
Silencing Victims in International Courts

Neglecting a Solemn Obligation

Nancy Paterson

"You haven't asked about what I went through at the Izbica massacre," protested Sadik Januzi, an elderly farmer from Kosovo, at the conclusion of his testimony at the trial of Slobodan Milosevic.¹ Mr. Januzi had come to the International Criminal Tribunal for the Former Yugoslavia (ICTY or Tribunal) to affirm that Serbian forces killed over 100 men in his home village. However, in an effort to speed up the trial, rather than let Mr. Januzi tell his story, the judges limited the prosecutor to asking a handful of questions and reading two brief summaries of Mr. Januzi's written statements into the record. Mr. Milosevic was then allowed to cross-examine Mr. Januzi.² When Mr. Milosevic finished, the witness was excused. "Mr. Januzi," said the judge, "we've got your statement before us. We've seen what you went through. We've heard it summarized. We've been able to read about it. And that concludes your evidence. Thank you for coming to the Tribunal to give it, and you're free to go."³ Such is the sad state of witness testimony from the victims of war crimes before the ICTY. It begs the questions: Are these witnesses really of such little value to this court? Is this what the United Nations had in mind when it created the Tribunal in 1993?

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Frustrated in no small part by its inability to bring a diplomatic end to the conflict in Yugoslavia, the United Nations established the ICTY to bring to justice the perpetrators of the war crimes committed in Bosnia and Croatia.⁴ However, the UN did not stop there. Perhaps guided more by rhetoric than reality, and by the need to invoke the special provisions of Chapter VII, the Security Council laid out a wider mandate for the Tribunal in Resolution 808 (1993). In addition to bringing the war criminals to the dock, the Security Council announced that it believed that establishing the Tribunal would bring an end to the horrific crimes and “would contribute to the restoration and maintenance of peace.”⁵

While most criminal courts throughout the world are designed to prosecute those responsible for heinous crimes, few, if any, are charged with the mandate to “contribute to the restoration and maintenance of peace.” Traditionally, criminal courts focus on providing a fair trial for the defendant to insure that his rights are protected. If, in the process, the system also benefits the victims and the community, so much the better, but the focus is always on the defendant. Most lawyers, regardless of what country they come from and what judicial system they practice in, would argue that this is the only role appropriate for a criminal court. They would reject the concept that a court can and should serve as a forum to “contribute to the restoration and maintenance of peace.” A court should strictly limit itself to its traditional legal role. There is no

reason now to tamper with the established system. The idea of providing justice for the victims and for the country as a whole as a means to restore and maintain peace would be considered well beyond the traditional mandate of criminal courts.

However, while the reasons for conducting defendant-focused trials are valid and this is undoubtedly a less controversial approach, the judges and other practitioners at the Tribunal cannot simply ignore the wider mandate given them by the UN Security Council. Confining the focus of a trial solely to the defendants without also considering the restorative effects the trial can have for the victims and the wider community of war survivors limits the court’s ability to help restore and maintain peace. To fulfill their mandate, these international courts must put more effort into implementing a variation of the traditional criminal court model. They must realize that the modern world is demanding more of them, and therefore they must look beyond the traditional views of a court’s function. Even the United States Supreme Court has confirmed this principle by noting, “For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted.”⁶

Since there are no precedents for such a mandate, just how does a new international criminal court go about restoring and maintaining peace? Restoring and maintaining peace requires that all those involved come to grips with the grim reality of the conflict.

This cannot be accomplished if the Tribunal is confined to simply scrutinizing the behavior of the accused.

War crimes trials must address the needs of three key parties: the perpetrators, the victims, and the community affected by the war. To accomplish this, the court must find a way to help the victims accept, understand, and verbalize what has happened to them. The victims must be given an opportunity to articulate and visualize their experiences. Anger and sadness have to be expressed in a public arena -anything less will only frustrate the victims and increase their pain and distress. If the individual victims of these terrible crimes are not given "their day in court," how can the country as a whole accept what has happened, acknowledge the pain and destruction that has been caused, and try to move on?

Limiting witness testimony like that of Mr. Januzi might speed up the trials, but in doing so the court is not only neglecting its responsibility to the victims of the conflict, but it is also preventing the public, as well as the judges themselves, from hearing the compelling stories the witnesses can tell. Like the defendants and the victims, the wider community also needs the forum of the criminal court to help it accept the extent of its responsibility for what happened. The community needs to try to understand how and why the war crimes occurred, and to fashion a plan for preventing such crimes in the future. Only by putting a face to the general suffering, by listening to the individual victim's pain, and by seeing the long-term impact of the crimes on individuals, can the public understand the senselessness of the acts and the need to find alternatives to war.

To get the Tribunal, and, more specifically, the judges of the Tribunal and oth-

er international criminal courts to accept the goals of providing justice and helping to restore and maintain peace, the judges must see the value of providing this forum for the victims and for the public. How can this broader approach make their job as judges easier? Simply put, what is in it for them?

First, the judges should consider the argument made by U.S. Supreme Court Justice Harlan that holding public trials brings many benefits. In his opinion in *U.S. v. Estes*, Justice Harlan argued that conducting public proceedings improves the overall quality of testimony, can motivate reluctant witnesses to come forward, and "may move all trial participants to perform their duties conscientiously."⁷ Perhaps most importantly, holding public trials allows the public to scrutinize the judges and other practitioners, and satisfy themselves that the legal authorities are fulfilling their responsibilities in an appropriate manner.⁸

How can holding a public trial improve the quality of witness testimony? Dr. Judith Herman, author of the seminal book, *Trauma and Recovery*, asserts that "public acknowledgement of the truth is more important than punishment of the perpetrators," for the victims of trauma, including victims of war crimes.⁹ By airing the facts of what happened in a public forum, the wider community can come to understand and acknowledge what happened. This acceptance of reality illustrates the potential healing powers of the system. Dr. Herman points out that, "The response of the community has a powerful influence on the ultimate resolution of the trauma."

In order for the victims to begin recovering, they need to reconnect with the community they feel has failed them. Once the community accepts the facts of

the crime, the community must act to hold the perpetrators of the crime responsible and then try to heal the injuries suffered by the victims. "These two responses—recognition and restitution—are necessary to rebuild the survivor's sense of order and justice."¹⁰ This focus on public acknowledgement and justice for the victims is of overriding significance to the survivors of war crimes.

the minds of the victims, the issue at stake is not just what the defendant did, but also the action or inaction of bystanders. According to Dr. Herman, victims feel a sense of "betrayal by the bystanders" and it is this sense of betrayal that drives them to seek some acknowledgement of their suffering and pain.¹¹

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In order to get the best testimony from the victims and improve the quality of the evidence, the judges need to appreciate the victim's point of view. The judges, as well as the lawyers and other court personnel, must accept that the victim's view of the court process does not correspond with that of the legal practitioners. The victims believe that the process is about them. If the judges tried to explain that the trial is about the defendant, most victims of war crimes would be incredulous. They would tell the judges that the court process is designed to give them a forum to talk about their pain and suffering, and to allow the judges, acting as representatives of the community, to acknowledge the facts of the crimes and to recognize the harm they—as victims—have suffered.

The international criminal courts cannot hope to achieve their goal of contributing to the restoration and maintenance of peace if they fail to address the victim's position. As Dr. Herman has pointed out, victims need to regain some power and control as part of their recovery. The timing and pacing of the narrative is central to the healing process. In

the best that can be provided? One way is to treat the witnesses with respect and understanding. If the Tribunal did a better job of understanding the needs of the witnesses, both physical and psychological, they could implement a better system for meeting those needs. If the witnesses feel that the court cares about them, they will care about the court, and try to the best of their ability to help the court understand what happened to them, their loved ones, and their neighbors. A victim who feels that the court values their testimony, is willing to go to great lengths to hear their testimony, and appreciates the danger and intimidation they may have experienced will be more motivated to speak fully and openly about what they experienced.

The judges should also consider the unique opportunities that the international nature of a criminal court such as the ICTY provides for broadening the impact of the criminal court system. An international criminal court provides a means for educating the worldwide community about the truth of what happened in armed conflicts; it is a means for edu-

cating civilians and the military about what acts constitute war crimes. Such knowledge may motivate governments and armies to change their conduct and behavior in future conflicts. Moreover, this knowledge reminds the world that wars are cruel and brutal exercises that scar not only individuals, but also entire villages, cities, and countries. Vivid accounts of war crimes remind people that there is more to war than the photos on the evening news.

Certainly, the simple act of providing a forum for victims to tell their stories will not, by itself, restore and maintain peace. However, if managed thoughtfully, it can move the process forward. Unfortunately, neither the ICTY or its counterpart for Rwanda (ICTR) has embraced this idea. Instead they have been bound to the traditional concept of how courts operate and what their roles should be, and they have made inadequate efforts to focus on the needs of the victims. Worse still, now that both the ICTY and ICTR are routinely and sharply criticized for the painfully slow pace of trials, they have moved to restrict witness testimony even more.

Giving more voice to the victims of the war can also help the judges to better understand the elements of the crimes they are considering. To prove the defendant guilty, the prosecution must prove several elements of each crime. When required to focus on the technical legal definitions of the elements, it is easy for the judges to miss the true significance of what they are actually considering. In the case of Slobodan Milosevic, the judges have to consider evidence as to whether or not Milosevic is responsible for torture, willfully causing great suffering, cruel treatment, and other inhumane acts.¹² When deciding if Milosevic committed the crimes of cruel treatment or "inhumane"

acts, the judges have to determine if he intended to impair the physical, intellectual, or moral integrity of the victim. The judges have to decide if the defendant subjected the victims to indignities, pain, or suffering that are grossly out of proportion to the treatment expected by one human being of another. How can a judge determine whether this happened to Mr. Januzi without hearing in depth from Mr. Januzi? To simply read a cold, bland witness statement into the record, as is now the norm at the ICTY, cannot possibly be an adequate substitute for the simple, yet dramatic and compelling testimony that often comes from victims. How victims choose to articulate their suffering is what breathes life into the whole concept of judging and achieving justice.

Giving victims an opportunity to tell their stories in public seems to be a simple concept. Why do judges seem unable to accept the value of this approach? Perhaps the judges are reluctant to listen to this testimony because, apart from judicial economy, there is "an emotional labor to judging."¹³ Hearing the details of brutal crimes and the effects of those crimes on those who survive is an emotionally draining experience from which judges are not immune. For judges who do not want to acknowledge or experience this emotional reality, it is much easier to brush aside the testimony of witnesses, to limit the details and specifics that come out in the courtroom, and to let others deal with that emotion. Ironically, while the judges try to push away the emotional impact of witness testimony, the victims themselves come to realize the restorative and healing power of a public reckoning.¹⁴

Having worked as a Trial Attorney at the ICTY for seven years, I know full well that the situation regarding victim witness testimony is much more complicated than I

have been able to address in this short article. I do not mean to suggest that the judges, lawyers, and support staff at the Tribunal have not tried mightily to address some of these issues. However, they have been thwarted by a myriad of complex issues that are difficult to resolve. Nonetheless, this is not an excuse. While overcoming the many challenges of getting witnesses to court and providing them the opportunity to tell their stories is difficult, it is not impossible. Investigating and prosecuting war crimes cases are among the most difficult challenges any court and prosecutor's office can confront, but the very fact that these trials continue shows that these challenges have been met and overcome. If the judges and prosecutors committed themselves to giving victims the opportunity to tell their stories in full, and strenuously enforced this commitment, this challenge can also be met. If the existing Tribunals cannot meet this challenge, at the very least the International Criminal Court should make this

one of its top priorities for the future.

To fulfill a mandate to "contribute to the restoration and maintenance of peace," international criminal courts must view valuing witness testimony not as an option, but as an obligation. It is important that the trials be part of a healing process. Providing the opportunity for victims to tell their stories not only helps them heal as individuals, it helps their communities and countries to heal as well. It requires additional resources, time, and effort; however, failure to accept this important component of the trials will constitute another unjust "betrayal of the bystanders." As war crimes survivor Bruno Bettelheim eloquently warned, "What cannot be talked about can also not be put to rest; and if it is not, the wounds continue to fester from generation to generation."

Author's Note: The views expressed in this article are those of Ms. Paterson and do not represent the views of the ICTY or the United Nations.

NOTES

1 *Prosecutor v Slobodan Milosevic*, No. IT-02-54, Trial Chamber I Transcripts, 24 April 2002, 3777.

2 Milosevic's questions focused only on KLA activity in the area and the shootings of Serb police officers and civilians. The witness was asked few questions about what happened to him, his family, or his neighbors.

3 *Prosecutor v Slobodan Milosevic*

4 In order to invoke the powers granted under Chapter VII, the Security Council had to find that the situation in Yugoslavia constituted "a threat to international peace and security." See U.N. Charter, Chapter 7, A/39 Internet, <http://www.un.org/Overview/Charter/chapter7.html> (Date accessed: 20 November 2002).

5 UN Security Council. 48th Session. 3175th Meeting. UN Security Resolution 808 (1993) on the International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 1993. Internet, http://www.ohr.int/other-doc/un-res-bih/default.asp?content_id=7118 (Date accessed: 21 November 2002).

6 *Estes v Texas*, 381 U.S. 532, 564 (1965).

7 *Ibid.*

8 *Ibid.*

9 Judith Herman, M.D., *Trauma and Recovery* (New York: Basic Books, 1992), 243.

10 *Ibid.*, 70.

11 Judith Herman, conversation with author, International Center for Ethics, Justice and Public Life, Brandeis University, 17 June 2002.

12 See indictment, *Prosecutor v. Slobodan Milosevic*, (Bosnia-Croatia indictment), counts 8-15, 23-29.

13 See Herman, conversation.

14 "Recognizing the impersonality of law, the survivor is to some degree relieved of the personal burden of battle. It is the law, not she, that must prevail. By making a public complaint or accusation, the survivor defies the perpetrator's attempt to silence and isolate her, and she opens the possibility of finding new allies. When others bear witness to the testimony of a crime, others share the responsibility for restoring justice. Furthermore, the survivor may come to understand her own legal battle as a contribution to a larger struggle, in which her actions may benefit others as well as herself." *Trauma and Recovery*, 210.