

## Denial of Justice for the Victims of *Republika Srpska* Atrocities

By Haris Subašić

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### 1. What is ‘Denial’?

‘Denial’ is a complex phenomenon. The term has different meanings which also depend on particular scientific theories and perspectives. Notably, ‘denial’ in psychoanalysis and psychoanalytical theory is understood as a healthy mechanism which is in the service of our lives. Persons who are faced with distressing truths (such as mourning, sickness or addictions) tend to distort objective reality in subconscious parts of the mind to avoid prolonged pain and suffering which can induce our system to behave abnormally. Intrapsychic psychoanalytic theory refers to Sigmund Freud’s ‘pleasure principle’ (*eros*)<sup>1</sup> as a driver of our self-defence mechanism in denial of death or other non-pleasurable occurrences. Interactional theory highlights B’s identification with A’s projection that denies some disturbing mental content as the creation and endurance of B’s own denials. Affect theory explains denial through the ego’s ‘emphatic wall mechanism’ which allows us to deny aversive external stimulus.<sup>2</sup>

Stanley Cohen’s sociological approach to denial examines the morality of negation-strategies at the societal level (which prescribes different social roles, tasks and duties). For Cohen, denial represents claims negating that something happens, exists, is true (moral value), or is known. Cohen offers a concept of *acknowledgement* of social responsibility toward human suffering, with various responsive models (such as truth commissions, criminal trials, compensation, criminalizing denial of the past, and memorialization). The concept entails expressing an appropriate personal, collective or official psychological, moral and public reaction, and taking a step to reject human suffering in our society and globally.<sup>3</sup> In contrast, academia lacks a commonly accepted definition of denial of rights of human beings, although we can talk about the denial of a particular human right, such as freedom from torture of a detainee. An example of denial of gross human rights violations would be negations of clearly-established facts about committed mass crimes.

Such denial of mass crimes is made up of jointly reinforcing moral, political and ideological dimensions. It entails a denial of moral responsibility for past mass crimes. This is facilitated by

<sup>1</sup> Sigmund Freud, “Negation”, in *The International Journal of Psycho-Analysis*, 1925, vol. 6, no. 4, pp. 367-371.

<sup>2</sup> See Eli L. Edelstein, Donald L. Nathanson and Andrew M. Stone (eds.), *Denial: A Clarification of Concepts and Research*, Plenum Press, New York, 1989.

<sup>3</sup> Stanley Cohen, *States of Denial: Knowing about Atrocities and Sufferings*, Polity Press, Cambridge, 2001.

some types of moral relativism (such as normative cultural relativism) which either justifies killings or re-humiliates survivors by denying that any wrong-doing has occurred.<sup>4</sup> The political dimension comprises specific political or cultural strategies that attack the identity of persons who belong to the victim group, and deny moral responsibility or facts about the inflicted mass crimes.<sup>5</sup> The ideological dimension includes criminal ideological elements (be it, for example, racial or national), and aims at the destruction of ‘other’ groups and truthfulness regarding committed atrocities.<sup>6</sup>

### 2. Denial of Justice

Although governments are obliged to address injustice, they often deny justice to victims of human rights violations. According to Hugo Victor Condé, ‘denial of justice’ means:

The legal effect of a ruling (decision, judgment, order) of a judicial, quasi-judicial, or administrative forum, which resolves an actual case and controversy in a way that does not fully comply with procedural and substantive standards under any international human rights legal norms binding on the state and under national law consistent with such international norms and applicable to the particular case.<sup>7</sup>

In the case *Selimović et al. v. Republika Srpska* (2003) before the Human Rights Chamber for Bosnia and Herzegovina, the court found that *Republika Srpska* failed to conduct a meaningful investigation of genocide in Srebrenica in Bosnia and Herzegovina further to requests from the relatives of disappeared victims “due to their Bosniak origin”.<sup>8</sup> It also found that *Republika Srpska*

<sup>4</sup> Israel W. Charny, “A Classification of Denials of the Holocaust and Other Genocides”, in *Journal of Genocide Research*, 2010, vol. 5, no. 1, p. 11; and Nenad Dimitrijević, *Duty to Respond: Mass Crime, Denial, and Collective Responsibility*, Central European University Press, Budapest, 2011, pp. 85-133.

<sup>5</sup> See Charny, 2010, *ibid.*, p. 11; and Dimitrijević, 2011, *ibid.*, pp. 42-50.

<sup>6</sup> See Martin Imbelau, “Denial”, in Dinah L. Shelton (ed.), *Encyclopedia of Genocide and Crimes against Humanity*, vol. 1, Thomson Gale, Michigan, 2005, pp. 243-244; and Eric D. Weitz, “Utopian Ideologies as Motives for Genocide”, in Dinah L. Shelton (ed.), *Encyclopedia of Genocide and Crimes against Humanity*, vol. 3, *op. cit.*, pp. 1124-1127.

<sup>7</sup> Hugo Victor Condé, *A Handbook of International Human Rights Terminology*, 2nd. edition, Nebraska, University of Nebraska Press, 2004, p. 63.

<sup>8</sup> Human Rights Chamber for Bosnia and Herzegovina, *Ferida Selimović et al. v. the Republika Srpska*, Decision on Admissibility and Merits, 7 March 2003, CH/01/8365, para. 202 (<https://www.legal-tools.org/doc/qpsuc4/>).

failed to ensure an effective remedy in relation to Articles 3 (prohibition of torture) and 8 (right to respect for private and family life) of the European Convention on Human Rights ('ECHR').<sup>9</sup> The European Court of Human Rights has interpreted Articles 2 (right to life) and 3 in combination with Article 1 (responsibility to respect the human rights enlisted in the Convention) as a duty of the state to investigate and punish persons liable for violating the right to life and inhumane treatment.<sup>10</sup> Consequently, under political pressure from the European Union, the United States and the Office of the High Representative ('OHR'),<sup>11</sup> the *Republika Srpska* government recognized in a 2004 report that 7,800 Bosnian Muslim men were killed in Srebrenica. It issued a public apology for "a war crime of enormous proportions".<sup>12</sup> In 2020, however, the *Republika Srpska* government annulled the 2004 report – which had been confirmed by the clear historical record of the International Criminal Tribunal for the former Yugoslavia ('ICTY') – and set-up an 'independent commission' to pursue its interpretations of the Srebrenica events.<sup>13</sup>

*Republika Srpska* institutions systematically deny other serious crimes as well, such as the well-documented ethnic cleansing committed against non-Serbs in Prijedor Municipality during the 1992-95 Bosnian war.<sup>14</sup> This is done, *inter alia*, by creating inadequate and discriminatory redress laws (by which tortured non-Serb detainees of the notorious Prijedor camps who later joined the Army of Bosnia and Herzegovina are labelled as "enemies"

<sup>9</sup> *Ibid.*

<sup>10</sup> See Raquel Aldana-Pindell, "An Emerging Universality of Justice: Accessible Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes", in *Human Rights Quarterly*, 2004, vol. 26, no. 3, pp. 634-644.

<sup>11</sup> The OHR is responsible for the supervision of the implementation of the civilian dimension of the Dayton Peace Agreement.

<sup>12</sup> Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia", in *Human Rights Quarterly*, 2005, vol. 27, no. 3, p. 942.

<sup>13</sup> Monica Hanson Green *et al.*, "Srebrenica Genocide Denial Report 2020", on *Srebrenica-Potočari Memorial and Cemetery for the Victims of the 1995 Genocide*, 9 May 2020 (available on its web site). Namely, according to Steven Leonard Jacobs, *Republika Srpska* funded the Serbian Historical Project in The Hague with USD 1,100,000 from 2008 to 2012 for historical revisionism of the Srebrenica genocide. See Steven Leonard Jacobs, "Denial of the Bosnian Genocide", in Paul Robert Bartrop (ed.), *Bosnian Genocide: The Essential Reference Guide*, ABC-CLIO, Santa Barbara, 2016, p. 101.

<sup>14</sup> Haris Subašić, "The Culture of Denial in Prijedor", 29 January 2013 (available on TransConflict's web site). On 8 October 1999, in the case of *Mahmutović v. Republika Srpska*, the Human Rights Chamber for Bosnia and Herzegovina found that the Municipality of Prnjavor's order for the body of the applicant's wife to be exhumed from a local cemetery (based on an unconstitutional 1994 decree for the Muslim town cemetery to be closed) to amount to a policy of ethnic cleansing and discrimination based on the claimant's religion and national origin. See Human Rights Chamber for Bosnia and Herzegovina, *Dževad Mahmutović v. the Republika Srpska*, Decision on Admissibility and Merits, 8 October 1999, CH/98/892, para. 104 (<https://www.legal-tools.org/doc/emfcgu/>). On 22 March 2018, the Constitutional Court of Bosnia and Herzegovina found that the Supreme Court of *Republika Srpska*'s decision on an obligation of a wartime rape survivor (a Bosnian Croat who was raped by a Bosnian Serb soldier in 1992) to pay legal costs in a trial against *Republika Srpska* for the harm she suffered, was in violation of the ECHR (Constitutional Court of Bosnia and Herzegovina, *S.A. v. Republika Srpska*, Decision on Admissibility and Merits, 22 March 2018, AP 1101/17 (<https://www.legal-tools.org/doc/9mtkij/>); see TRIAL International, "Constitutional Court of Bosnia and Herzegovina", 3 April 2018 (available on its web site)).

who do not enjoy a human right to reparation).<sup>15</sup> Moreover, the provisions on the amount of material reparation offered to the majority of the non-Serb civilian victims are inadequate for a dignified life and the grave harm suffered.<sup>16</sup> Controversially, there is no meaningful and *sui generis* legal recognition by *Republika Srpska* of the needs of the victims of Bosnian Serb mass crimes, such as official factual and truthful apologies, rehabilitation programmes, reparation funds, memorialization or remembrance events.

*Republika Srpska*'s denial of justice entails a failure to honour its constitutional and international legal obligations to provide an *effective remedy* (access to justice: investigation, prosecution and punishment) and *full reparations* to the victims of serious crimes for the grave harm suffered.

### 3. Political, Ideological and Moral Denial

According to Jack Donnelly, 'international legal universality' means that states universally endorse the rights of human beings. 'Functional universality' of human rights implies the effective protection of individuals, families and groups from a modern state through a set of practices.<sup>17</sup> However, both legal and functional universality of human rights for the survivors of the mass crimes in *Republika Srpska* are curtailed by political, ideological and moral denial.

The *political* dimension of denial enables ideological denial through various political and cultural strategies to reject moral responsibility for serious crimes and associated victims' rights, such as control of and attacks on the victims' very identity or destruction of historical truth and memory. For example, the accurate ICTY historical record on mass crimes against non-Serbs in Prijedor and Srebrenica is not at all included in the educational materials in *Republika Srpska* schools.<sup>18</sup> Its governmental media and memorial culture still promote a particular official agenda, interpretative denials, selective concerns, spins, and selective victims of the so-called 'Serbian defensive-liberation war'.<sup>19</sup>

The *ideological* dimension of denial is about some form of explicit national or racial ideologies (such as Nazi-Germany, 'Greater Serbia',<sup>20</sup> anti-Semitism, or Islamophobia) which are used as public programmes of action for the creation of an imagined homogeneous society that deprives human beings belonging to other national or racial groups of their basic rights. For example, the ICTY found that *Republika Srpska* engaged in ethnic crimes

<sup>15</sup> Haris Subašić, "The Banality of Evil in Republika Srpska – A Victim's Perspective", 3 February 2015 (available on TransConflict's web site).

<sup>16</sup> *Ibid.*

<sup>17</sup> Jack Donnelly, "Universality", in David P. Forsythe (ed.), *Encyclopedia of Human Rights*, vol. 5, Oxford University Press, 2009, pp. 261-262.

<sup>18</sup> Nevertheless, each ethnic group teaches its own version about the history of the Bosnian war. See Džana Brkanić, "Bosnia's Segregated Schooling Entrenches Wartime Divisions", *Balkan Insight*, 13 June 2017.

<sup>19</sup> Haris Subašić and Nerzuk Ćurak, "History, the ICTY's Record and the Bosnian Serb Culture of Denial", in James Gow, Rachel Kerr and Zoran Pajić (eds.), *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the Former Yugoslavia*, Routledge, London, 2013; and CPHA, "Анализа открила бројне обмане и фалсификате о Сребреници", Радио Телевизија Републике Српске, 8 July 2020 (in Serbian).

<sup>20</sup> See Reneo Lukic, "Greater Serbia: A New Reality in the Balkans", in *Nationalities Papers*, 1994, vol. 22, no. 1; and Omer Karabeg, "Stojanović i Perović: Може ли се Велика Србија створити мирним путем?", *Radio Slobodna Evropa*, 23 September 2018.

against non-Serbs in Prijedor to create a “pure Serbian state”<sup>21</sup> or in Srebrenica during mass killings of males and unlawful transfer of civilians from the area to prevent future reproduction and existence of Bosnian Muslims on the territory.<sup>22</sup> Since the establishment of the *Republika Srpska* structures in the spring of 1992, such ideology has been present in public affairs on the territory it controls, depriving non-Serb victims of mass crimes of their human rights.

Denial of *moral* responsibility for serious crimes humiliates victims. The exclusive national righteousness of ‘ethnic purity’ feeds a deliberate denial of victims’ rights. The former president of *Republika Srpska*, Milorad Dodik, regularly denied the genocidal acts that occurred in and around Srebrenica.<sup>23</sup> Local governmental officials in Prijedor – and their supporters – have consistently negated the ethnic cleansing of non-Serbs in their municipality.<sup>24</sup> Both represent moral denials of the rights of victims to truth, memory, human dignity, and equal rights.

It is of the utmost importance that *Republika Srpska*’s authorities as well as the central Bosnia and Herzegovina government create adequate public policies for victims’ redress based on reasonable readings of the humanistic foundations of international human rights. This is required to properly meet international and constitutional obligations.

For Ioanna Kuçuradi, human rights represent indispensable demands to recognize and protect “the value of human being” or “human dignity” (the totality of human characteristics and potentialities which differentiate humans from other living beings).<sup>25</sup> Awareness of the value of human beings is made up of what may be considered philosophical or anthropological recognition of the value of the human species, including the specificities of human beings (such as their potentialities) and their historical achievements (in particular in innovation, science and the arts). This awareness generates our belief in the objective value of human beings as well as the normative implication that we should treat all human beings in ways that can actualize such ‘worthy’ human potentialities. Human rights are thus practical implications of such human value, demanding from all persons (including public officials) a sort of treatment of individuals – or creation of conditions – that protects, or enables the development of, the full potential of human beings.

This human-centred understanding helps us as individuals and state officials to be aware of our primary or common *human*

<sup>21</sup> International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Milomir Stakić*, Trial Chamber, Judgment, 31 July 2003, IT-97-24, para. 710 (<https://www.legal-tools.org/doc/d67a05/>).

<sup>22</sup> International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgment, 02 August 2001, IT-98-33-T, paras. 594-599 (<https://www.legal-tools.org/doc/440d3a/>).

<sup>23</sup> “Bosnian Serb leader Milorad Dodik Disputes 1995 Srebrenica Genocide”, *Deutsche Welle*, 14 August 2018.

<sup>24</sup> “Vidaković: Srbi su u BiH vodili odbrambeni i oslobodilački rat!”, *Radio Televizija Republike Srpske*, 3 April 2017 (<https://www.legal-tools.org/doc/uLOYz8/>); and “Prijedor – Vidovdan: Sjećanje na stvaraoce Republike Srpske”, *Prijedorski Gradski Portal*, 28 June 2021 (<https://www.legal-tools.org/doc/flg2iq/>).

<sup>25</sup> Ioanna Kuçuradi, *Insan Hakları: Kavramları ve Sorunları*, Türkiye Felsefe Kurumu, Ankara, 2011, pp. 1-2; see also CHEN Bo, “‘Dignity’ and the Incomplete Grounding of International Human Rights”, FICHL Policy Brief Series No. 21 (2014), Torkel Opsahl Academic EPublisher, Brussels, 2014 (<http://www.toaep.org/pbs-pdf/21-chen>); and LIU Renxiang, “Two Types of ‘Dignity’ and Their Role in International Human Rights”, FICHL Policy Brief Series No. 68 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016 (<http://www.toaep.org/pbs-pdf/68-liu>).

identity, and to formulate public policies on that basis. By contrast, *cultural* identity (such as ethnic or religious identity) is made up of cultural or societal traditions that are often fluid, parochial norms directed at safekeeping benefits and interests of members of particular groups (as if deduced in given social conditions through induction, and not from the presupposition of a particular epistemic quality (the value of human potentialities)).<sup>26</sup>

Pragmatically, redress policies for victims of the atrocities in Bosnia and Herzegovina should be designed on the basis of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law (the ‘Basic Principles and Guidelines’).<sup>27</sup> They not only articulate the relevant principles of international human rights and humanitarian law, but emphasize human and social solidarity rather than conflicting approaches to the protection of victims’ rights.<sup>28</sup> The document goes beyond existing international law on remedies and reparations, pointing to various processes, modalities and approaches for their practical application.

#### 4. Transitional Justice and the Human Rights of Victims

Although the term ‘transitional justice’ was coined after World War II, its origins span even to ancient times when mass crimes were mediated in part through legal provisions of amnesty as if guaranteeing social certainty.<sup>29</sup>

Transitional justice can be defined as an

approach to systematic or massive violations of human rights that both provides redress to victims [criminal prosecution, truth-seeking, reparations] and creates or enhances opportunities for the transformation of the political systems [from authoritarian to liberal democracy], conflicts, and other conditions that may have been at the root of the abuses [reform of institutions and peace-building].<sup>30</sup>

Transitional justice is, with other words, a complex legal-political process – sometimes with international participation – that may include a variety of measures aimed at the political transformation of societies from authoritarianism to liberal-democracy, as well as a set of modalities to address past abuses, such as acts of genocide or war crimes.<sup>31</sup>

In the contemporary context, transitional justice is inspired by democratic-peace thought. Particularly, David P. Forsythe claims

<sup>26</sup> Ioanna Kuçuradi, “Universal Human Rights and Their Different Implications for Multiethnic and Multireligious Societies”, in Yahya Se-zai Tezel and Wulf Schönbohm (eds.), *World, Islam and Democracy*, Konrad-Adenauer Foundation, Ankara, 1999, pp. 42-52.

<sup>27</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006 (<https://www.legal-tools.org/doc/bcf508/>).

<sup>28</sup> Theo van Boven, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, in *United Nations Audiovisual Library of International Law*, 2010 (available on its web site).

<sup>29</sup> Christina Binder, “Introduction to the Concept of Transitional Justice”, in Walter Feichtinger, Gerald Hainzl and Predrag Jureković (eds.), *Transitional Justice Experiences from Africa and Western Balkans*, Schriftenreihe der LAVAK, Vienna, 2013, pp. 9-11.

<sup>30</sup> United Nations (‘UN’), “What Is Transitional Justice?”, 20 February 2008 (available on its web site).

<sup>31</sup> See Ruti G. Teitel, “The Law and Politics of Contemporary Transitional Justice”, in *Cornell International Law Journal*, 2005, vol. 38, no. 3.



that there is a pragmatic value of human rights as (i) a micro-contribution to human dignity (individual freedoms and opportunities), and (ii) a macro-contribution to human dignity by reducing conflicts leading to potential war (peace and prosperity).<sup>32</sup> Democratic-peace theory assumes that this is possible to achieve in liberal democracy with regular and fair elections, the rule of law, safekeeping of the individual and minority human rights, as well as by membership in regional markets and inter-governmental organizations. The theory was founded on the assumptions and evidence that democracies go less to war among themselves than autocracies, with support also in authorities such as Immanuel Kant's *On Perpetual Peace*,<sup>33</sup> Franklin Delano Roosevelt's four freedoms<sup>34</sup> (inspired by Herbert G. Wells' thoughts),<sup>35</sup> and the United Nations Charter.<sup>36</sup> Accordingly, victims and citizens' human rights would be protected more optimally in consolidated liberal democracies, which are better placed to avoid perpetual spirals of violence<sup>37</sup> for denied justice nationally and regionally.

However, the results of transitional justice in the democracy of Bosnia and Herzegovina as regards the protection of victims' rights can only be described as rather mixed. On the one hand, criminal prosecutions, transformed legal frameworks, 'disarmament, demobilisation and reintegration', and 'thin' forms of reconciliation have contributed significantly to the safeguarding of victims' rights to remedies and reparations by creating favourable legal (protection and advocacy of human rights), military (demilitarization), and social conditions (co-existence and co-operation). On the other hand, truth-seeking, reparations, vetting, structural reform, peace-building 'top-down', and 'thick' forms of reconciliation have not been successfully implemented. Victims of serious crimes committed in the early 1990s are therefore not able to enjoy full respect for their human rights.<sup>38</sup>

<sup>32</sup> David P. Forsythe, "Peace and Human Rights", in David P. Forsythe (ed.), 2009, vol. 4, p. 187, see above note 17.

<sup>33</sup> Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, W. Hastie and M.C. Smith trans., Slough Foundation, Philadelphia and the Syracuse University Humanities Center, Minneapolis, 2010 (<https://www.legal-tools.org/doc/dc079a/>).

<sup>34</sup> Dorothy V. Jones, "Franklin Delano Roosevelt", in David P. Forsythe (ed.), 2009, vol. 4, pp. 365-367, see above note 17.

<sup>35</sup> Herbert G. Wells, *The Rights of Man or What Are We Fighting For?*, Penguin Books, Harmondsworth, 1940.

<sup>36</sup> Forsythe, 2009, p. 188, see above note 32.

<sup>37</sup> See Adam Jones and Nicholas A. Robins (eds.), *Genocides by the Oppressed: Subaltern Genocide in Theory and Practice*, Indiana University Press, Bloomington, 2009.

<sup>38</sup> See Michael Freeman, "Bosnia and Herzegovina: Selected Development in Transitional Justice", on *International Center for Transitional Justice*, October 2004 (available on its web site); Massimo Moratti and Amra Sabic-El-Rayess, "Transitional Justice and DDR: The Case of Bosnia and Herzegovina", on *International Center for Transitional Justice*, June 2009 (available on its web site); David A. Hoogenboom and Stephanie Vielle, "Rebuilding Social Fabric in Failed States: Examining Transitional Justice in Bosnia", in *Human Rights Review*, 2010, vol. 11, no. 2; Ognjen Ridić and Edita Đapo, "Washington

## 5. Conclusion

To conclude, successive *Republika Srpska* governments have denied justice to non-Serb victims of mass crimes during the 1992-95 armed conflicts in Bosnia and Herzegovina, through persistent denial with intertwined political, ideological and moral underpinnings. This amounts to a systematic negation of respect for the human dignity and rights of non-Serb victims of the serious crimes which the international community failed to prevent or stop. The denial continuously adds salt to the deep wounds with which tens of thousands of non-Serb victims have to live.

What can be done to change this situation? Public policy throughout Bosnia and Herzegovina should respect the reasonable humanistic foundations of international human rights, including the Basic Principles and Guidelines<sup>39</sup> that seek to ensure that victims are not forgotten. International actors, human rights experts and advocates, and victims of mass crimes throughout the country of Bosnia and Herzegovina should use these normative-legal standards when undertaking local projects and national programmes to more effectively promote or protect the human rights of victims of the atrocities of the 1990s.

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<sup>39</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law, 2006, see above note 27.



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