

**Transitional Justice as Opportunity:
Moving Beyond a Narrative of the Past in Bosnia and Herzegovina**

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The narratives of transitional justice are primarily focused on the past, with traditional transitional justice mechanisms such as lustration, impunity, fact-finding, and truth commissions all supporting the primary concern of “dealing with the past.” Transitional justice, however, should not be intended to support permanent fact-finding missions nor never-ending crusades of impunity. While dealing with the past is important in the aftermath of conflict, transitional justice is actually a wider process by which a society moves from conflict to post-conflict and then from post-conflict to further progress. This failure of transitional justice to capture the forward-looking expectations of communities it serves is evident from an examination of citizen consultations conducted in Bosnia and Herzegovina: almost twenty years after the emergence of transitional justice mechanisms in the Balkans, communities affected by conflict repeatedly emphasize that their most salient concerns are not about the past, but about opportunities for the future. By failing to recognize this forward-looking desire – or “opportunity-talk” – amongst communities affected by conflict, transitional justice as a field of study and as a approach to peace building is constraining itself within a repetitive, though perhaps self-serving, feedback loop of an inescapable past. To survive as both a discipline and a practical tool, lessons from Bosnia and Herzegovina suggest that transitional justice may be better situated within broader rule of law and development fields in order to encompass the desires of communities to not only address the past, but to also to move beyond it in creating a new future.

Moderator: “What is your general impression of foreign presence and international intervention in Bosnia and Herzegovina?” Citizen: “Unfortunately, they have stayed too long, just as the transition period is lasting too long. Transition is not a system; it is a transitory solution, a transitory period. --- Consultation with Citizens, Banja Luka, 2011¹

¹ Bosnian Bones, Spanish Ghosts, *Citizens’ Perspectives on ‘Transitional Justice’ and Foreign Intervention*, Banja Luka – Focus Group 1 – Citizens, at 1-2.

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Introduction

The year 2013 marked the 20th anniversary of the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Along with the Nuremberg trials and South Africa's Truth and Reconciliation Commission, the establishment of the ICTY stands as one of the pivotal transitional justice moments of modern history. Two decades on from initial transitional justice interventions in the Balkans, the key question that policy makers and academics are failing to ask is, "When will the transition in the Balkans be complete?" Transitional justice, by its nature, takes us from one thing to another. After twenty years, rather than seeing a winding down of transitional justice in the region, the region abounds with increasing claims for *more* transitional justice initiatives.² Is this what survivors of conflict really want? What, if any, transitional justice needs are still left unmet? Rather than diminish the past experiences of victims of conflict, these questions are meant as stock-taking at a pivotal point in the transitional justice process. Skepticism about the status of transitional justice at the twenty-year mark of "transition" in Bosnia is necessary to challenge policy makers, practitioners, and academics in the field of transitional justice to assess: what are we transitioning *to*, and how do we know when get there?³

Much transitional justice literature deals with definitional questions, in both practical and normative senses, molding the borders of what the field of transitional justice is and should be. In its general and fairly well-accepted form, however, the term transitional justice describes the "full range of processes and mechanisms associated with a society's attempts to come to terms

2 For example, see Denis Dzidic, *Balkan States 'Must Back Truth Commission Now,'* BALKAN INSIGHT, May 20, 2013, available at <http://www.balkaninsight.com/en/article/balkan-states-must-back-truth-commission-now>. See also Dejan Guzina & Branka Marijan, *Strengthening Transitional Justice in Bosnia: Regional Possibilities and Parallel Narratives*, CENTER FOR INTERNATIONAL GOVERNANCE INNOVATION POLICY BRIEF, Oct. 21, 2013, available at <http://www.cigionline.org/publications/2013/10/strengthening-transitional-justice-bosnia-regional-possibilities-and-parallel-n>.

3 Yasmin Sooka aptly poses this question, "a transition to *what*?" in her work. Yasmin Sooka, *Dealing with the Past and Transitional Justice: Building Peace through Accountability*, 88-862 INT. R. OF THE RED CROSS 311, 312 (2006).

with a legacy of large-scale past abuses.”⁴ The operative word in this definition, and indeed in the treatment of transitional justice overall, is the word *legacy*. Transitional justice is a field that roots itself in the past and exerts its influence through backwards reflection.

The transitional justice field has been dominated by a discourse that pits the principles of accountability and reconciliation against the alternative narrative of forgetting and forgiving. While scholars have placed these concepts in opposition,⁵ these principles share more commonalities than differences, encompassing among them the full range of traditional transitional justice toolkit mechanisms from lustration to memorializing.⁶ Accountability and forgetting are principles that highlight societal equity and can be addressed (or forgotten) through the existence or lack of programs of impunity, punishment, lustration, and trials. Reconciliation and forgiving seek social harmony, enabling communities to deal with the past through truth commissions, memory, documentation, and dialogue. In these competing yet complementary narratives about transitional justice, the thing that is missing is a perspective on what might happen next. Transitional justice is so fueled by the horrors of the past that it is unable to accommodate the locally existing social desires to focus on the future.

Yet, making room for the future is exactly what transitional justice needs, and based on the data from consultations with local communities in Bosnia, what individuals in transitioning societies want. Transitional justice’s reliance on consultations with civil society and local populations is well established, and consultations are viewed as a best practice prerequisite to any transitional justice program implementation. In a key 2004 report, the UN Secretary-General

4 U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 16, U.N. Doc. S/2004/616* (Aug. 23, 2004), available at <http://www.unrol.org/files/2004%20report.pdf>.

5 For an example of the concepts of accountability and “forgiving and forgetting” being placed in opposition, see Samii, who in determining post-conflict preferences of Burundians asks whether they would prefer to “punish” offenders and “seek truth” about the past, or, alternatively, would prefer to “forgive and forget.” Cyrus Samii, *Who Wants to Forgive and Forget? Transitional Justice Preferences in Post-War Burundi*, J. OF PEACE RES. (2013).

6 Typical transitional justice mechanisms, or the transitional justice “toolkit,” includes approaches such as criminal prosecutions, truth commissions, reparations programs, post-conflict gender justice efforts, security system reform, and memorialization. For more information on traditional transitional justice approaches, see *What is Transitional Justice*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, available at <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>.

made this clear, noting that “local consultation enables a better understanding of the dynamics of past conflict,” and asserting that “the most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultations carried out.”⁷ In a later 2011 follow up report assessing progress, the UN Secretary-General went so far as to announce that “robust national consultations are now understood to be *essential* prerequisites to ensure that transitional justice mechanisms reflect the needs of conflict-affected communities, including victims.”⁸ While transitional justice asserts that it relies heavily on consultations with communities, it is uncertain whether the content of these consultations is given any weight when determining the structure of transitional justice programming. Transitional justice practitioners too often engage in consultations *ex post facto*, seeking those viewpoints that support the continued use of mechanisms seen as within the sphere of transitional justice, such as reparations and truth commissions, but ignoring those viewpoints that do not justify transitional justice programming means. While the field of transitional justice is overwhelmingly focused on dealing with the past, individuals – at least in post-conflict communities such as Bosnia – are focused on the future.

Transitional justice’s inability to recognize desires about the future, or *opportunity-talk*, that exists in post-conflict communities is a threat to field’s efficacy and future, and prevents individuals, societies, and nations from moving forward. Addressing only the concerns coming out of consultations, which fit into the traditional transitional justice narratives of accountability, reconciliation, and forgetting, and forgiving unnecessarily traps communities in the past and prevents the transitional justice process from ever actually *transitioning* to a point beyond post-conflict.

7 U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 16, U.N. Doc. S/2004/616* (Aug. 23, 2004), available at <http://www.unrol.org/files/2004%20report.pdf>.

8 U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 18, U.N. Doc. S/2011/634 (Oct. 12, 2011), available at http://www.unrol.org/files/S_2011_634EN.pdf (emphasis added).

Data from Bosnia: 2011

Nowhere is the phenomenon of ignored opportunity-talk so apparent as in the Balkans. With a comparatively long history of twenty years of transitional justice programming, the “consultative process” approach has been widely used by practitioners to assess the transitional justice needs and perceptions of local communities. From consultations dealing with the status of missing persons to those concerning the establishment of a regional truth and reconciliation commission, there has been no shortage of inquiry and feedback from the local community. A wide range of data has been accumulated from these varied consultations, some applicable to the practical and humanitarian concerns of communities immediately post-conflict and others relating to the larger state building questions of the present day.

One particularly interesting set of information comes from the more recent project “Bosnian Bones, Spanish Ghosts: Transitional Justice and the Legal Shaping of Memory after Two Modern Conflicts,” (abbreviated as BBSG) conducted from 2009-2013.⁹ This four-year effort at research, policy, and activism, funded by the European Research Council, included as one of its activities consultative meetings with citizens in cities across Bosnia. The theme of these consultations is “Citizens’ Perspectives on ‘Transitional Justice’ and Foreign Intervention,” with researchers asking questions such as “How do you understand the term transitional justice in Bosnia?”¹⁰ and “What do you think about ... foreign researchers that come to Bosnia?”¹¹ From the Republika Srpska to Croatian-dominated areas of Herzegovina to ethnically mixed Sarajevo, Bosnia serves as an especially rich case study as the data gathered during consultations comes from a range of opinions that may be affected along ethnic lines. Although countless surveys, consultations, and community meetings dealing with transitional justice issues have been held in Bosnia in the twenty years of

9 Transcripts of consultations with citizens, which will be relied on throughout this paper, are publicly accessible in both English and Bosnian/Croatian/Serbian at the project’s website, available at http://bosnianbones-spanishghosts.com/BBSG/txt.php?id=11&meni=1&left_gore=3&left_drop=3a&left_sele=3a7. The full citation to these sources is as follows: Bosnian Bones, Spanish Ghosts, *Citizens’ Perspectives on ‘Transitional Justice’ and Foreign Intervention*, [Location] – Focus Group [No.] – Citizens, at [page no.]. For ease of reference, I will cite to various transcript records starting with the location information. All transcript references are to the English language version, unless noted otherwise.

10 Stolac – Focus Group 2 – Citizens, at 12.

11 *Id.* at 2.

transitional justice efforts, the BBSG consultations can be differentiated in that organizers asked individuals not to remark on transitional justice topics such as trauma, past memory, or reparations, but on the transitional justice *process* itself. The transcripts of these consultations provide rare insight into how local communities view transitional justice as a system managed by international implementers. Further, the BBSG transcripts provide such insight at a point in time that is years removed from the end of the conflict, and thus well after the first transitional justice attempts were undertaken.

Methodology

Instances of citizen opportunity-talk and a focus on the future, rather than the past, can be found by reviewing the publicly available transcripts from these consultations. The scope of what constitutes opportunity-talk has been defined to constitute instances where citizens either refer to “opportunity” or “the future” directly, or make statements about improving one’s position in life (economically or otherwise).¹² While BBSG conducted separate consultations with citizens and NGO activists, those consultations conducted with NGO activists have been excluded from the review, favoring instead the perceptions of the citizen groups.¹³ A review of these transcripts shows that citizens repeatedly express their desire to improve the opportunities available to themselves and their families. This noted preference in the consultations of communities seeking to move on and focus on the future contrasts with the predominant narrative that transitional justice is, or should be, focused on addressing the past.

12 To control for issues with translation, a secondary review of the transcripts available in Bosnian/Croatian/Serbian languages was conducted, searching for references to certain keywords: *budućnost* (future), *sutrašnjica* (tomorrow, the immediate future), *prilika* (opportunity), and *moćnost* (possibility).

13 From experience, NGO activists are more likely to suffer from institutional enrichment, supporting transitional justice efforts *de facto* as their programming budgets may rely on the existence – and justification for – transitional justice interventions. To help avoid this bias only transcripts from consultations with citizens were reviewed. This control is not perfect, however, as the list of consultation participants is not public and the citizen consultations may also include individuals from the NGO sector.

Locating Opportunity-Talk within Consultations with Citizens

A review of the twelve BBSG consultations held with citizens on the topic of “Citizens’ Perspectives on ‘Transitional Justice’ and Foreign Intervention” reveal three categories of opportunity-talk expressed by participants. The first, *economic opportunity* is expressed directly in terms related to jobs, wages, and the economy. The second, which I term *socio-cultural opportunity*, refers primarily to the ability to forget and the personal, communal, and national opportunity to begin to allow non-transitional justice concerns to dominate social dialogue. The third, *structural opportunity*, is expressed by reference to issues such as corruption and transparency and focuses on rule-making and non-economic barriers to participation.

Economic Opportunity

It should stand out that in responding to questions about Bosnia’s experience with transitional justice that citizens repeatedly emphasize issues related to the economy. Economic issues do not typically fall within the scope of transitional justice studies, and the importance of economic opportunity has been undervalued among transitional justice practitioners given how salient these concerns seem to be among citizens. An emphasis on the economy manifests itself through specific references to jobs and the need for individuals to make a living to support their families but also through commentary on the national economy of the country and what, if any, role the international community should play in improving it.

Individual Economic Opportunity

Many of the discussions on transitional justice during the consultations commonly turn to citizens lamenting the lack of employment opportunities. Participants note that “those who want to work cannot”¹⁴ and that “the bottom line is that you cannot live out of your salary.”¹⁵ When confronted with questions on the role of transitional justice, one participant notes “those issues

14 Široki Brijeg –Focus Group 1 – Citizens, at 4.

15 Sarajevo –Focus Group 1 – Citizens, at 15.

sound distant to me, it was a long time ago and now we have 2011, we have moved much more forward from those topics. We are worrying about life concretely. What will we do tomorrow, who will buy firewood for us?”¹⁶ There is a foundational sense of being unfulfilled on a level of basic needs, explained through the sentiment that, in terms of financial opportunities, “all of us want, in a way, to secure a good existence.”¹⁷ There is a particular emphasis by participants on the need to go abroad to find employment, especially among young people.¹⁸ One participant exemplified the phenomenon, stating, “I am 20 and I have to think about my future. I am forced to go abroad in order to have a better life, because I do not see how I can succeed here.”¹⁹ A focus on the unemployment of youth particularly troubles participants with some concerned that youth “cannot marry and have families,” posing the question “What kind of society are we building?”²⁰

These concerns about unemployment were raised not in the context of the future of the country or ways to improve the lives of citizens, but rather in the context of the transitional justice process in Bosnia. When prompted by a question about transitional justice, one attendee notes, “I think that it is easy to establish what transitional *injustice* is. Obviously, in this transition of ours, there is lots of injustice. Starting with the fact that some people can’t get jobs, even though they have worked for years ...”²¹ This expresses the general feeling that transitional justice was supposed to give people *more* than what it has delivered thus far and that, despite post-conflict

16 Široki Brijeg –Focus Group 1 – Citizens, at 3.

17 Sarajevo – Focus Group 1 – Citizens, at 4. *See also* Široki Brijeg –Focus Group 1 – Citizens, at 3 (with a participant responding “more wounds and ruins . . . we should have moved forward far away from [those problems] . . . today I am forced to almost knock at doors at beg. Not to borrow but ask for help to school my children and feed them”).

18 Jajce – Focus Group 1 – Citizens, at 10; Bihac – Focus Group 1 – Citizens, at 10; Trebinje – Focus Group 1 – Citizens, at 2; *see also* Široki Brijeg –Focus Group 1 – Citizens, at 5.

19 Trebinje – Focus Group 1 – Citizens, at 6.

20 *See* Stolac – Focus Group 2 – Citizens, at 11. *See also* Jajce – Focus Group 1 – Citizens, at 8-9 (“After you turn 30, you shouldn’t hope for a job in this town”). *See also* Jajce – Focus Group 1 – Citizens, at 16 (“I started working when I was 18, I got an apartment when I was 23 and my children, one is 39, the other in 35, they are both unemployed. So it’s all about the economy. We need to work.”). *See also* Trebinje – Focus Group 1 – Citizens, at 7 (“their children, although educated, are also unemployed . . . Trebinje is quite specific when it comes to economic crisis and unemployment. How long will this last?”). *See also* Brčko – Focus Group 1 – Citizens, at 17 (“it is sad that, after graduation, young people have to spend ten or fifteen years looking for a job. . . . I hope it wil not take that long”).

21 Bihac – Focus Group 1 – Citizens, at 4.

reconstruction and justice efforts, the high unemployment rate is “a major source of people’s disappointment.”²² This disappointment is localized and reaches a personal, and not just communal, level as an attendee provides the anecdote that “when your kid wants to go out in the evening and you do not have 5 or 10 KM [\$3.50-\$7] to give him, it breaks your heart and you wonder if [the transition] was worth it.”²³ When posed with a similar question asking what transitional justice meant to them, another attendee explains “I connect it with a right to something . . . a basic human right is a *right to employment* that we don’t have. Here, the young people, you don’t have a right to have a job.”²⁴ Because of the lack of individual economic opportunity that persists throughout the country, the transitional justice process is viewed as, at least in some ways, failing the expectations of the post-conflict communities it was designed to assist.

Opportunity in the Macro Economy

In addition to expressing a desire for increased individual economic opportunity, participants also repeatedly expressed concerns over the lack of national economic opportunity and the country’s poor economic outlook overall. The country is described as having a “catastrophic” economic situation with unemployment “increasing daily.”²⁵ Some of this blame is directed towards government regulations, “the most complicated ones worldwide”²⁶ with “red tape [that] will practically kill you before you even start up your own business.”²⁷ Compounding Bosnia’s precarious macro-economic situation are the identified problems of brain drain and corruption, with growing frustration among citizens about the widespread lack of merit-based hiring.²⁸ Typifying this sentiment is one attendee who exclaims “we do not have a future, we definitely do not have

22 Tuzla – Focus Group 1 – Citizens, at 3.

23 Trebinje – Focus Group 1 – Citizens, at 10.

24 Jajce – Focus Group 1 – Citizens, at 7.

25 Tuzla – Focus Group 1 – Citizens, at 9; *see also* Trebinje – Focus Group 1 – Citizens, at 1.

26 Tuzla – Focus Group 1 – Citizens, at 8.

27 *Id.* at 9.

28 For comments on the phenomenon of brain drain *see* Mostar – Focus Group 1 – Citizens, at 1. For comments on the lack of merit-based hiring *see* Jajce – Focus Group 1 – Citizens, at 9 (“the literate ones sit at home while the illiterate go to work”) and *see also* Trebinje – Focus Group 1 – Citizens, at 9 (“I do not want to be a pawn; I do not want to get a job just because I have their booklet”).

a future. What can we offer now? No company operates.”²⁹ This lack of industry and lack of a middle class appear to make any broader societal discussions about transitional justice irrelevant, as one participant notes “there is no use in talking about modalities, culture, and stuff to a man who can’t meet his basic needs.”³⁰ Considering, as one participant put it, that “we are ... far away from the war; it is year 2011,” there is an expectation that the country’s economic outlook should have improved³¹ and that economic integration among factions in the Balkans should be the focus of any program going forward, rather than transitional justice.³²

Desires for increased macro-economic opportunity are closely related to comparisons with the past and individuals’ perceived economic security from the time period before the breakup of Yugoslavia. One such example was a participant who described, “we had industry before the war; we were amongst the developed countries... now...we live like parasites.”³³ The weakness of the macro-economy compared to pre-war days goes against many participants’ conceptions of justice, as to citizens in post-conflict Bosnia justice and economic opportunity go hand in hand. One participant notes that in the twenty years since the war ended, “there are rotting investments everywhere ... Who sees justice there? ... The future of my children is questionable in a country like this.”³⁴ Another pined for the strength of the economy under Tito, noting that under him “people enjoyed some kind of security. Today ... if you complain about something at work they say that there will be somebody that will take your position instead of you and you are forced to automatically accept anything ... this is a closed circle. There is no justice.”³⁵ And yet again, another individual conceives transitional justice in macroeconomic terms, explaining “when our country was under a totalitarian regime we were a republic with the most highly developed industry, but

29 Banja Luka – Focus Group 1 – Citizens, at 10.

30 Travnik – Focus Group 1 – Citizens, at 12. For further comments on a lack of industry or middle class *see also* Trebinje – Focus Group 1 – Citizens, at 7 and Tuzla– Focus Group 1 – Citizens, at 8.

31 Široki Brijeg – Focus Group 1 – Citizens, at 12.

32 *See* Sarajevo – Focus Group 1 – Citizens, at 4 (“the only thing that Bosnia and Herzegovina has in common is a common market, and nothing else is connecting it”). *See also* Sarajevo – Focus Group 1 – Citizens, at 3 (“I doubt that if we had the gross national income of Switzerland, we would have had this kind of war, ever!”).

33 Banja Luka – Focus Group 1 – Citizens, at 2.

34 Mostar – Focus Group 1 – Citizens, at 4.

35 Sarajevo – Focus Group 1 – Citizens, at 4.

today we're doomed to be an agricultural land ... There, I summed up what I think about human rights."³⁶ For individuals in post-conflict Bosnia, it is not enough that past crimes be uncovered, that interethnic dialogue be undertaken, or that past perpetrators be held accountable for their crimes; post-conflict Bosnians view justice in terms of economic opportunity, and any transitional justice process that does not transition Bosnia to a full-fledged market economy, for them, falls short of this mark.

Economic Opportunity and the Role of the International Community

The content of consultations with citizens not only points towards economic concerns that are embedded into their understanding of transitional justice but also provides feedback on the role of the international community in the transitional justice process. For many participants, the role of the international community in transitional justice is similarly interpreted as the role of the international community in economic transition. A number of participants explicitly state their expectation that the international community, including foreign companies, would have worked to counter unemployment through job creation programs and investment, "otherwise, it's all for nothing."³⁷ Some discussed the international community's misguided efforts, proclaiming that the country's economy had diminished because the EU "gave power to the wrong hands," and that the loan repayment policy required by the IMF is a "catastrophe" and impossible to pay.³⁸ Yet, most interesting is the conception that citizens have about the international community's efforts in the transitional justice sphere versus the economic development sphere. As one participant noted, in response to a question about what the international community should do to further transitional justice, "If the international community wanted ... stability in any context, then we would have been improving our economy. All that money, billions that they mention, has not been invested

36 Mostar – Focus Group 1 – Citizens, at 2.

37 Trebinje – Focus Group 1 – Citizens, at 2. *See also* Trebinje – Focus Group 1 – Citizens, at 8 (that unemployed is a serious problem which the international community should do something about); Omarska – Focus Group – Citizens, at 4 (that foreigners should "help this small place develop, invest and employ more workers); and Travnik – Focus Group 1 – Citizens, at 16 ("it is easy for foreigners to come to Bosnia to do some projects . . . I would rather have foreign *companies* here, the ones that would bring us economic prosperity").

38 Trebinje – Focus Group 1 – Citizens, at 7; Sarajevo – Focus Group 1 – Citizens, at 9.

where it should have.”³⁹ Also in response to the status of transitional justice, another offers, “once our economy gets better, all this will be forgotten fast.”⁴⁰

Skepticism towards the international community’s role in transitional justice – and thus as understood by citizens, its role in transitioning the economy – is also noted in the responses to questions about the effectiveness of the Hague Tribunal. Beyond the common regional perceptions that the ICTY suffers from severe politicization and that sentences are issued based on biases or negotiated notions of guilt, citizens also note the heavy economic impact that the Tribunal has on the region. The costs of the tribunal are a common complaint, with participants viewing it as “surely unnecessary,” with “huge amounts of money” spent on it for a “process that lasts so long.”⁴¹ As the most visible transitional justice mechanism in the region, the Tribunal is viewed in terms of a zero sum game; all of the costs dedicated to setting up the tribunal are money that could have been spent on economic development which actually improves the lives of the region’s poor. With a publicly available budget, citizens in the region are aware of the vast resources the Tribunal subsumes (more than an estimated \$2.3B)⁴² for the indictment of only 161 individuals.⁴³ Citizens see this money as providing a better life for criminals than they are each able to enjoy at home in Bosnia, with one participant noting that those indicted “are being privileged by the international community ... it boasts with how they have developed law and justice, and they still provide such treatment to such people.”⁴⁴ Because of a contrast in conditions between the Hague and Bosnia, the Tribunal is seen to be imparting economic benefit onto criminals rather than citizens. In a wide conception of who constitutes victims of the war, the funds spent on the ICTY

39 Sarajevo– Focus Group 1 – Citizens, at 3.

40 Brčko – Focus Group 1 – Citizens, at 12.

41 Travnik – Focus Group 1 – Citizens, at 10; Sarajevo – Focus Group 1 – Citizens, at 10.

42 Ford anticipates that through its expected 2015 closure, the ICTY will have cost approximately \$2.3B. For his calculation, see Stuart Ford, *How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending On and Contributions To International Criminal Courts*, 55 *St. Louis U. L.J.* 953, 960 (2011). However, as the closure date is likely to be later due to the ongoing Mladic trial, the ICTY’s cost is likely to be even more expensive. See the ICTY’s completion strategy and reports at <http://www.icty.org/sid/10016>.

43 For an up to date summary of the total indictment numbers, see the ICTY’s Office of the Prosecutor reports at <http://www.icty.org/sid/42>.

44 Travnik – Focus Group 1 – Citizens, at 9.

could have amounted to a \$125 per person living in Croatia, Bosnia, Kosovo, and Serbia in 1991.⁴⁵ In a narrower conception of victimhood, the amount spent on the ICTY could have amounted to a payment of \$16,428 to the families of the dead and missing.⁴⁶ The international community's focus on the ICTY as not one mechanism but *the* mechanism for transitional justice in the region is perceived to come at the cost of reduced economic opportunities for the societies left behind.

The conflation of transitional justice with economic opportunity reaches such depths that among some participants, reconciliation is redefined and traditional transitional justice concepts such as impunity and remembrance have fallen by the wayside. When asked about the transitional justice needs of society, one citizen responds with the following: "I think that the reconciliation would be best if it was oriented ... to the strengthening of the economy in Bosnia and Herzegovina... When people and youngsters have been given the possibility to work... That's the only segment where we could reach true reconciliation. Otherwise, it's just empty talk. We've listened to that story for the past 15 years, people aren't interested in the Hague or Mladic anymore, it's all about building, economy, work."⁴⁷ Under such a conception of transitional justice by citizens in the region, the economic opportunities of society take precedence over the prosecution needs of an internationally-established court; who are we then, as transitional justice practitioners, to say that this conflation of transitional justice with economic development is wrong? Individuals affected by conflict have already posited in their minds that transitional justice is or should amount to broader economic reforms and progress. As one participant poses as a question to the consultative group, but also to the transitional justice field as a whole: "This transition happens in many aspects, to

45 This number is derived from the 1991 census results of populations in the region. Considering the 4.3M in Bosnia, 4.2M in Croatia, 7.8M in Serbia, and 2M in Kosovo, for a total of approximately 18.3M people residing in the region at the time, this would amount to a payment per person of approximately \$125 ($\$2.3B / 18.3M = 125.6$, not including distribution costs). Use of the census numbers is for illustrative purposes only, as problems with the 1991 census are widely recognized (including primarily, Kosovar Albanian's boycott of the census).

46 The International Center for Transitional Justice estimates 140,000 deaths and disappearances as a result of conflicts in the Balkans, and with the estimate, the ICTY's budget of \$2.3B would amount to a payment of \$16,428 per family of a victim. *See* <http://ictj.org/publication/transitional-justice-former-yugoslavia>. Again, this figure is for illustrative purposes only, and would change based on the calculation of those considered victims (for instance, 200,000 is an oft-cited number of the international community for the number of dead, injured, and disappeared).

47 Jajce – Focus Group 1 – Citizens, at 11.

the market economy and in people's mentality. In which way should the new rules of the game and new form of justice be accepted?"⁴⁸ For transitional justice as a field to acknowledge the opportunity desires of post-conflict communities, it may similarly need to review the way in which this new, non-traditional form of transitional justice is accepted. To do so will require the field to adopt broader practices which recognize that at some point post-conflict communities require possibilities for the future in addition to remembrance of the past.

Socio-Cultural Opportunity (The Opportunity to Change the Dialogue)

A second area of opportunity-talk that participants engage in can be termed socio-cultural opportunity, referring to the opportunity of society to move beyond a dialogue of the past that infuses almost all aspects of life with static preconceptions of ethnicity. While initially identified as a desire among participants in consultations to be allowed the opportunity to forget the past, the term also can refer to a desire among citizens to move beyond rote, ethnically charged understandings and instead allow non-transitional justice concerns to dominate social dialogue. To understand the concepts of forgetting and diversifying the dialogue as "opportunities," it must first be acknowledged that social dialogue in the region is overwhelmingly influenced by a focus on the past and a constant and inescapable comparison of the collective faults or social positions of different ethnic groups.

The Opportunity to Forget

The collective ability to forget may help remove from the national dialogue a singular emphasis on the past, an emphasis that paralyzes national politics and prevents individuals from assuming an active role in public life. Some participants in consultations view the past as a weight suppressing communal capabilities aimed at moving forward. To cut free of this weight, these citizens take the view that society must overcome all reminders of the past. This manifests itself

48 Sarajevo – Focus Group 1 – Citizens, at 2-3.

as a rejection of memorialization and monuments⁴⁹ and an insistence to “not narrate tales as they do at the Hague Tribunal,”⁵⁰ because it “imposes” on society some unacceptable decisions and principles.⁵¹ Reminders of the past affect some individuals on a very visceral level. One participant walked out of the consultation at the mention of the past, responding when asked about the subject “to be honest, I am leaving now. I am not at all interested in all this; my head is full of all this.”⁵² Tired of being inundated with a dialogue about truth-telling and the past, others proclaim “we should shut up,”⁵³ and “look, everybody should get over those things, what’s been done . . . that’s right, get over it. Don’t talk to me about transparency.”⁵⁴ Such a strong opposition to the past is not universally shared, however. Others take a different approach, and instead of forcing a policy of forgetting on everyone, they hope that instead the opportunity to forget the past will present itself, and that “someday” such emphasis on the past will be unnecessary.⁵⁵ This is not to say that participants in consultations hold a universal view that society should move beyond the past. Some individuals mention the need to remember, as a way to ensure that history does not repeat itself.⁵⁶ This narrative of remembering the past for the purpose of preventing atrocities in the future is well accepted in the field of transitional justice. More interesting is the frequently expressed desire among participants to move away from the past, a concept that is not well accepted in transitional justice. In support of a policy of forgetting, one participant notes that society seems like it is “stuck in time. Twenty years have passed and nothing worth remembering has happened. It is simply

49 Stolac – Focus Group 2 – Citizens, at 22-23.

50 Travnik– Focus Group 1 – Citizens, at 13.

51 Omarska– Focus Group – Citizens, at 17. *See also* Brčko – Focus Group 1 – Citizens, at 5 (“Primarily politicians . . . they use nationalism as a cover . . . Since I have come back to Brčko, after being a refugee, I have not once had a conflict based on nationality; and I have been to many places and socialised with many people right after the war. . . Therefore, I really think that we do not need to listen to any such stories, so to say”).

52 Brčko– Focus Group 1 – Citizens, at 5.

53 Sarajevo – Focus Group 1 – Citizens, at 17.

54 Stolac – Focus Group 2 – Citizens, at 23.

55 Brčko – Focus Group 1 – Citizens, at 12.

56 For examples of comments made in support of remembering the past, *see* Bihac– Focus Group 1 – Citizens, at 13 (“Do you think we should stop mentioning Srebrenica? . . . We cannot forget it. If we were forced to forget, next generations will not know about it.”) (“History shouldn’t be forgotten . . . If they remember, it will be on their minds and it shouldn’t, it will not happen again.”).

empty. Nothing changes.”⁵⁷ Such a desire to forget is borne out of a desire to move on, and the hope that by forgetting, the existing social dialogue – consisting of a reversion to the past – will no longer be dominant.

By forgetting the past, some participants hope that this will open up the ability of individuals to bond over commonalities rather than differences. Participants repeatedly note the potential for good relations among the ethnic groups in the region, and the similar cultures and outlooks that the groups share, with “language, cultures interwoven.”⁵⁸ One refers to an intercultural experience by explaining “when it is the matter of existence, we can overcome everything, when one has to earn a salary, to bring food to his kids, he can overcome everything somehow.”⁵⁹ With this opportunity to move beyond the past, a new notion of justice is formed. One participant states that “justice would be if young people could work more, hang out more, if they could simply ... we don’t have to talk about Gotovina or Mladic or Oric, we could simply talk about what we do, what our professions are, and what we could be doing.”⁶⁰

Finally, a number of participants view the opportunity to forget not as a need to overcome the past, but rather as a need to move beyond the past in order to have a clean slate for the future. Thus, forgetting the past is a prerequisite for forming plans for the future. One participant noted, “the best thing that international powers managed to do here in the beginning is create the feeling of peace. But after that they have not extinguished the fire, they let it smolder. They do not let things settle.”⁶¹ In recalling the past, the potential for conflict becomes a fire ready to be awakened. To move beyond conflict and plan for anything beyond crisis, communities must be given the opportunity to forget. For some, the international community stands in the way of this ability to forget and plan for the future, with one individual noting “they need to give us the opportunity to build the country ourselves, to redefine our role ... they should let the country itself ... at least

57 Travnik– Focus Group 1 – Citizens, at 8.

58 Tuzla– Focus Group 1 – Citizens, at 5.

59 Široki Brijeg – Focus Group 1 – Citizens, at 7.

60 Stolac– Focus Group 1 – Citizens, at 26.

61 Široki Brijeg – Focus Group 1 – Citizens, at 2.

show the West that we succeeded in reconciling, and that we overcame those old ghosts of the past.”⁶² Another responded with the quip. “What should Germany do? They left their past behind them, they looked at what they can do to improve their future and the future of their children. We should do the same.”⁶³ By removing the past, individuals hope that they might remove “remnants of thinking from the previous system, which are incompatible with the life we are striving for.”⁶⁴ The past functions as “revengeful cries, because it takes us back, it is not where we are going.”⁶⁵

The Opportunity to Diversify the Dialogue

The emergence of socio-cultural opportunities to transcend the past does not need to constitute a forgetting or moving away from the past all together. A constant “dealing” with the past takes up valuable space in the collective consciousness and in individual lives and diminishes the importance of other social matters. Political usurpation of a dialogue based on the past – expressed by national politicians but also civil society actors and the international community – perpetuates a dragging-down of national consciousness and leaves little space to solve all other social problems. For this reason some individuals, rather than looking for the opportunity to forget the past all together, may express a desire to move away from the past in order to diversify social dialogue. Doing so can create breathing room for a new social agenda but can also help leave behind a narrative of the past that perpetuates ethnic stereotypes and results in people being seen as either the ethnicity of victim or perpetrator, rather than as an individual.

Leaving the past behind can allow new social dialogues, and a number of participants express a desire to leave the past behind so that society can finally address other concerns. One citizen explains that “the problem of Bosnia and Herzegovina is that we do not look into the future, we always go back... let the past go, let the courts and the police do their jobs, but let the people work, give them an opportunity to work, let me do my job, to teach kids, let this man in

62 Banja Luka – Focus Group 1 – Citizens, at 5.

63 *Id.* at 8.

64 Bihac – Focus Group 1 – Citizens, at 4.

65 *Id.* at 13.

manufacturing work and so on.”⁶⁶ In this way, opportunities to abandon the past act as conduits to allow a focus on the economic and livelihood concerns of the future. Another individual expresses the same sentiment posing the following question: “We have day to day crimes which are happening around the entire world: what, how, and why do people shoot each other in the middle of the day?”⁶⁷ A number of individuals commented on the need to move beyond the past and abandon the nationalism that fuels it in order to focus on economic issues.⁶⁸ Doing so, it was purported by one attendee, will allow the country in a short period of five to ten years to “become a normal society.”⁶⁹ Additionally, such a dominating narrative of the past that currently exists forecloses the participation of young people in social dialogue, as young generations who did not fully experience the conflict have less to contribute to the discussions on the past. Moving away from the past offers youths the opportunity to be “asked for their opinion,” to be “listened to,”⁷⁰ and to be “freed from primitivism”⁷¹ that may make them into “robots and clones” in the future.⁷² This so-called socio-cultural opportunity to move beyond the past makes available other avenues of social interaction across constituent groups.

Beyond allowing for the emergence of new inputs – from either a focus on a new topic or from the inclusion of the perspectives of under-represented groups – the opportunity to leave the past behind helps to diversify social dialogue by allowing society to differentiate between individuals and the *de facto* ethnic groups they may belong to. The current narrative of the past overwhelmingly posits that individuals be judged based on their last names, their birthplace, their parents, and their current home. In maintaining such a narrative of the past, social dialogue is constructed along group lines and judgments are made based on categorization rather than

66 Banja Luka – Focus Group 1 – Citizens, at 10.

67 Široki Brijeg – Focus Group 1 – Citizens, at 11.

68 Jajce – Focus Group 1 – Citizens, at 11, 12, 18 (“It would be better if [the international community] made a commercial for promoting tourism here in order to bring their people here instead of asking us what do we want to do with *UNPROFOR*”).

69 Stolac – Focus Group 2 – Citizens, at 21.

70 Trebinje – Focus Group 1 – Citizens, at 8.

71 Sarajevo – Focus Group 1 – Citizens, at 17.

72 *Id.* at 22.

assessments of individual circumstances. One participant expresses this by noting, “we shouldn’t speak about Muslims, Serbs, and Croats ... We should name the perpetrators. Once we reach the stage where we are able to talk about perpetrators as individuals, without mentioning their nationalities, then we have achieved something... We cannot judge other people by what an individual had done.”⁷³ Another echoes this sentiment, stating crimes of the past, “an individual did that, and of course, we can’t blame the whole ethnic group to which he belongs. We should de-stigmatize, de-stigmatize groups and national communities. You absolutely cannot identify a crime some individual or group did with a whole nation.”⁷⁴ Abandoning the dominant narrative of the past may provide increased accountability by focusing on individual actions rather than historical antagonisms, offering agreement that crimes of the past “were done by individuals.”⁷⁵

To effectively de-stigmatize national groups as a whole, participants recognize that political actors must also curb their nationalist partisanship. The opportunity to placate the dominant narrative of the past would make it more difficult for politicians to rally support along the ethnic lines that perpetuate certain narratives of “twisted logic” that proclaim some groups as victims and others as perpetrators.⁷⁶ The current narrative about the past not only increases “religious fanaticism”⁷⁷ but also stunts political progress with citizens voting according to ethnicity rather than effectiveness.⁷⁸ Equipped with the current backward-looking dialogue of the past, politicians are able to pander with “redneck politics” which make reconciliation all but impossible⁷⁹ and use memorials and remembrance “for political goals” and for “the promotion of nationalism.”⁸⁰

Some participants even go so far as to blame the international community for the current political climate of ethnic derision perpetuated by “nationalists and fascists,” noting that “the biggest and essential mistake was that [the international community] had not removed all such

73 Brčko – Focus Group 1 – Citizens, at 11.

74 Stolac – Focus Group 2– Citizens, at 18.

75 Tuzla– Focus Group 1 – Citizens, at 12.

76 *Id.*

77 Travnik – Focus Group 1 – Citizens, at 13.

78 Sarajevo– Focus Group 1 – Citizens, at 7.

79 Jajce – Focus Group 1 – Citizens, at 13.

80 Brčko– Focus Group 1 – Citizens, at 14.

parties and forbidden all aspects of nationalism.”⁸¹ In legitimizing a dominant narrative that focuses on the past through continued transitional justice programming that focuses on the past, the international community has thus supported the political system that prevents post-conflict Bosnia from making progress. The media correspondingly appeals to the “national conscience” and focuses on this divisive narrative of the past as well.⁸² As one attendee remarks, “there are some calm periods when we start thinking that we have been stupid and that we can live together after all; then someone remembers ...”⁸³ It is the remembering of the past that is seen as the problem, preventing the country from moving forward to a more prosperous future. Continuing a narrative of the past only immobilizes society from making real reforms and holds hostage a nation at the precipice of perpetual “remembering.” In seeking to reduce the role of such nationalism, citizens in consultations long for socio-cultural opportunities allowing them to abandon, or least adjust, this stagnant narrative of the past in order to diversify national dialogue in an effort at moving forward.

Structural Opportunity

In the context of questions about transitional justice and international intervention, a third area of opportunity-talk participants engage in relates to *structural opportunity*, expressed by reference to merit-based opportunity in the fields of education and employment, equity opportunity in terms of corruption and money laundering, and procedural opportunity related to equal application of the law and functioning of institutions in the legal system. Expressing desires to remove non-economic barriers to entry, participants highlight in their understanding of transitional justice the lack of transparency and permeating corruption that plague society. The repeated wishful requests for fairness – whether in university admissions, employment and hiring, transparency of government spending, or the equal application of laws to all individuals – all point toward a desire among citizens to be granted the structural opportunity to know and play

81 Travnik – Focus Group 1 – Citizens, at 17.

82 *Id.* at 13.

83 *Id.*

by the same “rules of the game.” Though not typically included in practitioners’ understanding of transitional justice, the establishment and implementation of “rules of the game” are what allow citizens the possibility to improve their position in life and are crucial in providing a level playing field from which to succeed.

Merit-Based Opportunity – Education and Employment

Participants in almost every consultation conducted by BBSG remarked on the unfair advantage that certain people have in the realms of education and employment in the country. Traditional transitional justice mechanisms, focused on addressing the past, would overlook such topics. Yet when asked whether they think transitional justice has been achieved, participants routinely respond with commentary about the structural inequalities that affect their daily lives. The lack of opportunity to be rewarded for hard work strips citizens of their agency and to them, amounts to a failure of the transitional justice process. The structural inequalities that affect the largest breadth of post-conflict communities are a lack of – but desire for – merit-based, rather than nepotistic, opportunities in education and employment.

The lack of merit-based opportunities begins at the system of education and only grows wider as one enters the workforce. The showing off of “diplomas and doctorates acquired overnight” reminds citizens of the importance of “formal diplomas, with little content.”⁸⁴ In contrast to the perceived meritocracy of the pre-war system, one participant notes, “today anybody can go anywhere as long as he/she is a child of somebody important, his neighbor or cousin. This is not good at all.”⁸⁵ A father remarks on how it is a “crime” that one daughter who attends private university has never failed a course, while the daughter attending public university struggles under a system of different standards.⁸⁶ The language used to describe these concerns (couched in terms of what is “just” versus what is “criminal”) evokes the descriptive words of fairness usually used in transitional justice. The failure to secure equal educational opportunities that are “just” constitutes

84 Bihac – Focus Group 1 – Citizens, at 5.

85 Omarska – Focus Group – Citizens, at 16.

86 *Id.*

a transitional justice issue in many citizens' minds. Even those programs explicitly designed by transitional justice practitioners seem to still fail in the minds of citizens, with one attendee explaining "at the university, in '97, we started the first international graduate study program under the title 'Transition and Reconstruction' ... to train 10 young people who would receive a Master's Diploma and would hold managing positions... We created the graduate program, completed it, and trained ... candidates ... Specifically speaking, those ten people are waiting for their opportunity ... ten young people. They are not even young anymore, they waited for their opportunity and it never came."⁸⁷ Citizens sense an inability to control the course of their lives, "from birth till grave," and this removes any hope they may have to use education to create a better future for themselves or their children.⁸⁸

Participants in consultations express even more overwhelmingly the desire to be treated on equal footing in the course of employment and hiring decisions. This desire for merit-based opportunities in employment is best exemplified by the response of one individual, whom, when questioned as to which groups of society should be included in the transitional justice process, responded with the following: "there is no justice. Justice, in the sense that I believe it should exist, does not exist. When a thirty year-old person cannot earn two hundred convertible marks [~\$140], what kind of justice are we talking about? And, a son of somebody important will earn a salary of three thousand."⁸⁹ It is evident that when asked about the process of transitional justice, participants immediately turn to the lack of justice in their daily lives. Participants grimly note the cyclical effects of unfair distribution of opportunity that prevents parents from believing that their children will have it any better; discrimination begins at school age, grows stronger based on one's political party and ethnic status, and reaches a peak in the inability to transparently seek employment as corrupt and preferential hiring lies "behind every corner."⁹⁰ Across the consultations, citizens note the "illiterate," "incompetent," "suitable... instead of the smart," "privileged," and "untouchable"

87 Banja Luka – Focus Group 1 – Citizens, at 2.

88 Bihac – Focus Group 1 – Citizens, at 7, 10.

89 Sarajevo – Focus Group 1 – Citizens, at 6.

90 Stolac – Focus Group 2 – Citizens, at 17.

who dominate and are employed in positions of power, constituting an “injustice” and giving citizens no hope to apply for even those positions that are advertised.⁹¹ For citizens, the inability to create a new future based on hard work and opportunity constitutes yet another failure of transitional justice. They lament that “what counts the most is that you are politically fit and you will be placed on a particular position because there is no one you have to report to.”⁹² Participants position these employment issues and the lack of merit-based hiring squarely within the field of transitional justice, noting that “in the environment of bribery and corruption, you come with an envelope and get a job, regardless of who you are... therefore *these* are the afflictions of our transitional society.” In speaking about the lack of merit-based employment, citizens embed in their understanding of transitional justice an idea that transitional justice, once achieved, will yield increased job-related opportunities. For them, employment is a crucial component of the transitional justice process.

Equity Opportunity – Corruption and Bribery

Another desire that participants express is the hope that the rampant system of political corruption and bribery will change. Complaints about a system of corruption are driven by participants’ desire to see bribery uprooted so that it may no longer be a controlling force in their lives, freeing up space for them to participate in civic life on equal footing. This desire can be understood as a desire for equity opportunity or the creation of a more transparent system where money is not required to solve all problems and where power structures will not abuse the funds meant to contribute to the progress of Bosnian society overall. These concerns are not conceived as institutionally fixated problems endemic to Bosnian politics and government. Rather, the problems of bribery and corruption are part and parcel to transitional justice itself. Participants take the view that “transitional justice includes bribery and corruption, the afflictions of society ... that some people are getting enormously rich while others are really poor.”⁹³ The bribery and corruption that

91 Bihac – Focus Group 1 – Citizens, at 10 (“illiterate”); Sarajevo – Focus Group 1 – Citizens, at 12 (“incompetent”); Travnik– Focus Group 1 – Citizens, at 8 (“suitable instead of smart”); Jajce – Focus Group 1 – Citizens, at 10 (“priveleged” and “untouchable”); and Široki Brijeg – Focus Group 1 – Citizens, at 11 (“injustice”).

92 Tuzla – Focus Group 1 – Citizens, at 7.

93 Bihac – Focus Group 1 – Citizens, at 4.

are embedded into everyday life in Bosnia strip citizens of the opportunity of equal participation where “someone who is hardworking cannot have a chance next to the rich one.”⁹⁴

The most visible instances of bribery and corruption are witnessed in the political sphere. Participants note that under the system of bribery and corruption “everything is for sale, and [individuals] sell their honor, sell themselves to political parties who divide and pacify them.”⁹⁵ Citizens raise individual instances of corrupt politicians and businessmen in their local communities, sarcastically deeming these instances “another great example of transitional justice.”⁹⁶ The system of “racketeering”⁹⁷ appears to disenfranchise ordinary citizens, making them feel like they do not have a voice when they vote,⁹⁸ explaining that politicians “keep passing the buck and ordinary people are those who suffer the consequences.”⁹⁹ The prolific cheating and corruption is not only viewed as a decline of the society’s collective morals but ushers in a withdrawal by citizens from participatory associations and organizations.¹⁰⁰

The international community’s involvement in the transitional justice process is viewed as contributing to, rather than competing with, this system of bribery and corruption. International actors are viewed as ignoring the corrupt system of politics¹⁰¹ or worse, working in concert with such political actors in “murky waters” where one participant describes that “politicians place the blame on the international community, the international community places the blame to the politicians” and despite the fact that “it has been going on like that for the last 20 years ... we have been standing still.”¹⁰² Many feel that the provision of large quantities of aid contributes to the system of bribery and corruption, expressing desires for the aid to be “tracked,” to include

94 Široki Brijeg – Focus Group 1 – Citizens, at 17.

95 Bihac – Focus Group 1 – Citizens, at 7.

96 Mostar – Focus Group 1 – Citizens, at 3.

97 Jajce – Focus Group 1 – Citizens, at 8 (“it’s about racketeering. Everything is corrupted”).

98 Trebinje – Focus Group 1 – Citizens, at 3 (“if we know the winner even before the elections, why bother?”).

99 Tuzla – Focus Group 1 – Citizens, at 4.

100 Brčko – Focus Group 1 – Citizens, at 16 (regarding moral decline); Sarajevo – Focus Group 1 – Citizens, at 2 (noting that transition in all countries “is linked to corruption” and “withdrawal of some association and organization”).

101 Trebinje – Focus Group 1 – Citizens, at 1.

102 *Id.* at 3.

“criteria for disbursement to prevent its misuse and contribute to transparency.”¹⁰³ Pessimistically, when faced with the question “Does transitional justice serve citizens?” one attendee responded with “it does not serve citizens ... I will say, in a derogatory way, that the international community has wasted billions on Bosnia and Herzegovina and no results have been reached. The majority of research says that these are organizations created to make some individuals richer, and that money is being laundered.”¹⁰⁴ These problems are viewed as structural ones, recognizing that “in this transition process, a great deal of interest and power should be invested in fighting bribery and corruption,”¹⁰⁵ even though it has not. From the consultations it is evident that not only are citizens longing for the social equity to participate outside of structures of bribery and corruption but view the lack of such opportunity as a specific failure of transitional justice efforts, rather than a failure of larger goals of state-building or democracy.

Procedural Opportunity – Laws and Legal Institutions

A final area of structural opportunity that participants desire is related to legal institutions, courts, and formal justice. Such structural barriers to the provision of justice prevent equal treatment of all citizens under the law and are viewed by those in the consultation as a failure of Bosnia’s transitional justice process. Participants repeatedly note that institutions at a basic level do not function properly.¹⁰⁶ One participant’s understanding of justice is that “justice means exercising your rights, but it goes with difficulty in our case, as the structures have been constructed in an ill manner starting from its foundations and leading to the distortion of the entire system ... it makes it difficult to find everything functional at the top level when the structure below is dysfunctional

103 Banja Luka – Focus Group 1 – Citizens, at 2; Trebinje – Focus Group 1 – Citizens, at 11 (aid is opened “for misuse, and that is all”).

104 Sarajevo – Focus Group 1 – Citizens, at 5.

105 Bihac – Focus Group 1 – Citizens, at 5.

106 See Široki Brijeg – Focus Group 1 – Citizens, at 3-4 (◊And when you ask an ordinary man he would answer: ◊Nothing functions properly in Široki Brijeg◊ ◊); Tuzla – Focus Group 1 – Citizens, at 9 (◊As for the efficiency of the public institutions, one could read about it in the print media◊); Sarajevo – Focus Group 1 – Citizens, at 3 (◊It is absolutely impossible to implement anything◊); Jajce – Focus Group 1 – Citizens, at 12 (◊I think the economy and judiciary must function properly◊); Bihac – Focus Group 1 – Citizens, at 9 (◊Once these institutions start doing their job as they should, things will get better around here.◊).

and made of different materials.”¹⁰⁷ In addition to the legal system not functioning institutionally, many remark that the laws that do exist cannot or are not being implemented.¹⁰⁸ One citizen notes that those in power will “adopt new laws every day, you don’t even know which one is which.”¹⁰⁹ Lacking in equal application to all citizens,¹¹⁰ law in Bosnia is described as “a net through which big flies pass while the mosquitoes get stuck.”¹¹¹ The repetition among participants that criminals in Bosnia are able to egregiously act above the law underlines the importance that individuals place in attaining equality before the law as part of the transition process. In its most basic form, citizens are frustrated with the undisputed fact of life in Bosnia that “if you have money, you have power.”¹¹² Legal institutions are viewed as contributing equally to the lack of procedural equality because, as one attendee notes, “we do not have a system to investigate ... they steal legally, because they’re allowed to steal. It is an interwoven octopus. They aren’t alone, it all comes from up there and is all interwoven.”¹¹³ Citizens view the opportunity for procedural equality to have eroded since pre-war times: one participant recalls, “I remember the system before the war, with certain established practices. There were penalties for each crime, there were no differences...[Now] it is a circus and it creates legal insecurity for citizens, they do not feel secure that someone will protect their rights and interests.”¹¹⁴ In the minds of individuals this lack of procedural opportunity leaves

107 Omarska – Focus Group – Citizens, at 12.

108 Tuzla – Focus Group 1 – Citizens, at 5, 6 (“the law remains a dead letter and no matter how hard we try those laws are not enforced in practice” and “my opinion is that the legal system is so sluggish”). *See also* Sarajevo – Focus Group 1 – Citizens, at 3 (“Nobody is responsible . . . we do not have somebody here that you can complain to for anything, not even to the court”).

109 Jajce – Focus Group 1 – Citizens, at 12.

110 Bihac – Focus Group 1 – Citizens, at 10 (“the law isn’t being applied all the way, or not equality for all”); Sarajevo – Focus Group 1 – Citizens, at 6 (“we are mixing justice with equality, equal rights and opportunities . . .”).

111 Jajce – Focus Group 1 – Citizens, at 8.

112 Trebinje – Focus Group 1 – Citizens, at 5. *See also* Trebinje – Focus Group 1 – Citizens, at 5 (“beyond war criminals, other criminals who are arrested multiple times and released”); Brčko – Focus Group 1 – Citizens, at 8 (“judiciary and prosecutors’ offices, they are all corrupt”); Jajce – Focus Group 1 – Citizens, at 2, 8 (“The judiciary and prosecutors’ offices don’t do much and nobody is being prosecuted. Only misdemeanors are being processed”)(“[legal mechanisms] are pretty corrupted with politicians paying bribes”); Bihac – Focus Group 1 – Citizens, at 9 (“Bribery and corruption are prevailing. This is why it cannot be guaranteed that legal processes would be just”).

113 Bihac – Focus Group 1 – Citizens, at 10.

114 Brčko – Focus Group 1 – Citizens, at 9.

the transitional justice process incomplete. One participant summed up the lack of procedural opportunity in interfering with transitional justice by referring to justice leaders as “so criminal that the reforms are impossible to implement. We witness it in the last fifteen or twenty years. Therefore, transitional justice is a disputable concept...”¹¹⁵ For citizens, the structural inadequacies of the legal system in Bosnia are just as much – if not more – a part of transitional justice as the traditional transitional justice concerns such fact-finding and reconciliation, which address the past.

The ability of the rich, the powerful, and the political to evade the law reduces any expectation among citizens that they may use the legal system to assert their rights. When posed with a question about justice, one citizen responds “it isn’t justice when small delinquents are being condemned and the real criminals walk ... they cannot be reached by the hand of justice and even if they could go to trial, they are found innocent nonetheless.”¹¹⁶ Another remarked about the courts that, “they capture those small fish while they let the big ones go ... the big fish stay on the surface.”¹¹⁷ This failure of equal treatment in the justice system is partially due to failures of the international community in their support for post-conflict programs, with participants noting the high cost of interventions in the justice system for the disappointing results.¹¹⁸ The fundamental feeling of this unfairness among citizens creates a despair that impedes individuals from forming a new future for themselves or their communities. This sinking sentiment of unfairness is summed up by a few attendees’ statements about justice: “we will not live long enough to see the court’s justice, but we have to continue living”,¹¹⁹ and “I’m just saying, there’s little justice, it almost doesn’t exist... People aren’t fighting for it because everybody thinks ... I always hear: we can’t change anything,

115 *Id.* at 1.

116 Bihac – Focus Group 1 – Citizens, at 7.

117 Jajce – Focus Group 1 – Citizens, at 12.

118 *See* Travnik – Focus Group 1 – Citizens, at 7 (“It is their greatest failure, of all the things they did in Bosnia . . . If they had wanted to achieve justice in a system like this, they should have pressed judiciary, prosecutors’ offices, and police). *See also* Široki Brijeg – Focus Group 1 – Citizens, at 13 (“How can the international community help, in my opinion?”).

119 Sarajevo – Focus Group 1 – Citizens, at 14.

we can't. When you think that you can't do anything, then you can't do anything."¹²⁰ Without a legal system that openly and equally applies the same rules to all, citizens feel that there is no "justice" that has been transitioned to. The lack of fairness in the legal system leads to the understanding that "one decent person cannot do anything or survive in such a society."¹²¹ Individual agency is lost, and hope for a successful transition for the country abandoned, when there are no strong, underlying legal institutions. Based on concerns raised by citizens in the consultation process, if given the procedural opportunity to be treated equally under the law, citizen engagement and satisfaction with the transitional justice process would increase.

Opportunity-Talk as an Ignored Narrative in Transitional Justice

The concerns expressed by ordinary citizens engaged in BBSG consultations in Bosnia almost twenty years after the process of transitional justice began raises serious questions about the responsiveness of transitional justice as a field to the needs of local communities. Citizens in the consultations repeatedly express desires that are forward looking, expecting that benchmarks beyond "dealing with the past" would have been met by society in the twenty years since the war ended. This insight is valuable, because concerns about economic development, social dialogue, or corruption were not raised by these citizens in the context of general political discussion or as responses to questions on the national economy; citizens raised concerns about the lack of opportunity in these areas in direct response to questions about transitional justice in Bosnia.

The analysis of the transcripts of these meetings suggests that transitional justice, at least at some point in the transition time, may be less about forgiveness and more about moving individuals and communities towards increased opportunities. Opportunity, broadly defined, can be found in many forms. In some contexts, the opportunity sought by post-conflict communities may be physical safety, forgiveness, or reconciliation – the traditional cornerstones of conflict intervention and transitional justice. However, the experience of Bosnia implies that individuals

120 Stolac – Focus Group 2 – Citizens, at 15.

121 Bihac – Focus Group 1 – Citizens, at 8.

are also seeking a sense of agency – the ability to act independently in order to form a better life for their families and to reach as high as one’s capabilities allow. These are core aspects of personhood and are fundamental expressions and applications of individual liberty. The strong presence of opportunity-talk in consultations shows us transitional justice practitioners that there are broad aspects of the transition process that the field has been ignorant to. By anchoring itself in the past and in the perhaps outdated modalities of the familiar transitional justice toolkit, transitional justice itself is depriving survivors of conflict from finding opportunities they desire. A singular focus by the transitional justice field on narratives of the past is far removed from the need expressed by citizens to engage in institution building, and may be construed as naïve at best, counterproductive at worst. As horrific as crimes of the past were, the human spirit is resilient, and, as evident in these consultations, individuals strive to move beyond a system where only the past determines the future’s possibilities. To accommodate post-conflict communities expressed desire for increased opportunities, transitional justice must either find a point at which it transitions its guidance to other more suitable development disciplines or capture this interest in opportunity and integrate opportunity-generation programming into its approach.

Opportunity Changing Over Time

The opportunity-talk raised by participants in consultations was often discussed in relation to the length of time that has passed since transition began, and thus temporal aspects of transition cannot be forgotten. The UN acknowledges the importance of timing in its report on transitional justice affirming “timing is critical in all our endeavors.”¹²² However, transitional justice leaders have not been able to elucidate how long a transitional justice process should last. Some are satisfied simply through a recognition that “the immediate demand for peace and essential need for justice can be addressed through an appreciation of timing,” and that “conditions usually change over

122 U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 5, U.N. Doc. S/2011/634 (Oct. 12, 2011), available at http://www.unrol.org/files/S_2011_634EN.pdf.

time.”¹²³ Others have been able to provide some specificity, noting that there appears to be a “shift in transitional justice policies at approximately 6 to 8 years after the onset of the transition.”¹²⁴ However, what happens after that period of time? How many “shifts” in transitional justice policy are necessary over the lifetime of a single transitional justice process?

These are precisely the questions that participants in the BBSG consultations also raise. Citizens struggle with reconciling the current status of their lives with the almost twenty years that have passed since the start to the transition, noting, “now it is a question of how long will this transitional period last, when is the end of the transition, when has it started, and when will it finish. Its long duration has had mostly negative effects on society.”¹²⁵ Bosnians view the international community as having “stayed too long, just as the transition period is lasting too long. Transition is not a system; it is a transitory solution, a transitory period.”¹²⁶ No one in the field of transitional justice – its scholars, practitioners, or intended beneficiaries – understands the arc of transitional justice needs or is able to predict a “closing date” for transitional justice given the unique needs particular to each country context. And, as a field, transitional justice may never be able to predict the timings or shifts required in each post-conflict transition given the unique aspects to each country context. However, there is reluctance among practitioners to acknowledge that, overall, the use of transitional justice mechanisms may have an efficacy expiration date. One participant, in response to the question “What is transitional justice?” aptly notes, “transition, as transition, we all know is a passage. Since this is about transitional justice, in my opinion it is some post-war passage taking us to ...resolution of a kind.”¹²⁷ But the question remains: a resolution to *what*?

The field of transitional justice reaches “no consensus about the definition of success let alone criteria by which this can be measured.”¹²⁸ There appear to be some striking principles in the

123 *Pursuing Peace, Justice, or Both?*, ICTJ 2009, available at <http://ictj.org/sites/default/files/ICTJ-Global-Peace-Justice-2009-English.pdf>

124 Laurel Fletcher, Harvey M. Weinstein, & Jamie Rowen, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RIGHTS QUART. 163, 205.

125 Omarska– Focus Group – Citizens, at 10.

126 Banja Luka– Focus Group 1 – Citizens, at 1-2.

127 Bihac – Focus Group 1 – Citizens, at 3.

128 Fletcher, et. all, 170, *supra* 124.

field of transitional justice that would apply towards a drive for greater inclusion of opportunity-talk and recognition of the expressed desires by citizens to broaden the transitional justice landscape. Primarily, transitional justice lauds responsiveness to local conditions and fulfillment of the needs of local populations in order to take “modest steps toward fulfilling the spirit, if not the letter, of the commitments originally made to victims at the start of the transition period.”¹²⁹ Such responsiveness may require a change of approach or the need to veer off course from traditional transitional justice mechanisms that no longer prove to be effective after certain points in time or “shifts” in the transitional justice context in each country.¹³⁰ Just such a change in approach may be necessary at this time in Bosnia given the length of time transitional justice approaches have been employed and the disappointment and dissatisfaction of citizens regarding the country’s progress. As a field, transitional justice acknowledges that as part of the transitional process certain structural reforms are needed, particularly those that “go to the heart of the conflict – land reform and resource distribution; racial, ethnic, and gender discrimination; political and social exclusion; etc.”¹³¹ Integrating a forward-looking perspective concerned with the future, rather than the past, may not go to the heart of the conflict but certainly goes to the heart of post-conflict communities in Bosnia today. Resistance to necessary structural reforms, it is said, “undermines the ability of countries to overcome the *burdens of history*,” though structural reforms ultimately will be “no substitute for a national consensus to confront *past inequities*.”¹³² Transitional justice’s continued emphasis on the past – even here, in the realm of structural reform – is ultimately at odds with the expressed needs of communities and the field’s commitment to a policy of responsiveness.

Twenty years removed from the conflict in the Balkans today, victims are asserting requests for opportunity. Whether they needed similar sorts of opportunities immediately after the conflict may be another question, but it is clear from community consultations that what conflict-affected communities expect at this point in time from transitional justice is the delivery of mechanisms of

129 *Id.* at 206.

130 *Id.* at 216.

131 *Id.* at 215.

132 *Id.* (emphasis added).

opportunities for the future, not a continued dialogue of dealing with the past. An examination of consultation transcripts suggests that transitional justice as a field may be so blinded by a focus on the past that it prevents itself from being able to adjust itself over time to the changing needs and trajectory of the transitional justice process. As a participant in the consultation offers, “People sometimes tell me that Bosnia and Herzegovina has future. Of course it does. The future will be gone on the day the world ends. But, I, you, we all do not have that much time. We cannot wait for the future a hundred years.”¹³³ Best expressed by a member of a community affected by transitional justice, the past must at some point give way to the future, and the time for the future is now.

Conclusion: Moving Transitional Justice Towards a Rule of Law Framework

Given demonstrated interest by those in Bosnia to focus on future opportunities, one might ask whether the field of transitional justice is even an appropriate avenue to use in advocating reform given transitional justice’s reiteration of “dealing with the past.” Though the field of transitional justice might not ever discover the exact apex of when things move from ‘transitioning’ to ‘transitioned,’ the experience of the BBSG consultations shows that transitional justice does need to adapt itself to include mechanisms that will affect not just the past but the future as well. Whether transitional justice practitioners view that transitional justice as a field should or should not be aimed at the future, Bosnian participants have shown to internalize notions of opportunity into their ideal versions of transitional justice.

Until recently, there has been relatively little study on the relationship between transitional justice and rule of law and any need to integrate the two fields. Perhaps this is so, because “there is an inevitable tension in the use of transitional justice’s mechanisms between a short-term role of mediation between one regime type and . . . the more long term process of using that mechanism to exemplify, catalyze, and establish rule of law institutions guided by rule of law development principles.”¹³⁴ However, it is precisely because of this tension – between transitional

133 Bihac – Focus Group 1 – Citizens, at 11.

134 Padraig McAuliffe, Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship, Routledge (2013) at 85.

justice's originally short-term aims and rule of law's intrinsic long-term view – that the two fields should be more closely intertwined, especially in light of this recent understanding that Bosnian citizens have internalized the longer-term results typified by rule of law and development work and have transposed them into their expectations for transitional justice in the country. The short-term requirement of transitional justice as the broker of peace, however, is fundamentally “not the same as what long-term socio-political and economic reform requires.”¹³⁵ Problematically for any conflict-affected community focused on the future, the institutions of transitional justice have “traditionally adopted a historical view of justice rather than conceiving of it as a broader structure reform project.”¹³⁶

Is the preponderance of opportunity-talk exhibited by citizens in consultations in Bosnia a reaction to – and acceptance of – transitional justice's inability to encapsulate these long-term socio-political and economic reforms? Or, are the references to increased opportunities a call for transitional justice to live up to its promises and do more than look towards the past? The development of opportunities for citizens may not come immediately from the aftermath of conflict, but for a transitional justice approach to be deemed accountable to its citizens, it must take into consideration the strong desires of local communities to focus on the future; it must broaden itself to be inclusive of the forward-looking prospects of those whose lives it aims to improve. For perhaps the first time, to be effective transitional justice must not narrow its field of vision but broaden it to integrate more salient and longer-term perspectives from the realms of rule of law and development studies.

In response to a question about how the international community behaves towards Bosnia and Herzegovina, an attendee at a consultation responded partially in parable, stating “it is impossible because those things don't exist anywhere in the world. The peasants of Herzegovina often say: ‘everything is possible, except a wooden furnace.’ You cannot start a fire in a wooden furnace.”¹³⁷ A similar lesson may be applied to the experiment that is transitional justice in Bosnia:

135 McAuliffe at 86.

136 *Id.*

137 Mostar – Focus Group 1 – Citizens, at 4.

the entire house will burn if the transitional justice fire is lit without the necessary supporting structures. To be effective in its work, to be accountable to citizens, and to establish the “rules of the game” that are required to treat all equally, transitional justice may need to find its place within the practices of rule of law and development, rather than setting itself apart as a singular field that addresses past atrocities. Doing so will help the field of transitional justice loosen its grip on the past and follow the lead of the populations it is serving, allowing opportunity-talk, rather than a backwards gaze, guide reform priorities for the future.

ANNEX:
LOCATING OPPORTUNITY-TALK IN CONSULTATION TRANSCRIPTS

Instances of Economic, Socio-Cultural, and Structural Opportunity-Talk in the 12 consultative focus groups organized by the project *Bosnian Bones, Spanish Ghosts* on the topic of *Citizens' Perspectives on 'Transitional Justice' and Foreign Intervention*. All transcripts can be located at: http://bosnianbonesspanishghosts.com/BBSG/txt.php?id=11&meni=1&left_gore=3&left_drop=3a&left_sele=3a7.

LOCATION	DATE	PREDOMINANT ETHNICITY	TRANSCRIPT PAGE NUMBER REFERENCE		
			Economic	Socio-Cultural	Structural
Banja Luka	9/20/2011	Serb	2, 10, 10	5, 8, 10	2, 2
Bihac	6/16/2011	Bosniak	4, 10	2, 4, 12, 13, 13, 13	4, 4, 5, 5, 5, 7, 7, 7, 8, 9, 9, 10, 10, 10
Brcko	6/17/2011	Bosniak / Serb	12, 12, 17, 18	5, 5, 11, 12, 14	1, 6, 8, 9, 16
Jajce	7/25/2011	Croat	7, 8-9, 9, 10, 11, 12, 16	4, 11, 12, 13, 13, 18	2, 8, 8, 10, 12, 12, 12
Mostar	9/28/2011	Croat / Bosniak	1, 2, 4		3-4
Omarska	4/25/2011	Serb	4	17	12, 16, 16
Sarajevo	7/22/2011	Bosniak	2-3, 3, 3, 4, 4, 4, 9, 10, 15	2, 7, 16, 17, 22, 22	2, 3, 5, 6, 6, 8, 12, 13, 14
Široki Brijeg	9/27/2011	Croat	3, 3, 4, 5, 12	2, 7, 11	3, 4, 11, 13, 17
Stolac	3/22/2011	Bosniak / Croat	11	18, 21, 22-23, 23, 23, 24, 26	15, 17
Travnik	7/26/2011	Croat / Bosniak	10, 11, 12, 16	8, 13, 13, 13, 17	7, 7, 8, 8
Trebinje	9/29/2011	Serb	1, 2, 2, 6, 7, 7, 7, 8, 9, 9, 10	8	1, 3, 3, 5, 11
Tuzla	10/26/2011	Bosniak / Serb	3, 8, 8, 9	5, 12, 12	3, 8, 9, 4, 6, 7, 9