Memory, forgiveness and unfinished justice in the former Yugoslavia

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ABSTRACT
Drawing its examples from the case of the former Yugoslavia, the paper explores the difficult intersections of justice, memory and forgiveness where the present bears the traces of a violent past of inter-communal conflict and mass crimes. It specifically delves into the limits of institutional attempts to respond in a redemptory and permanent manner to the claims for justice in a political community scarred by such an excruciating past. It examines three judicial or semi-judicial manifestations of memory based on how they relate to the past(s) of the former Yugoslavia: a) the punishment of the perpetrators, b) the recognition of the crimes committed, and c) forgetfulness in the name of peace and progress. Promoting reconciliation, governments often qualify a plea for forgiving as the last recourse to the impasse of institutional justice. At this fragile moment, forgiveness presents itself as a remedy for the impossibilities of institutional justice, without however fully evading the dangers of political expedience or the Western metaphysics of a 'universal' (Christian) ethos. Discussing memory as a dimension of justice, the paper concludes that if this intricate bond remains unexamined, the possibility of forgiveness in the former Yugoslavia could hardly attain any political meaning or vigour.

KEYWORDS: forgiveness; collective memory; justice; ICTY, former Yugoslavia; Paul Ricoeur

> The alternative to forgiveness, but by no means its opposite, is punishment… It is therefore quite significant, a structural element in the realm of human affairs, that men are unable to forgive what they cannot punish and that they are unable to punish what has turned out to be unforgivable.
> —Hannah Arendt[1]

Introduction

All 161 indicted for serious humanitarian law violations committed in the former Yugoslavia during the 1991–2001 period have been arrested. On March 24, 2016, the International Criminal Tribunal for the Former Yugoslavia (ICTY) found Radovan Karadžić guilty for the majority of the counts in the indictment, sentencing him to forty years' imprisonment.[2] A week later, the Tribunal acquitted Vojislav Šešelj of all charges of the indictment, with a majority decision on eight counts and a unanimous decision on one count.[3] Two more key cases are currently at trial[4] and two more on appeal.[5] As the ICTY workings are coming to a close, the emphasis of criticism has been mostly centred on whether the institution establishes a victor's justice[6] or its judgments follow widely accepted legal criteria.[7] A critical reflection on the impact of its rulings on peace and reconciliation in the region hence becomes relevant to the extent that these rulings are perceived as just and fair,[8] or that cooperation with the ICTY would allow the states involved to reap the long-term benefits of membership in Euro-Atlantic institutions.[9] That the ICTY as any other institution of retributive justice is, and should be, only focused on justice presents itself as almost a truism, defended by the pragmatic legalism of eminent scholars, prosecutors, and journalists alike.[10] A closer look however at the long ancestry of the emergence of war crimes tribunals seriously challenges this thesis,[11] embedding this tradition in imperialist practices and their enduring role in shaping international relations.[12]

The present paper recognizes the political and legal significance of this critique. It points however toward a different direction of critical reflection that remains rather unexplored, extending its scope beyond the functions of the ICTY to the limits of any institutional attempt to respond in a redemptory

and permanent manner to the claims for justice unearthed by the memory of past sufferings. The temporal dimension that brings to the fore the intricate workings of the memory of violence and memory's own call for justice further complicates the prospect of peaceful coexistence and reconciliation between the once belligerent communities. This emphasis on the limits of institutions neither neglects the points already raised by the existing critique, nor serves as an apology for intrinsically unavoidable institutional failings. To the contrary, it suggests that if we accept that these institutional limits and failings persist even if we recognize the best of intentions to institutions (that is, even if we accept the legalist argument that such institutions serve the law and justice alone, free from any political or imperialistic expedience), then we may recognize that the question of justice is far more complex than what these institutions are ready or able to address.

Given the public reactions to its rulings so far, the ICTY has (rather expectedly) failed to fully respond to all rival claims for justice stressed by both the protagonists of the trials and the once belligerent communities.[13] More interestingly, it has further failed to fully remedy the memory of suffering even in those communities that have welcomed the role of the ICTY and its verdicts.[14] As in most cases of mass crimes, this inability is reinforced by a broadening of the sense of guilt. Beyond the individual accountability investigated and conferred upon in the process of a trial, guilt further encloses the collective responsibility of the members of the political community connected to certain criminal actions, as well as that of their descendants. The result is often either the reproduction of estrangement and enmity, when memory is preserved, or the implementation of a fragile coexistence, when forgetting is opted or imposed.

Once we realize the inevitable limits of institutional-judicial responses to the convoluted grains of memory patterns, there arise a number of practical questions heretofore neglected as policy irrelevant or distant from the pressing realities of post-conflict peace restoration and justice implementation: Is peaceful coexistence possible if the memory of past sufferings is preserved? Is it ever possible for forgiveness to acquire a certain political content and offer a viable alternative to the unfinished of institutional justice? How does forgiveness relate to memory or forgetting? Answering these questions meets both the difficult workings of memory and the challenges of forgiveness as a limit idea. Due to its implicit constituent of love,[15] forgiveness is often introduced as an antipolitical faculty or apolitical option. Nonetheless, forgiveness is not foreign to political practice. To the contrary, a closer look at the practices of states (even within the former Yugoslavia) reveals its persistence in political life.[16] Identifying forgiveness as an apolitical or antipolitical category implies less about the essence of forgiveness itself, than about the way we have come to understand politics.

Indeed our explorations into the faculty of forgiveness have been rather limited until the turn of the century.[17] Forgiveness now returns however as a political response to the unfinished of institutional justice, as a condition for peaceful coexistence and progress, as a process more esoteric and complex than state apology, yet still more politicized.[18] Of course, the traditional dangers of short-sightedness persist, namely those of an essentialist reading of politics based on the Western metaphysics of a 'universal' (Christian) ethos, or of the invocation of forgiveness as an ideological instrument or rhetorical device merely serving political expediency. Indeed, our excavations into the possibilities of politics may benefit from realizing the 'im-possibility' of forgiveness.[19] Forgiveness is located on the very edge of politics and the law; and there it meets with the difficulties of remembering and the unfinished of justice. From this vantage point we may rethink the possibilities and the limits of our juridico-political institutions of retribution and reconciliation. Of all the theoretical approaches to forgiveness this paper will mostly draw from Paul Ricoeur's hermeneutic phenomenology, where forgiveness is discussed within the context of history, memory, forgetting, and the limits of institutions of both retribution and reconciliation.

Memory and justice

In cases where the community is scarred by mass crimes and civil strife, such as Kosovo or BiH,[20] the option of forgetting a painful and irreversible past, along with the investment of all human energy in the construction of a new future appears to be the most effective remedy. Where the past condemns the present to implacability or alienation, the imperative to forget the past is often seen as the price to be paid for a better future. The above reasoning forces us to accept that the perseverant claim for justice relevant to the debt of remembering, even when the work of institutional justice is done, is but

an irrational and dangerous choice. We therefore remain puzzled or suspicious toward those who remain adherent to a violent past, sacrificing the prospect of a promising future. We are not merely baffled with the persistence of the open woods in the Yugoslav successor states. After all, the temporal span dividing the crimes of the past from their echoes in the present is not great enough to excuse such puzzlement. James Booth is right to note that we have come to treat the persistence of the memory of an evil past as 'negative, divisive and irrational precisely because these individuals and peoples have lost the use of their future-oriented compass.'[21] This problematic bias however becomes even more perplexing in cases like Kosovo,[22] where part of the population still sees the current political arrangements as unjust and accepts them only as short-lived, or in cases like BiH, where the once belligerent 'other' is made invisible and absent, although living next-doors.

Voiced in the midst of wilderness and revolution, modern political thought has been often calling for an irrevocable break with the past of suffering, loss and despair, as the price to be paid for the longevity of political community.[23] The memory of past sufferings has been thus traditionally seen as an obstacle to the restoration of order, a malignant process that rekindles the desire for revenge, instead of serving the pressing needs of the present. This modern call for collective amnesia in the name of peace, order, and progress should be read less as an alert against the 'trifling and fruitless or destructive'[24] remembrance of past wrongs, than as a reminder that justice could hardly be exhausted in the workings of its institutions; that justice is instead irrevocably connected to the workings of memory.

The form of justice addressed here is closer to the meaning of *Dikē* of the Greek tragic poets, who recognized memory as one of the faces of justice.[25] Interestingly enough, this call for justice is not exclusively expressed by the victims alone or by an abhorred humanity, but also stressed by those who are willing and able to speak in the name of this humanity. Indicative in this respect is President Clinton's constant plea to preserve the memory of the atrocities committed in BiH and Kosovo, aiming at legitimizing NATO's intervention as a manifestation of *Dikē*.[26] The savageness of the crimes committed demands, for Clinton, an international response: 'Ending this tragedy is a moral imperative.'[27] Remembering the former is a precondition for legitimizing the latter. In Clinton's rhetoric, military intervention appears as the international community's legitimate response to the claim for justice. This claim is accompanied by the formal plea of the head of a state to preserve the memory of an excruciating past as a debt to the deceased and as a sine qua non condition for mediating between estranged communities.

Similar pleas have been repeatedly echoed at the official level in the former Yugoslavia, in order to serve multiple and often conflicting purposes.[28] Although such pleas are expressed at the official level, the kind of justice they call for is not exhausted at the level of institutions. The necessity to preserve the memory of an evil past appears as the community's task beyond governmental or judicial dictates. This non-institutional justice is but a manifestation of the community's identity and historicity in the collective imaginary of its members. The community pays its debt to its dead and at the same time evokes the injustice that its members have endured. The persistence of the excruciating past in the collective memory of the community functions as a substitute to those institutional-judicial processes. When serving justice, memory becomes an integral part of the collective identity of the community.

This non-institutional claim for justice never escapes of course the power configurations and political arrangements in the respective community. It is either subsumed by or breaks with the institutional forms of memory management, thus reaffirming or questioning both the identity and the delineation of political community. The practice of raising memorials of victims or statues of heroes under the initiative of local communities is a typical example of this process. In the case of the former Yugoslavia, the perplexity of this practice reflected the complexity and the antagonism of ethnic identities. After Tito's death, historical revisionism gradually led to the questioning of the common national experience, outbidding interethnic enmity.[29]

Memory's call for justice however may be also expressed as a formal plea to collective forgetting. In such cases, the perseverance of the memory of evil is treated as an impotent adherence to the past, preventing the community to move ahead toward a future of peace, unity, brotherhood and (more recently) prosperity, progress, Europe, market economy, etc. Tito's regime, for example, had banned any discussion on the crimes committed by the ethnic communities of Serbs, Croats and Bosniaks against each other during World War II. An overall strategy of amnesia was adopted removing these

crimes from the collective Yugoslav memory in the name of brotherhood and national unity guaranteed by the great leader. Nevertheless, the final outcome was the transformation of personal testimonies of those crimes into popular myths that were later transmitted within every ethnic group from one generation to the other enriched by a certain ideological surplus value.[30] The above calls for remembering and forgetting are not necessarily expressed in a mutually exclusive manner. Often expressed in parallel, they conflict but also supplement each other. This is particularly evident in the former Yugoslavia where the unease relation between the calls for remembering and forgetting worked in parallel with regime change. On the one hand, the institutional implementation of justice aimed at closing the case and limiting the burden of remembering an excruciating past. On the other hand, the call for forgetting attempted to silence memory in the name of a peaceful future.

In the last section I will return to the importance of the unofficial, unbidden manifestations of memory. In the following three sections, I will examine three judicial or semi-judicial manifestations of memory based on how they relate to the past(s) of the former Yugoslavia: a) the punishment of the perpetrators (ICTY), b) the recognition of the crimes committed (truth commissions), and finally c) forgetfulness in the name of progress or political unity (amnesty). The first manifestation of memory concerns the judicial implementation of justice. The second one aims at neither prosecution nor punishment, but at disclosing the truth, recognizing and assuming responsibility for the sufferings inflicted upon the victims. Finally, amnesty will be discussed as a form of politico-judicial forgetting that aims at effacing an excruciating past from collective memory.

Judicial Retribution

In cases of traumatic political transitions the primary functions of retributive justice are a) to insure that the evil policies of the fallen regime will be punished, and b) to avert the danger of a counter-revolution that would attempt to restore the fallen regime. This penal procedure marks the rift between the new and the old regime allowing the former to better consolidate its power in the people's collective subconscious. Furthermore, retributive justice comes to avert and respond to the human passion of revenge.[31] During the last century, the claim for retributive justice in the face of mass crimes has been always grounded on the moral responsibility of preserving the memory of these crimes, the victims and the perpetrators. In that sense, retributive justice is always already 'retroactive'.[32] Its principal aim is neither to provide a therapy to the trauma, nor to legitimize the new regime, nor even to preserve the community's identity. Retributive justice has to be based on the law: nullum crimen nulla poena sine lege.[33] However, the Nuremberg trials have taught us that in cases of crimes against humanity retributive justice serves the rule of law in a broader sense, it primarily responds to the command of memory.[34] By prosecuting the perpetrators of mass crimes, the trial resists the forgetting of injustice and the impunity of the perpetrators.[35]

The punishment of the perpetrators may not restore the status quo ante of the victims, but it restores the order of justice. Nevertheless, the punishment of the perpetrators does not simply respond to an impersonal claim for justice, but also to the claim of the victims to be recognized.[36] In the case of human rights violations, retributive justice undoubtedly constitutes such a response. The form of the response however raises certain difficulties. When the victims are not alive to listen to the response of justice to all they have endured, how is the recipient of this response defined?[37] This understanding of justice as a form of debt to those who are no longer members of the political community is of particular theoretical interest.[38] It allows us to reconsider some dimensions of memory beyond the institutional level. The same moral dimension of memory underscores the unofficial, public or private, practices and spontaneous manifestations of memory.[39]

Moreover, the international experience has proven that in cases of mass crimes committed by a regime, retributive justice is often legitimized through a rhetoric not limited to the restoration of justice. Especially when the state goes through a phase of democratic transition, this legitimizing principle often resides in noting the preventive and didactic scope of the trial. This aiming to the future is thought to provide for a longer-lasting outcome.[40] The didactic scope of such trials and their contribution to the consolidation of the community's identity reside on the presumption that collective identity presupposes a collective memory.[41] The liberal literature insists that the harvest of the past in the workings of retributive justice allows societies to consolidate their identity after a period of trauma and disruption.[42] The courtroom becomes the stage of a drama of responsibility and guilt. This stage is

framed by the wider canvass of the political identity of the community that includes what has been lost and what needs to be restored. The question however remains compelling: If the perpetrators are responsible for what has been lost, who is to determine what needs to be restored?[43]

As mentioned above, retributive justice concerns in part the restoration of the status quo ante (i.e. the French Republic prior to Vichy in France; the Hellenic Republic prior to dictatorship in Greece). Evidently, what is to be remembered and restored is the status quo ante in its idealized form. What happens though when this idealization is impossible, as in the cases of BiH and Kosovo? In such cases, James Booth suggests that the community's compass for the future is traced in the memory of justice not as lived experience, but in its Platonic sense, as an ideal Form from which the community has deviated.[44] The trial then functions not only as a rupture with the past, but also as the community's first response to the call of justice to denounce this past.[45] In the aftermath of the Holocaust and the Nuremberg trials, Booth's suggestion seems, at first, applicable in the former Yugoslav republics, which are devoid of a liberal democratic memory. However, this point may prove to be equally obscuring, at least to the extent that it may even function as the ideological basis for legitimizing options with weak foundations in international law or state practice.[46]

The case of the ICTY is of special interest in this respect and pertains to notable characteristics compared to prior cases of retributive justice. Equally notable is the criticism it has received, focusing on its lack of jurisdiction and its having been illegally established by a political organ, the UN Security Council (rather than the General Assembly) acting on its Chapter VII powers. Distinguishing between the legality and the legitimacy of the ICTY in a seminal paper published post mortem, Judge Antonio Cassese sturdily defended both of these aspects. With respect to legitimacy in particular, Cassese interestingly notes that it encompasses not only 'the moral and psychological acceptance of [the ICTY] by its constituency [former Yugoslav republics]', but also its 'consistency … with values that, whether or not shared by [the ICTY's] constituency, are based on the values common to *the whole community* within which the institution lives and operates.'[47] Questioning the inclusiveness of this 'whole community', the extent to which these values are common, or *who* and *how* exceptionally[48] decides on the ethico-political content both of these values and of this 'whole community' sumps up the core of the critique to the role of the ICTY. The low level of acceptance and trust in the ICTY among the constituencies in BiH, Croatia and Serbia[49] manifests that the ICTY has to seek its legitimacy not only beyond the constituency of its jurisdiction but in a set of universals that define the contours of what Cassese hesitates to address as humanity or global community.[50] More interestingly for the purposes of our analysis, and given the public mistrust to the Tribunal in the region, its workings seem to aggravate the already existing tensions between the conflicting communities, rather than facilitate their reconciliation.[51] To the extent that reconciliation lies at the convergence of justice and peace (two of the Tribunal's fundamental goals according to its founding 1993 UNSC Resolution),[52] the above do not simply manifest the failure of ICTY as a retributive institution to turn negative peace (absence of conflict) into positive peace in BiH.[53] They attest to the fact that, against Cassese, this convergence is highly improbable if not premised on the moral and psychological acceptance of the ICTY by its constituency in the former Yugoslav republics.

Cassese's distinction between legality and legitimacy presents itself as an unmitigated legal defence of the scope and function of the institution. It remains embedded however in a wider, post-Kosovo discourse that aims to serve as a plausible reconciliation of legality and morality. If the 'illegal but legitimate' approach used to describe NATO's Kosovo intervention[54] remains ultimately an unsustainable position in international law,[55] the 'legal *and* legitimate' approach in defence of the ICTY remains equally, and rather paradoxically, problematic. The legal objections to the legality argument aside, this approach does not merely trace the basis of the institution's legitimacy in a terrain other than the one defined by its constituency, an exception already introduced with the Nuremberg trials. It reinforces a contemporary predicament and 'jargon of exception'[56] that presents itself as dictated by necessity or the horrors of the crimes committed, while granting 'little purchase on how these exceptions are in fact made, how they come to seem legitimate, [and] how those limits in turn generate identities, agencies, and institutions that work through practices of self-limitation, and transgression.'[57]

Apparently, a hasty grounding of the functions and role of the ICTY on an 'exception-as-the-rule' conceptual platform, such as the one introduced by Giorgio Agamben,[58] may prove misleading. In all those increasingly multiplied instances post 9.11 where exception has turned into the rule[59] (i.e.

refugee camps, counter-terrorism legislation and policies, humanitarian and other interventions not sanctioned by the UN etc.) the law is suspended in the name of a state of exception or emergency.[60] The ICTY however does not implement an anomie dictated by necessity. It draws from and implements international (humanitarian) law. What is politically worrying and legally unsettling here relates of course neither to the application of this positive law, nor to the appreciation of mass crimes as a matter of international concern escaping the confines of the domestic jurisdiction of states (art. 2 par. 7 UN Charter), nor even to the establishment and function of a competent institution of ad hoc retributive justice.[61] It is relevant instead to the conditions under which this application, this appreciation, and this competence came into existence in the first place; how connected (and indebted) they are to the practices of imperialism; how this process contributes to a specific appropriation of the concept of mankind and of its enemies whose crimes are now subject to a universal jurisdiction; and how the latter coexists with (and paradoxically reinforces) persistent policies of hegemonic exceptionalism and extraterritoriality.[62]

If the ICTY marks a state of exception, this is more relevant to its demarcating the contours of 'legitimate war-relating killing' and its producing 'a conceptual hierarchy along which individual deaths are arrayed and narrated as more or less meaningful'.[63] As Elizabeth Dauphinee notes, in the context of the war crimes trial there emerge two 'structurally identical' spaces of exception: the first is identified 'as having produced the victim in the first place (the political and sometimes legal logic that underpins the expulsion and extermination of a people and the atrocities associated with the politics that make possible the 'war crime').' The second 'emerges within the contours and logics of the trial itself, which excise the perpetrator from the realm of legal legitimacy and into a state of exception through the mechanism of judgment.'[64] Even more interestingly for the purposes of the present analysis, Dauphinee also recognizes (with Agamben and Jenny Edkins) that although a war crimes trial evidently serves judgment (rather than justice) and closure (rather than disclosure), the victims always resist this closure by narrating in any form available the traumatic experience to future generations. In that sense, I would add, the memory's call for justice overwhelms the judgment of the Tribunal by transmitting a narrative that eventually overbears the one established in the trial as true. Even more crucially, all those victims, perpetrators and experiences that have been absent from the Tribunal's judgment[65] and its spaces of exception, they may emphatically reclaim their presence in such future narratives.

The way the ICTY attempts to balance between the restoration of justice and its avertive/didactic expedience, between memory's call for justice and the consolidation of legitimacy for the future is of particular interest here.[66] As we saw above, when a democratic and lawful regime is absent from the community's past, the restorative narrative developed in the hearings of a trial traces its grounding not in the community's past, but in Justice itself. When the content of justice is not formed however through a process of platonic remembrance that springs from within the community itself, but is instead externally introduced or imposed then no institutional guarantees could remove the objections raised by the community that feels it has been unfairly treated by the process. Even when individuals are trialled on the ground of their individual responsibility, even when guilt is individuated, as in the case of the ICTY, the respective communities never stop considering each other as collectively responsible for all the sufferings they have endured. When democratic memory is absent, retributive justice normally functions as a process of community's rupture with its past. Nevertheless, in the case of the former Yugoslavia, the trial seems to reinforce the rupture between the respective communities.

Truth

Judicial retribution may mitigate the pain and temper the anger caused by suffering. Repentance may even soothe the wrath of justice. Revenge however is associated with judicial retribution in a paradoxical form. Whereas the latter seeks to vanquish the passion for revenge, in the minds of those who suffered it may be seen as serving the same ends with revenge (retribution and remembrance) but in a rational and institutional manner. It may seem that the claim to preserve the memory of evil, to remember the wrongs done and those who suffered them, is solely connected to retribution, from its more passionate to its more rational and institutional forms, from revenge to judicial retribution. However, the memory of evil is by definition connected to truth as well.[67] What counts as true for a community is what has already resisted the processes of forgetting. No justice is served if the truth is

not served in the first place. No court can reach a just verdict if the truth is not first disclosed. It is the work of justice to bring truth to light, to disclose the injustice made, the names of the victims and of the perpetrators and to preserve their memory alive. Therefore, forgetting does not only deviate from truth but also from justice.[68] As a corollary, a forgetful community does not only live in falsity, but also in injustice.

In the face of the unspeakable, humanity has uttered the promise to preserve this triptych of memory, truth and justice.[69] And yet, in many instances post-Auschwitz, the same humanity has tragically conflated the unspeakable of the horrors with the undeclared of the crimes. In such cases, historical revisionism of the Holocaust has come to function as hubris. Denying the truth of the mass crimes and of their victims is no different from erasing them from memory. They both sentence the victims to a second death.[70] Hence, justice is served not only though judicial retribution, but also through preserving the memory of both the crimes and the victims alive.[71] The manifestations of our abiding to this moral obligation to the dead are many, ranging from memory books and museums[72] to more institutional responses, such as in the workings of truth and reconciliation commissions.[73] Nevertheless, we still fail to fully comprehend the very bond that gives rise to this fidelity to the dead.[74] The customary conceptualization of our ethico-political obligations is based on the obligations we recognize toward those who live with us in the political life of an organized community. Even more, we fail to fully grasp the inherent dynamic of this obligation that plays a vital role in organizing our present and future actions.

Any reservation against the adequacy of truth commissions or similar strategies to fully cope alone with an excruciating past should come as no surprise. After all, truth commissions are formed to facilitate the disclosure of truth rather than the punishment of the perpetrators, while amnesty is offered to help secure integration in the community and encourage those guilty to confess their crimes.[75] Truth alone cannot function however as a substitute for judicial retribution and punishment. Irrespective of whether judicial retribution and the punishment of those guilty may truly function as a form of catharsis, it is still a fact that the form of justice called for by memory and that served by judicial retribution remain the two sides of the same coin. Therefore, when the strategy of truth commissions is followed alone, the community concedes to sacrifice retribution in the name of truth and reconciliation. This sacrifice explains the heavy ethical burden that such commissions bear, when judicial retribution is not opted as a parallel strategy.

In the former Yugoslavia however, where both strategies of judicial retribution and truth disclosure have been pursued, catharsis remains distant. The so far attempts at the governmental level to establish truth commissions have met limited or no success. At the non-governmental level the most notable initiative to establish a Regional Commission (RECOM) to determine and disclose the facts about the war crimes committed is gradually gaining regional governmental support. Establishing the facts however upsets the official historical narratives upon which current political elites draw their power.[76] The evocation of ethno-nationalist discourse by those elites (a powerful mobilization tool especially before elections) has not only resulted in the gradual elimination of ideological differences among political parties.[77] It has significantly favoured the prevalence of monological truths and incommunicable accounts of the past sufferings.

The true challenge remains how to set a truth finding mechanism that would remain credible in the whole former Yugoslav sway. This challenge is particularly evident in the case of BiH. Besides the elite strategies noted above, the application of the liberal principles and policies introduced with the Dayton Agreement has eventually proven to encourage rather than mediate the estrangement between the three constituent ethnicities, blocking the cultural exchange between them. The paradox is hard to pass unnoticed. The same liberal democratic principles that were followed in almost all institutional attempts to promote peaceful coexistence and democratization in the country, in order to avert the danger of the hegemonic prepotency of a dominant national identity, eventually came to encourage the adoption of policies of impotent protective isolationism by the respective ethnic communities. As long as there exist more than one estranged communities in the country, there will persist more than one truths.[78] Such a multiplicity of truths is not by itself an impediment to peaceful coexistence. The problem lies in its enclosing a number of conflicting truths which do not merely stand with their backs against each other. They present absolute, inhospitable, and mutually exclusive narratives, in which one own's hero is another one's murderer, and one's own moments of sorrow and loss are another one's moments of ethno-national grandeur.

Hence the paradox: Although truth commissions aim at truth disclosure, although war crimes tribunals presuppose this disclosure to reach a verdict, what is actually at stake is less the disclosure than the closure of truth, less serving justice than reaching a judgment.[79] Irrespective of whether truth commissions and retributive justice institutions serve the same or different forms of restorative justice,[80] they both relate to truth in a similar manner. As Edkins has aptly put it, '[i]n the case of the tribunal, whether a truth commission or a war crimes tribunal, what is sought is closure, either in the form of reconciliation between perpetrator and victim, or the conviction of those responsible for the crime… Both conviction and amnesty are judgments that establish what is to count as truth'.[81] The crux of the paradox lies exactly here: Although both truth commissions and war crimes tribunals are set to serve justice to the victims, their narrative accounts of what and how it is to be remembered are never free of omissions, exclusions and silences, thus reaffirming the conviction that they serve as brushstrokes on the victor's historical fresco. This is what we may call with Walter Benjamin a moment of barbarism,[82] a moment of violence anew. We may address it as narrative violence but it is no less excruciating than the violence of lived experience, and no less pregnant of the dangers of revisionism and revenge. In a nutshell, the crucial ethico-political challenge here is not limited to the disclosure of truth, but extends to our critical disposition toward its closure attempted at the level of institutions. Here we meet the challenges and difficulties of forgetting and forgiving.

Forgetting and Forgiving

Whereas mercy lessens or precludes punishment and is not strange to judicial proceedings,[83] forgiveness reverses both the order and the logic of retribution calling for a different relating of the victims with the perpetrators.[84] Whereas mercy is expressed through the institutions of justice, forgiveness concerns a clearly subjective process.[85] The intrinsically esoteric character of forgiveness raises some difficulties once we move to the social plane of analysis discussing similar options at the community or inter-communal level. The option of forgiveness first presupposes that the members of a community acknowledge that any event the community takes pride in, is indispensably connected to the suffering that the same event has caused to the members of another community. Suffering is always manifested twice, first as suffering caused and then as suffering endured. Forgiveness reverses this order of sequence. 'It is necessary this time to proceed from the suffering of others; imagining the suffering of others *before* re-examining one's own.'[86]

As Ricoeur has noted, it is impossible to contain forgiveness in the usual categories founded upon the principles of retribution and reciprocity. Based on 'the order of philanthropy' and falling within the scope of 'an economy of the gift', forgiveness 'exceeds the order of morality'. Forgiveness lifts 'the burden of guilt which paralyzes the relations between individuals who are acting out and suffering their own history. It does not abolish the debt insofar as we are and remain the inheritors of the past, but lifts the pain of the debt.'[87] This intrinsic difficulty of forgiveness reveals its remedial dynamism as 'a kind of healing of memory, the end of mourning', delivering memory 'from the weight of debt'.[88] It is a gift offered without one's waiting for anything in return (in lieu of a gift, *anti-doron*). As noted above, the element of forgiveness is often included in the practices of organized political communities, such as in the often made pleas for forgiveness or in the regulations and functions of a penal system (e.g. pardon). Just as pardon outreaches the law of the state, forgiveness outreaches morality. Forgiveness springs from an 'economy of the gift' that goes against the logic of retribution directing judicial justice.[89] The call for forgiveness does not necessarily entail a redesigning of politics and justice, but it may allow us to reconsider their recognized limits.[90]

It should be noted however that forgiveness is not simply a practice that could be easily or light-heartedly followed. The dangers lurking within the institutional expressions of forgiveness are two. The first danger concerns the very right to forgive. Recognizing the significance of the perpetrator's contrition does not imply one could rightfully expect to be forgiven. The only one that could rightfully forgive is the victim. Of course, as Ricoeur has nicely put it, 'there is a time for the unforgivable and a time for forgiveness.'[91] The second danger to be averted concerns the possible confusion between forgiving and forgetting, two categories that have to remain mutually exclusive. To forgive presupposes that one has *not* forgotten. The danger to be averted, according to Jankélévitch, is a 'forgetful forgiveness'.[92] To the contrary, as suggested above, forgiveness presupposes an unbroken

relation with the past through memory. This relation has to remain intact and active. In that sense, forgiveness is a 'form of therapy of memory, the end of mourning. [It] gives memory a future.'[93]

The strategy of collective forgetting has been often opted at the plane of institutions, especially when the burden of the past is so heavy that stands as an obstacle to peaceful coexistence or to the perseverance of the community itself. The intrinsic difficulties of forgiveness do not often leave any options to the community other than collective forgetfulness, especially when the preservation of memory may lead to nostalgia, sorrow and revenge.[94] In those cases, collective amnesia, commanded forgetting or manipulated memory (another version of forgetting) are premised as imperative strategies in order to limit the negative consequences of the trauma caused by the past suffering.[95] In contrast to forgiveness, forgetfulness promises to acquit us from the bondage of an afflictive memory.[96]

By virtue of its implicit rupture with the past, forgetting as a political or judicial option may function as a tool for pacification and reconciliation.[97] Forgetting appears as serving the fundamental political need of bringing conflict to an end, especially when the community has survived an excruciating political experience. Nations are not founded only on those things remembered, but also on those their members are willing to forget.[98] In that sense, the political option of collective amnesty should be seen less as a form of collective forgiving, than as a form of collective forgetting in the name of peace and prosperity.[99] As a juridico-political option, amnesty has been historically preferred especially when political unity was at stake.[100] Combining informal strategies of collective forgetting with certain reconciliatory elements, the scope of amnesia has proven to be much broader but equally important. To be precise, amnesia is hardly ever a memory vacuum. Instead of merely asking for certain painful memories to be deleted, it almost always involves the reconstruction of the past in ways that bridge the temporal gaps and allow the perseverance of the community.[101]

The combination of amnesty with amnesia may function of course as a strategy serving diverse ends, ranging from political unity to the impunity of the perpetrators or the distortion of the collective remembrance of the past. Never fully escaping the power configurations within the respective community, the combination of amnesty with amnesia may even come to serve the short-sighted expediencies of the elites controlling and orchestrating the ideological instruments of memory.[102] This should not lead us however to the conclusion that remembering and forgetting are mere arbitrary artefacts. As we have seen, memory's call for justice is a manifestation of our fidelity to the dead, to those who are no longer members of the community. Amnesty, to the contrary, redirects our ethical responsibility with respect to both memory and justice toward the present and the future of the community. When the community goes through a transition phase, as in the Yugoslav successor states, the promise for a new, better future often calls for a sacrifice of memory and justice in the altar of the practical value of the opted policies. In such cases, the rupture between the community's past and its future caused by amnesty is less the result of the community's avoidance to ethically and legally evaluate the wrongs of the past, than a compulsory retreat of the claim to remembrance and justice in the name of a future imperilled by the sterile adherence to the sufferings of the past and the repetition of violence.

The etymological relation between amnesty and amnesia may be self-evident, but these concepts are far from synonyms. Where amnesty has been opted as a strategy of coping with an excruciating past, it has been often distinguished from amnesia. During the transition of the post-communist countries in Central and Eastern Europe, for example, amnesty was presented as a non-retributive or non-revengeful option of liberal democracy. Hence the distinction in the workings of memory at the levels of the community and the law: whereas the law is asked to 'forget', the community has the right *and* the obligation to remember. 'Amnesty – yes; amnesia – no' has been the dominant maxim in this process.[103] This approach seems to echo the older pressing question set by the Holocaust legacy. Does this non-retributive strategy allow the society to fully overcome the evil past? Is justice truly served? In my view, this non-vengeful face of the new liberal democratic rule pertains to an impalpable form of cynicism. Whereas mercy is exhausted at the level of juridico-political institutions, celebrating the new ethos of liberal democracy, the memory of evil is preserved in society as a constant reminder of what needs to be avoided in the future but also as something that already belongs to the past as a museum exhibit.[104]

The former Yugoslav republics pertain to particular complexities with respect to how their legacies are represented in the successor states. The Yugoslav wars have further strengthened the implicit

difficulties at least to the extent that their coping with the past was intrinsically related to the legitimization of their existence as independent states. Paradoxically enough, and in contrast to what has been the case in other post-communist countries of Central and Eastern Europe, those difficulties concerned almost exclusively what preceded and followed the communist period of Tito's rule. The workings of the ICTY have allowed no room for even debating the possibility of amnesty in the former Yugoslavia. This has not silenced however the debates on remembering and forgetting.

Although amnesty has never been seriously considered as an alternative to retribution for the crimes committed during the Yugoslav wars, it offers an interesting opportunity for critically evaluating the workings of judicial retribution with respect to memory and justice. It has been suggested that amnesty and, in general, the remedy of past grievances may be an ideal option in cases of democratic transition or restoration.[105] In that sense, developing a sense of trust and tolerance is of fundamental importance to the consolidation of democracy, which may be threatened by policy options that insist on 'truth disclosure' and the legal prosecution of the perpetrators. Such policy options may almost unavoidably lead to a segregation of the people into groups of innocent victims and evil perpetrators. In their most pathological forms, they may eventually lead to the unhistorical victimization of one group with two significant political implications, already evident in the former Yugoslavia. On the one hand, this may reinforce social disintegration within the successor states, at least to the extent that those ethnically associated with the perpetrators will still bear the mark of guilt within a new political arrangement 'unfairly' imposed by the West. Admittedly, this possibility falls far beyond the inclusive scope that the new democratic rule is called to serve. On the other hand, this victimization process may favour post-conflict political arrangements that still remain ethnically divisive. A closer look at the postwar political arrangements implemented in the former Yugoslavia reflect the Western schematization and rationalization of the Yugoslav wars in terms other than those corresponding to their specificities, eventually allowing, intensifying and reproducing estrangement between the conflicting communities.[106]

These considerations bring forth the problem of the longevity of all those political arrangements, which albeit distant as options from amnesty, share similar promises and ask for similar sacrifices. For the people of those Yugoslav successor states which have not yet joined the European Union, for example, the dream of European accession, the promises of development, prosperity and progress may all suffice for now as powerful motivations to override the difficulties of inter-communal coexistence, to forget the pain caused by internal strives and overcome the 'Balkan' past. Nothing could guarantee however that all these compromises, arrangements or consents will make the Erinyes sleep forever. Especially when the promise for the future turns into everyday reality, fully disclosing its difficulties or impasses, then the future generations could be hardly convinced that the price was worth-paid by their predecessors. The price of forgetting is heavy and never prepaid in full.

Conclusion: The Limits of Institutions

This paper discussed the limits of the juridico-political institutions in their responding to memory's call for justice with an emphasis in the former Yugoslavia, by examining the relation between memory and justice within the scope of three different categories: judicial retribution and punishment, truth disclosure, amnesia and amnesty. It remains a fact that even when justice is institutionally served through judicial retribution and the punishment of the perpetrators, even when such institutional processes complete their work, a sense of the unaccomplished of justice may persist.[107] In all those cases, the debt of memory is persistently manifested in parallel or even after the work of judicial retribution is over.[108] Beyond the legal particularities or procedural difficulties, this incompleteness is relevant both to the way we conceptualize guilt,[109] and to the irrevocability of court decisions. The trials of the perpetrators of mass crimes must inescapably look to individual accountability.[110] For example, the ICTY has to identify guilt only to those held to be the direct authors of the crimes, thus averting the danger of holding accountable the whole community that collaborated with or supported the regime that ordered those crimes or even silently acquiesced to their perpetration.[111]

Nevertheless, what constitutes a manifestation of our legal civilization is often incapable of fully satisfying memory's claim for justice. When memory calls for justice, it often demands the recognition of a responsibility that includes (but also reaches beyond) individual accountability. It demands that the members of the political community recognize a form of co-responsibility, even if

they are *not* legally accountable. Evidently, this implies neither holding a whole people accountable, nor its incrimination. To the contrary, it implies that when memory calls for justice it calls for a sense of shame (*onēdos*) that springs not from (co-)responsibility but from belongingness to a community that was even indirectly associated with the perpetration of mass crimes.[112] Memory as shame responds to the claim of memory for justice surpassing guilt and legal accountability.

In that sense, the incompleteness we addressed above depends less on whether judicial retribution has completed its work by bringing to trial all those alleged to be the direct authors of mass crimes, than on the limited capacity of institutional justice to fully remedy the traumas in the community's memory of an excruciating past. Irrespective of the measure of success of the ICTY in its retributive objective, peaceful coexistence will not be cemented and estrangement between the once belligerent communities will not be fully mediated, before the memory's claim for justice of a single community offers hospitality to the memories of the other communities and their own justice claims. This narrative hospitality precedes the possibility of forgiveness at the inter-communal level.[113]

Moreover, the truth revealed in the courtroom of a trial could not be compared to the one that truth and reconciliation commissions aim to expose. This may be partly explained by the difference between the objective representation of the past attempted during a trial and the memory of a witness or of the victim imbibed by the passion of revenge and/or the emotional content of a trauma.[114] In any case, the truth of memory, the truth of witnessing is distant from the truth of the law and of history,[115] at least to the extent that the former does not aim at the attribution of guilt or at the investigation of a crime, but foremost at the re-accession of the victims into the narrative identity and collective memory of the community. The question is less the (historical) explanation or the (legal) definition of responsibility, than the restoration of the unity of a fragmented community.

The international experience has so far proven that judicial or semi-judicial retribution does not succeed in permanently healing the woods of an excruciating past, definitely closing the circle of violence or fully satisfying memory's claim for justice. The former Yugoslav republics have not escaped this rule. As we have seen, memory's call for justice is expressed in numerous ways. In the context of the law, it may be expressed as retribution and punishment, as truth disclosure and witnessing, or as collective amnesia. Those manifestations dictated by different but complementary needs: to pay the moral debt to the victims by punishing the perpetrators, to preserve justice, to save the victims from the second death of oblivion, to allow the goods of the future to prevail over the sufferings of the past. All those manifestations reveal a kinship between memory and justice. At the same time, though, they evince the limits of the institutions that express them.

Memory's claim for justice demands more than a tribunal or a truth commission can deliver. Freed from the necessity to define and identify individual guilt, the justice called for by memory could not be simply satisfied by the punishment of the perpetrators. Whereas judicial retribution aims to irreversibly close the cases of a painful past, to disassociate the past from the present and future, memory's claim for justice denies the filing of the past. To the contrary, it aims at drawing up the past and preserving it in the present, in order to fulfil the moral debt to the dead and reaffirm the permanent relation that connects us with them. As we have seen, three are the faces of the justice called for by memory, which revel the limits of our institutions: a) the claim to recognize a wider co-responsibility that lasts in time and is transmitted to the future generations as shame, b) the claim to disassociate the crime from the face of the direct authors of the crimes, so that the crime will be constantly condemned even after the end of the trial, c) the elevation of the justice called for by memory to a central ingredient of the identity and the longevity of a community.

My analysis started with the claim that the form of justice demanded by memory first presupposes averting the danger of forgetting the past crimes and their victims. The paper suggested that memory's call for justice dictates, but also surpasses a series of institutional practices of judicature, disclosing their imperfect and fragmentary scope. The strong bond of memory with justice was not discussed as an obsession or as a syndrome, but as one of the faces of justice itself, which in its ideal form exceeds the limits of institutions, aiming at preserving the memory of the perpetrators, their crimes and their victims alive. If this bond remains unexamined, the possibility of forgiveness between the once belligerent communities of the former Yugoslavia could hardly attain any political meaning or vigour.

Disclosure statement
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Notes

[1] Hannah Arendt, *The Human Condition*, Chicago University Press, Chicago, IL, 1998, p. 241.
[2] Karadžić (IT–95–5/18). Parties have the right to appeal the judgment.
[3] Šešelj (IT–03–67). Parties have the right to appeal the judgment.
[4] a) Hadžić (IT–04–75). The trial has been adjourned since 20 October 2014 for reasons related to Hadžić's health; b) Mladić (IT–09–92). The trial judgment is expected in November 2017.
[5] a) Prlić *et al.* (IT–04–74). The appeal judgment is expected in November 2017; b) Stanišić & Župljanin (IT–08–91) 'Bosnia and Herzegovina'. The appeal judgment expected in June 2016.
[6] See, for example, B. Wringe, 'Why punish war crimes? Victor's justice and expressive justifications of punishment', *Law and Philosophy*, 25(2), 2006, pp. 159–191; V.M. Creta, 'The search for justice in the former Yugoslavia and beyond: analysing the rights of the accused under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia', *Houston Journal of International Law*, 20(2), 1998, pp. 381–418; R.M. Hayden, 'Biased "justice": humanrightsism and the International Criminal Tribunal for the Former Yugoslavia', *Cleveland State Law Review*, 47(4), 1999, pp. 549–573; S.T. Johnson, 'On the road to disaster: the rights of the accused and the International Criminal Tribunal for the Former Yugoslavia', *International Legal Perspectives*, 10(1), 1998, pp. 111–192; A. Jokic (ed.), *War Crimes and Collective Wrongdoing: A Reader*, Blackwell, Malden, MA, 2001.
[7] See, for example, P. Akhavan, 'Beyond impunity: can international criminal justice prevent future atrocities?' *American Journal of International Law*, 95(1), 2001, pp. 7–31; J. Meernik and K. King, 'The effectiveness of international law and the ICTY: preliminary results of an empirical study', *International Criminal Law Review*, 1(3), 2002, pp. 343–372; Steven R. Ratner, Jason S. Abrams and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press, Oxford, 2001.
[8] Michael P. Scharf, *Balkan Justice: The Story behind the First International War Crimes Trial since Nuremberg*, Carolina Academic Press, Durham, NC, 1997, p. 215.
[9] R. Kerr, 'Peace through justice? The International Criminal Tribunal for the Former Yugoslavia', *Southeast European and Black Sea Studies*, 7(3), 2007, pp. 373–385.
[10] See, for example, J. Meernik, 'Victor's justice or the law? Judging and punishing at the International Criminal Tribunal for the Former Yugoslavia', *Journal of Conflict Resolution*, 47(2), 2003, pp. 140–162; Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, NJ, 2000; Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, New Press, New York, 2006; John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, University of Chicago Press, Chicago, IL, 2003; R. Goldstone, 'The United Nations' war crimes tribunals: an assessment', *Connecticut Journal of International Law*, 12(2), 1997, pp. 227–240; Pierre Hazan, *Justice in a Time of War: The True Story behind the International Criminal Tribunal for the Former Yugoslavia*, Texas A&M University Press, College Station, TX, 2004.
[11] Charles Anthony Smith, *The Rise and Fall of War Crimes Trials: From Charles I to Bush II*, Cambridge University Press, Cambridge, 2014.
[12] J. Graubart and L. Varadarajan, 'Taking Milosevic seriously: imperialism, law, and the politics of global justice', *International Relations*, 27(4), 2013, pp. 439–460.
[13] 'Student dorm named after war crimes suspect Radovan Karadžić', *The Guardian*, 21 March 2016.
[14] '"Is the Tribunal not ashamed?" Karadžić sentence angers victims', *The Guardian*, 24 March 2016. See further on the matter, J. Meernik, 'Justice and peace? How the International Criminal Tribunal affects societal peace in Bosnia', *Journal of Peace Research*, 42(3), 2005, pp. 271–289.
[15] See Arendt, *The Human Condition*, op. cit., p. 242; P. Ricoeur, 'Love and justice', in R. Kearney (ed.), *Paul Ricoeur: The Hermeneutics of Action*, Sage, London, 1996, pp. 23–39; Glen Pettigrove, *Forgiveness and Love*, Oxford University Press, Oxford, 2012.
[16] See, for example, D.W. Shriver, Jr., 'Is there forgiveness in politics? Germany, Vietnam, and America', in R.D. Enright and J. North (eds), *Exploring Forgiveness*, University of Wisconsin Press, Madison, WI, 1998, pp. 131–149.
[17] Some of the most notable reflections (beyond religion or psychology) include Joram Graf Haber, *Forgiveness: A Philosophical Study*, Rowman & Littlefield, Savage, MD, 1991; Donald W. Shriver, Jr., *An Ethic for Enemies: Forgiveness in Politics*, Oxford University Press, Oxford, 1995.
[18] See, for example, Peter E. Digeser, *Political Forgiveness*, Cornell University Press, Ithaca, NY, 2001; Charles L. Griswold, *Forgiveness: A Philosophical Exploration*, Cambridge University Press, New York, 2007; Jeffrey

K. Olick, *The Politics of Regret: On Collective Memory and Historical Responsibility*, Routledge, New York, 2007; Julie McGonegal, *Imagining Justice: The Politics of Postcolonial Forgiveness and Reconciliation*, McGill-Queen's Press, Ithaca, NY, 2009; David Konstan, *Before Forgiveness: The Origins of a Moral Idea*, Cambridge University Press, Cambridge, 2010; Jill Scott, *A Poetics of Forgiveness: Cultural Responses to Loss and Wrongdoing*, Palgrave Macmillan, London, 2010; Margaret R. Holmgren, *Forgiveness and Retribution: Responding to Wrongdoing*, Cambridge University Press, Cambridge, 2012; Michael Ure and Mervyn Frost (eds), *The Politics of Compassion*, Routledge, New York, 2014.

[19] See Hannah Arendt, *The Origins of Totalitarianism*, Harcourt Brace Jovanovich, New York, 1973, p. 459. See also Jacques Derrida, *On Cosmopolitanism and Forgiveness*, Routledge, London, 2001.

[20] Characterizing the Bosnian War as a civil war does not imply here a 'moral levelling'. D. Campbell, 'Metabosnia: narratives of the Bosnian War', *Review of International Studies*, 24(2), 1998, pp. 261–281. See on the matter Sumantra Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention*, Oxford University Press, Oxford, 2002, p. 21; Steven L. Burg and Paul S. Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention*, M.E. Sharpe, Armonk, NY, 2000, pp. 169–191; Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Stanford University Press, Stanford, CA, 2012.

[21] J.W. Booth, 'The unforgotten: memories of justice', *American Political Science Review*, 95(4), 2001, p. 777.

[22] See L. Burema, 'Reconciliation in Kosovo: a few steps taken, a long road ahead', *Journal of Ethnopolitics and Minority Issues in Europe*, 11(4), 2012, pp. 7–27.

[23] Thomas Paine, *Rights of Man*, Pelican, Harmondsworth, 1969, p. 64; F. Bacon, 'Of revenge', in *Francis Bacon: The Major Works*, Oxford University Press, Oxford, 2008, p. 347.

[24] Booth, op. cit., p. 777.

[25] Nicole Loraux, *The Divided City: On Memory and Forgetting in Ancient Athens*, Zone Books, New York, 2002, pp. 103, 217–248; Michèle Simondon, *La mémoire et l'oubli dans la pensée grecque jusqu'à la fin du Ve siècle avant J.-C. : psychologie archaïque, mythes et doctrines*, Belles Lettres, Paris, 1982, p. 224; J.P. Euben, 'Justice and the *Oresteia*', *American Political Science Review*, 76(1), 1982, pp. 22–33.

[26] See E.N. Ben-Porath, 'Rhetoric of atrocities: the place of horrific human rights abuses in presidential persuasion efforts', *Presidential Studies Quarterly*, 37(2), 2007, pp. 181–202.

[27] President W.J. Clinton, 'Address to the nation on airstrikes against Serbian targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 24 March 1999', in *Public Papers of the Presidents of the United States, William J. Clinton, 1999*, Book I, US Government Printing Office, Washington, DC, 2000, p. 451.

[28] In 2004, for example, then Serbian President Boris Tadić officially expressed an apology on behalf of Serbia in Sarajevo. Two years later, then Croatian President Stjepan Mesić returned an apology to Serbians. In the same year, Svetozar Marović, then President of the State Union of Serbia and Montenegro, apologized to Bosnians and Croatians during his visit to Srebrenica. In 2007, Tadić publicly expressed his apologies on behalf of the Serbian people during his visit to Croatia. In 2013, Serbian President Tomislav Nikolić apologized for all 'crimes' committed by Serbs during the break-up of Yugoslavia, including Srebrenica, without however describing those 'crimes' as genocide. The perplexities of this practice extent beyond the incomplete of what is asked to be forgiven. In the early 1990s, an intensive practice of intra-ethnic forgiveness and reconciliation empowered by the Kanun was called to serve, for example, the struggle for an Albanian national state in Kosovo. See Denisa Kostovicova, *Kosovo: The Politics of Identity and Space*, Routledge, London, 2005, p. 117. Typical is also the plea made by Agim Çeku, then Prime Minister of Kosovo and former chief of the Kosovo Liberation Army (KLA). For Çeku, the Albanian community bears the imperative not to forget the vicious crimes committed by the Serbs during the war. When asked about the possibility of forgiveness in the process of inter-communal reconciliation, Çeku responded repeating Clinton's plea: 'Yes, of course. Not to forget, but to forgive, yes. We have to do this.' A. Angyal, 'Çeku: not to forget, but to forgive', *FigyelőNet*, 4 October 2007. See also Melissa Nobles, *The Politics of Official Apologies*, Cambridge University Press, New York, 2008; Jennifer M. Lind, *Sorry States: Apologies in International Politics*, Cornell University Press, Ithaca, NY, 2008.

[29] This antagonism of memory representations reflected conflicting claims to justice. See Perica Vjekoslav, *Balkan Idols, Religion and Nationalism in Yugoslav States*, Oxford University Press, Oxford, 2004.

[30] The case of the infamous WWII concentration camp of Jasenovac in Croatia aptly serves as a typical example. See P. Kolstø, 'Forthcoming. The Serbian-Croatian controversy over Jasenovac', in S.P. Ramet and O. Listhaug (eds), *Serbia and Serbs in World War Two*, Palgrave Macmillan, New York, 2011, pp. 225–246.

[31] S. Holmes, 'The end of decommunization', *East European Constitutional Review*, 3(3–4), 1994, pp. 33–36.

[32] Carlos Santiago Nino, *Radical Evil on Trial*, Yale University Press, New Haven, CT, 1996, p. 33ff.

[33] Lawrence Weschler, *A Miracle, a Universe: Settling Accounts with Torturers*, Pantheon Books, New York, 1990, p. 244.

[34] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, Boston, MA, 1998, p. 25.

[35] Vladimir Jankélévitch, *Forgiveness*, University of Chicago Press, Chicago, IL, 2005, p. 52; Vladimir Jankélévitch, *L'imprescriptible : pardonner? Duns l'honneur et la dignité*, Seuil, Paris, 1986, p. 26.
[36] Bernard Williams, *Shame and Necessity*, University of California Press, Berkeley, CA, 1993, p. 70.
[37] Bruce A. Ackerman, *The Future of Liberal Revolution*, Yale University Press, New Haven, CT, 1992, pp. 3, 89ff; J. Elster, 'Coming to terms with the past: a framework for the study of justice in the transition to democracy', *European Journal of Sociology*, 39(1), 1998, pp. 23–27.
[38] A. Neier, J. Zalaquett and A. Michnik, 'Why deal with the past?' in A. Boraine, J. Levy and R. Scheffer (eds), *Dealing with the Past: Truth and Reconciliation in South Africa*, IDASA, Cape Town, 1994, p. 3.
[39] Judith Shklar, *The Faces of Injustice*, Yale University Press, New Haven, CT, 1990, pp. 94–96; Robert Parker, *Miasma: Pollution and Purification in Early Greek Religion*, Clarendon Press, Oxford, 1983, p. 107.
[40] R. Alfonsín, '"Never again" in Argentina', *Journal of Democracy*, 4(1), 1993, p. 16.
[41] Mark Osiel, *Mass Atrocity, Collective Memory, and the Law*, Transaction Publishers, New Brunswick, NJ, 1997, p. 6.
[42] J. Waldron, 'Superseding historic injustice', *Ethics*, 103(1), 1992, pp. 5–6.
[43] The ICTY officers often expressed their convictions that the Tribunal was repeating the historical moments of Nuremberg. See Hagan, *Justice in the Balkans*, op. cit., p. 18. See also Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, Yale University Press, New Haven, CT, 2000.
[44] Booth, op. cit., p. 780.
[45] A similar symbolic process is followed during the revolutionary institution of a community. See Jacques Le Goff, *History and Memory*, Columbia University Press, New York, 1992, p. 9; Hannah Arendt, *On Revolution*, Penguin, New York, 2006, pp. 196–197, 207–208.
[46] See J. Summers (ed.), *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights*, Martinus Nijhoff, Leiden, 2011.
[47] A. Cassese, 'The legitimacy of International Criminal Tribunals and the current prospects of international criminal justice', *Leiden Journal of International Law*, 25(2), 2012, p. 492 (emphasis in original).
[48] These two questions, of who and how exceptionally decides, address two connected yet distinct conceptions of exceptionalism. The former (*who* decides) builds mainly on Carl Schmitt, whereas the latter (mostly focusing on *how* this exceptional decision is made) draws mostly from Giorgio Agamben. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, MIT Press, London, 1985; Giorgio Agamben, *The State of Exception*, University of Chicago Press, Chicago, IL, 2005. On the differences between these two exceptionalisms, see J. Huysmans, 'The jargon of exception: on Schmitt, Agamben and the absence of political society', *International Political Sociology*, 2(2), 2008, pp. 165–183.
[49] Sanja Kutnjak Ivković and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts*, Oxford University Press, Oxford, 2011, p. 22.
[50] The claims to such universals 'cannot be understood solely through an analysis of external political forces, but must be combined with attention to how these are refracted through internal organizational change within international institutions.' J. Hagan, R. Levi and G. Ferrales, 'Swaying the hand of justice: the internal and external dynamics of regime change at the International Criminal Tribunal for the Former Yugoslavia', *Law & Social Inquiry*, 31(3), 2006, p. 585. See here Pierre Bourdieu and Loïc Wacquant, *An Invitation to Reflexive Sociology*, University of Chicago Press, Chicago, IL, 1992.
[51] See, for example, Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*, Springer, New York, 2003, pp. 166–184.
[52] J. Meernik and J.R. Guerrero, 'Can international criminal justice advance ethnic reconciliation? The ICTY and ethnic relations in Bosnia-Herzegovina', *Southeast European and Black Sea Studies*, 14(3), 2014, pp. 383–407.
[53] J.N. Clark, 'From negative to positive peace: the case of Bosnia and Hercegovina', *Journal of Human Rights*, 8(4), 2009, pp. 360–384.
[54] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, Oxford University Press, Oxford, 2000, p. 4.
[55] A. Roberts, 'Legality vs. legitimacy: can uses of force be illegal but justified?', in P. Alston and E. Macdonald (eds), *Human Rights, Intervention, and the Use of Force*, Oxford University Press, Oxford, 2008, pp. 179–214.
[56] Huysmans, op. cit., pp. 180–181.
[57] R.B.J. Walker, 'Lines of insecurity: international, imperial, exceptional', *Security Dialogue*, 37(1), 2006, pp. 78–79.
[58] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford University Press, Stanford, CA, 1998.
[59] See S.B. Sahin, 'How exception became the norm: normalizing intervention as an exercise in risk management in Kosovo', *Journal of Balkan and Near Eastern Studies*, 15(1), 2013, pp. 17–36.
[60] Agamben, *The State of Exception*, op. cit.

[61] See C.C. Joyner, 'Arresting impunity: the case for universal jurisdiction in bringing war criminals to accountability', *Law and Contemporary Problems*, 59(4), 1996, pp. 153–172; A. Addis, 'Imagining the international community: the constitutive dimension of universal jurisdiction', *Human Rights Quarterly*, 31(1), 2009, pp. 129–162.
[62] See R.E. Brooks, 'The new imperialism: violence, norms, and the "rule of law"', *Michigan Law Review*, 101(7), 2003, pp. 2275–2340; N. Chazal, 'Beyond borders? The International Criminal Court and the geopolitics of international criminal justice', *Griffith Law Review*, 22(3), 2013, pp. 707–728; R.E. Lopez, 'The judicial expansion of American exceptionalism', *Duke Forum for Law & Social Change*, 6(1), 2014, pp. 1–29.
[63] E. Dauphinee, 'War crimes and the ruin of law', *Millennium – Journal of International Studies*, 37(1), 2008, p. 51.
[64] Ibid., pp. 56, 57.
[65] See J.M. Selimovic, 'Challenges of postconflict coexistence: narrating truth and justice in a Bosnian town', *Political Psychology*, 36(2), 2015, pp. 231–242.
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[67] According to Nicole Loraux's reminder of the self-evident, for the Ancients, truth (*alētheia*) was the opposite of forgetfulness (*lēthē*) and hence a synonym to non-forgetting (*a-lētheia* = non-forgetting). N. Loraux, « De l'amnistie et de son contraire », in Yosef H. Yerushalmi, et al., *Usages de l'oubli*, Seuil, Paris, 1988, p. 37.
[68] Y.H. Yerushalmi, « Réflexions sur l'oubli », in ibid., p. 20. See also Marcel Detienne, *The Masters of Truth in Archaic Greece*, Zone Books, New York, 1999, pp. 32, 41–48; S. Drakulić, 'Truth is justice for Srebrenica', *Guardian*, 10 June 2010.
[69] See, for example, Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, Yale University Press, New Haven, CT, 2001; Dominick LaCapra, *History and Memory after Auschwitz*, Cornell University Press, Ithaca, NY, 1998.
[70] Simondon, op. cit., p. 124.
[71] Jorge Semprun, *Mal et modernité : le travail de l'histoire*, Climats, Paris, 1995, p. 91; Nicole Lapierre, *Le silence de la mémoire : à la recherche des juifs de Plock*, Plon, Paris, 1989, p. 10.
[72] See, for example, D. Sito-Susic, 'Bosnia revives landmark museum of ethnic treasures', *Reuters*, 15 September 2015.
[73] L. Huyse, 'Justice after transition: on the choices successor elites make in dealing with the past', *Law and Social Inquiry*, 20(1), 1995, pp. 52–53.
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[75] Wole Soyinka, *The Burden of Memory, the Muse of Forgiveness*, Oxford University Press, New York, 1999, p. 13; A. Holiday, 'Forgiving and forgetting: the truth and reconciliation commission', in S. Nutall and C. Coetzee (eds), *Negotiating the Past: The Making of Memory in South Africa*, Oxford University Press, Cape Town, 1998, p. 47.
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[88] Paul Ricoeur, *The Just*, University of Chicago Press, Chicago, IL, 2000, p. 144.
[89] See B.P. Daunhauer, 'Ricoeur and the tasks of citizenship', in J. Wall, W. Schweiker and W.D. Hall (eds), *Paul Ricoeur and Contemporary Moral Thought*, Routledge, New York, 2002, pp. 233–250; Bernard P. Daunhauer, *Paul Ricoeur: The Promise and Risk of Politics*, Rowman and Littlefield, Lanham, 1998, pp. 264–265.
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