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Jelena Pejic

Abstract

The purpose of this Essay is to examine the establishment of the Yugoslav Truth and Reconciliation Commission and to draw some early conclusions on whether it will be capable of rendering the facts that I would so desperately like my uncle to face. The first part will deal with the need for a Truth and Reconciliation Commission, while the second part will outline and then comment on its basic documents. The assumption is that the reader is basically familiar with the work of similar commissions around the world and the text will therefore not attempt to repeat the literature on the subject.

ESSAYS

THE YUGOSLAV TRUTH AND RECONCILIATION COMMISSION: A SHAKY START

*Jelena Pejic**

INTRODUCTION

For many years now I have hardly spoken to one of my uncles. We parted ways after a series of heated discussions on the causes and course of the tragedy that was, at the time, unfolding in the former Yugoslavia. No amount of facts could convince him: he simply denied any Serbian responsibility for the bloodshed and destruction visited by Serbian or Serbian-sponsored forces outside their borders and refused to believe that crimes were being committed. When I asked him once to pick up an opposition newspaper as proof of my arguments, he waved me down saying he did not need to read "Western propaganda." Time and again in our discussions I felt I was hitting a brick wall. When, several months ago, I learned that Yugoslav President Vojislav Kostunica had established a Yugoslav Truth and Reconciliation Commission ("Commission"), my uncle immediately came to mind. Finally, I thought, he will have to hear what really happened. Finally, he will have to come to terms with the magnitude of the atrocities committed in "his" name and will have to share the shame that I, and others like myself, have been living with.

The purpose of this Essay is to examine the establishment of the Yugoslav Truth and Reconciliation Commission and to draw some early conclusions on whether it will be capable of rendering the facts that I would so desperately like my uncle to face. The first part will deal with the need for a Truth and Reconciliation Commission, while the second part will outline and then comment on its basic documents. The assumption is that the reader is basically familiar with the work of similar commissions

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around the world and the text will therefore not attempt to repeat the literature on the subject.¹

I. *THE NEED FOR A TRUTH AND RECONCILIATION COMMISSION*

An initial question that needs to be answered is whether a Yugoslav Truth and Reconciliation Commission is necessary given the ongoing work of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). Created in 1993 by the U.N. Security Council,² the Tribunal has already proven to be a formidable mechanism for dispensing justice and establishing individual criminal responsibility for the crimes committed in the region. Its proceedings are also finally generating more interest in the Federal Republic of Yugoslavia ("FRY"), especially since the surrender by Serbian authorities of former Serbian and Yugoslav President Slobodan Milosevic.³

It is submitted that, despite its remarkable work to date and the account of events it will produce going forward, the Tribunal can be well complemented by a national Truth and Reconciliation Commission. Like any other judicial institution, the primary role of the ICTY is to establish the criminal responsibility of individuals in legal proceedings that are regulated by fixed definitions of crimes and rules of procedure and evidence. Its aim is to determine the specific acts committed by an accused and to rule on whether those acts fit the legal definition of one or more crimes over which the ICTY has jurisdiction. The political, economic, social, cultural, and other contexts in which the former Yugoslav wars were planned and carried out are examined only to the extent that they may be of relevance to better identifying

1. See generally PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* (2001).

2. See S.C. Res. 827, U.N. SCOR 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993) (establishing International Criminal Tribunal for the Former Yugoslavia ("ICTY") to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia).

3. See ICTY Outstanding Public Indictments, at <http://www.un.org/icty/glance/indictlist-e.htm> (updated Oct. 10, 2001) (identifying 80 indictees, of whom 49 are currently in proceedings before Tribunal with 31 remaining at large); ICTY Fact Sheet on ICTY Proceedings, at <http://www.un.org/icty/glance/procfact-e.htm> (updated Oct. 10, 2001) (identifying 23 defendants tried by ICTY for crimes in former Yugoslavia, another 9 who await trial, 7 defendants who are currently being tried, and 16 who are at pretrial stage).

the role and responsibility of the individual in the dock. Responsibility is defined, broadly speaking, as either direct commission of a crime or as responsibility that ensues on the basis of a person's failure to prevent or punish crimes by others which he or she knew or should have known about.⁴ The political and moral responsibility of all those who were part of the system that allowed the crimes to happen is not, and cannot be, a part of the Tribunal's functions. Thus, the "truth" that the Tribunal seeks to establish is much narrower than a "big picture" rendition of events that a national Truth and Reconciliation Commission could presumably produce.

Furthermore, no judicial body, including the ICTY, is designed to examine the entire functioning of a society with a view to determining what power structures facilitated the commission of crimes, and the steps that should be taken to prevent their recurrence in the future. A Yugoslav Truth and Reconciliation Commission could, like other such commissions, recommend legislative, judicial, administrative, policy, and practical reforms that would aim to change the environment and eliminate the structures that fostered impunity. Just as importantly, a national Truth and Reconciliation Commission could suggest further steps that would need to be taken to provide redress to victims. While the ICTY Rules of Procedure and Evidence do contain a rudimentary compensation mechanism,⁵ the Commission could cast the net much wider, both in terms of the victims and the measures that would be adequate to alleviate the wrongs suffered.

Another reason that a Yugoslav Truth and Reconciliation Commission is necessary lies—it must be said—in the very low esteem in which the ICTY is held in the country. While distrust of the Tribunal is based on nationalist feeling fed by propaganda—according to which the ICTY is "anti-Serb"—it remains a fact that the majority of Serbs do not believe in the ICTY's fairness and dispute the facts it establishes.⁶ This perception of the

4. Statute of the International Tribunal, art. 7, *available at* http://www.un.org/icty/basic/statut/stat2000_con.htm.

5. ICTY Rules of Procedure and Evidence, Rule 106, *available at* http://www.un.org/icty/basic/rpe/IT32_rev21con.htm.

6. In all fairness, it must be said that the ICTY's credibility was irreparably harmed in the eyes of the average Serb by two events: Milosevic's indictment at the height of the NATO bombing campaign in the Federal Republic of Yugoslavia ("FRY") and by the

Tribunal, no matter how erroneous, means that the public at large is not likely to accept the record of events determined by the Tribunal and that its truth-telling function will be even more limited than would ordinarily be the case. If there were any chance of reaching out to Serbs who continue to deny or refuse to face reality, it would appear that a national Truth and Reconciliation Commission would be a more appropriate mechanism for doing so. As a domestic institution, a national Commission would obviously enjoy a much greater degree of confidence provided its composition, mandate, and methods of work were determined in a consultative and transparent manner. Its credibility could be the strongest recommendation for later acceptance of the facts and truth it would present to the public.

Depending on its mandate, the Truth and Reconciliation Commission could also provide an important impetus to domestic prosecutions for crimes under international and domestic law, a function that the ICTY cannot play for the reasons mentioned above. Despite increasing evidence of atrocities unearthed on Serbian soil,⁷ only two Serbian citizens have been charged with war crimes by domestic courts to date.⁸ The political atmosphere in the country is such that anyone pressing for

ICTY's subsequent determination that the campaign did not warrant a war crimes investigation. The fact that Milosevic was indicted in the spring of 1999, just as NATO aircraft were daily bombing cities across Yugoslavia inevitably made it seem as if the Tribunal was being used as an additional instrument of war against the FRY. The ICTY's refusal to then even investigate certain incidents in the air campaign, especially the bombing of TV Belgrade (which Amnesty International called a war crime) further cemented suspicions about the ICTY's even-handedness. See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, Int'l Crim. Tribunal for the former Yugoslavia, ¶ 90 (June 13, 2000), available at <http://www.un.org/icty/pressreal/nato061300.htm> (recommending against investigation of NATO bombing because of insufficient evidence and lack of applicable law); see also AMNESTY INTERNATIONAL, "COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS? (June 13, 2000), available at <http://www.amnesty.org/ailib/aipub/2000/SUM/47001800.htm> (reporting violations of laws of war by NATO during Operation Allied Force and the decision to not investigate NATO's alleged war crimes); Andrew Osborn, *New Charges Piled on Milosevic*, GUARDIAN, Oct. 10, 2001, at 19 (detailing latest indictments of Milosevic for war crimes).

7. See Carlotta Gall, *A Year Later, A Free Serbia Struggles to Overcome its Past*, N.Y. TIMES, Oct. 6, 2001, at A3 (describing mass graves found in Serbia, believed to contain the bodies of massacred Albanians transported to Serbia and buried by special forces).

8. See Marina Grihoric, *Regional Report: Serbia's Faltering War Crime Prosecution*, INST. FOR WAR & PEACE REP., TRIBUNAL UPDATE NO. 234 (Sept. 12, 2001) (recounting Serbia's national courts' hesitancy and inability to bring war crimes charges against suspect citizens).

war crimes prosecutions must be prepared to bear the consequences in terms of loss of support and credibility. Even more importantly, the national judicial system is still not capable of holding war crimes trials that would conform to international due process standards even if genuine political will for such trials existed. The judiciary was professionally and materially devastated during the Milosevic period and it will take time before it regains confidence in itself and the trust of the population. By researching certain particularly heinous events in recent Serbian and Yugoslav history, a Truth and Reconciliation Commission could, it is submitted, lay the groundwork for prosecutions by establishing facts that could make judicial action more acceptable politically and easier legally.⁹

Having briefly outlined some of the benefits of establishing a Yugoslav Truth and Reconciliation Commission, a further question that needs to be answered is—what kind of Commission? And whose truth should it be seeking to find and whom

9. "Perception of the Truth in Serbia" is the title of a booklet compiling the results of an opinion poll conducted in Serbia ahead of an international conference organized by Radio B92 entitled "In Search of Truth and Responsibility—Towards a Democratic Future" (Belgrade, May 18-20, 2001). The poll was conducted by the Strategic Marketing Agency in Belgrade, Central Serbia and Vojvodina in the second half of April 2001 by means of face to face interviews with 2,171 people. The aim of the poll was to find out what Serbs from Serbia think about the events of the Milosevic era, whom they believe, and what they are afraid of. The results were startling, to say the least. According to the poll, "Croatian nationalism" was listed as the leading reason for the break-up of the former Yugoslavia, while Serbian nationalism was ranked last on a list of 14 possible responses. When asked to name a single event that decisively contributed to the beginning of the war in the former Yugoslavia, interviewees rated the fact that "the United States became the sole superpower" above "Milosevic coming to power." More than half of those polled could not name a single war crime committed by Serbian forces. When asked to identify whom they thought most responsible for the ex-Yugoslav wars, interviewees listed former Croatian President Franjo Tudjman ahead of Slobodan Milosevic and former President of Bosnia and Herzegovina, Alija Izetbegovic. The two most highly ranked individuals in terms of defending Serb interests in the wars that took place in the last decade of the 20th century are indicted war criminals Ratko Mladic and Radovan Karadzic, former President and Commander in Chief of the Bosnian Serbs. The poll also showed that interviewees more readily believed accounts of Serb suffering during the Balkan wars than accounts according to which Serbs were responsible for the suffering of others. Most telling about the need to attempt to present the truth was the answer to the following question: "Did any new fact that you learned about from any source about any event linked to the wars in Croatia, Bosnia-Herzegovina, Kosovo, make you change your mind about the role of the warring parties?" 85.5% of those polled responded negatively, while only 14.5% responded positively. (Vidjenje istine u Srbiji", za B92 realizovao SMMRI (2001)) (on file with author).

should it attempt to reconcile? In the Yugoslav case, the answers are not as simple as they might appear.

According to a leading authority on the subject, truth commissions generally share four characteristics.¹⁰ They focus on the past instead of a specific event and attempt to paint the overall picture of certain human rights abuses or violations of international humanitarian law over a period of time. They exist temporarily and cease to operate after the submission of a report. Truth commissions are usually granted enhanced access to information and a greater ability to research sensitive issues, thereby ensuring impact of their report.¹¹ As will be demonstrated below, the Yugoslav Truth and Reconciliation Commission broadly fits this description, with one important and troubling exception. Its primary aim will not be to produce an overall picture of human rights and humanitarian law violations, but an account of the causes that led to the war(s) in which these violations were perpetrated. This change in focus can obviously significantly diminish its very *raison d'être*, which is to let the truth be told and to thus serve as a mechanism in the fight against impunity.

There are also various specific benchmarks that have been used to evaluate the likelihood of a prospective or current truth commission's success. For the purposes of this Essay, it is submitted that a commission should,¹² first, have a very clear mandate. There should also be consensus in society that the commission is needed and that its memberships are appropriate. The commission's membership should be balanced, representing all political sectors, so that it will be accepted as an impartial and independent authority. The commission's work should be publicized, including an announcement of its creation and clarification of its mandate to the public. The commission should conduct a professional, systematic investigation and should have the power to subpoena witnesses and guarantee their rights and safety. It should be given the financial resources and staff—in terms of expertise and number—to allow it to be effective. Its methodol-

10. See generally Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 6 HUMAN RIGHTS Q. 597 (1994).

11. *Id.* at 604.

12. The ensuing list of benchmarks is taken, in a slightly adapted version, from: Mary Albon, *Truth and Justice: The Delicate Balance—Documentation of Prior Regimes and Individual Rights*, in TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES I 290-91 (Neil J. Kritz ed., 1995).

ogy should be calibrated to the specific circumstances at hand so as to enable it to seek and examine all relevant sources of information.

The commission's work should be transparent and its findings should be made public after the expiry of its time-limited mandate. The commission should seek the cooperation of non-governmental organizations ("NGOs"), particularly those working in the human rights field. It should not only document the past, but also submit evidence of crimes to courts for criminal prosecutions. It should make system-wide recommendations on how best to protect human rights in the future. The commission must also protect the due process rights of identified perpetrators throughout its proceedings. The basic documents of the Yugoslav Truth and Reconciliation Commission will be examined below with these benchmarks in mind.

A very important question that arises with respect to the Yugoslav Truth and Reconciliation Commission is whose "truth" it should seek to determine. As opposed to most other truth commissions to date which dealt with situations of human rights abuses and/or with violations of international humanitarian law in situations of internal conflict, the war(s) in the former Yugoslavia started out as an internal armed conflict¹³ that quickly became internationalized¹⁴ and eventually led to a clear-cut case of international armed conflict.¹⁵ It is submitted that the Commission should limit itself to two areas: 1) to examining Serbia's and the FRY's role and the responsibility of their leaderships for the crimes perpetrated in the above-mentioned conflicts, and 2) to examining the human rights abuses committed during the Milosevic period against the citizens of Serbia and the FRY within their borders. As will be explained below, any other approach could, once again, be interpreted as an attempt to impose a Serbian version of the "truth" on others.

Following on that, it is also submitted that the Commission

13. See generally, LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION 154-64 (1996) (describing Slovenia's 10 day war following its declaration of independence).

14. See generally *id.* at 222-30 (explaining outbreak of war in Bosnia in 1992).

15. Marie-Janine Calic, *Kosovo in the Twentieth Century: A Historical Account*, in KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP 19-31 (Albrecht Schnabel & Ramesh Thakur eds., 2000) (commenting on background to war in Kosovo).

should seek to achieve only reconciliation between the various segments of Serbian and Yugoslav society—minority and groups belonging to the political opposition for example—who were victimized during the Milosevic era and those responsible for the violations against them. While the historical importance and need for regional, inter-State reconciliation in the Balkans cannot be overemphasized, it is submitted that what will inevitably be perceived by others as a Serbian version of the truth cannot be the foundation of such reconciliation. This would require a truly regional, inter-State effort, if it is to stand any chance of success.

II. THE YUGOSLAV TRUTH AND RECONCILIATION COMMISSION

A. *Method of Establishment and Composition*

The Commission was established by means of a presidential decision issued on March 29, 2001.¹⁶ The fairly short text defines the Commission's mandate and lists the nineteen individuals initially appointed to its membership,¹⁷ of whom four are no longer members for various reasons.¹⁸

Comment:

While there was initially some domestic criticism of the fact that the Commission was established by an act of the President, rather than Parliament,¹⁹ presidential decrees have historically been the most common way of creating truth commissions.²⁰ Given the balance of power in the current federal legislature where a number of seats are still held by parties that were in

16. *Decision on the Establishment of the Truth and Reconciliation Commission*, OFFICIAL GAZETTE OF THE FEDERAL REPUBLIC OF YUGOSLAVIA ("FRY"), No. 15/2001 (Mar. 30, 2001) [hereinafter *Establishment Decision*].

17. *Id.* The 19 initially appointed Commission members are: Radovan Bigovic, Ljubodrag Dimic, Vojin Dimitrijevic, Slavoljub Djukic, Sulejman Hrnjica, Aleksandar Lojpur, Bosko Mijatovic, Radmila Nakarada, Predrag Palavestra, Latinka Perovic, Vladika Sava (Vukovic), Zoran Stankovic, Svetozar Stojanovic, Darko Tanaskovic, Tibor Varadi, Mirjana Vasovic, Svetlana Velmar-Jankovic, and Mihajlo Vojvodic. *Id.*

18. Vojin Dimitrijevic and Latinka Perovic have since resigned from the Commission, Tibor Varadi withdrew due to obligations at the Federal Ministry of Foreign Affairs where he is Chief Legal Adviser, and Vladika Sava (Vukovic) died in the summer of 2001. Vojin Dimitrijevic and Latinka Perovic resigned due to disagreements over the Commission's mandate.

19. See Lepa Mijic, *A Long and Costly Path to the Truth*, GLAS JAVNOSTI, Aug. 13, 2001, at 4 (on file with author).

20. See HAYNER, *supra* note 1, at 291-97.

power during the Milosevic era, it is, in any event, unlikely that a commission could have been created by an act of Parliament. The Commission's composition as listed in the decision is broad-ranging in so far as it includes representatives of both the nationalist and civic political options in Serbia, as well as two members of ethnic minority groups. However, the Commission could have benefited from a larger inclusion of other ethnic minority representatives, members of other religious communities apart from the Serbian Orthodox Church, NGOs, and professional associations. It is submitted that the Yugoslav Truth and Reconciliation Commission could also have greatly benefited from the formal appointment to membership of foreign experts, particularly those with previous experience in truth commissions.²¹ It should, in other words, have been a "mixed" body.

The most obvious omission in terms of the Commission's membership is the absence of any representatives from Montenegro, Yugoslavia's other republic. While the reasons have not been officially explained, they lie in the current uncertainty surrounding the future of the Yugoslav federation.²² It should therefore be noted that the Commission is, for now, made up only of members from one of the two federal units and is, therefore, not really "Yugoslav."

B. Mandate

Pursuant to its founding document, the Commission's "task" is to: 1) "organize research work on the uncovering of evidence on the social, inter-ethnic and political conflicts which led to the war and to shed light on the causal links among these events;" 2) "to inform the domestic and international public about its work and results," and 3) "to achieve cooperation with

21. While Alex Boraine—former Deputy Chair of the South African Truth and Reconciliation Commission and currently President of the New York-based International Center for Transitional Justice—has been appointed permanent advisor to the Commission, neither he nor any other foreign expert has been named a Commission member. *Alex Boraine Future Permanent Adviser to Truth Commission*, BETA NEWS AGENCY, May 16, 2001 (on file with author).

22. Commission member Svetozar Stojanovic recently told the press that the Commission had asked President Kostunica to expand it by appointing two or three more lawyers, members of other religious communities, and representatives from Montenegro. He told GLAS JAVNOSTI that due to elections in Montenegro the President "did not want to interfere, so that [his appointment] would not be interpreted as pressure." See Mijic, *supra* note 19.

similar commissions and bodies in neighboring countries and abroad with the aim of exchanging experiences.”²³ The presidential decision authorizes the Commission to adopt two additional documents, drafts of which were presented to the public to varying degrees: the Commission’s Rules of Procedure²⁴ and its Basic Program Document.²⁵ They are relevant to an examination of the Commission’s mandate as they further elaborate it.

The Commission’s “purpose,” according to the draft Rules,²⁶ is to “contribute to general reconciliation within the FRY and with neighboring nations by means of facing the truth about the conflicts in the Socialist Federal Republic of Yugoslavia (“SFRY”) and the successor states, which caused crimes against the peace, numerous violations of human rights, of the law of war and humanitarian law.” The Commission shall also “comprehensively examine and establish the causes and courses of conflicts which led to the disintegration of the former state and to the war, causing enormous human sufferings and destruction in the past decade.”²⁷

Under the Commission’s draft Program, its purpose is to:

initiate and organize research on: a) the main causes of the political, economic, social and moral collapse of the SFRY; b) the wars and other conflicts in the region of the former Yugoslavia, which caused great human casualties, ethnic cleansings, displacement, camps, economic damage and destruction, the destruction of cultural property, the appearance of dictatorships, the international isolation of the country, and the general criminalization of society; c) violations of human rights and violations of international public, humanitarian

23. *Establishment Decision*, *supra* note 16 (author’s trans.).

24. Draft Rules of Procedure, Commission for Truth and Reconciliation (Apr. 2001) [hereinafter Rules] (on file with author). The draft Rules were discussed at a May 18-20, 2001 international conference held in Belgrade, after participants criticized the lack of transparency in the initial stages of the Commission’s work. Commission member Aleksandar Lojpur invited all those present, especially non-governmental organizations (“NGOs”), to submit comments on the draft Rules to the Commission.

25. Draft of Basic Program Document, Commission for Truth and Reconciliation [hereinafter Program] (on file with author). The draft Program was presented by Commission members at a press conference held in Belgrade on July 31, 2001. Commission Coordinator Ljubodrag Dimic invited the public to “a dialogue and an exchange of views” on the draft Program. K. Djordjevic, *A Commission With Six Research Teams*, *POLITIKA*, Aug. 1, 2001, at 7.

26. Rules, *supra* note 24, art. 1(1) (author’s trans.).

27. *Id.* art. 1(2) (author’s trans.).

and the law of war.²⁸

The Commission also “intends” to “eliminate many of the sources and forms of misunderstanding” and to “establish trust between social groups and peoples” by means of “establishing the truth.”²⁹

Comment:

From a legal-technical point of view it is rather unusual—and, it is submitted, confusing—that the Commission’s mandate should be spelled out, each time somewhat differently, in three different documents. In other words, the clarity of the Commission’s mandate appears blurred because of uncertainty about which document—and therefore which provisions regulating the mandate—are controlling. Based on hierarchy of norms one would have to conclude that the presidential decision has priority, but no similar differentiation can easily be made between the draft Rules and Program.³⁰ The need for a distinction may be illustrated by the draft Rules’ explicit recognition that “crimes against the peace” constitute a possible avenue of research, whereas no such reference is found in the draft Program.³¹ Given that both the Rules and Program are still in draft form, it is submitted that the texts should be made consistent from the point of view of legal technique. Provisions on the Commission’s mandate should be removed from the Rules of Procedure and be further elaborated only in its Basic Program Document.

A detailed analysis of the way in which the Commission’s mandate is substantively laid out in the three documents is beyond the scope of this text.³² A few general observations will be

28. Program, *supra* note 25, at General Provisions, ¶ 2 (author’s trans.).

29. *Id.* (author’s trans.)

30. It is submitted that the Rules would prevail over the Program—which would in itself be a source of additional confusion—based on the fact that the Rules must be approved by the Commission’s founder and are to be published in the Official Gazette of the FRY. See Rules, *supra* note 24, art. 7(1)(1)(1).

31. The Program makes no explicit reference to “crimes against the peace,” unless its mention of violations of “international public . . . law” is meant to be read as a synonym, which would require an impossibly bold interpretive leap.

32. In his resignation letter to President Kostunica, Professor Vojin Dimitrijevic gave several reasons for declining membership, including the Commission’s very broad geographic and temporal mandate. He also specified: “There are many causes of war, but the rules of humanitarian law are one, and they must be respected by both the attacker and the attacked in armed conflict. As may be guessed, it is the bestiality in our wars that I am most interested in as a lawyer. However, the Commission is expected to

offered instead. The first, and most troubling conclusion that one reaches after an even cursory reading of the mandate provisions, is that the Commission's primary aim is to look into the causes and course of the armed conflicts that took place in the former Yugoslavia, and not into the unspeakable violations of international law that were perpetrated as those conflicts were unfolding. This is a departure from the mandates of most previous truth commissions, whose main goal was precisely to identify violations and, depending on commission set-up, those responsible for them. The Yugoslav Commission's reversal of focus to causes of violence instead of its consequences robs the Commission of its very *raison d'être*—to tell the truth about victims and perpetrators. While establishing the background to violations is important, context must not be allowed to erase the faces and grief of those whose suffering was, so often in the Balkans, justified by calls to "historical duty." While historical research must, in sum, be an important part of the Commission's work, it should not be its main goal.

The second problem with the Commission's mandate as currently defined is that it obviously aims to look into the causes of the former Yugoslavia's disintegration as a whole, which greatly expands the scope, feasibility, and political import of its work. It is difficult to imagine how a Commission based in one of the five countries that came out of the SFRY's collapse can hope to objectively assess—and present the "truth"—on events about which each of the five States continue to have differing views. Could the Yugoslav Truth Commission hope to, for example, objectively pass judgment on the reasons for Slovenia's push for independence? And, is the Commission competent to make a determination about responsibility for crimes against the peace, acts which the international community is still struggling to define from the point of view of individual criminal responsi-

establish great truths: I am afraid of Great Truths because it is in their name and with the aim of their expansion that cruel violence has been inflicted. Reconciliation can be commenced by much more modest means. For its purposes, establishing intent, or who was right or wrong, or whose behavior can be explained and understood (and maybe justified) is not important. What is important is who was human and who was inhuman." Vojin Dimitrijevic, *Open letter to Dr. Vojislav Kostunica*, DANAS, Apr. 18, 2001, at 6 (author's trans.). In her resignation letter, Latinka Perovic said that the Commission's "mandate is not clear, but [the Commission] is firmly institutionalized, whereby a framework within which the truth can be sought has already been established." *FRY Truth Commission*, BETA NEWS, Apr. 17, 2001 (author's trans.).

bility?³³ How could a one-sided identification of the perpetrator(s) of such crimes, if that were possible, be beneficial to reconciliation if the other State parties rejected it? These are, relatively speaking, easier questions. Attempting to comprehensively and objectively portray the views of all sides in the Croatian and Bosnian wars would be almost impossible.

There is also the related problem of how the Yugoslav Commission will access documents and witnesses in the territories of other States that might, as yet, be unwilling to share evidence essential to its research. It is submitted, therefore, that one avenue of the Commission's work should be research and investigation of Serbia's and the FRY's contribution to the start of the Balkan wars and, above all, the responsibility of their leaderships for the serious violations that were committed during those armed conflicts (1991-99). While this would still present obstacles in terms of access to evidence and witnesses in neighboring countries, requests for access might be more readily granted if the Commission's mandate were less sweeping than it currently is. The Commission's aim should be, in other words, to take a hard look at Serbia and Yugoslavia. Any broader conclusions must be left to a regional, inter-State truth-telling initiative, which the Commission could encourage as one of its recommendations.

A second avenue of the Commission's work should be to examine and investigate the human rights abuses committed against the citizens of Serbia and Montenegro during the Milosevic period. As is well-known, his regime produced no end of assassinations, disappearances, torture, and other crimes against members of opposition political parties and minority groups. The Commission should have far fewer problems investigating these and other abuses in terms of access to victims, witnesses, and evidence.

33. The crime of aggression was included in the Rome Statute of the International Criminal Court, but was not defined. A Preparatory Commission that meets periodically at U.N. headquarters in New York is still attempting to draft a widely acceptable definition of this crime for the purposes of establishing individual criminal responsibility. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), art. 5(2), available at <http://www.un.org/law/icc/>, reprinted in ROY LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 481-482 (1999).

C. Method of Work

The Commission's draft Rules of Procedure provide that the Commission "shall organize research on the state crisis and on the social conflicts which led to the war. The Commission shall endeavor to clarify the causal links between the events which are the subject of the research."³⁴ The draft document adds that the Commission "shall seek to establish cooperation with similar commissions and bodies, governmental and non-governmental organizations in neighboring countries, as well as with international inter-governmental and non-governmental organizations and bodies."³⁵ The draft also provides that the Commission will establish working groups and that its Coordinator, or the working groups, may decide to engage "experts, or expert teams, institutes, and NGOs," for certain aspects of the research.³⁶ These bodies are designated as "accessory."³⁷ The draft Rules do not mention public hearings or witness testimony, nor do they refer to cooperation with the ICTY, which is, fortunately, rectified by the draft Program.

As already noted, the draft Basic Program Document also provides that the Commission's mandate is to be carried out by means of "initiating and organizing research."³⁸ It specifies that the Commission "cooperates with all governmental and non-governmental organizations that have relevant documentation and deal with the problems involved, which includes cooperation with domestic and international experts."³⁹ The Commission also deems that "dialogue with the international community . . . including the ICTY," as well as with other similar institutions at home and in the vicinity (the region of the former SFRY), are "absolutely necessary" and constitute "one of its main tasks."⁴⁰ According to the draft Program, the Commission's work will go

34. Rules, *supra* note 24, art. 2(1) (author's trans.).

35. *Id.* art. 2(3) (author's trans.).

36. *Id.* art. 4(4) and (5) (author's trans.). The draft Rules also provide that one of the Commission's members shall be designated Coordinator, charged with organizing its work. *Id.* art. 4(1). A Rapporteur shall also be chosen from among Commission members on a six-month basis. The Rapporteur will represent the Commission in contacts with the public, government bodies, international organizations, and other organizations and bodies. *Id.* art. 4(2).

37. *Id.* art. 4(5) (author's trans.).

38. Program, *supra* note 25, at General Provisions, ¶ 2 (author's trans.).

39. *Id.* ¶ 5 (author's trans.).

40. *Id.* (author's trans.).

through several phases: it will first “take stock of existing materials and information,” then “collect first-hand materials and witness testimony,” “identify the main controversies, . . . analyze the entire material,” and “present the results.”⁴¹

The draft Program also specifies that the Commission will create “research teams” that will focus on: “1) scientific and expert research, and 2) talks with participants of events (high-profile political actors, organizers, perpetrators, witnesses, and victims of crime, soldiers, policemen, those who incited conflict, and others).”⁴² The Commission and its research teams “shall commence” work in six working groups, devoted to research on: a) “the key historical events and processes 1980-2000, b) violations of human rights and violations of humanitarian and the law of war, c) socio-psychological factors, d) the role of the religious factor, e) the role of public opinion and the media, and f) the influence of foreign factors.”⁴³ Each working group is authorized to further define its “area and methodology of work and to appoint associates.”⁴⁴ Finally, the draft Program stipulates that the Commission “shall organize public discussions, hearings and testimony”⁴⁵

Comment:

The Commission’s method of work is, once again, to be found in two documents with overlapping, but not identical provisions, which makes it rather difficult to gauge how it will in fact be carried out. It is clear, however, that the focus is on research rather than on investigation and on creating a historical record rather than on documenting crimes. This is evident from the fact that only one of the six envisaged working groups will be dealing with violations of human rights and international humanitarian law, whereas all the rest will be devoted to presenting the “bigger picture.” It is not clear what the temporal scope of the groups will be, i.e., whether only the first group (historical events and processes) will research the last two decades of the past century or whether the others will adopt the same timeframe. It is submitted that examining the history of the former SFRY from Tito’s death (1980) until the beginning of the war in

41. Rules, *supra* note 24, at Method of Work, ¶ 3 (author’s trans.).

42. *Id.* ¶ 4 (author’s trans.).

43. *Id.* ¶ 5 (author’s trans.).

44. Rules, *supra* note 24, art. 4(5) (author’s trans.).

45. *Id.* at Organization of Work, ¶ 7 (author’s trans.).

Slovenia (1991) is unnecessary for understanding the atrocities committed after 1991, given that history—even one of past grievances—can never be used to justify present-day crimes. It is also unclear why two separate groups should be devoted to examining the role of the religious factor (the SFRY was a communist country where expressions of religious fervor were not particularly tolerated) and to foreign influence in the conflicts, respectively. The creation of the latter is, in particular, an uncomfortable indication of the direction of the Commission's inquiry, one that suggests an inability to come to terms with the fact that crimes committed in the Balkans were home grown. The subject matter of these two groups could well be folded into the first and their resources freed up for use by the other groups (it is also unclear what exactly the group on "socio-psychological factors" is meant to address.)

While the Commission's intended reliance on direct evidence, such as that which can be provided by victims and witnesses, and from public testimony, is commendable, the extent to which the Commission will make use of them remains to be seen. In the event that testimony is extensively used, which is to be hoped, proper measures for victim and witness protection will need to be put in place. The same applies to alleged perpetrators, as regards their due process rights. The final versions of the Commission's Rules would also need to specify what its powers of subpoena will be, if any. It is also assumed that the Commission will develop other internal documents regulating essential issues such as the security of its archives, documentation, data base management, etc.

While it is encouraging that the Commission's draft Program envisages "dialogue" with the ICTY, it is also to be hoped that the relationship between these two institutions will be more clearly defined going forward. The Commission need not duplicate the Tribunal's work in creating a historical record and it is expected that its conclusions about the role and responsibility of domestic actors will not significantly differ from the ICTY's. The Commission's final report could, in fact, indirectly assist the ICTY by providing it with additional information on patterns of violations and who was behind them.

D. *Transparency*

The presidential decision establishing the Commission specifies that one of its tasks is to “inform the domestic and international public about its work and results.”⁴⁶

The Commission’s draft Rules provide that the Commission “shall keep the public informed about the results of its work”⁴⁷ and that this shall be done by means of the Commission Rapporteur’s press conferences, as well as through periodic reports, and reports.⁴⁸ According to the draft Rules, the Rapporteur shall hold a press conference after each Commission meeting in order to inform the public about its work.⁴⁹ As for periodic reports, the Commission shall “publish collections of works presenting the results of research work carried out by the Commission, its working groups, and expert teams.”⁵⁰ The Commission shall also “prepare and publish reports which will provide a clear and synthesized overview of its work, as well as that of its working groups and expert teams.”⁵¹

The Commission’s draft Program supplements the Rules in so far as it provides that “the Commission’s work is public.”⁵² It adds that the Commission shall hold regular press conferences, that its members shall maintain regular contacts with the media,⁵³ and that it shall “critically publish relevant documentation and thus present it to the broad public.”⁵⁴ At the end of its mandate the Commission shall, “by means of a report, inform the public about the results of its entire research and convey its rec-

46. See *Establishment Decision*, *supra* note 16.

47. Rules, *supra* note 24, art. 2(2) (author’s trans.).

48. *Id.* art. 6(1)-(3) (author’s trans.).

49. *Id.* art. 6(1) (author’s trans.).

50. *Id.* art. 6(2) (author’s trans.).

51. *Id.* art. 6(3) (author’s trans.). The draft Rules also provide for the publication of a separate opinion by “a Commission member or a group of members” on “an issue” dealt with in the “Commission’s Report”. *Id.* art. 6(4) (author’s trans.). The phrasing leads to the conclusion that this option applies only to the Commission’s final report even though the draft Rules do not mention a final report (it is, however, mentioned in the draft Program, as will be cited below), nor do they provide for its method of adoption. Thus, it could happen that the Commission’s final report is adopted with separate opinions attached to different segments of the text. This is a troubling possibility from the point of view of the final report’s effect and credibility.

52. Program, *supra* note 25, at General Provisions, ¶ 4 (author’s trans.).

53. *Id.* at Organization of Work, ¶ 6 (author’s trans.).

54. *Id.* ¶ 8 (author’s trans.).

ommendations to the government.”⁵⁵ As already mentioned, the Commission will also “organize public talks, hearings and testimony.”⁵⁶

Comment:

It is encouraging that the texts cited above reflect an evolution in the Commission’s approach to the transparency of work. While the presidential decision speaks only of informing the domestic and international public of the Commission’s work and results, the draft Rules and Program further elaborate the ways in which the public will be kept informed. The difference between the three types of reports mentioned in the documents, however, is not clear—periodic reports, Commission reports, and final report—and it is to be hoped that the Commission will clarify this going forward. The documents also fail to sufficiently differentiate between publicizing the progress of the Commission’s work, its results (press conferences, reports) and the publicity of its actual proceedings. While there is a general statement that the Commission’s work is “public” and that public talks, hearings, and testimony will be held, there is no further elaboration of the extent to which public proceedings will be part of the Commission’s work. Given that the persons indicted for crimes under international law are already being tried before the ICTY in public hearings, it is submitted that there is no reason not to make use of public hearings, unless victim and witness protection demand otherwise.

E. *Time-Frame*

The Commission’s draft Rules provide that it shall endeavor to complete its work as soon as possible, and no later than three years from the date of adoption of these Rules. If the Commission fails to complete its work in the above-mentioned period, it shall continue operating until its completion, unless the Commission or its founder adopts a decision terminating the Commission’s work and dissolving it after the expiry of the above-mentioned period.⁵⁷

The draft Program only says that “the Commission shall en-

55. *Id.* ¶ 9 (author’s trans.).

56. *Id.* ¶ 7 (author’s trans.).

57. Rules, *supra* note 24, art. 7(4) (author’s trans.).

deavor to complete its work in three years.”⁵⁸

Comment:

Contrary to most other truth commissions, which were given between six months and a year to finish their investigations and present a report,⁵⁹ the Yugoslav Commission will have an unusually long life-span. This is probably due to its focus on broad-ranging research, rather than on investigation of violations, which, as already submitted, will greatly diminish its truth-telling function. While there is no doubt that a short time-frame puts great pressure on Commissioners and their staff, the reasons in favor of brevity are considerable—the aim is to present a final report while

there is still a momentum of transition under way, when a spirit of reconciliation may still be in the air and recommended reforms are more likely to be implemented. A truth commission cannot hope to document or investigate everything that falls within its mandate; it must choose a few sample cases for investigation and only summarize the rest.⁶⁰

It seems likely that the Yugoslav Commission’s three-year time-frame will reduce the impact of its report and therefore devalue the work that will have preceded it. Moreover, when one has in mind that the three-year period has not started running yet (it starts with the adoption of the draft Rules), it may be concluded that much valuable time has been lost already. Just as troubling is the draft Rules’ suggestion that the Commission might not finish work within a three-year period, as reiterated in the draft Program. The tentativeness of the texts points to the worrisome possibility that the job will not get done on time.

F. *Funding and Staff*

The draft Rules provide that the Commission will be State funded but can also accept donations,⁶¹ while the draft Program specifies that the Commission “shall dispose of its own budget.”⁶² As regards staff, the draft Program provides that the Commission and its research teams “shall be assisted by permanently em-

58. Program, *supra* note 25, at Organization of Work, ¶ 3 (author’s trans.).

59. See HAYNER, *supra* note 1, at 222-23.

60. *Id.* at 222.

61. Rules, *supra* note 24, art. 5 (1) (author’s trans.). Donations must, however, be approved by the Commission’s Coordinator and the President’s office.

62. Program, *supra* note 25, at Organization of Work, ¶ 2 (author’s trans.).

ployed staff.”⁶³ The Commission will, as previously mentioned, be able to engage “experts or expert teams, institutes and NGOs”⁶⁴ to carry out certain segments of the research, to be paid out of the Commission’s budget.⁶⁵ The Commission’s Secretary is also a permanent employee, drawn from the President’s office.⁶⁶

Comment:

While provisions on the Commission’s methods of funding and staff, rudimentary as they are, seem adequate, the reality is that neither funding nor staff were put in place by the middle of August 2001.⁶⁷ The Commission still had no office space or phone.⁶⁸ According to Commission members, the President’s office had assured them that the necessary conditions for work would be created by the end of the month.⁶⁹ As of this writing, at the end of September 2001, no change in the situation had been reported. There is no doubt that providing proper funding and staff for the Commission will be difficult given the current economic situation in the country. If, however, there is a genuine will to see the Commission’s mandate through, a way must be found. An obvious option would be to follow the example of some other truth commissions and seek donations from abroad.⁷⁰

G. *Miscellaneous Issues*

The Commission’s draft Program provides that, along with the submission of a final report, recommendations will be made

63. *Id.* ¶ 4 (author’s trans.).

64. Rules, *supra* note 24, art. 5 (author’s trans.).

65. *Id.* (author’s trans.).

66. *Id.* art. 4(3) (author’s trans.).

67. Mijic, *supra* note 19.

68. *Id.*

69. According to Commission member Svetozar Stojanovic: “This slow start is not the result of action by Commission members, but is due to the fact that it has not received money, office space or administrative staff. A decision on this must be taken by the federal government. The previous government has fallen, the new one has just been constituted and we expect that it will take a decision shortly. We asked the President’s office and have been promised that this will be done by the end of the month [Aug. 2001].” *Id.* Stojanovic pointed out that despite lack of funding, premises, and staff, Commission members had worked on drafting the Basic Program document and had been in touch with Commission adviser Alex Boraine.

70. See HAYNER, *supra* note 1, at 223-24.

to the government.⁷¹ However, none of the documents reviewed above mention the relationship between the Commission's work and future domestic trials for violations of human rights or international humanitarian law, nor do they authorize the Commission to examine redress to victims.

Comment:

Even though the draft Program envisages that recommendations will be made to the government by the Commission, it is difficult to make any assessment about their possible direction given the research rather than investigative focus of the Commission's work. Where truth commissions have dealt primarily with documenting abuses and violations, it has been easier to provide specific guidance on changes that should be made in the area of administration of justice, reform of the armed forces and police, political reforms, prosecutions of perpetrators, redress to victims, etc.,⁷² as a means of ensuring that crimes will not be repeated. It is hoped that the Commission's openness to witness testimony and other sources of direct evidence, even though only hesitantly reflected in the draft Program, will similarly lead to specific recommendations for reform and follow-up.

It is also submitted that the Yugoslav Commission must clarify its relationship to potential domestic trials for violations of human rights and international humanitarian law. The Commission cannot be, nor should it be, a substitute judicial body, but it should redefine its mandate so as to contribute to accountability for perpetrators. There are several possible options—from naming names, recommending non-penal sanctions (such as removal from public office), to passing on files to prosecutors where the evidence warrants it. If the Commission were to focus on documenting violations it could provide the much needed impetus for domestic trials, especially as the Yugoslav criminal justice system obliges prosecutors to open investigations into acts such as murder and torture, war crimes, or crimes against humanity *ex officio*. Its recommendations should provide specific guidance to the government on follow-up that could be taken by means of the judicial system.

The same need for clarification of the Commission's mandate exists as regards redress to victims, which can take several

71. Program, *supra* note 25, at Organization of Work, ¶ 9 (author's trans.).

72. See HAYNER, *supra* note 1, at 306-13.

forms. While it is not suggested that the Commission itself should practically deal with this issue, its recommendations should outline the options for further government action.

CONCLUSION

While it is commendable that a national Truth and Reconciliation Commission was created in Yugoslavia last spring, its operation needs to be properly set up. Truth commissions can be an important mechanism in strengthening accountability for violations of international and domestic law only if their mandate permits them to play a truth-telling role. The Yugoslav Commission's focus on research rather than on documenting violations, as well as its wide geographic and temporal scope, risk transforming it into a body that will essentially be (re)writing history. There are other, more qualified institutions that could perform that task and no other institution within Yugoslavia that could take on the Commission's role. Its mandate should therefore be clarified and streamlined to provide the Commission with the substantive and procedural authority needed by a truth-telling body aimed at enhancing accountability and contributing to reconciliation. To this end, the Commission should generate broad public discussion and seek the views of all groups and individuals, both at home and abroad, who could assist it in defining its mandate and method of work going forward.

The political will and concrete backing of the government is also crucial to the successful completion of the Commission's task. If the requisite will for an honest and impartial look at the past is lacking, then the Commission's work could result in harming, rather than helping truth-telling and the process of reconciliation. A Yugoslav Truth and Reconciliation Commission that fairly quickly presents a credible report on violations, their victims, and the perpetrators is essential not only domestically, but more widely as well. It could facilitate truth-telling in other countries of the region and would hopefully facilitate the creation of an inter-State truth and reconciliation commission which, it is submitted, should be the next step.