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Despina Syrri

Visiting Fellow
Centre for Holocaust and Genocide Studies
Amsterdam

On Dealing with the Past, Transitional Justice and Archives

> *The archive: if we want to know what this will have meant,*
> *we will only know tomorrow. Perhaps.*
> Derrida, *Mal d' Archive*[1]

Abstract: This paper aims to explore initiatives in dealing with the past in South East Europe, particularly with regard to archives, and to reflect on discussions about the documentation of atrocities and sufferings and the shift from war to peace, ongoing in the Balkan countries affected by the 1991–1999 wars while the countries are still struggling to find the best way(s) to deal with the past and its consequences. Transitional justice may be framed as opening up different approaches to create collective memories, to share and to transfer these through time-space. New technologies used in archiving are assumed to open new avenues to democratization and accountability, in communication and free circulation of information, and to create a much broader negotiating process, with significant opportunities for the preservation of memory(ies), documentation and contestation — a far more multi-sited, multi-scalar and multi-level board where novel alliances, formations and mediations might arise. One particular case is that of the digitization and public accessibility of the tribunals' archives, which are supposed to constitute an important legal and cultural heritage that belongs to the world community, as well as to the states and the citizens involved. The information contained in these archives is expected to be made available for new forms of use, such as scientific research and investigation by/for surviving relatives, while respecting different legal constraints. The archives would also serve the advancement of the international justice system by explaining the workings of the tribunals to the general public. Consequently the important question that arises is the ownership of these archives. The reciprocal "production" and "consumption" (shaping) of the colonial narrative of history and identity entail that the former colonizers and colonized are a community of records, sharing a common archival heritage. Therefore, what in Western archival practice is called the subject of the record has to be reconsidered as a full partner in the record-creating process, as a co-creator of the record. These archives thus seem to constitute a "joint heritage" shared by a number of "communities of records", contributing to the possible formation of new identities and politics.

Keywords: South-East Europe, transitional justice, archives, record-creating process, community of records, collective memories, colonizers/colonized

Transitional justice may be framed as opening up different ways to create collective memories, to share and to transfer these through time-space. In different locations (physical and virtual) people have recently developed various practices to enact, translate and resist communities' memories. This

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[1] J. Derrida, *Mal d'Archive, Une Impression Freudienne* (Paris: Galilee, 1995), http://www.hydra.umn.edu/derrida/arch.htmi, Peter Krapp 1995.

paper aims to examine initiatives in dealing with the past in South-East Europe, particularly in the case of archives. In the countries of the Balkans most affected by the 1991–1999 wars discussions have been ongoing about the documentation of the wars, as countries are still struggling to find the best way(s) to deal with the past and its consequences, and to rebuild intra-society trust and good neighbourly relations.

New technologies used in archiving are assumed to open new avenues for democratization and accountability, in communication and free circulation of information, and to create a far larger negotiating process, with significant opportunities for the preservation of memory(ies), documentation and contestation — a far more multi-sited, multi-scalar and multi-level board where novel alliances, formations and mediations might arise. The concept of (global) commons, or global public goods, is of central importance to the development of the information society. In terms of the three-part definition of the International Task Force on Global Public Goods, commons are public goods which are deemed important to the international community; they cannot, or will not, be adequately addressed by individual countries; and are thus best addressed multilaterally and collectively. In the light of this definition the demise of the traditional dichotomy of private participation and public control becomes nowhere more apparent than with regards to society in the information age. Yet, while the natural and social dimensions of commons have been pointed out, the informational dimension of commons is yet to become a topic of intensive international discourse.[2]

One particular case is that of tribunals' archives, which are supposed to constitute an important legal and cultural inheritance that belongs to the world community, and must therefore be secured for future generations. While respecting different legal constraints, the information contained in these archives is expected to be made available for new forms of use, such as scientific research and investigation by/for surviving relatives. Furthermore, the archives would serve to explain the workings of the tribunals to the general public, and consequently the advancement of the international justice system. Their digitization and public access has been widely discussed. The next important question that arises is who owns these archives. What in Western archival practice is called the subject of the record has to be reconsidered as a full partner in the record-creating process, as a co-creator of the record. The reciprocal "production" and "consumption" (shaping) of the colonial narrative of history and identity entail that former colonizers

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[2] This explains why the two World Summits on the Information Society (WSIS), one held in Geneva in 2003, the other in Tunisia in 2005, paid little attention to the concept of commons.

and former colonized are a community of records, sharing a joint archival heritage. So these archives too seem to constitute a legacy, a "joint heritage", shared by a number of "communities of records".

What conclusions could be drawn from the documenting of atrocity and suffering and the shift from war to peace? This paper is concerned with challenging categorizations and disputing some of our conventional approaches to the problems of social experience. It will attempt to explore beneath the totalities we seek to impose on the disparate material experience, the lived history constituting the archives, thus the inscription of history on the body and in subjectivity, to look anew at this dispersion and to incorporate in this gaze that which appears discontinuous with itself, that which is not concordant with the ways in which it orders, categorizes, and contains.

Memory, history and archives

The role of memory in different cultures and collectivities, and the ways of dealing with memory (trans)formation has been questioned, and the relation between individuals' memories and collective memories and the eventual subsistence of a "collective memory" analyzed. The different ways of memory construction and transmission and how collectivities' memories are manifested in historical and fictional narratives, visual artworks, laws and constitutions, commemorative practices, or landscapes, is under investigation, as well as the influence of political, social, economic, cultural or religious concerns on collective memory, considering that some events are lamented or celebrated across generations, but some are quickly forgotten, trying to answer the question: "What (or, who?) has the power to guide the processes of remembering?"

What are the ways in which memories of social, political and violent military encounters have been transmitted within twentieth- and twenty-first-century European culture? What roles are played by those who mediate the memory of conflict (first-hand witnesses, historians, journalists, writers, filmmakers)? What kinds of interactions and tensions are visible between public and private discourses of memory? In what ways are memories of conflict (or their absence) shaped by the political, economic and social parameters of the present? To what ends are such narratives of the past deployed?

Memory has become a heterogeneous and transnational object of research. Historians are facing a fundamental challenge, as Philipp Ther ar-

gues in his "The burden of history and the trap of memory",[3] claiming that the concepts of remembrance and memory depend upon what a national collective imagines when it thinks back over the past. Agreeing with the Austrian cultural historian Moritz Csaky, he also stresses the transnational character of remembrance, and that the lost cultures of the east can in many places be understood as mixed cultures rather than being imprinting with their national stamp, mentioning the example of the German expellees who remember places that have long since ceased to be German, in just the same way that Polish expellees refer to places that today belong to Ukraine or Lithuania.

Pierre Nora in his "Reasons for the current upsurge in memory"[4] underlines very succinctly some of the immediate effects of this recent surge, such as a significantly increasing ways in which the past is used for political, commercial and tourist purposes, the sharp rise in the number of commemorative events, all intended to show that the past has ceased to have a single meaning and that a present that is overlaid with an awareness of its own history necessarily allows for several possible versions of the past:

> The second effect of this change in the way memory is organised has been to deprive the historian of the monopoly he traditionally enjoyed in interpreting the past. In a world in which you had collective history and individual memories, the historian exercised exclusive control, so to speak, over the past. … Today, the historian is far from alone in manufacturing the past; it is a role he shares with the judge, the witness, the media and the legislator. All the more reason, therefore, to speak out loud and clear today on behalf of the "duty towards history", rather than the "duty to remember", the need which a few of us were proclaiming some twenty or twenty-five years ago.

> For the real problem raised by the sacred aura with which memory has now been invested is to know how, why and at what moment the otherwise positive principle of emancipation and liberation on which it is based backfires and becomes a form of closure, a grounds for exclusion and an instrument of war. To claim the right to memory is, at bottom, to call for justice. In the effects it has had, however, it has often become a call to murder.

The literature on archives during the recent years explores the role and possibilities of the archive and questions its functions as an a priori container of memory, demonstrating thus the extent to which thinking about archives is embracing new realities and new possibilities. Traditionally ar-

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[3] First published in *Transit* 30/2005/2006 (German version) Eurozine, Published 2006–08–21, Original in German, Translation by Simon Garnett, Contribution by Transit.

[4] First published in *Transit* 04/2002 (German version), www.eurozine.com

chives have been seen as preserving memory and as holding the past. This orthodoxy has increasingly been questioned, unfolding the ways in which archives construct, sanctify and bury pasts, showing how remembering can never be separated from forgetting, and arguing that the archive is also about the future rather than just the past. Quoting from Jacques Derrida:

> And the theory of the archive is a theory of this institutionalisation, that is to say of the law, of the right which authorises it. This right imposes or supposes a bundle of limits which all have a history, a deconstructible history, and to the deconstruction of which psycho-analysis has not been foreign, to say the least. In what concerns family or state law, the relations between the secret and the non-secret, or, and this is not the same thing, between the private and the public, in what concerns property or access rights, publication or reproduction rights, in what concerns classification and ordering (what comes under theory or under private correspondence, for example? what comes under system? under biography or autobiography? under personal and intellectual anamnesis? in so-called theoretical works, what is worthy of this name and what is not? should one rely on what Freud says about this to classify his works, and believe for example that it has to do with a novel when he speaks of a "historical novel", etc.?), in each of these cases, the limits, the borders and the distinctions have been shaken by an earthquake from which no classificational concept, no implementation of the archive, can be sheltered. Not a single order.[5]

Achille Mbembe takes the thought further when, claiming that examining archives is to be interested in that which life has left behind, in debt and debris, he argues that both the historian and the archivist inhabit a sepulchre. The historian is also engaged in a fight against another remnant of death, the spectre(s), which find, through written texts, a path to an existence that no longer unfolds according to the same modality as in their lifetime; thus historiography, and the very possibility of a political community (polis) are only conceivable on condition that the spectre should remain silent, should accept that from now on it may only speak through another, or be represented by a sign, or by some object which, not belonging to any one in particular, now belongs to all. It is by the bias of this act of dispossession — this leaving out of the author — that the historian establishes his/her authority, and a society establishes a specific domain: the domain for things which, being shared, belong exclusively to no one (the public domain).

> And this is why the historian and the archivist have long been so useful to the state, notably in contexts where the latter was set up as an appointed guardian of that domain of things that belong exclu-

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[5] Derrida, *Mal d'Archives*.

sively to no one. In fact, both the historian and the archivist occupy a strategic position in the production of an instituting imaginary. One might ask what their role from now on may be, especially in contexts where the process of democratising a chronophagic act – that is, the abolition of the archive – is at an advanced stage.

The curious thing is the long-held belief that the state rested on something other than on this desire to abolish the archive, to free itself of debris. What could be more noble? But perhaps it is a condition for the existence of all societies: the need permanently to destroy the 'debris' – the taming, by violence if necessary, of the demon that they carry.[6]

Colonialism and mass violence in Europe

Memories and recollections of the past are often contested and the past is painstakingly constituted through the interplay of collective construction, political bargains, reversals, rationalizing of refusals to come to terms with it, as well as attempts to recognize the past and cope with it. The process of building societies which are not just ethno-culturally heterogeneous but also open to all diverse groups has been contingent to coming to terms with the past. While engaging in ordering, grouping and negotiating the past, new relationships of participation, exchange, dialogue, new meanings, disagreement and compromise, possibly trust and respect, could be established. Europe has arrived at a point where its own historical relationship with the world is part of a lively debate not only about the past, but also about the future. Discussion about the European empire(s) seems to be resurfacing as part of a European discourse of self-understanding and self-reassurance during the European Union's integration process.

Colonialism was central to the discourse on national identity, to the continent's understanding of itself as a (or numerous) world power(s). As postcolonial studies have shown, colonial engagement neither started nor ended with formal colonial rule. Whereas certain parts of Europe experienced the traumatic violence of decolonization, others believed that they had nothing to do with the colonial exploitation of large parts of Africa, Asia or South America. They were innocent — so many believed — of the devastations brought about by European colonialism and could therefore engage with the new postcolonial world without the dark shadow of a colonial past. Some observers have termed this "colonial amnesia".

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[6] A. Mbembe, "The Power of the Archive and its Limits", in C. Hamilton, V. Harris, J. Taylor, M. Pickover, G. Reid & R. Saleh R., eds., *Refiguring the Archive* (Cape Town: David Philip, 2002), 19–26.

In *The Origins of Totalitarianism*, Hannah Arendt argued that there was an inextricable causal link between the establishment of European overseas colonial empires in the late nineteenth century and the murderous anti-Semitism of the Nazis in the twentieth. Imperialism came home to Europe, she argued, through the rapid spread of racial anti-Semitism beginning in the late nineteenth century, and reached its final stage in the attempted annihilation of the Jews. More recently the extremes of racial politics in Europe, culminating in the Holocaust, have been located in the earlier imperial experience outside of Europe. To understand the ways in which Europe's colonial past shaped discourses, mentalities, and politics in Europe, we need to examine the personnel active in the imperial realm before 1919 and their roles in subsequent decades and especially in the Nazi era. If any group carried the direct experience of "handling" populations in the imperial realm back into Europe in the middle decades of the twentieth century, it would be the soldiers, civilian officials, and scientists who moved back and forth between the two worlds. It is important to provide empirical evidence and to specify the institution and cultural mechanisms by which ideas and practices developed in the imperial realm were transmitted back to Europe and became the bases for policies instituted decades later.

Colonialism also played a central role in the thinking and work of the Polish-Jewish specialist in international law Raphael Lemkin (1900–1959) who coined the term "genocide" in 1944. It was not only the study of colonial mass murders that provided Lemkin with a conceptual framework for analyzing the German policy of occupation and extermination in Eastern Europe during the Second World War. Until recently, however, most scholars have ignored the relationship between the phenomena of colonialism and genocide. Colonial atrocities such as, for example, the "first genocide of the twentieth century" against the Herero and Nama in German Southwest-Africa (today's Namibia) 1904–1908, or the wars of extermination against indigenous peoples in both Americas and in Australia, are often still labelled as "pre-modern mass murders".

As Reinhart Koessler explains in his paper "Genocide, Apology and Reparation — the linkage between images of the past in Namibia and Germany",[7] the relationship between Namibia and Germany is a special one — not just by a resolution of the Bundestag saying so upon Namibia's in-

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[7] R. Koessler, "Genocide, Apology and Reparation – the linkage between images of the past in Namibia and Germany", July 2007, Paper presented at: AEGIS European Conference on African Studies "African Alternatives: Initiative and Creativity beyond Current Constraints". AEGIS related journals panel: Africa's contested memories, July 11, 2007 to July 14, 2007, Leiden, The Netherlands, http://www.freiburg-postkolonial.de/Seiten/koessler-linkage-2007.pdf

dependence in 1990, but on account of a number of linkages, both historic and current. He explores some of the ways in which this connection finds expression in the frequently controversial ways of negotiating a past which, on account of sometimes acrimonious exchanges, does not appear quite as bygone as might be suggested by some hundred years that have elapsed since some key events to which people still refer to took place. His key thesis is that discourses and debates around the past in both countries mutually function as sounding boards as it were, throwing impulses and themes back and forth. In a way, this may be considered as a specific case of an "entangled history",[8] relating social actors and public discourses within both the former colony and the former colonial power in an intricate web of repeated and ongoing interaction. In Namibia, the concerns voiced in this context remain pressing for many groups even today.

The notion of mass violence refers to collective human destructiveness, the causes of which are mainly political, social and cultural. "Mass violence" does not cover aggression among combatants, but rather violence that occurs in wartime and peacetime directly or indirectly affecting civilian populations. State and non-state actors in conflict frequently evoke past massacres (documented or not) to justify and legitimize their own violence. The role of mass violence in modern times has acquired a special character, transforming itself in a tool of social control used to discipline populations and to transform social relationships. Genocides have also found a strong echo in the repressive experiences of the "outside of Europe", Africa, Asia, Latin America. Genocidal social practices in these regions have scarcely been dealt with, and have not been systematically connected to previous European experiences of genocide or to the experiences of war and postcolonial counter-insurgency.

There is a lot of current research on the motivations of the "ordinary", non-pathological, perpetrators of political violence, ethnic strife and genocide, yet the social origins of mass violence, the causes of wars and civil wars and other forms of mass violence taking a political form, such as nationalism, religion, gender, are yet to be explored in depth and correlated. Most situational explanations of the perpetrators' aggressiveness focus on either economic or ideological factors. What is lacking is a research question that can operationalize the comparison of different cases of violence. Perhaps

[8] Cf. S. Randeria, "Entangled histories of uneven modernities: Civil society, caste solidarities and legal pluralism in post-colonial India", in *Unraveling Ties: From Social Cohesion to New Practices of Connectedness*, eds. Y. Elkana, I. Krastev, E. Macamo and S. Randeria (Frankfurt and New York 2002), 284–311, and "Civil society and legal pluralism in the shadow of caste: Entangled modernities in post-colonial India", in *Hybridising East and West: Tales beyond Westernisation*, eds. D. Schimmer, G. Saalman and C. Kessler (Berlin 2006), 97–124.

— as the Amsterdam sociologist De Swaan has recently suggested — we are asking a wrong question here. Perhaps we should not ask why people kill, but rather how they — in different types of societies with different political systems — deal with the fact that they kill, or have killed recently. This more functionalist approach (as the logical opposite of the traditional "intentionalist" Holocaust research of the past) could enable us to link this topic to the larger topic of transitional justice.

As far as sources are concerned, historians almost exclusively deal with two types of sources, namely judicial sources (as for example the ICTY or the Nuremberg documents), or with oral history based upon fieldwork (in Rwanda, Cambodia, etc.). This calls for input from specialists in cultural anthropology or ethnography, or/and for input coming from researchers from conflict areas, thus overcoming language and cultural barriers. Some of the best researchers to be consulted come from the former colonial powers. There also is a lot of research by social scientists on how conflicts are mitigated or played down. They often focus upon middle classes, often racially or ethnically mixed middle classes, who play an important role in local elites and can make conscious efforts to reduce tensions (as in South Africa during the end of Apartheid or in the Southern and Western regions of Rwanda). The need to "repair" these societies, the obligation to protect, is now felt as a global responsibility, whereas mastering the unmasterable past in the case of Germany (*Vergangenheitsbewältigung*) was basically seen as a problem to be solved by the Germans themselves. Local research communities are to be included more often in this type of research, because they can help identify the limitations of European perspectives. Local experts can see possibilities for restoring peace which others fail to identify. There is a consensus that the law cannot solve all of the problems, that, to quote Alex Boraine, "it is necessary to embrace a notion of justice that is wider, deeper, and richer than retributive justice".

South–East Europe

Everyday lives and their imaginings during the processes of transition in the Balkans emerging in the last decade from state socialism, war, and ethnicized nationalism are very heterogeneous. Multiple crossings occur, as changes and political transformations take place in the region in the context of globalization, transnationalism and Europeanization. International actors exert influence on national policies to varying degrees and in several and diverse ways, while states redefine their role in this "multi-level and multi-actor" process. Understanding how the various spatial scales at which changes operate are socially constructed and discursively represented is an important key to better theorizing transitional justice practices. While post-

colonialism is often associated with the "Global South", the paper argues that postcolonialism as a critical theoretical stance can be used to understand the transition in South-East Europe.

Robert Donia tells the story of the obliteration, segmentation and privatization of memory in Bosnia.[9] Bosnia's institutions of memory have undergone a major transformation since the multiparty elections of 1990, as illustrated by the fate of those located in the city of Sarajevo. During the war and prolonged siege of 1992–1995, key institutions of memory were destroyed while others were left largely untouched. But the peace agreements and post-war political structures have devastated many of those that survived the wartime destruction. Nationalist elites have trifurcated libraries and cultural societies while smothering through neglect many institutions that are not dedicated to nationalist causes. The post-war political structure has orphaned the most important institutions of memory in Bosnia and Herzegovina, fragmented many of them, and weakened those that have not been divided. The privatized world of memory is becoming a highly selective one, and it is increasingly challenging to preserve the historical record apart from those themes deemed urgent by the nationalist elites. There is no possibility of replicating the wartime global outrage provoked by images of libraries and museums aflame and in ruins. In any case, that outrage did not translate into meaningful financial support from outside Bosnia for reconstitution of the lost collections. The nationalists are on the verge of prevailing in their effort to reformulate the fundamental sources of historical inquiry for future generations. It remains uncertain whether they will exercise their newly-acquired control for the benefit of all or only to advance the interests of their particular constituencies.

In the Western Balkan post-war context emphasis on firmly formatted and often dislocated conflict resolution training, adhering to set frameworks of Western knowledge, tended to marginalize the importance of direct community engagement with local power structures and the creation of opportunities for locally relevant social development. Particularly in Bosnia and Herzegovina this debate continues to be of high relevance to the people, organizations and institutions, as new mechanisms (the War Crimes Chamber) and other transitional justice approaches (such as a truth commission) have recently been put in place, though rarely attempting to pose the fundamental question as to the goals that should be pursued in the process of dealing with the past. Additionally, in the other two countries involved, similar, mainly civil society initiatives on documentation have been taking place. Peace building as social politics is a long-term process which

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[9] R. J. Donia, "Archives and Cultural Memory under Fire: Destruction and the Post-war Nationalist Transformation".

engages actors from different organizational and institutional backgrounds (including local government agencies and social service providers, civil initiatives and nongovernmental organizations with different ideologies, politicians, as well as international organizations active in local contexts) in a set of joint efforts aimed at devising locally relevant social and economic development of their communities and relating the practices that promote social integration of the micro-level to their impact at the macro-level of social structuring and politics.

Amongst the recent efforts, over the last few years the National Library of Serbia is being drastically modernized in material, financial, mentality and operational terms, and is involved in various international networks, e.g. with the Library of Congress and EU projects. Most importantly, close contact and collaboration with the relevant Library in Sarajevo has been established. The National Library has organized a network of NGOs as partnering beneficiaries, including most well-known ones, e.g. Centre for Humanitarian Law, providing them access to services and information. The Library is also hosting the NGO Documentation Centre Wars 1991–1999, working on documentation projects for a number of years, such as collecting more than 300 oral histories from victims (with partners in both Croatia and Bosnia), documentaries, an extensive library on related issues, a project on camp inmates, future plans for addressing war crimes perpetrators integration. Another initiative is that of the Research and Documentation Center Sarajevo in cooperation with its partners, the Humanitarian Law Center in Serbia and Documenta in Croatia. Worth noting is the will to overcome the accumulated grievances, bitterness and guilt. There is an increasing awareness of the ideological use(s) of history and that transforming narratives of atrocities into personal and historical myths will seriously damage any possibility of peaceful coexistence in the region and beyond. The very significant work undertaken by civil society organizations in all countries at times strives to rid itself of negative experiences of the past with the understanding that limiting dealing with the past to blame attribution, mere retribution/punishment, means to lag behind the effort of repairing social bonds, rebuilding trust and attaining social justice.

The ICTY archives

The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 was established by United Nations' Security Council resolution 827 (passed on 25 May 1993) to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991.

A key component of the ICTY Completion Strategy concerns appropriate disposition of its paper and electronic records.

The primary purpose of the ICTY records is serving the primary purpose of the Tribunal[10] to bring to justice persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. ICTY archives have a significant secondary value for reasons analogous to the arguments recently proposed by Bruce Montgomery with regard to the archives of human rights NGOs,[11] namely that the archival record is important for historical accountability, which will be "used by researchers, prosecutors, and victims alike with the aim of analyzing and making known the dimensions of particular human rights violations"; the archival evidence "is important for the memory of the thousands of victims and survivors of human rights abuses, their relatives, and others who must individually confront the truth of what transpired. Retaining the memory of victims and survivors is also important to preserve at least some semblance of identity for those who suffered extreme depredations…"; and that "archival records of human rights abuses will likely assume new and critical importance as this evidence becomes pivotal in the adjucation of cases. Post-authoritarian governments can only be helped if they confront the crimes of the past and end impunity with the aim of building new democratic societies based on the rule of law."

Eric Ketelaar asks the question: Who owns the ICTY archives?[12] Legally, either the Tribunal or its parent body, the United Nations, is the owner of the assets of the Tribunal, including documents and other materials. Intrinsically, however, one has to recognize the rights of other parties to the primary functions of the Tribunal. I argue that some principles and propositions developed with regard to the archives of colonizers and colonized peoples should be applied to the ICTY archives.

What in Western archival practice is called the subject of the record has to be reconsidered as a full partner in the record-creating process, as a co-creator of the record. And are there not other co-creators, such as indictees and witnesses? Not only the individual co-creators have a legitimate interest in the records. The right to know is not simply the right of any individual victim: it is also a collective right: "A people's knowledge of the history of its oppression is part of its heritage." The reciprocal "production"

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[10] http://www.un.org/icty/glance/index.htm [this and all other web pages cited hereafter consulted 24 July 2005]

[11] B. P. Montgomery, "Fact-Finding by Human Rights Non-Governmental Organizations: Challenges, Strategies, and the Shaping of Archival Evidence", *Archivaria* 58 (2004), 21–50.

[12] E. Ketelaar, A Joint Heritage, Shared by Communities of Records.

and "consumption" of the colonial narrative of history and identity entail that former colonisers and former colonised are a community of records, sharing a joint archival heritage. ICTY's archives too constitute a legacy, a "joint heritage", shared by a number of "communities of records". These communities consist of stakeholders occupying different positions, depending on the degree of their involvement in the core business of the Tribunal. The interests of stakeholders change over time: some stakeholders will not have an immediate interest; stakeholders' interests may gradually increase or decrease. It is important to take these different spatial and temporal positions into account when devising policies for custody, appraisal, access, use, preservation, etc. of ICTY's legacy.

Justice, reconciliation and memory

According to Security Council's resolution 827 (1993), the ICTY was established "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia". The central purpose of the ICTY, as of any criminal court, is the deterrence of, and retribution for, serious wrongdoing. Anything more, like establishing a historical record of what happened, or contributing to healing individuals' and communities' traumas, or to reconciliation — may be a side effect of a trial, but only if, as Mark Osiel puts it,[13] the game within the courtroom and in society at large is well-played: if the trial is staged and dramatized as a "secular ritual of commemoration".[14] In the words of the ICTY's first president Antonio Cassese, one of the Tribunal's aims is to help create "an historical record of what occurred during the conflict". Cassese added: "thereby preventing historical revisionism", making it clear that the objective is not so much contributing to historiography, but to prevent denial.[15]

The Tribunal's records, however, do contain "the truth" — they describe, just as any other record, what the recorder believed or construed to be the truth, the reality. Long before post-modern thinkers have started to question "the truth" or the impartiality of the record, lawyers and legal scholars found that the truth is a legal construction. Defendants, witnesses, juries, prosecutors and judges tell, hear and record a version, their version of what happened in a particular case, a particular trial, within the legal con-

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[13] M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1999), 293.

[14] Ibid.

[15] A. Cassese, "The ICTY: A Living and Vital Reality", *Journal of International Criminal Justice* 2 (2004), 585–597.

text of that time. It is, for example, well known — but often misunderstood — that the Nuremberg Tribunal framed — had to frame — Nazi crimes against humanity as an offence punishable only in connection to the crime of waging aggressive war.[16] The term "genocide" was only used once during the trial. An example of this "framing" is the documentary film showed in Nuremberg in evidence of mass killings. It was not filmed in any of the extermination camps, it did not try to explain what we now term the Holocaust, but was construed to underpin a story of political terror and war excesses. What is recorded is never simply "what happened".[17]

To understand fully the significance and the meaning of these tribunals, one has to acknowledge that they necessarily have to be selective as any trial of war crimes and mass violation of humanitarian law has to be selective.[18] Only a small portion of all perpetrators — not to mention bystanders — can be indicted. The Nuremberg Tribunal tried only 24 Germans in the first instance, and later another 185 war criminals were tried. These 209 stood for the thousands involved in knowingly causing the deaths of more than twenty million people and the suffering of many millions more. The ICTY has made its contribution to reconciliation, mainly through an impressive outreach programme (mostly funded from non-UN sources). One has to acknowledge, however, that reconciliation is not achievable through ICTY activities only.

Truth commissions have a much larger mandate and, therefore, more opportunities to involve victims and their families.[19] The South-African Truth and Reconciliation Commission was addressed by 22,000 people. All their stories were recorded and are in principle accessible in the TRC's archives. Two thousand people were carefully selected to tell their story in public. Seven thousand perpetrators of the Apartheid regime applied for amnesty, which was awarded in roughly half the cases. Many of the stories of victims and perpetrators were interwoven, a beginning of a shared "truth-

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[16] L. Douglas, "Film as witness: screening 'Nazi Concentration Camp before the Nuremberg Tribunal", *Yale Law Journal* 105 (1995), 449–481.

[17] C. B. Trace, "What is Recorded is Never Simply 'What Happened': Record Keeping in Modern Organizational Culture", *Archival Science* 2 (2002), 137–159.

[18] Minow, *Between Vengeance and Forgiveness*, 31, 40–45, 122.

[19] P. Hayner, *Unspeakable Truths. Facing the Challenge of Truth Commissions* (New York and London: Routledge, 2002); T. Huskamp Peterson, *Final Acts. A Guide to Preserving the Records of Truth Commissions* (Washington DC and Baltimore: Woodrow Wilson Center Press and The John Hopkins University Press, 2005) [http://www.wilsoncenter.org/press/peterson_finalacts.pdf].

telling" which is indispensable for reconciliation.[20] "Truth" in the aftermath of traumatic events is not a historical truth or a juridical truth: it is a psychological truth.[21] Sharing experiences and emotions[22] connects not only victims and perpetrators, but bystanders too: "Their discomfort with the truth is a symptom of their shame and that, too, makes them victims."[23]

Such truth-telling, according to Payam Akhavan, a legal advisor of the Office of the Prosecutor of the ICTY, is not feasible within the confines of a courtroom of the Tribunal "necessarily restrained by the limits of the judicial process". The Tribunal can establish a factual record of what happened, but sometimes, according to former President Cassese, "proceedings are even having an adverse effect and are ultimately rekindling nationalism and ethnic animosity".[24] The Tribunal generally "has left the various ethnic groups still firm in their differing views of how the war started, its aftermath, and the concept of collective and individual responsibilities for actions taken in it."[25] National reconciliation can not be achieved if the record of what happened "is not recognized and internalized by the peoples of the former Yugoslavia".[26]

According to today's liberal-democratic agenda, the process of "Truth and Reconciliation" (T&R) seems to be the most desirable way of dealing with the historical legacy of wars and bloodshed in the former Yugoslavia. In order to secure the lasting peace and prosperity in the region it is necessary to reach the objective truth about the painful reality of the wars, to come to a basic consensus on "what really happened". Only in that way might it be possible to overcome conflicting and particular visions of any

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[20] P. Akhavan, "Justice in The Hague, peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal", *Human Rights Quarterly* 20 (1998), 737–816

[21] Minow, *Between Vengeance and Forgiveness*, 129. Michael Ignatieff uses the term "moral truth": Akhavan, "Justice in The Hague", 770.

[22] V. Christophe and B. Rimé, "Exposure to the social sharing of emotion: Emotional impact, listener responses and secondary social sharing", *European Journal of Social Psychology* 27 (1997), 37–54.

[23] Ariel Dorfman in conversation with Richard Goldstone: Minow, *Between Vengeance and Forgiveness*, xii; see also Minow, *Between Vengeance and Forgiveness*, 121; Akhavan, "Justice in The Hague", 325, 348: "Those who were mere spectators in the face of humanity are also part of the equation."

[24] Cassese, "The ICTY".

[25] C. Burns, L. McGrew and I. Todorovic, "Imagine Coexistence Pilot Projects in Rwanda and Bosnia", in A. Chauyes and M. Minow, eds., *Imagine Coexistence. Restoring Humanity After Violent Ethnic Conflict* (San Francisco: Jossey-Bass, 2003), 85–101.

[26] Akhavan, "Justice in The Hague", 742, 770, 783–784.

respective national group. Yet, Slobodan Karamanic wonders whether the concept of T&R represents an effective alternative to the division of historical truth among different nationalist interpretations of history, or whether it is rather inevitably caught within the same limits of national imaginary.[27] The T&R norm of objectivity entirely depends upon the category of nation. As the discourse of T&R indicates, objective truth can be derived only from the framework of national truth: every particular nation which has been involved in conflicts should accept a part of the responsibility for the crimes committed in its name. Consequently, the problem of T&R is understood as a problem of national consciousness. The central ideological mechanism of reconciliation therefore takes the form of national recognition, the recognition of one's own share of national responsibility or blame. Within this structural limitation, the concept of T&R functions as another type of historical revisionism in a double sense: on the one hand, desingularizing the very political nature of the "post-socialist" nation, and, on the other, neglecting or denying a whole set of contradictions, tensions and violence that came up during the course of the second historical encounter of the principles of nation-state with the complexity of the Yugoslav situation.

Martha Minow writes that "the idea of accessible court records that speak for themselves … is problematic".[28] Indeed, records do not speak for themselves; they echo the user's interests, hopes and fears. This empowers the user to re-create in his/her own way what is found in the records that were created by the court in its way. That is why archives are never closed and never complete: every individual, every generation, is allowed its own interpretation of the archive, is allowed to re-invent and to re-construct its view on the past. That is to say, in Hanna Arendt's words, "it has the right to rearrange the facts in accordance with its own perspective; we don't admit the right to touch the factual matter itself."[29]

Appropriating the past

The court's verdict is final, but its reading of the historical event is not. Court records have, therefore, no more value than other records. Law's closure has to be rejected in favour of History's and Memory's recurrence. Memory is never "finished". As James Booth writes, "the legal expression

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[27] 16 September 2007, Slobodan Karamanić, "Truth and Reconciliation" as Historical Revisionism.

[28] Minow, *Between Vengeance and Forgiveness*, 125.

[29] H. Arendt, "Truth and Politics" (1954), *Between Past and Future. Eight Exercises in Political Thought* (Hammondsworth: Penguin Books, 1977), 227–264.

of memory-justice does not exhaust the claims of the past on us".[30] "Past victims and perpetrators, or our memory of them, have the ability to return almost unbidden."[31] A trial punishes the guilty leaders, and the rest of society is freed of any burden of responsibility. But this is a premature closure, the prematurity partially explaining why the legacy of the Second World War still disturbs Europe, despite trials and purges of those most directly accountable. "The sense of incompleteness is not principally due to any perpetrators left unpunished but to the limited way that legal action weaves the past into the national biography, into the memory of a community."[32] It is not only the victims and their families who have to come to grips with the past: society at large has to acknowledge the past.

As an individual, one determines one's own identity, but "using building materials" from history, geography, collective memory, power apparatuses, religious revelations etc., and all that within the constraints of the community one is in.[33] As John Stuart Mill argued, the strongest cause for the "feeling of nationality" is "identity of political antecedents: the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past."[34] The common past, sustained through time into the present, is what gives continuity, cohesion and coherence to a community.[35] The search for roots and belonging[36] may contribute to making the community into a "community of memory". But that will also contribute to marking the limits to other groups and their members. This "dual process of inclusion and exclusion"[37] may — as the events in the former Yugoslavia

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[30] W. J. Booth, "The Unforgotten: Memories of Justice", *American Political Science Review* 95 (2001), 786.

[31] Ibid., 785.

[32] Ibid., 787.

[33] M. Castells, *The Power of Identity*, 2nd ed. (Malden, MA, Oxford and Carlton Vic: Blackwell, 2004), 7; P. Roberts, "Identity, reflection and justification", in B. Haddock and P. Sutch, eds., *Multiculturalism, Identity and Rights* (London and New York: Routledge, 2003), 142–157.

[34] J. S. Mill, "Considerations on representative government", chapter XVI: R. B. McCallum, ed., *On liberty and Considerations on representative government by J. S. Mill* (Oxford: Basil Blakckwell, 1946; repr. 1948), 291.

[35] D. Morley and K. Robins, *Spaces of identity: global media, electronic landscapes, and cultural boundaries* (London and New York: Routledge, 1995).

[36] G. Delanty, *Community* (New York: Routledge, 2003), 189.

[37] P. Hamilton, "The Knife Edge: Debates about Memory and History", in K. Darian-Smith and P. Hamilton, eds., *Memory and history in twentieth-century Australia* (Melbourne: Oxford University Press, 1994), 23.

that led to the creation of the ICTY have shown so poignantly — generate intolerance, discrimination, cleansing and usurpation.

Legally, either the Tribunal or its parent body, the United Nations, is the owner of the assets of the Tribunal, including documents and other materials. Intrinsically, however, one has to recognise the rights of other parties to the primary functions of the Tribunal. What in Western archival practice is called the subject of the record has to be reconsidered as a full partner in the record-creating process, as a co-creator of the record.[38] In several cultures people consider records about them as records owned by them. Moreover, in many jurisdictions legislation on data protection and on medical files acknowledges specific rights of the "data subject" to be respected by the creating agency.

Jeannette Bastian has enriched archival discourse with the notion of a "community of records".[39] Bastian refers to a community both as a record-creating entity and as a memory frame that contextualises the records it creates. According to Bastian, the records of a community become the products of a multi-tiered process of creation that begins with the individual creator but can be fully realized only within the expanse of this creator's entire society. The records of individuals become part of an entire community of records.[40] Communities, she argues, are defined through the relationship between actions and records, the actions creating a mirror in which records and actions reflect one another. A community of records may be further imagined as an aggregate of records in all forms generated by multiple layers of actions and interactions between and among the people and institutions within a community.[41]

Colonial archiving "shaped" local communities in the colonizer's taxonomies, while these communities "asserted their identity and agency in response to the authority of colonial rule".[42] This reciprocal "production" and

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[38] M. Piggott and S. McKemmish, "Recordkeeping, Reconciliation and Political Reality", in S. Lloyd, ed., *Past Caring? What does Society Expect of Archivists?* Proceedings of the Australian Society of Archivists Conference, Sydney 13–17 August 2002 (Canberra: Australian Society of Archivists, 2002), 111–122, also available at http://www.sims.monash.edu.au/research/rcrg/publications/piggottmckemmish2002.pdf

[39] J. A. Bastian, *Owning Memory. How a Caribbean Community Lost its Archives and Found Its History* (Westport Conn. and London: Libraries Unlimited, 2003), 3, 5.

[40] Ibid., 3.

[41] Ibid., 3, 5.

[42] S. Mathur, "History and anthropology in South Asia: rethinking the archive", *Annual Review of Anthropology* 29 (2000), 95; A. L. Stoler, "Colonial Archives and the Arts of Governance", Archival Science 2 (2002), 87–109; B. Joseph, Reading the East India Company, 1720–1840. Colonial Currencies of Gender (Chicago and London: The University of Chicago Press, 2004).

"consumption" (shaping and, what Wertsch calls "mastery")[43] of the colonial narrative of history and identity entail that former colonizers and former colonized are a community of records. The same is true for other mutually associated groups, for example indigenous people and immigrants. Thus the stakeholders in the ICTY's legacy constitute several communities of records, partly overlapping each other: victims and convicted, the ICTY staff and defence counsel, witnesses and prosecutors, the UN and governments.

Interestingly, Achile Mbembe's definition of the postcolony[44] as a timespace characterized by proliferation and multiplicity seems to be of use in exploring the case of transitional justice in the Balkans today. According to Mbembe, the postcolony as a temporal formation is definitely an era of dispersed entanglements, the unity of which is produced out of differences. From a spatial point of view, it is an overlapping of different, intersected and entwined threads in tension with one another. The notion of the "postcolony" refers to a timescape which is simultaneously in the process of being formed and of being dissolved through a movement that brings both the "being formed" and the "being dissolved" into collision. The term "postcolony" indicates the desire to take very seriously the intrinsic qualities and power of "contemporaneousness", while firmly keeping in mind the fact that the present itself is a concatenation of multiple temporalities. Because of the entanglement of these multiple temporalities, the space is evolving in multiple and overlapping directions simultaneously. But there is no way we can overcome the neurosis of victimization if, by transforming the past into our subjective present, we root our identities in injury alone. For the past to become a principle of action in the present, we have to manage to admit the reality of loss as that which must sustain human dialogue and stop living in the past instead of integrating it into the present. In any case, the complete restitution of the past is not only terrifying, but also a clear impossibility.

Yet, most importantly, the archive lies within and beyond. To quote Derrida again:

> In an enigmatic sense which will clarify itself perhaps (perhaps, because nothing can be sure here, for essential reasons), the question of the archive is not, I repeat, a question of the past, the question of a concept dealing with the past which already might either be at our disposal or not at out disposal, an archivable concept of the archive, but rather a question of the future, the very question of the future, question of a response, of a promise and of a responsibility for tomorrow. The archive: if we want to know what this will have meant,

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[43] J. V. Wertsch, "Narrative Tools of History and Identity", *Culture & Psychology* 3 (1997), 5–20.

[44] A. Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001).

we will only know tomorrow. Perhaps. A spectral messianicity is at
work in the concept of the archive and like religion, like history, like
science itself, this ties it to a very singular experience of the prom-
ise.[45]

Furthermore, the performance of law, which erects an authority whose
exercise of power is mystifying rather than regulative, could be interrogat-
ed. Following Judith Butler's suggestion, one could reflect on the laws that
the authority's inquisitorial call itself embodies and on the demands that
mandate the authority's performance of juridical command. Informed by
Philippe Lacoue-Labarthe's work on mimetic representation, Yaakov Perry
proposes a model for reading the performance of authority whose juridical
vision is distorted each time it is purported to be literalized, and exempli-
fies how the very claim to originality in certain postcolonial sites of power,
where no forces are immune to the burdens of mimetic representation, is
itself always already bound to a simulacral economy of representation.[46]

Thus this paper has sought to examine, to hold against this type of
embodied history, the archive, some theories and assumptions about the
nature of social experience, and to examine the ways in which this lived his-
tory, this inscription of history on the body and in subjectivity, speaks to and
refutes our conventional understandings. It has also sought to recover the
subject in history, the subject in the archives about the wars in the former
Yugoslavia, and in this recovery of subjecthood, to urge for the recovery of
the subject in social intervention.

This is a subject, present or absent, speaking or/and silenced, who is
complex, dispersed, who offers no easy unanimities of purpose, action, sub-
jectivity or intention. These are subjects who appear in the narratives of ar-
chives, in extraordinary but ultimately mundane complexity. These are sub-
jects who are both inscribed and inscribe themselves in changing networks
of power. The atrocity and excess of power during the period of politicized
contention could give way to new regimentations of power, in which the
new citizen in the post-Yugoslav countries, scarred and burnt, attempts the
constitution of a new subjecthood, within reconfigured power, and seeks
unities of selfhood that would trace meaningful lineaments, connections, a
teleology of life, in full cognisance of the complexity of history and of the
subject in history, the possibility of change, of agency and of a new type of
citizenship.

Such a perspective would also enable us to develop a non-Eurocen-
tric awareness of the role of Europe in the world by taking a view of Europe

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[45] Derrida, *Mal d'Archive*.

[46] Y. Perry, "Law's violations: the formalization of authority in Achille Mbembe's reading
of the postcolony", *Postcolonial Studies* 10/3 (September 2007), 243–256.

as a project of becoming, that is, partly, constituted through its many outsides; taking a post-colonial approach to Europe as being always relationally produced and, also partly, as having produced and producing its outsides; taking a view that "making Europe" is a project in which many agencies are invested, spatially distributed, connected and concretized in particular locations; and (possibly) understanding that its outsides may also be insides (the non-Europeanness of its migrant citizens/would-be citizens, the disaffected nationals versus Europe).