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# Emotional Legacies, Transitional Justice and Alethic Truth

## A Novel Basis for Exploring Reconciliation

Janine Natalya Clark\*

### Abstract

*Transitional justice processes seek to address the legacy of past human rights abuses. This article focuses on the emotional dimensions of legacy. It argues that war crimes and human rights abuses leave important emotional legacies that have not received sufficient attention within transitional justice theory or practice, and underscores that any process of 'dealing with the past' is necessarily incomplete if powerful emotions connected to that past are overlooked. Drawing on the author's fieldwork in the Bosnian village of Ahmići, the article aims to demonstrate that the neglect of emotional legacies – which it links to the concept of therapeutic jurisprudence – represents a missed opportunity to explore how the meta emotions that people share constitute potential new bases for building reconciliation in post-conflict societies such as Bosnia-Herzegovina. Reflecting more broadly on the relationship between truth and reconciliation, it emphasizes the utility of alethic truth as a concept that accommodates and draws attention to common emotions – and thus points to unexplored dimensions of the relationship between truth and reconciliation.*

### 1. Introduction

*Interviewer: As someone who survived sexual violence, what three words would you use to describe yourself?*

*Interviewee 1: To describe myself?*

*Interviewer: Yes.*

*[long pause]*

*Interviewee 1: I sometimes feel disgusted with myself. I cannot shave. {I cannot} Look at myself, believe me, in the mirror. [long pause] There is stigma; I keep thinking... [long*

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*pause] I don't know how to describe it with words. It is sorrow, misery ... Atrocity ... [very long pause] [Interviewee starts to cry]*

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*Interviewer: Are there any parts of your war story that are important for you and that no one has ever asked you about?*

*Interviewee 2: Well, no one has ever asked me: "How did you feel?" "How did you feel?" How was it on my soul? How did I ... . Five minutes is like one year of a normal life. Well, that is what it was. That is how I felt. This is a huge fear. You don't know what will... what idiot might come along. Will they kill you? Then you agonise about your family. Where is my family? What about my kids? You have not seen them for a long while. Are they going to school, is something...*

*Interviewer: So, people were just looking for facts from you and did not ask you how you felt?*

*Interviewee 2: Well, they never {asked} that.*

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During the author's recent fieldwork in Bosnia-Herzegovina (BiH) with men and women who suffered conflict-related sexual violence during the Bosnian war (1992-95), emotions emerged as a prominent thematic and integral part of the interview process. Interviewees expressed and articulated 'basic emotions' such as sadness, fear and joy;<sup>1</sup> provided insights into some of their 'self-conscious emotions',<sup>2</sup> including shame, humiliation and pride; and demonstrated some of their inner emotions through tears, smiles and body language. As Wood and Smith underline, 'understanding emotions is crucial to properly appreciating how lives are lived, histories experienced, geographies made and futures shaped.'<sup>3</sup> Notwithstanding the significance of emotions, they have not always received adequate

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<sup>1</sup> P. Ekman, 'An Argument for Basic Emotions', 6 *Cognition and Emotion* (1992) 169-200.

<sup>2</sup> M. Lewis, 'Self-Conscious Emotions', 83 *American Scientist* (1995) 68-78.

<sup>3</sup> N. Wood and S.J. Smith, 'Instrumental Routes to Emotional Geographies', 5 *Social and Cultural Geography* (2004) 533-548, at 533.

scholarly attention. Bourke, for example, notes that ‘Despite the centrality of emotional experience in the past, analysis of emotions such as fear has remained peripheral to the historical discipline.’<sup>4</sup> In the legal field, Abrams and Kerens observe that ‘...we may be witnessing a recuperation of the tendency to dichotomize and hierarchize reason and emotion: one which casts doubt not on the *presence* of emotions in law, but on the *value* of analysing and responding to that presence.’<sup>5</sup> This interdisciplinary article focuses on the presence and value of emotions in the context of transitional justice.

Transitional justice refers to the range of judicial and non-judicial processes aimed at addressing ‘the legacy of past brutalities.’<sup>6</sup> Regardless of whether it takes the form of criminal trials, truth commissions, reparations or a combination of different processes, it is necessarily fraught with challenges. These include, inter alia, ‘the contested nature of dealing with the legacy of the past...’,<sup>7</sup> and the fact that conflicts can arise between ‘the legal legacy of the past and the laws and regulations of the new or reconstructed democracy...’.<sup>8</sup> While divided societies are likely to disagree on what exactly constitutes the ‘legacy of the past’, a more fundamental issue is the lack of critical debate and discussion on the very notion of ‘legacy.’

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<sup>4</sup> J. Bourke, ‘Fear and Anxiety: Writing about Emotion in Modern History’, 55 *History Workshop Journal* (2003) 111-133, at 112.

<sup>5</sup> K. Abrams and H. Keren, ‘Who’s Afraid of Law and the Emotions’, 94 *Minnesota Law Review* (2010) 1997-2074, at 2001.

<sup>6</sup> B.A. Leebaw, ‘The Irreconcilable Goals of Transitional Justice’, 30 *Human Rights Quarterly* (2008) 95-118, at 100.

<sup>7</sup> P. Lundy, ‘Paradoxes and Challenges of Transitional Justice at the “Local” Level: Historical Enquiries in Northern Ireland’, 6 *Contemporary Social Science: Journal of the Academy of Social Sciences* (2011) 89-105, at 101.

<sup>8</sup> M. Arenhövel, ‘Democratization and Transitional Justice’, 15 *Democratization* (2008) 570-587, at 575.

The concept has often been invoked in relation to individual transitional justice mechanisms – and in particular international and hybrid criminal courts – as a shorthand terminology for their successes and failures.<sup>9</sup> The use of ‘legacy’ as an essentially evaluative idea, however, does not go far enough; there are many questions that still need to be asked. Crucially, in a transitional justice context, what are the parameters of ‘legacy’? Where are the boundaries? Where do they end? Highlighting the multiple and far-reaching dimensions of the concept, Nadery, for example, points out that ‘The legacy of past abuses is noticeable in all aspects of Afghan society, psychologically and physically.’<sup>10</sup>

Legacy, in other words, is a highly complex and multi-layered concept, and this article is specifically about the *emotional* dimensions of legacy. Developing the argument that war crimes and human rights abuses leave important emotional legacies that have not received sufficient attention within transitional justice theory or practice, it underscores that any process of ‘dealing with the past’ is necessarily incomplete if powerful emotions connected to that past – and which carry over into and permeate the present – are neglected. As Hutchinson and Bleiker underline, ‘Post-conflict societies are not simply divided by the pain of past or continuing injustices, but also by the feelings that accompany traumatic histories and memories.’<sup>11</sup> The article links the discussion of emotions to the idea of therapeutic

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<sup>9</sup> See, for example, Y. Danieli, ‘Reappraising the Nuremberg Trials and Their Legacies: The Role of Victims in International Law’, 27 *Cardozo Law Review* (2005) 1633-1650; C.A. MacKinnon, ‘The ICTR’s Legacy on Sexual Violence’, 14 *New England Journal of International and Comparative Law* (2008) 211-220; C.C. Jalloh, *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (New York: Cambridge University Press, 2014).

<sup>10</sup> A.N. Nadery, ‘Peace or Justice? Transitional Justice in Afghanistan’, 1 *International Journal of Transitional Justice* (2007) 173-179, at 174.

<sup>11</sup> E. Hutchinson and R. Bleiker, ‘Emotional Reconciliation: Reconstituting Identity and Community after Trauma’, 11 *European Journal of Social Theory* (2008) 385-403, at 391.

jurisprudence,<sup>12</sup> but in a way that takes the concept in a new direction. This work is not about the therapeutic effects of legal processes on emotional well-being. Therapeutic jurisprudence, however, is one of the potential outcomes of transitional justice processes giving more attention to emotional legacies.

The author's aforementioned fieldwork with victims-/survivors of conflict-related sexual violence<sup>13</sup> provided the initial impetus for thinking about emotional legacies and transitional justice. This article, however, examines and demonstrates the practical significance of emotions through a specific focus on reconciliation – defined as the emotional repair of relationships and the re-building of trust that enable interactions extending beyond simply 'mutual acceptance.'<sup>14</sup> It posits that the neglect of emotional legacies represents a missed opportunity to explore how the meta emotions that people share – and which form part of 'a

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<sup>12</sup> D.B. Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence', 1 *Psychology, Public Policy and Law* (1995) 220-236.

<sup>13</sup> This research was undertaken as part of a five-year comparative study – focused on BiH, Colombia and Uganda – about resilience and conflict-related sexual violence. Based on quantitative and qualitative data primarily collected between September 2018 and July 2019, the study is exploring why some victims-/survivors display high levels of resilience while others do not. Resilience is fundamentally 'about ecosystems and people together as integrated social-ecological systems in which social systems and ecosystems are recognized as coupled, interdependent, and coevolving.' F. Berkes and H. Ross, 'Community Resilience: Toward an Integrated Approach', 26 *Society and Natural Resources: An International Journal* (2012) 5-20, at 7. The ultimate aim of the study, thus, is to use the data to develop a new model of transitional justice that addresses 'legacy' through a focus on the interactions between individuals and their environments and, in this way, contributes to fostering resilience across multiple intersecting micro, meso and macro systems. While somewhat clumsy, the term 'victims-/survivors' is used in recognition of the fact that some men and women who have experienced conflict-related sexual violence see themselves as victims, some view themselves as survivors and some perceive themselves as both victims and survivors.

<sup>14</sup> Some definitions of reconciliation are rather minimalist. Staub et al., for example, define it as 'mutual acceptance by members of formerly hostile groups of each other.' E. Staub, L.A. Pearlman, A. Gubin and A. Hagenimana, 'Healing, Reconciliation, Forgiving and the Prevention of Violence after Genocide or Mass Killing: An Intervention and its Experimental Evaluation in Rwanda', 24 *Journal of Social and Clinical Psychology* (2005) 297-334, at 301. Other definitions, in contrast, are more maximalist. Writing about what she calls an 'interconnectedness-towards-wholeness', for example, Krog argues that the concepts of reconciliation and forgiveness are both inseparable and mutually dependent. A. Krog (2008) "'This Thing Called Reconciliation...': Forgiveness as Part of an Interconnectedness-towards-Wholeness', 27 *South African Journal of Philosophy* (2008) 353-366, at 355-356. This article's own definition of reconciliation, which underlines the importance of emotions, seeks to steer a more middle course and builds on the author's previous research on the subject. See, for example, J.N. Clark, *International Criminal Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the former Yugoslavia* (Abingdon: Routledge, 2014).

social ontology of connection’<sup>15</sup> – constitute potential new bases for building reconciliation in post-conflict societies such as BiH. This argument is empirically developed using the case study of Ahmići, an ethnically-mixed village in central Bosnia-Herzegovina (BiH).

Reflecting more broadly on the relationship between truth and reconciliation, it emphasizes the utility of ‘alethic truth.’<sup>16</sup> The term ‘alethic’, in this regard, is about more than just ‘uncovering’ the truth. It is also about the boundaries of truth, and more particularly its experiential and emotional boundaries. The article acknowledges the fact that, on the surface at least, the concept of alethic truth and its recognition of different layers of truth does not have an obvious place within transitional justice processes – and most obviously criminal trials – that are committed to establishing ‘*the truth*’ about complex crimes and human rights violations, especially with regard to the responsibility of one or more individuals. As Lange points out, however, ‘an analysis of emotions allows us to identify close interrelationships between a legal and a social realm...’.<sup>17</sup> The concept of alethic truth is an example of these interrelationships, and the broader social framework within which transitional justice processes may be situated.

Divided into five sections, the article’s first section provides an overview of the author’s recent fieldwork in Ahmići. The second section contextualizes the article’s focus on emotions and transitional justice through a broader discussion about law and emotions, and it introduces the concept of therapeutic jurisprudence. The third section argues that while

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<sup>15</sup> V. Lawson, ‘Geographies of Care and Responsibility’, 97 *Annals of the Association of American Geographers* (2007) 1-11, at 3.

<sup>16</sup> R. Bhaskar, *Dialectic: The Pulse of Freedom* (London: Verso, 1993).

<sup>17</sup> B. Lange, ‘The Emotional Dimension in Legal Regulation’, 29 *Journal of Law and Society* (2002) 197-225, at 206.

transitional justice has not ignored emotions, it has not given sufficient attention to the wider emotional legacies of war crimes and human rights violations. Emotions have primarily been discussed in the context of formal transitional justice processes (and often with explicit or implicit reference to therapeutic jurisprudence), while more long-term emotional legacies have been overlooked. The fourth section is empirical and uses the author's interviews in Ahmići to demonstrate the significance of emotions for reconciliation, an important transitional justice goal. It focuses particularly on the deep sense of hurt that both Bosnian Muslim (Bosniak) and Croat interviewees expressed. The final section emphasizes an important nexus between emotions and the concept of 'alethic truth.' In so doing, it argues that emotions – and their experiential underpinnings – point to potential new ways of framing and conceptualizing the relationship between truth and reconciliation.

## **2. Methodology**

During the Bosnian war, an attack on the village of Ahmići in April 1993 resulted in the deaths of 116 Bosniak civilians. The prosecution of several of the perpetrators at the International Criminal Tribunal for the former Yugoslavia (ICTY) did little to contribute to the emotional repair of relationships and re-building of trust among local Bosniaks and Croats;<sup>18</sup> and the Tribunal critically neglected the emotional legacies of the crime, captured in the notion of 'a hurt remembered.'<sup>19</sup> While these unaddressed legacies contribute to the maintenance of inter-ethnic divides, they also have an unexplored potential to bring the community together.

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<sup>18</sup> Clark, *supra* note 14.

<sup>19</sup> R. Chopra, 'Commemorating Hurt: Memorializing Operation Bluestar', 6 *Sikh Formations: Religion, Culture, Theory* (2010) 119-152, at 122.



This article draws on the author's most recent fieldwork in Ahmići,<sup>20</sup> carried out during a two-week period in July 2019 (and on the various ICTY judgements related to Ahmići). The purpose of these interviews – focused on the central thematic of resilience – was to explore the resources that members of the community have utilized to re-build their lives,<sup>21</sup> and to examine how the community itself has adapted to the shocks and stressors that it underwent during the Bosnian war. The author interviewed 10 members of the community in the local languages (Bosnian/Croatian), of whom six were men and four were women. Seven interviewees were Bosniaks and three were Croats.

While the number of interviewees is admittedly small, which is not unusual for a qualitative study, this reflects the challenges of doing research in Ahmići. Even if it has not received the same level of attention as other places in BiH where significant crimes occurred, such as Srebrenica and Prijedor, a deep sense of 'interview fatigue'<sup>22</sup> nevertheless exists. Many Bosniak members of the community lost several members of their family and simply do not want to, or cannot, continue to speak about what happened. That only three of the 10 interviewees gave permission for their interviews to be recorded,<sup>23</sup> moreover, is a strong indicator that levels of mistrust remain high.<sup>24</sup> Some interviewees were clearly concerned that if they were to speak 'on record', their words could be misused and cause problems for them.

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<sup>20</sup> The author first undertook fieldwork in Ahmići in 2008.

<sup>21</sup> Interviewees were asked questions about resources, reflecting the fact that 'Resilience is the process of harnessing biological, psychosocial, structural, and cultural resources to sustain wellbeing.' C. Panter-Brick and J.F. Leckman, 'Editorial Commentary: Resilience in Child Development – Interconnected Pathways to Wellbeing', 54 *Journal of Child Psychiatry and Psychology* (2013) 333-336, at 333.

<sup>22</sup> S. Michael, 'The Promise of Appreciative Inquiry as an Interview Tool for Field Research', 15 *Development in Practice* (2005) 222-230, at 227.

<sup>23</sup> A fully encrypted voice recorder was used for this purpose.

<sup>24</sup> It is interesting to note that, in contrast, the author was able to record all of her 21 interviews in BiH (conducted between January and July 2019) with victims-/survivors of conflict-related sexual violence. These

Finding local Croats (Bosnian Croats) willing to participate in the research was especially difficult.<sup>25</sup> Firstly, there are relatively few of them in Ahmići itself. Although the village is mixed, Bosniaks have always been the majority. According to the pre-war 1991 census, for example, ‘Ahmići had about 500 inhabitants, of whom about 90% were Muslims, which meant 200 Muslim houses and fifteen or so Croat ones.’<sup>26</sup> Nearby Šantići, however, is a predominantly Croat village. Secondly, Croats in Ahmići have sought to distance themselves – and indeed their Croat neighbours<sup>27</sup> – from the events of April 1993. Hence, they often seem wary of answering questions, afraid of being misrepresented or wrongly implicated in what happened.<sup>28</sup> One interviewee, for example, repeatedly insisted that he would not have returned to Ahmići when he did if he had known what was going to happen.<sup>29</sup>

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interviews were carried out as part of a large five-year research project about resilience and victims-/survivors of conflict-related sexual violence in BiH, Colombia and Uganda. The research is being funded by the European Research Council. The purpose of recording the interviews was fully explained to the interviewees during the informed consent process. All of them were satisfied with the information provided and gave permission for the author to record.

<sup>25</sup> A snowball sampling strategy was used to establish contact with possible Croat interviewees, while a local contact facilitated the interviews with Bosniaks.

<sup>26</sup> Judgment, *Blaškić* (IT-95-14-T), Trial Chamber, 3 March 2000, § 384.

<sup>27</sup> Among local Croats, there is a tendency to blame ‘others’ for the attack on Ahmići, reflecting a narrative that has developed from the top down. According to the *Kupreškić et al.* Trial Chamber judgment, for example, ‘Akhavan [an international human rights lawyer and part of an investigation team] met the military and political leaders of the Bosnian Croat community – Tihomir Blaškić, Mario Čerkez and Dario Kordić – who admitted to being in control of the area, but denied responsibility for the attack on Ahmići, claiming that the attack had been committed by the Serbs or by the Muslims themselves in order to attract international sympathy.’ Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14 January 2000: § 182. It has been established that the perpetrators of the crimes committed in Ahmići were the 4<sup>th</sup> Military Police Battalion of the HVO and its anti-terrorist platoon, the ‘Jokers.’ Judgment, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004, § 374. By majority, the Appeals Chamber found that the Trial Chamber was reasonable to conclude *on the evidence before it* that, as the commander of the HVO in Central Bosnia, Tihomir Blaškić exercised ‘command authority’ over the ‘Military Police’ (§ 381) – but itself determined that, taking into account *new* evidence admitted on appeal, he did not in fact exercise ‘effective control’ (§ 421) over the perpetrators, and therefore was not responsible for their conduct as a superior.

<sup>28</sup> According to the aforementioned *Kupreškić et al.* Trial Chamber judgment, ‘The able-bodied Croatian inhabitants of Ahmići provided assistance and support in various forms. Some of them took part in the military operations against the Muslims. It is also true, however, that a few Croatian inhabitants of Ahmići endeavoured to save Muslim friends or neighbours by prompting them to escape and helping them in such attempts, or at any rate by providing them with suggestions as to how to avoid being killed.’ *Ibid.*, § 3340.

<sup>29</sup> Author interview, Ahmići, 17 July 2019.

All interviews took place at the interviewees' homes and typically lasted around 40 minutes. The longest interview was one hour and 21 minutes. Although the interviewees told diverse stories, a common narrative thread was a deep sense of hurt. This thread is woven into the article's case study section. The next two sections, however, focus on emotions more broadly – and on their relevance in legal and transitional justice settings.

### **3. Law, Emotions and Therapeutic Jurisprudence**

On the surface at least, emotions do not have an obvious place in law. Harris and Schultz note that 'The prevailing image of the law is of blindfolded Justice balancing the scales of decision.'<sup>30</sup> The purpose of this blindfold is precisely to 'shut out persons and passions that might inappropriately influence her inward deliberation.'<sup>31</sup> Viewed in this way, emotions are potentially destabilizing, undermining the elemental rationality that governs the administration of justice and judicial decision-making. As Blumenthal highlights, 'Traditionally, discussions of law and the emotions portray emotions as a counterpoint to rational thought: emotion has typically been viewed as a corruptive force that distorts logical reasoning.'<sup>32</sup> More fundamentally, seen from a rational choice perspective, emotions are 'troublesome' precisely because they appear to problematize the core assumption that people act in accordance with their own rational preferences.<sup>33</sup>

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<sup>30</sup> A.P. Harris and M.M. Shultz, "A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education", 45 *Stanford Law Review* (1993) 1773-1806, at 1777.

<sup>31</sup> *Ibid.*

<sup>32</sup> J.A. Blumenthal, 'Law and the Emotions: The Problems of Affective Forecasting', 80 *Indiana Law Journal* (2005) 155-238, at 160.

<sup>33</sup> E.A. Posner, 'Law and the Emotions', 89 *Georgetown Law Journal* (2001) 1977-2012, at 1980.

Kahan and Nussbaum's work has challenged such a stark binary approach to emotions and thought processes. Critiquing what they have termed a 'mechanistic conception' that essentially strips emotions of any thought content,<sup>34</sup> they underline that even though certain emotions – such as rage and anger – can take hold even without our consent,<sup>35</sup> others can only be explained in the context of the thought processes that necessarily underpin them. The authors give the example of a person grieving the death of a child. This grief, they underline, 'cannot adequately be described simply as a force or a current – or even as a force caused by a thought that remains external to the grief – for we must mention that the grief itself is *directed at the child...*'.<sup>36</sup>

Contrasting a mechanistic concept of emotions with an 'evaluative conception',<sup>37</sup> Kahan and Nussbaum underscore that even emotions such as fear and anger involve important evaluative judgments.<sup>38</sup> For example, one does not go through life fearing absolutely everything. Rather, 'What inspires fear is the thought of damages impending that cut to the heart of one's own cherished goals, relationships, and projects.'<sup>39</sup> The key point is that emotions – and the evaluative processes that they reflect – inform how people act and the decisions and choices that they make.<sup>40</sup> Hence, they have a legitimate place within the law and should be taken seriously.

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<sup>34</sup> D.M. Kahan and M.C. Nussbaum, 'Two Conceptions of Emotion in Criminal Law', 96 *Columbia Law Review* (1996) 269-374, at 273.

<sup>35</sup> *Ibid.*, at 279.

<sup>36</sup> *Ibid.*, at 282.

<sup>37</sup> *Ibid.*, at 273.

<sup>38</sup> *Ibid.*, at 295.

<sup>39</sup> *Ibid.*, at 286.

<sup>40</sup> Posner, *supra* note 33, at 1982.

Certainly, there is a growing body of scholarship exploring the diverse role of emotions in law and legal processes. Scholars have underlined, inter alia, the increasing emotional content of public discourse about crime and justice;<sup>41</sup> the common practice among defence lawyers of appealing to the emotions and feelings of jury members;<sup>42</sup> the influence of emotions in capital punishment cases;<sup>43</sup> and the role of emotions in criminal law defences.<sup>44</sup> While emotions are pertinent to all areas of law in different ways,<sup>45</sup> the foregoing examples demonstrate that they have a particular resonance in the area of criminal and international criminal law. Describing criminal courts and procedures as ‘a prominent institutional space and institutional mechanism for emotions in society,’<sup>46</sup> Karstedt underlines that the very edifice of criminal law ‘is erected on a strong undercurrent of emotions: the fear of sanctions, that should instil compliance, or vengeance that is to be channelled by legal procedures.’<sup>47</sup>

The juxtaposition of law and emotions thus distorts the complex inter-linkages between the two. Fundamentally, ‘Law, crime and justice are deeply emotional areas.’<sup>48</sup> Further

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<sup>41</sup> A. Freiberg and W.G. Carson, ‘The Limits to Evidence-Based Policy: Evidence, Emotion and Criminal Justice’, 69 *Australian Journal of Public Administration* (2010) 152-164, at 157.

<sup>42</sup> T. Weigend, ‘Is the Criminal Process about Truth? A German Perspective’, 26 *Harvard Journal of Law and Public Policy* (2003) 157-174, at 166.

<sup>43</sup> J. Shroeder, C.C. Guin, R. Pogue and D. Bordelon, ‘Mitigating Circumstances in Death Penalty Decisions: Using Evidence-Based Research to Inform Social Work Practice in Capital Trials’, 51 *Social Work* (2006) 355-364, at 356.

<sup>44</sup> E. Spain, *The Role of Emotions in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge: Cambridge University Press, 2011).

<sup>45</sup> Emphasizing, for example, that ‘The law always has taken account of emotion’, Maroney notes that ‘Criminal law reflects theories of fear, grief, and remorse; family law seeks (ideally) to facilitate love and attachment; tort law measures emotional suffering; litigants seek emotional satisfaction by invoking legal mechanisms; legal decision makers may have strong feelings about parties in their cases.’ T.A. Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’, 30 *Law and Human Behavior* (2006) 119-142, at 120.

<sup>46</sup> S. Karstedt, ‘Emotions and Criminal Justice’, 6 *Theoretical Criminology* (2009) 299-317, at 300.

<sup>47</sup> *Ibid.*, at 301.

<sup>48</sup> Freiberg and Carson, *supra* note 41, at 157.

highlighting this, the concept of therapeutic jurisprudence, which has its origins in mental health law,<sup>49</sup> is about recognizing that law, legal judgements and processes can have significant emotional effects on individuals.<sup>50</sup> An interdisciplinary concept that draws insights from disciplines including psychology, psychiatry, criminology and social work,<sup>51</sup> therapeutic jurisprudence emphasizes that ‘Law is a social force that has inevitable consequences for people’s emotional well-being.’<sup>52</sup> These consequences can be positive or negative. Decisions taken in international criminal courts are just one example. An individual witness might ultimately feel relieved and satisfied that ‘justice’ has been done; or, alternatively, s/he might feel deeply disappointed, wronged and used by the criminal justice system. The negative experiences of ‘interviewee 2’, cited at the start of this article, who testified in a local court in BiH, illustrate the latter point.

Therapeutic jurisprudence, however, is about more than simply drawing attention to the various ways in which law can affect a person’s emotional state. Part of its reform agenda is precisely about fostering legal changes that increase and enhance the law’s therapeutic effects.<sup>53</sup> According to Wexler, therapeutic jurisprudence has ‘sought to look at the law in a richer way’, specifically by focusing on ‘the therapeutic and antitherapeutic impact of “legal landscapes” (legal rules and legal procedures) and of the “practices and techniques” (legal

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<sup>49</sup> D. B. Wexler, ‘Two Decades of Therapeutic Jurisprudence’, 24 *Touro Law Review* (2008) 17-30, at 21.

<sup>50</sup> D.B. Wexler, ‘Therapeutic Jurisprudence: An Overview’, 17 *Thomas M. Cooley Law Review* (2000) 125-134.

<sup>51</sup> A. Birgden, ‘Therapeutic Jurisprudence and Responsivity: Finding the Will and the Way in Offender Rehabilitation’, 10 *Psychology, Crime and Law* (2004) 283-295, at 285; D.B. Wexler, ‘New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices’, 7 *Arizona Summit Law Review* (2014) 463-480, at 463.

<sup>52</sup> B.J. Winick, ‘Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime’, 33 *Nova Law Review* (2009) 535-544, at 535.

<sup>53</sup> B.J. Winick and B.J. Wexler, ‘Drug Treatment Court: Therapeutic Jurisprudence Applied’, 18 *Touro Law Review* (2001) 479-485, at 479.

roles) of actors such as lawyers, judges, and other professionals operating in a legal context.’<sup>54</sup>

Therapeutic jurisprudence, in other words, is a concept that powerfully highlights the symbiosis between law and emotions. It is also a concept with a ‘growing international dimension.’<sup>55</sup> It has been applied, in particular, to discussions about international human rights.<sup>56</sup> While this article has an international focus, it is not about the potential role of law ‘as a therapeutic agent...’.<sup>57</sup> Centred on transitional justice, which has an important legal component, it is about the emotional dimensions of international crimes. Its core argument is that transitional justice processes that purport to address the ‘legacy’ of past human rights abuses have not given adequate attention to the emotional legacies of these crimes. This, in turn, has important implications for post-conflict reconciliation processes. While the article is not, therefore, specifically about therapeutic jurisprudence, its call for transitional processes to give more attention to emotional legacies represents a novel extension of the concept.

#### **4. Emotions, Emotional Legacies and Transitional Justice**

Within transitional justice scholarship, discussions about emotions often have a therapeutic jurisprudence dimension, even if this is not explicitly stated. Specifically, such discussions frequently focus on victims, and in particular on how transitional justice processes can affect

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<sup>54</sup> Wexler, ‘New Wine in New Bottles’, *supra* note 51, at 463.

<sup>55</sup> Wexler, ‘Two Decades of Therapeutic Jurisprudence’, *supra* note 49, at 17.

<sup>56</sup> See, for example, B.J. Winick, ‘Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law’, 21 *New York Law School Journal of International and Comparative Law* (2002) 537-572; A. Birgden and P.L. Perlin, “‘Tolling for the Luckless, the Abandoned and Forsaken’”: Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists’, 13 *Legal and Criminal Psychology* (2008) 231-243; M.L. Perlin, “‘The Ladder of the Law has no Top and no Bottom’”: How Therapeutic Jurisprudence Can Give Rise to International Human Rights’, 37 *International Journal of Law and Psychiatry* (2014) 535-542.

<sup>57</sup> Wexler, ‘Two Decades of Therapeutic Jurisprudence’, *supra* note 49, at 20.

emotional well-being.<sup>58</sup> Karstedt, for example, points out that: ‘It is one of the strongest claims and justifications of TJ [transitional justice] that participation in TJ procedures, truth telling, and testimony, that is, the sharing of traumatic emotional experiences, leads to emotional relief, long-term emotional recovery, and “healing” of victims.’<sup>59</sup> She underlines, however, that such claims are often inflated and lack empirical support. This is reflected in the fact that ‘Research provides consistent evidence that merely talking about or sharing an emotional experience does not resolve it or lead to emotional recovery.’<sup>60</sup> In other words, it is not enough to expect that simply providing victims with a space in which to articulate and express their emotions will have beneficial effects and foster emotional well-being.<sup>61</sup>

Doak’s work explicitly engages with the concept of therapeutic jurisprudence. Focused on criminal trials and truth and reconciliation commissions (TRCs), he essentially assesses these processes against the criteria of their therapeutic (and antitherapeutic) effects and their

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<sup>58</sup> See, for example, A. Allan and M.M. Allan, ‘The South African Truth and Reconciliation Commission as a Therapeutic Tool’, 18 *Behavioral Sciences and the Law* (2000) 459-477; P. Gobodo-Madikizela, ‘Remorse, Forgiveness and Rehumanization: Stories from South Africa’, 42 *Journal of Humanistic Psychology* (2002) 7-32; C. Byrne, ‘Benefit or Burden: Victims’ Reflections on TRC Participation’, 10 *Peace and Conflict: Journal of Peace Psychology* (2004) 230-249; J. O’Connell, ‘Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?’ 46 *Harvard International Law Journal* (2005) 295-345; B. Rimé, P. Kanyangara, V. Yzerbet and D. Paez, ‘The Impact of Gacaca Tribunals in Rwanda: Psychosocial Effects of Participation in a Truth and Reconciliation Process after Genocide’, 41 *European Journal of Social Psychology* (2011) 695-706; K. Brounéus, ‘The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health’, 54 *Journal of Conflict Resolution* (2010) 408-437; M. Lawry-White, ‘The Reparative Effect of Truth Seeking in Transitional Justice’, 64 *International and Comparative Law Quarterly* (2015) 141-178; K.L. King and J.D. Meernik, *The Witness Experience: Testimony at the ICTY and its Impact* (New York: Cambridge University Press, 2017).

<sup>59</sup> S. Karstedt, ‘The Emotion Dynamics of Transitional Justice: An Emotion Sharing Perspective’, 8 *Emotion Review* (2016) 50-55, at 53.

<sup>60</sup> *Ibid.*

<sup>61</sup> C. Martín-Beristain, D. Páez, Bernard Rimé and P. Kanyangara, ‘Psychosocial Effects of Participation in Rituals of Transitional Justice: A Collective-Level Analysis and Review of the Literature of the Effects of TRCs and Trials on Human Rights Violations in Latin America’, 25 *Revista de Psicología Social* (2010) 47-60, at 59.



capacity to ‘deliver therapeutic benefits.’<sup>62</sup> Stressing that victims can suffer emotional harm from participating in transitional justice processes,<sup>63</sup> he accordingly calls for what he terms an ‘emotionally intelligent model of transitional justice.’<sup>64</sup> This would mean that courts and truth commissions fulfil their duties to victims by taking steps to ‘maximize their healing potential and minimize their harming potential.’<sup>65</sup> The steps that Doak suggests, however – which include minimizing the risk of re-traumatizing victims and giving them more narrative freedom<sup>66</sup> – are not new. Furthermore, adopting such a heavy victim-centred focus may even be socially myopic, in the sense that it still neglects ‘the fundamental tension between victims’ psychological needs and those of society as a whole.’<sup>67</sup>

Extending the focus beyond the emotional effects of particular transitional justice processes, some transitional justice scholars have discussed emotions in a wider context by looking at the utility of particular emotions. These include ‘potentially explosive emotions’<sup>68</sup> – such as anger and resentment – that are seemingly in tension with core transitional justice goals. For some scholars, the challenge for transitional justice is not to dilute these emotions, but, rather,

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<sup>62</sup> J. Doak, ‘The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions’, 11 *International Criminal Law Review* (2011) 263-298, at 279.

<sup>63</sup> *Ibid.*, at 266.

<sup>64</sup> *Ibid.*, 290. See also M.S. King, ‘Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice’, 32 *Melbourne University Law Review* (2008) 1096-1126.

<sup>65</sup> Doak, *ibid.*, at 290.

<sup>66</sup> *Ibid.*

<sup>67</sup> David Mendeloff, ‘Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice’, 31 *Human Rights Quarterly* (2009) 592-623, at 622.

<sup>68</sup> R. Lyster, ‘Amnesty: The Burden of Victims’, in C. Villa-Vicencio and W. Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000) 184-192, at 187.

to harness them in a way that ultimately contributes to the delivery of ‘justice.’<sup>69</sup> Jeffery’s work on the Extraordinary Chambers in the Courts of Cambodia (ECCC), for example, underscores that ‘forging a path’ between the extremes of forgiveness and revenge means ‘finding ways to channel the emotional drive to justice into constructive justice processes...’ that keep revenge in check.<sup>70</sup> For her part, Mihai emphasizes that negative emotions have an entirely legitimate place within transitional justice. Concentrating on indignation and resentment, she argues that such emotions – in addition to the fact that victims of injustice are entitled to feel them<sup>71</sup> – have an important signalling function. Fundamentally, ‘As markers of a sense of justice, they bear normative weight and should be recognized as legitimate objects of concern by decision makers. Such emotions act as valuable signals of alarm that injustices need correction.’<sup>72</sup>

The broader point is that emotions are not only significant for transitional justice at the level of individual victims and their emotional well-being. They necessarily have wider effects.<sup>73</sup>

The notion of emotional healing in transitional justice, for example, ‘challenges us to think beyond the individual to healing at a family, community, regional and national level.’<sup>74</sup> While emotions can powerfully affect the way that individuals engage with these different social

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<sup>69</sup> Focusing on retributive emotions of anger, Cartesian indignation, hatred, contempt and Aristotelian indignation, Elster has explored how: ‘In transitional justice, these five emotions map into distinct legal and administrative reactions.’ J. Elster, ‘Emotions and Transitional Justice’, 86 *Surroundings: An Interdisciplinary Journal* (2003) 17-40, at 31.

<sup>70</sup> R. Jeffery, ‘The Forgiveness Dilemma: Emotions and Justice at the Khmer Rouge Tribunal’, 69 *Australian Journal of International Affairs* (2015) 35-52, at 36-37.

<sup>71</sup> M. Mihai, *Negative Emotions and Transitional Justice* (New York: Cambridge University Press, 2016).

<sup>72</sup> *Ibid.*, at 38-39.

<sup>73</sup> Indeed, therapeutic jurisprudence is not simply about individuals and the impact of laws and legal processes on their emotional well-being. As Wexler has underlined, the focus can also be on families, communities and society as a whole. Wexler, ‘Reflections on the Scope of Therapeutic Jurisprudence’, *supra* note 12, at 224.

<sup>74</sup> Lawry-Wight, *supra* note 58, at 167.

ecologies, thus potentially altering those ecologies,<sup>75</sup> they can also contribute to fostering new emotional climates that constrain (or benefit) transitional justice work. In their work with Maya communities in Guatemala, for example, Lykes et al. found that ‘human rights violations impacted the emotional climate of communities by increasing fear, sadness, and distrust, all of which led to decreased ability to talk to others about experiences, particularly of the terror and repression.’<sup>76</sup>

Emotions, therefore, are highly relevant to transitional justice, just as they are to law more generally. Indeed, Karstedt maintains that contemporary transitional justice processes ‘give unprecedented space to the expression of emotions.’<sup>77</sup> The issue, however, is that *outside of* formal transitional justice procedures, emotions have not received the attention they deserve.<sup>78</sup> In short, the assumed emotional and therapeutic benefits of truth-telling, recognition and acknowledgement mean that emotions quickly fall off transitional justice’s radar once mechanisms have been put in place for these benefits to be realized at least in theory. Seeking to address this gap, this article’s particular contribution to existing scholarship on emotions and transitional justice – and an extension of therapeutic jurisprudence – is its focus on the emotional legacies of war crimes and human rights abuses.

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<sup>75</sup> J.K. Graybill, ‘Mapping an Emotional Topography of an Ecological Homeland: The Case of Sakhalin Island, Russia’, 8 *Emotion, Space and Society* (2013) 39-50, at 46

<sup>76</sup> M.B. Lykes, C. Martín-Beristain and M.L.C. Pérez-Armiñan, ‘Political Violence, Impunity, and Emotional Climate in Maya Communities’, 63 *Journal of Social Issues: A Journal of the Society for the Psychological Study of Social Issues* (2007) 369-385, at 383. See also M. Cárdenas, D. Páez, B. Rimé and M. Arnoso, ‘How Transitional Justice Processes and Official Apologies Influence Reconciliation: The Case of the Chilean “Truth and Reconciliation” and “Political Imprisonment and Torture” Commissions’, 25 *Journal of Occupational and Organizational Psychology* (2015) 515-530, at 516.

<sup>77</sup> Karstedt, *supra* note 59, at 51.

<sup>78</sup> Reflecting on what he calls ‘check-box transitional justice initiatives’ in post-war Liberia, for example, Pul argues that ‘Unfortunately, Liberians have not transitioned from their deeply hurt pasts into new days of friendship and cordial co-citizenship.’ H.A.S. Pul, ‘Making Me You: The Elusive Missions of Development and Peace in Liberia and Sierra Leone’, 11 *Journal of Peacebuilding and Development* (2011) 40-53, at 45.

By also demonstrating that these legacies continue to shape human relationships long after the conclusion of formal transitional justice processes that purportedly help to heal those relationships,<sup>79</sup> the article uses its conceptual and empirical discussion of emotional legacies as a basis for reconceptualizing the relationship between truth and reconciliation.

The concept of ‘emotional legacies’ has been utilized in various contexts. Noakes, for example, refers to the ‘lasting emotional legacies of wartime death’;<sup>80</sup> and Bessel submits that ‘the emotional legacy of National Socialism and war created fertile ground for a politics of hatred throughout Germany.’<sup>81</sup> Nussio’s research in Colombia, aimed at exploring how former paramilitaries described their involvement in the armed conflict, offers a more developed usage of the term. Speaking about ‘emotional legacies’ to refer to the emotional dimensions of their descriptions,<sup>82</sup> and underlining the difficulties of separating the emotional legacies from the actual perceptions, he posits that ‘Emotional legacies of war are the emotional dimension of today’s perception of the past involvement in war.’<sup>83</sup>

Nussio’s discussion of emotional legacies is important for two key reasons. Firstly, he emphasizes that these legacies are not fixed and static. Rather, they can change over time,

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<sup>79</sup> In a speech delivered in London in 2005, the ICTY’s then Prosecutor, Carla Del Ponte, for example, noted that ‘Our primary objective is to bring justice, thereby contributing to the reconciliation between peoples who have been torn apart by the wars of the nineties.’ ICTY, ‘Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the former Yugoslavia: Address at Goldman Sachs, London, 6 October 2005’, (2005), available at: [https://www.icty.org/x/file/Press/PR\\_attachments/cdp-goldmansachs-050610-e.htm](https://www.icty.org/x/file/Press/PR_attachments/cdp-goldmansachs-050610-e.htm) (visited 27 November 2019).

<sup>80</sup> L. Noakes, “‘My Husband is Interested in War Generally’: Gender, Family History and the Emotional Legacies of Total War”, 27 *Women’s History Review* (2018) 610-626, at 619.

<sup>81</sup> R. Bessel, ‘Hatred after War: Emotion and the Postwar History of East Germany’, 17 *History and Memory* (2005) 195-216, at 207.

<sup>82</sup> E. Nussio, ‘Emotional Legacies of War among Former Colombian Paramilitaries’, 18 *Peace and Conflict: Journal of Peace Psychology* (2012) 369-383, at 378.

<sup>83</sup> *Ibid.*

thereby opening up ‘a window of opportunity for strategies to counterbalance the undesired effects of the past involvement in war.’<sup>84</sup> This window of opportunity thus points to the need for transitional justice processes to give more attention to addressing and transforming emotional legacies that can obstruct the realization of core transitional justice goals. Secondly, and following on from the previous point, Nussio remarks that ‘Emotional legacies are important for various aspects of peacebuilding.’<sup>85</sup> This nexus between emotional legacies and transitional justice becomes more explicit through his observation that emotional legacies of war can affect how ex-combatants respond to reconciliation activities and transitional justice processes.<sup>86</sup>

Nussio accordingly stresses the importance of developing ‘a model of emotional legacies of past participation in war’, which involves asking the crucial question: ‘What emotional legacies remain today?’<sup>87</sup> Notwithstanding the fact that transitional justice mechanisms and processes seek precisely to deal with the legacies of past human rights violations and abuses, they have rarely addressed Nussio’s question. The next section directly addresses it, through a particular focus on the emotional legacies of the 1993 massacre committed in the Bosnian village of Ahmići.

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<sup>84</sup> *Ibid.*, at 380.

<sup>85</sup> *Ibid.*, at 370. See also G.E. Irani and N.C. Funk, ‘Rituals of Reconciliation: Arab-Islamic Perspectives’, 20 *Arab Studies Quarterly* (1998) 53-73, at 54.

<sup>86</sup> Nussio, *ibid.*

<sup>87</sup> *Ibid.*

## 5. A Community of Hurt and the Untapped Potential of Emotional Legacies

Driving through the verdant Lašva Valley, one can almost miss Ahmići. Travelling from the direction of Zenica towards Vitez, a prominent brown Catholic cross on the left hand side of road marks the start of the Ahmići area. However, the village itself is further along the road, the minaret of the *donja džamija* (lower mosque) indicating the turn-off on the right-hand side. The road winds up through the village, past the local store that has been closed for several years, and up to the *gornja džamija* (upper mosque) – ‘the landmark of Upper Ahmići.’<sup>88</sup> One is struck by the quietness and the sense of emptiness. The village feels lifeless, as though the energy has been somehow sucked out of it. A couple sit on their terrace drinking strong Bosnian coffee. A woman tends to the roses in her garden. Silence. Stillness.

In front of the lower mosque, an imposing memorial lists the names and birth years of the 116 men, women and children who lost their lives in Ahmići on 16 April 1993. The black lettering etched into the memorial stone asks that the crime is never forgotten or repeated (*‘Da se nikad ne zaboravi i ne ponovi!’*). Across the courtyard, a small memorial room displays scenes of chaos and despair, images of burnt-out homes and blackened bodies. According to the ICTY, some of the bodies were ‘so badly charred they could not be identified and in positions suggesting that they had been burned alive.’<sup>89</sup> Many of the victims are buried a short drive away in the *Šehidsko mezarje* (Martyrs’ cemetery) in Stari Vitez.

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<sup>88</sup> Judgment, *Kupreškić et al.*, *supra* note 27, at § 148. Local residents offer different explanations as to why this small village has two mosques. In one of its judgments, a Trial Chamber of the ICTY noted that historically many imams and mullahs came from Ahmići. Hence, ‘Muslims in Bosnia considered Ahmići to be a holy place’ and one that ‘symbolized Muslim culture in Bosnia.’ Judgment, *Blaškić*, *supra* note 26, at § 411.

<sup>89</sup> Judgment, *Blaškić*, *ibid.*, § 416.

Twenty-eight victims remain missing,<sup>90</sup> and local Bosniaks frequently complain that their Croat neighbours are deliberately withholding vital information in this regard. The aforementioned silence that pervades Ahmići, thus, is not only an absence of sound. For some, it is also a strategic and concealing silence.

Both Bosniak and Croat interviewees reflected positively on pre-war life in Ahmići and variously described the relationships between people as ‘ideal’, ‘harmonious’, ‘super’ and ‘brotherly.’ Ethnicity did not matter and people celebrated Bayram and Christmas together, they visited each other’s houses for coffee and they were ‘*kumovi*’ (best man, maid of honour, etc.) at each other’s weddings. Nobody expected that life would change; ‘You couldn’t believe that one side would start shooting at the other’, one interviewee emphasized.<sup>91</sup>

#### ***A. April 1993***

Formed in April 1992, the Croatian Defence Council (HVO) was allied with the army of BiH (ABiH) during the early part of the Bosnian war. By autumn of that year, however, this alliance had started to break down and clashes between the two sides took place.<sup>92</sup> By December 1992, the situation on the ground had changed dramatically; ‘the HVO had taken control of the municipalities of the Lašva Valley and had only met significant opposition in Novi Travnik and Ahmići. Much of Central Bosnia therefore was in the hands of the HVO.’<sup>93</sup>

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<sup>90</sup> Author interview, Ahmići, 8 July 2019.

<sup>91</sup> Author interview, Ahmići, 11 July 2019.

<sup>92</sup> Judgment, *Aleksovski* (IT-95-14/1-T), Trial Chamber, 25 June 1999, § 23.

<sup>93</sup> Judgment, *Kordić and Čerkez* (IT-95-14/2-T), Trial Chamber, 26 February 2001, § 537.

From then on, the relationship between the two armies continued to deteriorate. Following an outbreak of open hostilities in late January 1993, for example, the HVO rounded up Bosniak men from the municipality of Busovača in the Lašva Valley area.<sup>94</sup>

Sitting on a chair in his garden, one interviewee looked out over the fields below. ‘When there are clouds’, he mused, ‘then there is rain and lightning.’<sup>95</sup> The rain and lightning hit Ahmići on 16 April 1993. Miroslav Bralo, a member of the ‘Jokers’,<sup>96</sup> was one of the perpetrators of the ‘massacre undisputedly committed’<sup>97</sup> in Ahmići that day – and one of only 20 ICTY defendants who ultimately pleaded guilty. Released from a local prison just a day earlier, on the condition that he would fully participate in the attack,<sup>98</sup> Bralo ‘set fire to numerous homes belonging to the Muslim inhabitants of Ahmići, using incendiary materials including incendiary bullets, and aided and abetted others in setting fire to further Muslim residences.’<sup>99</sup>

Tihomir Blaškić was the commander of the HVO in Central Bosnia. In his trial at the ICTY, the Trial Chamber took the view that the 16 April attack ‘was planned and organised’,<sup>100</sup> that order D269 (issued by Blaškić) was ‘very clearly an order to attack’<sup>101</sup> and that ‘no military

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<sup>94</sup> Judgment, *Aleksovski*, *supra* note 92, § 23.

<sup>95</sup> Author interview, Ahmići, 11 July 2019.

<sup>96</sup> See *supra* note 27.

<sup>97</sup> Judgment, *Kordić and Čerkez* (IT-95-14/2-A), 17 December 2004, § 1.

<sup>98</sup> Sentencing Judgment, *Bralo* (IT-95-17-S), Trial Chamber, 7 December 2005, § 10.

<sup>99</sup> *Ibid.*

<sup>100</sup> Judgment, *Blaškić*, *supra* note 26, § 386.

<sup>101</sup> *Ibid.*, § 437.



objective justified that attack.<sup>102</sup> The Appeals Chamber, in contrast, took a very different view. It assessed that order D269 was in fact ‘a lawful order, a command to prevent an attack, and did not instruct the troops mentioned therein to launch an offensive attack or commit crimes.’<sup>103</sup> It further opined that there was a ‘military justification’ for Blaškić to issue order D269<sup>104</sup> and adjudged that he did not have effective control over the military units that committed the crimes in Ahmići, meaning that ‘the constituent elements’ of command responsibility were not satisfied.<sup>105</sup> It accordingly reduced Blaškić’s sentence from 45 years to nine years. Four days later, he was granted early release. Bosnian Croats in Ahmići and other parts of BiH celebrated,<sup>106</sup> and Blaškić ‘returned home to a hero’s welcome in Croatia.’<sup>107</sup>

Five months later, the ICTY Appeals Chamber delivered its judgment against *Kordić and Čerkez*. It found that a ‘reasonable trier of fact’ could have reached the conclusion that during a meeting of the Bosnian Croat leadership that took place in Vitez on 15 April 1993, a decision was made ‘to launch an attack against the Muslims’ – and that ‘the direction of the attack was to be Ahmići and other Lašva Valley villages.’<sup>108</sup> It further found that going beyond the written orders that Blaškić himself had issued, there was an additional order

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<sup>102</sup> *Ibid.*, § 437; see also § 410.

<sup>103</sup> Judgment, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004, § 335.

<sup>104</sup> *Ibid.*, § 333.

<sup>105</sup> *Ibid.*, § 421.

<sup>106</sup> ICTY, ‘View from The Hague: Croats Celebrated, Only Blaškić Showed Remorse’ (2004), available at [http://www.icty.org/x/file/Outreach/view\\_from\\_hague/balkan\\_040910\\_en.pdf](http://www.icty.org/x/file/Outreach/view_from_hague/balkan_040910_en.pdf) (visited 11 October 2019).

<sup>107</sup> D. Saxon, ‘Exporting Justice: Perceptions of the ICTY among Serbian, Croatian and Muslim Communities in the Former Yugoslavia’, 4 *Journal of Human Rights* (2005) 559-572, 565.

<sup>108</sup> Judgment, *Kordić and Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, § 697.

(‘order B’) ‘to kill all Muslim military aged men, while civilians were not to be killed but expelled and the houses set on fire.’<sup>109</sup> This order, it concluded, came from Kordić, ‘as the responsible regional politician...’.<sup>110</sup> The judgment additionally notes that ‘Kordić agrees that the killings in Ahmići on 16 April 1993 were “clearly crimes” and amounted to a massacre.’<sup>111</sup> The Appeals Chamber upheld his 25-year sentence (Čerkez’s sentence was reduced from 15 to six years).

Highlighting the fact that the ICTY’s trials had few therapeutic effects in Ahmići, Blaškić and Kordić are two names that provoke strong emotions among Bosniaks and Croats alike. Bosniaks frequently make general references to these cases as evidence that ‘justice’ has not been done for the victims of Ahmići. One interviewee, for example, stressed that ‘Blaškić and Kordić were convicted and then they were released. People are bitter about this.’<sup>112</sup> A common view among Croats, in contrast, is that Blaškić and Kordić are war heroes who should not have been put on trial at all. Others maintain that if their own leaders were prosecuted, Bosniak leaders should have similarly been held accountable. One Croat interviewee, for example, insisted that: ‘I cannot agree with a court that prosecutes Croatian commanders while it doesn’t prosecute Bosniak commanders.’<sup>113</sup> In making this argument,

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<sup>109</sup> *Ibid.*, § 699.

<sup>110</sup> Judgment, *Kordić and Čerkez*, *supra* note 97, at § 700; see also § 699. During the Bosnian war, Kordić was the president of the Croatian Democratic Union of Bosnia-Herzegovina, the main political party of Bosnian Croats.

<sup>111</sup> *Ibid.*, § 472.

<sup>112</sup> Author interview, Ahmići, 16 July 2019.

<sup>113</sup> Author interview, Ahmići, 17 July 2019.

he briefly mentioned Šefer Halilović, the former Chief of the Main Staff of the ABiH who stood trial at the ICTY and was acquitted.<sup>114</sup>

Such polarized views, and the frustrations that they reflect, powerfully underscore the fact that in environments where everything ‘gets filtered through a lens of ethnic, religious, or other conflict-related bias’,<sup>115</sup> legal procedures and judgments can help to entrench rather than ameliorate inter-ethnic and community divides. Yet, while these divides have an emotional dimension, it is argued that emotions also constitute a meta commonality that can potentially help to bridge community divisions.

### ***B. Shared Emotions***

In Ahmići, Bosniaks and Croats profoundly disagree on the basic facts of what happened on 16 April 1993, who was involved and who was ultimately responsible. However, what also emerged from the author’s fieldwork in the village is that they share a deep sense of hurt, ‘the

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<sup>114</sup> At the centre of the case against Halilović was an ABiH-led military operation, ‘Nerevta-93’, that aimed to end the HVO’s blockade of the city of Mostar. The Trial Chamber found that during ‘combat operations’ carried out by various units of the ABiH in September 1993, seven people who took no active part in the hostilities were killed in the Bosnian Croat village of Grabovica, while a further 25 were killed in the village of Uzdol. Judgment, *Halilović* (IT-01-48-T), Trial Chamber, 16 November 2005, § 728. Adjudging that Halilović did not have effective control over the troops that carried out these crimes (§ 747, § 751), the Trial Chamber concluded that the Prosecution had ‘failed to establish that Šefer Halilović was responsible under Article 7(3) [command responsibility] for the crimes committed in Grabovica and Uzdol’ (§ 752). The Prosecution submitted six grounds of appeal. The Appeals Chamber, however, ultimately concurred with the Trial Chamber’s reasoning. It emphasized, inter alia, that ‘In any event, the Prosecution failed to substantiate on appeal any argument that would allow the Appeals Chamber to conclude that the mere existence of a military operation “together with the entirety of the evidence presented at trial, would have [lead to the conclusion] that Halilović was at least the de facto superior of those who committed the crime in Grabovica during this military operation”.’ Judgment, *Halilović* (IT-01-48-A), Appeals Chamber, 16 October 2007, § 142. The Appeals Chamber thus affirmed Halilović’s acquittal.

<sup>115</sup> T. Meijers and M. Glasius, ‘Trials as Messages of Justice: What should be Expected of International Criminal Courts?’ 30 *Ethics and International Affairs* (2016) 429-447, at 443.

most irreducible “real” of an individual’s history.’<sup>116</sup> A Bosniak interviewee spoke about multiple losses. Three members of her family were killed in the attack on Ahmići and it hurts her that no one has been held accountable for their deaths. All of her family photos were destroyed when her home was set alight. Revealing that she does not have even a single photograph of her late husband, she reflected: ‘It’s as if I don’t have a past.’ For her, a further source of hurt is that her Croat *kuma* (bridesmaid) never warned her that Ahmići would be attacked. The interviewee recalled that while she was internally displaced in nearby Zenica, she did briefly speak to this woman via telephone. However, the latter’s husband cut the call short and they have had no further contact.<sup>117</sup>

Going over to a side cabinet in her lounge and carefully taking out a brown envelope that had some black and white photographs inside, another Bosniak interviewee spoke about the family members that she had lost on 16 April 1993 – and the direct involvement of one of her former Croat neighbours. She recalled that when she returned to Ahmići, some local Croats had offered help but she refused to accept anything from them. For her, it was too little, too late. She further recounted how her mother had wanted to ask one particular Croat why he did nothing to save them. Describing her life as empty, she stressed that she carries her sadness and hurt with her and does not share them with anyone. In addition to the anniversary of the Ahmići massacre, for her Bayram (when Muslim families come together to celebrate the end of Ramadan) is also a painful reminder of everything that she has lost.<sup>118</sup>

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<sup>116</sup> Bourke, *supra* note 4, at 23.

<sup>117</sup> Author interview, Ahmići, 9 July 2019.

<sup>118</sup> Author interview, Ahmići, 16 July 2019.

Smoking a cigarette and looking across at some nearby outbuildings, a Croat interviewee emphasized that he can never reconcile himself with the war and everything that happened. It was something that he will never understand, he reflected; ‘I could not have believed that I would take up a gun and shoot at my neighbours, and that they would shoot at me.’<sup>119</sup> He lost several members of his own family in the nearby village of Buhine Kuće, and stressed that no one talks about the crimes committed there. In contrast, everyone knows about Ahmići. ‘Nobody wants to know about Croat suffering’, he insisted, ‘and this is because of politics.’<sup>120</sup>

In a similar vein, a second male Croat interviewee maintained that while he was not defending people like Blaškić and Kordić, the reality is that crimes were committed on both sides and that the ABiH’s attacks on Croats in places such as Buhine Kuće and Križančevo Selo have been overlooked and gone unpunished.<sup>121</sup> This interviewee also talked about his family members being wrongly accused of involvement in the events of 16 April 1993 and complained that they have never received an apology or damages. His family’s name was tarnished, he stressed, and even today some of his Bosniak neighbours do not speak to him.<sup>122</sup>

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<sup>119</sup> Author interview, Ahmići, 11 July 2019.

<sup>120</sup> Author interview, Ahmići, 17 July 2019.

<sup>121</sup> Crimes committed against Croats in the Lašva Valley have received relatively little attention. However, the interviewee was seemingly unaware that in February 2019, the State Court of BiH confirmed an indictment against eight former members of the ABiH in connection with events in Križančevo Selo in December 1993. Seven defendants have been charged with the criminal offence of War Crimes against Prisoners of War. The eighth defendant, Ibrahim Purić (the former commander of the 325<sup>th</sup> Mountain Brigade of the ABiH), is charged with War Crimes against Civilians. According to the indictment, at least 12 HVO soldiers were killed (after they had surrendered) in Križančevo Selo, as well as two civilians. The Court of Bosnia and Herzegovina, ‘Indictment confirmed in the case of *Ibrahim Purić et al.*’ (2019), available at <http://www.sudbih.gov.ba/vijest/potvrena-optunica-u-predmetu-ibrahim-puri-i-dr-21038> (visited 8 October 2019). Croatian sources maintain that at least 64 people were killed in the village. Hina News Agency, ‘*Osmorica bivših pripadnika armije BiH optuženi za ratni zločin nad Hrvatima tereti ih se za ubojstvo najmanje 12 civila i ratnih zarobljenika*’ (2019), available at: <https://www.jutarnji.hr/vijesti/svijet/osmorica-bivsih-pripadnika-armije-bih-optuzeni-za-ratni-zlocin-nad-hrvatima-tereti-ih-se-za-ubojstvo-najmanje-12-civila-i-ratnih-zarobljenika/8398604/> (visited 8 October 2019).

Bosniaks and Croats in Ahmići will almost certainly never agree on what happened in April 1993, or be satisfied with a ‘clean, structured legal narrative’ that transforms highly complex events into a ‘legal truth.’<sup>123</sup> As Stolk underlines, ‘structure, facts, dates, times, places, accuracy does not necessarily do justice to pain, suffering, chaos and conflict.’<sup>124</sup> More broadly, the case study of Ahmići accentuates the huge challenges of delivering therapeutic jurisprudence in a divided and polarized environment. This, however, is not the end of the story. The various expressions and manifestations of hurt that the author encountered constitute important emotional legacies of the Bosnian war that transitional justice – and international criminal law – has critically neglected. While these legacies have different experiential bases,<sup>125</sup> it is this article’s contention that ‘the mutual capacity to feel hurt’<sup>126</sup> potentially provides a foundation for bringing people together and fostering reconciliation.

According to Shnabel and Nadler’s needs-based model of reconciliation, it is essential to address the parties’ emotional needs.<sup>127</sup> This means restoring the parties’ damaged psychological resources. The authors argue that ‘the main psychological resource that is damaged for victims is their sense of power, whereas the main psychological resource that is

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<sup>122</sup> Author interview, Ahmići, 17 July 2019.

<sup>123</sup> S. Stolk, ‘The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity’, 13 *Journal of International Criminal Justice* (2015) 973-994, at 989.

<sup>124</sup> *Ibid.*, at 986.

<sup>125</sup> According to Pile, ‘Emotions may take on social forms of expression, but behind these forms of expression lie genuine personal experiences – that are seeking representation.’ S. Pile, ‘Emotions and Affect in Recent Human Geography’, 35 *Transactions of the Institute of British Geographers* (2010) 5-20, at 11.

<sup>126</sup> L. Waite, G. Valentine and H. Lewis, ‘Multiply Vulnerable Populations: Mobilising a Politics of Compassion from the “Capacity to Hurt”’, 15 *Social and Cultural Geography* (2014) 313-331, at 327.

<sup>127</sup> N. Shnabel and A. Nadler, ‘A Needs-Based Model of Reconciliation: Satisfying the Differential Emotional Needs of Victim and Perpetrator as a Key to Promoting Reconciliation’, 94 *Journal of Personality and Social Psychology* (2008) 116-132, at 116.

damaged for perpetrators is their sense of belongingness and social acceptance.’<sup>128</sup> Events in Ahmici damaged people’s sense of empathy, and addressing the deep sense of hurt that exists on both sides is a first step in repairing this. By extension, therefore, it is also an important part of enabling reconciliation, which is pivotally about ‘making a human connection with the other person’<sup>129</sup> and ‘the development of empathy.’<sup>130</sup>

This argument identifying a shared sense of hurt, as a dimension of unexplored emotional legacies, has broader implications. The final section will explore these. Fundamentally, if emotional legacies provide a basis for rebuilding inter-personal ties and connections, this raises the crucial question of how transitional justice processes – including but not limited to international criminal trials – can capture and address these emotional legacies. Part of the answer lies in the concept of alethic truth, which, in turn, points to a new truth-reconciliation nexus.

## 6. Emotional Legacies, Reconciliation and Alethic Truth

Within transitional justice scholarship, the relationship between truth and reconciliation has received significant attention.<sup>131</sup> The nexus between the two concepts necessarily raises

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<sup>128</sup> *Ibid.*, at 129-130.

<sup>129</sup> Gobodo-Madikizela, *supra* note 58, at 13.

<sup>130</sup> J. Halpern and H.M. Weinstein, ‘Rehumanizing the Other: Empathy and Reconciliation’, 26 *Human Rights Quarterly* (2004) 561-583, at 567.

<sup>131</sup> See, for example, B. Hamber, ‘Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence’, in N. Biggar (ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Washington, D.C: Georgetown University Press, 2003) 155-175; J.L. Gibson. ‘Does Truth Lead to Reconciliation: Testing the Causal Assumptions of the South African Truth and Reconciliation Process’, 48 *American Journal of Political Science* (2004) 201-217; T.A. Borer (ed), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (Notre Dame, IN: University of Notre Dame Press, 2006); B. Ingelaere, “‘Does the Truth Pass Across the Fire Without Burning?’: Locating the Short Circuit in Rwanda’s Gacaca Courts’, 47 *Journal of Modern African Studies* (2009) 507-528; Clark, *supra* note 14; J. Meernik, N.

complex cause and effect issues. Gibson, for example, notes that ‘research on large processes of societal transformation can rarely if ever provide unequivocal evidence on what causes what.’<sup>132</sup> Theorization and analysis of the relationship between truth and reconciliation also requires critical reflection on the very notion of ‘truth’, a concept that is extremely difficult to pin down.<sup>133</sup> Writing the story of South Africa’s Truth and Reconciliation process, Krog reflects: ‘I cut and paste the upper layer, in order to get the second layer told, which is actually the story I want to tell ... Of course it’s quilted together from hundreds of stories that we’ve experienced or heard about in the past two years.’<sup>134</sup> ‘Truth’, in other words, is a patchwork of stories, experiences and emotions; and the challenge for transitional justice processes is to give expression to these different layers of truth.

Arguing that transitional justice processes neglect the emotional legacies of war crimes and human rights abuses, this article calls for an expanded conceptualization of ‘truth’ that accommodates ‘the plurality’ of different individual and collective experiences.<sup>135</sup> These experiences form the basis of emotions and emotional connectivity that add an important new dimension to transitional justice work. They also broaden and extend the concept of therapeutic jurisprudence, by bringing into its purview the emotional legacies that any

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Golcevsky, M. McKay, A. Feinberg, K. King and R. Krastev, ‘Truth, Justice and Education: Towards Reconciliation in the Former Yugoslavia’, 16 *Southeast European and Black Sea Studies* (2016) 413-431.

<sup>132</sup> J.L. Gibson, ‘The Contributions of Truth to Reconciliation: Lessons from South Africa’, 50 *Journal of Conflict Resolution* (2006) 409-432, at 428.

<sup>133</sup> Y. Naqvi, ‘The Right to Truth in International Law: Fact or Fiction?’ 88 *International Review of the Red Cross* (2006) 245-273, at 273.

<sup>134</sup> A. Krog, *Country of My Skull* (Johannesburg: Random House, 1998), at 170.

<sup>135</sup> K. Andrieu, ‘Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm’, 41 *Security Dialogue* (2010) 537-558, at 542.



therapeutic-oriented approach to dealing with the past cannot ignore. The truth that this article is emphasizing can be termed alethic or pluralist.

According to Edwards, ‘alethic pluralism offers a treatment of truth that allows for a wide range of beliefs, sentences, and the like to be true, while holding on to the idea that there are interesting things to say about truth.’<sup>136</sup> It allows, for example, ‘for the possibility that the truth of propositions concerning respectively pebbles, the law and large cardinal numbers is to be accounted for in different terms.’<sup>137</sup> This necessarily affects the resonance potential of truths documented through the mechanism of criminal trials, or other transitional justice processes such as TRCs. In short, the factual truths established through transitional justice processes can be highly ‘frictional’,<sup>138</sup> rubbing up against localized experiential and emotional truths. This is not to downplay the crucial importance of ascertaining the facts of what happened. The key point is simply that ‘to have the property of truth is to have a property that can, by its very nature, be realized in multiple ways.’<sup>139</sup>

The notion of alethic truth has received minimal attention within the field of transitional justice. When it has been discussed, the emphasis has primarily been on ‘uncovering’ the truth,<sup>140</sup> as if ‘the truth’ is something that is simply waiting to be unearthed. The wider issue,

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<sup>136</sup> D. Edwards, ‘Simplifying Alethic Pluralism’, 49 *Southern Journal of Philosophy* (2011) 28-48, at 32.

<sup>137</sup> N.J. Pedersen, ‘Stabilizing Alethic Pluralism’, 60 *Philosophical Quarterly* (2010) 92-108, at 93.

<sup>138</sup> R. Shaw, ‘Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone’, 1 *International Journal of Transitional Justice* (2007) 183-207.

<sup>139</sup> M.P. Lynch, ‘A Functionalist Theory of Truth’, in M.P. Lynch (ed), *The Nature of Truth: Classic and Contemporary Perspectives* (Cambridge, MA: MIT Press, 2001) 723-748, at 741.

<sup>140</sup> See, for example, C.J. Piranio and E. Kanterian, ‘Memory, Justice and the Court: On the Dimensions of Memory-Justice under the Rome Statute’, 24 *Cambridge Review of International Affairs* (2011) 425-447, at 427; M.S. Rusu, ‘Transitional Politics of Memory: Political Strategies of Managing the Past in Post-Communist Romania’, 69 *Europe-Asia Studies* (2017) 1257-1279, at 1262.

however, is that an elastic alethic conceptualization of truth appears discordant with one of the key aims of many transitional justice processes, and in particular criminal trials, namely to establish the truth. As Laudan argues, ‘It... seems fair to say that, whatever else it is, a criminal trial is first and foremost an *epistemic* engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators.’<sup>141</sup>

Yet, this does not mean that legal processes – or transitional justice more generally – cannot accommodate alethic and pluralist notions of truth. As discussed in the previous section, the concept of therapeutic jurisprudence draws attention to the different ways in which legal processes can affect – positively or negatively – a person’s emotional well-being. More broadly, these processes create their own emotional legacies; the case study of Ahmići highlights this. Ultimately, therefore, there is no tension between ‘juridified truth’<sup>142</sup> and alethic truth. Rather, the former simply constitutes part of a broader alethic truth mosaic. In this way, criminal trials can potentially contribute indirectly to reconciliation processes, their emotional legacies providing material for further transitional work focused on the exploration of alethic truth.

Crucial for understanding the unexplored nexus between alethic truth and reconciliation is Bhaskar’s work on dialectical critical realism. What Bhaskar terms ‘moments of transcendental connection’, Norrie notes, essentially refers to ‘forms of human exchange where simple communications disclose moments of identity and connection, in the senses of

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<sup>141</sup> Larry Laudan, *Truth, Error and Criminal Law: An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006), at 2.

<sup>142</sup> Stolk, *supra* note 123, at 988.

community that exist even in communities that are split and contradictory...'<sup>143</sup> For Bhaskar, therefore, there is a fundamental 'co-presence in human being of all the experiences, for good and ill.'<sup>144</sup> As Bhaskar defines it, 'Co-presence is simply "where some other thing is enfolded or implicit within a being" and the claim of metaReality is that "the alethic truth of all other beings" is enfolded within myself and hence co-present with and amidst the conflict, alienation and separation which characterize the world.'<sup>145</sup> This article maintains that emotions are a crucial dimension of 'the alethic truth of other beings', and a core part of the 'ultimate underlying identity' that enables individuals to understand and identify with each other.<sup>146</sup>

Transitional justice processes are primarily interested in facts; who did what, to whom, when, how? They seldom, if at all, ask: 'What are the vulnerabilities we share, and what do we owe to each other in terms of fundamental questions about solidarity and our moral being?'<sup>147</sup> Asking these questions is an important part of addressing the emotional legacies of war crimes and human rights abuses and, in so doing, of approaching reconciliation via emotions and 'the connections that bind us together.'<sup>148</sup> Using the case study of Ahmići, this article has proposed that 'hurt feelings', and more specifically the mutual capacity to feel hurt, provide an unexplored basis for drawing out and highlighting these crucial connections.

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<sup>143</sup> A. Norrie, 'Critical Realism and the Metaphysics of Justice', 15 *Journal of Critical Realism* (2016) 391-408, at 394.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*, citing R. Bhaskar, *The Philosophy of Meta Reality* (Abingdon: Routledge, 2012) xlix.

<sup>146</sup> Norrie, *ibid.*

<sup>147</sup> *Ibid.*, at 406.

<sup>148</sup> Lawson, *supra* note 15, at 4.

Even when facts remain contested, a common sense of hurt can contribute to building ‘emotional proximity’, and this includes the recognition by one group that ‘their hurt might be caused by the same processes which also hurt others in related but different ways.’<sup>149</sup> The empirical evidence from Ahmići shows that a deep sense of hurt exists on both sides (which the ICTY’s work, unsupported by a broader transitional justice structure, seems to have contributed to further entrenching). Yet, this also raises questions about the feasibility of fostering ‘emotional proximity.’ In this regard, it is important to emphasize that while the process of building this proximity would obviously entail enormous challenges, no efforts have been made to do so. It is also essential to underline that in addition to their shared sense of hurt, what interviewees also had in common was the desire for their children, grandchildren and future generations to live in peace and never to experience war. The large Catholic cross that marks the start of Ahmići commemorates Croat suffering. The memorial in front of the lower mosque honours the Bosniak victims. A memorial that recognized the shared hurt on both sides would be an important first step in the direction of addressing the emotional legacies of both the war and the ICTY’s work – and thus of laying the foundations for a more harmonious future.

More than 20 years after the Bosnian war ended, BiH remains deeply divided along ethnic lines, and its complex constitutional and governance structures encourage and exacerbate these splits. As McMahon and Western note, ‘the framework is tailor-made for those who wish to stoke ethnic antagonisms for political gain.’<sup>150</sup> The memory of the war is similarly exploited for political gain. Within the BiH Federation, the persistent instrumentalization of

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<sup>149</sup> Waite et al., *supra* note 126, at 327.

<sup>150</sup> P.C. McMahon and J. Western, ‘The Death of Dayton: How to Stop Bosnia from Falling Apart’, 88 *Foreign Affairs* (2009) 69-83, at 71.

the 1995 Srebrenica genocide – and the repeated message that people should ‘never forget’ – is just one example.<sup>151</sup> In this environment, the war is a politically expedient topic and a reminder of what ‘they’ did to ‘us.’ In many ways, the country remains stuck in the past and transitional justice efforts have had limited success. This has created a ‘mutually hurting stalemate’<sup>152</sup> that is benefitting no one except those in power. Hence, the moment is ‘ripe’<sup>153</sup> to try something new, and to think about ways of positively and constructively utilizing the war’s emotional legacies – and, specifically, common feelings of hurt.

## 7. Conclusion

According to Harris and Schultz, ‘it seems that emotion could not possibly be eliminated from the domain of the law.’<sup>154</sup> This article has explored some of the different ways in which emotions have been discussed in the related fields of law and transitional justice, placing a particular emphasis on the concept of therapeutic jurisprudence. While agreeing with Harris and Schultz, its key argument is that transitional justice processes typically neglect the emotional legacies of war crimes and human rights abuses – legacies that themselves intersect with the emotional legacies of transitional justice mechanisms as an extended dimension of therapeutic jurisprudence. The article’s key aim, therefore, was to draw attention to these emotional legacies, using the case study of Ahmići in central BiH.

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<sup>151</sup> See J.N. Clark, ‘The Burden of Memory’ (2019), available at: <https://www.birmingham.ac.uk/schools/law/research/projects/csrs/stories/burden-of-memory.aspx>

<sup>152</sup> I.W. Zartman, ‘The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments’, 1 *Global Review of Ethnopolitics* (2008) 8-18, at 8.

<sup>153</sup> *Ibid.*

<sup>154</sup> Harris and Schultz, *supra* note 30, at 1778.

Kwek and Seyfert argue that ‘affect analysis can serve as a conceptual and hermeneutic bridge across different cosmologies.’<sup>155</sup> While their focus is on heterological societies that include non-humans as members, their concept of ‘affective attunement’ – which emphasizes the relations between humans and their environments<sup>156</sup> – is also highly relevant to human societies, and in particular to societies that have undergone war and human rights abuses. The cardinal point is that emotions – as the expressed feelings of broader affective states – are not only about individuals. They also ‘link the individual with the social in dynamic ways’, and hence they are ‘always about social enaction.’<sup>157</sup> Consequently, they crucially matter for transitional justice and, by extension, for reconciliation.<sup>158</sup> Despite this, social science-based debates on reconciliation have often overlooked the significance of emotions.<sup>159</sup>

Drawing on the author’s fieldwork, this article has argued that emotions that contribute to intra-community divides can also, potentially, provide a basis for building reconciliation by fostering awareness of meta connections and commonalities that transcend divides. In so doing, it has posited a relationship between emotions and alethic truth, and pointed to a novel ‘alethic utility’ within transitional justice work. Piranio and Kanterian note that the process of uncovering the truth about past human rights abuses, creating spaces for victims and witnesses to be heard and documenting the facts of what happened ‘is powerfully alethic in both an instrumental sense (in retributive and restorative phases of justice) and intrinsic sense

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<sup>155</sup> D.H.B. Kwek and R. Seyfert, ‘Affect Matters: Strolling through Heterological Ecologies’, 30 *Public Culture* (2018) 35-59, at 41.

<sup>156</sup> *Ibid.*, at 45.

<sup>157</sup> Bourke, *supra* note 4, at 113.

<sup>158</sup> Hutchinson and Bleiker, *supra* note 11, at 397-398.

<sup>159</sup> *Ibid.*, at 397.

(in public discovery of particular harms inflicted upon particular peoples).<sup>160</sup> This article, in contrast, has drawn attention to alethic truth as a concept that accommodates and draws attention to common emotions – and thus points to unexplored dimensions of the relationship between truth and reconciliation.

Teitel's work has identified three different 'phases' of transitional justice.<sup>161</sup> The third and present phase, she argues, 'can be characterized as steady-state transitional justice. The discourse has now moved from the periphery to the center'.<sup>162</sup> Ultimately, this emotion-focused article has sought to demonstrate – theoretically and empirically – the need for a new 'phase' of transitional justice that is not about periphery and centre, but about the core concept of 'legacy'. Within transitional justice theory and practice, critical engagement with the concept of 'legacy' is essential; and giving more attention to emotional legacies is an important first step.

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<sup>160</sup> Piranio and Kanterian, *supra* note 140, at 435.

<sup>161</sup> R.G. Teitel, 'Transitional Justice Genealogy', 16 *Harvard Human Rights Journal* (2003) 69-94.

<sup>162</sup> *Ibid.*, at 89.