

Transitional Justice in Bosnia and Herzegovina: Findings of a Public Survey

STEFAN PRIESNER, LYNNE O'DONOGHUE and ALMA DEDIĆ

Sažetak

Iako je minulo već deset godina od potpisivanja Daytonskog Sporazuma kojim je završen troipogodišnji sukob u BiH, statistički podaci o kompletnoj slici ratnih zločina i kršenja međunarodnog humanitarnog prava počinjenih u zemlji su još uvijek nedostupni. Najšešće korišćene procjene koriste podatke o 200.000 ubijenih, uključujući i one koji su podlegli zbog gladi ili smrzavanja ili se vode kao nestali, od toga 16000 djece. Oko 2,2 miliona ljudi je bilo prisiljeno napustiti svoje domove što je izazvalo najveću izbjegličku krizu u Europi nakon Drugog svjetskog rata. Od ovog broja oko 1,3 miliona protjeranih je bilo raseljeno unutar BiH. Od 30,000 nestalih u toku rata oko 15,000 do 20,000 još uvijek nije pronađeno. Infrastruktura je pretrpjela velike štete. Više od 1600 vjerskih objekata je oštećeno ili uništeno, od toga 1200 islamskih građevina. Sistematska i brutalna silovanja, mučenja, ubijanja i progona, kao i druge forme povrijeda ljudskih prava, su bili masovni. Lista počinjenih zlodjela je, nažalost, i preduga.

Abstract

Although it is almost a decade since the signing of the Dayton Accords, which brought to an end the three-and-a-half-year Bosnian conflict, statistical evidence of the full scale of the war crimes and severe breaches of international humanitarian law committed on the territory remains elusive. The most commonly used data estimates that up to 200,000 people were killed, died of starvation or cold, or are missing, including over 16,000 children.¹ Some 2.2 million people fled their homes – creating the largest refugee crisis in Europe since the Second World War – of whom 1.3 million were internally displaced. From the 30,000 people who went missing during the war, 15,000 to 20,000 people are yet to be found.² Infrastructure damage was profound. More than 1,600 religious buildings were damaged, over 1,200 of which were Islamic. Systematic and brutal rape, torture, killing, expulsion and other serious forms of human rights violations took place on a massive scale. And the list goes on.

BiH is a very different place than it was a decade ago. Basic freedoms have been restored, notably the freedom of movement and religion. By January 2005, one million people had exercised their right to return to their properties. Major reforms have been undertaken, notably judicial reform to include a new criminal code, basic police reform and defence reform bringing the former warring armies of BiH into one state-level force as from 1 January 2005. Important competencies have been transferred from the entities³ to the state level, and the country is poised to start negotiations to enter a Stabilization and Association Agreement with the European Union – the first step on the ladder to full EU integration.⁴

Naturally enough, the tenth post-Dayton year has become one of reflection and reappraisal as the country moves increasingly away from heavy international oversight towards full national ownership. Constitutional reform is under discussion and the future of the Office of the High Representative and the Bonn Powers are also under review. There is also another question moving to the forefront of general debate – namely that of dealing with the past. How best to establish the real truth of what happened? What about reconciliation within this deeply divided society? Is it too late? Is it too early? And how? Gnawing away at the back of many minds is the underlying fear that a failure to face up to and deal with the past, and through this process affect some kind of reconciliation, will leave the door dangerously open for further conflict.

Transitional Justice

The ways in which societies in transition from authoritarian rule to democracy, or from war to peace, address the legacies of gross and systematic abuses of human rights and other violations are known collectively as ‘transitional justice’. For further simplification and mapping of developments, these can be further divided into four equally important pillars: criminal justice, truth-seeking, reparations, and institutional reform. The following gives an extremely brief overview of the developments within the BiH context in each of these areas.

Criminal Justice

Criminal trials for wide-scale and flagrant war crimes act as a deterrent, force accountability and bring justice for victims’ families. They also help increase public confidence in the State’s ability – and willingness – to enforce the law.

The International Criminal Tribunal for former Yugoslavia⁵ (ICTY) in The Hague was established by the UN Security Council in 1993 while the war was still ongoing. It is the first such court of its kind since those at Nuremberg and Tokyo set up in the aftermath of the Second World War. ICTY’s mandate is to pass judgment on grave breaches of the 1949 Geneva Conventions – violations of the laws or customs of war; genocide; and crimes against humanity – which took place during the 1991–1995 conflict in the former Yugoslavia.

The Tribunal lists its core achievements as spearheading the shift from impunity to accountability, establishing facts, bringing justice to thousands of victims and

giving them a voice, accomplishments in international law, and strengthening the rule of law in BiH. Yet for many of the victims' families, ICTY's activities have been too little and too slow, and they have expressed strong dissatisfaction over the lightness of sentencing, particularly in the case of plea bargaining. In this respect, it is generally believed that ICTY was slow to introduce a proper outreach campaign, leading to many misunderstandings by the victims' families.

Criticism of the Tribunal should be set against the enormous caseload it has faced – there are said to be over 10,000 suspected war criminals – and the inherent difficulties relating to obtaining witnesses. Having handed down its last indictment in early 2005, the current plan is for ICTY to complete its work in 2010. However, the Tribunal has also said that it would wish to remain open to conduct the trials of indicted war criminals Radovan Karadžić and Ratko Mladić, still at large, who are wanted for the Srebrenica massacre of up to 8,000 Bosniak men and boys in July 1995.

The domestic War Crimes Chamber (WCC), part of the State Court of BiH, opened in March 2005. This Chamber is set to become the most prominent criminal court dealing with war crimes committed in BiH between 1991 and 1995.⁶ Its first task has been to process numerous war crimes cases handed down by ICTY to decide which should be tried before the WCC and which should go before the local courts. It is unclear at this stage how many cases it will be able to prosecute, but it is unlikely to exceed a few hundred.

Lastly, there are the sixteen domestic courts that also have jurisdiction over war crimes, crimes against humanity and genocide – ten cantonal courts in the Federation, five district courts in the Republika Srpska (RS) and one in Brčko District. It is worth pointing out that these courts will be handling more than 90 per cent of the caseload, yet do not receive anything like the funding support given to the WCC and are seriously lacking in capacity.

Truth-Seeking

The second pillar in the transitional justice tool box is 'truth-seeking', or 'fact-finding'. Discussions have been under way intermittently since the signing of the Dayton Accords on ways to establish the truth about what happened during the conflict, including proposals on a draft law for a truth commission, but little concrete progress has been achieved.

The one exception in this regard is the landmark 2004 RS Srebrenica Commission report, which led to an apology by the RS Government to the families of the Srebrenica victims. This commission arose out of an obligation for the RS to respond to a Human Rights Chamber decision regarding forty-nine complaints brought by victims' families. Nevertheless, it required the intervention by the High Representative, Lord Ashdown, to set it in motion. Despite similar rulings by the Human Rights Chamber on other incidents of severe human rights violations⁷, there have so far been no further such commissions.

Under the truth-seeking pillar comes documentation. Leading the field is the invaluable work of the Investigation and Documentation Centre (IDC) led by Mirsad Tokaca.⁸ In the past twelve years, IDC has gathered millions of pages

of various documents, predominantly statements of surviving victims and eyewitnesses, and registered the locations of over 440 prisons and concentration camps, 320 mass graves and 900 incidents of mass killing where civilians were the predominant victims.

Also under this heading is the important work of the inter-governmental organization ICMP (International Commission of Missing Persons⁹) in the exhumation and identification of bodily remains. Additionally, two entity-level missing persons institutes were set up. At the end of August 2005, the state-level Missing Persons Institute was officially inaugurated, which replaced the two entity-level bodies.

Reparations

The issue of reparations has, so far, not figured prominently across the BiH post-conflict landscape. No reparations were allowed at ICTY and none have been provided for within the mandate of the War Crimes Chamber. There have, however, been recent regional developments, such as Montenegro compensating Croatia for the 1991 shelling of Dubrovnik. The outcome is awaited in early 2006 of a pending case against Serbia, filed with the International Court of Justice by BiH. There is also a compensation claim against the Netherlands by the victims' families of Srebrenica currently being addressed by the Dutch courts. Many believe that the whole issue of reparations will have to be addressed at some later stage.

Institutional Reform

Countries recovering from conflict often need to adopt a broad range of institutional reforms to prevent a relapse into violence. In BiH, new human rights institutions were created post-conflict, such as the Human Rights Chamber. This was replaced at the end of 2003, in line with Dayton Agreement, by the Commission for Human Rights of the Constitutional Court of BiH.

Police reform carried out by the United Nations Mission in BiH (UNMIBH) included a rigorous screening process of police officers¹⁰ but widespread lustration within the political and military sphere did not take place. However, the High Representative's Bonn powers, granted by the Peace Implementation Council in 1997¹¹, gave him the mandate to dismiss obstructionist politicians from public life and these included some staunchly nationalist wartime politicians. However, there are still alleged to be war criminals holding public office.¹²

Highlights of the Transitional Justice Survey in BiH

To find out how the public viewed the progress, or otherwise, made within the field of transitional justice, UNDP commissioned an opinion poll in June 2005.¹³ This was conducted using the tried and tested quantitative methodology of UNDP's Early Warning System reports, carried out by Prism Research of BiH. 1,500 people were interviewed, divided into three units – Bosniak¹⁴ and Croat-

majority areas in the Federation, and Serb-majority areas in the RS. The first step was to ascertain how far across the total population the effects of the war had reached.

Table 1: During the 1992–1995 war, I experienced a threat to:

In %	Total	FBiH	RS	Urban	Rural	Bosniaks	Croats	Serbs
My right to life	58.6	65.7	48.7	57.3	59.5	69.7	54.7	45.4
My right to ownership of my home	46.1	45.9	46.4	50.7	42.5	50.4	37.0	43.4

The results showed that almost two-thirds of people had experienced a threat to their life during the war. The people from the Federation of BiH (FBiH) were more exposed to threats to their life than those from the RS.

Table 2: Individuals who caused unjustifiable harm to others during the war:

In %	Total	FBiH	RS	Male	Female	Bosniaks	Croats	Serbs
Should be held accountable, without exception	64.9	64.9	63.9	73.6	56.5	64.9	67.2	63.8
Only those who committed actual war crimes should be held accountable	19.4	21.6	16.1	14.0	24.5	22.2	17.1	17.3
Those who committed war crimes should be tried, and the rest should be granted an amnesty.	5.1	5.9	4.1	5.8	4.4	5.4	6.7	4.1
Everyone who caused unjustifiable harm of any sort should be granted an amnesty.	3.3	3.4	3.3	3.0	3.6	3.4	0.9	2.6

One of the key questions posed in the survey was what people thought about how to deal with war criminals, and whether amnesty was a possibility. When talking about amnesty in the context of BiH, it is important to bear in mind the nature of the war and the different responsibilities among the three constituent peoples. Two-thirds of people polled – and with no significant differences between the entities and the three constituent peoples – believed that all individuals who committed war crimes should be held accountable. Compared to this, the number of people who think that individuals who committed war crimes should be granted amnesty is almost insignificant.

The results as shown in the above table send out a clear message: perpetrators must be held accountable. This finding corresponds to the findings of UNDP’s field mission report¹⁵, which commented: ‘Bosnians overwhelmingly identify criminal justice as the most legitimate response to crime, if not the only one. At all levels of society and in every part of the country, putting war criminals on trial is seen as a necessity, with no serious alternative’.

Table 3: The best way to deal with events that occurred during the 1992–1995 war is:

In %	Total	FBIH	RS	Urban	Rural	Male	Female	Bosniaks	Croats	Serbs
By open discussion or public debate on what happened	23.9	22.0	27.6	30.5	18.9	23.7	24.0	18.4	24.5	29.1
I can discuss it only with my close friends	18.6	17.0	20.2	15.5	20.9	18.0	19.2	19.2	17.3	18.7

Apart from the fact that most people will never forget what happened between 1992 and 1995, there is also a considerable number of people who are already prepared to deal with the past, albeit in different ways. Open discussion, for example, is favoured over talking to close friends.

Table 4: In my opinion, ICTY:

In %	Total	FBIH	RS	Male	Female	Bosniaks	Croats	Serbs
Has done a good job and justified its existence	23.3	24.8	20.1	25.0	21.7	24.0	31.9	18.8
Has not done a good job, but is necessary	36.8	44.1	25.6	43.5	30.4	46.4	22.2	29.8

The public's opinion of ICTY according to this poll differs noticeably between the two entities. In the FBiH, large numbers of people (almost 45 per cent of those questioned) have a positive attitude towards ICTY, while in the RS this percentage is much lower. However, it should be noted that the number of people who believe that it is necessary, even though it has not done a good job, is 36.8 per cent. There are many reasons that could account for this poor opinion of ICTY, such as the slowness of court's proceedings, lightness of sentencing, allegations of political bias, and the fact that indicted war criminals Radovan Karadzic, Ratko Mladic and Ante Gotovina were still at large at the time the polls were conducted. Gotovina was arrested in late 2005.

Table 5: What do you think of the new War Crimes Chamber of the Court of BiH?

In %	Total	FBIH	RS	Male	Female	Bosniaks	Croats	Serbs
It will speed up the processing of war crimes	23.5	25.8	19.6	29.4	17.8	26.1	22.6	21.7
It will allow the majority of suspects to be tried.	6.8	6.2	6.9	6.6	7.0	7.5	3.5	7.3
Lower level courts should be included in trying war crimes (municipal, cantonal, entity)	11.0	11.5	10.8	10.4	11.5	10.3	12.9	9.0
I don't think it will contribute to establishing responsibility for war crimes committed during the war in BiH	33.2	33.3	34.7	35.0	31.5	34.7	26.9	34.1

An overall positive trend emerges from these survey results on the War Crimes Chamber. This is particularly the case when compared to the results for overall levels of confidence in the BiH judicial system, which revealed that 47 per cent of the population had no confidence in either the laws or the judges. Nevertheless, people tend to doubt the WCC's potential contribution towards establishing the responsibility for war crimes, but at the same time acknowledged the need for such an institution to put war criminals on trial. Confidence might go up after the first trials have been completed and sentences meted out.

Table 6: A Truth and Reconciliation Commission is needed and should be set up:

In %	Total	FBIH	RS	Men	Female	Bosniaks	Croats	Serbs
	55.7	54.6	56.2	63.1	48.7	56.7	49.0	57.6

This result was especially illuminating. The survey showed that 55 per cent of people polled recognized the need and desirability of a truth and reconciliation commission and the differences between the entities is minimal. Note also that the percentage in favour is slightly higher in the RS.

Table 7: A Truth and Reconciliation Commission should be composed of:

In %	Total	FBIH	RS	Urban	Rural	Bosniaks	Croats	Serbs
Only local personnel	42.8	39.4	46.4	38.8	45.9	38.2	36.9	51.4
Both local and international personnel	40.0	43.5	36.1	45.0	40.7	43.6	43.5	33.3

While there are a host of details to be addressed in setting up a truth commission, one of the most difficult is the ethnic composition of such a body, specifically the presence of internationals. Most of those polled favour local composition

for the commission, particularly in the RS, and in rural rather than urban areas, although a decent percentage believe it should be mixed.

Table 8: The best way to preserve a historical record of events during the 1992–1995 war is:

In %	Total	FBiH	RS	Male	Female	Bosniaks	Croats	Serbs
Treat them in history textbooks	32.4	41.3	19.0	34.4	30.5	43.6	28.3	17.4
Not deal with them for the next twenty years to avoid stirring up memories, fears and hatred	26.6	19.6	37.5	28.4	24.8	19.2	19.2	39.4

The question then arises as to how to preserve a historical record of what happened and how. The results of this poll showed that most of the public support the preservation of a historical record of events, particularly in the FBiH. However, people seem to be divided over exactly how to do this, with over 30 per cent in the RS preferring to wait, while 32 per cent (mostly in the FBiH) came out in favour of textbooks.

Table 9: Tolerance between different ethnic groups in my area is:

In %	Total	FBiH	RS	Urban	Rural	Bosniak	Croat	Serb
Good or acceptable and no urgent steps are needed	71.4	68.3	76.1	77.5	66.7	71.7	60.9	74.0
There are no other ethnic groups in my area	13.3	14.3	12.0	5.3	19.2	13.8	14.7	13.5

The question on inter-ethnic tolerance provided particularly encouraging results, noting at the same time the number of people who are still living in mono-ethnic areas. More than 70 per cent said that the level of tolerance between members of different ethnic groups is good, or at least satisfactory. It would appear that the tolerance levels that prevailed in this region for centuries may yet be surviving, against all odds.

Conclusion

While the full results of the survey and the field mission will be published shortly, this brief summary highlights some key findings. Firstly, and not surprisingly, grievances are still huge. Thus, measures are needed to help build confidence in the state and its institutions, with rather more emphasis on confidence-building measures than has hitherto been the case.

The second message is that the vast majority of Bosnians demand solutions through criminal justice – amnesty is clearly not an option. Yet, taking a realistic look at the current situation, there remains the unpalatable fact that the justice

system will not be able to address the country's legacy of mass violence within the current generation.

The support shown in this survey for a truth and reconciliation commission was surprising, if not impressive. Yet at the same time, other parts of the survey showed that there is only the start of willingness to talk about the past. One can perhaps deduce that setting up a truth commission of any kind must be preceded by outreach, confidence-building and constituency-building measures across all sectors of society, if it is to be an effective method of seeking the truth as a basis for building a stable and reconciled society in BiH.

Another positive note is the existing level of inter-ethnic tolerance. As Gandhi once remarked, 'Intolerance is itself a form of violence and an obstacle to the growth of a true democratic spirit'. It is this tolerance that can be built upon as ways are sought to build up confidence towards facing and dealing with the past.

The post-war set-up, of course, has been in many ways a barrier to reconciliation – the constitution itself, the political divisions, and the voting rights and mechanisms. Although the Dayton Agreement served to end the war, it has subsequently exacerbated and underlined the perceived ethnic differences of the three constitutional peoples by obliging self-categorization.¹⁶ The other divisive post-war issue is education. Unless the children of Bosnia and Herzegovina learn together, grow up together and live together, the mutual understanding that once so characterized this country – and of which this country was so proud – will forever remain consigned to the history books.

Yet, if one were to draw an overall conclusion from this initial poll, it must surely be that for the people of Bosnia and Herzegovina, the time is now more propitious than ever to address the painful issue of dealing with the past.

The views and opinions presented in this paper reflect those of the authors and do not necessarily reflect the official position of the United Nations Development Programme (UNDP).

Endnotes

¹ In November 2005, the Investigation and Documentation Centre BiH revealed that, according to its research and findings, that figure is more realistically around 100,000. Full preliminary results are due out in March 2006.

² According to the International Commission on Missing Persons see: <<http://www.ic-mp.org/home.php>>.

³ Under the Dayton Agreement, Bosnia and Herzegovina was divided into two entities – the Muslim Croat Federation (FBiH) and Republika Srpska (RS) – and one district (Brčko).

⁴ The go-ahead was given on 21 November 2005.

⁵ See <<http://www.un.org/icty/>>.

⁶ <http://www.registarbih.gov.ba/index_e.asp>.

⁷ There are currently sixteen such rulings, including the incidents in Sarajevo, Glamoc, Prijedor, Foca and Visegrad.

⁸ This €450,000 project has been funded by the Norwegian government since early 2004. See <<http://www.idc.org.ba/news.html>>.

⁹ See <<http://www.ic-mp.org/home.php>>.

¹⁰ See <<http://www.un.org/Depts/dpko/missions/unmibh>>.

¹¹ For full information on the Office of the High Representative, see <www.ohr.int>.

¹² The RS Srebrenica Commission findings indicated that as many as 872 individuals are still working in public institutions. This is currently under investigation.

¹³ The full report 'Justice and Truth in BiH – Public Perceptions' can be accessed on <www.undp.ba>.

¹⁴ This term refers to the Bosnian Muslim sector of the population.

¹⁵ This internal UNDP document, completed in July 2005, examined transitional justice issues in BiH.

¹⁶ In Washington in November 2005, and following initial meetings facilitated by the US Institute for Peace, representatives of leading political parties signed an agreement to work towards constitutional amendments during the first half of 2006, prior to the General Elections in October 2006.