who resigned for different reasons, mostly related to the envisaged mandate of the TRC.¹¹⁸

Like the Srebrenica and Sarajevo commissions of enquiry (and many truth commissions from around the world), the Serbian and Montenegrin TRC was formed by the decision of the executive branch -- in this case, the President. Establishing this body by way of a parliamentary act would have probably been a preferable solution, especially in the conditions of sectarianism. This is arguable if we consider the widely shared belief in human rights literature that the higher the legal status of its founding act, the more independent and autonomous the human rights institution is likely to be.¹¹⁹

Additionally, the Serbian and Montenegrin TRC had a far-reaching temporal and territorial jurisdiction to investigate the causes of the Yugoslav conflict(s), which inevitably involved examining at least the last two decades of the 20th century and performing research not only on the territory of Serbia and Montenegro, but also in the now independent states of the former Yugoslavia. The founding act envisaged that one of the tasks of the TRC was to “establish cooperation with corresponding commissions and institutions both in neighboring countries and abroad as a matter of exchanging experience.”¹²⁰ However, the fact that no similar body existed and still does not exist in any of the countries encompassed by the territorial jurisdiction of the TRC, and that the relevant documentation and information was (and still is) distributed across several different state institutions, research centers, NGOs, victims’ associations etc., made the objectives of the Serbian and Montenegrin TRC very difficult to achieve.

112 Perhaps most importantly, unlike the South African TRC, the proposals for a BiH TRC did not actually consider any form of amnesty from prosecution (probably the most controversial aspect of the South African case) and the first TRC initiative did not envisage the proposed TRC having explicit subpoena powers, as was the case with the South African TRC.

113 Cf. M. Tokaca, *supra* note 96.

114 Interview with three NGO participants in the second TRC initiative, September-November 2010.

115 The ‘Decree on Founding the Truth and Reconciliation Commission,’ *Official Gazette of Federal Republic of Yugoslavia 15/2001 and 59/2002* (March 29 2001), <www.usip.org/files/file/resources/collections/commissions/Serbia&Montenegro-Charter.pdf>, visited on 20 December 2010.

116 *Ibid.*

117 See J. Pejić, *supra* note 101, pp. 10-11.

118 For example, a liberal law professor, Vojin Dimitrijević, wrote in his letter of resignation that the Commission was designed to deal with “Great Truths,” instead of determining “who was human, and who was inhuman.” Similarly, a liberal historian, Latinka Perović, explained her resignation, stating that the TRC’s “mandate is not clear, but [the Commission] is firmly institutionalized, whereby a framework within which the truth can be sought has already been established.” *Ibid.* pp.11-12.

119 See e.g. B. Lindsnaes and L. Lindholt, ‘National Human Rights Institutions – Standard Setting and Achievements,’ in B. Lindsnaes (ed.), *National Human Rights Institutions: Articles and Working Papers* (The Danish Centre for Human Rights, Copenhagen, 2000) pp. 1-48. There are some advantages to establishment of a truth commission by Presidential decree. For example, it is usually faster than by an act of parliament. Also, in a case such as Peru, forming a truth and reconciliation commission through a Presidential decree was a strategic means to circumvent sectarian parliamentary power struggles involving many elected supporters of the previous regime in the legislature. These examples are, of course, of limited significance for Bosnia and Herzegovina, bearing in mind that its specific ethnic power-sharing mechanisms and veto rights in decision-making are replicated both in the three-member Presidency of BiH and in the Council of Ministers of BiH.

120 See The Decree on Founding the Truth and Reconciliation Commission, *supra* note 115.

Ultimately, the factors that caused the range of truth-telling initiatives in BiH to fail are complex, and – with one exception – significantly different from the problems associated with the Serbian and Montenegrin case. Some claimed that the first two BiH TRC initiatives were essentially promoted by the external actors, and were taken over by local NGOs formed precisely for the purpose of implementing a TRC project. This suggested that the two initiatives did not have much traction and were not “locally owned.” Furthermore, initial opposition from the BiH public, including some religious authorities (in particular, the Islamic community), the lack of society-wide consultations, and the ICTY’s ambivalently cautious stance¹²¹ all contributed to the demise of the first initiative.¹²²

However, unlike the first attempt to establish a TRC, the second initiative, financed by the United States Institute for Peace (USIP) and led by a local NGO called the “Dayton Project,” did have the public support of the ICTY.¹²³ In addition, it followed shortly after the relative success of the Srebrenica Commission.¹²⁴ This endeavor was plagued by management and resource problems in the organization leading the initiative.¹²⁵ The Dayton Project’s initiative was a two-track endeavor: on one hand, it aimed to establish a network of committed NGOs that would endorse the TRC project, and on the other, it established a working group on the draft law and forwarded an agreed text to the Parliamentary Assembly of BiH. While the former track was made public, the latter, more political approach (which was also – importantly – initiated first),¹²⁶ was mostly non-transparent. The second initiative therefore appeared to be a combination of ‘bottom-up’ and ‘top-down’ approaches to truth-seeking. It was, however, impossible that the two tracks would function in isolation from each other: rather, they certainly influenced one another. The composition of the working group,¹²⁷ combined with the fact that they worked mostly behind closed doors, undermined the prospects of support among the NGOs and the wider public. In addition, the way the process was conducted and the way the working group communicated with the public seemed to have

generated significant opposition rather than support.¹²⁸ In the words of one working group member, the draft law initiative failed because they lost public support. Additionally, the upcoming general elections of 2006 prevented them from implementing their plan of having broad and extensive consultations with civil society on the draft law they had produced.¹²⁹

Different actors give somewhat conflicting accounts of the two processes. Both the first initiative and the Dayton Project leaders claim and emphasize relatively broad consultations and the inclusiveness of their proposals. Conversely, some other CSOs’ leaders suggested that they thought they were only included in the process at what they perceived to be its very final stage. One victims’ representative commented that both times the draft law was presented basically as a “take it or leave it” project, with no meaningful options for substantive contribution by the victims.¹³⁰

Thus, it seems that both initiatives were designed as one-time endeavors, rather than as long-lasting, continuous consultative processes. Their mandates to advocate for the establishment of a TRC were more limited in time than the proposed TRC itself. Both organizations ceased to exist soon after their proposals had reached the political institutions of the country. Our interlocutors also commented on the sensitive political environment during the first initiative, and noted the fact that many wartime leaders were still very active in the political and public sphere, and were unsurprisingly suspicious of a body that might examine their own role in the conflict. In addition, no serious transfer of knowledge and experience between the two projects took place. In part because of financial constraints, there were no serious follow-up consultations or advocacy activities by the partner organizations. As a participant in the first initiative confirmed, donors also seemed unwilling to commit significant support to the idea at the time.¹³¹ Therefore, NGOs had limited resources to pressure the government structures to take up or endorse the draft laws; no transfer of knowledge or enthusiasm for a TRC was facilitated; and no partner organizations cultivated. The two initiatives ultimately died with their pioneering organizations.

121 See e.g., C. Jorda, ‘The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina,’ *ICTY Press Release*, 17 May 2001, <www.icty.org/sid/7985>, visited on 23 December 2010.

122 Interview with a prominent leader of the first TRC initiative, September 2010.

123 In her November 4, 2003 speech to the OSCE Permanent Council in Vienna, Chief Prosecutor Carla Del Ponte suggested that “the international community should consider getting active in this area” and that the OSCE could play a role in creating TRCs in the former Yugoslavia. OSCE, ‘ICTY’s Carla del Ponte Says OSCE could Support Truth and Reconciliation Commissions in South-eastern Europe,’ November 4 2003, <www.osce.org/item/7885.html>, visited on 23 December 2010.

124 The Commission finished its work in 2004.

125 Interview with a former Dayton Project employee, September 2010.

126 *Ibid.*

127 At least one member of the working group was highly controversial, was perceived by many to have made inflammatory remarks during the war, and was not possibly able to have satisfied the criteria for a credible “consensus figure,” as envisaged in Chapter Three, Consensus Figures and the Importance of Credible Leadership, *infra*.

128 For example, on rare occasions, when the members of the Group would talk to the press, they would, curiously enough, emphasize only the most controversial issues, such as that the future TRC would not cooperate with the Prosecutor’s Office in respect of the transfer of evidence. The titles of some of the relevant newspaper articles are particularly illustrative in this regard: S. Rozajac, ‘Working Group for Drafting the Law on a Truth Commission: Political Parties Investigate Crimes in Bosnia and Herzegovina?’ *Oslobodjenje*, 11 March 2006, p. 7; R. Cengic, ‘Working Group for Drafting the [TRC] Law Continues with its Activities: Transferring Findings to the Prosecutor Offices an Open Issue,’ *Nezavisne novine*, 3 March 2006, p. 8; S. Rozajac, ‘Preparing the Law on Truth Commission: The Court of Bosnia and Herzegovina Will not Use the [TRC’s] Findings,’ *Oslobodjenje*, 16 March 2006, p. 11 (citing statement of a member of the working group); E. Hadzovic, ‘20 Million Dollars for an Arranged Truth,’ *Dani* No. 456, 10 March 2006, pp. 26-28.

129 Interview with a high-profile politician who was a member of the working group, November 2010.

130 Interview with a victim association representative, September 2010.

131 Interview with a participant in a second TRC initiative, November 2010.

Significantly, not much has been done to promote the potential of truth-telling in BiH in the intervening period. A recent poll on transitional justice shows the weak promotion, and lack of public awareness of the practice and potential of truth-seeking processes for BiH: almost 61 percent of respondents in BiH do not understand what a truth commission is.¹³² Our conversations throughout BiH during the field mission generally confirmed this: some of our interlocutors were unable to discern either the meaning of truth-telling efforts or the potential benefits of such efforts in the BiH context.

At first glance, it seems odd that the main actors in the two early truth commission initiatives opted for an approach that could best be described as a limited civil society campaign for introducing a top-down approach to truth-telling. It is striking that a small number of NGOs were engaged in a project of immediate transfer of ownership over truth-telling to the governmental structures, before any more comprehensive coalition of NGOs that might support, provide legitimacy for, participate in, and oversee the process, was even formed. This approach, however, is not surprising, especially in the context

of the (chronologically) first BiH initiative. As Priscilla Hayner explains: top-down approaches to truth-telling, without extensive consultations preceding the establishment of an official institution were the norm rather than the exception in the 15 truth commissions she analyzed.¹³³

A sensitive post-conflict political environment seldom encourages meaningful consultation and debate, which would often only aggravate the tensions and make the prospects of creating a truth-telling body even bleaker. However, the fact that the two initiatives effectively failed because of a lack of meaningful consultations, coupled with the subsequent growth in influence of CSOs – and victims associations in particular – does expose the top-down approach to truth-telling to justified criticism. Also, a quick review of prevailing practice in truth-seeking elsewhere in the world, demonstrates the importance of inclusive participation and consultation to the success of truth-seeking initiatives in other transitional countries.¹³⁴

Similar problems undermined the work of the Sarajevo¹³⁵ and Bijeljina¹³⁶ commissions. In particular, the Sarajevo Commission was formed under pressure, in the context of political manipulation and heated debates over the mandate of

the Commission. This immediately had a negative influence on its public image. Although the Commission was supposed to complete its work within one year, its only tangible output to date is a “scientific project,” which is a general guidebook for empirical social research (including various structured interview forms and a glossary of terms) adapted to the specificities of the siege of Sarajevo.¹³⁷ Furthermore, whereas the draft laws of the previous BiH TRC initiatives both emphasized that the prospective Commissioners should be persons of high moral integrity and credibility, with no significant wartime experience, this was not the approach taken by the Sarajevo Commission. Instead, prominent wartime figures, including one high profile general, were appointed as members of this Commission. Similar problems with composition and the lack of transparency were evident in the appointment of the Bijeljina commissioners. In this instance, the ethnic composition of the Commission was a source of great controversy. Based on the 1991 census, a ratio of six Serbs to only two Bosniaks was chosen, despite the fact that the great majority of the victims in that municipality were Bosniaks. Both commissions were formed without significant consultation, in a highly politicized environment, and without the backing of the relevant CSOs. Both testify to the failure of non-inclusive, top-down approaches to truth-seeking in the BiH context.

Compared to other initiatives in BiH, and indeed in the region of former Yugoslavia, the Srebrenica Commission succeeded in publishing a final report, which was endorsed by the Government of Republika Srpska and followed by an official apology of then-President of Republika Srpska, Dragan Cavic. The Government formed the Commission, which seems to have been directed first and foremost to the public in Republika Srpska and the Serb people. In this sense, the Srebrenica Commission, although it was not a truth commission per se (but rather an event-specific commission of inquiry), displayed a classical truth-commission algorithm: research and investigation, a public report, and official recognition and apology. It is therefore both inexplicable and regrettable that the Srebrenica Commission's report is hardly used or mentioned in the public sphere.¹³⁸ The report was not followed by intense promotion efforts in Republika Srpska or in other parts of the state. This is partly because no one seemed to be completely happy with the results of the Commission's work. Some of our interlocutors commented that although it was a good report, it did not go far enough and was therefore insufficient. Others complained that it was drafted in a hurry and under significant pressure by the Office of the High Representative (OHR). As a result, they contend, its conclusions

¹³² Pajic and Popovic, “Facing the Past,” *supra* note 91, pp. 24-25.

¹³³ See P. Hayner, ‘Fifteen Truth Commission 1974 to 1994: A Comparative Study,’ 16 *Human Rights Quarterly* (1994) pp. 639-640.

¹³⁴ See Chapter Three, Informed Consultation Indispensable to Credible Truth Seeking, *infra*.

¹³⁵ The Commission was formed by the Council of Ministers of BiH in May 2006.

¹³⁶ The Commission was formed by the decision of the Municipal Council of Bijeljina in mid-2008.

¹³⁷ A somewhat adapted version of the project was published as S. Cekic and D. Termiz, ‘Zrtve zlocina u Sarajevu 1992-1996: naucnoistrazivacki projekat’ [‘Victims of Crimes in Sarajevo 1992-1996: scientific research project’] (Institute for Research of Crimes against Humanity and International Law, Sarajevo, 2007).

¹³⁸ Interview with two members of the Commission, September – October, 2010.

must be scrutinized and re-examined. Indeed, the fact that the OHR had an observer in each session of the Commission might have negatively influenced domestic ownership of the process and its outcomes. On the other hand, according to one of the members of the Commission, the role of the OHR was indispensable in ensuring the necessary minimum conditions for their successful undertaking.¹³⁹

Ultimately, the Srebrenica Commission report is also incomplete. It calls for continued work on determining the final number of casualties in Srebrenica in July 1995, but this never took place.

The weak reception of even successful official truth-seeking projects, such as the work of the Srebrenica Commission, constitutes another reason for pursuing a consolidated truth-telling approach.

Unofficial Truth-Telling Projects: Mapping the BiH Cacophony

Unofficial truth-telling initiatives in BiH, particularly driven by various NGOs and civil society networks, started with their work as early as during the war itself. Such organizations started working with victims very early in the 1990s and continued supporting them ever since. As the criminal justice processes

took off at various levels, these organizations engaged in different capacities over time: as predecessors to the court processes, as close collaborators with them, and as independent but complementary actors, engaged in various forms of war-related fact finding. These organizations and the initiatives they have undertaken vary in their strength, orientation and ambition, in their attitude towards and relationship with criminal trials, or in regard to the degree of their influence in the public sphere or their communication with a wider audience. However, our various meetings and the analysis of the available secondary sources on the topic have shown that there is a plethora of projects that future truth-telling initiatives can learn from and very few of those whose results cannot already be used or built upon.

It should be noted that these organizations operate in a very competitive environment. Although there are no official statistics pertaining to the number and structure of NGOs in BiH, the most recent information estimates a total number of around 12,189 NGOs, out of which 6,620 are considered to be active.¹⁴⁰ The breakdown of these organizations by their primary focus is not useful for our purposes,¹⁴¹ but the estimated proportion of 4.72 percent (or around 312 organizations) of those “originating from the most recent war,”¹⁴² gives some indication of the richness of activities, projects and initiatives being implemented in close proximity to the field of transitional justice. This notion of a dynamic field can be further illustrated by the fact that many organizations that aim to advance women’s rights or human rights in general, or that offer psycho-social support (all making up to an additional 20 percent of the whole) also have transitional justice-related projects, even where many of them might not self-identify as transitional justice practitioners.

Among the relatively large number of CSOs, those specifically and strategically focused on transitional justice are nonetheless rare. There are, however, several broad types of NGOs of relevance to truth-seeking and truth-telling in BiH. The variety of their activities is difficult to capture in a single classification. Firstly, some groups are made up of grassroots victims’ organizations, such as concentration camp survivors,¹⁴³ civilian victims’ associations (one in each political entity of BiH), numerous missing persons’ associations, or women victims of the war. Secondly, some organizations treat victims as beneficiaries of some or all of their programs, which may or may not be directly related to truth-telling. For example, this group would include organizations such as Vive Žene from Tuzla, which works mostly with women victims and offers them psychological support; Strength of Woman; and Medica from Zenica, who, among other things, offers psycho-social and medical support to women and children who were victims of wartime and post-war violence. The institutional memory of these organizations and their experience working with the changing needs and expectations of victims over time, can be an invaluable source of information and guidance for future truth-telling efforts. Thirdly, there are a small number of organizations devoted to truth-seeking and truth-telling *per se*, such as the Sarajevo-based Research and Documentation

¹³⁹ Interview with a member of the Commission, October 2010.

¹⁴⁰ See G. Zeravcic and E. Biscevic, ‘Analysis of the State of Civil Society Sector in Bosnia and Herzegovina’, in *Civil Society: Contributions to Devising a Strategy for Establishing a Stimulating Environment for the Development of Civil Society in Bosnia and Herzegovina*, (HTSPE Ltd. UK and Kronauer Consulting, Sarajevo, 2009) pp. 79-81, <http://www.kronauer-consulting.com/index.asp?lang=e&id_meni=>, visited on 23 December 2010.

¹⁴¹ There are organisations that reportedly focus on human rights, women’s issues etc., which could also have projects and activities related to transitional justice and truth-telling.

¹⁴² Zeravcic and Biscevic, *supra* note 140, p. 80.

¹⁴³ Namely: Association of Camp Prisoners of Bosnia and Herzegovina, Association of Camp Prisoners of Republika Srpska and Croatian Association of the Homeland War Concentration Camp Prisoners.

Center (RDC), HLC from Belgrade, the Centre for Dealing with the Past – Documenta (Croatia), XY Films¹⁴⁴, or the Association of Women from Prijedor Izvor. Lastly, some organizations and individuals have innovative truth-telling projects, such as the organization GARIWO, which collected and published collections of positive stories from the war under the title “Good People in the Times of Evil,” as well as various oral history projects, such as those of Documenta from Croatia, and initiatives focusing on war veterans, such as those implemented by the Centre for Nonviolent Action (Sarajevo/Belgrade).

The geographical distribution of organizations dealing with transitional justice issues is not even: these NGOs are mostly located in and around urban centres and most of them are in the Federation of BiH. They are most prolific in North-Eastern Bosnia and Herzegovina (Tuzla and Brčko), the central Drina River valley (Zvornik, Vlasenica, Bratunac, Srebrenica, etc.), Sarajevo and Mostar. NGOs in some regions, such as North-Western Bosnia and Herzegovina, hardly deal with transitional justice issues at all.¹⁴⁵ This observation reminds us that the often-heard saying that “the BiH conflict is the most documented in history” should be viewed with some caution. This is so because some events are more documented than others, some regions more covered by transitional justice initiatives than others, and some wartime events still await adequate disclosure and documentation efforts.

In addition, NGO activities aimed specifically at documenting the facts of the BiH conflict, although extremely important, are mostly limited, sporadic and neither well-organized nor coordinated. Very few organizations, for example, have searchable databases with cross-referenced data on the relevant events or parts of the population. There are, however, some positive examples in this context, which include the Association of Camp Prisoners of BiH, the Association of Camp Prisoners of Republika Srpska, the Croat Association of Camp Prisoners of the Homeland War in BiH, Women Victims of War and the

Association of Women from Prijedor Izvor. The RDC in Sarajevo, which runs the Human Losses Project, which documents direct human casualties of the war throughout BiH (establishing around 100,000 fatalities), with their ambition and focus, their sound methodological approach, and their use of a variety of sources of information (such as interviews, documentation from various institutions and organizations and direct visits to grave sites), is another model of organized and coordinated truth-seeking in the BiH context. A different example is a project of the Association of Women from Prijedor Izvor, a truth-seeking initiative that takes place over a considerable

period of time, involving enormous commitment and human energy, as well as rigorous methodological standards, despite the very scarce resources at their disposal. Its major initiative documenting human losses in the 1992–1995 war in the municipality of Prijedor includes photographs and basic information on each person killed. This information is constantly updated. Given the large amount of work involved, three consecutive editions publicizing their findings understandably took 14 years to complete.

Although truth-seeking initiatives continue to take place in various organizational settings, with different motivations and different direct beneficiaries, truth-telling as a distinctive and targeted activity seems to be less well developed. It is important to note, for example, that most of the databases of the relevant NGOs, including the above mentioned ones, are not publicly available. The publications that they produce typically represent only part of the richness of information that they collected, and are usually not widely distributed or published. The events they organize, based on the results of their activities and findings, are usually one-time endeavors, with limited significant follow-up activities and, more often than not, they lack a sustained presence in the different localities that they cover. For example, the RDC has presented the results of its Human Losses Project in more than a dozen municipalities throughout BiH, but those events can be counted more as promotional activities than as truth-telling public engagements that contain the crucial elements of consistency and continuity. The RDC's plan to extract the databases for different municipalities and make them available has still not been implemented, and their databases remain centralized and accessible only through field offices in Sarajevo and Gorazde.

One of the rare exceptions in this regard is the RDC's Atlas of Crimes. Overlapping to a certain extent with the Prosecutor Office's catalogue of crimes, this project uses new information sharing technologies and tools (namely Google Earth) to present facts on the locations and crimes committed during the war, including the locations of prison camps, information on mass executions, the names of the victims and known perpetrators, destroyed religious objects, etc. At the moment, this project does not yet provide searchable information on locations and details of crimes committed against the Serb and Croat victims, which has caused some dissatisfaction within victims' communities from those two ethnic groups, and which was expressed to us during our field mission. However, the Atlas of Crimes is still an ongoing initiative and the crimes against Serbs and Croats are planned to be systematically included as the project progresses.

¹⁴⁴ This documentary film production company is no longer operational.

¹⁴⁵ Popovic, *supra* note 108, pp. 138–139.

The archival work of NGOs in this field is particularly problematic. Many have significant collections of primary documents and records of interviews with victims and survivors, often taken immediately after the event in question. However, most of these organizations have neither adequate resources nor expert support for their archival work. In the absence of a state-sponsored institution, which could host the wealth of their materials, over time the archives often exceed their spatial capacities. As one representative of a prisoners' camp association informed us, their documentation is kept in various places, including private apartments.

At the same time, the quality of CSOs' contributions in documenting and promoting the facts related to the war in BiH, though often impressive, should not be idealized. Indeed, not all organizations performing research in this field have grounded their activities in a rigorous methodology; some activist organizations in the area of transitional justice are more oriented around producing propaganda than research, while others, such as a significant number of victim organizations, are politicized or manipulated by the political elites – to some extent due to their dependence on state funding. As a government representative working in the field has aptly described the problem: "too much space has been left to politics and politicians in this area, too."

In addition, most of the organizations reflect the BiH constitutional and social reality: the vast majority of NGOs are focused mostly on one particular ethnic group. In part, this may be due to simple inertia and the lack of incentives and broader social context in which they would change their orientation to be more inclusive of others. Thus, even if they advance the rights of one particular category of victims, such as camp prisoners, they are generally divided along ethnic lines. At the same time, however, all these civil society initiatives and projects can be valuable "if there were a way to see them as part of the whole mosaic,"¹⁴⁶ that is, if they contribute to a full understanding of the multiple truths about the war and engage in dialogue and exchange.

Although civil society in BiH is relatively vibrant, often crossing ethnic lines to work on joint initiatives, such projects are considerably rare in the field of transitional justice and truth-telling. As already indicated by the relevant insights from Northern Ireland's truth-telling scene, successful truth-telling in a divided society naturally involves both in-group and cross-community initiatives.¹⁴⁷ One of the most important problems with unofficial truth-telling in BiH thus becomes immediately evident: civil society projects directly related

to truth-telling and truth-seeking which seek to engage or communicate across ethnic lines remain extremely rare. Where such cooperation does exist, it is usually constituency-based (e.g. women or youth, etc) rather than issue based (focused on truth-seeking), or mostly confined to the purely technical level, such as attracting donor funds or pressuring the government to enact adequate corresponding status-related laws. In fact, as of relatively recently, even this level of engagement has become the source of divisions, rather than cooperation. As one prison camp association representative emphasized, these groups are sometimes divided by material issues, such as reparations.¹⁴⁸ This is why those rare exceptions from the general rule of intra-group truth-telling initiatives deserve particular attention.

Examples of a Different Approach

The Centre for Nonviolent Action (Sarajevo/Belgrade) is a good example of an issue-specific and boundary-crossing truth-telling initiative. It works with the war veterans from all the armies that took part in the hostilities in BiH, including citizens of Serbia and Montenegro. Their philosophical stance, which falls broadly into the approach of "re-humanizing the other,"¹⁴⁹ as well as their courageous take on a very controversial idea (and their great care and procedural rigor when organizing very sensitive joint initiatives involving former enemies), makes for an interesting and innovative model of truth-telling in divided societies. As their representative confirmed, they focus mostly on exploring and sharing with the public in BiH, Serbia and Montenegro the initial motivation of each individual for going to the war. However, such a focus is not easily maintained and the public speeches and events that they organize often include descriptions of the wartime experiences of ex-combatants.¹⁵⁰

Another good example is a series of high quality documentaries, created by the Sarajevo-based XY Films, on war crimes and their aftermaths in different local communities throughout BiH. XY Films produced around 50 such documentaries with donor support and then distributed the films, free of charge, to various public and private broadcasters, from the state TV to the various very local TV stations. Many TV broadcasters showed this important material, although often not in primetime spots. Just like the South African TRC, the producers of the series refused to follow the logic of statistics and the actual ratio of crimes committed over different groups in BiH. Instead, almost as

¹⁴⁶ L. Aucoin and E. Babbitt, 'Transitional Justice: Assessment Survey of Conditions in the Former Yugoslavia,' UNDP (2006) p. 127.

¹⁴⁷ See Gormally and McEvoy, *supra* note 23, pp. 24-28.

¹⁴⁸ See Chapter Three, Truth-telling: a Victim-Centered Approach, *infra*.

¹⁴⁹ See e.g., J. Halpern and H. M. Weinstein, 'Re-humanizing the Other: Empathy and Reconciliation,' 26 *Human Rights Quarterly* (2004) pp. 561-583.

¹⁵⁰ Interview with a representative of the organisation, November 2010.

a rule, they opted to cover crimes committed over two or three different groups in each 30-minute episode of the series. One of the producers explained the principal two reasons why they followed this approach: 1) to build a sense of solidarity among the victims of an ethnically divided public, and 2) to intertwine the different stories to make it difficult for their work to be manipulated through editing and transformed into mono-ethnic narratives. Unfortunately, XY Films no longer exists, but its documentaries remain publicly available and libraries, the media and other public institutions have copies of its films.¹⁵¹

RDC is the principal and only independent comprehensive truth-seeking initiative focused on establishing facts on casualties throughout BiH. Its focus on BiH as a whole is not only methodological, but also promotional. With its follow-up activities, the RDC tries to reach the public from both entities and from all ethnic groups. It is widely seen as objective and as providing reliable sources of information on the conflict.

Regional and International Initiatives¹⁵²

Many of the organizations that cross entity and ethnic boundaries within BiH have significant partners in the region. HLC in Belgrade and Documenta in Croatia, for example, figure prominently in every report on transitional justice in the Balkans. As a representative of the Centre for Nonviolent Action said from his own experience, regional partnerships, apart from being valuable in and of themselves, also have the potential to ease the tensions within BiH and to make even the seemingly controversial projects, such as those involving war veterans, easier to undertake.¹⁵³

Some coalitions and regional experience-sharing networks are certainly worth mentioning in this context. HLC and Documenta, for example, are currently implementing projects on human losses in Kosovo and Croatia¹⁵⁴ relying on the experience of the RDC in establishing and maintaining a database of victims. As regional leaders in the field, moreover, these three organizations were included in the initial core of the ongoing initiative for establishing RECOM, the proposed independent regional inter-state commission for investigating and disclosing the facts about war crimes, victims of war and other serious human rights violations committed on the territory of the former Yugoslavia.

¹⁵¹ See the (still active) website of the XY Films, where copies of all documentaries they filmed can be found. XY Films, 'Home,' <www.xyfilms.net/index.php>, visited on 23 December 2010.

¹⁵² See also Chapter Three, Bringing in the "Regional," *infra*.

¹⁵³ Interview with a representative of the organisation, November 2010.

¹⁵⁴ While Humanitarian Law Center works on documenting casualties in Kosovo alone, both organizations share responsibility for accounting for human losses in Croatia. The division of labor is based on citizenship of victims: Documenta deals with accounting for the killed or missing citizens of Croatia, while HLC documents citizens of Serbia, Montenegro and Kosovo who went missing during the war in Croatia – and Bosnia and Herzegovina.

Although the origins of this approach can be traced back to 2006, the initiative for RECOM was officially launched in May 2008, under the basic premise that a regional approach to truth-telling is necessary, given the historical context in which the crimes and violations occurred and the important regional dimensions of those crimes.¹⁵⁵ Although it eventually lost the support of the RDC, following an inclusive process of regional consultations, the coalition has received the support of over 1000 organizations and individuals from throughout the region. As well-intended critics argue, the coalition might still face significant problems, such as the political issue of the still uncertain support of all regional governments, or the methodological problem of building such diverse experiences and conflicts in different countries (Slovenia and BiH being the two extreme points of the spectrum) into a coherent narrative.¹⁵⁶ Nevertheless, the RECOM initiative is a potentially influential player in the field whose activities and developments need to be taken into account in any state-wide truth-telling effort in BiH.

The Igman Initiative is another significant example of regional cooperation with components related to truth-telling. One of their four "macro projects" is titled "The truth about the past, the foundations for the future."¹⁵⁷ The Initiative convened an expert working group in 2003, in part to contemplate a model for regional truth-telling, based on the learning from other transitional contexts. However, efforts within this expert group have still not resulted in concrete proposals or specific activities, to some extent because of the belief that the conditions for regional truth-telling efforts are still not ripe. Instead, the Igman Initiative adopted a broader approach to truth-seeking, emphasizing the importance of inter-communal public events and gatherings to address the perceived underlying obstacles to institutionalized truth-telling efforts, such as intolerance, ethnic hatred and the absence of inter-ethnic dialogue.¹⁵⁸ A further interesting regional initiative broadly related to the field is the Southeast European Joint History Project of the Centre for Democracy and Reconciliation in Southeast Europe. It aims to revise "ethnocentric school history teaching by avoiding the production of stereotypes, by identifying attitudes that encourage conflict, by suggesting alternative teaching methods and by promoting the idea of multiple interpretations of one event."¹⁵⁹

¹⁵⁵ See The Initiative for RECOM, 'Why RECOM,' <www.korekom.org/public/fck_files/Why%20RECOM_eng_memo.pdf>, visited on 23 December 2010.

¹⁵⁶ See e.g., J. Subotic, 'The RECOM Initiative: The Promise and Peril of Regional Truth-Seeking in the Balkans,' *Pulsdemokratije* (2010), <www.pulsdemokratije.ba/index.php?l=en>, visited on 23 December 2010.

¹⁵⁷ See Igman Initiative, 'Macro Projects' <www.igman-initiative.org/pages/macro_p.htm>, visited on 23 December 2010.

¹⁵⁸ Cf. Popovic, *supra* note 108, p. 128.

¹⁵⁹ See Center for Democracy and Reconciliation in Southeast Europe "The Southeast European Joint History Project," <www.cdsee.org/jhp/pdf/JHP-Overview-short-October%202009.pdf>, visited on 23 December 2010.

Focused international expert research initiatives devoted to examining certain aspects of the fall of Yugoslavia and the subsequent wars also represent a valuable source of information and unbiased historical interpretations. One such project is Purdue University's "The Scholars' Initiative: Confronting the Yugoslav Controversies," which has seemingly resonated with the people from the countries of the former Yugoslavia and whose main findings have been published in regional print media. Combining local and international experts in various fields, from history to international law, this project aims "to bridge the gap that separates their knowledge of the tragic events of the period 1986–2000 from the proprietary interpretations that nationalist politicians and media have impressed on mass culture."¹⁶⁰ The project is a good example of a plethora of independent external resources that are already readily available and can be used as a point of reference for assessing the quality of the existing efforts in the field and for enhanced and sustained truth-telling work in the future.

Problems, Gaps and Pertinent Issues in Unofficial Truth-Seeking in BiH

Cross-community truth-telling initiatives are rare in the BiH context.¹⁶¹ According to many of those whom we contacted, lack of mutual trust is still an obstacle for this kind of cooperation. For example, a victims' organization from the Federation of BiH actively participated in presentations and panel speeches on Srebrenica in Serbia, in partnership with human rights organizations from Serbia, but have never done so in Republika Srpska. As reported in an interview, similar projects in Republika Srpska would not be feasible in the current political scenario. In this way, engaging in a regional process is seen as a more strategic shortcut for reaching the audience in the other political entity within BiH, or as a different level of engagement in the absence of viable options for work with the "other" inside the country.

Additionally, in the course of our field mission, several people emphasized that their organizations, projects and stories are not recognized by the corresponding NGOs from other ethnic groups. At the same time, somewhat paradoxically, they invariably stated that they see the victim organizations and the public from other ethnic groups as amongst their primary audiences.

Returnee communities and their truth-seeking initiatives are a particularly valuable source of insights into the problems of truth-telling in a multi-ethnic environment. As a representative of the Association of Women Izvor from Prijedor explained, local authorities— as one of their primary audiences— have mostly ignored their documentation work. Although some form of cooperation and joint events with similar Serb associations from the municipality of Prijedor have been established, their work is not adequately recognized by the local public.¹⁶² The stories from other localities, such as Bijeljina,¹⁶³ repeat a similar pattern of parallel, ethnically-defined truth-telling universes which cannot easily be brought into dialogue, despite relatively peaceful coexistence in the same physical area. Although we did not contact other organizations doing truth-telling work in similar contexts throughout BiH, it is very likely that their experience with the local community would be similar.

Those actors who have been endeavoring to implement cross-community initiatives have had mixed experiences. Attempts to work inclusively with everyone often seem to merely produce suspicion on all sides. However, this impression seems different on the level of individual contacts with ordinary citizens. As a XY Films representative told us, they felt accepted and enjoyed cooperation in nearly all localities in which they worked.¹⁶⁴ Although often impossible to ignore, these organizations have also faced problems of acceptance and adequate recognition in the wider public. XY Films, for example, has had their documentaries on war crimes broadcast at different times on different television stations. There were instances where their work was only being showcased at two or three a.m. RDC has received mixed reactions, mostly based on the selective reception of their findings. This is not surprising, as selectivity has also been a lasting feature of the perspective on the results of the ICTY's work in the region. The Bosniak part of the public has expressed discontent at the RDC's efforts at "minimizing the number of victims," while the media in Republika Srpska have often praised the Human Losses Project, emphasizing, *inter alia*, the fact that it established that as much as 500 people counted as killed in the Srebrenica Commission's report are actually alive. This shows that the cross-community initiatives, although extremely important, cannot alone change the often hostile, ethnically-defined social and media environment in which they operate — and their messages often become distorted and manipulated in different parts of the tripartite public.

¹⁶⁰ See The Scholars' Initiative, 'Confronting the Yugoslav Controversies', *Purdue University* (2001–2006), pp. 2–3, <www.cla.purdue.edu/academic/history/facstaff/Ingrao/si/prospectus.pdf>, visited on 23 December 2010.

¹⁶¹ See Chapter Three, Connecting the Local to the Global, *infra*

¹⁶² Interview with an NGO representative, September 2010.

¹⁶³ Interview with an NGO representative from Bijeljina, November 2010.

¹⁶⁴ Only one story, the one on Bugojno in central BiH, could not be filmed due to the lack of cooperation on the part of the local actors. Interview with a former XY Films employee, November 2010.

Another striking feature is the often reported lack of awareness or interest on the part of the relevant state institutions (such as ministries of justice at different levels of governance) with regards to of the variety of activities that different CSOs have implemented in the truth-seeking field and transitional justice more generally. A representative of one NGO commented that government officials were usually surprised when exposed to the information on their various activities.¹⁶⁵ The relevant state institutions and the general public are clearly not sufficiently aware of all the work being done in the field. This is not unique to BiH and is also recognized as a problem in Croatia, where Documenta, a leading NGO in the field of transitional justice, is currently implementing a project aimed at creating a documentary archive which would collect the legacy of all the NGOs working in the field in Croatia.¹⁶⁶ This is certainly another important gap that needs to be filled in BiH if a meaningful truth-seeking and truth-telling endeavor is to be undertaken.

The Challenges of Institutional Truth-Seeking: The BiH Missing Persons Institute (MPI)

To date, the MPI is the only joint, state-level truth-seeking initiative. Envisaged by the 2004 Law on Missing Persons,¹⁶⁷ formed in 2005 following an agreement between ICMP and the Council of Ministers,¹⁶⁸ and fully operational as of early 2008, MPI was established to coordinate the approaches to accounting for between 8,000 and 10,000 persons still missing. Although it embodies the principle of ethnic parity in its principal organs such as the directorate, managing board and advisory board, MPI was also formed as a way of abandoning the ethnic approach to the search for missing persons, which was dominant in bodies preceding it.¹⁶⁹

The experience of MPI illustrates the numerous obstacles a joint truth-seeking institution faces in the divided BiH public. Although MPI is formed by an agreement involving the state government, and although it is relatively well equipped, adequately staffed and highly professional, it is still seen as partial in certain parts of BiH, notably in Republika Srpska. This led to the formation

of the Republika Srpska Operative Team for Missing Persons in June 2008. This entity body was established “due to the expressed dissatisfaction of the families of victims from Republika Srpska with the work of MPI in the first six months of 2008.”¹⁷⁰ Indeed, the accusations that MPI has not identified an adequate, sufficient or proportionate number of victims from all sides, still figure prominently in the RS media, RS institutions and the perspectives of many victims’ organizations. Additionally, as the representatives of ICMP informed us, although identifications take place without regard to ethnic origin, commemorations do not. The ICMP initiative to commemorate all 30,000 missing in the conflict in one joint ceremony to be held on August 30 – The International Day of Missing Persons – largely failed due to the lack of support of the relevant actors.¹⁷¹

One of our interlocutors did admit that although he strongly opposed MPI at the very beginning, after having an opportunity to see its staff working – and based on the quality of their work – he became one of the MPI’s strongest supporters. This demonstrates the potential of well designed and professional institutions to gradually gain support in a severely divided society such as BiH. However, after two successful operational years, MPI (as the only legally mandated institution for tracing and solving the fates of missing persons in BiH), nonetheless still needs to start functioning as a genuine focal point of all efforts in this field, through the development of new partnerships and alliances, more effective communication and public engagement strategies and more effective collaboration of some of its Directorate and its key stakeholders. This is especially important considering the stated intention of the RS Operative Team for Missing Persons when it was formed, that it was not intended “... to derogate the Institute of BiH, but to support it in its work.”¹⁷²

All this shows that the ethnic approach to truth-telling will not inherently disappear simply by virtue of forming a joint institution, and that new creative strategies for engaging a divided public are necessary.

¹⁶⁵ Interview, November 2010.

¹⁶⁶ See, ‘Documentation of the CSOs’, *Documenta*, <www.documenta.hr/documenta/index.php?option=com_content&view=section&layout=blog&id=11&Itemid=74&lang=en>, visited on 23 December 2010.

¹⁶⁷ Law on Missing Persons, *Official Gazette of BiH No. 50/04*, <www.ic-mp.org/wp-content/uploads/2007/11/lawmp_en.pdf> (unofficial translation by ICMP), visited on 23 December 2010.

¹⁶⁸ Agreement on Assuming the Role of Co-Founders of the Missing Persons Institute of Bosnia and Herzegovina, <www.ic-mp.org/wp-content/uploads/2007/11/agreement_en.pdf>, visited on 23 December 2010.

¹⁶⁹ These are the Office for Missing Persons of Republika Srpska, Missing Persons Commission of Federation of Bosnia and Herzegovina and State Commission for Missing Persons. See D. Popovic, *supra* note 108, pp. 69, 119-120.

¹⁷⁰ See RS Operative Team for Missing Persons, <www.nestallrs.com/onama_lat.html>, visited on 23 December 2010.

¹⁷¹ Interview, September 2010.

¹⁷² See RS Operative Team for Missing Persons, *supra* note 170.

Concluding Observations

In concluding this chapter, a couple of additional observations are in order:

Outreach and public engagement: The truth-seeking projects within BiH, such as the Srebrenica Commission or MPI, have not done enough to engage or explain to the wider public the methods of their work and sources used. This is important, in particular, because nearly all our interlocutors expressed their confidence in an objective, scientifically-based fact-finding endeavor of this sort. At the same time, many of our interlocutors claimed that such an approach still had to be applied in BiH.

Deficit in meaningful truth-telling: Despite the wealth of available documentation on the BiH conflict, the activities that would critically discuss previous truth-telling initiatives and promote existing ones are still rare in all parts of BiH, not least in cross-community settings. Despite the optimism expressed by Juan Méndez, for example, who stated that it is not clear what another report on truth in the Balkans could achieve after the UN bodies have documented the conflict so meticulously,¹⁷³ the collected evidence and documentation are hardly discussed in the public sphere in BiH, and certainly not in a systematic way. Certainly, the thematic and country-specific work of the UN rapporteurs, to which Méndez refers are rarely, if at all, invoked in the BiH public. Indeed, the Srebrenica Commission is, as its two commissioners confirmed to us, nearly forgotten only six years after it published its report, while rare references to it mostly deny or otherwise question its findings.

Timing: All potential times for truth-seeking present particular obstacles. The first TRC initiatives faced difficulties related to the cultural context and lack of public knowledge of the options for truth-telling and the potential of such projects in BiH. The ICTY's ambiguous stance compounded the problem. In essence, the ICTY wanted to make sure that the TRC would not interfere with its own work (and was thus perceived as imposing on – if only in a negative sense – the future mandate of the TRC). When the previous UNDP situation analysis was drafted, at the time of the second TRC initiative, the authors of the Report found the overall atmosphere and the environment extremely beneficial for truth-telling due to important developments, including the crucial context of the report of the Srebrenica Commission and the public apology which followed it.¹⁷⁴ According to the authors, this first official success in the field of non-judicial truth-telling clearly demonstrated the potential of a truth-seeking process in BiH.¹⁷⁵

¹⁷³ J.E. Méndez, 'Accountability for Past Abuses,' 19 *Human Rights Quarterly* (1997), p. 267

¹⁷⁴ See UNDP, *supra* note 15.

¹⁷⁵ *Ibid.*

Six years later, it is doubtful that the overall conditions have improved. In fact, according to several international officials and representatives of the victims' organizations that we interviewed, the current political situation is worse now than it was in 2005 or even 2000. According to many of our interlocutors, the level of mutual cooperation between the different victims' organizations has decreased compared to previous years. Additionally, there have been no serious developments in the field comparable to the Srebrenica Commission report, despite some institutional steps forward (such as the formation of MPI). However, those expressing a negative stance on the evolution of the truth-telling environment in BiH mostly refer to general and well-known reasons of political tensions and divisive rhetoric.

A number of our interlocutors, however, did articulate the belief that the timing for truth-telling is actually much better now than ever before. They offered plausible reasons for this position: politicians (although not the parties) who were the wartime leaders are no longer prominent in politics; there is a trend towards official apologies in the region (initiated by the President of Croatia, followed by the President of Serbia, and most recently, by the Bosniak member of the three-member BiH Presidency); the developments at the level of war crimes prosecutions in the region have caused a considerable decrease in taboos and contributed significantly to the widespread notion of the individualization of guilt¹⁷⁶ (although some regions and some topics still remain uncovered – for example the inter-Bosniak conflict in Western Bosnia); there is a general atmosphere in which everyone is finally able to move away from black and white portrayals of reality and admit that there were perpetrators of crimes on all sides; finally, in the meantime, a new generation of BiH experts in transitional justice has entered the scene, which brings a new hope that a BiH-specific model of truth-telling, informed by experiences, successes and failures worldwide, will finally emerge.

Victims are not tired. Talking to various representatives of victims' associations, as well as to those working or cooperating with victims, we are reassured that victims are not experiencing "transitional justice fatigue." They still want to tell their stories and the value of having them recorded in some way seems to have a therapeutic value to many victims.¹⁷⁷ The only problem noted by many interlocutors is the lack of a structured, victim-friendly forum in which victims could share their stories and experiences with the wider public.

¹⁷⁶ For example, one of the authors of the XY Films' war crimes documentaries based his optimism in this regard on the illustrative example that 90 percent of crimes they covered in their documentaries since 2005 have been solved by the courts in the meantime. Interview, November 2010.

¹⁷⁷ Interview with an experienced victims' psychotherapist, October 2010.



Chapter Three

Criteria, Conditions and Challenges for Truth-Seeking in BiH

This Chapter attempts to set out and discuss the key elements that – in our view – need to be taken into account and addressed in any truth-seeking endeavor in BiH. Based in part on the assessment of the successes and failures of previous and existing truth-seeking initiatives discussed in Chapter Two, and the broad goals of truth-telling defined in Chapter One, these criteria, conditions and challenges offer the thematic lenses through which we believe future truth-seeking in BiH needs to be contemplated. These key issues have emerged from the research undertaken, the documents studied and the interviews conducted during the team's mission traversing the country. They are therefore derived from our understanding of the particular conditions on the ground in BiH, and are defined through the way they were articulated by those we met. We have roughly divided these criteria, challenges and conditions into three broad categories: Those that are about *how* this is done, or process and strategy issues; those that are about *what* must be addressed, or thematic content issues; and those that stipulate *who* must be given specific consideration in the process, or issues relating to specific target social constituencies.

This exercise has not been undertaken with any preconceived assumptions about the precise form that an optimal truth-seeking exercise might take. However, it is our view that whatever the specific form – and this document will not be prescriptive about this – it is argued that the criteria, conditions and challenges set out in this Chapter, will be definitive of what needs to be navigated and engaged in the process. To this end, this Chapter will distill – under specific thematic headings – some of the key lessons learned from other experiences across the globe, both through official and unofficial truth-telling processes.

Process and Strategy Issues: How?

Truth-Seeking as “Fact-Finding”: Forensic, Scientific Truth-Seeking and Psycho-Social Truth-Telling

The persuasive power of the paradigm of accountability through the criminal courts in BiH has already been given some attention.¹⁷⁸ For many with whom we spoke, this judicial framework not only revolves around the criminal courts as the primary arbiters of the truth, but also has a significant influence on the kind of truth that is frequently anticipated – the “forensic truth,” or the undeniable facts of the criminal courtroom. This widely articulated predilection also appears to underpin a strong argument that there is only “one truth” about the past, rather than a diverse range of compatible, yet subjective, perspectives on it. To some extent, this approach seems to feed the passionate political, ethnic and sectarian competition over facts, details and numbers that continue to have a dominant influence on the BiH political and truth-seeking environment. At the same time, this approach is also the product of these very sectarian political and ideological positions.

For some, this battleground over “the facts” represents a continuation of the conflict through non-violent means. For others, it emphasizes the importance of being able to extract scientific proof to demonstrate what happened and how, and to prevent denial of the violations committed. Still others lament the manner in which this services the processes of political and sectarian manipulation and mobilization of victims and its divisive impact on victims’ movements.¹⁷⁹ Despite their hard work and dedication to elicit the facts about past atrocities, some people have also been ostracized – even by their “home” communities – if they were perceived to have strayed from a particular political orthodoxy about what happened and who was most responsible. One BiH commentator interviewed pointed out in frustration that the effect is that specific loss in many cases unfortunately gets “trivialized” or rendered “invisible” relative to some other greater injustice. He went on to point out that in BiH, it is sometimes more important to “split hairs” and wage politicized battles over the details, instead of focusing attention on the key societal issues of loss, dialogue and humanizing the other.

These notions of verifiable truths and provable facts, while important components of coherent truth-seeking,¹⁸⁰ set a very high and often unrealistic expectation of what can be achieved by judicial or quasi-judicial truth-seeking. However, as one member of a victims’ association noted, even though the courts might be where most people look to establish a truth that cannot be contested, they are ultimately clumsy institutions for providing the whole truth in all its complexity.

The power and importance of forensic truth or fact-finding is however not just about a judicial paradigm. The extraordinary work of MPI and ICMP in dealing with disappearances through DNA testing and exhumations, the construction of integrated lists of the missing, and the return of remains to the families, etc., best illustrates how critical scientific investigations can be to victims and survivors, even when they do not directly feed into specific prosecutions. Furthermore, scientific fact-finding sets boundaries on the political manipulation of these realities.

Forensic truth-seeking of this sort also contributes to psycho-social truth, the highly personalized stories of individual victims and survivors, and acknowledges the trauma, pain, loss, and complex emotional questions which scientific findings might trigger for individuals, communities, and society-wide. Despite the pervasiveness of the prosecutorial paradigm, there is an extensive need and belief in a more subjective truth-telling approach, which takes account of the importance of victims’ telling their stories, being heard, and being acknowledged for their suffering.¹⁸¹ Such truth-telling is psycho-social, rather than forensic, and is less subject to scrutiny, verification, judgment or cross-examination. By its very nature, such truth-telling produces multi-dimensional and occasionally contradictory versions of the past with multiple voices and truths rather than a singular truth.¹⁸² Just because truth-telling includes a psycho-social aspect, however, does not mean that it results in psychological healing or some form of catharsis. Often these processes, in fact, elicit deep and unresolved trauma, rather than inherently achieving recovery or reconciliation.¹⁸³

¹⁸⁰ See Chapter One, *supra*.

¹⁸¹ See Chapter Three, The Importance of Acknowledgement, *infra*.

¹⁸² For a more detailed discussion of these different kinds of truth, see Posel and Simpson, *supra* note 40, pp.1-13; and G. Simpson, ‘Tell no Lies, Claim no Easy Victories: A Brief Evaluation of South Africa’s Truth and Reconciliation Commission,’ in Posel and Simpson, *supra* note 40, pp. 220-251.

¹⁸³ There is a growing literature in the psychological field which engages critically with these issues of trauma, healing and truth-seeking, and which points to a complex inter-relationship between individual and collective psycho-social processes and truth recovery. E.g., Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma* (Springer, New York, 2010); B. Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (Springer, New York, 2009); D. Becker, ‘Confronting the Truth of the Erinyes: The Illusion of Harmony in the Healing of Trauma,’ in T. A. Borer (Ed.), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (Notre Dame Press, Indiana, 2006) pp. 231-258; M. Humphrey, *The Politics of Atrocity and Reconciliation: From Terror to Trauma* (Routledge, London, 2002) pp. 104-124; E. Staub, ‘Reconciliation after Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps toward a General Theory,’ 27:6 *Political Psychology* (2006) pp. 867-894; M. B. Lykes and M. Mersky, ‘Reparations and Mental Health: Psychosocial Interventions towards Healing, Human Agency, and Rethreading Social Realities’ in P. De Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, Oxford, 2006) pp. 589-622; and C.N. van der Merwe and P. Gobodo-Madikizela, *Narrating our Healing: Perspectives on Working through Trauma* (Cambridge Scholars Publishing, Newcastle, 2007).

¹⁷⁸ See Chapter Two, *supra*; see also Chapter Three, The Relationship Between Truth-Seeking and Trials, *infra*.

¹⁷⁹ See Chapter Three, Truth-telling: A Victim-Centered Approach, *infra*.

These two aspects of truth-seeking should, therefore, not be treated as mutually exclusive and are actually complementary, reflecting the varying needs of communities in BiH. They coincide substantially with the notions of "fact-finding" and "voice." Together, they enrich truth-telling and cultivate the space for dialogue and compatible narratives in society as a whole. Even the notion of individual legal responsibility, intrinsic to criminal accountability processes, is at the same time articulated as also having a psycho-social truth-seeking dimension. As a representative of a victims' group said:

You will hear one truth when you sit with us, another when you sit with Croats and still another when you sit with the Serbs. Each has their own version. But naming names and who did what is an essential part of the truth. These names will save us from merely blaming people through their ethnic labels. Victims too, need to have names, faces and stories.

One research expert made a critical observation that broader, more inclusive and holistic truth-seeking need not be any less fact-based or scientific in its approach. It may produce competing versions of the past, but just because truth-telling is not exclusively judicial and forensic in character, does not mean that the methodologies are not scientific or rigorous. This is of particular significance in the divided and sectarian BiH context. It also has important implications for the role of historians in facilitating, catalyzing and inspiring creative, scientific, and inclusive dialogues about the past, rather than avoiding these issues as divisive and irreconcilable.

These perspectives on the compatibility of psycho-social and legalistic truths were also articulated by one interlocutor from within the Government who noted that the need for hard facts was indisputable, but that they should be accompanied by the creation of safe spaces for individuals to tell their stories, express their views and be heard. Another interlocutor articulated this notion of complementary forms of truth-seeking even more strongly when she noted that even though the facts might be there for everyone to see, they are not always easily accepted. However, she pointed out that the process of victim testimony gave a face and a voice to these "dry" facts. She said that "it is hard not to hear when a mother tells her story. It is more difficult to contest politically." This view implicitly recognizes the inherent value of cultivating a society-wide dialogue through psycho-social truth-telling that demystifies and re-humanizes "the other."

Once again, these are not observations or dilemmas that are unique to BiH. Many truth commissions acknowledge their engagement with these different types of truths, some more self-consciously than others. The Final Report of the South African TRC specifically addressed both the potential tensions and the complementary nature of these different forms of truth-telling.¹⁸⁴ It has also been noted that this presented a dilemma for the TRC as it "walked a tightrope" between competing expectations of the truth-seeking process.¹⁸⁵ In many respects, the South African TRC pioneered new dimensions in the psycho-social impact of truth-telling through the innovation of public hearings for victim testimony. Although this was not without its liabilities and its critics,¹⁸⁶ the subsequent use of this practice in the Peruvian TRC and in East Timor's CAVR meant that these were models of commissions that actively engaged the psycho-social needs of victims and survivors. Indeed, these commissions emphasized the creation of a safe space for story-telling, provision of psychological support services for witnesses, and attentiveness to the design of the space in which this story-telling took place. Unlike the South African TRC, however, both the Peruvian and East Timorese commissions also modeled creative truth-seeking in tandem with judicial processes in these societies.¹⁸⁷ These two examples reflect the evolution of truth-seeking processes that were simultaneously responsive to psycho-social and forensic demands. This was in stark contrast with some earlier commissions, such as the Chilean Commission, which was highly legalistic in its style, was judicial in its orientation, did not hold victims' hearings, and opted for a largely forensic approach.¹⁸⁸ The Ghanaian case is also an interesting contrast because, although it included victims' testimonies, the organization of the hearings very strongly resembled the formality and hierarchical profile of a traditional courtroom, as opposed to other commissions that were more accommodating of victim participation, both in the form and the content of the process.

The relationship between these two forms of truth is also often a challenge in oral history projects. On the one hand, historians who practice oral history often argue that it is much closer to forensic truth,¹⁸⁹ while others have pointed to the potential remedial impact of the act of giving testimony.¹⁹⁰

¹⁸⁴ Truth and Reconciliation Commission, Truth and Reconciliation Commission of South Africa Report, (Juta & Co., Cape Town, 1998), Vol.1 Chapter 5, paragraph 29. For a detailed discussion of this in the South African case, see D. Posel, 'The TRC Report: What Kind of History? What Kind of Truth?' in D. Posel and G. Simpson, *supra* note 40, pp.147-172.

¹⁸⁵ *Ibid.*

¹⁸⁶ In particular, there was some heated debate in psychological circles about the assumptions of healing that were sometimes associated with public testimony. Also, there have been important challenges about the inappropriateness of public testimony in respect of certain crimes (such as sexual violence) or in respect of some vulnerable groups, who may be further exposed or detrimentally affected, including women and children (although children did not participate in the South African TRC hearings directly).

¹⁸⁷ For more on this see Chapter Three, The Relationship Between Truth-Seeking and Trials, *infra*.

¹⁸⁸ See Chapter One, A Note on International Comparisons, *supra*.

¹⁸⁹ *E.g.*, Columbia University Oral History Research Office, "About OHRO," <blogs.cul.columbia.edu/ohro/about/>, visited on 18 December 2010.

¹⁹⁰ See S. Linton, *Reconciliation in Cambodia* (Documentation Center of Cambodia, Phnom Penh, 2004).

For example, in Northern Ireland, the Ardoyne Commemoration Project, an unofficial initiative, examined the different ways that both forensic truth and psycho-social truth intermingle, seeing both as intrinsic to the effort to “allow ordinary people to tell their story.”¹⁹¹ To accomplish this, the project brought together classic oral history methodologies with the more therapeutic process of encouraging family members to tell stories in their own ways.

Although these psycho-social and forensic approaches to truth-telling appear sometimes to compete with each other, it is clear that best practice treats them as complementary. It is also evident that despite the cultural prevalence of a judicial paradigm of truth-seeking in BiH, it is nonetheless both possible and critical that any future truth-seeking mechanism seeks to integrate these approaches, encouraging different methodologies as complementary, rather than contradictory, in crafting a complex truth, compatible narratives and a society-wide dialogue about the past.

Consensus Figures and the Importance of Credible Leadership

Violent conflicts in BiH in the 1990s and the negotiated constitutional arrangements at the end of that period produced a state and a negotiated settlement that remains premised on a high degree of sectarian competition and division. This is also reflected in the de facto politico-ethnic segregation of the various entities and the society at large, from the local to the national levels. Because sectarianism and ethnic division are rooted in the conflicts of the past, including the patterns of violence and displacement that any truth-seeking exercise would examine, there is a high degree of suspicion, skepticism and lack of trust about the potential for this process to be fair if it is driven by the government. As one of our interlocutors stridently asserted, “The people who are in power now are people who wielded power during the war. On all sides it is hard to trust and have confidence in them.”

Still others with whom we met expressed concern at the inefficiency of BiH state institutions that are mired in sectarian and political contests, to the point of sometimes being dysfunctional. As one of those we met with stated, “The people are not as divided as the institutions are divided.” A member of a victims' association complained:

Everyone committed crimes, but not everyone will acknowledge their roles and responsibilities. Crimes were committed in the name of us ordinary people... but it happened on all sides. We should all speak out... In many ways, it is easier to reconcile the people than the politicians who are not committed and who manipulate the situation. And this too happens on all sides.

Another victims' representative said, “All the politicians play games with the numbers. They seek to manipulate the victims associations. We need space to meet together without the politicians.”

However, this is not just true at the political level and does not only play itself out in political competition between adversaries who share responsibilities in state-level government. This political sectarianism is also evident in the fractiousness, divisions and, as some claimed, the political “manipulation” of the victim movement itself. Many of our interlocutors pointed to highly politicized victims' associations, which seem to be divided along sectarian, ethnic and political lines. They appear to be more committed to their competing claims to history and the seriousness of the violations they endured than they are connected to each other by their common experiences of loss and suffering during the conflicts.

Many of those with whom we spoke believed that these entrenched divisions within the state and society meant that the prospects for credible truth-seeking in BiH are now worse than they were five or even ten years ago. As one social worker indicated, “In 1999, I think the situation for this sort of work [truth-seeking] was perhaps better than it is now. Now the conflict mentality has been entrenched. The ability to accept responsibility has also been diminished.” Likewise, a foreign observer, who had spent much time in the country, commented, “The country lives politically as if it was 15 years ago. It is oriented around memories of the past, not plans for the future.”¹⁹²

¹⁹¹ See Ardoyne Commemoration Project, *supra* note 45, p. 11

¹⁹² These perspectives refer specifically the political context and the particular impasse as they were articulated in respect of the political and governmental levels, but should not eclipse some of the more optimistic perspectives for the timing and importance of truth-seeking through other sectors, that are reflected elsewhere in this report.

It is highly significant that at a time when BiH is contemplating the importance of truth-seeking, the trust in political leadership to oversee this process is not there. This has fundamental implications for who needs to monitor, accompany and drive this process. Truth-seeking in BiH must be championed by a credible, competent and trusted leadership, and particularly by a

collective of “consensus figures” – men and women of the utmost integrity and independence (not necessarily people of high profile), who are able to credibly relate and command respect across the ethnic and sectarian divides that dominate BiH society. The importance of legitimate, autonomous, cross-disciplinary leadership – particularly from within civil society and the NGO community, within academia, drawn from the caring professions, etc. – cannot be overstated in these processes. This is especially important if truth-seeking is to have an independent life outside of highly contested and politicized state structures.

These “consensus figures” will also need to be people of courage and fortitude if they are to lead the building of a truth-seeking *movement*. In the course of our time in BiH, the team of consultants heard many accounts of how committed individuals who have crossed the lines of ethnic or sectarian loyalty, especially where they have done this in the name of truth-seeking or fact-finding, have quickly been subject to victimization and ostracism, even from within their home communities.

Indeed, international experience across a wide range of countries bears out the central importance of “consensus figures” as leaders of credible truth-seeking processes. And the transparent, consultative processes by which they are selected is as important as the personal leadership qualities of those selected.

The mandates of truth commissions from across the globe provide a rich description of the figures that are suitable for these responsibilities, especially in divided societies. The truth commissions of Morocco, Sierra Leone, East Timor, South Africa and Liberia (to mention a few) provide instructive guidelines for the sort of leadership needed to champion any BiH truth-seeking endeavor. The key qualities identified include: impartiality, integrity, independence, freedom from bias or prejudice, high moral character, commitment to human rights and to non-discrimination on the basis of race, ethnicity, gender, caste, etc.¹⁹³

¹⁹³ E.g., Liberia, *Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia* (2005), Arts. IV, V, IX; Morocco, *Dahir No 1.04.42 of the 19th of Safar 1425* (10 April 2004), Preamble, Art. 3; Sierra Leone, *The Truth and Reconciliation Commission Act* (2000), Secs. 3, 14; South Africa, *Promotion of National Unity and Reconciliation Act* (1995), Secs. 7, 13, 17, 24, 36; Timor Leste, *UNTEAT Regulation No. 2001/10* (2001), Secs. 2, 4, 5, 11, 41, 42.

People who serve in these capacities must have no track record of human rights abuse. Various commission mandates stipulate that commissioners should be drawn from diverse professional and disciplinary backgrounds, should be broadly representative of the societies from which they are drawn, and special attention should be given to the participation and leadership of women. The key characteristics required of those who lead truth-telling processes in any country are perhaps best captured by the words of the Chairperson of the Chilean Truth Commission, José Zalaquett:

We are taking the liberty of stating why we accepted the noble task with which we have been honored. We were aware that it would be difficult, and that our own limitations would make it more so. We nonetheless accepted it without hesitation. The members of our group uphold a variety of philosophies of life. We are aware that we adhere to a variety of traditions, that our political loyalties are different, and that we have different perspectives on our country's history... We accepted our task because the same fundamental principle unites us all – respect for human persons simply because they are human persons – and because we believe that the person is protected by inalienable rights which cannot be violated on the grounds of any accidental condition, nationality, creed, race, or ideology. These are rights that no power, no matter how far-reaching, may violate. We are united by an utter conviction that the human person in his or her dignity constitutes inviolable limits to the activity of other human beings. This is the primordial rule of human life in common. Finally, we are united in our yearning to make our country a land worthy to shelter the children of our species, which is always regarded as the highest expression of creation.¹⁹⁴

¹⁹⁴ *Report of the Chilean National Commission on Truth and Reconciliation*, *supra* note 16, pp. 20-21.

In some cases, the central importance of neutrality and independence, as well as the dangers of perceptions of bias, were deemed so important in highly divided societies that it was deliberately decided to include prominent internationals amongst the commissioners to increase perceptions of credible impartiality. The most extreme case was in El Salvador where the Commission was made up entirely of foreigners because it was felt that perceptions of neutrality could not otherwise be assured.¹⁹⁵ In Guatemala, the head of the Commission for Historical Clarification was a foreigner, but the other two commissioners were Guatemalan. In Sierra Leone, a hybrid truth commission was established with three international commissioners appointed by the UN Office of the High Commissioner for Human Rights (OHCHR) and four national commissioners recommended by a panel of diverse political stakeholders, including civil society representatives.¹⁹⁶ In the case of Liberia, instead of internationals serving as commissioners, an International Technical Advisory Committee (ITAC) was constituted to work directly with the commissioners.¹⁹⁷

Similarly, unofficial truth projects risk the perception that they are not truly objective, that they have a political agenda, or that their staff are partisan. For this reason, unofficial projects such as the Greensboro Truth and Reconciliation Commission (GTRC) or the *Tortura Nunca Mais* project (Brazil)¹⁹⁸ have gone out of their way to demonstrate that their leadership and staff are adhering to the highest possible standards of objective inquiry.

In this sense, unofficial projects, too, have sought consensus figures, such as GTRC, a municipal-level, community-driven project to uncover the truth about an event of racial and political violence in Greensboro, North Carolina in 1979. In its mandate, GTRC includes:

GTRC will consist of seven (7) commissioners who shall be persons of recognized integrity and principle. With a demonstrated commitment to the values of truth, reconciliation, equity, and justice.¹⁹⁹

195 C. Tomuschat, "Clarification Commission in Guatemala," 23 *Human Rights Quarterly* (2001) pp. 233-258, at 237-239. Although Tomuschat was the Chairperson of the Guatemalan Commission, he was comparing Guatemala and El Salvador here. He writes about El Salvador: "No one seemed able to be absolutely neutral. Almost everyone was counted as a person either of the right or the left, the middle ground having been completely eroded during the long years of fratricidal conflict. Therefore, in order to ensure that findings and conclusions would be as objective as possible, it was felt that nationals of El Salvador should be excluded, all the more so since any person prepared to lend her services in the most objective manner might have run the risk of being put under pressure—or might even have risked her life." *Ibid.*, p. 238.

196 M. Freeman and P. Hayner "Truth-Telling," in D. Bloomfield, T. Barnes and L. Huyse (eds.), *Reconciliation After Violent Conflict: A Handbook*, (International IDEA, Stockholm, 2003) p. 129.

197 Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia (2005), Section 10, <www.ictj.org/static/Africa/Liberia/liberiactract.eng.pdf>, visited on 20 December 2010.

198 This project—to determine the extent of torture in Brazil during authoritarian rule by using state records, involved a formal relationship with the World Council of Churches, which gave it added legitimacy.

199 Greensboro Truth and Community Reconciliation Project, 'Mandate for the Greensboro Truth and Reconciliation Commission,' *Greensboro News & Record*, 6 May 2003, <www.greensborotrc.org>, visited on 18 December 2010

However, if the character and qualities of those who lead such endeavors (whether official or unofficial) are important, then the process by which these figures are selected is equally significant. Clearly, one of the factors that are evidenced internationally as critical to the perceptions of a legitimate truth-seeking process is the transparency and inclusive participation in the commissioner selection process. There are excellent examples from East Timor, Sierra Leone and South Africa, among others, which had clear, transparent and inclusive participatory processes for the appointment of the commissioners and the chairpersons of the commissions. Many of these cases had panels that included a range of political parties, NGOs, religious leaders, victim groups, other civil society representatives and members of the international community, who were responsible for vetting and short-listing candidates.²⁰⁰ In South Africa, for instance, the process of interviewing candidates was public. In other cases, commissioners were finally appointed by the President or highest international administrative authority in the country after consultation with civil society.

By contrast, the case of Ghana illustrates some of the potential problems with a lack of transparency and consultation in the appointment of truth commissioners. In particular, this resulted in perceptions that the National Reconciliation Commission (NRC) was not a politically neutral body.²⁰¹ Similarly, in the case of the bi-national Indonesian/Timorese Commission on Truth and Friendship (CTF), the selection of commissioners took place behind closed doors and without civil society input. When combined with the adversarial operations of commissioners, this gave rise to public perceptions that the commissioners were divided into two irreconcilable factions based on nationality and competition over the dominance of one side's pre-existing historical view.²⁰²

Most striking is the recent experience of Kenya where the sitting Chairperson of the Truth, Justice and Reconciliation Commission (TJRC) eventually had to resign on the basis that he was implicated in some of the events that the TJRC was tasked to investigate. The controversy had previously resulted in several other commissioners resigning and eventually the TJRC itself was brought to its knees.²⁰³

200 It should be noted that the draft TRC laws for BiH (particularly the second one framed in 2006) did set out tentative selection processes for future Commissioners which included a nomination panel made up of diverse stakeholders and proposed broad civil society consultation. See Chapter Two, Official Truth-telling Efforts in Bosnia and Herzegovina, *supra*.

201 N. Valji, "Ghana's National Reconciliation Commission: A Comparative Assessment," *International Center for Transitional Justice and Centre for the Study of Violence and Reconciliation Occasional Paper Series*, September 2006, p. 7.

202 M. Hirst, 'Too Much Friendship, Too Little Truth,' *International Center for Transitional Justice* (January 2008), <www.ictj.org/images/content/7/7/772.pdf>, visited on 18 December 2010, pp. 37-38.

203 TJRC Communications Department, 'TJRC Commissioners Applaud Chair Bethwel Kiplagat for Stepping Aside,' November 2010, <www.tjrkenya.org/index.php/news/182-tjrc-commissioners-applaud-chair-bethwel-kiplagat-for-stepping-aside>, visited on 23 December 2010.

As noted by Mark Freeman and Patricia Hayner:

The key lesson from past truth commissions is that a commission will generally garner greater public and international support where its members are selected through a consultative process and where an honest attempt is made to ensure a fair balance in the representation of political views, ethnic or religious groups and gender.²⁰⁴

What is most clear in the BiH context is that the character and credentials of those who are tasked with catalyzing and facilitating a broad-based truth-seeking process, combined with the consultative and transparent selection of them, will be of paramount importance. The credibility and viability of such an endeavor will depend on the leadership, integrity and independence of those who are to champion and monitor these activities. Indeed, in the current climate, such “consensus figures,” capable of crossing the ethnic and sectarian divides in BiH society, will be essential to the legitimacy of the truth-seeking process and to the credibility of the society-wide dialogue that it seeks to catalyze over the next decade. Leadership should be exercised in a manner that is supported by the Government, but fully autonomous and independent of the highly contested political state structures. It should be insulated from narrow sectarianism as the lens on the past.

“The Beginning of History”: Time Frames and Mandate

In BiH, identifying when the conflict began or clarifying the root causes of the conflict are highly politicized issues and reflect entrenched sectarian perspectives. These debates, which for many go back centuries, are often invoked as an illustration the uniqueness of BiH and as an indication of the intractability of the conflict. This presents an immediate challenge for determining how far back in time the exercise of truth-seeking ought to reach. However, determining the “start date” (and “end date”) for similar truth-telling initiatives is a vexing question for truth commissions and other truth projects all over the world, and BiH is not nearly as unique in this regard as might be imagined.

In BiH, for example, one question that arises is whether the period to be examined should focus only on 1992–1995 or a longer period of time. How should truth-telling deal with historical antecedents to conflict or long-running resentments? Has there been adequate accounting for the treatment of certain communities during World War II, for example, and, if not, should a truth-telling initiative begin with accounts from the trauma experienced during that period?

In other contexts, both official and unofficial truth-seeking initiatives have also had to grapple with the question of *temporal mandate*. In post-Colonial countries, such as Kenya, the designers of the truth commission had to consider whether to go back as far as colonial rule. At essence was the question “when did this conflict ‘begin,’” which inherently brings up issues related to root causes, historical legacies and long-term inheritances, such as patterns of exclusion or unfairness that go back for decades, even centuries.

One way to finesse this problem is to avoid the idea that there should be a single truth-telling body with a single temporal mandate, but rather to endorse the idea of various different truth-telling initiatives that define temporal mandate in different ways and for different reasons. So, for example, the Iraq Memory Foundation (IMF), an unofficial truth-telling initiative, defined its temporal mandate as the Ba’athist period in Iraq which, they argued, started in 1968 and ended with the United States’ invasion in 2003. When criticized for not including human rights abuse and war crimes committed *after* 2003, the IMF justified its definition of temporal mandate by arguing that the Ba’athist period was characterized by certain patterns and events that made it distinct from other periods. Indeed, the IMF suggested, it had a clear “start date” and “end date.” Whether human rights abuse committed after 2003 was as bad or worse during the 1968–2003 period was beside the point. The IMF encouraged other truth-seeking efforts to focus on the post-2003 period and offered to collaborate with them, but maintained that it would stick to an examination of the Ba’athist period.

Narrowing in on a specific temporal period does not limit a truth-telling exercise from also examining antecedents or prior patterns that contributed or led to the period under examination. In the Solomon Islands, as in many truth commission mandates, for example, the legislation is very specific. The commission is charged with examining “human rights violations or abuses which occurred between 1st January 1998 and 23rd July 2003, including the

²⁰⁴ M. Freeman and P. Hayner *supra* note 196, p. 129.

destruction of property, deprivation of rights to own property and the right to settle and make a living" and additionally with "considering sectoral impacts on health, education, legal and other sectors, without diluting the emphasis on individual victims" with the overall goal of "devising policy options or measures that may prevent similar situations or a repetition of such events in the future."²⁰⁵ But the Solomon Islands legislation also requires the commission to examine the "antecedents" and "root causes" of the conflict.

Many truth-telling initiatives thus begin with a closely defined temporal mandate but, aware that history is continuity, also require an analysis that takes a longer history into account. In Guatemala, both the (official) Commission for Historical Clarification (CEH) and the (unofficial) Recuperation of Historical Memory (REMHI) project focused their inquiries on the period between 1962 and the final peace agreement in 1996. However, both initiatives also looked back into deeper historical patterns. The final report of the CEH concluded by emphasizing patterns of social exclusion established during the colonial period, suggesting that "the proclamation of independence in 1821, an event prompted by the country's elite, saw the creation of an authoritarian State which excluded the majority of the population, was racist in its precepts and practices, and served to protect the economic interests of the privileged minority."²⁰⁶ In Ghana, the Truth Commission was mandated to examine violations during three distinct periods of "unconstitutional government", but also provided that the Commission could examine any similar violations between March 1957 and January 1993, on application by the affected person.²⁰⁷ The Liberian Commission was tasked with considering human right violations including "massacres, sexual violations, murder, extra-judicial killings and economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts, during the period January 1979 to October 14, 2003", but was also responsible for "establishing the antecedents, circumstances, factors and context of such violations and abuses" and was empowered to investigate any similar violation preceding this period, on application by the affected individual or group.²⁰⁸ Similarly, both the Sierra Leone and the South African

truth commissions were mandated to investigate specific kinds of violations during a particular period, but were also mandated to examine and explain the "antecedent causes" of these violations.

In BiH, we found the discussion over time-period to be somewhat uncontroversial among most of the people with whom we spoke, although this does not mean it is entirely settled. As in virtually every context in the world, there are reasonable arguments to be made—arguments that involve the very nature of causation in history, root causes, and historical legacies—in favor of examining different time periods. Nonetheless, we found a general agreement on the 1992–1995 period as the primary timeframe to be examined by truth-seeking initiatives, although there were a few suggestions that antecedents should also be explored, most obviously World War II.

What is important is that the question of temporal mandate and timeframes be discussed in a neutral forum, ideally one that allows for different opinions to surface and be debated using reasonable historiographical arguments.

One example to follow in this regard is the discussion concerning mandates and timeframes that was coordinated by the Healing Through Remembering Project in Northern Ireland. Its 2006 publication, entitled "Making Peace with the Past: Options for Truth Recovery Regarding the Conflict in and about Northern Ireland,"²⁰⁹ examined the question of temporal mandate, among many other topics. As a starting point, the discussion assumed that the period under examination would logically be 1966 to 1998. However, it opened up the possibilities either (1) that numerous different truth-telling initiatives could grapple with different time frames, including what it called "truth recovery from below" (i.e. unofficial truth-telling initiatives), and/or (2) that any formal truth-telling initiative, such as a truth commission, would need to consider and define this question, and not take the most obvious dates for granted.

Therefore, we suggest that temporal mandate become one of the key criteria to be discussed as truth-seeking develops further in BiH. Indeed, the discussion about timeframe can *itself* become a dialogic process that leads to a clearer understanding of the relationship between past, present, and future, and the connections between what happened before, during, and after the conflict and how this affects future generations.

²⁰⁵ See Solomon Islands Truth and Reconciliation Commission Act 2008 (No. 5 of 2008), 28 August 2008, National Parliament, Article 5(1)(b)-(d) <http://www.padii.org/sb/legis/num_act/tarca2008371/>, visited on 18 December 2010.

²⁰⁶ Commission for Historical Clarification, *Guatemala Memory of Silence*, T'Z'INIL NA'TAB'AL, Report of the Commission for Historical Clarification Conclusion and Recommendations, February 1999, <<http://shr.aaas.org/guatemala/ceh/report/english/concl.html>>, visited on 18 December 2010.

²⁰⁷ Parliament of the Republic of Ghana, *The National Reconciliation Commission Act* (2002) Section 3, <www.ghanareview.com/reconact.html>, visited on 1 January 2011, stipulates that: (1) The object of the Commission is to seek and promote national reconciliation among the people of this country (a) by establishing accurate, complete and historical record of violations and abuses of human rights inflicted on persons by public institutions and holders of public office during periods of unconstitutional government, namely from: (i) 24th February 1966 to 21st August 1969; (ii) 13th January, 1972 to 23rd September 1979; and (iii) 31st December, 1981 to 6th January, 1993; and (b) by making recommendations to the President for redress of wrongs committed within the specified periods. (2) Notwithstanding the periods specified in subsection (1) (a), the Commission may, on an application by any person, pursue the object set out in subsection (1) in respect of any other period between 6th March 1957 and 6th January 1993.

²⁰⁸ Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia (2005), Section 4 (a), *supra* note 197.

²⁰⁹ McEvoy, *supra* note 32.

Informed Consultation Indispensable to Credible Truth-Seeking

Several early truth-seeking initiatives in BiH died – at least in part – on the sword of a failure to consult widely enough with key stakeholder groups in preparing these initiatives. There may have been many different reasons for this, compounded by dilemmas of timing, resources, particular challenges of judicial accountability at the time, etc. There is little doubt that these factors were aggravated by perceptions that non-judicial forms of accountability – specifically a truth commission – were largely imported by international actors from other contexts that did not adequately resonate with the nature of the conflict, society and polity in BiH. Strong resistance to these approaches was thus unsurprising and is certainly not unique to BiH.

Nonetheless, broad-based consultations that secure the buy-in and commitment of key stakeholders are a critical prerequisite for legitimate and credible truth-seeking processes. In fact, international standards *require* that a truth commission's creation be “based on broad public consultations in which the views of victims and survivors are especially sought.”²¹⁰ Truth-seeking commissions are dramatically enriched by ensuring that consultations are not

merely formal processes, but are well *informed* by the experiences, mistakes, innovation, and best practices of others, who have navigated these tricky paths in their own societies. There is clearly no template or model anywhere that will be suitable for BiH; indeed, the innovation that takes place in BiH will hopefully provide a learning opportunity for those grappling with similar challenges in other parts of the world. However, the ability of civil society, victims associations, youth and women's groups, political leaders, religious communities, and the full range of stakeholders to engage in these processes with a greater understanding of the options available is an invaluable investment in the success of truth-seeking in BiH, whatever forms the truth-seeking ultimately takes.

There are ample examples from international experience that demonstrate the manner in which consultative, inclusive, participatory and transparent processes service the potential for credible truth-seeking. Other examples equally illustrate that failure to take these processes seriously will jeopardize the legitimacy and often the very functionality of the process. For instance, it is crucial to have public participation in the selection of consensus figures to lead

and support truth-seeking endeavors.²¹¹ The broad range of actors on some of the panels responsible for vetting and selecting short-listed candidates shows the importance of expansive participation. In various contexts, these panels have included not only NGOs and victims groups, but also former (political) prisoners, former rebel groups, religious leaders, business leaders, academics and representative members of the international community, among others.

This immediately prompts the key question of *who* should be involved and prioritized in these consultative processes to inform the important decisions on design, focus, methodology and approaches to truth-seeking. Firstly, victims are one of the most important target groups;²¹² however, they are not always well-organized or institutionally articulate. Moreover, as in the cases of BiH and Northern Ireland, victims' associations may be very divided and politicized along ethnic, religious or sectarian lines. They do not always speak for the fully diverse range of victims affected by the conflict. Violent conflicts of the magnitude of those in BiH produce entire victimized communities that go beyond those who have suffered the most devastating and obvious losses. As was also pointed out during interviews, it was sometimes important to distinguish between the leadership and ‘rank and file’ of victims' movements.

International experience in both official and unofficial truth-seeking clearly demonstrates that consultation with – and the participation of – victims

groups, whilst indispensable, is simply not enough. Consultations need to be considerably more open, representative of societal stakeholders, and more inclusive.²¹³ The inclusion of other civil society groups is critical. They often provide access to a wider community of victims who are not always represented by organized victims associations. Youth groups, women's organizations, religious leaders, academics and social scientists, members of the business community, psycho-social service providers, human rights organizations, local civic and community organizations, and many others, have vital contributions to make and substantial potential investment in societal-level truth-seeking.

In addition, the participation of these groups secures substantive input and potential future partners to the truth-telling processes eventually selected, designed and implemented. International experience demonstrates that frequently, they become critical partners and service providers (for example

²¹⁰ Orentlicher, *supra* note 71, p. 8.

²¹¹ See Chapter Three, Consensus Figures and the Importance of Credible Leadership, *supra*.

²¹² See Chapter Three, A Victim-Centered Approach, *infra*.

²¹³ See for example: Amnesty International, ‘Liberia: Truth, Justice and Reparation - Memorandum on the Truth and Reconciliation Commission Act’ Amnesty International (2005) pp. 27-28; B. Hamber, ‘Putting the Past in Perspective,’ Paper presented at the Putting the Past in Perspective Seminar, Queen's University Belfast, 17 May 2008 (2008) pp. 12-14; McConnachie, *supra* note 28, pp. 10, 14-15..

of documentation, monitoring, facilitation of access to local and victim communities, providers of psycho-social services, technology support, etc.) to truth-seeking enterprises.²¹⁴ Evidence also suggests that the earlier that these stakeholder groups (such as women's organizations and youth groups) are substantively involved, the greater the prospects that the issues relating to their social constituencies (women and young people, for example) will be addressed by the truth-seeking and truth-telling processes.²¹⁵

The process in Peru, for instance, actively engaged various civil society groups and social constituencies. The Executive Secretary of the Peruvian TRC subsequently reflected, "the relationship between truth commission and civil society can determine the success or failure of the process."²¹⁶

In contrast, failure to consult with civil society groups can have the opposite effect: it can stimulate substantial resistance to a truth commission or a similar truth-seeking endeavor. The Indonesia/East Timor Commission on Truth and Friendship (CTF) is telling on this point. Despite significant criticism of the initial CTF concept, its creators made minimal attempts to involve communities, victims, human rights groups, or the UN in the Commission's design. As a result, civil society refused to assist the CTF in its work and some groups actively campaigned against it. The credibility and effectiveness of the CTF's work was thus stymied and it quickly lost the support of key local actors as well as international agencies and NGOs.²¹⁷ In comparison, in Liberia, Morocco and South Africa, early extensive consultation in the preparatory phase secured strong support from NGOs and civil society groups. This eventually waned and these groups became more critical of the processes as they proceeded.²¹⁸

214 The Recovery of Historical Memory Project (REMHI) in Guatemala provides an excellent case here. This is dealt with extensively in Chapter Three, Connecting the Local to the Global, *infra*. Likewise, in Chile, the Commission used information on disappearances that an NGO had collected as the starting point for its investigations. McConnachie, *supra* note 28, p. 20. In Sierra Leone, NGOs conducted activities, such as sensitization, mapping the conflict, researching violations, identifying traditional methods of reconciliation and the role of traditional leaders, enhancing the participation of combatants, and promoting and protecting women and children. *Ibid.* pp. 10-11. And, in South Africa, NGO staff provided counseling to victims, witnesses, and TRC staff, gave back-up support in debriefing sessions of the TRC, trained TRC staff, and submitted policy briefs on certain issues like witness protection and reparations. NGOs also provided documentation to the TRC to be incorporated in a national database. Religious organizations devised a program for children who were too young to testify in public hearings. H. van der Merwe, P. Dewhurst & B. Hamber, 'Non-governmental Organisations and the Truth and Reconciliation Commission: An impact assessment,' *Centre for the Study of Violence and Reconciliation* (1999), <www.csvr.org.za/index.php?option=com_content&task=view&id=760>, visited on 18 December 2010.

215 See B. Goldblatt, 'Evaluating the Gender Content of Reparations: Lessons from South Africa' in R. Rubio-Marin (ed.), *What Happened to the Women?: Gender and Reparations for Human Rights Violations* (Social Science Research Center, New York, 2006) pp. 53-59, 63; V. Nesiiah, *Truth Commissions and Gender: Principles, Policies, and Procedures* (International Center for Transitional Justice, New York, July 2006), <www.ictj.org/static/Gender/GendHandbook.eng.pdf>, visited on 18 December 2010, pp. 6, 12-13, 34; UNICEF Innocenti Research Centre and The International Center for Transitional Justice, 'Children and Truth Commissions,' *The International Center for Transitional Justice* (August, 2010), <www.ictj.org/static/Publications/children_truth_commissions_eng_2010.pdf>, visited on 28 December 2010, pp. 10-11, 21-22, 26, 28, 32, 61-62.

216 McConnachie, *supra* note 28, Preface, p.13.

217 Hirst, *supra* note 202.

218 Hayner, *supra* note 11, pp. 226-227.

To some extent, however, this is both inevitable and healthy as those groups working with victims and survivors might become "critical partners" to the truth-seeking process, depending on how effectively the needs of their key social constituencies are addressed.

This raises the questions not only of who should be consulted, but also at what stages in the process and by what means they should be consulted. In many respects, the selection of those who might lead, accompany, or facilitate the truth-seeking endeavor is one of the later steps in the process. However, this issue requires much earlier and deeper consultation interventions. In other places around the world, creative public engagement and consultation processes have been organized much earlier in the process around the issues of what form truth-seeking might take and negotiations over the mandate of a truth-seeking approach or of a truth commission (including such "hot" issues as the period to be examined, the crimes to be considered, etc.). Buy-in through participation, maximum inclusivity and transparency must therefore start at the very beginnings of the process.²¹⁹ Thereafter, key stakeholders might be brought in on a wide range of issues and steps along the way, including the design of truth-seeking methodologies and structures, participation in legislative drafting processes, the provision of support services associated with such truth-seeking endeavors (for victims as well as for those undertaking enquiries or managing the processes), etc. This is not by any means an exhaustive list, but rather illustrates the opportunities for indispensable consultative and public engagement strategies at every point in the formative process.

Previous international truth-seeking initiatives have employed creative consultation and inclusive procedures in the lead up to establishing a truth-seeking mechanism.²²⁰ One recent example that is potentially highly relevant to the BiH case is Northern Ireland's Consultative Group on the Past (2006-2009). This elaborate consultation process had to engage with highly politicized and sectarian victim groups. In September 2007, the Group invited any individuals or groups to share their views on how Northern Irish society could best approach the legacy of the preceding 40 years, lessons to be learned, and the steps that might enable society to build a shared future that was not overshadowed by the past. The Group emphasized that its role was to make recommendations about a process for dealing with the past and that the Group itself was not that process.²²¹

219 In East Timor, for example, the Commission (CAVR) understood the need to engage civil society early on. At the outset, it created a Program Support Division that prepared strategies for building relationships with civil society organizations, including holding regular meetings. As a result, the Commission avoided the possibility that an "us-and-them" perception would develop. McConnachie, *supra* note 28, p. 25.

220 Although the commissions in Peru, East Timor, and South Africa were different, each built on and improved upon the lessons from preceding experiences.

221 Consultative Group on the Past, *supra* note 9, p. 45.

The Group reached out to people who had been affected by the conflict, both inside and outside Northern Ireland, actively seeking their input. It sought advice from other groups, such as the Equality Commission for Northern Ireland and Victim Support to ensure that consultation was as accessible as possible and to provide support to those engaging with the process. The consultations were widely advertised in the newspapers, press releases, on radio and on television. Letters were proactively sent to a wide range of interested groups inviting them to participate. Existing organizational networks were utilized to increase awareness and to make the Group more accessible. Articles were published in various newsletters and radio and television interviews were given in support. In addition, a website was created so that the public could gain information about the Group's work, make submissions and express views publicly in a discussion forum. By the end of the consultation period, the Group had received 290 written submissions and 2,086 letters on input, as well as many letters providing general commentary and offering support. It met privately with 141 individuals or groups, many of which represented groups of hundreds of individuals. These meetings took place in various venues across the country, in bigger and smaller towns, as well as in other parts of the UK. The Group also organized numerous public events and discussion forums in towns and cities, selected to make the meetings geographically accessible to as many people as possible. Public meetings were preceded by advertisements and articles that were featured in the respective local media outlets and local councils were informed. Members of the Group also engaged in informal discussions. This allowed the Group to hear from those who were not comfortable engaging in more formal meetings. During the course of the public engagement, many groups and organizations independently convened seminars, workshops or conferences to discuss how to deal with the past. Group members endeavored to attend as many of these as possible.²²²

It is important to note that when the Consultative Group was set up, it was encouraged to take into account the "landscape of initiatives" that had already been undertaken by both governmental and non-governmental groups to "deal with the past." It was clear that much excellent work and research had already been done by a range of individuals, voluntary and community groups, NGOs, statutory bodies, various Commissions of Enquiry, etc.²²³

²²² *Ibid.* pp. 45-48.
²²³ *Ibid.* p. 47.

Reflecting on its consultations, the Group's report noted, "[W]hile we have left the violence behind us, we have found new ways to continue the conflict."²²⁴ Although all sides agreed that victims and survivors should be central to the process of dealing with the past, victims' groups were highly divided on sectarian lines and increasingly politicized. Consultations, therefore, produced a heated debate on the "hierarchy" of victims and crimes and the dangers of "moral equivalence" when considering different victim's experiences.²²⁵ In recommending the establishment of a Commission for Victims and Survivors for Northern Ireland based on these consultations, the Group specifically sought to facilitate better interaction and cooperation between the various victim groups.²²⁶

Based on other international experiences, it is clear that early consultation, inclusive participation and transparency are crucial in creating legitimate and credible truth-seeking measures. It is insufficient to rely only on input from victims' groups; contributions from the full range of stakeholders will ensure that truth-seeking services the wider society. These groups, moreover, must be well informed if they are to participate optimally. Their participation therefore needs to be facilitated and supported with information and exposure to other experiences globally. Ultimately, all this is a strong basis for the recommendation that this very report, and the tentative proposals it generates, should stimulate better informed consultations, debate and dialogue with all important national and local groups (where this has not already happened). The proposed pilots must serve the objective of ensuring that truth-seeking has a consultation-based platform in BiH.

Beginning in January 2010 with the establishment by the Council of Ministers of the Expert Working Group, some important consultations on truth-seeking and truth-telling have been initiated in BiH as a key component of a government

-led initiative to develop a Transitional Justice Strategy.²²⁷ This process has been led by the BiH Ministry of Justice and the BiH Ministry for Human Rights and Refugees, and has involved representatives from various levels of government (state, entity, district, cantonal and municipal levels). It has also included a broad range of victim associations, CSOs and other stakeholders. UNDP BiH

²²⁴ *Ibid.* p. 66.

²²⁵ *Ibid.*

²²⁶ *Ibid.* pp. 89-90.

²²⁷ See *supra* note 14. A series of three consultation events (in 2009 in Fojnica, Mostar and Brcko) preceded this official launching of the process. For more information about the transitional justice strategy, see the UNDP/BiH website. For example, the strategy is discussed here: <http://www.undp.ba/index.aspx?PID=7&RID=583>, visited on December 20, 2010.

provides technical support to the process. Recognizing the importance of informed discussion and debate among stakeholders – as well as the need to involve numerous stakeholders throughout all stages of the process – this has already resulted in two consultative events focused on truth-seeking and other forms of dialogue. In particular, this process has engaged victims of all ethnic groups to develop strategic approaches that will address the current needs and problems encountered by these victims' groups. Members of the Expert Working Group have participated in these consultations, which also informed the work and proceedings of the Expert Working Group in their process of drafting of the BiH Transitional Justice Strategy.

This is an important start to an *informed* consultation process of truth-telling in BiH and has contributed to building mutual confidence and creating some space for dialogue on these essential issues. These initial processes will need to be expanded and developed, drawing a wider range of organizations and stakeholders into the process, as BiH moves towards defining its own truth-seeking strategies, and in anticipation of the presentation of a Draft BiH Transitional Justice Strategy in 2011. NEED UPDATE

Content and Thematic Issues: What?

The Relationship between Truth-Seeking and Trials

The relationship between courts and truth-telling institutions is often seen as complementary in transitional justice efforts.²²⁸ The argument for a multiple-track approach to dealing with the past is usually based on a simple assumption that the courts are limited to deciding individual guilt, while truth-telling bodies build upon the courts' work, offer the missing bigger picture of violent events and broader aspects of accountability, and provide contextual evidence and other relevant materials. Additionally, truth-telling bodies, it

is often emphasized, serve a separate function of filling the impunity gap by providing a form of accountability in situations of massive and systematic violations, where courts cannot possibly do justice in every case. At the same time, such bodies aim at reaching further into social structures and conditions to understand the systemic character of the crimes. And finally, truth-telling

²²⁸ See Chapter One, *supra*. This should also be seen within a broader context of a holistic approach to transitional justice in which not only trials and truth-seeking, but also reparation, institutional reform and memorialization (amongst others) are ideally viewed as complementing each other (and potentially being sequenced) as part of a more comprehensive approach to dealing with the past in societies emerging from a history of violence.

bodies are usually conceived of as being more victim-friendly, both in terms of compensating for the lack of victims' voices in trials and with regard to their overall goal of empowering the usually marginalized and often politically instrumentalized victims' community.²²⁹

This common picture of a natural division of labor is, however, somewhat more complex (and rich) in the context of the former Yugoslavia in general and in BiH in particular. For a start, the ICTY seems to have a more ambitious historical record than many other courts, and the Prosecutor's Office of BiH has been engaged in what essentially is a truth-seeking project, substantially separate from the main trajectory of its work.²³⁰

The mutually beneficial relationship of these two tracks of transitional justice is certainly an important goal of peace building efforts; however, it is not always easily achieved. For example, one of our interlocutors complained that his organization continues to submit documentation to the Prosecutor's Office of BiH in the hope of contributing to the prosecution of perpetrators who committed crimes against some of the organization's members. However, he noted that the Prosecutor's Office only admits documentation that is relevant for ongoing investigations or trials or that is otherwise in accordance with its standard of evidence. This example shows that courts are not comprehensive truth-telling institutions in their own right. Working alone, they cannot achieve the broader goals of dealing with the past in a post-conflict society, which requires extensive and systematic documentation, memory and honoring the victims, although their contribution to a wider truth-seeking endeavor is indispensable.

At times, there may be unanticipated overlap or even conflict between courts and truth-telling institutions. The simultaneous existence of both these tracks of transitional justice opens space for conflict and divergence. This conflict can be both substantive, in terms of the conflicting structure of "truth" or facts on the same events established by courts and truth-telling initiatives, and procedural, concerning the methods of collection and exchange of evidence in the separate procedures of the two institutions.

²²⁹ Cf. Hayner, *supra* note 11. See also L. Olson, 'Mechanisms Complementing Prosecution,' 84 *International Review of the Red Cross* (2002), pp. 173-189.

²³⁰ See Chapter Two, *supra*.

The ICTY's initial position on an official truth-telling institution in BiH was one of wariness, or even open opposition. At a 2001 conference in Sarajevo, Claude Jorda, then-president of the Court, expressed his "duty to ensure that this national [TRC] initiative not run counter to the mission of the Tribunal and that it be consonant with the powers conferred on the Tribunal by the Security Council."²³¹ Although he acknowledged the ICTY's limitations in terms of truth-telling, Jorda still suggested that the draft TRC law should provide for non-interference in the ICTY's work, close cooperation on evidence collection and exchange, and the right of an ICTY liaison officer to attend all the TRC's hearings.²³² Unsurprisingly, these recommendations ended up in the final version of the draft Law.²³³ Similarly, the second draft TRC Law insisted on the complementarity between the TRC's work and the mandates of the ICTY, the Court of BiH, and the district and cantonal courts. As a member of the working group on the draft TRC Law informed us, however, the single most divisive issue among the group was determining how exactly to achieve complementarity in practice.²³⁴ The draft Law thus proclaimed complementarity while elucidating an "alternative" provision, similar to the one in the previous draft law, whereby there is a presumption of the confidentiality of statements given to the TRC.²³⁵

There are different ways to avoid this problem. Some truth-telling institutions, for example, have worked closely with a court's prosecutor, or have generally had a strong prosecutorial inclination. For example, the TRC in Peru (2001-2003) established a "judicialisation unit" to prepare criminal cases and recommend them for prosecution.²³⁶ Similarly, in explaining its usefulness and potential in the regional context of the former Yugoslavia, the coalition for RECOM advocated that a regional TRC would also "help the war crimes prosecutors' offices, by collecting evidence, encouraging witnesses and victims to participate in war crimes trials, and organizing case files in certain instances."²³⁷ In some other cases, creative ways of minimizing or avoiding the divergence in addressing impunity were used. In Sierra Leone, for example,

in the absence of a formal arrangement between the Truth Commission and the Special Court of Sierra Leone on solving procedural conflicts, the Special Court's Prosecutor made a deliberate decision not to use the statements taken during the TRC's hearings.²³⁸ Simultaneously, the Special Court issued a decision allowing the defendants to appear before the Truth Commission, but without authorizing public hearings, thereby resolving the potential procedural conflict from the opposite direction.²³⁹

Perhaps the most prominent example of such synergetic work is the case of East Timor's Commission for Reception, Truth and Reconciliation (CAVR). The CAVR, in essence, became part of the overall criminal justice mechanism. It transferred cases involving more serious offences to the Office of the General Prosecutor. If the Prosecutor acted on the referral, the Commission immediately terminated its work on the case in question.²⁴⁰

Another concern expressed by the ICTY was that the historical narratives and stories revealed by the two transitional justice institutions might contradict each other.²⁴¹ Elisabeth Evenson frames this dilemma in the context of Sierra Leone: "[b]oth institutions operate to provide a measure of truth; if these truths conflict in the end, it is unclear what contribution either will have made to the process of transitional justice."²⁴²

In this context, it is important to remember that trials typically last for a rather limited period of time, therefore restricting the time in which to collect and analyze evidence. It is not impossible that broader truth-seeking approaches may produce broad-based evidence at a later point that may appear to contradict a court's findings, or which might suggest a different conclusion or at very least contextual framing. In such instances, the coherence resides in the cumulative or *holistic* truth produced rather than in the exact correlation between the findings of these two different truth-telling mechanisms, which

231 The speech of the ICTY President Claude Jorda, titled "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina," delivered in Sarajevo on May 12, 2001, <www.icty.org/sid/7985>, visited on 18 December 2010.

232 *Ibid.*

233 See *First Draft Law of the first TRC initiative* (UNDP archive), Arts. 5, 6, and 8.

234 Interview with a member of the second TRC initiative, November 2010.

235 See *second Draft Law on the TRC* (UNDP archive). Such an approach could increase the likelihood of collecting a certain number of statements from perpetrators, as was done in Sierra Leone. The Sierra Leonean TRC, for example, collected around 8,000 statements, out of which more than 13 percent were provided directly by perpetrators. See P. Hayner, 'The Sierra Leone Truth and Reconciliation Commission: *Reviewing the First Year*', *International Center for Transitional Justice* (2004), p. 4, <www.ictj.org/images/content/1/0/100.pdf>, visited on 18 December 2010. For more details on the TRC for Sierra Leone, see T. Kelsall, 'Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone', 27 *Human Rights Quarterly* (2005) pp. 361-391.

236 See e.g., E. Gonzalez Cueva, 'The Contribution of the Peruvian Truth and Reconciliation Commission to Prosecutions', in W. Schabas and S. Darcy (eds.), *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (Kluwer Academic Publishers, Dordrecht, 2004) pp. 55-66.

237 See The Coalition for RECOM, 'Why Recom' <http://www.korekom.org/public/fck_files/Why%20RECOM_bos_memo.pdf>, visited on 18 December 2010.

238 See generally E. Evenson, 'Truth and Justice in Sierra Leone: Coordination between Commission and Court', 104 *Columbia Law Review* (2004) pp. 730-767.

239 *Prosecutor v. Norman*, 29 October 2003, Special Court for Sierra Leone, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone, <www.sc-sl.org/CASES/ProsecutorsvFofanaandKondewaCDFCase/TrialChamberDecisions/tabid/153/Default.aspx>, visited on 18 December 2010.

240 The CAVR was also charged with holding Community Reconciliation Procedures to reintegrate people into their communities. If during the Community Reconciliation Procedures hearing, the CAVR were to receive credible information of a deponent's participation in a serious criminal offence, the hearing would be terminated and the matter referred to the Office of the General Prosecutor. See UN Transitional Administration in East Timor, *Regulation No. 2001/10 (On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor)*, Part 4, Section 27, <un.org/en/peacekeeping/missions/past/etimor/untaetr/Reg10e.pdf>, visited on 18 December 2010. For an elaborate analysis of this relationship see P. Burgess, 'Justice and Reconciliation in East Timor, The Relationship between the Commission for Reception, Truth and Reconciliation and the Courts', 15 *Criminal Law Forum* (2004) pp. 135-158. Also, see D. Babo-Soares, 'Nahe Biti: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor', 5:1 *The Asia Pacific Journal of Anthropology* (April 2004).

241 See Hayner, *supra* note 11, pp. 207-208.

242 See Evenson, *supra* note 238, at p. 759.

might also seek and rely on different kinds of evidence and testimony. Indeed, even courts produce potentially contradictory outcomes in different individual cases, and the ICTY itself has produced conflicting findings of fact in such instances.²⁴³

For example, the difference between ICTY and Izvor – an NGO from Prijedor – in their respective calculations of casualties in that municipality (whereby the number established by the latter is substantively higher),²⁴⁴ is an eloquent illustration of the distinction between the ambition and the respective contributions of truth-seeking within trials and ongoing truth-seeking initiatives. While the ICTY, in the *Stakić* case, was guided by the principle of efficiency and was focused on the illustrative incidents that could be ascribed to the accused, the continuous work of Izvor at establishing the exact number and identity of those murdered in Prijedor might have even brought into question the ICTY's statement that "the total number of victims [in Prijedor] can never be accurately calculated."²⁴⁵ The parallel work of the two organizations, therefore, did not result in conflicting truths, but in more complete ones.

Although the notion of complementarity between these mechanisms is both procedural and outcome-related, it does not necessarily require identical outcomes or mirror images of the truth. In this vein, it is important to properly understand, for example, the often expressed dissatisfaction with the Srebrenica Commission Report's failure to term the atrocities committed against Bosniaks in Srebrenica as genocide. What seems to be neglected is the fact that this is probably the only point of departure of the Commission's report from the corresponding ICTY decision in *Prosecutor v Krstić*.²⁴⁶ Moreover, even this divergence becomes less problematic when seen through comparative lenses: generally speaking, truth commissions or commissions of inquiry rarely make legal qualifications of events under their investigation.²⁴⁷ This is also consistent with the approach of the Srebrenica Commission and is made explicit in the report itself.²⁴⁸

243 For example, in *Prosecutor v. Kordić*, the ICTY Trial Chamber found that the shelling of Zenica (a city in central Bosnia) could not be attributed to HVO (Croat Defence Council). In a later judgment, in the case of *Prosecutor v. Kordić*, the Chamber found, based on new evidence, that such shelling did take place. See M. Prelec, *supra* note 97.

244 See *Prosecutor v Stakić*, in which the ICTY's Trial Chamber offered a "conservative estimate" of more than 1500 Bosniaks killed. The Association of Women "Izvor" from Prijedor, on the other hand, came up with the (most recent) list of 3227 names, which has been updated constantly in the three editions of the related publication.

245 *Ibid.* par. 654.

246 *Prosecutor v Krstić*, 19 April 2004, ICTY, IT-98-33-A, Judgment, <www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf>, visited on 18 December 2010; *Prosecutor v Krstić*, 2 August 2001, ICTY, IT-98-33-T, <www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>, visited on 18 December 2010.

247 The Guatemalan Commission for Historical Clarification found that the "agents of the state committed acts of genocide against the groups of Mayan population." Commission for Historical Clarification, *supra* note 206, para. 122. This is probably the most cited, if not the only, exception to this rule.

248 As the Report states, "The Commission is not a judicial body and has no mandate to consider legal issues, as that was the task and right of competent courts only."

Certainly, no transitional justice mechanism is perfect; each has its limitations. The immensity of the task of documenting and establishing a coherent account of grave violence and mass suffering cannot possibly be entirely captured by even the most perfect methodology. What is important is the critical engagement with previous and existing truth-telling projects. The notion of complementarity, for those contemplating a truth-seeking strategy going forward, implies taking into account the evidence that has already been produced, identifying any gaps and inconsistencies, and moving forward. This does not entail the denunciation of the work of predecessors, but rather the recognition and supplementation of their contributions. Truth-telling is thereby understood and implemented as an ongoing and cumulative activity that leads to a more complete and consolidated account of events – and one in which courts can accommodate and be enriched by the work of other truth-seeking exercises.

In situations where truth-seeking initiatives preceded the work of the criminal justice system, these initiatives often proved to be an invaluable source of contextual information or evidence for prosecutions. For example, the Argentinean truth commission (CONADEP) was established, in large part, as an institution that would provide the broader background to help support trials. It gave many materials to the judicial branch, thus contributing directly to trials that have been on-going since the 1980s. Likewise, the impressive work of the NGO called the "Documentation Center of Cambodia" in documenting crimes and atrocities of the Khmer Rouge regime,²⁴⁹ and the subsequent use of its archival materials by the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC)²⁵⁰ is one of the best example of the highly beneficial effect of independent truth-seeking efforts that can provide evidence leading to successful prosecutions.

Despite the significant efforts of NGOs in documenting crimes and casualties of the war,²⁵¹ in BiH the sequencing of overall truth-telling efforts is the reverse of the Cambodian case. Courts, particularly the ICTY, have spearheaded the truth-seeking front in the former Yugoslavia for almost 20 years. As a result, after almost two decades of a very active criminal justice paradigm in BiH, the potential for conflict between these two tracks of transitional justice is, in fact, considerably less likely. As many of our interlocutors confirmed, the criminal proceedings have contributed to a better overall environment for future truth-telling efforts and have produced a plethora of evidence.

249 See Documentation Center of Cambodia, Home Page, <www.dccam.org/>, visited on 18 December 2010.

250 See Extraordinary Chambers in the Courts of Cambodia, Home Page, <www.eccc.gov.kh/english/>, visited on 18 December 2010.

251 See Chapter 2, *supra*.

The fact that courts have gone *before* a coordinated truth-telling initiative in BiH is potentially a great advantage, not a disadvantage, to any future truth-telling endeavor. This is also demonstrated by the experience of the Srebrenica Commission, which, according to one of its commissioners, benefited greatly from being given access to the ICTY's electronic database. Simultaneously, the Prosecutors' Office of BiH, in their own words, also benefited from the Commission's work in more than one way.

As a coherent approach to truth-telling develops in BiH, trials will inevitably be a core component of this, although with certain clear limitations. For instance, trials produce vast amounts of testimonies, eyewitness accounts, depositions, legal filings, and other documents.²⁵² While much of this important evidence is likely to remain sealed because of legal restrictions and privacy concerns, some of it may be available for truth-telling processes over time. Inevitably, the materials in the ICTY's archive will influence any future truth-telling efforts in the medium and longer term.²⁵³

Through our interviews, the BiH War Crimes Chamber made clear to us that it cannot be directly and formally involved in a future truth-telling initiative, and must remain highly insulated from anything outside the operations of the court itself. However, many of the materials generated by both the BiH courts (The Court of BiH, in particular) and the ICTY are already part of the public record. Some of the cases have been reported and, with time, some of the court's materials have become available for broader use.

The BiH Prosecutor's Office, in our interview, openly supported a separate track of truth-telling, expressing the possibility of – and certainly the need for – close cooperation and sharing of resources and experiences. It would therefore be somewhat surprising if participants in the debates on the mandate and procedures of a potential truth commission, or a more expansive truth-seeking approach for BiH, continued to devote significant energy to resolving the assumed tension between these two tracks of transitional justice. The emphasis ought to be on how to ensure coordination and coherence between these hopefully complementary initiatives through an enduring, consolidated truth-seeking approach, like the one we propose in this report.²⁵⁴ As one of our interlocutors eloquently stated: "If we don't elicit the truth in a way that provides more detailed context to the work of the courts, as a society we will all remain prisoners of the cycles of violence. In this way, we are all victims."

²⁵² Some estimates, for example, indicate that the ICTY alone has taken around 100,000 statements so far.

²⁵³ For a discussion of the possible options for making public use of the ICTY's archive in the countries of the former Yugoslavia see e.g., *Feasibility study on the creation of information centres on the International Tribunal for the Former Yugoslavia in the Former Yugoslavia*, (UN Doc. S/2010/154), < www.securitycouncilreport.org/atf/cf/%2010%20154.pdf>, visited on 18 December 2010. Cf. T.H. Peterson, 'Temporary Courts, Permanent Records,' *USIP Special Report 170* (August 2006).

²⁵⁴ See Chapter Four, *infra*.

The Importance of Acknowledgement

The acknowledgement of victims is one of the core functions of truth-telling. In transitions from violent conflict, the experiences of victims are often at risk of being "swept under the carpet" in favor of securing pacts between competing political elites in an endeavor to build a new society. Even trials can add to the marginalization of victims as spectators in the legal processes and rituals, which can often be perpetrator-obsessed. The danger is that those who have been most brutalized by the violent conflict can quite easily become invisible and inaudible, compounding their past trauma through further experiences of exclusion. It is for this reason that the notion of truth-telling and truth-seeking is substantially about giving voice to victims – an opportunity to be acknowledged through speaking and by being heard. In lieu of a primary focus on politicians and perpetrators, truth-telling is a vital way of putting the needs and expectations of the victims of the conflict "front and center."

Truth-telling also offers the wider society an opportunity to hear, to recognize the suffering, and to come to terms with the loss that crosses ethnic and sectarian lines, without presuming any moral equivalence between the suffering or the responsibility of different stakeholders. Therefore, it is not necessary to create a "hierarchy of crimes", or to deem particular crimes to be more important or equally important compared with others, in order to facilitate a process which recognizes and acknowledges the suffering of victims on all sides of the conflict.

It is in listening and recognition that victims experience the acknowledgement that is a core function of truth-seeking and truth-telling. Representatives of victims' groups and individual victims across the board expressed this in BiH. For many, it was about the need to tell the stories that they believed were not being heard or understood. One victim explained, "The trauma of ordinary people is what we forget about. Those who have no compensation, who fled and walked 30 km through the forests, between minefields... and the soldiers who let us go, because they knew we were doing no harm." Another simply stated, "My father was a victim twice: once when he was killed and a second time when he was hidden."

In the range of conversations that the consultant team had with stakeholders across the country, the need for acknowledgement was one of the most prevalently expressed notions. It was appreciated both as a need to speak out and a need to be heard, as well as an opportunity for acknowledgement at the individual, community and societal levels (even possibly at the regional level). One of our interlocutors made this very clear: "I know what happened to me and to my family... but I want the world to know and I want to be acknowledged. History must be written through the lens of what happened to us."

But for different people the target audience varied. Although not mutually exclusive, for some the intention was to be heard and recognized in their own communities and within particular social sectors. Three different women with whom we spoke suggested that, for women, one of the most important processes would be to speak to and be heard by other women. One of them suggested the use of "victim circles," in which women could safely share their stories. For another, the point was to get women together across the ethnic groups and from different localities. A third argued that through national hearings and regional round tables, women could lead the processes of truth-telling. Several of those we interviewed emphasized the need for days of commemoration for the missing, while others wanted specific recognition of the experiences of those in prison camps or victims of torture.

Still others with whom we interacted emphasized the recognition that came with a dialogue across the political, ethnic and sectarian divides, whether at a national, community, or even a more individual level. One woman described this in the following way:

One man said this to me: 'that was the hill I was shooting from'. He told me as if I was his friend rather than the person he was shooting at. But I took this as a good sign – a sign that he can trust me, that he can talk to me... to us.

For some, the critical concern was a supportive and empathetic environment in which to speak. One trauma expert shared her views on the particularly delicate issue of how women might deal with and be acknowledged as victims or survivors of sexual violence: "Even a rape survivor will speak readily if there is someone to listen empathetically. She will tell her story like it happened yesterday... like a fruit that explodes."

Some of those with whom we spoke believed that the international community was a target audience. In some quarters, the international community was viewed as partly complicit in the violations. Others thought internationals were unaware of the reality of what transpired in BiH. There was also a strong sentiment that it was crucial to be heard by those who wield power inside BiH. Despite the skepticism expressed about government and politicians, there were some for whom acknowledgement primarily revolved around the official recognition of the government of the day. One of our interlocutors put it thus:

We need truth told by many different parties and from different sources, but at some point this does need to be taken on by the government or some official body... Partly because the state must give answers and must provide reparations. There must be something at state level to add weight, but also for remedies and responses.

Others remained cautious about the politicization of the process and expressed concern that political manipulation might impede the exercise of acknowledgement:

It is more politically important to find a mass grave and solve that. So, the politics get in the way. So, a soldier's story might get lost in the politics of which crimes were most serious or grave. The legal and the political defeat the personal and the human.

Although it is not appropriate to transpose what is required from one society to another, there are nonetheless clear indications that some of the methods used elsewhere may resonate with this rich set of ideas and expression of needs. For example, many truth commissions, such as those in Chile, Peru, and South Africa, and several unofficial documentation and truth-seeking projects, like the Ardoyne project in Northern Ireland, compiled registries of victims' names as a form of recognition.²⁵⁵ In some of these cases, details up to a page or two long were provided on each victim. Furthermore, in several instances, such as in El Salvador, memorials have been constructed to give profile and recognition to those names. For many official truth commissions, including

²⁵⁵ See note 45, *supra*.

East Timor, Sierra Leone, South Africa, Peru and Morocco, amongst others, the precise objective of the commission was to present the government of the day with a report and a set of recommendations to gain formal acknowledgement, even if on behalf of a predecessor regime.

One less frequent but nonetheless highly symbolic act of acknowledgement that has received considerable attention is the provision of public apologies – both official and unofficial.²⁵⁶ For example, although the conservative Australian government was unwilling to make an apology for the decades of abuse of indigenous Australian children who were forcibly removed from their families and brought up in church run schools, the Australian public annually acknowledges the violations that took place on a specific day which became known as “Sorry Day.”²⁵⁷ Finally, when a new government took power under the leadership of then-Prime Minister Rudd, he opened the Australian parliament with an elaborate and formal apology on behalf of the government. Not all apologies are treated as genuine; in most instances, it is necessary for government apologies to be accompanied by fair provision of reparation and institutional reforms, if these gestures are not to be treated as purely symbolic.²⁵⁸

Various other practices have developed through the evolution of truth commissions that have been significant in how they have facilitated the sort of acknowledgement envisaged by many of the victims groups in BiH. In particular, in the wake of the South African TRC, the power and impact of public hearings, which were televised into homes around the world, saw most subsequent truth commissions emulate this practice. Examples include East Timor, Liberia and Peru. The power of such public processes is unquestionable in generating a public dialogue, in creating recognition of the experiences of victims and in preventing subsequent denial – all critical aspects of acknowledgement. But it is neither possible nor always desirable for victim testimony to be public. For example, some truth commissions have specifically found it inappropriate to subject either children or women who were victims of sexual violence, to the bright lights of public scrutiny. Another key truth-telling methodology that has broadened the base of participation in truth commissions, whilst simultaneously providing a more private form of acknowledgement, has been the evolution of broad-based statement-taking from victims and witnesses. For example, in the South African case almost

22,000 victims gave statements. In Liberia, this even involved statement-taking programs within the Liberian diaspora in the United States. Further innovative forms of acknowledgement that have emerged alongside formal truth-seeking endeavors have been the establishment of memorials, days of commemoration, museums and sites of conscience dedicated to the victims. Other critical aspects to acknowledgement that have been connected to truth-seeking and truth-telling processes include reparations, institutional reform and trials.

The range of avenues for translating truth-telling into effective acknowledgement of victims' experiences is almost unlimited if the processes are creative and sensitive. Examples include the local processes of reintegrating former combatants into communities in Uganda and Mozambique, community reconciliation practices in East Timor and Canada, and high profile national apologies and days of remembrance in Australia and Northern Ireland. These processes may be driven “from below” or may have full governmental involvement and commitment. It should be remembered that whilst governmental acknowledgement may be important, it is possible also to distinguish between governmental *ownership* of these processes, and governmental *acknowledgement* itself.

Bringing in the “Regional”

Conflicts frequently do not respect the boundaries of nation states. In many regions of the world, terrible conflicts have raged that can be best understood as regional conflicts, even if the bulk of the fighting or injury took place in a single country or sub-national area. In contexts as varied as Lebanon and the Democratic Republic of Congo, for example, understanding the regional dimension of conflict is vital to fully grasping and telling the story of the conflict as a whole. East Timor is another case where the regional or cross-national dimension played an important part in both the conflict—which involved Indonesia as the occupying power—and the various truth-telling efforts that sought to deal with it, in particular the bi-national Indonesia/Timor-Leste “Truth and Friendship” Commission. Although this effort has been criticized in many ways,²⁵⁹ it was one of the first efforts to develop a truth-seeking effort that engaged more than one country.

²⁵⁶ On apologies, see M. Gibney, R. E. Howard-Hassmann, J. Coicaud and N. Steiner (eds.), *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, October 2008) p. 344. See also E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Johns Hopkins University Press, Baltimore, 2001); R. Brooks (ed.), *When Sorry Isn't Enough* (New York University Press, New York, 1999).

²⁵⁷ Hayner, *supra* note 11, p. 22. The current Canadian Truth Commission and reparations program is looking into similar abuses of indigenous children for almost a century in Canada, through the residential schools program in that country.

²⁵⁸ See P. De Greiff, ‘The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted,’ in M. Gibney, R. E. Howard-Hassmann, J. Coicaud and N. Steiner (eds.), *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, October 2008)

²⁵⁹ Some of the criticisms include insufficient consultation processes in the set-up of the commission; a weak temporal mandate (the Commission did not look at some of the time periods when the worst abuse took place); and flawed terms of reference (e.g., the Commission “focused on settling outstanding demands for justice by removing the threat to perpetrators rather than requiring them to account for their actions”). See M. Hirst, *supra* note 202.

In BiH, this regional aspect, especially as it involves the states that made up the former Yugoslavia, will inevitably be a component of any broad truth-telling initiative. Like temporal mandate and other questions addressed in this section, however, determining the boundaries of geography—not to mention the role of external or international actors and forces—requires robust discussion in a neutral forum. The question in this section, therefore, is how should the regional aspect be integrated into truth-telling? There are at least three modes of doing so. First, truth-telling initiatives could seek to develop separate areas of their work that locate the BiH conflict in a broader historical and geographical context. Second, the truth-telling initiatives within BiH could establish working partnerships of reciprocal exchange with similar efforts in the other countries, perhaps most obviously Serbia and Croatia. A third possibility is to contribute to the development of an explicitly regional truth-telling initiative. Each of these is examined below, but decisions about this important question must be made through dialogue and discussion in a neutral forum concerning what is the best answer for BiH.

The first model can be seen, for example, in the unofficial truth-telling project *Uruguay Nunca Mas* (Never Again Uruguay) which was an initiative that took place without state support in Uruguay. A key component of their analysis of the Uruguay case is the broader international context: the Cold War in particular, and the ways that rightwing regimes were supported in Latin America.²⁶⁰ This model also resembles choices made by the South African Truth Commission. Because the truth commission in South Africa was charged with examining human rights abuse committed “within or outside” South Africa in the period 1960–1994, some of its work examined “evidence of violations committed by South African security forces or their agents and/or surrogates in nine regional states – Botswana, Lesotho, Swaziland, Angola, Mozambique, Zimbabwe, Zambia, Tanzania, and the Seychelles.” The primary focus of these investigations was on “killings and attempted killings (including targeted assassinations, cross-border raids and large-scale massacres, as well as abductions and infrastructural sabotage).”²⁶¹

A second approach to the challenge of regionalism would be to establish working relationships across national boundaries, with reciprocal relationships among NGOs, perhaps convened into a network. Indeed, this has already happened in BiH and neighboring states, and will no doubt continue to happen.

²⁶⁰ Servicio Paz y Justicia Uruguay (translated by E. Hampsten), *Uruguay Nunca Más* (Temple University Press, Philadelphia, 1989)

²⁶¹ See Truth and Reconciliation Commission of South Africa Report, *supra* note 25, Volume 2, p. 45

We were aware of one set of relationships—between RDC from BiH, HLC from Serbia, and Documenta from Croatia—that pursued this approach, working towards compatible methodologies for NGO-based truth-seeking.

The third option is an official regional truth-seeking initiative. This has never been done before and would be a bold and innovative way to deal with the challenges of a regional conflict. After all, when war transcends national boundaries and involves multiple national actors, the goals and mode of truth-telling may be different than in a purely national setting. Because of the regional aspect of the 1992–1995 conflict, another possible goal of a BiH truth-telling process would be to engage in a reciprocal relationship with other initiatives that seek to arrive at a fuller truth about what happened during the conflict.

Such an initiative is currently underway in BiH, implemented under the auspices of the Coalition for RECOM (Regional Commission Tasked with Establishing the Facts about All Victims of War Crimes and Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia in the period from 1991–2001). The goal of this initiative is to establish a regional commission, which would be mandated with determining what happened in the (entire) former Yugoslavia during the 1990s. A draft statute for this regional truth-seeking project has been drawn up and discussed, including in BiH, and the effort seems to have attracted the attention of many in both the region and the international community. Indeed, although the initiative seems to have mixed support in different parts of BiH, RECOM is most likely to flourish with BiH participation, since a large percentage of victims of the conflicts in the 1990s were from BiH.²⁶²

The precise manner in which to best deal with the regional dimensions of the 1992–1995 conflict remains open for debate and discussion.

²⁶² See Chapter Two, Regional and International Initiatives, *supra*.

Connecting the Local to the Global

Considerable attention has been given to the difference between official (state/authorities-based) and unofficial (civil society-based) truth-telling, but there is a further distinction that needs detailed consideration: the extent to which these approaches engage at the local as opposed to state-wide levels or, put another way, how they relate local experiences of conflict to the more “global” narratives about the past.²⁶³ This is not just a question of geography, but has implications for truth-seeking in relation to particular institutions, aimed at specific social sectors (children, youth, women, etc), or at the community or municipal/cantonal level, etc. This is important because it might impact the extent to which truth-seeking processes enable the wider community to find a “voice” and the opportunities to tell their stories about the particular ways in which violence and conflict affected them. This is distinct from the broad political interpretations of the past and is important in forging compatible narratives that have meaning and resonance at the local level. In BiH, as in many other war-torn societies, much of the past conflict played itself out in very intimate localized patterns of violence, beneath the umbrella of broader political, sectarian, ethnic and military conflict. Equally important, the fault-lines or risks of renewed conflict must be dealt with at the wider political level but might also often be triggered by local dynamics in conflict-affected societies.

By their very nature, state-based and state-wide truth-seeking initiatives tend to focus on the “meta-narrative” or the “big picture” story of the conflict. By contrast, unofficial truth-seeking often focuses on the local level. This is also often characterized as being based on different truth-seeking methodologies: *top-down* or *bottom-up* approaches. There is, of course, a symbiotic relationship between these experiences. It is thus unsurprising that to varying degrees, both official and unofficial truth-seeking initiatives often endeavor to span this divide and “connect the local to the global” as part of the construction of compatible narratives. This is of particular importance in a society such as BiH, which is so politically and ethnically fragmented, and it presents hurdles and dangers for truth-telling strategies that must be carefully navigated. Based on our consultations and the analysis of previous truth-seeking experiments in BiH, these factors helped to shape the particular strategies that we have proposed.

²⁶³ This issue of how the local relates to the global has received considerable attention in the transitional justice field more generally, not only in relation to truth-seeking, but also in respect of international, state-based, local and even “traditional” or community-based criminal justice systems. Similar concerns have shaped debates on reconciliation, institutional reform and reparations. See ‘Special Issue: Whose Justice? Global and Local Approaches to Transitional Justice,’ *International Journal of Transitional Justice* Vol 3:3 (2009).

Elsewhere in the world, official truth-seeking mechanisms often attempted to bridge this potential gap by engaging more at the local level and by trying to make truth commissions more accessible to local communities. In many cases, this was primarily attempted through decentralized truth-seeking structures and operations. For example, in Sri Lanka, the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons (1994–1997) consisted of three geographically distinct commissions to investigate disappearances over the previous seven years. The commissions were created on the same dates and given identical mandates, but each worked independently in its assigned third of the country and each implemented its mandate somewhat differently.²⁶⁴ The commission in East Timor had 30 regional commissioners chosen through a public nomination process in each district. In addition, regional representation was one of the key criteria in the selection of national commissioners. The Guatemalan Commission for Historical Clarification (1997–1999) had 14 field offices, but for security reasons, none of the field office directors were nationals. These field offices were open for four to five months to receive testimony.²⁶⁵

Similarly, the South African TRC established regional structures and held hearings in different parts of the country. It also divided its work into three separate committees: the Human Rights Violations Committee, the highly problematic and controversial Amnesty Committee and the Reparations and Rehabilitation Committee. Some of the TRC’s hearings, moreover, focused on the dynamics of conflict in particular localities. In addition, the TRC held special hearings on certain sectors or key institutions of society, like the religious community, the judiciary, the business community, the health sector, the media, prisons, and the security sector. Other special hearings looked at specific social sectors, such as youth and women. In this way, like the Guatemalan commission before it and the Peruvian commission after it, the South African TRC attempted to cultivate a more “inclusive” truth-seeking approach.²⁶⁶

The Peruvian TRC invested major resources in obtaining testimony from rural areas, where much of the atrocities took place. It established regional offices with fixed and mobile teams to collect testimonies, fill out records, make reports, investigate cases, and promote dissemination and education initiatives. The regional offices, in turn, managed zonal offices, which were decentralized

²⁶⁴ Hayner, *supra* note 11, p.77.

²⁶⁵ Hayner reports that because many villages were isolated and remote, commission staff sometimes had to walk for six to eight hours through the mountains to reach villages to invite testimony. *Ibid.* p. 33.

²⁶⁶ For a discussion of such an attempt to create more “inclusive” truth-seeking in the context of gender, see the critical approach taken in the context of women’s involvement in the Peruvian TRC by K. Theidon, ‘Gender in Transition: Common Sense, Women, and War,’ 6 *Journal of Human Rights* (2007) pp. 453–478.

offices directed by a zone coordinator. These zonal offices also had fixed teams and mobile teams that traveled to remote communities with no regional or zonal offices. In addition, to ensure cultural and ethnic sensitivity, the Peruvian Commission reported that it employed professional staff from areas that tended to be the target of cultural and ethnic discrimination and made sure that the regional offices had employees who could speak the local languages and were knowledgeable about the cultural practices in each region.²⁶⁷

Some truth commissions also facilitated local or community level reconciliation processes. Perhaps the most renowned was the Nate Biti Bot process in East Timor, which focused on the reintegration of offenders (for lesser crimes) into their communities.²⁶⁸ In Canada, local reconciliation processes have been developed in indigenous communities as a bi-product of the Canadian Truth Commission's examination of the forced removal of indigenous children from their families and placement in residential schools over the past century. The Recovery of Historical Memory Project (REHMI) warrants particular mention because it was a typically an *unofficial* truth-seeking initiative that attempted to build an extensive decentralized, state-wide profile and presence. REHMI was an unofficial truth-seeking project of the Human Rights Office of the Archbishop of Guatemala. It included 800 interviewers who collected 6,500 testimonies and documented more than 55,000 human rights violations across Guatemala. Of its 600 interviewers, 500 were indigenous. REHMI conducted interviews in 18 languages and was thus able to reach the most remote rural areas, linguistically, geographically and culturally – arguably outstripping the official Guatemalan Commission for Historical Clarification.²⁶⁹

However, despite these creative and important approaches, official truth commissions are often criticized for failing to penetrate and adequately integrate the more local experience.²⁷⁰ This is perhaps an inevitable consequence of the construction of a meta-narrative generated by state-wide processes or official commissions, which arguably frequently fail to resonate sufficiently with the intimate character of the violent conflict and its legacies at the local level. Indeed, this cannot merely be remedied by the structural and operational decentralization of official truth-seeking – as important as that might be.

267 Peruvian Truth and Reconciliation Commission, 'Final Report' (2003) pp. 40–42, <www.cverdad.org.pe/ingles/ifinal/index.php>, visited on 18 December 2010. This was not without its problems and the Commission in fact navigated a sometimes awkward relationship with local indigenous communities in Peru.

268 See Chapter Three, The Relationship Between Truth-Seeking and Trials, *supra*. See also note 240 *supra*.

269 McConnachie, *supra* note 28, p.30.

270 Not to mention the fact that decentralization itself can present its own problems. For instance, examples like the Sri Lankan decentralized truth-seeking process are often criticized as unsuccessful because of the lack of coordination and coherence in the operations of the various regional offices that are often arguably too autonomous. This should be stressed as a significant factor in "decentralized" truth-telling processes. It remains critical that coordination, integration and coherence are designed into the processes and structures, rather than presuming this will be an automatic cumulative effect.

Truth-seeking processes need, to some extent, to be driven and owned at the local level – from the bottom-up – in a manner that is more responsive to the community-level experiences of violence and conflict, more in keeping with the generation of a dialogue and compatible narratives about the past, and less shaped by the exigencies of crafting a meta-narrative of history.

Unofficial or "bottom-up" truth-seeking often resonates more effectively with local communities, is frequently more responsive to the particular local experience of violence and is generally driven by CSOs that are embedded in the affected communities. Such bottom-up truth-seeking can also be resistant to centralized manipulation of the truth-seeking process – or the crafting of a new historical orthodoxy for sectarian, political and ideological reasons. But there are also dangers in romanticizing bottom-up truth-telling processes. Local-level truth-telling may well risk being esoteric (or worse) if it remains isolated, localized and disconnected from a society-wide history of past conflicts. Local-level truth-seeking might therefore suffer from the opposite effect to that which afflicts official truth-seeking-processes: even a broad range of local-level, unofficial truth-telling initiatives – if not coordinated, integrated and connected – may provide a discordant version of the past that contributes little to a broader process of dialogue or compatible narratives.

In this regard, Werbner points out that sometimes the local understanding of conflict can be very self-referential and can itself become insulated from the national or global context, while at other times it becomes suffused by the these broader contexts.²⁷¹ This presents particular challenges in BiH, in which the consequences of both violent conflict and the post-violence political processes have produced a highly segregated and ethnically divided society where "the local" is more often than not synonymous with mono-ethnic communities and experiences. One of our interlocutors, who was involved in the Bijeljina Commission, made exactly this point, saying that the Commission failed because it was too exclusively local and "mono-ethnic" in its orientation. Similar criticisms have been raised in some quarters about the Srebrenica Commission on the basis that this singular focus in some ways distracted from the wider range of experiences. Whether one agrees with this or not,

271 R. Werbner, 'Human Rights and Moral Knowledge: Arguments of Accountability in Zimbabwe', in M. Strathern (ed.) *Shifting Contexts* (Routledge, London, 1995) p. 112.

there is clearly a danger that local level truth-seeking that is not integrated, coordinated and debated may produce versions of the past that are insulated from each other and further entrench ethnically exclusive versions of the past, rather than prompting a dialogue about this.

It is evident that there are assets and liabilities to both official and unofficial truth-seeking when viewed through the prism of the relationship of local to global truth-seeking processes. But there is also an important symbiotic relationship between the two. This can best be achieved through a combination of “top-down” and “bottom-up” truth-seeking, or a creative blend of official and unofficial truth-seeking. At the very least, localized truth-seeking that takes place in diverse sectors, communities and institutions must be connected and integrated. Any truth-seeking initiative in BiH will need to focus on achieving this if it is to benefit the wider society, rather than reinforcing separate narratives of largely mono-ethnic and divided victim communities. This makes the ability to create platforms and audibility for local processes all the more important. Public hearings at the local level may powerfully transmit to other communities a better understanding of each other if they are part of a coordinated and cohesive initiative. The recent innovation of the Liberian Truth Commission in taking statements amongst the Liberian diaspora in the USA, is an illustration of how this might have impact even across the Atlantic.²⁷²

For some commentators, this symbiotic relationship is symbolized by the prospects for societal-level “healing”:

[Y]ou need to heal the socio-political context for the full healing of the individuals and their families, as you need to heal the individuals to heal the sociopolitical context. This is a mutually reinforcing context of shared mourning, shared memory, a sense that the memory is preserved... The survivors are not lonely in their pain.²⁷³

²⁷² Indeed, our discussions in BiH indicated that this question of accessing and refugees from the BiH conflict – scattered far and wide, from Scandinavia to Australia – and including them in the truth-seeking process, is viewed as an important consideration in the design of any truth-telling strategy.

²⁷³ Y. Danieli, ‘Preliminary Reflections from a Psychological Perspective,’ in T. van Boven (ed.) *Seminar on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (Netherlands Institute of Human Rights, Maastricht, 1992) p. 575

Victims of war, however, also become symbols of the struggle waged by the respective sides. Their experiences of victimhood are understandably taken up as belonging to a wider society.²⁷⁴ This relationship between the individual and broader society also operates in reverse: individuals sometimes want their grievances to be recognized as politically significant. The individual has, in other words, constructed the meaning of its victimization within the national political discourse and will only accept interventions that deal with it on this basis. Individual human rights abuse is thus a process that must combine the private and the public in a manner that is sensitive to individual suffering and individual needs, while also taking into account its contextualization in the public political realm and the impact that it may have on this realm. The same is more generally true of the relationship between the local and the global.

The conclusion is that there is a crucial need for a state-wide dialogue, both within and across communities. Coordination and integration is not only important from a logistical perspective, but is essential to the public's engagement in dialogue and the creation of a wider audience. Ultimately, this approach does not rely on romanticized notions of bottom up truth-telling, but recognizes the importance of crafting a state-wide dialogue and building a cumulative narrative about the past that is inclusive and that opens up the conversation. These perspectives inform the proposed approach to a mixture of official and unofficial as well as bottom-up and top-down methods of truth-seeking that is articulated in the recommendations of this report.

Social Constituency Issues: Who?

Truth-telling: Victim-Centered Approach

There is a common assumption that truth-seeking and truth-telling are ultimately victim-centered approaches to dealing with past violent conflict because – amongst other things – they give voice and visibility to victims and survivors, including a chance to recount their stories. In this regard, truth-seeking draws both on trials as one source of truth, but also complements the criminal justice system's limitations in providing full justice for all victims or a comprehensive understanding of massive and systematic violations.²⁷⁵

²⁷⁴ E. Jelin, 1994. ‘The Politics of Memory: The Human Rights Movement and Construction of Democracy in Argentina,’ *Latin American Perspectives*, Issue 81, Vol. 21, No.2 (1994) pp. 38-58

²⁷⁵ This has been outlined in the opening section of this report and it is not intended to reproduce that general analysis here.

Acknowledgement and the recognition of victims' and survivors' experiences ought to be at the heart of the truth-seeking endeavor and are some of the primary concerns of those who spoke to us and the victims groups around BiH.²⁷⁶

The emerging global norm on the "Right to Truth" explicitly articulates this as a *right of victims*.²⁷⁷ This was true from its earliest articulation in the Geneva Conventions in which the right of families to know the fate of their relatives who disappeared in wars and armed conflicts was established.²⁷⁸ More recently this was embedded in The International Convention for the Protection of All Person from Enforced Disappearances, which states:

Each *victim* has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.²⁷⁹

This has particular relevance for the issue of disappearances in BiH that was articulated as a dominant concern during our conversations in the country. But it is important to repeat in this context that this emerging norm has also clearly been articulated as both an *individual entitlement* of victims, and as a *collective entitlement* of communities and the society at large. As Diane Orentlicher states, "[V]ictims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate."²⁸⁰ Principle 2 on the "Inalienable Right to the Truth," however, articulates this as a collective entitlement: "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes."²⁸¹

Despite frustrations expressed by various victim groups and representatives in the arena of disappearances and missing people, there is some extraordinary work being done in BiH – with a view to both addressing the individual claims of victims, survivors and their families, as well as attempting to craft a

community-level and collective pictures. This work is also instructive because it is simultaneously taking place within state institutions (MPI in particular), through the support and interventions of international organizations (ICMP), and in a range of local and community-level initiatives.²⁸² Nevertheless, serious gaps and deficiencies remain, and the lack of coordination and integrated coherence of the various initiatives must still be addressed. This was evident in the residual pain of many – on all sides of the conflict – who spoke to us about the unresolved trauma of still searching for information about what happened to their loved ones. But the creative work that is being done in this arena is illustrative of the victim-oriented approach and potential that is essential to the core of any truth-seeking strategy for BiH.

However, it is also very clear from our mission and our interactions with victim's groups across the country that we cannot afford to be naïve about the role and divisions within the victims' movements in BiH. Although there is a common understanding of the rights and needs of victims in relation to truth-seeking and truth-telling, victims groups are divided along sectarian, ethnic and political lines and these divisions tend to trump the common experiences that they might have as victims of the conflict.

International experience of both official and unofficial truth-seeking shows that as important as it is to place the needs of victims and survivors at the heart of any truth-seeking and truth-telling processes, it is also critical not to oversimplify the needs and expectations of victims, or to "romanticize" the unity, homogeneity and common interests of victim communities and organizations. It is also important to distinguish between victimized communities and individual victims, between victim organizations and the wider community of victims and survivors who might not be part of these groups, and between different groups of victims with specific needs and expectations, such as women, the disabled, or children.

In addition, it is important to recognize that victim's needs and wants may change over time:

²⁷⁶ See Chapter Three, The Importance of Acknowledgment, *supra*.

²⁷⁷ Orentlicher, *supra* note 71, p. 7; see also Chapter One, The "Right to Truth," *supra*.

²⁷⁸ Additional Protocol 1 to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) Article 32, <www.icrc.org/ihl.nsf/FULL/470?OpenDocument>, visited on 18 December 2010.

²⁷⁹ International Convention for the Protection of All Persons from Enforced Disappearance (2006) (authors' emphasis), Article 24, <www2.ohchr.org/english/law/disappearance-convention.htm>, visited on 18 December 2010.

²⁸⁰ Orentlicher, *supra* note 71, p. 7.

²⁸¹ *Ibid.*

²⁸² See Chapter Two, *supra*.

[A]ggregated and static identities representative of... an archetypal victim, on whose behalf numerous actors claim to speak [over-simplifies the needs of all victims]. In this context, it should be underlined that victim communities do not articulate such homogenous views and are themselves fractured and fragmented, along with the societies from which they come. . . Evidence from the field shows that the aspirations and needs of victim communities most affected by the conflict are subtle, fluid and frequently reflect a complex integration and sequencing of changing needs and expectations.²⁸³

No general presumptions can be claimed about how all victims will “heal” or whether reconciliation is possible at all for many of them. There are few useful rules about how different people handle their historical trauma and – ultimately – although truth-telling may benefit the wider society, even that might in some instances provoke more pain than it resolves for individual victims.²⁸⁴ Finally, it is also important to recognize that, in many societies, victim associations become easily drawn into sectarian politics. This politicization, combined with manipulation, can often serve to mask the common experiences and needs that victims in fact share across the political, ethnic and sectarian divides.

Observers of the BiH situation have recognized this problem. As one of them told us, “We cannot be too naïve: victims’ stories can be another way of ‘fighting the war’... It can be organized revisionism by other means.”

One factor that appears to have played a key role in dividing victims and survivor communities is – ironically – the issue of reparations. This is partly because of the particular design of the compensation approaches adopted in BiH.²⁸⁵ It is also a product of a series of compensation strategies that predated an organized approach to truth-seeking, perhaps with the exception of the necessarily limited contribution to truth that is provided by the criminal courts. In some senses, the grave risks of reparations that are dissociated from truth-seeking and truth-telling processes is precisely that this tends to

foster division, manipulation of the system and a sense of mistrust and even betrayal by victims. Some victims may feel their suffering is not valued as much as the suffering of others or that they are being asked to “sell the souls” of their lost relatives in exchange for compensation, without actually knowing what happened to them. Various people with whom we met commented on this experience. As one victim pointed out, “The problem in BiH is that we have reparations without truth. As a result, ten years ago it was easier for prison camp survivors to share their experiences. But we are divided now by material things – reparations.”

The issue of access to compensation was but one factor that entrenched divisions and fractured common interests within the broader victim community in BiH. This also overlapped with wider questions of differentiation and recognition that became highly politicized in the differences between civilians and soldiers who lost their lives, the different degrees of recognition and protection afforded to prison camp survivors and victims of torture, as opposed to those who were disabled or missing, as well as the competing claims for attention of traumatized veterans and those who had suffered terrible loss at their hands. Some members of victim associations referred to differences between “majority and minority victims.” Another interlocutor noted that it was not even possible to share a day on which to commemorate all the victims. The complexity of these competing claims and divisions was summed up by one woman who told us, “When the war started, I had relatives in three armies.”

The fact that different compensatory amounts could be claimed depending on which “category” victims fell under merely “added insult to injury” for some, while for others it was a real pressure to classify their loss in a way that fit best with the classifications of the compensation process.²⁸⁶ The real risk, however, is that rather than providing the recognition and acknowledgement for victims that is intended by reparations, this became a source of resentment and division. As one victim expressing some frustration and bitterness said, “Many people got rich on the bones of the missing.”

At the same time, even amongst those who were most devastatingly impacted by the violence, there was often an extraordinary recognition of the dangers of excessive political manipulation of victims groups. One victim association representative commented:

283 G. Simpson, ‘One Amongst Many: The ICC as a Tool of Justice During Transition,’ in N. Waddell and P. Clark (eds.), *Courting Conflict: Justice, Peace and the ICC in Africa* (Royal African Society, London 2008) p. 76.

284 See B. Hamber, D. Nageng and G. O’Malley, ‘Telling It Like It Is...: Understanding The Truth And Reconciliation Commission from the Perspective of Survivors,’ 26 *Psychology in Society* (2000) pp.18-42; B. Hamber, ‘The Burdens of Truth: An Evaluation of the Psychological Support Services and Initiatives undertaken by the South African Truth and Reconciliation Commission,’ 55:1 *American Imago* (1998) pp. 9-28.

285 Popovic, *supra* note 108, pp. 51-80, 132-141.

286 See *ibid*, pp. 51-80,

We have all lost everything... in a way... But collective guilt is insanity – there must be facts and individual accountability. We must accept what happened in Srebrenica and in Mostar. We must let the 'normal people' speak, not just the politicians.

Even more remarkable is the profound understanding that victims and survivors sometimes have more in common than the politics, ethnicity, gender and sectarianism that divides them. This was powerfully articulated by one mother of a disappeared soldier:

Even though I understand that no-one will be tried for killing a soldier – as a mother – I still want to bury my son... He was my son and I was his mother. Like any other mother, I want to find my son and hear the truth about how he died. We have that in common. And the man who was buried alone was also always someone's father or someone's son.

Although there is not a lot of comparative work that has been done internationally on victim organizations, these issues, tensions and experiences of victims' movements are also not unique to BiH. The divisive impact of reparations is a common theme, so too the issues of political division and sectarianism within and between victim organizations.²⁸⁷ For instance, similar experiences and dynamics have played themselves out within the Khulumani Survivors Support Group in South Africa²⁸⁸ as well as among the Mothers of the Plaza de Mayo in Argentina.²⁸⁹

These are some of the essential challenges that will be confronted by any truth-seeking program in BiH. On the one hand, victims must be the focus of the process, whilst ensuring that the needs of the wider society to deal with the past are also addressed. On the other hand, there will be an essential challenge in building trust both within a very divided and fractured victim community, and between victims' associations and an even more sectarian and divided political class and state. There is some comfort in the fact that similar dynamics have

characterized victims' movements in other international contexts. Yet they are not matched by quite the same degree of sectarian and political manipulation that characterizes a BiH state produced by a fairly unique conflict and political settlement.

Gender in Truth-Seeking: Primary Concern

Violence is gendered. That is, men and women tend to experience violence in different ways. On the one hand, this is obvious: the majority of active combatants in conflicts are usually men, for example, and this has implications. Most prisoners of war are men; most victims who fall in a battlefield and are buried in mass graves are men. At the same time, women are more likely than men to experience the devastation of war on the home front, to have their homes invaded, to suffer from displacement, or to lose a husband or son (and perhaps a breadwinner) to war. The World Bank explains it this way:

Conflicts, civil wars, and crises affect men and women differently. Women focus on survival, searching for and providing food and shelter for children, the sick, and the elderly. They also are vulnerable to physical assault and displacement. Men are recruited for fighting and are thus separated from their communities. When male combatants are killed, women are left to shoulder the full burden of providing for children and extended families. Like other crises, violent conflict overturns many social norms and structures.²⁹⁰

The gendered nature of violence has been painfully clear in BiH, perhaps most visibly and egregiously through questions of sexual violence. As in many other contexts, the prevalence of sexual violence during armed conflict has left a particular legacy in BiH with reports of tens of thousands of women and girls having been raped or sexually assaulted during the 1992–1995 period.²⁹¹ Moreover, women's experiences during conflict extend beyond sexual violence. As the Geneva Center for the Democratic Control of Armed Forces put it:

287 See Chapter Three, *Informed Consultation Indispensable to Credible Truth-Seeking*, supra (discussing the example of Northern Ireland); Consultative Group on the Past, supra note 9, p. 66.

288 See generally T. Madlingozi, 'On Transitional Justice Entrepreneurs and the Production of Victims', *Journal of Human Rights Practice*, Advance Access (2010).

289 See A. Brysk, *The Politics of Human Rights in Argentina: Protest, Change, and Democratization* (Stanford University Press, Stanford, 1994).

290 See World Bank, *Gender, Justice, and Truth Commissions* (2006), <siteresources.worldbank.org/.../Resources/GJTClayoutrevised.pdf>, visited on 18 December 2010.

291 A film has captured the suffering and resilience of rape victims in BiH: 'Calling the Ghosts A Story about Rape, War and Women.' It was produced by Julia Ormond and directed by Mandy Jacobson and Karmen Jelencic. Also see J. Ward and M. Marsh, *Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources*, A Briefing Paper Prepared for Symposium on Sexual Violence in Conflict and Beyond, 21–23 June 2006 (United Nations Population Fund, Belgium, 2006).

During armed conflicts, women are susceptible to marginalization, poverty and suffering, with existing inequalities and patterns of discrimination tending to be exacerbated. Whilst the impact of armed conflict on women differs considerably between contexts and between individual women, it is possible to identify common characteristics: widespread sexual violence, the extreme burden which war places on women to ensure their own survival and the care of children and the elderly, and the challenges that war brings to women who decide to take up arms.²⁹²

In numerous contexts around the world, efforts to deal with the past have sought to emphasize gender as key component of post-conflict reconstruction and it is clear to us from our discussions that many women in BiH want to be heard. In fact, truth-telling, as it has been defined in this report, includes the idea of “voice.” Allowing women to control the narrative and tell their stories in their own way are potential ways to allow for a gender perspective to emerge. The reverse is also true. As one of the people we interviewed put it, “women begin to ask the question ‘what is the point, why should I testify? Why should I tell my story if no one is listening?’” She went on to say that women who are victims “want to speak out but also want to be listened to ... Often they want non-material benefits; they want their suffering to be recorded somewhere, to mean something for future generations.”

This needs to be done *well*, with great attention paid to psycho-social aspects and the creation of forums that encourage *voice*. Unofficial truth-seeking processes—especially oral history projects—often take this idea as the basis for empowerment of interviewees, many of whom have been all too often in positions of powerlessness. Creating a neutral and receptive forum for women to be heard is, therefore, at the heart of truth-telling.²⁹³

²⁹² V. Nesiah, *supra* note 215, p. 9.

²⁹³ It is argued by some that a “gendered perspective” on truth-telling offers the space for women to overcome some of the traditional divisions in society (ethnic, religious, etc.) through finding common cause in their shared experiences as women, and that this offers a unique space for the generation of ‘compatible narratives’. On the other hand, there are also commentators who suggest that the prevalence of ethnic identity and ethnic-based organizing serves as an effective obstacle to meaningful networking and cooperation between women, and that this imposes severe limitations on the potential for women to lead in public engagements or in various forms of truth-telling. That this is contested terrain is not disputed, but the importance of optimizing the opportunities for women in truth-seeking and peace-building, across the divides in BiH, is nonetheless critical.

There are other reasons to consider gender as a key component of truth-telling. The relevant international legal norms are increasingly focusing on questions of gender.²⁹⁴ For example, Security Council Resolution 1325 (2000) calls on:

[A]ll actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, *inter alia*: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls...²⁹⁵

How, then, can a truth-telling effort—or series of truth-telling initiatives—in BiH grapple with complex questions of gender? This is an essential criterion for moving forward in the realm of truth-seeking, and it needs to be discussed in BiH in conversation with numerous actors and stakeholders, including women's organizations, psycho-social trauma institutions, victims association, and others.

Indeed, the idea that violence is gendered has profound implications for truth-telling. It suggests that any truth-telling initiative must be sensitive to gender as it develops strategies for fact-finding, voice, and compatible narratives. This can take place at a few different levels, including

- definition of crimes/experiences to be examined
- integration in the truth-telling initiative of broader societal context
- the design of truth-telling initiatives

²⁹⁴ See Avon Global Center for Women and Justice, *Analysis of International Jurisprudence Involving Sexual and Other Gender-Based Violence during Conflict* (Cornell Law School International Human Rights Clinic, Ithaca, 2010).

²⁹⁵ See Security Council Resolution 1325 (2000), article 8, <www.un.org/events/res_1325e.pdf>, visited on 18 December 2010.

To deal with the first of these, truth-telling initiatives must determine which crime(s) or experience(s) they will focus on. This is a selective process that contains inevitable bias, and will distort the fuller experience of both men and women, since it would be operationally difficult to include the entire universe of experience. For example, if a truth-telling exercise focuses on prisoners in prison camps, the truth that is told is more likely to be the experiences of men, in many contexts. If the focus of the truth-telling exercise is to look at internal displacement, the result will be to look more closely at the experiences of families and women.

Many truth-telling exercises, both official and unofficial, have tended to focus on violations of human rights as defined by international law. These tend to include crimes against humanity such as disappearance, extrajudicial execution, torture, and other violations or harm committed by the state or non-state actors on the individual. For example, the Paraguayan truth commission largely focused on (1) arbitrary detentions, (2) cases of torture, (3) victims of summary executions, and (4) forced disappearances.

Sexual violence is often included in the crimes examined, especially rape as a crime against humanity and war crime, at least since the International Criminal Tribunal for Rwanda in the case of *Prosecutor v. Jean-Paul Akayesu*²⁹⁶ and the ICTY case of *Prosecutor v. Anto Furundzija*, defined this clearly.²⁹⁷ Indeed, women are often victims of sexual violence and, as Kelli Askin puts it, “despite its insidious prevalence during armed conflict, even the most notorious or egregious cases of sexual violence are typically committed with absolute impunity.”²⁹⁸ Given the importance of sexual violence in the BiH context, this is likely to be a key element of truth-seeking, although provisions will need to be made in the design (see below) of truth-telling initiatives to allow for privacy, confidentiality, and for sensitive topics to be discussed in respectful ways.

In addition to sexual violence, there are numerous additional harms experienced by women in war, some of which do not “count” as serious crimes according to purely legal definitions. In this way, truth-telling initiatives may “fail to look into the economic impact, the effect on families torn apart, or the deep damage to the psyche and trauma of a population as a result of widespread rape.”²⁹⁹

Because crimes can be defined too narrowly according to strict legal definitions of war crimes, for example, there is a possibility that many of the experiences of women will be left out. In a critical examination of the South African TRC, Beth Goldblatt and Sheila Meintjies explain:

[T]he TRC's narrow interpretation of 'severe ill-treatment' means that women who bore the brunt of oppression through forced removals, pass arrests and other acts of systemic apartheid violence have not been identified as victims of gross human rights violations. We have also argued that women's evidence as wives and mothers of victims has often cast them as secondary victims rather than as primary agents in a struggle against injustice. A third dimension of a gender analysis ... is the lack of testimony to the TRC from women victims of sexual violence to the TRC.³⁰⁰

Beyond the definition of crimes, a second set of questions revolves around the broader context of gender roles in society, culture, and the on-going nature of *ordinary* violence and discrimination against women, and to what degree these questions get addressed by truth-telling initiatives. Additionally, this set of questions involves gender roles in society and how these get defined over time. Examining gender roles, in turn, does not only imply looking at women, but rather equally at “masculinities” or the ways in which masculine identities are constructed and maintained.³⁰¹

A core question in this regard is what is often referred to as a distinction between public and private spheres, although this distinction is far from a simple dichotomy.³⁰² Still, as Fionnuala Ní Aoláin and Catherine Turner put it, “what generally *matters* is what occurred in and on the streets, public spaces, and formal institutional settings. Violations within the home or close to private intimate spaces that women themselves describe as central to their experiences of vulnerability, lack of security, and violation are deemed to fall

296 See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 37 I.L.M. 1399 (Sept. 2, 1998).

297 See *Prosecutor v. Anto Furundzija*, IT-95-17/1-A, Judgment, 21 July 2000, <www.icty.org/case/furundzija/4>, visited on 27 December 2010. Also, see D. Scheffer, ‘Rape as a War Crime’, Fordham University New York, October 29, 1999, <www.converge.org.nz/pma/arape.htm>, visited on 18 December 2010.

298 K. Askin, ‘The Quest for Post-Conflict Gender Justice’, 41:3 *Columbia Journal of Transnational Law* (2010).

299 Hayner, *supra* note 11, p. 86.

300 B. Goldblatt and S. Meintjies, ‘Dealing with the Aftermath: Sexual Violence and the Truth and Reconciliation Commission’ *Agenda No. 36, No to Violence* (1997) pp. 7–18.

301 See e.g., J. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (Cambridge University Press, Cambridge, 2001).

302 These are complex issues. For example, when considering the gendered nature of violence, most generally think of women as victims. But it is important to remember that “women are increasingly recognized as actors, enablers, and even perpetrators, instead of simply as victims, of wartime violence. As more women participate as combatants and government officials, women are being accused of responsibility for war crimes, crimes against humanity, and genocide, including crimes involving sexual violence.” K. Askin, *supra* note 298, p. 15.

within the 'private' domain in most legal and social systems, and frequently outside the circle of notice and accountability."³⁰³ Because of this, "violations within people's homes are of substantially less importance, and often entirely invisible, to truth telling. This insight is important in identifying the chasm of differences that may exist between a male version of what constitutes meaningful accountability and a woman's perception of the same process."³⁰⁴ So, for example, domestic violence might surge because of increased conflict, discrimination against women might remain equally bad or worse during the war, and women might become marginalized as a result of displacement or social stigmas associated with rape. If these issues occur, it is possible, even likely, that they will not get factored into a truth-telling process – or at least not with the same rigor as, for example, the classic violations of human rights, such as murder, arbitrary detention or cruel and inhuman treatment.

Kimberly Theidon develops these ideas when she examines the TRC in Peru:

When women talk about the suffering of family members and of their communities; when they recall the long daily walks to the river for water and the hours spent scrounging for bits of kindling; when they tearfully recall their children's gnawing hunger that they tried to calm with water and salt; when they remember with outrage how they were subjected to ethnic insults in the streets of the very cities in which they sought refuge—they are talking about themselves and the gendered dimensions of war. And, beyond the list of dangers that engulfed them, they have much to say about the actions they took in the face of those challenges. They also give us much to consider regarding common-sense notions of a gendered perspective on war.³⁰⁵

A third major consideration for truth-seeking initiatives involves inclusion of women in the structure, composition, staff, and activities of such initiatives. In the realm of formal truth commissions, for example, the International Center for Transitional Justice (ICTJ) explains that "among other advantages, having more women on staff may make a commission less alienating for female victims.

³⁰³ F. N. Aoláin and C. Turner, 'Gender, Truth, and Transition,' 16 *UCLA Women's Law Journal* (2007) pp. 229-79.

³⁰⁴ *Ibid.*

³⁰⁵ See Theidon, *supra* note 40.

This starts with statement takers, who are often the first point of contact. Gender may be equally relevant for other staff positions, including those who have responsibilities for community liaisons, investigations, legal and psychosocial support, and, perhaps most important, the commissioners themselves. While there have been no systematic studies, in a range of commissions, female commissioners have taken the lead in offering a supportive and affirming environment for female victims.³⁰⁶

Related to this concern is the idea of training on gender awareness, so that all staff can be sensitized to the ways in truth-telling must integrate a gender analysis. In this regard, some truth commissions—such as the Peruvian commission—took a two pronged approach to factoring a gender approach into the work of the commission. The commission included a Gender Unit, charged with thinking through issues related to gender, raising difficult questions within the commission, and doing projects, research, and activities that would focus specifically on women and gender roles. The Commission also made an institution-wide commitment to gender mainstreaming, demanding that all members of the commission integrate a gender analysis into their work.

There are additional ways to bring gender-sensitive approaches into truth-telling initiatives. For example, some truth commissions have sought to create environments that are welcoming to all victims who come forward, regardless of background, gender, race, etc. This requires some consideration of how truth-telling is set up and arranged. Some truth commissions (such as the National Reconciliation Commission, NRC, in Ghana) have set up public hearings to resemble public courtrooms. Witnesses are interrogated by commissioners resembling judges. But other commissions, like the Liberian one, have raised questions about whether this atmosphere is most conducive to making people feel comfortable tell their stories. One project brought together women in 'dialogue circles' in their communities to discuss the conflict in a more hospitable environment than, for example, in a hearing room, court, or formal setting. The information gathered was then fed into the truth commission.³⁰⁷

Incorporating gender into truth-telling, whether official or unofficial, is a vital way to enhance all three aspects of truth-telling discussed here: *fact-finding* (because more facts will emerge and be taken into account if a gender analysis is used to frame discussions around what happened and which kinds of experiences to examine); *voice* (because by giving people, whether women or men, the ability to control the story and tell it in their own words, a truth-telling

³⁰⁶ Nesiah, *supra* note 215, p. 10.

³⁰⁷ A. Pillay and L. Goodfriend, 'Evaluation Women's Participation in Transitional Justice and Governance: A Community Dialogue Process in Liberia,' *Accord, Conflict Trends*, Vol.2 (2009).

initiative can allow for a potentially empowering experience), and, potentially, *compatible narratives* (because, often, the narratives of victims can be heard in ways that cross ethnic and other divides and speak to more basic shared identities).

The Importance of Addressing Youth and Children

For many of those that we interacted with in BiH, a primary audience and target constituency of truth-seeking is the “next generation.”³⁰⁸ Many of the people with whom we met expressed a concern that current and future young people in BiH be able to engage with the history of conflict without being “owned” by it. As one interviewee stated, “Young people want to talk about the future, not the past. But they reflect what they learn from their parents or their ethnically segregated communities.” Another put it this way: “Our job is not to tell our stories to change each other, but to understand each other. Then we will tell our children a different tale.”

There was a strong sense that there are competing claims on the identity of young people in BiH. Some people told us that the youth just want to get on with their “normal lives.” Others indicated that they are trapped by the version of the past handed down to them by their parents in an increasingly sectarian and ethnically divided society. Although these seem to be competing views, one parent, who is a member of a victims’ association, claimed, “Our children are even more divided than us.”

What is clear is that the next generation can either reproduce the divisions of the past, or can actively engage with it as part of a historical dialogue that produces an integrated identity, in which “the other” in BiH society is humanized rather than demonized. The lack of contact between young people across the ethnic and sectarian divides, as well as the role of a divided education system, all indicate that it is in fact critical that truth-seeking prioritizes the engagement with young people and focuses on this new generation.

³⁰⁸ This was also the conclusion of the consultations process at Fojnica, see Chapter One, Goals of Truth-Telling in Bosnia and Herzegovina, *supra*: and note 58, *supra*.

This has been an explicit objective of many truth-seeking initiatives in other parts of the world. Some focused more narrowly on the impact of conflict on youth and children – not an unimportant aspect of the conflicts in BiH during the 1990s. Nonetheless, the goal of youth and child-focused truth-seeking activities is also to make the voices of one generation of young people audible to the next generation, rather than exclusively focusing on the role of youth and children in the truth-seeking process itself. This is as much a focus on how young people of *today* experience the conflicts of the past, as it is a focus on how the violence and conflicts impacted youth *at the time of the conflict*.

However, truth commissions have generally proven more effective at including young people in the process, than at translating this into strategies for engaging future generations of youth. For example, Peru’s truth commission created a youth organization to participate in the commission, composed of 1,400 volunteers aged 18 to 25, who were children during the conflict. This organization helped collect evidence and disseminate information through cultural, educational and communication activities, with significant assistance from universities. The South African TRC convened special public hearings to examine the specific experience of children and young people under Apartheid, but took a policy decision not to take the actual testimony of children under 18 years of age. The Commission’s final report included a chapter on the special children’s hearings, and the Commission developed some recommendations specific to children and their needs.

To date, Sierra Leone’s TRC represents the most comprehensive recognition of children and youth, as victims of violence during the conflict, as participants in the truth commission process itself, and as a future generation that needed to be a target audience for the Truth Commissions findings. More than 300 children voluntarily gave statements in private and confidential hearings, accompanied by a social worker on request. The Commission paid special attention to the rights and protection of children, particularly girls. It designated an entire section of its report to address the effects of war on children, acknowledging the crimes committed against them, and re-affirming the need to enforce international and national laws regulating children’s rights. Sierra Leone also took the unique initiative of producing a “child-friendly” version of its TRC report.³⁰⁹

³⁰⁹ A. Smith, ‘Children, Education and Reconciliation,’ *Innocenti Working Paper* (June 2010).

For many with whom we spoke in BiH, the objective was not just to hear the experiences of children and understand the impact of violent conflicts on them,, but also to translate the lessons learned from the past into education and engagement for the current generation. As one of our interlocutors stated, "The product of any truth commission or truth-seeking – including the verdicts of the courts – should go into the schools and into the text books... so the next generation is not trapped in this debate and contest, or misled by the denial."

Truth-seeking endeavors in other parts of the world have aspired to do this, although with varying degrees of success.³¹⁰ In Sierra Leone and Peru, truth commissions produced materials for classroom use, including guidelines for teachers. The materials, however, have not been made an official part of the school program in either country. In Peru, this was despite the fact that a teacher's manual enthusiastically stated that:

The final report of the [commission] is a fundamental tool that must be taken advantage of...through the elaboration of educational materials... schools can stimulate students – the children and adolescents of our country – to approach the violent past as part of their personal and social history. We hope that this material will contribute to strengthening a sense of collective identity and a culture of peace.

However, members of the Peruvian Congress denounced the Recordándonos school workbooks and the initiative was taken off the Ministry of Education's agenda.³¹¹

South Africa's 1998 TRC Report recommended including its findings in the country's new history curriculum, and there have been considerable commitments made to teaching about the past conflicts in education policy and curricula. However, the TRC and the challenges of facing the past and how it relates to the nation's future is a theme only briefly addressed in the national school's curriculum.³¹² In Guatemala, NGOs developed teaching resources

based on the country's truth commission report, whose recommendation stated that the history of the conflict, including its causes, impact and the peace agreements, should be included in primary, secondary and tertiary educational curricula. However, these materials have not yet been formally incorporated into the national curriculum. In Germany, teaching materials that condemn German actions during the Second World War "have frequently been cited as one of the central proponents of a reconciliatory stance towards wronged populations." The development of a curriculum based on the findings of a TRC may similarly demonstrate a reconciliatory position by the State and may contribute symbolically to closing a period of violence or repression.³¹³

Many of those we spoke to across BiH showed an acute awareness of how new generations learned from segregated curricula in segregated schools. A number of pained references were made to the notion of "two schools under one roof."³¹⁴ Several of those we spoke to pointed to the fact that because of effective ethnic segregation, many young people in BiH today do not have the same reference points as their parents, who at least had the experience of living in integrated communities. For BiH, if future generations are not to re-perpetuate the myths about "the other", but instead are able to respect the dignity of all victims of the conflict, then truth-seeking must actively engage youth. They must serve both as participants and as audiences of the process, particularly, but not exclusively, through formal and informal educational activities, as well as through cultural and social sharing across the boundaries of ethnicity and locality.

Truth-Seeking at the Institutional Level

Many of the people with whom we met during our mission in BiH expressed a significant concern that those who were responsible or otherwise involved in the 1992-1995 atrocities still occupy positions of power in the Entity and State governments. Although some suggested that this was slowly changing, we were left with a prevailing sense that this lack of confidence still has significant traction within public opinion. This presents some very serious challenges for the implementation of truth-seeking initiatives through State institutions and at the State level.

³¹⁰ In general, see UNICEF Innocenti Research Centre and The International Center for Transitional Justice, 'Children and Truth Commissions,' *supra*, note 215.

³¹¹ J. Paulson, 'Truth commissions and national curriculum: The case of the Recordándonos resource in Peru,' in S. Parmar, M. J. Roseman, S. Siegrist and T. Sowa, (eds.), *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, Human Rights Program at Harvard Law School (March 2010).

³¹² *Ibid.*; E. Cole and K. Murphy, 'History Education Reform, Transitional Justice and the Transformation of Identities,' *International Center for Transitional Justice Research Brief* (October 2009).

³¹³ Paulson, *supra* note 311.

³¹⁴ Alić, *supra* note 55.

This, however, is not a challenge unique to BiH. Institutional reform, both inside and outside the State, is a critical component of the transitional justice toolbox. It is also a controversial and sometimes paradoxical dimension of dealing with the past. Although official truth-seeking is often important in determining the (political and moral) *institutional responsibility* for past violations (beyond just the responsibility of individuals), it often relies on the support of those very institutional actors to enable truth-seeking, to conduct investigations into the past wrongdoings, as well as to implement the subsequent recommendations of a truth-seeking body. In this way, truth-telling often treats various institutions as both the object and the subject of this exercise. In other words, many of the institutions involved – both inside and outside the state, such as police, the media, the security forces, political parties, etc. – were responsible for creating the environment and conditions that allowed human rights violations to take place. Yet at the same time, they are the very institutions that are responsible for preventing such violations and are expected to operate as the guardians of vulnerable populations in a new rights-based society.

Although not the focus of this report, institutional reform (as well as reparations and prosecutions), is clearly also relevant to the truth-seeking agenda and a critical dimension of a holistic approach to dealing with the past. However, UNDP and the Government of BiH will deal with the challenges of institutional reform in a separate segment of the BiH Transitional Justice Strategy³¹⁵ and we will only briefly address some important and general implications for the contribution truth-seeking can make to this programmatic issue.³¹⁶

So far, efforts at reforming institutions in BiH, undertaken with the significant role of the international community, have mostly been focused on two critical sectors: the judiciary and the police. These efforts also focused particularly on the reform of the institutions' personnel.³¹⁷ This was understandable as an "institution acts through its employees and is represented by them. Personnel reform is, therefore, a critical component of any effective and sustainable institutional reform process."³¹⁸ Moreover, in general, one of the important

results of an institutionalized truth-seeking process may be "removing or disqualifying human rights offenders from public office."³¹⁹

The previous attempts at establishing a truth-seeking body for BiH recognized this important aspect of dealing with the past in a post-conflict society. The two draft laws on the BiH TRC discussed the mandate of a future TRC, including, inter alia, the examination of "the role of media, political parties, religious communities, international non-governmental actors and other relevant sectors as determined by the TRC."³²⁰

Although removing offenders from their ranks is a crucial aspect of institutional reform, the more complex understanding and exposure of the role of institutions in facilitating, encouraging, permitting or justifying atrocities, is equally if not more important to preventing the repetition of such violations. This is particularly valuable because it provides the institutions in question with platforms against which to measure their past conduct and to benefit from meaningful steps towards structural and legislative reform, as well as the transformation of entrenched institutional cultures. Therefore, a broader approach to institutional transformation is necessary, involving a variety of measures.

In particular, institutional reform should be oriented around the promotion of accountability and the independence of institutions and their practices, rather than just the accountability of the individuals within them. Such an approach to institutional reform might also contribute to ensuring that institutions become more representative and inclusive of the society they serve, as well as more responsive to it. It might also promote the adoption of a range of symbolic measures signaling the changed role and identity of institutions that were formerly abusive, but which are now supposed to uphold democratic values and embrace human rights.³²¹ It is perhaps in the scrutiny and reflection on these broader institutional roles that truth-seeking processes have great promise at the institutional level.

315 The various dimensions of institutional reform and the particular institutions affected in BiH, is dealt with in some detail in Popovic, *supra* note 108, pp.90-115.

316 We therefore did not elaborate this dimension of future truth-telling efforts, nor did we seek to elucidate in any detail, the relationship between truth-seeking and institutional reform in Bosnia and Herzegovina.

317 The vetting procedures differed significantly in respect of the police as opposed to the judiciary. The former, conducted from 1999 to 2002, was a general and comprehensive vetting process focused on establishing police officers' eligibility to hold this public post, based on their war-time conduct. This was administered through the establishment of a special commission. The procedure related to the judiciary (2002-2004) on the other hand, was more dependent on incumbents and applicants having to demonstrate their suitability for appointment or reappointment to these positions. For more details, see A. Mayer-Rieckh, 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina,' in A. Mayer-Rieckh and P. de Greiff (eds.), *supra*, note 30.

318 Office of the UN High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States. Vetting: An Operational Framework* (HR/PUB/06/5) (2006), p. 4.

319 See McConnachie, *supra* note 28, p. 36.

320 (Draft) Law on the Truth and Reconciliation Commission, *supra* note 101, Art. 6; Second Draft Law on the Truth and Reconciliation Commission, *supra* note 109, Art. 1(iii). The Srebrenica Commission also gave some attention to analyzing the role of the police and the army of Republika Srpska in the Srebrenica genocide of July 1995.

321 See A. Mayer-Rieckh, 'On Preventing Abuse: Vetting and Other Transitional Reforms,' in Mayer-Rieckh and de Greiff, *supra* note 30.

To this end, some truth-telling bodies have engaged in specific sectoral and institutional investigations to elucidate the role of institutions in past wrongdoings. Most famously, the South African TRC held public institutional hearings specifically related to various sectors in which the horrific consequences of the Apartheid regime were most evident. This particular strand of the South African TRC's work included the health sector, the media, and the business community, in addition to consideration of the role of the legal profession and the judiciary, the police and other State bodies.³²² Several subsequent truth commissions have followed this example as well.

It is our view that the widely perceived inefficiency of the piecemeal approach to vetting in BiH³²³ calls for the establishment of a more organic link between truth-seeking and a broader engagement with institutional reform in future transitional justice efforts. Furthermore, while specific information on individual conduct is clearly important, broader, contextual information is crucial as it provides a framework for interpreting *specific* findings.³²⁴ A well-crafted truth-seeking process can therefore go beyond vetting procedures to help provide the necessary *contextual* information and can make a potentially invaluable contribution by focusing attention on a range of institutions in BiH society.

One of the results of a concerted truth-seeking effort can certainly be, as it has often been in many transitional contexts, the establishment of institutional responsibility and the implementation of specific recommendations aimed at institutional reform in a wide range of state and non-state institutions. Included here, for example, might be the particular role of the media, or the role of educational institutions, etc.³²⁵ Such (non-binding) recommendations were envisaged in the two previous draft laws on the TRC for BiH.³²⁶ Similar recommendations, including explicit calls for institutional reform, for example, were issued by the Salvadoran³²⁷ and Liberian³²⁸ truth commissions.

It is the strong sentiment of our team that a customized truth-telling strategy in BiH has a great deal to offer in the realm of institutional reform – particularly through an approach which goes beyond just individual or institutional vetting. However, as institutional reforms were not the specific focus of this research, we did not have the range of meetings with diverse institutional stakeholders that might lend more detail, nuance and institutionally diverse content to our analysis. If nothing else, this is an agenda item for ongoing discussions on the specific role, ambit and priorities of truth-seeking in BiH.

322 There is some debate on the effectiveness of some of these institutional hearings and recommendations made by the South African TRC. For example see J. Rauch, 'Police Transformation and the South African TRC', *Centre for the Study of Violence and Reconciliation* (2004), <www.csvr.org.za/docs/policing/policetransformationandTRC.pdf>, visited on 3 January 2011; and D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Orders* (Hart Publishing, Oxford, 2003).

323 See e.g. Popovic, *supra* note 108, p. 111-112.

324 Cf. S. Rumin, 'Gathering and Managing Information in Vetting Processes', in Mayer-Rieckh and de Greiff, *supra* note 30, pp. 428-429.

325 See E. A. Cole, 'Transitional Justice and the Reform of History Education', *International Journal of Transitional Justice*, Vol. 1 (2007); or M. Šajkaš, 'Transitional Justice and the Role of the Media in the Balkans', *International Center for Transitional Justice* (2007) <www.ictj.org/images/content/8/3/833.pdf>, visited on 4 January 2011.

326 (Draft) Law on the Truth and Reconciliation Commission, *supra* note 101, Art. 2; Second Draft Law on the Truth and Reconciliation Commission, *supra* note 109, Art. 10.

327 The Commission on the Truth for El Salvador issued mandatory recommendations. See Commission on the Truth for El Salvador, *From Madness to Hope: The 12-Year War in El Salvador* (USIP, Washington, 1993) ch. 5, <www.usip.org/files/file/ElSalvador-Report.pdf>, visited on 4 January 2011.

328 The Truth and Reconciliation Commission of Liberia's report included non-binding recommendations. See Truth and Reconciliation Commission of Liberia, *Final Report*, (Liberia 2009), <www.trcofliberia.org/>, visited on 4 January 2011.

CONCLUSIONS AND RECOMMENDATIONS

"Truth-telling is about humanizing 'the other'...recognizing the suffering of others alongside ourselves. And not just alongside... perhaps this can help reconnect us?"³²⁹

BiH is at a precarious moment in its post-war history. The ravages of the 1992–1995 violence continue to play themselves out, and the past remains an integral and arguably dominant feature of the present. For some, this is truer today than any time over the last decade and a half. Whilst the formal political settlement at Dayton put a stop to the war, it clearly did not put an end to tension and distrust. In some ways, it consolidated in a constitutional arrangement the sectarian and ethnic divisions that still shape the system of governance. Along with this, the legacies of past trauma and violent conflict continue to dominate the shape of social relations in both state and society in the present. As the UNDP's National Human Development Report (2009) points out in great detail, the level of social trust in BiH is perilously low, as is trust in the state and high-level political actors, especially across different communities.³³⁰

Less than two weeks before the drafting of this report, Valentin Inzko, the High Representative for BiH, reported that there is still "insufficient" dialogue in BiH, and that "national agendas inside the country have continued to prevail over cooperation and compromise."³³¹ He went on to assert that "while there was substantial progress in the first 11 years after the war, in the last four years, there has been stagnation... political obstruction and bickering."³³² This resonates with some of the frustrations and concerns expressed by many of those with whom we spoke during our mission. There was a strong sense that the potential for dialogue-based "compatible narratives" would probably have been much better a decade ago than it is now (but there were diverse views on this, and some did articulate a more optimistic perspective). There also appeared to be an increasing loss of confidence in a fractured and ethnically divided government to provide good faith political leadership and direction on

³²⁹ Interview, Bosnia and Herzegovina, September 2010.

³³⁰ UNDP, *National Human Development Report*, *supra* note 33.

³³¹ United Nations News Service, 'Bosnia and Herzegovina Cannot Afford Continued Stalemate, Security Council Told', UN Daily News, 11 November 2010.

³³² *Ibid.*

these matters. Those with whom we spoke conveyed strong reservations about both the *political will* and the *capacity* of the BiH Government to implement the measures necessary for comprehensive truth-seeking in the country.

Despite this skepticism about the particular role of government and politicians, our research, interviews and mission to BiH revealed an enthusiasm for some form of ongoing truth-seeking and fact-finding, and in some instances, a sense of urgency about the importance and timing of this. We also encountered a range of innovative projects in this area, which did not always self-identify as truth-seeking projects. On the other hand, we also experienced a high level of ignorance about the range of activities that truth-seeking might entail, a veritable battleground over “the facts” and whose truth prevailed, and some clear gaps with regards to what still needs to be done. In addition, there was a real lack of coordination and integration of various initiatives at community, local, state-wide and even regional levels. It is for these reasons that we have described this as a “cacophony” of initiatives: innovative, noisy and outspoken, but often discordant and uncoordinated. Despite debates over whether the time for truth-seeking is optimal in BiH at present, there was a clear organic drive for various truth-telling activities and an understanding that there was a lot still to be done. These perspectives resonate very strongly with the core objectives of truth-telling as set out in Chapter One of this report: the need for *fact-finding*, the quest to *speak and be heard*, and a need to create the space for a national dialogue about the past which might eventually allow the emergence of *compatible narratives* embedded in complex truths about the past.

What is also clear from our consultations, as articulated in this report, is that there are certain critical factors that any truth-seeking initiative in BiH will have to address:

- The first is the importance of a transparent, inclusive participation in a broad-based consultation process on the very form, nature and content of truth-seeking itself. This is necessary not only to avoid repeating the sorts of mistakes made in some of the early initiatives to establish a truth commission in BiH, but also to address the relative paucity of information available and the lack of public knowledge about the various options for truth-seeking. Despite the widespread need expressed for truth-seeking, we have observed that there are

still substantial gaps in the knowledge and information available on different practices, options and approaches. Therefore, consultations on this must not just be *inclusive*, but they must also be *informed*. Broad-based and participatory consultations, with an emphasis on civil society engagement, are critical to local ownership of the truth-seeking agenda. With UNDP support, the Expert Working Group made an important start in the past year, but it still needs to be expanded and made even more participatory. UNDP's support to ensure that this process is well informed is also an important part of the drafting of the BiH Transitional Justice Strategy in the coming months.³³³ NEED UPDATE? Consultations of this sort represent the important beginning of state-wide dialogue processes and debate about the past – a key objective of truth-seeking in divided societies, vitally needed in BiH.

- The second broad imperative is that any truth-telling strategy will need to draw on, coordinate and connect the range of existing initiatives in BiH, inside and outside of government, at local levels, in various institutions and in various diverse social sectors. At the same time, it is imperative to initiate and facilitate fact-finding and truth-seeking more generally, to supplement current activities, to fill in knowledge gaps, and to address sectarian claims through scientific methods, whilst also cultivating safe spaces for testimony and reflection. The truth-seeking agenda, therefore, will optimally embrace a diverse range of activities that may reach well beyond the functional boundaries of a traditional, official truth commission. It may demand a balance between truth-seeking “from below” and more top-down state-wide processes, as well as building “public-private partnerships” into an innovative truth-seeking approach that is unique to BiH.
- The third key factor is that effective truth-seeking mechanisms in BiH will demand leadership that is able to traverse the ethnic and sectarian divisions within the society and the state. In this regard, we have referred to the importance of “consensus figures” as being indispensable to the credibility of truth-seeking mechanisms, the trust in fact-finding and the safety necessary for truth-telling. It is doubtful that this can be achieved by those affiliated to any of the political parties or responsible in any way for the past violent conflict. Furthermore, the clear and unambiguous independence from other government bodies of any orchestrated truth-seeking initiative is

³³³ See Chapter Three, Informed Consultation Indispensable to Credible Truth Seeking, *supra*.

critical to its integrity and credibility, at least in the medium term, considering the extent of factionalism and sectarian competition within and between entity and state structures. The open and participatory selection of impartial and trusted people who are independently to lead such a process represents another opportunity to contribute to building a culture of transparent governance, as the truth-seeking process is cultivated.³³⁴

- Fourth, truth-seeking processes must optimize the recognition and acknowledgement of victims and survivors, with particular attention to gender-differentiated experiences and the specific needs of children and youth, both during the war and also as recipients of cross-generational memory in the wake of it. In respect of the need for acknowledgement at least, there is a strong urge that the state should play a key contributing role in the process, due also to its responsibility for the provision of reparation. However, there are also important forms of acknowledgement that revolve around not merely the role of government, but the opportunity to speak and be heard *between* the ethnic, local and sectarian divides, as well as *within* the communities in which people live. At the heart of this process of acknowledgement and the humanization of "the other" is an indispensable component necessary to the cultivation of a national dialogue about the past.
- Finally, any truth-seeking-strategy for BiH must be conceived of as an ongoing and durable exercise that will take considerable time. This is an endeavor of some magnitude that is potentially critical to the future of the country and the prevention of a return to conflict or to the political and economic dysfunction of sectarian division inside and outside the state. It does no justice to the magnitude of the task to see this as achievable within just a few years and through a single institutional intervention. Dialogue about the past has to be percolated over time and in a diverse range of communities, practices and institutions. An important dimension of this long-term view is the prospect that other initiatives which might currently appear less likely or possible may become more viable at a later point – as political conditions change or as existing truth-seeking measures gain traction, build trust and cultivate the dialogue necessary for a discourse of compatible narratives. The potential therefore exists for this cumulative approach

³³⁴ See Chapter Three, Consensus Figures and the Importance of Credible Leadership, *supra*.

to truth-seeking to achieve a "critical mass" and provide a realistic platform for a focused state-wide truth commission of some sort. By the same token, these initiatives may also become integrated into credible truth-seeking that is able to take place at a more regional level within the former Yugoslavia.

Proposed Approach

Based on the preceding analysis, we now briefly examine what a coherent truth-telling approach might be for BiH. We make a core proposal and suggest a number of pilot interventions that might serve as strategic entry points to both test and apply this approach and that potentially stand alone as innovative and important truth-telling interventions that could be implemented.

However, as a precursor to this section, we must once again stress the importance of inclusive consultation processes among the people of BiH to resolve the very issues that we are grappling with in this report. This has been a strong assertion at the core of our argument throughout the report. The proposals and tentative pilot interventions presented below should therefore not be seen as prescriptive or exhaustive. On the contrary, this report should itself be viewed as a discussion paper, intended to stimulate, provoke and catalyze a dialogue about the nature, objectives and priorities of truth-seeking in BiH. Our intention in offering an innovative and creative approach to truth-seeking that is customized to the particular conditions in BiH at this time is precisely intended to open up the conversation. Nothing we say here should be construed as the final word, or as anything but debatable. The precise objective is the state-wide dialogue that this ought to provoke.

Having said this, we believe that an official truth commission (based on the classical structures, functions and models of truth commissions in other parts of the world) is likely not the best option for BiH at this particular time and will not optimally service the primary truth-seeking needs in the country at present.³³⁵ There are several reasons for suggesting this:

³³⁵ It is our perspective that these needs are ultimately defined by truth-seeking as means of generating a process of social engagement and a broad-based dialogue about the past, rather than by the objective of arriving at an "official truth."

- The degree of ethnic division or exclusion, as well as sectarianism, not merely in BiH society, but particularly in the institutions and structures of the State, presents a key challenge to an official truth commission. Such divisions in society are not *per se* a reason *not* to have a truth commission since many societies that have established truth commissions are severely fractured. Indeed, truth commissions are frequently viewed precisely as a means of building mutual trust, reconciliation or addressing these historical divisions within society. In BiH, the extent of this sectarianism has however not only resulted in the politicization of victims' movement, but tends to dominate the operations of the State as well. To establish an official truth commission could have the ironic effect of subjecting existing truth-seeking initiatives (both inside and outside of government) to these machinations, potentially even damaging them. The pervasive sectarianism would also result in the constant testing of the political will of an already discordant and sometimes dysfunctional State.
- There is sometimes a risk that an official truth commission might seek to craft a new historical orthodoxy about past conflicts – attempting to create an “official truth.” This sort of truth-seeking can potentially cement entrenched narratives, reinforcing the perspective that one truth about the past will necessarily prevail, and thereby silencing, instead of cultivating, a national dialogue and public debate about the past. In and of itself, this risk is not reason to reject out of hand the possibility of an official truth commission for BiH, especially at some point in the future.³³⁶ An official truth commission, like the alternatives to it (including those that we are proposing here) may fall victim to these divisions, unless they are carefully designed and structured. What matters is the nature of truth-telling *as a process*: the extent of the inclusive consultation and participation; the guaranteed independence of the truth-seeking mechanism/s; the integrity of those who lead the process; and the creative ways in which it opens up legitimate debate and dialogue. Truth-seeking *is a process* and not merely a vehicle for the construction of an official truth. So, whatever the measures for achieving this, they should be optimally capable of guaranteeing such a process – and an official truth commission may not be best able to do this when compared with a combination of alternative approaches.

³³⁶ Indeed, we have already noted that there is arguably a parallel risk that the alternative of an overly decentralized or localized process, might equally fail to navigate the sectarianism in society - rather than just in the State - or the mono-ethnic narratives of the local. See Chapter Three, Connecting the Local to the Global, *supra*.

- There is already a legacy of misunderstanding about the role of truth commissions in BiH, embedded in the earlier attempts to establish one. This is compounded by a superficial skepticism about the comparability of other societies where truth commissions have been implemented with BiH.
- Truth commissions traditionally operate on relatively short time frames and highly specific mandates with respect to both the crimes and the experiences to be investigated. There is a strong argument to be made that BiH requires a more durable engagement with the past, perhaps even a permanent standing structure to facilitate, document and drive these processes within the wider society.
- Truth commissions tend to revolve around very particular methodologies, including statement-taking, hearings, establishing a database, research and investigations, the drafting of a report, etc. But the range of truth-telling activities and approaches needed and already operational in BiH begs for an institutional arrangement with a broader set of functions and a richer diversity of mechanisms.
- The diverse spectrum of truth-seeking approaches often takes place at a very decentralized and often localized level in BiH. This potentially brings a great richness to truth-telling in the country, but also demands coordination, integration and coherence between these diverse interventions. Whilst truth commissions tend to focus on building a meta-narrative in societies emerging from conflict – and this is an important antidote to the limitations of atomized local-level engagements – they nonetheless do not provide the umbrella function through which such localized and diverse interventions may be connected with each other, serving to craft a cumulative effect. A truth commission may, therefore, not be the ideal institutional mechanism to capitalize on the diverse and decentralized character of truth-telling in BiH.

This does not mean that a truth commission is necessarily excluded as a possibility in BiH at some point. Instead, it suggests that the timing may be wrong at present. It also strongly implies that any official truth commission be just one truth-seeking mechanism amongst others, and that the meta-narrative that it might create may simply not be adequate. Indeed, one of the important messages we received during our missions in the country was that many in BiH believe that the people cannot afford to wait for such a “consolidated truth,” and that the need to advance the process of truth-telling incrementally is now considered by many as urgent. This also does not, however, preclude the possibility of targeted or specialized truth-seeking through specific state institutions, such as MPI or any other appropriate mechanisms.

We therefore propose that a carefully designed alternative institutional arrangement – a kind of State-wide “Truth-seeking Forum” – may be better positioned to overcome the likely limitations of any official truth commission.³³⁷ Such a “*Truth-seeking Forum*” would have a primary responsibility to foster diverse truth-telling “from below.” But, most importantly, it would also capture, coordinate and insure coherence between the range of initiatives, building a cumulative picture, it would initiate and support new interventions where necessary, and would connect state-based and civil society initiatives into a coherent broad-based approach. In this regard, it would integrate the potentials and address the limitations of official and unofficial truth-seeking approaches and meld “bottom-up” and “top-down” approaches.

We do not intend to suggest a prescriptive or detailed proposal of what such an alternative approach may look like, but merely to set out some of the generic characteristics that may best service the objectives of truth-telling and fact-finding in BiH at this juncture:

- ✓ A key factor is that this would be an institution with a broad mandate to support, facilitate and initiate truth-seeking, as well as to help to channel funding into truth-seeking as part of its responsibility for promoting a state-wide dialogue about the past, on the broadest possible front;
- ✓ To this end, it would survey and identify all existing state and non-state truth-telling initiatives—and even international ones—to link them together as a broad and diverse network of initiatives;
- ✓ It would strengthen and support, rather than replace, existing interventions by acting as a resource to those initiatives, providing them with expertise, information, access and connections to national and global networks on documentation, oral history, training opportunities, grants, fellowships, etc;
- ✓ It would have a strong base and network in BiH research and academic institutions and would have the capacity to support or initiate research or other interventions to address important gaps or misinformation in the fields of truth-seeking, fact-finding and memory;
- ✓ It may initiate and help develop needed projects, such as municipal oral histories, audio and video recording of victim experiences, testimony gathering and even advocating on behalf of all victims, etc.;

³³⁷ This notional arrangement may take the form of an “institute” or some other kind of institutional arrangement. The name is certainly not predetermined, nor is it our intention to describe this arrangement in any prescriptive detail. However, we have deliberately used the word “forum” because of its dictionary definition. According to Webster’s English Dictionary, there are several complementary sub-meanings of the word: n. pl. fo-rums also fo-ra (fôr, fr) - 1. a. The public square or marketplace of an ancient Roman city that was the assembly place for judicial activity and public business. b. A public meeting place for open discussion. c. A medium for open discussion or voicing of ideas, such as a newspaper, a radio or television program, or a website; 2. A public meeting or presentation involving a discussion usually among experts and often including audience participation; 3. A court of law; a tribunal.

- ✓ It may act as a central repository and archive for all pertinent or sensitive documents and materials relevant to its truth-seeking mandate, or that are in danger of being lost to age, deterioration, or damage; and,
- ✓ It would carry the primary responsibility for fostering and promoting dialogue about the past, particularly in respect of competing narratives or divergent truth-seeking results.

Such a “Truth-Seeking Forum” may also have some essential institutional characteristics:

- ✓ It would optimally have a long-term or potentially a standing mandate, so that it could continue this work indefinitely or for a substantial period, rather than the shorter time frame of most truth commissions;
- ✓ It would be assured state funding (in addition to being able to secure additional donor contributions), and would need to be guaranteed its independence and autonomy from governmental control. At the same time, it would report regularly to the BiH Parliament on its finances to ensure some oversight and accountability by the State (for example, as an independent national human rights commission might do).
- ✓ It would be led by a panel of “consensus figures,” possibly including selected members of the international community, that were transparently selected based on their integrity, political independence and technical capacities, as well as their ability to transcend the ethnic and sectarian divisions in BiH society and the Government; and,
- ✓ It would be accessible to the public.

This broad approach promotes the idea of a truth-seeking “umbrella organization” that addresses some of the limitations of a truth commission, overcomes the dilemmas of State oversight or subjecting truth-telling to the whims of sectarian politicians, is resistant to the idea of a unitary truth or a state-sanctioned orthodoxy about the past, builds on and supplements what already exists, and catalyzes the much needed process of dialogue about the past in BiH. It also has the potential to make a significant contribution to principles and styles of governance in the country. It is inclusive and autonomous, yet accountable, and can transcend the fractured character of the BiH polity. In the realm of truth-seeking, it strives to cultivate a sort of “public-private partnership” between the government and civil society initiatives, catalyzing, supporting and chaperoning initiatives inside and outside of the government and connecting, coordinating and integrating a broad based truth-seeking approach.

This approach is innovative and creative. It recognizes both the challenge and the opportunity that BiH faces in dealing with its past. Instead of merely reproducing an “international model,” we believe BiH can learn from these other experiences, but nonetheless forge a unique and customized approach to truth-telling that could serve as an international example in the future. It is important to recognize, however, that this approach is not entirely without precedent. In Northern Ireland, after an extensive three-year public consultation process,³³⁸ the Consultative Group on the Past reached similar conclusions about the need for a “bottom-up” and integrated truth-seeking approach, drawing on existing or past initiatives from civil society and more official processes. It sought “to create a new type of mechanism suited to the culture and history of Northern Ireland” rather than merely produce “a copy of the South African TRC.”³³⁹ The Group, therefore, “favored a mechanism which would be private, non-judicial and non-adversarial in preference to the public, judicial or quasi-judicial commissions of other countries.”³⁴⁰

With these goals in mind, the Group made a series of innovative recommendations. In terms of structure, it proposed the establishment of a Reconciliation Forum to serve as an over-arching coordinating body in addition to two commissions that would liaise through and be supported by the Reconciliation Forum.³⁴¹ The Legacy Commission would address the past, while the Commission for Victims and Survivors for Northern Ireland (CVSNI) would attend to the needs and concerns of victims and survivors. In addition, the Group made three thematic recommendations: society issues, processes of justice and information recovery and remembering. First, it provided a non-exhaustive list of “society issues”: sectarianism, remembering, young people, services for healthcare needs, economic benefits and the return of displaced people and refugees.³⁴² The Reconciliation Forum would address these issues by analyzing prior activities and the need for further measures. The Legacy Commission would look specifically at sectarianism, highlighting the contribution that all sectors of society could make. Second, on the issue of “Processes of Justice and Information Recovery,” the Group proposed the creation of a Review and Investigations Unit, within the Legacy Commission, to review and investigate historical cases, backed by police powers. The process of recovering information of importance to relatives would be separated from the investigation procedure and be subject to a distinct process within

the Legacy Commission, under an Information Recovery Unit and a Thematic Examination Unit.³⁴³ Third, on “Remembering,” the Group suggested that the annual Day of Reflection be continued under the name “Day of Reflection and Reconciliation.”³⁴⁴ In addition, CVSNI would facilitate story-telling, educational endeavors, and remembering projects. At the end of its mandate, the Reconciliation Forum would implement a ceremony remembering the past, challenge the people of Northern Ireland to sign a declaration that they will never again kill or injure others on political grounds, and work towards a shared memorial.³⁴⁵

Some Pilot Programs

Truth-telling in BiH is a long-term challenge, and cannot be addressed quickly by the creation of any single institution. The proposed *Truth-Seeking Forum* is, therefore, seen as an attempt to capture and supplement a broader mosaic of truth-telling in BiH – a responsibility for transforming what we have called the “cacophony” of truth-telling initiatives, into a harmonious dialogue or compatible narratives.

However, part of our terms of reference is also to propose some pilot truth-seeking projects for consideration and discussion with UNDP and the Government Expert Working Group on Transitional Justice. In undertaking this complex task, we were constantly struck by the multitude of innovative and exciting ideas for new and existing truth-telling projects that emerged in interviews and our discussions during the mission. In the pages below, we propose six specific potential pilot projects. However, before elaborating on these pilots, we would like to share a broader, but non-exhaustive and impressionistic overview of the range of ideas that emerged during our many conversations in-country. This list is meant to facilitate discussion. We can imagine any or all of them (in no particular order), as constructive projects that could contribute components of an integrated overall approach to truth-telling in BiH:

338 See Chapter Three, *Informed Consultation Indispensable to Credible Truth-Seeking*, supra.

339 Consultative Group on the Past, supra note 9, p. 56.

340 Ibid.

341 Ibid. p. 139.

342 Ibid. p. 138.

343 Ibid. pp. 143-146.

344 Ibid. pp. 101-102.

345 Ibid. pp. 102-105, 142-143.

- Creating a historians “dialogue circle” on historiography of the conflict and violence in BiH and the former Yugoslavia, keeping in mind the so-called example of the Historians Quarrel in Germany, when professional historians, provoked by a series of articles and discussions, engaged in a heated debate about the discipline of history and dealing with the past.³⁴⁶
- Supporting and developing projects such as the RDC’s “Signals of the Heart” initiative, an oral history project that seeks to capture the stories of those who broke the shackles by crossing the sectarian divide to try to save others during the conflict.
- Developing an oral history and photographic project on “making the invisible visible” – giving voice and visibility to the missing.³⁴⁷
- Considering the development of “a day of remembrance” for those who are missing.
- Mapping and analyzing public memorials and monuments throughout the country to evaluate whether and to what extent they are contributing to truth-telling.³⁴⁸
- Creating dialogic and pedagogic memorials, as truth-telling initiatives, such as the Memory Park in Argentina³⁴⁹ or some of the memorials in Hiroshima, Japan.³⁵⁰ Developing a “trials as truth-seeking” project: transforming real legal cases and verdicts into radio and video stories of the conflict.
- Considering different formats of exhibits or museums to generate cross-community discussions about the past.
- Developing municipal-level, participatory, community histories such as those done in Chile by *Educación y Comunicación* projects or the *Ardayne* project in Northern Ireland.³⁵¹

346 An excellent examination of this series of debates is C. Maier, *The Unmasterable Past: History, Holocaust, and German National Identity* (Harvard University Press, Cambridge, 1997).

347 A similar project was undertaken in South Africa through a partnership between the Centre for the Study of Violence and Reconciliation (CSVR), the Khulumani Support Group (a victims’ organization) and Constitution Hill (the precinct housing South Africa’s Constitutional Court). The project took the form of an exhibition commemorating the disappeared, entitled *Syanikhumbula*, meaning “we are missing you.” See L. Madumo, ‘Exhibition Looks at the Missing,’ *Johannesburg News Agency*, 23 August 2007, <www.joburgnews.co.za/2007/aug/aug23_conhill.stm>, visited on 30 December 2010.

348 For example, the International Center for Transitional Justice undertook a “memory inventory” of monuments and public naming in Liberia, working with the Minister of Culture, to determine whether memorials were contributing to post-conflict reconstruction. This work is examined in International Center for Transitional Justice, ‘Memorialization Undertakings: Assessing Lessons From The Field,’ *International Center for Transitional Justice*, 11 June 2010, <www.ictj.org/en/news/coverage/article/3819.html>, visited on 28 December 2010.

349 The Argentine non-governmental organization, Open Memory/Memoria Abierta has done a great deal of innovative work on these kinds of initiatives. See A. Varas, ‘Monument to the Victims of State Terrorism in Park of Memory,’ in *Memoria Abierta, Architecture and Memory* (Memoria Abierta, Buenos Aires, Argentina, 2009) <www.memoriaabierta.org.ar/materiales/pdf/architectureandmemory.pdf> visited on 30 December 2010. See also e.g., *Memoria Abierta, Vestiges, ‘Transmissions through Objects,’ Memoria Abierta*, <www.memoriaabierta.org.ar/eng/principal.php>, visited on 28 December 2010.

350 The Hiroshima Peace Memorial Museum artfully combines memory spaces, pedagogical museum exhibits, and future-oriented action strategies. See Hiroshima Peace Memorial Museum, ‘Hiroshima Peace Site,’ Hiroshima Peace Memorial Museum, <www.pcf.city.hiroshima.jp/top_e.html>, visited on 28 December 2010.

351 See Chapter One, A Note on International Comparisons, *supra*.

- Developing an initiative similar to the National Vision Project in Sierra Leone, a national competition on envisioning long-term peace through art, architecture, poetry, and writing that was launched by the truth commission.
- Considering International study visits (such as to Northern Ireland) to meet with civil society and state counterparts and discuss long-term truth-telling strategies in other countries. Such study visits have been common in the field of transitional justice and have often helped key stakeholders formulate a vision in their own country.
- Connecting BiH organizations and practitioners with organizations in other countries that are engaged in memory, documentation and archive work (such as “Memorial” in Russia, the South African History Archive, the Documentation Center in Cambodia, or the global Documentation Center Affinity Group), to study options for digitizing, centralizing and coordinating archives and databases.
- Building a national network of memorials and then mapping, connecting and identifying them across the country.
- A “diasporas” project, based on gathering testimony and memories of those who were displaced or who voluntarily left BiH, but who may have important reflections on the war and the national dialogue about it.³⁵²

To reiterate, the preceding list is meant to help inspire brainstorming and discussion among stake-holders (as it did for us) around possible projects and initiatives that might be strengthened or launched in BiH.

In the meantime, we suggest specific consideration be given to the following six initiatives as possible pilot projects. These six projects provide opportunities to test the approaches discussed in this report because they address key social constituencies that have a particular stake in truth-seeking in BiH and, in some instances, because they already model coordinated participation of diverse State and non-state stakeholders. We also consider them to be specific projects that could be piloted and developed immediately. Moreover, in addition to the brainstorming list above, they can have a complementary relationship with the State-wide *Truth-Seeking Forum* idea that has been mooted. Indeed, the *Forum* could undertake or support exactly these kinds of projects. These pilots are not exhaustively treated, but merely illustrated:

352 A similar endeavor was undertaken by the Liberian Truth Commission with the Liberian Diaspora in the US. See Chapter Three, Connecting the Local to the Global, *supra*.

Pilot #1 – Best Practices Evaluation in the Field of Disappearances

At the outset, it should be acknowledged that this is not classically a pilot program. Rather, it is based on our appreciation of the exceptional work being done in this sphere, particularly by ICMP and MPI, but also through some innovative work at the local level. Furthermore, the initiatives on disappearances address a critical area of concern to victims and survivors across the ethnic boundaries of BiH society, and also coordinate and integrate the work of a range of organizations, both inside and outside government structures. In many respects, this may represent a model of the sort of practice that a broad-based *Truth-Seeking Forum* would seek to emulate or stimulate. For these reasons, we believe it would be strategic and useful to support ICMP and MPI (assuming this would be beneficial to these organizations as well) to undertake a “best practices evaluation” of this work to consider the lessons learned that might be of use to other areas of truth-telling. This is obviously envisaged as a supportive exercise and not as an “external evaluation.”

Pilot #2 – Youth-based Essay-writing Contest

We propose constituting a committee of “consensus figures” and highly respected figures from the arts and letters to be “judges” for a national essay writing contest, targeting the involvement of young people. This project would encourage the submission of essays or short videos on the topics of: “how young people understand the past conflict in BiH” and “how can BiH best guarantee that future generations will live in peace”. This essay writing competition would have further parameters (e.g. word limits, style, etc.) and clear criteria for judging that would inhibit inappropriate submissions, although the committee may receive some. A website could be constructed that explains the process of the competition and announces winners. National prizes would be carefully chosen to create the right incentives. Not only would this project actively engage the youth as a strategically critical sector, but it would also provide great insight into youth perceptions of the past and the impact of the conflict, as well as their aspirations and attitudes to peace.

Pilot #3 – Mapping Concentration/Prison Camps

In our interviews, it became apparent that the definition of “concentration camp” or “prison camp” remains unclear and contested. During the interviews, our interlocutors used these terms to refer to a wide variety of conditions, from large-scale camps with dozens or hundreds of people, to a single person being imprisoned in a basement cell. Furthermore, in many of our discussions, it was articulated that this category of victims of the war were not adequately recognized and acknowledged on all sides of the conflicts. Therefore, we propose a pilot project that brings people together from all communities to define these categories and then, using these definitions, create a map of all of the camps that existed from 1992–1995. Moreover, the team that develops this project should also consider how to commemorate these sites—if at all—through memorialization efforts, pedagogical projects, photography exhibits, oral history projects, etc. In creating this initiative, UNDP and others could draw on experiences from other contexts, including Germany, Poland, Cambodia, and Morocco,³⁵³ and could forge links with on-going projects in BiH, such as the War Crimes Atlas of the RDC.

Pilot #4 – Women as Storytellers: Oral History Project

We propose that UNDP and the Government Expert Working Group consider initiating work with women's organizations, victims' associations and professional historians trained in rigorous oral history methodology to develop a “women as storytellers” oral history project that focuses on women's experiences of war between 1992 and 1995. Trauma experts with experience in working with sexual violence support groups and other similar interventions should be actively involved in the design and implementation of this pilot project. This pilot may be initiated at the local level and then developed so that it facilitates the interaction of women from across the ethnic divisions in the society. The results of such a project could be then shared with the population more broadly, translated into public engagement and education campaigns, and used to foster discussions on shared experiences, gender, humanizing the other, memory and the importance of stories in dealing with the past.

³⁵³ In all of these cases, there has been extensive work done on memory sites. See Louis Bickford, “Memory Works, Memoryworks” in Pablo de Greiff (ed), *How Things Work: Understanding Transitional Justice Processes* (forthcoming)

Pilot # 5 – Training/Capacity Building on Truth-seeking

Our interviews demonstrated that there remains a fairly undeveloped understanding of truth-telling in BiH in general and a low level of capacity for engaging in these exercises in key State institutions, some civil society sectors, and in the media. Instead of seeing truth-telling as a broad category of different approaches, many people continue to automatically associate the idea with the particular experiences of the South African TRC on one hand, or with the kind of fact-finding that fits most squarely with the judicial paradigm, on the other. We propose, therefore, that a series of trainings and capacity building activities be designed and undertaken with these key stakeholders. These activities, shaped in workshops, international study tours or expert technical advice programs, would look at voice, fact-finding, and compatible narratives, and bring in questions of truth, memory and memorialization, forensics, oral history, and accountability.

Pilot #6 – Developing a Thesaurus

We propose that UNDP host a series of meetings among carefully-selected participants from various victim communities on the seemingly innocent project of creating a shared vocabulary to discuss the conflict. In Chile, for example, the *Vicaría de la Solidaridad* organized exactly this kind of roundtable discussion in 1993–1994. It took over a year of all-day monthly meetings to do it, but it resulted in a thesaurus that was an agreed-upon lexicon for the terms that regularly get used. While some of these were drawn directly from international law—in which case discussing them in a roundtable format was still very useful—others (like “prison camp” or “reconciliation” or “memorial”) do not have single, universal definitions. What becomes important in this case is the dialogue required to arrive at a shared definition of the term.

Final Word: A Historical Opportunity?

It is our hope that this document will help to catalyze the public dialogue about truth-telling and the full range of truth-seeking opportunities, methods and innovations available to policy-makers in BiH. In the approach we have proposed and in the potential pilots we have suggested, we have drawn on the creative energy and ideas of all those with whom we spoke. We have tried to reflect these ideas in thinking creatively, drawing on the experience of others, and remaining true to the primacy of local context. We have sought to draw modestly on other experiences that might offer useful lessons for BiH, but have also tried to stimulate debate and creative thinking that may reach beyond just the contemplation of other examples or models. We have therefore also repeatedly reiterated that our intention is *not* to be prescriptive – we have not written off any specific approaches or advocated for the exclusive adoption of others.

It is our view that BiH confronts a historical opportunity to generate and engage in a country-wide dialogue about the past. Many with whom we spoke believe this cannot again be deferred to another potentially better time, but rather that this is an urgent need. However, we are mindful that this requires not only the enthusiasm and commitment of ordinary people, victims, women and young people, etc., but it also demands political will and a new kind of statesmanship (or *stateswomanship*), courage, and investment – if truth-telling is to contribute to BiH's ability to deal with the past and forge a durable peace going forward. The political courage required includes an unconditional commitment to the autonomy and independence of the truth-seeking process, recognition of the time required to do this properly, and a full commitment to a broad-based and inclusive consultation process.

Although it draws on other experiences, this report suggests a route which is potentially unique to BiH. As such, the historical opportunity it offers is not merely important for BiH or a chance to learn from elsewhere in the world, but it is also a chance to innovate in an evolving field of truth-telling – indeed, a chance for the world to learn from BiH.

List of Abbreviations

CSOs	– civil society organizations
CSVSR	– Centre for the Study of Violence and Reconciliation
CTF	– (Indonesian/Timorese) Commission on Truth and Friendship
DC–Cam	– Documentation Center of Cambodia
GFA	– General Framework Agreement for Peace in BiH
GTRC	– Greensboro Truth and Reconciliation Commission
HLC	– Humanitarian Law Center
ICMP	– International Commission on Missing Persons
ICTJ	– International Center for Transitional Justice
ICTY	– International Criminal Tribunal for the Former Yugoslavia
IJTJ	– International Journal of Transitional Justice
IMF	– Iraq Memory Foundation
ITAC	– International Technical Advisory Committee
MPI	– Missing Persons Institute
NRC	– National Reconciliation Commission
OHCHR	– Office of the High Commissioner for Human Rights
OHR	– Office of the High Representative
RDC	– Research and Documentation Center
REMHI	– Guatemala's Recuperation of Historical Memory Project
TJRC	– (Kenyan) Truth, Justice and Reconciliation Commission
TRC	– Truth and Reconciliation Commission
USIP	– United States Institute for Peace