

May 4, 2020

# Memories of Judgement: Constructing the ICTY's Legacies

# Washington University Global Studies Law Review

---

---

VOLUME 19

NUMBER 3

2020

---

---

## **MEMORIES OF JUDGMENT: CONSTRUCTING THE ICTY'S LEGACIES\***

**DIANE ORENTLICHER\*\***

### FOREWORD

I am grateful to Professor Leila Sadat, Patrick McCarthy, and Dr. Ben Moore for inviting me to participate in this symposium, which explores issues of truly profound importance. I am delighted to be here for several reasons. One is the opportunity to visit St. Louis, home to an extraordinary community of Bosnian-Americans who have so enriched its vibrant culture. At a time when our national government, like many others, is determined to close our borders to those seeking safety from harm, St. Louis is living testament to our nobler instincts: this city stepped

---

\* This article is a reprinting of the keynote address given on October 4\*, 2019 at a symposium regarding The Role of the International Criminal Tribunal for the former Yugoslavia in Understanding the War and Genocide in Bosnia-Herzegovina. The Symposium was sponsored by the Whitney R. Harris World Law Institute, Washington University in St. Louis School of Law, the Bosnia Memory Project at Fontbonne University and The *Global Studies Law Review*.

\*\* Prof. Orentlicher, American University Washington College of Law; former Deputy for War Crimes Issues in the U.S. Department of State.

up to welcome Bosnian refugees during their native country's darkest hour.<sup>1</sup>

This symposium also provides a welcome opportunity to salute Professor Sadat's leading role in generating an effort, now underway at the United Nations, to draft a treaty on crimes against humanity.<sup>2</sup> In one respect, she follows in a long tradition: brilliant and visionary women have played key roles in *other* historic efforts to construct the ramparts of human protection from the bricks and mortar of international law. Yet those women's contributions have so often been erased in legal histories. I am confident this will not happen to Leila. But just for good measure, I seize every opportunity I can to recognize that she is *the* person who pioneered efforts to develop a treaty on crimes against humanity.

And of course, it is an honor to address a subject that has been a key focus of my work for many years, the impact and legacies of the International Criminal Tribunal for the former Yugoslavia ("ICTY" or "Tribunal"). More precisely, for over a dozen years, much of my scholarship has sought to understand the Tribunal's impact beyond its own courtrooms and judgments.

---

1 See Andrea Y. Henderson, *St. Louis Welcomed This Bosnian Muslim Woman, Now She's Giving Back*, ST. LOUIS PUB. RADIO (July 23, 2019), <https://news.stlpublicradio.org/post/st-louis-welcomed-bosnian-muslim-woman-now-shes-giving-back#stream/0>.

2 See, e.g., *Initiative Fact Sheet*, WHITNEY R. HARRIS WORLD L. INST. <http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/about/fact-sheet-about-the-crimes-against-humanity-initiative/> (last visited Jan. 31, 2020) for information about the Crimes Against Humanity Initiative of the Whitney R. Harris World Law Institute, which Professor Sadat leads.

I. INTRODUCTION .....316

II. ASPIRATIONS OF THE TRIBUNAL’S REGIONAL SUPPORTERS:  
DISPELLING DENIAL AND FOSTERING ACKNOWLEDGMENT.....317

III. HONORING MEMORY IN POLARIZED SOCIETIES.....322

IV. CONCLUSION.....326

## I. INTRODUCTION

As the title of this symposium reflects, a critically important dimension of the Tribunal's legacy is its role in understanding the war and genocide in Bosnia. In my remarks, I want to drill down on the word "understanding," one of the most complex facets of the ICTY's legacy.

In brief, I will make four points. The first is that the ICTY's *expected* contribution to understanding the 1990s conflict in Bosnia and the atrocities associated with that conflict was deeply important to many individuals whom I have interviewed in Bosnia-Herzegovina, as well as in Serbia, about the ICTY's impact in their countries.

Second, the hard facts and legal conclusions established through court procedures, however impartial and rigorous, do not automatically translate into general knowledge or understanding, particularly in polarized societies. On the contrary, despite the work of the ICTY, denialism about wartime atrocities has been on the rise in the former Yugoslavia.

Third, the rise in denialism in Bosnia and its neighbors despite the ICTY's work highlights a significant challenge for human rights champions everywhere, as well as for citizens of Bosnia, Serbia, and other Western Balkan countries.

Finally, I will conclude with several thoughts about how we can honor the sacred duty of remembrance in a way that enriches our understanding of the past in the challenging context of polarized societies.

## II. ASPIRATIONS OF THE TRIBUNAL'S REGIONAL SUPPORTERS: DISPELLING DENIAL AND FOSTERING ACKNOWLEDGMENT

My book *Some Kind of Justice*,<sup>3</sup> as well as my earlier research on the ICTY's impact,<sup>4</sup> began with a question: What did the ICTY, which was launched by diplomats in New York and based in The Hague,<sup>5</sup> mean in the daily lives of Bosnians, who had endured unspeakable horrors during the 1990s conflict in their country, and to Serbians, whose wartime leader had plunged the former Yugoslavia into calamitous violence?

Through field research in Bosnia and Serbia, I quickly learned that citizens of both countries—more precisely, those citizens who *supported* the ICTY<sup>6</sup>—had more than a few expectations about what the Tribunal would deliver. While armed conflict was still underway, some hoped its very creation would send a powerful signal to those committing brutal crimes that the international community would no longer tolerate their depredations;<sup>7</sup> many Bosniaks (Bosnian Muslims) in particular thought the Tribunal would deliver the justice they desperately needed.<sup>8</sup>

Many believed and hoped the ICTY's work would have a wider, and lasting, social impact. Of particular relevance to the subject of this symposium, many of the Tribunal's supporters in both Serbia and Bosnia believed its work would bring an end to pernicious forms of denialism about wartime atrocities, which had been pervasive during the 1990s conflict itself<sup>9</sup> and have persisted long after the conflict ended.<sup>10</sup>

3 DIANE F. ORENTLICHER, *SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA* (2018).

4 DIANE F. ORENTLICHER, *THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA* (2010), <https://www.justiceinitiative.org/uploads/e18cc4a9-a631-4471-a22d-29a203662478/that-someone-guilty-20100708.pdf>. See also DIANE F. ORENTLICHER, *SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA* (2008), [https://www.justiceinitiative.org/uploads/a0be82c5-aa8a-4bcd-9d23-bcef4d94f93c/serbia\\_20080501.pdf](https://www.justiceinitiative.org/uploads/a0be82c5-aa8a-4bcd-9d23-bcef4d94f93c/serbia_20080501.pdf).

5 The United Nations Security Council created the ICTY in May 1993, more than a year after brutal conflict came to Bosnia. See S.C. Res. 827 (May 25, 1993).

6 Although the ICTY was extremely unpopular in Serbia, it nonetheless enjoyed robust support from a minority of Serbian citizens. See ORENTLICHER, *supra* note 4, at 114.

7 See *id.* at 24.

8 See *id.* at 5, 91-92, 94-96.

9 See Alicia Ely Yamin, *Ethnic Cleansing and Other Lies: Combining Health and Human Rights in the Search for Truth and Justice in the Former Yugoslavia*, 2 HEALTH & HUM. RTS. 58, 60, 78-79 (1996).

10 ORENTLICHER, *supra* note 4, at 444.

Throughout the three-and-a-half-year conflict, Serbian propaganda had portrayed Bosnian Muslims as a mortal threat<sup>11</sup> and routinely inverted reality to bolster this narrative.<sup>12</sup> For example, Serbian media justified brutal Serb attacks against innocent civilians by claiming Bosnian Muslims attacked themselves. Similarly, when Bosnian Serb forces executed some 8,000 Bosniaks in Srebrenica in mid-July 1995, journalists working for Serbian media dutifully reported the claim of Bosnian Serb military leader Ratko Mladić that civilians in Srebrenica were safe and Bosniak soldiers who had been captured were “being treated in compliance with the Geneva Convention[s].”<sup>13</sup>

For those who had survived horrific crimes, of whom the overwhelming majority were Bosniak,<sup>14</sup> this brand of denialism was a further torment on top of the shattering losses they had already experienced. For these individuals, the end of denialism and, more affirmatively, acknowledgment of terrible wrongs would be a precious form of repair.

In a meaningful sense, then, survivors of wartime atrocities anticipated that Hague justice would be a justice of memory. The Tribunal would, they reckoned, authoritatively refute the falsehoods through which perpetrators of wartime atrocities had sought to justify their actions. In doing so, it would construct an accurate and just collective memory of what happened in the 1990s conflict.

As for citizens whose country or ethnic community had been associated with atrocities, whether by organizing, committing, or silently condoning them, those who welcomed the ICTY believed acknowledgment of their country’s or ethnic community’s grievous wrongs was a necessary step toward atonement and, many hoped, ultimately toward reconciliation.<sup>15</sup>

But these hopes were not realized—not, at least, in the transformative way many expected. To be sure, the Tribunal did its part admirably: its

11 See Vojin Dimitrijević, *Serbia: Towards European Integration with the Burden of the Past?*, in *THE VIOLENT DISSOLUTION OF YUGOSLAVIA: CAUSES, DYNAMICS AND EFFECTS* 211, 211 (Miroslav Hadžić ed., 2004).

12 See Sabrina P. Ramet, *The Denial Syndrome and Its Consequences: Serbian Political Culture Since 2000*, 40 *COMMUNIST & POST-COMMUNIST STUD.* 41, 47 (2007).

13 ORENTLICHER, *supra* note 4, at 217; see also *id.* at 99-100, 232, 281-82.

14 See *id.* at 5, 195.

15 The overwhelming majority of atrocities prosecuted in The Hague were committed by ethnic Serbs and with the support of the Serbian government. See *id.* at 196. Nevertheless, members of each major ethnic group in Bosnia committed war crimes, and the issues of acknowledgment to which I refer here are to some extent relevant for Bosniaks and Croats as well as Serbs.

investigative work is impressive, and the results of its efforts will be crucial to any responsible history of the 1990s conflicts. The ICTY's judgments have, moreover, set forth in meticulous and compelling detail key facts about wartime atrocities, including responsibility for them.

Unfortunately, however, credibly establishing crucial facts did not translate into a shared understanding among major ethnic groups in the former Yugoslavia of what took place during the 1990s conflicts. Far from it. In the words of Serbian civil society activist Marijana Toma, despite the ICTY's work, throughout the former Yugoslavia, "What we are seeing now, there are. . . conflicts *of* memory. We have wars of memory, like . . . Serbian version of the past or this Croatian version of the past, in conflict with each other. And you have . . . wars *for* memory. And that is what we are waging here."<sup>16</sup>

Now I want to be clear: none of this is to suggest the ICTY failed to influence beliefs. In fact, I believe it influenced the beliefs and understanding of many citizens in the former Yugoslavia.<sup>17</sup> But this is a far cry from dispelling denialism, which has remained a prominent feature of public discourses and has, in fact, intensified in the past decade.<sup>18</sup>

My book draws upon the astute insights of Bosnian and Serbian citizens, as well as a wealth of social science research, to explain why, in retrospect, this should not have come as a surprise. As we know all too well in the present moment of "post-truth" America, the availability of credible information, which the ICTY produced in abundance, is not the same as widespread knowledge or understanding.<sup>19</sup> Rather, the ICTY's judgments provide grist for interpretation—they are merely "inputs," if you will, for memory-making processes.

A raft of social science research helps us understand why, even when confronted with credible information, many people resist believing it. A few examples of underlying dynamics illustrate the point.

First, many of us are disinclined to believe information that makes us

---

<sup>16</sup> *Id.* at 122.

<sup>17</sup> *See id.* at 236-39; 244.

<sup>18</sup> *See* DIANE ORENTLICHER, SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA 444-45 (2d ed. 2019).

<sup>19</sup> *See* Susan B. Glasser, *Covering Politics in a "Post-Truth" America*, BROOKINGS INSTITUTION (Dec. 2, 2016), <https://www.brookings.edu/essay/covering-politics-in-a-post-truth-america/>.



feel bad about ourselves. And if we identify strongly with a group—a religious or ethnic group, for example—there is a human tendency to resist believing information that casts our in-group in a harsh light.<sup>20</sup> Thus we might expect many Bosnian Serbs who did not carry out atrocities themselves to discredit information, however well-documented, about atrocities committed by other Serbs.

It may well be the case that this dynamic accounts in part for why it took decades for a majority of German citizens to condemn National Socialism in a forthright fashion. It required the emergence of a new generation, one that was not implicated itself in the Holocaust, to condemn the singular atrocities of Nazi Germany. For the most part, the generation who were adults during the period of National Socialism did not condemn themselves.<sup>21</sup>

It is instructive, as well, to recall how German citizens reacted to Nuremberg. Many welcomed the trial before the International Military Tribunal (IMT) while it was underway because they interpreted the prosecution of leading Nazi figures as an exoneration of their own responsibility for the Holocaust. The most common “meaning” or “understanding” of Nuremberg among Germans was that a handful of leaders—those in the dock—was responsible for World War II and the atrocities associated with it.<sup>22</sup>

But it soon became clear that a majority of Germans had no interest in a process of reckoning that swept more widely. Allied prosecutions of Nazi war criminals conducted soon after the IMT trial “were greeted mainly with rejection and protest,”<sup>23</sup> and Germans soon revised their assessment of the IMT, as well as the principles for which it stood.<sup>24</sup>

20 See Sabina Čehajić-Clancy, *Dealing with Ingroup Committed Atrocities: Moral Responsibility and Group-Based Guilt*, in THE SOCIAL PSYCHOLOGY OF INTRACTABLE CONFLICTS 103, 103 (Eran Halperin & Keren Sharvit, eds. 2015); Sabina Čehajić-Clancy et al., *Affirmation, Acknowledgment of In-Group Responsibility, Group-Based Guilt, and Support for Reparative Measures*, 101 J. PERSONALITY & SOC. PSYCH. 256 (2011); Sabina Čehajić & Rupert Brown, *Silencing the Past: Effects of Intergroup Contact on Acknowledgment of In-Group Responsibility*, 1 SOC. PSYCHOL. & PERSONALITY SCI. 190, 192 (2010).

21 See ORENTLICHER, *supra* note 4, at 440-41.

22 See Susanne Karstedt, *Coming to Terms with the Past in Germany after 1945 and 1989: Public Judgments on Procedures and Justice*, 20 L. & POL’Y 15, 24 (1998); TONY JUDD, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 54, 809 (2005); Donald Bloxham, *The Nuremberg Trials and the Occupation of Germany*, 27 CARDOZO L. REV. 1599, 1601-03 (2005-06).

23 NORBERT FREI, *ADENAUER’S GERMANY AND THE NAZI PAST: THE POLITICS OF AMNESTY AND INTEGRATION* 94 (Joel Golb trans., 2002).

24 See ORENTLICHER, *supra* note 4, at 434-35.

Second, people tend to process new information in a way that squares with what they already believe to be true. Put differently, many are disposed to reject information that is inconsistent with what they believe they already know.<sup>25</sup> Thus if wartime propaganda relentlessly conveyed to Serbs that they faced a mortal threat from Bosnian Muslims, as it did, and then a Tribunal in The Hague concluded that Bosnian Serbs committed grievous atrocities against Muslims, many Serbs would be primed to reject this new information. And humans are almost ingenious in our capacity to find grounds to discredit information we are loath to believe.<sup>26</sup> Among many Serbs in Bosnia and Serbia, a key strategy was to dismiss the ICTY's findings on the asserted grounds that the Tribunal itself was an instrument of anti-Serb bias.<sup>27</sup>

Third, most of us rely on trusted sources to cue us on what to believe. Each of us is too busy to assess for ourselves complex information about every issue that matters. Instead, we typically rely on leaders, experts, friends and communities in whom we have confidence to help us figure out what to make of a wealth of complex information.<sup>28</sup>

Fatefully, in the former Yugoslavia political leaders and elites with a vested interest in discrediting the ICTY have often served that role. From the time the Tribunal was created, Serbia's wartime leader, Slobodan Milošević, and other Serbian leaders wove the ICTY into a broader narrative of Serb victimization. As Mirko Klarin has noted, their motives were self-serving: deeply implicated in wartime atrocities, "it was not in the best interests" of the Milošević regime "for the public in [Serbia] to have a positive image of the ICTY's mission and work."<sup>29</sup> Instead, its leaders "did all they could to convince their subjects that the Tribunal was

25 See Erica Dawson et al., *Motivated Reasoning and Performance on the Wason Selection Task*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1379, 1380 (2002); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

26 See Charles S. Taber & Milton Lodge, *Motivated Skepticism and the Evaluations of Political Beliefs*, 50 AM. J. POL. SCI. 755, 755, 761-63 (2006); but see Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes' Steadfast Factual Adherence*, 41 POL. BEHAV. 135 (2019) (suggesting most people do not engage in too much cognitive work to reject information they disbelieve).

27 See ORENTLICHER, *supra* note 4, at 220-21.

28 See Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U.L. REV. 1295, 1299-1300, 1305-14 (2003).

29 Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89, 90 (2009).

biased and hostile” towards Serbia.<sup>30</sup>

In Bosnia, one of the most strident and influential Serb nationalists, Milorad Dodik, has long calculated that his personal and political interests are best served by espousing denialist rhetoric. In particular, Dodik apparently believes that challenging the ICTY’s rulings helped him win successive elections.<sup>31</sup> Whatever his motives, Dodik’s denialist claims have caused incalculable harm. Imagine the pain survivors of the Srebrenica massacre, which the ICTY and International Court of Justice have ruled a genocide,<sup>32</sup> must experience when they hear Dodik dismiss Srebrenica as “the greatest deception of the 20<sup>th</sup> Century.”<sup>33</sup>

In short, for a variety of reasons we do not see anything like a shared understanding of the 1990s conflict in the Western Balkans, despite the ICTY’s meticulous work. Instead, a multitude of incommensurable histories have been constructed and are contested in increasingly worrying ways.

### III. HONORING MEMORY IN POLARIZED SOCIETIES

In light of this sobering pattern, some scholars have concluded that the work of the ICTY, rather than fostering a shared understanding of the 1990s conflict in the former Yugoslavia, intensified divisions in the region.<sup>34</sup> As evidence, they cite ethnically-divided responses to ICTY verdicts.<sup>35</sup>

It is true that political leaders and citizens have routinely denounced verdicts that convict a member of their ethnic group and celebrated

30 *Id.*

31 See ORENTLICHER, *supra* note 4, at 300-01. Dodik previously served as prime minister and then president of the Serb entity in Bosnia. Since October 2018, he has served as the Serb member of Bosnia’s three-person presidency.

32 See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-A, Appeal Judgment, ¶¶ 21, 23 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, Judgment ¶ 297 (Feb. 26, 2007).

33 Katharina Bart & Maja Zuvela, *Bosnian Serb Leader: Srebrenica Was 20th Century’s ‘Greatest Deception,’* REUTERS (June 25, 2015), [reuters.com/article/us-bosnia-serbia-arrest/bosnian-serb-leader-srebrenica-was-20th-centurys-greatest-deception-idUSKBN0P51OL20150625](https://reuters.com/article/us-bosnia-serbia-arrest/bosnian-serb-leader-srebrenica-was-20th-centurys-greatest-deception-idUSKBN0P51OL20150625).

34 See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28:3 INT’L SECURITY 5, 21 (2003-04).

35 See, e.g., Janine Natalya Clark, *Justice Far from Reconciliation*, OSSERVATORIO BALCANI E CAUCASO TRANSEUROPA (May 5, 2013), <https://www.balcanicaucaso.org/eng/Areas/Balkans/Justice-far-from-reconciliation-131640>.

convictions of defendants whose victims share their ethnicity.<sup>36</sup> Even so, I do not find these scholars' causation claims persuasive.<sup>37</sup> Regional leaders have taken every opportunity to advance denialist narratives, and have done so in myriad settings, whether or not the ICTY recently issued an opinion.<sup>38</sup>

More troubling in its possible implications for efforts to combat denialism is social science research indicating that attempts to correct false beliefs can have a "backfire effect," at least among certain people. Rather than persuading those audiences to change their minds, this research suggests that presenting information at odds with their beliefs can lead them to hold more firmly to incorrect views.<sup>39</sup> This research raises the question whether efforts to counter denialist views in Bosnia could, at least in some circumstances, backfire.

On a related note, some have suggested that, if we wish to encourage a society to address a dark chapter in its past through an honest reckoning, we might do well to observe a period of what amounts to transitional amnesia.<sup>40</sup> Better let matters rest for awhile, the argument runs, because if you keep the denialists busy denying, they will pass their beliefs on to another generation.

Yet the implications of this perspective are deeply unsettling. For as long as I can remember, I was taught that people of conscience bear a sacred duty to remember crimes against humanity and the precious lives lost to such wrongs. We remember and bear witness for myriad reasons,

36 See, e.g., *Bosnians Ethnically Divided Over Karadzic Life Sentence*, BALKANS TRANSITIONAL JUST., Mar. 20, 2019.

37 One study found that, while ICTY arrests and verdicts tended to trigger an immediate surge in inter-ethnic hostility, they had little effect on societal peace overall. James Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271, 287 (2005). In a later study, Meernik and a co-author found that, among Bosnian survey participants, there tended to be a positive correlation between a favorable view of the ICTY and "reconciled attitudes towards members of other ethnic groups." James Meernik & Jose Raul Guerrero, *Can International Criminal Justice Advance Ethnic Reconciliation? The ICTY and Ethnic Relations in Bosnia-Herzegovina*, 14 SOUTHEAST EUR. & BLACK SEA STUD. 383, 397, 400 (2014).

38 See, e.g., Vedran Pavlić, *Tensions between Croatia and Serbia to Rise Again?*, TOTAL CROATIA NEWS (July 16, 2017).

39 See Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 319-20 (2010).

40 See TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* 61 (2005); See also Marko Milanović, *Courting Failure: When Are International Criminal Courts Likely to Be Believed by Local Audiences?*, in THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 13-16 (Kevin Jon Heller et al. eds.) (forthcoming 2021).

each profoundly important.

We commit to remembrance in no small part to honor those who perished, ensuring they live on in our hearts as they should have lived out their natural lives.<sup>41</sup> Holocaust survivor and Nobel laureate Elie Wiesel believed that, in addition, we bear a duty to preserve memory of the singular horrors of the Third Reich because it is the surest way to upend what the Nazis sought to achieve—erasing memory and, with it, culture itself. As Wiesel put it, “without memory, there is no culture. Without memory, there would be no civilization, no society, no future.”<sup>42</sup>

In a similar vein Holocaust survivor Primo Levi, another singular voice of conscience, saw that the complete negation of morality embodied in Nazi ideology and practice entailed the destruction of civilization itself. In his words, “It is worth considering the fact that all of them, master and pupils, gradually took leave of reality at the same pace as their morals became detached from the morals common to every time and every civilization.”<sup>43</sup>

Wiesel believed as well that, by bearing witness, survivors might prevent others from experiencing barbaric forms of human depredation. In his words, by speaking about what they endured, Holocaust survivors might “shake humanity out of its indifference and keep the torturer from torturing ever again.”<sup>44</sup> Levi similarly believed that reckoning with the Holocaust is crucial to prevention, writing: “knowing is imperative, because what happened could happen again. Conscience can be seduced and obscured again—even our consciences.”<sup>45</sup>

If, as Wiesel put it, “it is memory that will save humanity” if anything

41 A recent article in the *New York Times* captures the power of bearing witness, and its meaning to a young Polish Jew, Renia Spiegel, who kept a diary as the Final Solution closed in on her. Writing about Spiegel’s diary, which was to be published 77 years after her death, the *Times* reporter said: “At a moment when basic agreement over simple truths has become a political battleground and history a weapon, the publication” of the diary “offers a reminder of the power of bearing witness.” In her first entry, Spiegel wrote: “I want someone I can talk to ... who will feel what I feel, believe what I say...” Joanna Berendt, *A Slain Jewish Girl’s Diary of Life Under the Soviets and the Nazis*, N.Y. TIMES, Sept. 24, 2019, at A7.

42 Elie Wiesel, *A God Who Remembers*, NPR (Apr. 7, 2008), <https://www.npr.org/2008/04/07/89357808/a-god-who-remembers>.

43 Primo Levi, quoted in Edward Mendelson, *Bearer of Witness*, N.Y. TIMES, Nov. 29, 2015, at SBR1. Levi also wrote that the “entire history” of the Third Reich “can be reread as a war against memory, an Orwellian falsification of memory, falsification of reality, negation of reality.” PRIMO LEVI, *THE DROWNED AND THE SAVED* 21 (Raymond Rosenthal trans., 1988).

44 Elie Wiesel, Nobel Lecture: Hope, Despair and Memory (Dec. 11, 1986).

45 PRIMO LEVI, *IF THIS IS A MAN / THE TRUCE*, 442 (2013 ed.).

can,<sup>46</sup> bearing witness cannot be solely a private matter. If there is a duty to remember, it is one that impels us to speak out. To be sure, in a region where denialism is pervasive, as it is in Bosnia and neighboring countries, bearing witness can be disruptive, as acts of political and social resistance often are. And yet—and here I come back to the unsettling questions I raised earlier—what if speaking out, what if relentlessly demanding that denialists accept well-established facts as well as the moral meaning of those facts backfires? What if bearing witness leads denialists to turn up the volume of dangerous discourses?

These questions merit substantial attention. Here, I can only briefly note several general considerations.

First, we would do well to mine the insights of new social science research that can help us become smarter and wiser about strategies for persuading people to align their beliefs with facts rather than falsehoods.<sup>47</sup> Second, we should take care not to overstate the implications of research that has identified a backfire effect. New research already suggests that studies identifying and then “confirming” such an effect overstated the risk.<sup>48</sup> In a similar vein, and as I have already intimated, there is good reason to question the conclusion of some scholars that the ICTY fueled ethnic tensions in Bosnia.

Third, particularly when our understanding of the social dynamics surrounding the entrenchment and abatement of denialism remains poor, we would do well to honor and support the agency of survivors in identifying worthwhile processes of knowledge production and meaning-making in their societies. In Bosnia, survivors of wartime atrocities have

46 Wiesel, *supra* note 45.

47 See, e.g., Sabina Čehajić-Clancy et al., *Affirmation, Acknowledgment of In-Group Responsibility, Group-Based Guilt, and Support for Reparative Measures*, 101 J. PERSONALITY & SOC. PSYCHOL. 256, 267 (2011) (strategies that enable individuals to view themselves positively apparently increase their willingness to acknowledge wrongdoing); Toby Bolsen & James N. Druckman, *Validating Conspiracy Beliefs and Effectively Communicating Scientific Consensus*, 10 WEATHER CLIMATE & SOC'Y 453, 456–57 (2018) (validating general conspiracy beliefs of individuals who believe climate change is a hoax may make them more receptive to scientific consensus messages contradicting this view); Gordon Pennycook & David Rand, *Why Do People Fall for Fake News?*, N.Y. TIMES, Jan. 20, 2019, at SR12 (results of recent research, some not yet published, suggest that cultivating analytic reasoning may increase the likelihood that people will recognize incorrect information).

48 See Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes' Steadfast Factual Adherence*, 41 POL. BEHAV. 135, 160–61 (2019).

been at the forefront of efforts to challenge denialism.<sup>49</sup>

Finally, we would do well to recognize that knowledge and memory-making processes are profoundly shaped by the political and social contexts in which they unfold.<sup>50</sup> And in Bosnia, the political context is hardly conducive to the construction of a shared understanding of the past. Among other reasons, the ethnic segregation enshrined in the Bosnian Constitution, imposed as part of the Dayton peace agreement, impedes daily encounters that foster empathy among the country's ethnic groups, without which constructing a shared understanding of the past is inconceivable. Moreover, the complex political arrangements imposed in the Constitution incentivize appeals to extreme nationalism. It is hardly surprising, then, that elections have often favored hardline nationalists.<sup>51</sup> In short, if we hope to see an end to denialism, much of the work will have to be done in the realm of politics.

#### IV. CONCLUSION

These challenges are deeply complicated, and many of their underlying dynamics are beyond our control. But to paraphrase the wise sage J.K. Rowling, there is an immense power in human empathy, particularly when it leads to collective action.<sup>52</sup> Nowhere is the power of human empathy—and the possibility of constructing a shared understanding of the past that empathy enables—more urgently needed than in Bosnia.

---

49 For discussion of local initiatives to reconstruct memories of war in Bosnia's divided societies, see ORENTLICHER, *supra* note 4, at 319-20.

50 See Ereshnee Naidu, *Memory Beyond Transitions: The Role of Memory in Long-Term Social Reconstruction*, 6 INT'L J. TRANSITIONAL JUST. 161, 171 (2012) (book review).

51 See ORENTLICHER, *SOME KIND OF JUSTICE*, *supra* note 4, at 293-95.

52 J.K. Rowling, Harvard Commencement Speech (June 5, 2008).