MANUAL ON TRANSITIONAL JUSTICE

Concepts, Mechanisms and Challenges

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CONTENTS

FOREWORD

An entire manual could be written on any one aspect of the Transitional Justice (TJ) enterprise in order to be fully exhaustive and cover all the aspects of the debates that have taken place on the matter. This essay seeks, by conducting a theoretical review of existing research on TJ, rather to highlight the intersection of certain ideas and concepts, by examining all TJ goals and all the relevant mechanisms to reach them. The idea is for this manual to be a reference point for understanding what TJ is, what it involves, what its challenges and pitfalls are, and – most importantly – why it is crucial to deal with the past in post-conflict societies. By cataloguing the different instruments available, it hopes to show how they interact with one another and to evidence their complementarity. Additionally, while keeping Kosovo as the central focus, this document uses several different historical examples in order to highlight both the universal value of dealing with the past and the crucial importance of a contextual and sensitive implementation of TJ, avoiding standardization and 'one-size-fits-all' approaches. While this work is presenting the options out there rather than providing a judgment, it is nonetheless nourished by the authors' previous research on TJ and peace building, and ideologically close to the earliest work published on this topic, including that of Mani and Lambourne who advocated for alternative models of TJ.[1]

Lorraine Degruson

1 Degruson (2014).

BRIEF HISTORY OF THE CONFLICT IN KOSOVO[2]

Transitional Justice (TJ) looks at reconciliation between former enemies; therefore it is useful to look at Kosovo's history, to understand the relations between the Albanian and Serb communities that eventually led to the war. It is even more important, however, to look at the most recent history, in particular the conduct of the war and the great amount of causalities and atrocities on both sides, crucial justifications for the TJ effort.

- **A century-old struggle**

The struggle over who Kosovo belongs to goes back to the first traces of life in the region. The history of Kosovo, seen by the Serb and Albanian elites, largely relies on two opposite propaganda myths that have made them willing to fight for the control of the region several times in history. While this background is central to understanding the conflict, it is also quite secondary compared to more recent events in the region, where selective versions of history on both sides provided a fertile ground for opportunistic politicians to exploit grievances and fears and to promote intolerance, militarization, and ultimately, war. While tensions between communities were reduced under Tito's rule, after his death nationalism surged up everywhere in the Balkans, both leading to and as a consequence of the political elites' manipulation of the masses (in Kosovo, this was done by the politician Slobodan Milosevic). Albanians in Kosovo protested the growing repression against them, at first peacefully, and from 1996 violently – with the creation of the Kosovo Liberation Army/Ushtria Çlirimtare e Kosovës (KLA/UÇK), which started its revolution by assassinating Serb police and paramilitary leaders, as well as Albanians collaborating with the regime, which in turn led to fierce retaliation.

2 HRW (2001).

- **The war of independence**

The Serbian forces responded with severe counter-insurgency measures, committing abuses such as arbitrary retaliations for KLA attacks, random beatings in public places, and targeted attacks against Albanian politicians. These gained scale in early 1998 with the attack on the Drenica region, which was characterized by the indiscriminate targeting of civilians. These measures aimed to crush the revolt, but instead backfired into the radicalization of the Albanian population, swelling the ranks of the KLA, whose capacities were also greatly increased by a sudden flow of weapons coming from Albania in 1997. On February 28, 1999, the fighting in Kosovo officially became an 'internal armed conflict', a threshold which, once crossed, produced a situation under which the fighting forces on both side were obliged to respect the basic protections of the Laws of War.[3] However, none of the parties respected these rules. Lootings, killings and destructions were frequent throughout the region by regular and paramilitary forces, both the Serbian forces and the KLA. Indeed, while the former's exactions were larger in number and scale, the latter also committed serious violations of International Humanitarian Law (IHL) during the war, especially in the forms of hostage-taking, extrajudicial executions, and expulsion of Serbian and Albanian citizens from their homes. The massacre of Gornje Obrinje in September 1998 and the massacre of Račak in January 1999 finally catalyzed a response from the until then disunited International Community, who organized the Rambouillet Conference in February 1999 in order to find a peaceful solution to the conflict. As the peace talks failed, NATO air strikes commenced the 24th of March. After a 77-days-long air campaign, the war in Kosovo ended with the Kumanovo Agreement on the 9th of June 1999.[4]

3 In particular those provided by Common Article 3 to the four Geneva Conventions of 1949, the Protocol II to those conventions, and the customary rules of war.

4 Roberts (1999).

CHAPTER 1:
INTRODUCTION TO TRANSITIONAL JUSTICE

1. Meaning and goal: dealing with the past to build the future

Transitional Justice (TJ) is, literally, a form of justice adapted to societies transforming after a dark page of their history, and seeking to deal with the past so that it never reoccurs.[5] It is a framework – or a set of practices - for addressing the legacy of mass atrocities and human rights abuses in societies recovering from conflict. TJ has two aspects: it is backward-looking (it deals with the events of the past), but also forward-looking, as it intends to prevent the recurrence of these events. TJ can include various different measures, such as criminal prosecutions (retributive justice), reparations, truth-seeking (restorative justice), memorialisation (monuments, ceremonies, bank holidays, public statements, etc), and institutional reforms (such as vetting). This variety of instruments illustrates the variety of goals for TJ: to secure criminal responsibility and provide accountability, to bring redress/reparation to victims, to deliver a common truth about what happened, to promote individual and national reconciliation, to promote possibilities for peace in the long term, and to advance security and development goals (such as DDR, and addressing socio-economic disparities) as well as the rule of law. All of these goals tend to deal with the past and build the future.

2. The 4 main pillars of Transitional Justice

As we just saw, there is a wide choice of TJ instruments. These can be divided in 4 main pillars.

5 Davis (2014).

2.1. Criminal prosecutions

These can take different forms. They can be international, like the trials held by the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Court (ICC). They can be local, such as in the specialized War Crimes Chamber of the Belgrade District Court or the Section for War Crimes within the State Court in Bosnia. They can also be hybrid, mixing international and national elements, as in the Special Court for Sierra Leone (SCSL), or the trials held by the EU Rule of Law Mission (EULEX) in Kosovo.

The importance of criminal prosecutions after conflict can be established by several observations. Firstly, punishing offenders allows the fostering of a democratic culture, contributing to the legitimization of the new authority after the conflict and to the entrenchment of the rule of law on which the new state will be based. Accountability for past offenses is fundamental for securing a new order based on legal security and citizen accountability. It also serves to create trust in the newly formed institutions and to fund the state structure in accordance with international legal norms. By ending impunity, trials deter future crimes and therefore contribute to stability. Secondly, trials realize the fundamental right of victims to justice. By putting behind bars those who have done wrong to them, it brings redress to the victims, and is an important acknowledgment of their suffering and an act of respect to their memory. Fulfilling this individual right is essential to peace and stability, and to enabling victims to move on. Finally, trials can also often be expected to help achieve social peace by reconciling former enemies, because they individualize guilt and therefore take responsibility away from the masses. Trying those who bear the greatest responsibility, it has been argued, allows the deflation of the collective blame phenomenon that is a recurrent feature of contemporary civil wars, by exposing the leadership's role in exacerbating hatreds and manipulating opinions. In a post-conflict context, normalization of relations between two communities previously opposed cannot be achieved as long as war crimes on both sides have not been prosecuted, so that the myths from the past on which both communities have based their irreconcilable opinions are deconstructed.

2.2. Truth-seeking measures

Achieving a common version of history, a common memory of the past, is also essential to reconciliation and moving forward. This is done via truth-seeking processes. The establishment of an official truth on which everyone agrees can prevent future generations from falling in revisionism, and political elites from manipulating events from the past to fit their own political agenda. Truth also allows victims to obtain redress and accomplish the process of their mourning. While many TJ instruments contribute to truth-seeking (such as trials or listing of victims), the most appropriate instrument is the truth commission.

2.3. Reparations

The right to reparations is an extremely important aspect of the delivery of justice to victims, and therefore an essential transitional justice component. On the one hand, reparations made to victims contribute to some form of symbolic acknowledgment of their loss, allowing recovery from war trauma. It allows victims to exercise their right to redress, and is an important tribute to those they remember. On the other hand, armed conflict generally affects the poor and vulnerable groups of society more strikingly, so reparations are an indispensable element of post-conflict justice if victims are to be able to re-establish their dignity, resume their lives and participate in society on an equal footing.[6] While monetary compensation is the most common form of reparation, many other methods can be used (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), all containing important social and psychological functions of rehabilitation, reintegration, and tribute to the victimized. Symbolic reparations via apologies, acknowledgments, and memorials, are also useful for honouring victims' memories and establishing facts.

6 Stover (2005)

2.4. Institutional reform: building trust in institutions

In addressing mass atrocities and a legacy of conflict, it is also necessary to fundamentally change those institutions responsible for human rights abuses, in order to restore the rule of law and abolish the culture of impunity that has been established. Because public institutions (such as the police, military, and judiciary) often become the instrument of human rights abuses during conflicts, it is essential after transition to drain and reform them. Institutional reform is therefore the process of restructuring the state so that it comes to abide by human rights norms and the provisions of the rule of law, as well as purging it of perpetrators both to provide individual accountability and secure non-repetition. Institutional reform can involve measures targeting individual deficiencies (vetting processes to eliminate from public service abusive and corrupt officials) and structural deficiencies, via organizational and legal reforms (restructuring institutions, new laws and amendments, Security Sector Reform, Disarmament, Demobilization and Reintegration, etc.), as well as by educative measures. The goal of institutional reform within TJ is to send a message to citizens that they are the rights-bearers and to build trust between them and their institutions.

3. The Challenges of Transitional Justice

- **Each TJ instrument has its limits**

While TJ is a very important enterprise, none of the detailed mechanisms available is perfect, and they all have their inherent limitations. Prosecutions, for example, are designed for societies in which the violation of the law is the exception. In civil conflicts such as that of former Yugoslavia, those violations became the norm, and therefore prosecutions entail a significant commitment of time and resources almost impossible to obtain, and that has led international courts to proceed with great selectivity. Because of the amount of crimes, one needs to accept that prosecution can only ever be a partial way to dealing with systematic human rights abuse. Moreover, whether these prosecutions are held locally or abroad has an impact on their effectiveness. Finally, mistakes in the management of local and international criminal trials (issues with outreach, witness protection, perception of the courts by victims) have often hindered their efficiency.[7] Reparations also contain risks, as they may exacerbate political tensions. They can be perceived as biased by some of the victims. The choice of how to distribute reparations is politically sensitive and can leave those left out very frustrated, creating discord between communities, exacerbating grievances, and further marginalizing some individuals.

- **TJ operates in a very sensitive context**

One needs to remember that TJ is a very difficult and sensitive enterprise in a very complex and unstable context. The wide array of aims that was previously detailed is obviously too ambitious to be realistic, because the diverse issues arising after conflict are too complex to be solved by only one approach to TJ. Moreover, the field of TJ encounters many practical difficulties: the scale and political nature of the crimes, the risk of altering a delicate political balance and creating instability, and the resistance that can be opposed by the national leadership. The management of expectations is a crucial element of the perception of TJ's success by the general public. Moreover, there is no single solution applicable to all post-conflict contexts, and each society engaging in TJ must chose its own path, in accordance with the cultural and social background. TJ is extremely context-specific and victim-dependent. It is sensitive, politicized and political. While it aims to offer a way for societies to deal with their past and achieve long-term transformation/transition, it also has great potential for destabilization, misuse and mismanagement.

- **TJ must be multi-faceted and contextual**

Of all the different instruments of TJ, none should have preference, for they all are complementary. For example, while criminal prosecution of perpetrators is necessary, it is not sufficient for bringing justice to

7 Orentlicher (2010)

victims, for the right to just reparation is a separate and equally essential part of providing post-conflict justice to civilian victims of war crimes. Indeed, many studies show that when asked, victims do not define 'justice' as punishment of criminals only, but instead as an ensemble of social and economic rights as well.[8] Similarly, if some perpetrators are punished but state institutions remain plagued with abusive officials, TJ will be lacking. Victims' expectations after conflict are diverse, for war affects victims in many different ways, and therefore meeting the objectives of TJ requires using the different mechanisms available in a holistic, creative, and specifically tailored manner.[9]

4. An overview of TJ in Kosovo

4.1. Criminal prosecutions of the war crimes committed in Kosovo

Criminal prosecutions of the crimes committed during the war in Kosovo have been carried out by three different mechanisms. On the one hand, the international trials at the ICTY have dealt with the most high-profile cases. On the other hand, Kosovo's judicial system has been engaged in prosecuting war crimes locally with the help of UNMIK and EULEX. Finally, trials have also been heard in front of Serbian courts. Recently, it has been announced that local criminal procedures will be expanded by the establishment of a new court, often referred to before the public as the "Special Court" or "Special Chambers", which will deal with the crimes committed by former senior officials of the former Kosovo Liberation Army (KLA) during and in the aftermath of the conflict in Kosovo. Besides the obviously complexity of this system, which can lack transparency, the record of criminal prosecutions for the crimes committed in Kosovo has been mixed. Many observers have denounced the lack of results of the ICTY, and criticized the work of UNMIK and EULEX, illustrating how complex the issue of dealing with past crimes is in the Kosovo context.

8 Stover (2005)
9 Davis (2014)

4.2. Truth-seeking in Kosovo

Due to the regional character of the wars in the former Yugoslavia, including the Kosovo conflict, and due to the movement of victims and perpetrators across the region, regional cooperation must be an essential element of any Transitional Justice effort. The RECOM process (the inter-state Commission for Establishing and Disclosing the Facts about all Victims of War Crimes and Human Rights Abuses in the Territory of the Former Yugoslavia from 1991 – 2001) was initiated in order to provide for a collective, regional, truth-seeking effort. It is now driven by the regional Coalition for RECOM with more than 1,900 members, comprising organizations and individuals from the post-Yugoslav states. After years of lobbying, it is expected that a Regional Truth Commission will be established in the near future. RECOM's overall objective is to establish a fact-based regional consensus about the past thereby advancing the process of reconciliation between different communities, and between states themselves. Unfortunately, national political agenda throughout the Balkans and poor awareness of regional projects within the population often hinder progress in this field.

4.3. Reparations in Kosovo

In Kosovo, the Law[10] providing for war crimes reparations is flawed with many shortcomings, and in particular the discriminatory definition of a civilian victim, excluding many civilian victims and particularly in disfavour of Serbian victims of the war in Kosovo. The perceived bias against Serbs perpetuates a wrong 'black and white' narrative about the war, preventing an accurate and fact-based narrative. It is also perceived as politically motivated and discriminatory, creating discord amongst victim communities, and so detrimental to reconciliation between the two communities. The use of symbolic reparations such as memorials is also very controversial in Kosovo, for it promotes a one-sided history of the war.

10 The full name of the law is: "Law on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of the Kosova Liberation Army, Sexual Violence Victims, Civilian Victims of War and their Families". It will be referred thereafter to as the Law on Reparations

4.4. Institutional reform in Kosovo – building trust in institutions

In Kosovo, while structural and legal reforms have been carried out in the immediate post-conflict time-frame as part of the state-building effort, institutional reform is still missing on some aspects. Indeed, there has been no vetting process, and many of Kosovo's most prominent ethnic Albanian political leaders played an active role in the 1999 conflict as members of the KLA. While some of them have been indicted or are subject to investigation, many have simply remained in power and are prominent leaders today. In terms of restoring the trust of citizens in their institutions, it seems that the task has been left incomplete. Most ethnic Serbs believe that there is a lack of genuine political will to protect the rights of the Serb community. The extensive legislative and institutional system in Kosovo aimed at the protection and promotion of the rights and interests of minority communities was never fully implemented, nor was it efficient. For example, while the Serbian and Albanian languages are accorded equal official status on paper, in reality it is difficult to access public institutions and information in Serbian. Moreover, the ethnic Albanian population also distrusts public institutions, because of repeated corruption scandals. Some commentators argue that one of Kosovo's main challenges in its forward-looking TJ effort is to create such trust.

CHAPTER 2:
RECORDING CASUALTIES - THE KOSOVO MEMORY BOOK

One aspect of dealing with the past is the exhaustive and accurate recording of war casualties in order to present the truth about what happened, and face the human losses of the war. In Kosovo, this has been done via the Kosovo Memory Book (KMB), a joint project initiated in 1998 between the HLC based in Serbia and the HLC Kosovo, and aimed at producing 4 volumes listing and documenting all human losses in connection with the war in Kosovo between January 1, 1998, and December 31, 2000. The process of recording casualties, and specifically in the context of the KMB, serves a variety of purposes that will be detailed thereafter. The KMB, thanks to its multiple contributions to TJ, has become an unprecedented tool for peace-building.

5. The importance of recording casualties and the contributions of the KMB

Recording casualties serves different but interrelated purposes. While the main goal of the KMB has been the establishment of a collective memory based on facts and restoration of some dignity to victims, it also serves further aims through its support to other TJ initiatives.[11] Indeed, the KMB, since it provides an accurate and exhaustive database on the victims of the war, helps to improve compliance with human rights obligations and accountability of office-holders, and creates the conditions (a register of all victims)

11 Kruger and Ball (2014)

for the initiation of prosecutions, reparation programmes, and truth-seeking initiatives.

5.1. The memorial role of the KMB

Some of the biggest impediments to reconciliation between communities and positive peace are competing versions of the past, denial, and political manipulation of figures. Indeed, such behaviour both denies victimhood to many victims and perpetuates binary divisions in societies.[12] In this respect, a comprehensive record of individual human losses from the conflict in Kosovo is essential to reverse the public denial and political manipulation of victims which occurs across the region and which perpetuates a cycle of aggression. By providing such a record, one of the main goals of the KMB has been to build a common historical memory about the armed conflict in Kosovo (1998-2000) – shared by all victims through all ethnic groups - thereby preventing future historical revisionism and manipulation of the number of killed and forcibly disappeared. In this respect, recording casualties plays a memorial role.[13]

Wall of names, Kigali Memorial (Roginek)

12 Minor (2012)
13 Minor (2012)

Srebrenica Memorial (Degruson)

5.2. The KMB's restoration of dignity to victims

The KMB's second main goal, by recording human losses, is to restore dignity to the victims and their families by an official acknowledgement of their losses and sufferings. The KMB, in listing all victims of the armed conflict in Kosovo from 1998 to 2000 on a name-by-name basis, publicly presents (and prompts public recognition of) the truth about crimes committed in the past, and contributes towards ending the uncertainty of families about the fate of their loved ones.[14]

5.3. The KMB's use to victims' assistance:

The recording of casualties in a comprehensive and systematic fashion is a very useful tool in providing assistance to victims after conflict, and in particular to the realization of their right to reparations. Indeed, a proper policy strategy for reparations can only be designed based on accurate and unified data about the beneficiaries.[15] Very often in post-conflict situations the biggest impediment to the provision of reparative measures is the lack of precise and reliable data collection, as different agencies often come up with different information. The KMB, thanks to the systematic recording it has done of victims' data, including details about what happened, to

14 Minor (2012)
15 Minor , and Olgiati (2014)

whom, when, where, and why, and to the cross-referencing of all existing data in Kosovo to avoid duplications, misses and errors, has become a tool to fulfill the victims' need for material assistance.

5.4. The KMB's contribution to criminal prosecutions

The material collected in the KMB is, for the same reasons (accuracy, comprehensiveness) also of great use to criminal prosecutions.[16] The HLC has indeed been able to locate victims and perpetrators, and initiate criminal charges based on the information collected in the KMB.

5.5. The KMB's contribution to regional truth-seeking

The KMB's database will be extremely useful for the RECOM process, whose objective is to achieve a regional consensus regarding the past that is based on facts. The KMB, by recording these facts on deaths and disappearances in Kosovo, is initiating this process, thereby creating the initial steps (a register of all victims in Kosovo) for a broader regional process.

5.6. The KMB's contribution to reconciliation

This record is unique in terms of recording casualties in Kosovo, because no difference is made between Serb and Albanian civilians, who are in one book together, as are KLA fighters, Serbian police and soldiers. This unity of victimhood promotes the idea that everyone who suffered from the war is entitled to equal victim status, regardless of ethnicity and religion. It also has a forward-looking element, in that it fosters the idea that, once all victims have been remembered, a clean slate is achieved and Kosovo society can move on from its past in an inclusive manner. In this respect, the KMB attempts to break the 'us versus them' narratives, and to further reconciliation between communities in Kosovo.

16 Minor , and Olgiati (2014) ; Minor (2012)

To sum up: the KMB's impartial and exhaustive recording of casualties serves victims' justice, collective memory, truth and reconciliation. This multipurpose use shows the interconnectivity of different TJ mechanisms, and the fact that there is no single dimension to justice. The ability of the KMB to impact so greatly in the field of TJ is due to a strict methodology aiming for accuracy and comprehensiveness.

6. The KMB recipe: strict methodology and accuracy

6.1. Methodology and format[17]

The KMB database

The database of the KMB displays the original sources of all data, and almost all links in English, Croatian, Serbian and Albanian. Every piece of information is linked to a victim ID number and an event ID number. One person can be linked to different events, and in each of them hold a different role (victim, witness, et al.). A particular event gathers several people and several documents (referring to times, dates, facts) and enables the provision of a form of narrative fed by and feeding into victims' individual testimonies about events.

All individuals are divided between: 'war victim', 'possible victim' and 'not war victim'. In the 'war victims' category, there are no anonymous victims listed. However, there are some anonymous victims in the other two categories, which are constantly verified and updated. The KMB therefore leaves space for progress, while strictly indicating as war victims those victims about whom the information is unquestionable. This precision is crucial so that the KMB – and its list of war victims – can be relied on for the purposes detailed above. The mentioning of names in the KMB enables the cross-validation of the data by allowing a testing of their traceability to real people.

War victims' status

War victims in the KMB are divided between 3 status types: 'civilian,' 'soldier,' and 'police'. A civilian is defined as any victim not member of an armed group taking part in the conflict. The KMB also mentions the sex, date and place of birth, and ethnicity of each war victim.

17 Kruger and Ball (2014)

Regardless of their status, the vast majority of victims are Albanians, followed by Serbs. Finally, the KMB also gives information on the last place of residence of the victims before their death or disappearance, and the date of the death or disappearance. For case of disappearance, the KMB also gives the last place where the victim was seen.

Method

The HLC Kosovo has been collecting data on human losses by means of field research trips, interviews of family members, witness statements, court documentation, various media sources, international and local reports from governmental and non-governmental organizations, etc. The information obtained has been in accordance with a very precise methodology. One of the most important indicators of the accuracy of the KMB is the quantity of sources used to verify information. A victim will be included in the 'war victims' category only if a connection to the war can be established without doubt, based on sufficiently reliable information on the circumstances of the death or disappearance. The protocol for verification of information is extremely precise. Unless a court judgment is available, at least two independent sources must confirm a connection to the war. Sources will be considered as 'independent' if no link can be found between them. During field investigations, the independence of sources will be ensured by the pattern and timescale of the interviews, as being conducted in different locations at different moments in time in order to allow cross-verification of the data obtained. Sources will be listed as 'primary sources' if they give precise evidence of the victims from immediate witnesses of the event, or as 'secondary sources' when they evaluate or comment on primary sources' information. Victims listed in the database have on average eight documents mentioning them.

6.2. The findings so far

A total of 31,600 documents were used to document the deaths or disappearances of 13,549 people – 10,829 Albanians, 2,199 Serbs and 529 Roma, Bosnians, Montenegrins and other non-Albanians – in connection with the war between January 1st 1998 and December 31st 2000. Amongst these, recognized as war victims were: 10,334 civilians in total, of whom 8,693 were Albanians, 1,196 Serbs and 445 Roma and others; and 3,215 members of armed formations, including 2,122 members of the KLA and FARK, 1,090 members of Serbian forces, and 3 members of KFOR. In addition, there are 1,603 possible victims whose war victim status has not been confirmed.[18]

6.3. International recognition of the accuracy of the KMB

In its evaluation of the KMB in 2014, the Human Rights Data Analysis Group (HRDAG) concluded that the KMB "documents all or nearly all the human losses during the conflicts in Kosovo over the period 1998–2000 (…) it is very unlikely that there are more than a few tens of undocumented deaths". This conclusion was drawn after several analyses and findings, including a comparison with ten other databases documenting human losses in Kosovo. Such a record of accuracy is due to the KMB's very strict methodology serving the purpose of accuracy of the findings.[19] With this recognition, it can be said that the KMB has reached its goal of becoming a respected record of all human losses attributable to the war in Kosovo.

18 Preliminary results – to be confirmed in June 2015
19 Kruger and Ball (2014)

CHAPTER 3:
CRIMINAL PROSECUTIONS OF WAR CRIMES

Since the 90s, criminal prosecutions – often referred to as retributive justice - have overwhelmingly been the preferred TJ tool for dealing with the past.[20] Kosovo is no exception, and in fact illustrates many of the aspects criminal prosecutions for war crimes can assume, and many of their controversies they can attract. The importance of criminal prosecutions over other means of TJ after conflicts derives from several observations and fuels several expectations. As was detailed in chapter 1, trial proponents claim that they fulfill many goals, from establishing justice to providing truth, while securing peace (via deterrence) and reconciliation (via individualizing guilt and exposing the leaderships' roles in exacerbating hatreds and manipulating opinions).[21]

Criminal prosecutions for the crimes committed during the war in Kosovo have been executed through three different mechanisms, whilst a new one has recently been announced. International trials at the ICTY have dealt with 5 of the most high-profile cases, while Kosovo's judiciary system has been engaged in prosecuting war crimes locally under the hybrid system of the administration of the United Nations Mission in Kosovo (UNMIK), followed in 2008 by the EU Rule of Law Mission (EULEX). Some of the war crimes committed in Kosovo have also been dealt with locally in Serbia by a specialized War Crimes Chamber of the Belgrade District Court and a War Crimes Prosecutor's Office since 2003. In the near future, local criminal procedures will be expanded by the establishment of a new court, which will operate within Kosovo's judicial system but with trials held abroad.

This multiplicity of institutions dealing with war crimes trials for Kosovo is, to say the least, confusing. They all have pro's and con's linked to their specificities, and their overall record in achieving the goals set for them in Kosovo has been mixed, partly due to these goals being unachievable by trials alone. Understanding the features and outcomes of the different justice institutions in Kosovo requires some preliminary remarks on the different considerations at play when assessing the quality and effectiveness of justice after conflict.

1. Considering the claim that trials have unrealistic expectations

- It has been argued by some observers that the unrealistic expectations set for trials for war crimes have been 'laying the ground for disappointment'[22], and that managing these expectations is the key to positive public perception.

2. Considering that "justice must not only be done, but must be seen to be done"[23]

- While justice refers to a normative ideal as such, in the peace-building context what matters is how the communities affected by war perceive the various justice initiatives, highlighting the importance of outreach.

3. Considering the pro's and con's of international versus national criminal proceedings[24]

- Pragmatic considerations show that post-conflict states often lack the capacity and political will to investigate alleged war crimes when the alleged perpetrators are linked to the government and political sphere
- In this respect, international trials have less risks of bias, unfairness and victor's justice than local proceedings
- However, local trials bear greater potential for capacity-building and local ownership – the latter being the key to trials' success and making national trials more likely to impact on victims and society than international ones.
- Hybrid systems have tried to take the best of both – international legal safeguards and local ownership.

4. Considering the importance of both retributive and restorative justice[25]

- The current TJ focus has been put overwhelmingly on 'trial justice'[26] involving criminal accountability.
- However, the culturally relative meaning of justice and limits of criminal punishment are acknowledged.
- Restorative justice takes into account other dimensions, such a rebuilding relationships and material assistance.

20 This preference is evident in regards to the great developments of ICL, the increasing number of international tribunals, and the official public discourse of international actors. Kerr & Mobekk (2007); Degruson (2014)
21 Kerr & Mobekk (2007)
22 Orentlicher (2010)
23 statement of A. Cassese, in Kerr & Mobekk (2007)
24 Kerr & Mobekk (2007) ; Mani (2007)
25 Hovil & Quinn (2005) ; Sriram (2007) ; Engstrom (2013) ; Akman (2008)
26 Engstrom (2013)

PART 1:
THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

ICTY, The Hague (Degruson)

The ICTY was created by United Nations Security Council Resolution 827, which also contains the Statute of the ICTY determining its jurisdiction, organizational structure, and criminal procedures in general.

7. Mandate and Jurisdiction of the court

The ICTY has exerted jurisdiction over 4 crimes committed in the territory of the former Yugoslavia from 1991 onwards. This jurisdiction covers crimes committed in Kosovo from the 28th of February 1999, the date when the conflict officially reached the level of an 'internal armed conflict'.[27] The ICTY has tried those bearing the greatest responsibility for the war crimes within its jurisdiction, in accordance with the principle of command responsibility, the doctrine of hierarchical accountability in cases of crimes committed during wartime.

27 Article 1 of the ICTY statute ; HRW (2001)

Article 2: Jurisdiction over grave breaches of the 1949 Geneva conventions[28]

The four Geneva Conventions set forth rules for the wartime protection of civilians, who do not take part in the fighting, and sick, wounded or shipwrecked members of armed forces and prisoners of war, who can no longer fight.

"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- *willful killing;*
- *torture or inhuman treatment, including biological experiments;*
- *willfully causing great suffering or serious injury to body or health;*
- *extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*
- *compelling a prisoner of war or a civilian to serve in the forces of a hostile power;*
- *willfully depriving a prisoner of war or a civilian of the rights of a fair and regular trial;*
- *unlawful deportation or transfer or unlawful confinement of a civilian;*
- *taking civilians as hostages."*

Article 3 : Jurisdiction over violations of the laws or customs of war[29]

The laws or customs of war are a body of international law introduced through various international treaties, conventions and agreements, most notably the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949 and Additional Protocols of 1977, as well as through the development of customary international law. Article 3 sets out a non-exhaustive list of violations of the laws or customs of war, such as: *employment of poisonous weapons, wanton destruction of cities not justified by military necessity, destruction of institutions dedicated to religion and plunder of public or private property.*

Article 4: Jurisdiction over the crime of genocidet[30]

Article 4 lists acts which constitute genocide, if committed *"with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"*. These acts include: killing members of the group and causing serious bodily or mental harm to members of the group. In addition to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity in genocide are also punishable under Article 4.

Article 5: Jurisdiction over crimes against humanity[31]

"The following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- murder; - extermination; - enslavement; - deportation; - imprisonment; - torture; - rape; - persecutions on political, racial and religious grounds; - other inhumane acts."

28 Article 2 of the ICTY statute
29 Article 3 of the ICTY statute
30 Article 4 of the ICTY statute
31 Article 5 of the ICTY statute

8. The cases

Since the beginning of its jurisdiction in February 1999, the ICTY has dealt with 5 separates cases, some of which have covered several alleged offenders. 3 were dealing with abuses committed by Serbian officials and 2 by Albanian KLA leaders. 8 people in total were found guilty of crimes committed in the Kosovo conflict.

Case Slobodan Milošević (IT-02-54)[32]

- President of the Federal Republic of Yugoslavia (FRY) from 15 July 1997 until 6 October 2000.
- Crimes indicted for (inter alia):
  - forced deportation of approximately 800,000 Kosovo Albanian civilians;
  - contribution to creation of an atmosphere of fear and oppression through the threat to use and use of force;
  - murder of hundreds of Kosovo Albanian civilians – men, women and children, which occurred in a widespread and systematic manner throughout the province of Kosovo;
  - sexual assaults carried out by forces of the FRY and Serbia against Albanian women;
  - systematic campaign of destruction of property owned by Kosovo Albanian civilians via widespread shelling;
  - the burning and destruction of property, including homes, farms, businesses, cultural monuments and religious sites.
- Died on 11 March 2006, leading to the ending of the proceedings.

32 Case sheet S. Milosević

Case Šainović et al. (IT-05-87)[33]

The Prosecutor v. Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić & Milan Milutinović

- Respectively: Deputy Prime Minister of the Federal Republic of Yugoslavia, Chief of the General Staff of the Yugoslav Army (VJ), Commander of the Third Army of the VJ, Chief of Staff of the Priština Corps of the VJ, Head of the Serbian Ministry of Internal Affairs (MUP) for Kosovo & Metohija, and President of Serbia.
- Convicted of, inter alia:
  - deportation, other inhumane acts (forcible transfer), murder, persecutions on political, racial or religious grounds (crimes against humanity), and
  - murder (violations of the laws or customs of war).
- PResponsibility established for Operation Reka, the gravest crime against civilians committed during the war in Kosovo, where at least 350 Albanian civilians were killed.[34]
- Sentenced respectively to 18, 15, 22, 14, 20 years' imprisonment. Milutinović acquitted.

Case Vlastimir Đorđević (IT-05-87/1)[35]

- Assistant Minister of the Serbian Ministry of Internal Affairs (MUP) and Chief of the Public Security Department (RJB) of the MUP; responsible for all units and personnel of the RJB in Serbia, including Kosovo between 1 January and 20 June 1999.
- Convicted of:
  - deportation, other inhumane acts (forcible transfer), murder, persecutions on political, racial and religious grounds (crimes against humanity) and
  - murder (violations of the laws or customs of war).
- Responsibility established in Operation Reka.
- Sentenced to 18 years' imprisonment.

Case Limaj et al. (IT-03-66)[36]

The Prosecutor v. Fatmir Limaj, Isak Musliu & Haradin Bala

- All allegedly KLA commanders holding duties in the Lapušnik/Llapushnik area and the Lapušnik/Llapushnik prison camp.
- Limaj and Musliu acquitted for lack of evidence - Bala sentenced to 13 years' imprisonment.

33 Case sheet Sainovic et al.
34 'Operation Reka' (2015)
35 Case sheet Dordevic
36 Case sheet Limaj et al.

Case Haradinaj et al. (IT-04-84)[37]

The Prosecutor v. Ramush Haradinaj, Idriz Balaj & Lahi Brahimaj

- Respectively: Commander of the Kosovo Liberation Army (KLA) in the Dukagjin operational zone ; Member of the KLA and Commander of the special unit known as the "Black Eagles"; member of the KLA General Staff stationed at the headquarters in Jablanica/Jabllanicë.
- Haradinaj and Balaj acquitted for lack of evidence - Brahimaj sentenced to six years of imprisonment.

9. The legacy of the ICTY in Kosovo: achievements, limitations and criticisms

The legacy of the ICTY has been mitigated in the whole region of the former Yugoslavia. While some very important jurisprudential developments have been welcomed in terms of substantive law (in, inter alia, the Tadić and Blaškić cases, and with regards to the notion of effective/overall control and protection of cultural heritage), the practical impact of the court in the field has been questioned, especially in Kosovo, where there is doubt as to whether it has brought justice and reconciliation to victims, as had been expected.

• ICTY justice, perceived through an ethnic prism, fell short of bringing reconciliation

While the fairness of the ICTY in its case selection has been recognized internationally,[38] the individual guilts that were established by the tribunal have failed to eradicate the patterns of collective blame at play in Kosovo and restore trust between the communities, mainly due to their necessary selectivity.[39] In a conflict like the one in Kosovo - characterized by the great disparity between military capacities, and the quantity and degree of atrocities committed by both sides - the amount of prosecutions for war crimes committed by Serbs and Albanians could not have been equal, and objective appraisal of the ICTY prosecutions should not be based on figures, even though these are quite disproportionate. Nevertheless, despite the established impartiality of the ICTY case selection, the fact that it is predominantly Serbs who have been convicted has led to a perception of bias from the Serb community and therefore exacerbated ethnic narratives rather than defused them. The court's verdicts are therefore generally perceived through an ethnic prism, according as to whether the accused are considered as war heroes or war criminals.[40] This negative effect can be partly explained by the lack of an outreach programme at the ICTY which, had it been more effective, would have increased popular understanding of the procedural rules and the prosecution patterns derived therefrom.[41] Instead, as high levels of mistrust, very little contacts between groups, and competing versions of the past persist in Kosovo, the experience of the ICTY has highlighted the practical limitations of prosecutions in achieving social reconciliation.[42] While it remains that many established crimes against Serbs and other minorities remain unaccounted for, the imperfectness of the ICTY justice has also left many Albanian victims with no judicial recognition of their wounds.

• An imperfect delivery of justice

Empirical investigations in former Yugoslavia have highlighted the limits of a purely retributive approach to justice.[43] Indeed, when asked, some victims claimed that the work of the ICTY hardly touched on their experiences, creating a feeling of dissatisfaction amongst them. These voices relate to the fact that trials as such, by focusing on the offenders rather than on the victims, and by putting victims through adversarial procedures and a judicial questioning of their losses, do not necessarily give an appropriate platform for the acknowledgments of their wounds. Moreover, the necessary selectivity of trials due to time and resources constraints has inevitably made trial justice symbolic, and therefore imperfect in victims' minds, as only some

37 Case sheet Haradinaj et al
38 Clark (2010)
39 Clark (2009) ; Orentlicher (2010)
40 Orentlicher (2010)
41 Devitt (2012)
42 Martin-Ortega (2013)
43 Clark (2009)

of them have been heard.[44] Indeed there have only been 5 cases completed during the whole jurisdiction of the court. Both Albanian and Serbian victims are left with a feeling that crimes done to them remain unpunished, illustrating some limitations of the retributive justice provided by trials, despite a clear wish from many of them for ending impunity.

- **Challenging the benefits of international trials over national trials, and the lack of outreach at the ICTY**

Another aspect of the justice rendered by the ICTY that has been debated is whether international proceedings were more appropriate than national ones to deal with war crimes in Kosovo. International tribunals are generally chosen over national prosecutions, due to the latter's potential for biased and victor's justice.[45] Nonetheless, the example of the SICT (see box below) showed that these risks can be mitigated by procedural safeguards. Moreover, it has just been established that international courts themselves are not guaranteed to be perceived as impartial, owing to their recurrent lack of local ownership. In fact, the example of the ICTY shows that international courts are often too remote from the affected populations to be locally perceived as meaningful. Local ownership gives greater chances to prosecutions to impact on victims and be accepted by the society. In this respect, the ICTY's failure to transpose its work on the ground in a comprehensive way accounts for most of its failures. Proper outreach, thereby securing popular understanding of the selection criteria for cases and verdicts, is bound to be less of an issue with local proceedings.[46]

44 Akman (2008) ; Tepperman (2002)
45 More details in Kerr & Mobekk (2007)
46 Mani (2007)

Impartiality and local ownership at the Supreme Iraqi Criminal Tribunal (SICT)

 [47]

- **Impartiality is not necessarily the prerogative of international justice mechanisms:** national or hybrid courts - as demonstrated in the case of the SICT [48] – can entail institutional safeguards for impartiality and procedural fairness. Here guarantees were provided to ensure that the SICT would not be perceived as an 'anti-Sunni' court.[49]

- **Avoiding a crisis of legitimacy:** In Iraq, close observers had concluded that an externally imposed international tribunal would result in a 'crisis of legitimacy', threatening efforts to prosecute the members of the Ba'ath party responsible for the oppression of the Iraqi population. By preferring local (and hybrid) procedures, the punitive authority of the SICT was seen as deriving from the sovereign authority of the Iraqi people directly, and not imposed from the outside.[50]

10. ICTY follow-up: local trials in Kosovo and Serbia and regional truth commission

The ICTY having completed the 5 cases for Kosovo crimes, and in the light of some of the criticisms heard above, it began transferring the remaining ones to national courts, as part of an effort to strengthen local capacities and restore local ownership for war crimes trials. Due to the inherent limitations of international tribunals such as the ICTY, and to the ICTY's structural weaknesses, it has become crucial that local courts prosecute war crimes in order to close the

47 photo:http://en.protothema.gr/judge-who-presided-over-husseins-trial-executed-say-reports/
48 The SICT is in fact more of a hybrid court
49 Vinjamuri (2003)
50 Newton (2006)

impunity gap. A specialized War Crimes Chamber of the Belgrade District Court and a War Crimes Prosecutor's Office was established in Serbia in 2003. In Kosovo, war crimes cases were handed to international prosecutors and tried by international or mixed trial panels set up under the administration of the United Nations Mission in Kosovo (UNMIK), followed in 2008 by the EU Rule of Law Mission (EULEX). The two local proceedings will be described in the following two parts.

Moreover, the next chapter will enhance the reader's sense of the importance of regional cooperation when it comes to the crimes committed in the 90s in the former Yugoslavia. The criminal cases before the ICTY have unfortunately been the occasion for the countries of ex-Yugoslavia to fight for their own truth, and to attempt to prove that their vision of the past was the only right one. This is evidenced, for instance, by public condemnations of some verdicts (in Serbia notably regarding the acquittals of the Croat generals Markac and Gotovina in 2012) and by the sums dedicated by nation states to the defense of their alleged war criminals. However, in this context, a regional truth is needed, and establishing this is the aim of the regional initiative for a truth commission (RECOM).

PART 2:
WAR CRIMES TRIALS HELD IN KOSOVO

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Due to the inherent and structural limitations of the ICTY, a hybrid system was installed in Kosovo as a necessary complement to international justice. The UN administration in Kosovo soon allowed international judges to sit with domestic ones in local courts, and to judge war crimes cases put forward by international prosecutors. This took place as part of UNMIK's mission in Kosovo, and from 2008 as part of the EU Rule of Law Mission (EULEX), divided into its two 'divisions'. The 'Executive Division' investigates, prosecutes and adjudicates sensitive cases using its executive powers. The 'Strengthening Division' monitors, mentors, and advises local counterparts in the police, justice and customs fields. For the purpose of this chapter, only the former will be dealt with, as it is the one dealing with prosecutions. The latter will nonetheless be relevant to the last chapter on institutional reform.

11. EULEX trials: rationale, mandate and functioning

In the light of what was previously said about the pros and cons of international versus local trials, and considering the general disappointment with international justice in Kosovo, it is of great importance to try war criminals in their home country (that is, in Kosovo and Serbia), both in terms of capacity-building and as regards the quality of justice delivered to the victims. Accordingly, a hybrid system was designed as a compromise. Indeed, EULEX was designed

51 photo: EULEX factsheet

with an international component bringing the necessary international safeguards to the Kosovo judiciary regarding international human rights standards, while a local component was set to guarantee the legitimacy and local ownership of the trials, and also showing awareness of the local context and procedures. Moreover, in Kosovo's peace-building context, the development of an independent judiciary able to take over EULEX was a priority goal.

Mandate of the Executive Division (ED) of EULEX[52]

- EULEX Judges and Prosecutors deal with ongoing cases related to: war crimes; terrorism; organized crime and high level corruption; other serious crimes.
- EULEX Judges and Prosecutors are embedded in Kosovo institutions and serve in accordance with Kosovo law. "The EULEX mission is conceived as a joint effort with local authorities, in line with the local ownership principle."
- The ED is focused on "delivering rule of law services until the progress of local authorities allows a complete transferof executive functions to them." The Mission will "gradually reduce as Kosovo's rule of law institutions develop and take on more and more of the responsibilities in these areas". Under the "normally no new cases policy", no new case will be initiated and EULEX will only complete those cases initiated before 15 April 2014. Only in north Kosovo will the ED prosecute and adjudicate cases until the Dialogue with Belgrade brings a solution for the judiciary.

As shown above, this mandate evidently set two rationales for EULEX upon its creation in post-independence Kosovo: the bringing of justice for war crimes, and the development of local capacities by fostering the autonomy of local actors. The EULEX mandate was extended on the 21st of April 2014, and is due to terminate the 14th of June 2016. A Strategic Review will be conducted in the second half of 2015 to assess the achieved progress and discuss the remainder of its mandate.[53]

52 As set forward by EULEX website ; EULEX factsheet
53 EULEX factsheet

12. The contribution of EULEX to end impunity: the cases

According to the HLC figures, between July 1999 and August 2015 - that is, over the period of the more than 15 years monitored - 99 alleged perpetrators have faced trial in front of the courts in Kosovo. On the basis of these results, EULEX claim that "by investigating senior ministers, politicians, former Kosovo Liberation Army (KLA) commanders, business men and the informal secret services, the mission has seriously challenged the perception of impunity".[54] Indeed, thanks to the Mission, the impunity gap has been somewhat reduced, via those completed cases that have brought satisfaction to the victims involved. Had UNMIK and then EULEX not dealt with prosecuting war crimes in Kosovo, it is likely that fewer cases would have been taken to court, and that almost no cases against ethnic Albanians would have been initiated. Additionally, the last chapter will also establish that EULEX has contributed to institutional reform in quite some depth. Nonetheless, notwithstanding some progress on building a legal system based on the rule of law and reducing the impunity gap, the record for war crimes trials in Kosovo has been plagued by significant shortcomings.

13. The limitations of Kosovo's hybrid war crimes prosecutions under EULEX Mission

The EULEX impact in Kosovo has suffered from several recurring concerns over both its effectiveness in prosecuting war crimes and its accountability. While some justice has been delivered in Kosovo via local war crimes trials, and despite the general professionalism of EULEX staff in handling war crimes trials, it has been, overall, a highly flawed process.

13.1. Pace of the prosecution, rate and nature of convictions: an imperfect delivery of justice

Between July 1999 and August 2015, there have been 99 alleged

54 EULEX factsheet

perpetrators indicted, while a total of 10,317 civilian victims of the war have been identified in the Kosovo Memory Book. It is impossible to determine exactly the number of victims connected to these 99 indictments, which have certainly been the occasion for some form of retributive justice, but the discrepancy between the amount of potential perpetrators indicted and the amount of victims is clear. Additionally, these indictments have only led to 27 convictions (along with 13 acquittals, 21 escapes, and the remaining indictments suspended or ongoing). While the trial process is always profitable for victims, one can wonder what satisfaction they can receive from so small an amount of punishment for their perpetrators. There is a common perception within Kosovo society that the majority of perpetrators have been left unpunished.

The lengthiness of the proceedings is also problematic, making justice ever more distant from the victims. For example, 10 war crimes trials were held during 2014, in which 43 individuals were accused, but only one conviction was rendered. As war crimes cases get older, they only become harder to try, for victims, witnesses, and evidence may all become less available or accessible over time. Notwithstanding the inevitable intricacies and the carefulness required in dealing with such cases, which partly accounts for their slow pace, the protracted character of the procedures is deeply frustrating for victims, fueling the claim that the justice rendered by trials alone is insufficient. Additionally, just as with the ICTY, verdicts have been perceived through an ethnic prism.

Many victims' grievances and losses remain unaccounted for, and impunity remains for a lot of perpetrators. While selectivity and length are the somewhat natural limitations of trials, this inefficiency has been aggravated by several factors, ranging from the insufficient amount of international staff allocated and their inadequate training, to lack of means and poor coordination, by which the international community has failed to sustain its ambitions for delivering justice in Kosovo. Some progress might have been initiated in 2015, with a higher number of prosecutors dedicated to WCT. Moreover, it is hoped that the work of the new special court (see below) will deliver some form of justice to victims who are still lacking redress.

13.2. Flawed legal proceedings and mishandling of the victims[55]

All sorts of inconsistencies and lack of legal professionalism in war crimes cases in Kosovo have been reported. For instance, in one case the appeal chambers rendered completely different verdicts at two different stages of the procedure on the basis of the same evidence, causing obvious issues of legal certainty and discouraging victims. Moreover, regular assessment of local war crime trials evidenced a trend of judges putting victims 'in the background' of the trial and passively letting them be mistreated by the accused and their defense counsels. This trend, adding to the frustration caused by the selectivity and length of the proceedings, has resulted in greatly hindering the purpose of trials as a mean of redress for victims. The inherent and constructed/structural limitations of retributive justice have failed to provide an adequate platform to victims for the acknowledgement of their wounds.

13.3. Issues with witness protection[56]

The most crucial impediment to the efficient delivery of justice in war crimes trials in Kosovo remains the issue of witness protection. This is evident in witnesses showing a sudden 'surprisingly fresh memory' regarding very distant events in time, or, on the other hand, forgetting details that they had weeks before described in detail. This pattern of changing statements due to intimidations or blackmail is present in almost all hearings, including for protected witnesses.[57] The protection measures of the Law on Witness Protection as it stands today are not strong enough nor well enough implemented, allowing witnesses to be identified by the parties despite their protection. Moreover, in a society like Kosovo, where clan and family ties are of such relevance, and where favours and solidarity define many social interactions, one can always find through the network a way to spread information outside of the courtroom even when confidential, and one will generally favour group solidarity over legal precision, even when under oath. Removing witnesses from Kosovo seems like a solution, but only a temporary one, for this issue begins

55 'High-Profile trials: Justice Delayed' (2014)
56 'Witness still the Achilles Heel in High Profile Trials' (2013)
57 For instance, the Fatmir Limaj case before local courts, in which, in the initial proceedings of 2012, the key witness was found dead in a park in Germany

way ahead of the actual initiation of trials and their accompanying protection measures. This issue remains the Achilles' heel of criminal proceedings in Kosovo, illustrating some of the limitations of locally held trials.

13.4. Local capacities still very poor[58]

The hybrid system set up in Kosovo (mixing international and local elements) was thought to give more legitimacy to the proceedings, with the leaving of matters in the hands of the locals for the sake of greater local acceptance; and it was expected to build the capacity of the judicial system in Kosovo so that it could one day take over fully. This goal has failed to be achieved. The EULEX staff was conceived as a support to local action, but has in fact been making all the important decisions. It is evident in mixed panels, where a huge gap exists between foreign and local judges. They do not seem to communicate and the local judge is often left to simply approve the rulings made by the EULEX judges. This has certainly occurred out of a desire for efficiency, but it has created a legitimacy gap, illustrated by the recent Kosovo MP's declaration accusing international judges of arbitrarily taking over cases from local prosecutors. Indeed, there has been no single local prosecutor, as a supposed representative of the state of Kosovo, in the last 15 years, and only 2 indictments have been rendered by local judges. The Law of 21 April 2014, reducing EULEX competences and transferring the most difficult cases to local prosecutors and judges, has led to the creation at the beginning of 2015 of a Special Prosecutor's Office with a Department for War Crimes in Kosovo. While this is a positive development, local prosecutors have yet to be seen in the courtroom. As the EULEX mandate comes to an end next year, the Kosovo judicial system is nowhere near ready to take over. In sum, while the hybrid system was thought of as a compromise gathering the best of international and local trials, it has in fact done the opposite: while failing to restore ownership and build capacity like a local court, war crimes trials in Kosovo have also failed to secure international legal safeguards in terms of the procedural conduct of the proceedings.

58 'High-Profile trials: Justice Delayed' (2014)

13.5. The credibility gap

To EULEX's recurring concerns over its effectiveness in prosecuting war crimes must be added attacks on its integrity and accountability, due to several scandals alleging that EULEX judges and prosecutors have been taking bribery from local lawyers on war crimes cases. The latest scandal to date, in November 2014, has succeeded in dismantling EULEX legitimacy in Kosovo. Additionally, EULEX has also severely disappointed popular expectations that it would tackle corruption and promote good economic governance. This credibility gap, even when not directly linked to war crimes trials, has negatively impacted EULEX perception in Kosovo, and therefore the popular belief that it can bring justice efficiently. Accordingly, the Kosovo Security Barometer, measuring public perception and trust in justice institutions, found that, in 2014, prosecutions, including for war crimes, were the second least trusted institution in Kosovo, with 41.9% of the respondents declaring no trust in EULEX.[59]

For many observers, concerns over EULEX's effectiveness and accountability have raised the question as to whether an institution with such a record can be effective in combating impunity. For them, the establishment of the new special war crimes court evidences the failure of EULEX to fulfill its mandate. Moreover, while the proper conduct of local war crimes trials has been facing two main challenges, namely the issue of witness protection and the lack of capacity building, the soon-to-be Special Court will need strong safeguards.

59 Kosovo Security Barometer (2014)

14. The soon-to-be Special Court

The mandate of the Special Court

- In the coming period, local criminal procedures will be expanded by the establishment of a new court, often referred to in the public as the "Special Court" or "Special Chambers", which will deal with the crimes committed by former senior officials of the former Kosovo Liberation Army (KLA) during and in the aftermath of the conflict in Kosovo.
- Its primary function will be to investigate the allegations found in Dick Marty's 2010 report regarding various offences ('organ trafficking', mistreatment of detainees, abductions, and systematic killing of Milosevic collaborators). This report has focused on the "Drenica Group", led by Hashim Thaci, then Kosovo's prime minister and now foreign minister. In 2014, the findings of the EU Special Investigative Task Force's were ''largely consistent'' with the Marty report and established "compelling evidence" against certain former senior KLA officials.
- The court will be embedded nationally but seated abroad (hybrid system). Strong guarantees in terms of witness protection have allegedly been taken. As of December 2015, very little official information has been released about the future structure, procedures and work of the court, whose mandate and functioning so far lack transparency.

Even before its establishment, and due to expected indictments against former high-ranking KLA officials, the Special Court has raised a very high interest of the public in Kosovo and has sparked divides in the political spectrum. Increased media coverage of such a sensitive topic will likely result in sensationalistic media reporting, diffusing inaccurate information and creating tensions within the communities and between them, and decreasing the popularity of the court within the general public. A good public image of the court is essential to its perception by victims, and efforts should be made to increase outreach, raising awareness of the court's work, mandate and procedure.

14.1. Despite many criticisms…

For many observers, this new court is seen as yet another violation of Kosovo's sovereignty, in a context where, in 2015, only 13.6% of the respondents agree that Kosovo's judicial system takes decisions independently, down from almost 25% a year before.[60] Besides this, the main reason for the rejection of the court by many Albanians is that the court's mandate is discrediting the KLA's righteous cause of the liberation war of Kosovo. In fact, the one-sided nature of the court is indeed problematic, because it sends a dangerous message, and comes to add yet another court to the piecemeal justice approach that has been taken in Kosovo, where no initiative seems to make much sense anymore. Finally, it is easy to question the efficiency and legitimacy of yet another imposed judicial structure, in the light of the previous ones' failings as established above. Kosovo citizens are tired of international justice. In the eyes of both Albanians and Serbs, the accumulated judicial systems imposed on them by the International Community have failed to deliver justice. For the Albanians, the selectivity of international war crime cases means to them failure to investigate and judge those responsible for the many mass graves of Kosovo Albanians found in the country and in Serbia. For Serbs, even more straight-forwardly, international justice has failed to account for the cleansing of the Serbian population in Kosovo at the end of the war. Moreover, failure to curve institutional corruption and economic criminality has brought popular confidence in international justice close to null.

14.2. The court will bring more justice to the victims…

Notwithstanding these criticisms, the allegations against the mentioned crimes are serious and, until they have been properly investigated, justice will not have been done in Kosovo. Shedding light on these allegations is not only important for the credibility of Kosovo's legal system, but also for improving Kosovo's image abroad. More importantly, it counts for victims. One could argue that one crime investigated and bringing justice to some victim is a sufficient reason for the court. Moreover, for years, most people in Kosovo believed that war crimes had only been committed by the others: the Serbs and their collaborators. There had never been talk of the KLA's crimes in such an exposed way before the Marty report. It is time that these crimes are also investigated.

60 Public Pulse report IX (2015)

14.3. Provided careful management and safeguards are secured!

In the light of the factors at play during war crimes trials at large and the specific features of international and local trials in Kosovo so far, the new court's impact will very much depend on whether careful guarantees are provided. The bad record and reputation of the ICTY and EULEX will inevitably stain the new court, unless a proper outreach is carried out. Robust witness protection also needs to be designed. The challenge is to prove that lessons have been learnt.

PART 3:
TRIALS IN FRONT OF THE SERBIAN COURTS

As part of the effort to try war criminals in their home country, both in terms of capacity-building and regarding the quality of justice delivered to the victims, the Law on the Organization and Competence of Government Authorities in War Crimes Proceedings was adopted on July, 2003, with the assistance and support of the international community. The Law transferred jurisdiction for war crimes cases to specialized institutions within Serbia, giving them jurisdiction over crimes against humanity and violations of international law as set out in the Serbian Penal Code, and over serious violations of international humanitarian law that occurred on the territories of the former Republic of Yugoslavia from 1 January 1991.

15. War crimes jurisdictions and decisions rendered with regard to Kosovo

The three main state agencies involved in the prosecution of war crimes are: the Office of the War Crimes Prosecutor (OWCP), the Department for War Crimes of the High Court in Belgrade (DWCHC), and the Department of War Crimes of the Court of Appeal in Belgrade (DWCCA). Their work in prosecuting war crimes is carried out with the help of the War Crimes Investigation Service (WCIS), the Protection Unit (Unit), and the Service for the Support and Assistance to Victims and Witnesses of the Department for War Crimes of the Higher Court in Belgrade.

Before the establishment of the DWCHC in 2003, a handful of cases had been completed under regular jurisdiction in Serbia. Regarding war crimes committed in Kosovo, 5 cases had been completed (Podujevo I (Cvjetan), Milos Lukic, Orahovac (Petkovic & Simic), Emini (Milos Simonic & Dragisa Markovic), and Kushnin). A total of 10 individuals (all ethnic Serbs) were accused, of whom 7 were convicted and 3 acquitted.

Since its creation, and up to August 2015, the DWCHC in Serbia has initiated 6 cases against Serbs – in which 29 persons were accused, and 4 cases against Albanians – in which 20 persons were accused. While some cases are still ongoing (Qyshk, Lubenik, Pavlan & Zahaq, Trnje and Sinan Morina), 5 of those cases have been fully completed.

Cases completed by the DWCHC:

- **Case Suva Reka** – 7 accused, 4 convicted (total 68 years), 3 acquitted
- **Case Podujevo II** – 4 accused, 4 convicted (total 75 years)
- **Case Bytyqi** – 2 accused, 2 acquitted
- **Case Anton Lekaj** – 1 accused, 1 convicted (13 years)
- **Case Grupi I Gjilanit** – 18 accused, 18 released

In total, there have been 59 indictments, 16 convictions and 24 releases since 2003.

16. Appraisal of the efficiency of the work of the OPWC and of the DWCHC

The DWCHC and OWCP Chamber have significantly developed their capacity to prosecute and try war crimes perpetrators according to international fair-trial standards since their creation, and gained a real potential to provide justice to many victims. Some elements have limited this capacity however, resulting in a far from total efficiency.[61]

16.1. The efficiency of the DWCHC and OWCP: number of cases and length of proceedings

Given the number of prosecutors employed at the OWCP, the number of crimes committed by Serb forces and the number of suspects residing in Serbia, the number of indictments (59) in Serbia does not reflect the nature or breadth of the crimes committed and the scale of civilian casualties on both sides in the Kosovo armed conflict. Additionally, some trials have been in pre-trial phase for more than 10 years, while other are still pending completion to date. This abusive length is well illustrated by the Trnje Case, which was initiated thanks to the HLC initiative to press charges against alleged perpetrators. While information about the perpetrators became public as early as 2002, proceedings lasted until the end of 2013![62] Moreover, the poor record in terms of the number of convictions by the courts in Serbia needs to be understood by comparison to that of the War Crimes Chamber of the State Court of BiH and Croatia, where dozens of cases have been completed, putting into question Serbia's commitment to justice.[63]

16.2. Small number of high-level perpetrators indicted

Not only have the number of trials been quite low, but also indictments against low-ranking individuals have prevailed, along with indictments involving events with a small number of casualties and perpetrators. While the ICTY established the responsibility of the highest political, military and police officials of the former Federal Republic of Yugoslavia and the Republic of Serbia for the crimes committed in Kosovo, it was Serbia's role to follow on with middle-ranking and remaining high-ranking officials.[64] The fact that it has largely failed to do so is the most frequent critique of the work of the DWCHC. Indeed, 3 years after its establishment, the DWCHC has only indicted 6 individuals holding some kind of high position in the military, police and political hierarchies.[65] This reluctance to bring charges against high-ranking officials can be partly explained by the perceived omnipotence of the army and police, which have not been properly subjected to vetting procedures after the war (see the last chapter). Moreover, the OWCP has long argued that it was voluntarily going for small-fry first in order to build up public legitimacy before engaging in bringing influential individuals to justice. Whether or not that strategy was appropriate at the beginning of its work, it remains that this issue persists more than 10 years later.[66] The result is a massive justice gap between the very

61 'Serbia - Submission to the Universal Periodic Review Of the UN Human Rights Council' (2008)

62 'Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice'(2013)
63 'Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice' (2013)
64 Bogdan Ivanišević (2007)
65 Bogdan Ivanišević (2007)
66 Bogdan Ivanišević (2007)

few high-ranking individuals prosecuted in The Hague and the very low-ranking soldiers, paramilitaries and police officers prosecuted at the DWCHC, resulting in impunity for most senior military and police officers.[67]

16.3. Defective investigations, controversial judgments and sentencing policy

Observers have established that the OWCP has sometimes been filing indictments on the basis of incomplete investigations in cases of war crimes committed in Kosovo. Similarly, indictments have tended to be modified at the last minute to be more lenient towards the accused.[68] Moreover, while the appraisals of the judgments rendered by the court have at times been deemed professional and objective, at others they seemed politically – rather than legally – motivated. For instance it was argued, in the Kashnjeti case, and in the Bytyqi case, that the unprofessional performance of the prosecutor led to the Chamber's finding that the facts were imprecise and contradictory.[69] Additionally, it is sometimes claimed that too much weight is given to mitigating circumstances in the court's sentencing policy, resulting in lenient convictions.[70]

These efficiency shortages are due to a number of problems, from the lack of intergovernmental contact due to Serbia's refusal to recognize Kosovo and hindering the process of evidence-gathering, to the reluctance of Kosovo Albanians to cooperate with the OWCP. It is also due to a blatant lack of resources. Regardless of the validity of these reasons, the fact that crimes against Kosovo Albanians have gone largely unpunished explains the low level of trust in the OWCP by Kosovo Albanians.[71]

67 "Serbia: Ending Impunity for Crimes against International Law" (2014)
68 'Trials for War Crimes and Ethnically Motivated Crimes in Serbia in 2010' (2011)
69 "Serbia: Ending Impunity for Crimes against International Law" (2014)
70 'Trials for War Crimes and Ethnically Motivated Crimes in Serbia in 2010' (2011)
71 Bogdan Ivanišević (2007)

17. Factors' hindering DWCHC and OWCP impact potential

17.1. Lack of political will

Ethnic nationalism remains strong in Serbia, as is demonstrated by the public's significant support for nationalist political parties, and it is weakening the resolve and effectiveness of the DWCHC, the OWCP and the WCIS. The Serbian elites are still somewhat engaged in denying responsibility for crimes committed by members of the Serbian forces during the Yugoslavia wars. For this reason, the DWCHC and the OWCP have both been plagued by a lack of the political will to support their work either politically or financially, and the influence of national politics in Serbia has, as the OWPC itself has admitted, often resulted in political pressures on the proceedings - from open support to ignorance or direct attack, depending on the government in power.[72] The general lack of support by Serbian prominent figures to domestic war crimes prosecutions has occurred in the wider context of a sharp hostility towards the work of the ICTY in Serbia, widely viewed as an anti-Serb institution. This sentiment has been easily and widely exploited to fit different political agenda over the years.

The political ambivalence regarding war crimes trials in Serbia is one example of the broader lack of a successful transitional justice process in Serbia. However, despite the many problems and shortcomings identified with the prosecution of those responsible for war crimes, it is the area where most visible progress has been recorded.[73] Indeed, outside this domain, transitional justice in Serbia has been marked by the absence of any truth-seeking effort, the weakness of the reparations programmes and the blatant lack of vetting of officials who may be implicated in past crimes. These deficiencies in TJ as a whole illustrate the status and political strength of those individuals still refusing to deal with Serbia's past and relying on a widespread perception of history as a narrative in which Serbia is always the victim of external actors' plots. The absence of other transitional justice processes at the domestic level places additional responsibility

72 "Serbia: Ending Impunity for Crimes against International Law" (2014)
73 'Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice'(2013)

on the prosecutors and judges involved in war crimes prosecutions.[74]

17.2. Lack of financial, human, and technical resources

Partly because of this lack of political support, the funds available to the OWCP and DWCHC are way too weak for the tasks that they need to conduct. This lack of resources creates daily difficulties, impedes their capacity to recruit defense attorneys, and does not cover the travel expenses of the prosecutors (field visits, trips to The Hague or to Kosovo). Additionally, both institutions are seriously understaffed, and specifically lack analysts and legal assistants.[75]

Moreover, technical problems obstruct the OWCP and DWCHC's ability to pursue higher-level cases of war crimes. Indeed, the scale and planning of such crimes take place within a system. The main challenge in prosecuting them is to highlight the nature of the participation and the knowledge and intent of those responsible. To do so, in addition to traditional investigation techniques (inter alia, reconstruction of the crime scene and forensic analysis), specific analyses of the particular practices and structure of military and paramilitary organizations, as well as analyses of the political and institutional relationships in place are required, as well as a careful study of the local context and the dynamics of conflict. The technical skills needed to fulfill this research go way beyond ordinary criminal investigation techniques, and require inputs from historians, and military and political analysts.[76] The lack of resources, despite various donations, accounts largely for the lack of capacity to proceed with the workload and for the lengthiness of the trials.[77]

17.3. Cooperation with the Police Unit

There has been a chronic lack of commitment and initiative from the War Crimes Investigation Service Service (WCIS), the police unit in charge of investigating war crimes and cooperating with the OPWC. Their mandate entails a cooperation component (arrests, and assisting the OPWC in collecting evidence to be used in trials), but also a clear initiative component (uncovering perpetrators and disclosing information to the OPWC). In fact to date, not only has the WCIS not always cooperated in a timely and appropriate manner (with its failures to proceed with warrants quickly, suspected bias in their reluctance to arrest Serb individuals, etc.) but also the WCIS has almost never spontaneously approached the OWCP with information on possible perpetrators (with the exception of the Suva Reka case). Some observers have claimed that the relationship between these two agencies designed to work together is in fact the weakest point in the system.[78]

17.4. Cooperation with UNMIK and EULEX

As the crimes under the DWCHC's jurisdiction were not committed on Serbia's current territory, agencies in Serbia have no authority over Kosovo and therefore no means of locating and contacting directly the witnesses. Even if they had, it is highly likely that potential witnesses would refuse to collaborate without mediation by a third party, considering that most Kosovo Albanians deeply distrust Serbian institutions. War crimes agencies in Serbia can only carry out their work via cooperation with the relevant agencies in Kosovo. However, as Serbia does not officially recognize the independence of its former province, the OWCP has had no contact with the Kosovo judiciary, and has instead gathered its evidence with the help of UNMIK and then EULEX. Such cooperation had long been plagued by very slow progress at the time of UNMIK, partly accounting for the small amount of cases relating to Kosovo initiated by the court. Recent cooperation with EULEX, within the framework of the Protocol on Cooperation between the Ministry of the Interior of the Republic of Serbia and EULEX, has been a lot more fruitful.[79]

74 Bogdan Ivanišević (2007)
75 'Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice'(2013) ; Bogdan Ivanišević (2007)
76 Bogdan Ivanišević (2007)
77 "Serbia: Ending Impunity for Crimes against International Law" (2014)
78 'Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice'(2013) ; Bogdan Ivanišević (2007)
79 'Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice'(2013) ; Bogdan Ivanišević (2007)

17.5. Issues with witness support and witness protection

The Witness Assistance and Support Unit (WSU) at the DWCHC – also under-resourced and understaffed - has inadequately fulfilled its task of assisting the witnesses during the proceedings, for it has only partially managed to create free and truthful conditions for testimony by witnesses. These deficiencies have led to serious allegations of intimidation, deterring witnesses from testifying.

In addition to these inherent limitationss, one of the biggest challenges for the OWCP and the DWCHC has been the non-availability of witnesses. Indeed, witnesses, while they have generally agreed to meet with Serbian prosecutors and investigating judges in Pristina, have for a long time been extremely reluctant to testify in Belgrade, slowing down the procedures and sometimes impeding the occurrence of trials. By the end of 2007, some progress had been achieved, as Albanian witnesses agreed to appear before the court in Belgrade in the Suva Reka trial.[80]

To sum up, the unfavourable political context, creating a resource deficit, and the flawed cooperation of the DWCHC and the OWCP with both the WCIS, WSU and Kosovo's judiciary, have greatly limited the Serbian judicial system's capacity to bring suspected war criminals to justice.[81] This has resulted in a small amount of cases focusing predominantly on small-fry offenders.

18. Using the legacy of the ICTY[82]

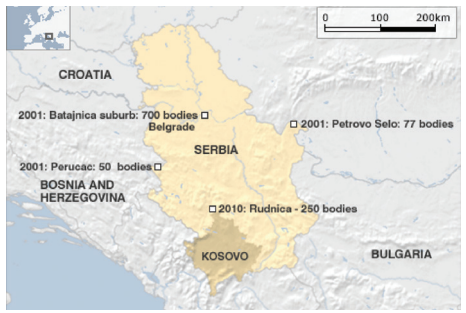
The ICTY has contributed to war crimes prosecutions in Serbia in several ways. In particular, the ICTY contribution to war crimes trials in Serbia has also taken the shape of training for judges, prosecutors, and officials involved in witness support concerning a substantive amount of international criminal law, including modes of liability such as command responsibility, and concerning procedural innovations,

80 Bogdan Ivanišević (2007) ; "Serbia: Ending Impunity for Crimes against International Law" (2014)
81 'Serbia - Submission to the Universal Periodic Review of the UN Human Rights Council' (2008)
82 Bogdan Ivanišević (2007)

such as how testimony via video-link functions in practice. Moreover, all judges in the DWCHC have visited the ICTY, and many of them took part in the conferences on regional cooperation regarding war crimes prosecutions organized in 2007.

With regards to the use of ICTY evidence and substantive law by national jurisdiction, all commentators agree that cooperation should have been more proactive. While evidence from the ICTY has contributed to progress in investigations and trials – specifically in the Suva Reka case, heavily relying on ICTY evidence – cooperation with ICTY has at times been complicated, and it has sometimes occurred that its evidences have been in fact detoured or misused. More symbiosis needs to be achieved on this level, as some of the evidence put forward in the ICTY remains unused by local courts, perpetuating impunity.

More cooperation with the ICTY should have taken place: Operation Reka and the Batajnica grave[83]



84

- Operation Reka led to the gravest crime against civilians committed during the war in Kosovo, and among the gravest of all the crimes committed in the 1990s in the former Yugoslavia. On 27 and 28 April 1999, the Yugoslav Army (VJ) and Serbian Ministry of Interior (MUP) conducted a joint, large-scale operation in the Kosovo villages lying west of the town of Gjakovë/Đakovica, where at least 350 ethnic Albanian civilians were killed and thousands more expelled to Albania. The mortal remains of 309 victims were found in the secret Batajnica mass graves in Belgrade suburb in 2001.

83 'Operation Reka' (2015) ; "Serbia: Ending Impunity for Crimes against International Law" (2014)
84 photo: http://news.bbc.co.uk/2/hi/europe/8671783.stm

- The ICTY, in the Đorđević and Šainović et al. cases, established the circumstances of this massacre, including the exact role of the VJ and the MUP, the pattern of crimes and the subsequent concealment of the bodies. On the 27 April 1999, VJ soldiers and policemen entered the Albanian-inhabited villages in the area (Dobrosh/Dobroš, Ramoc, Rracaj/Racaj, Korenicë/Korenica, Molić, Brovina, Guskë/Guska, Nivokaz, and others), and ordered local residents to leave for Albania, in doing so killing dozens of civilians (68 were killed in Korenicë/Korenica). Several thousands of villagers therefore formed two convoys and headed towards the town of Gjakovë/Đakovica. In the village of Mejë/Meja, the convoys passed through two checkpoints, where the police separated 274 males from the convoys, ordering the rest to continue towards Albania. The mortal remains of 252 of those men were found in 2001 in a mass grave in Batajnica, 10 in Mejë/Meja and surrounding villages, while 12 men are still unaccounted for. How and where exactly they were killed remains largely unaccounted for, as this is one of the only massacres of the war with no survivors, and therefore no eye witnesses.

- Almost the entire police and military leadership of the Federal Republic of Yugoslavia (FRY) was found guilty and convicted by the ICTY of the crimes committed in Operation Reka. However, to date, not a single individual has been tried before Serbian courts for the crimes committed in Operation Reka, or for the concealment of bodies in the Batajnica mass grave, despite the fact that during the ICTY trials, the military and police units which took part in it were identified.

- While the OWCP announced the case would be investigated in 2004, more than 10 years after no investigation has been launched, despite ample evidence given by the ICTY on the pattern of the crimes and the involvement of Serb officials. Indeed, it is available information that VJ and Serbian police units took part in Operation Reka. A certain number of those persons who perpetrated Operation Reka are holding significant positions in Serbian institutions today. This is in particular the case of Momir Stojanović, who is currently a Member of the Parliament of the Republic of Serbia and Chairman of the Parliamentary Committee for Security Services Control, despite clearly having taken part in Operation Reka.

- Due to the width and scale of the atrocities, this case should be a priority for investigation and prosecution, especially since evidence about it has already been presented and accepted in court. However, so far communications from the OWCP have established that no reliable conclusion had been reached on the identity of perpetrators.

Despite their shortcomings, the DWCHC and the OWCP have the potential to provide justice to many victims of the atrocities committed during the war in the former Yugoslavia. In fact, their capacities have significantly developed in the past years. Concerns remain primarily at the lack of progress on mid-level cases, and the limited use of ICTY evidence to initiate important indictments for the delivery of justice.

CONCLUSION:
TRIALS NECESSARY BUT INSUFFICIENT

As this chapter has shown so far, the case of Kosovo is a great case study of the issues and controversies around criminal prosecutions in post-conflict contexts. It illustrates the dilemmas of international versus local trials, and the crucial issue of the perception of justice by victims. The latter is often negatively affected by the inherent and structural limitations of trials, as well as by the overwhelmingly ambitious goals set for international criminal prosecutions, which are expected to achieve justice for victims, accountability, democracy-strengthening, deterrence, and reconciliation all together. These controversies can be grouped under 4 interrelated aspects, and lead to the conclusion that trials alone cannot conduct the entire TJ task and need to be combined with other mechanisms.

The discrepancy between the disproportionate expectations set for trials and their inherent and structural limitations.

While TJ is a very important enterprise, none of the mechanisms designed to carry it out is perfect, and they all have their inherent limitations. Trials, due to their necessary selectivity, can only ever be a partial way to dealing with systematic human rights abuses after conflict. Moreover, whether these prosecutions are held locally or abroad has an impact on their effectiveness, and on the perception that justice has been done by victims. Additionally, there are, quite simply, limits to what trials can achieve, as retributive justice is no panacea for victims (see below). Keeping in mind these inherent limitations, the main impediments to the full efficiency of criminal justice are mistakes in the management of local and international criminal trials (issues with outreach, witness protection, etc.).[85]

85 Orentlicher (2010)

The limits of Retributive Justice, despite a clear demand for accountability

While more than 800 bodies were found in the Batjanica grave and 52 in the Rudnica grave, only a handful of individuals have faced trial for this crime in both international and local courts, leaving the impression that many of these crimes remain unaccounted for amongst Albanian victims and their families. This is even truer amongst Serbian victims. The selectivity of trials provides an inevitably symbolic justice.[86] Leading offenders and some of their victims will be heard, but the majority of victims will not. Moreover, during trials, victims are just one element of the proceedings: their testimony will be examined by the court solely in order to establish or dismiss guilt; they are often not able to tell their full story, and their assertions will always be challenged.[87] Criminal justice is punitive in nature, yet this might not bring full satisfaction to the individual victims if they perceive their judicial role as secondary to that of perpetrators.[88]

This frustration with the justice provided by trials needs to be tempered by the unquestionable value of ending impunity, evident in the clear satisfaction that it brings to victims who, overall, prefer an imperfect justice process to no justice at all.[89] Indeed, frustrations expressed at the fact that some criminals remain uncaught by the ICTY illustrate that bringing them to justice is what victims want.[90] While courts focus excessively on perpetrators, they provide victims with the accountability they seek.[91] Nonetheless, as is shown by the example of criminal prosecutions in Kosovo by the ICTY, EULEX trials, and Serbian courts, while a demand for retribution has to be met, more retributive forms of justice are also necessary. A Truth Commission (TC), by making victims central, can contribute more to the process of their healing.[92] Moreover, TRCs avoids lengthy legal procedures by providing an official yet flexible platform for any victim to be heard, giving 'a voice to the voiceless'.[93]

86 Given the millions of people affected, in particular since a single indictment requires several years, many documents and testimonies, judges and lawyers, etc. See Akman (2008), p132
87 Akman (2008), p134
88 Akman (2008), p133 ; Clark (2009), p464
89 Orentlicher (2010), p33
90 Clark (2009), p471
91 Ibid, p486
92 See the issues with this medical term in Kerr & Mobekk (2007), p136
93 Akman (2008), p134 ; Kerr & Mobekk (2007), p138

The limited contribution of trials to reconciliation

On the reconciliation level, criminal prosecutions in Kosovo have left both communities with a sense that many of the atrocities committed during the conflict have gone unpunished, and have resulted in a feeling on both sides that, in the prosecution of war crimes, the "other side" was accorded preferential treatment. The Serb community points to the low number of Albanians convicted for war crimes committed against Serbs, and the failure to convict high profile politicians. Similarly, a common complaint from the Albanian community is that excessive attention is paid to the prosecution of Albanians, when so many Albanian victims have not received justice (in particular in the current context of the creation of the special court and recent mass grave excavations at Rudnica). Trying those bearing the greatest responsibility, it has been argued, would assist the deflation of the collective blame phenomenon that is a recurrent feature of contemporary civil wars, via the exposure of the leadership's role in exacerbating hatreds and manipulating opinions. However, the selectivity of trials and their perception through an ethnic prism have not eradicated collective blaming, and have in fact exacerbated ethnic narratives rather than defused them. Against this shortcoming, the truth provided by TRCs, going beyond the mere 'trial truth' provided in trials, might be of greater help in building a collective memory and progressing towards reconciliation.

Variety of needs, complementarity of means

Due to the international inclination towards trials, victims' needs have often been reduced to the sole desire for retributive punishment. While such a desire is very real, it is only one aspect of what needs to be restored after conflict. The appraisal of the situation in Kosovo shows that the legacy of criminal trials is neither black nor white. Prosecutions in this context have been absolutely necessary, because they are very important for victims and bring justice, truth and reconciliation, albeit not in the straightforward way they are expected to.[94] Nonetheless, it is crucial to recall that, due to their limits and flaws,trials must be part of a holistic and integrated approach to Transitional Justice.[95] TCs, focusing more on truth-seeking and reconciliation, are an equally important part of the transitional justice puzzle, and a complement to other approaches.[96]

94 Degruson (2014), p11

The ambiguous role of international criminal prosecution in northern Uganda[97]

98

In the light of the considerations set up in the introduction, and of the examination of the role of trials in Kosovo, a parallel can be drawn by looking at the impact of the International Criminal Court (ICC) prosecutions in Uganda since 2004, and at the reservations expressed regarding its cultural relevance and its impact on local reconciliation.

1. **The international versus local and retributive versus restorative justice framework is deeply flawed in Uganda**

- A major criticism of the ICC involvement in Uganda was that retributive justice did not resonate with the victims, and that the ICC's intervention was a dismissal of customary justice preferences, a dispute resolution system of long date based on forgiveness and the restoration of clan membership. These traditional mechanisms seemed to promise deeper local ownership and cultural acceptability in Uganda.[99]
- However, opposing these mechanisms to criminal justice as a whole was too simplistic, as surveys showed that attitudes towards the meaning of justice was shaped by personal experiences of violence, group membership, and cultural affiliation, and was therefore dynamic and in no way generalisable. As substantial commitment to accountability was recorded, it meant that mechanisms based on forgiveness did not suppress the demand for accountability from parts of northern Ugandan society. [100]

95 Lambourne (2008) ; Mani (2002)
96 Ibid. p128

- The polarization of the debate between international versus local and retributive versus restorative justice is too simplistic, as neither of them alone is likely to adequately fulfill the demands of justice in such a complex and multi-layered conflict. Both the ICC and traditional mechanisms are flawed in that they claim indisputable and universal legitimacy for the manner in which they seek to bring justice. In fact, they are both legitimate ways to deal with the legacy of the conflict in northern Uganda.[101]

2. The ICC involvement failed to resonate with the complexities of the conflict, hampering local reconciliation

- In Uganda, the victims/perpetrator dichotomy used in trials is unhelpful to understand the dynamics of this war, characterized by atrocities committed on all sides, and where 85% of the LRA was composed of abducted children, therefore simultaneously perpetrators and victims. In this context, the real challenge was reintegration and reconciliation for those individuals, and some claimed it would be better achieved through traditional restorative rituals focusing on forgiveness and seeking a way of coexistence between former parties, rather than on divisive individual prosecutions.[102]
- Moreover, the ICC prosecutorial pattern – focusing only on the rebels and excluding government officials - brought a very incomplete telling of violence and accountability, considering the Ugandan history long-term, with its many different layers of responsibility shifting through time.[103]
- Finally, the ICC has not addressed the structural (socio-economic) roots of the war, in particular the long-lasting neglect of the north. When asked, economic and social rebuilding is the most pressing concern of affected communities, and it is clear that the ICC alone will not bring lasting peace if it is not backed up by general development.

The case of Uganda shows the limits of criminal prosecutions in such a post-conflict context. Albeit desirable and necessary, trials must be designed carefullym and completed by other tools such as TRCs, reintegration programmes and material assistance, as no one-size-fits-all solution can sufficiently restore justice to the victims of Uganda.[104]

97 Degruson (2014)
98 photo: Kersten M. http://justiceinconflict.org/2011/10/18/revisiting-the-peace-justice-debate-in-northern-uganda/
99 Ssenyonjo (2007), p61, pp64-5 ; Hovil & Quinn (2005), p24 ; Nagy (2013),
100 Otim & Wierda (2010)
101 Hovil & Quinn (2005), p31; Branch (2007), p193
102 Nagy (2013)
103 Nagy (2013)
104 Allen (2006), p160

CHAPTER 4:
THE RIGHT TO KNOW & TRUTH COMMISSIONS

Achieving a common version of history via truth-seeking processes, and a common memory of the past, is essential to reconciliation and to moving forward. While many TJ instruments contribute to truth-seeking (such as trials proceedings, accurate records of victim casualties, declassification of archives, etc.) one of the most appropriate instruments are Truth Commissions (TCs).

19. The purposes served by the right to know

19.1. The right to know for individual mourning: the benefits of the truth

The right to know the truth about what happened in the wake of armed conflict is recognized by all societies and individuals, as a necessary part of mourning after conflict. Trials can assist this mourning, but only for a few victims, due to their selectivity, therefore the right to know cannot be fully fulfilled by a court. The right to know also prevents approximations as regards the casualties or the pattern of violence that are harmful to victims' self-esteem, as was established in the first chapter on the recording of casualties.[105]

19.2. The right to know in order to understand the pattern and extent of the war

As was previously established, trials focus on single historical events, because they must respect the principle of legal certainty and because they must be selective. The truth they give is therefore only partial. The right to know in fact goes beyond mere 'trial' truth, in order for victims to understand the pattern of violence that has taken place and where their individual losses are localized within the bigger picture of violence.

105 RECOM Initiative' (2012)

19.3. The right to know in order to prevent political manipulations

Nowhere better than in the Balkans have unscrupulous leaders created myths serving their power ambitions by prolonging grievances. In a post-conflict context, it is very easy for the new leadership to perpetuate these myths by claiming that members of their ethnic group are innocent victims while others are all culpable perpetrators, in order to perpetuate inter-group animosities. Not knowing about the facts in an exhaustive manner means they will remain open at best to interpretation, at worst to ideological fantasizing. Prosecutions can help deconstruct this dangerous myth-making, but only shed light on some events. Moreover, the previous chapter showed how trial verdicts can also have the counterproductive effect of dividing along ethnic lines. The right to know in order to establish the facts and to counter revisionism goes beyond the truth that trials can bring, and is better served in a wider enterprise of truth-seeking.

20. Truth Commissions: definition and tools available

The first TC ever established was Argentina's National Commission on the Disappearance of Persons, created by President Raúl Alfonsín on 15th of December 1983. It issued a report entitled Nunca Más (Never Again), that documented all human rights violations that took place under the military dictatorship, and triggered the trials of the juntas. Building from these Latin American origins, TCs have progressively become an essential TJ tool. They have been implemented in 30 different occasions as of today, under a variety of forms, with the South African TC being the most famous example.

TCs are non-judicial and independent panels of inquiry established to determine the facts, the root causes, and the societal consequences of past human rights and humanitarian law violations. They include a number of investigative steps, from the consultation of archives to the interview of individuals via public hearings. The TCs generally conduct independent research, design material support to victims, and propose policy recommendations to trigger institutional and legal reform and prevent recurrence of war crimes and human rights violations. Their work can also open way for criminal prosecutions, although punishment is not the focus on TCs, which can also offer partial or complete amnesties.[106] They also aim to reach a final historical narrative about the past, and to evidence a pattern of abuse over a set period of time rather than a specific event.

21. Strengths and contributions of Truth Commissions

TCs contribute to TJ in several different ways, and their strengths are often seen by contrast to the limitations of criminal prosecutions. Indeed the main asset of TCS is that they constitute retributive justice, by providing a historical record (truth) and a platform to victims for the acknowledgement of their wounds. Moreover, TCs can contribute to other TJ instruments in several ways.

21.1. TCs bring the truth and a platform for the victims

Truth commissions have the potential to break cycles of violence by providing restorative justice to victims. Restorative justice is a theory of justice based on the assumption that, unlike retributive justice, redress can be brought to victims via healing rather than punishment. In this respect, it is the healing power of talking about the past and of knowing the truth that is being propounded. Moreover, the avoidance of focusing on punishment comes from the objective of living together. Indeed, Desmond Tutu, justifying the creation of the TC and the use of amnesty, stated : "While the Allies could pack up and go home after Nuremberg [war crimes tribunals following WWII], we in South Africa had to live with one another." Societal reconciliation is often a stated goal of truth commissions.[107] Regarding the individual justice provided to victims, the previous chapter highlighted the limits of a purely retributive approach to justice.[108] In trials, victims' testimonies are used to determine guilt and their role can seem secondary to that of perpetrators. It has been

106 ICTJ factsheet I (2008)
107 Brahm (2004)
108 Clark (2009), p464

claimed that TCs, by making victims central, contribute more to their healing process, and is a better platform for the acknowledgement of their wounds.[109]

Moreover, because trials are costly and lengthy, the justice provided is inevitably symbolic.[110] Leading offenders and some of their victims will be heard, but the majority of victims will not.[111] Such trials can only paint a partial picture of the historical events (only those needed in court proceedings will be examined), but also, they cannot bring more than partial satisfaction to victims. Furthermore, those victims heard in court will necessarily be subjected to frustrating cross-examination procedures and the legal challenging typical of the adversarial system.[112] Restorative justice provided by TCs, on the other hand, avoids lengthy and cumbersome legal procedures by providing an official yet flexible platform where any victim can be heard.[113] The South African experience, for instance, demonstrated the ability to hear thousands of victims with no paperwork or bureaucrat inertia, and in a very cost-effective way.[114] In that respect, TCs 'give a voice to the voiceless'.[115] By bringing a platform to all victims without distinction, and without proceeding with the selectivity that has plagued trials, the restorative justice delivered by TCs allows victims to tell their stories, thereby obtaining some form of redress, and recovering some of their dignity.[116]

21.2. The contribution of TCs to other TJ instruments: institutional reforms, reparations, prosecutions

Via their conclusions and findings, often grouped in a final report, TCs contribute to several other instruments of TJ. They provide recommendations that can lead to institutional and legal reforms of the government in power, in order to prevent reccurrence of

109 See the issues with this medical term in Kerr & Mobekk (2007), p136
110 Given the millions of people affected, in particular since a single indictment requires several years, and many documents and testimonies, judges and lawyers, etc. See Akman (2008), p132
111 Tepperman (2002) [online]
112 Corliss (2013)
113 Akman (2008), p134
114 Ibid.
115 Kerr & Mobekk (2007), p138
116 Brahm E. (2004)

past violence, and to reparation programmes to bring material redress to the victims. Finally, by establishing who was responsible, they can also lead to criminal prosecutions. Via these interrelated contributions, TCs provide the opportunity to previously divided societies to initiate the process of rebuilding civic trust between communities and citizens, and trust in the institutions in place.

Contributions of TCs to TJ: the case of Peru[117]

The TC established in Peru in June 2001 was tasked to investigate the abuses committed by state officials and insurgents. To do so, it inquired into the conditions that led to the outburst of violence, and completed a report the 28th of August 2003, in which it condemned the atrocities committed on all sides. The TC's contributed to the initiation of political reform, criminal prosecutions and a reparations programme for victims, by that greatly contributing to Peru's democratic transition.

Different TCs will have different impacts on different post-conflict situations. However, they also have their own inherent and structural limitations.

22. Limits and Weaknesses of TCs

The effectiveness and contribution of TCs in bringing justice and reconciliation to victims as has been claimed above have exhibited some limitations. On the one hand, just as we observed for trials, there are some inherent limitations to what TC can achieve, due to the limits to retributive justice and to the therapeutic effect of truth. On the other hand, some truth commissions have been flawed from the very moment of their establishment, due to external factors or to their own mandate. In this respect, the case of the SA Truth and Reconciliation Commission is illustrative. More generally, just as for trials, the general expectations of what TCs can achieve have been overoptimistic and account for the subsequent criticisms.[118]

117 ICTJ factsheet II (2008)
118 Brahm E. (2004)

22.1. The questionable benefits of the truth

The therapeutic benefits of victims coming forward in front of a TC are not straightforward. It is claimed that the opportunity given to victims to tell their story and hear of their relatives' fate is beneficial to their healing process. While this is certainly true in most cases, for some victims it has been quite a traumatizing experience, bringing back old distress and therefore causing many new ones.[119] The benefits victims can get from telling their stories, in order to be wholly fulfilling, need to be part of a long-term process. In a TC however, victims don't always have enough time available to come forward the way they wish, and sufficient resources are often lacking to ensure follow-on support. In fact, empirical studies have shown that the ability of TC to soothe victims' negative feelings has been mixed. While a survey conducted in SA established that more than half of the respondents felt the TC may have made people angrier, in El Salvador widespread support to the commission's findings was reported.[120]

22.2. Pragmatic limits to what TCs can achieve

TCs can be used as political tools. This was the case in Uganda and Chad, where the TC findings served to discredit the previous regime and to legitimize the new governments. By contrast, in Zimbabwe, the findings of the TC were never published because they were too critical of the new government. In Ecuador and Bolivia, the TCs were dissolved because their work was deemed too politically sensitive.[121] Moreover, the TCs capacity to go far enough in their enterprise to deal with the past and generate reconciliation is limited by their lack of implementation powers: they do not have the power to punish nor the authority to implement the reforms they recommend, and are widely dependent on political support.

119 RECOM Initiative' (2012)
120 Brahm E. (2004)
121 Brahm E. (2004)

22.3. The limits of restorative justice and the issue of amnesties

TCs are thought of as restorative bodies, focused on healing and restoring relationships rather than on criminal punishment. This inner feature often forbids fulfillment of accountability, which is a very frequent demand amongst victims. Indeed, for the victims there lies a clear satisfaction in the ending of impunity and the punishment of those who have done them wrong.[122] The practice of TCs of 'wiping the slate clean', often resulting in amnesties, is controversial. While it allows for a wider participation and avoids a rigid focus on punishment, it also abrogate the rights of victims to seek redress, leading to individual frustration and resentment, since it concretely benefits those who have committed offenses, damaging the victims' self esteem and right to justice. In El Salvador, blanket amnesties were given to most military officers through the TC, creating great dismay in the civil society.[123] Additionally, the use of amnesty contradicts the principles of the rule of law, notably by damaging the crucial principle that people must answer for their crimes. Accordingly, not victims all are satisfied with this form of retributive justice.[124]

122 Orentlicher (2010), p13
123 Kerr & Mobekk (2007), p139-140
124 Brahm E. (2004)

Trials and Truth Commissions: the restorative vs. retributive justice debate

- **Benefits of restorative justice over 'trial' justice:**
  - Light procedure, flexible platform: many more victims can be heard
  - Victims central to the process: greater healing is possible

- **Limits of restorative justice: takes away victims' right to accountability:**
  - local claim for the punishment of offenders
  - often great frustration of victims with amnesties

- **Pro's and con's to both justice systems:**
  - TCs are a better platform for victims voices and for exhaustive truth
  - Trials provide victims with the accountability they seek, unlike many TRCs.

Following the example of those suggesting that a TC in former Yugoslavia could 'complete the missing part of the ICTY puzzle', it seems that TCs and prosecutions have different pros and cons, and are complementary to rather than exclusive of each other. [125]

125 Akman (2008), p140

22.4. Issues of mandate and means : no perfect recipe for TCs' success

Case study: the South African Truth and Reconciliation Commission (TRC), between successes and limits[126]

127

- **Background:** from 1948 to 1992, apartheid in South Africa was the state's official policy, where non-white South Africans were deprived of basic political and socio-economic rights, such as the right to freedom and assembly, the right to education and to medical care. An estimated 200,000 black South-Africans were arbitrarily arrested, the majority of them undergoing torture during detention and at times summary executions. After years of sanctions and international condemnations, and when Nelson Mandela, leader of the African National Congress (ANC), was released after 27 years spent in jail in 1991, negotiations began with the National Party (NP) then in power. Disagreements were fierce, as the NP wanted amnesties, while the ANP insisted on bringing the white responsible to trial. In April 1994, the ANP won the elections and Mandela became President.

- **The TRC's mandate:** The South-African TRC was established in May 1995, as a product of a political compromise, with the competence to inquire into events from March 1960 until December 1993. The commission was tasked with preparing a findings report, and issuing recommendations on reparations and amnesties. Its members were chosen to represent the totality of South African society (seven Blacks, six Whites, two Coloured and two Indians), and were presided over by Archbishop Desmond Tutu. This institution was established in order to create a common history about the past that would allow former victims and perpetrators to live together.

- **Unprecedented achievement of the truth:** after 3 years, the TRC's report was produced, in which was gathered the testimony of 20,000 people, and the conclusion of public hearings organized in 80 communities throughout the country, painting a fuller picture of the crimes of Apartheid, and exposing man

- **Limits and criticisms:** despite this achievement, the TRC had a number of flaws prohibiting true reconciliation:
  - **A limited mandate:** because of its negotiated nature, the persons to be heard in front of the TRC were limited to those victims of gross human rights violations with a political objective. Consequently, excluded from the TRC's mandate were the victims of forced displacements, of impoverished living conditions, or of other offenses that had not caused direct physical harm to people, but were equally as important.
  - **A limited truth:** as the TRCs did not have the power to compel attendance, many key political leaders stayed away
  - **Discrepancy between the amnesty provisions and the reparation programme:** the amnesty provisions of the TRCs were the most debated elements of the TRC. These were conditional, and granted as long as the crimes were politically motivated and fully disclosed before the Commission. Even though 7,115 persons presented themselves, a lot more abstained, and those who came forward only partially confessed their crimes. 5,392 of them were refused amnesty, but very little judicial action was taken afterwards. To counteract the unpopularity of the amnesty provisions, recommendations were made on reparations. Of the 90,000 victims who applied for reparations with the TRC, less than a third obtained this right, and the payments were late and tedious due to lack of resources. The blatant difference in the treatment of perpetrators and victims was the main factor obstructing true justice and reconciliation in South Africa.

- **Conclusion:** The TRC of South Africa is deemed a unique model in the transition to democracy. Thanks to its 'amnesty for truth' component, many truths were disclosed, and many people took part. Nonetheless, the limits detailed above have left space for debate on the efficiency of truth for reconciliation, at least in this particular case. It should come as no surprise that, in a society which has been divided for so long, there remain today different perceptions of history, as some people still deny that apartheid took place as part of a systematic policy. Moreover, the remaining impunity gap has created many frustrations amongst victims, aggravated by the lack of a comprehensive reparations programme.

126 ICTJ factsheet II (2008)
127 photo:http://www.trial-ch.org/en/resources/truth-commissions/africa/south-africa.html

23. Guidelines for success: the importance of complementarity

Even though all TCs differ in their capacities and outcomes, the example of the South African TRC hopefully allows for some lessons learnt, helpful in designing some guidelines for the success of TCs. Independence from government is crucial, for their success will depend on their credibility and transparency in the eyes of the general public. Victims must remain central, and be given as much time as possible to come forward, in order that the healing process that TCs can provide can be fulfilled. TCs also need to be flexible and aware of the needs of the society they operate in: amnesties may be a good option to attract wide participation, but can also create resentment, so that criminal proceedings should not be excluded. Finally, TCs must be designed in complementarity with other TJ tools, as part of a comprehensive TJ strategy. TCs will work better if aligned with the victim's right to retributive justice and to reparations, rather than substituted for these rights, because bringing truth about past crimes will be very frustrating if it falls short of punishing perpetrators, bringing material assistance to victims, and reforming institutions.[128] Surveys conducted in South-Africa, which found that most victims were complaining about the lack of reparations, showed the particular importance of material assistance to victims in TJ. Before turning to this aspect, the next chapter will look at the most recent truth-seeking effort in former Yugoslavia.

128 ICTJ factsheet I (2008)

Complementarity of means: the case of Rwanda[129]


130

- **Background:** independent since 1962, Rwanda had early on seen a violent power struggle between its Hutu majority (80% of the population) and Tutsi minority, culminating in a civil war in 1994. The two groups have been ethnically divided only since the colonization of Rwanda, which forever altered what previously was a fluid and essentially socio-economic distinction between Tutsis – mostly herders - and Hutus – mostly farmers. Notably, Belgian rule ethnicized relations via the imposition of identity cards indicating race, and by generally favouring Tutsis, whom they placed in charge of their colonial administration, leading to great resentment from Hutus, who took back control after decolonization. While the civil war ended at the beginning of 1994, the violence dramatically peaked in April 1994: in 3 months, 800,000 Tutsis, Twas and moderate Hutus were brutally killed by their Hutu neighbors.

- **Variety of TJ means:** the International Criminal Tribunal for Rwanda (ICTR) was established by the Security Council in November 1994 to bring those who had planned and participated in the genocide to justice. Local trials, the Gacaca courts, also took place to try the thousands of persons accused of having taken part in the massacres. Finally, the National Unity and Reconciliation Commission (NURC) was created in 1999, to end discrimination and promote cohabitation between communities.

- **Operations of the NURC:** because this task was already completed by the ICTR and the Gacaca, the NURC's mandate did not include a truth-finding component. Instead, the Commission used a number of tools such as a Peace-building and Reconciliation Programme, aiming to gather the population of Rwanda to debate on national politics, or solidarity camps, initiating their participants into principles of peaceful coexistence and tolerance. Several national Summits were also organized to help make the process participatory, and 'reconciliation clubs' were formed in schools and in universities.

- **Legacy:** A Report was published in 2001, establishing the NURC findings regarding, inter alia, the origin of the conflict in Rwanda, the causes of violence after the genocide, and social cohesion in Rwanda. The Commission helped to draft a law on the repression of discrimination and to ensure that the text of existing laws were consistent with the goal of reconciliation. Today, identity cards no longer establish racial identity, and Hutus and Tutsis have been integrated into one single armed force. The reconciliation is deemed to have been an overall success, thanks to the complementary work of different tools.

129 TRIAL
130 photo:http://archive.worldvisionmagazine.org/story/faqs-rwanda-genocide-and-aftermath-3

CHAPTER 5:
THE RECOM INITIATIVE

The RECOM process (inter-state Commission for Establishing and Disclosing the Facts about all Victims of War Crimes and Human Rights Abuses in the Territory of the Former Yugoslavia from 1991 – 2001) was initiated in May 2006 in order to provide for a collective, regional, truth-seeking effort. It is driven by the regional Coalition for RECOM, composed of more than 1900 members – organizations and individuals from all post-Yugoslav states. After years of lobbying, it is expected that a regional truth commission will be established in the near future.

24. The goals pursued by RECOM

Due to the regional character of the wars in the former Yugoslavia, including the Kosovo conflict, and to the movement of victims and perpetrators across the region, regional cooperation must be an essential element of any Transitional Justice effort. RECOM's overall objective is to establish a fact-based regional consensus about the past, advancing the process of reconciliation between different communities, and between states themselves. Unfortunately, both the national political agenda throughout the Balkans and poor awareness of regional projects within the population often hinder progress in this field.

Without aiming to be an alternative to war crime trials conducted in the Balkans, RECOM attempts to compensate for the limitations of the perpetrator-oriented and individual facts-oriented approach to truth and justice provided by trials. Indeed, in the countries of former Yugoslavia, and in Kosovo as chapter 3 demonstrated, criminal prosecutions have not led to any public debate on the past nor been perceived as legitimate mechanisms to establish the truth about the past (notably because their verdicts are seen through an ethnic prism). In front of a local demand to establish this truth, RECOM was formed as a local initiative, drawing its legitimacy from the ownership of the project by a number of local civil society organizations.[131] The core idea behind RECOM, therefore, is both to establish the facts behind the war crimes and to trigger public debate about those facts.

One of the core aspects of RECOM will be the final establishment of the casualties of the war, by means of the production of a definitive list of all those killed and missing. Knowing about the fate of the dead and missing is crucial to coping with the legacy of the war. In this respect, it will be able to rely on the work that has already been done in this respect by civil society organizations (HLC, HLC Kosovo, Documenta, etc.). This preliminary work really makes RECOM's objective realistic and feasible.[132] Additionally, the facts established by RECOM will prevent their political manipulation, exacerbating exclusionary nationalist feelings.[133] It will also help in designing a comprehensive mechanism for victims to seek reparations.

25. The coalition for RECOM, public support and local ownership

The Coalition for RECOM, formed in 2008 in Pristina, is a network of several hundred civil society organizations and individuals (more than 1,900, as of 2013) – including victims' associations, human rights groups, former detention camp inmates, veterans' groups, youth organizations, women's groups, historians, journalists and artists - advocating for the establishment of RECOM by the governments of post-Yugoslav countries.[134]

131 'Memo: The RECOM Initiative - The Case for Support of the European Union ' (2009)
132 RECOM Initiative' (2012)
133 RECOM Initiative' (2012)
134 'Memo: The RECOM Initiative - The Case for Support of the European Union ' (2009)

Following the establishment of the coalition, a campaign was launched in 2011 to collect 542,000 signatures from members of the public to support the creation of RECOM. People signed irrespective of their ethnic background, showing thereby their interest and support to the project.[135]

26. The adoption of the RECOM Statute and the challenge of political support

The coalition soon tasked a group of 4 jurists and 2 historians from different states to draft the RECOM Statutes, defining its goals, tasks and competences, and taking into consideration international legal standards, previous TC experiences, and the particularities of legal systems in the region. The general assembly of the Coalition adopted the RECOM Draft Statute in March 2011.[136]

The draft statute was then sent for review and support to all presidents of the post-Yugoslav states, in order for them to examine the constitutional conditions for the establishment of RECOM in each country. In November 2014, the coalition reviewed and validated the changes that had been made by the presidents' envoys, deemed to have preserved the essence of the draft statutes.

The next step is the national parliaments' vote to implement RECOM. This has not taken place yet, as RECOM has now entered in its most difficult phase: that of support at state level.[137] Regional governments' willingness to commit efficiently to this process will be put to the test in the coming months.

135 RECOM Initiative' (2012)
136 RECOM STATUTES
137 RECOM Initiative (2015)

CHAPTER 6: REPARATIONS

The right to reparations is an extremely important aspect of the delivery of justice to victims, and therefore an essential transitional justice component. It is an integral part of international criminal law, reflecting the growing attention given to victims, and evident in the provisions of the Rome Statute of the International Criminal Court,[138] and in the UN Basic Principles on reparation (2006).[139] Despite these international provisions, however, it is generally admitted that responsibility for reparations is that of the State.

27. Different forms of reparations restoring different aspects of justice

Reparations can be material or symbolic. When it comes to the former, monetary compensation is the most common form of reparation, but a lot of other methods can be used (restitution, compensation, rehabilitation, social benefits, satisfaction and guarantees of non-repetition). The latter can take the form of formal apologies, public commemorations, monuments and memorials, and is commonly referred to as memorialisation.[140] No matter their shape or nature, reparations all contain the important social and psychological functions of the rehabilitation of and tribute to the victims. They also contribute to reconciliation by jointly bringing different stakeholders into the public sphere of remembrance.[141] Moreover, it is claimed that the right to reparations is one of the most 'concrete' dimensions of TJ.

138 See Article 75 of the Rome Statute of the International Criminal Court
139 UN Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, preamble adopted by the UN Commission on Human Rights on 19 April 2005
140 Djordjević (2002)
141 Naidu (2004)

Variety of reparation measures through history:[142]
Chile
• After the conflict in Chile, the government paid about 1,6 billion dollars of pensions to victims of the Pinochet Regime (from 1996 to 2008). It also established a specific health care programme for survivors and publicly apologized for their suffering.
Sierra Leone
• The President, in 2010, formally apologized to the woman war victims, until then left out of the rehabilitation process.
Cambodia
• Symbolic and collective reparations were ordered by the Extraordinary Chambers in the Courts of Cambodia (ECCC) after the first crime against humanity conviction. The ECCC also compelled convicts to present apologies to their victims.

Both material and symbolic reparations bring symbolic justice to the victims, by publicly affirming that victims are rights-holders entitled to redress, with acknowledgements of their loss, and tributes to their memory. It also symbolizes the official acknowledgement of the state for its past wrongdoings.[143] Material reparations additionally provide some form of material justice.

28. Material reparation programmes and their challenges

Despite its desired pragmatism, the design and implementation of an effective reparations process is fraught with difficulties.

28.1. Material justice: Justice in its concreteness

Armed conflict generally affects the poor and vulnerable groups of society more strikingly than others. Reparations are an indispensable element of post-conflict justice, helping victims to be able to re-establish their dignity, resume their lives and participate in society on an equal footing. Many studies accounting for victims' perceptions of justice have shown some resistance to a definition of 'justice' that focuses solely on the punishment of suspected war criminals, for

142 Hamber (2000)
143 Hamber (2000)

justice had to include an array of social and economic rights as a compensation for victims.[144] Lessons learnt from the ad hoc tribunals set up by the UN, where too little attention was given to the victims themselves and their rights (including their right to reparation), shed light on the detrimental effect this kind of evaluation of priorities has on victims' perceptions of justice – as being seemingly unjust and ignoring their tragic reality - and therefore to the goals promoted by international justice itself. Indeed, the examples of both Uganda and South Africa previously examined have shown that, when asked, economic and social rebuilding are the most pressing concerns of affected communities. Trials or truth alone will not bring lasting peace nor the feeling that justice has been done, if it is not backed up by general development and material assistance.[145]

28.2. Reparations' dependence on casualty recording

Preliminarily, the design of a comprehensive reparations programme after conflict is no easy task. Indeed, it requires identifying all victims and distinguishing which of them should be entitled to reparations. The prerequisite of reparations is therefore an accurate list of victims, linking two TJ tools: reparations and recording of casualties. In the former Yugoslav states for example, the important gaps remaining in victims' data has impeded accurate assessment of how many of them are in need of reparations.[146]

28.3. Political risks of reparations

If wrongly designed, a reparations programme can exacerbate political tensions. Indeed, in post-conflict states undergoing political transition, various considerations need to be considered, such as how the reparation process is perceived by different parts of the population, and how the balance of power is affected by it. A partisan and biased distribution of reparations, differentiations between victims, will further divide the society and exacerbate grievances.

144 Stover (2005)
145 'Visit by ICC State Parties Delegate to Uganda' (2010), p37
146 Van der Auweraert (2013)

28.4. Individual frustrations and disenfranchisements caused by reparations

All reparations programmes will have a discretionary threshold, involving the impossible task of putting a monetary value on the suffering of victims. As different values will be awarded to different victims, and as some victims will not qualify under this threshold and therefore be excluded from reparations processes, this can create feelings of injustice and frustration.[147] This was the case in South Africa, where were only victims of 'gross violations', that is, of physical harm, were considered entitled to reparations, thereby excluding those who had suffered from violations of their economic and social rights (deportation, exclusion from schools and hospitals, etc.).[148] Moreover, most of the time, veterans will be awarded a considerably larger amount of reparations than civilian victims, symptomatic of the dominant discourse exalting those who fought on 'our' side.[149] Conversely, the assignation of victimhood for the purpose of reparations can perpetuate the victims' sense of such an identity developed during the conflict, thereby causing further segregation between groups.

28.5. Limits of monetary compensation

The losses of war cannot really be fully redeemed with money, and doing so with reparations is sometimes deemed to be buying victims' silence. Therefore – and even though they are welcomed by victims in need of material assistance - in essence, material reparations are merely another form of symbolic reparation.

147 Van der Auweraert (2013)
148 Hamper (2000)
149 Van der Auweraert (2013)

Material Reparations in Kosovo: a discriminatory law

- In Kosovo, the Law[150] providing for war crimes reparations is flawed with a number of shortcomings. The most important issue is the Law's discriminatory definition of a civilian victim. Indeed, the Law defines a civilian victim as *"a person who died or waswounded by enemy forces and then died between 27/02/1998 and 20/06/1999."*

- This excludes all civilian victims of non-enemy forces, i.e. from the Kosovo Liberation Army or NATO, from the circle of those eligible for reparations, and many victims who died outside the set timeframe, specifically victims of the retaliatory killings of Serbs by the Albanian victors.

- Evidently, this law is particularly in disfavour of Serbian victims of the war in Kosovo - but not only them, because some ethnic Albanians also were victims outside of this time frame, as well as members of the RAE community.

- Nevertheless, the perceived bias against Serbs perpetuates a wrong 'black and white' narrative about the war, preventing an accurate and fact-based truth. It is also perceived as politically motivated and discriminatory, creating discord amongst victim communities detrimental to reconciliation, as Serbs have no recognition to their victimhood under this Law.

- It is one of the HLC Kosovo's major projects to rectify this discrimination by – on the basis of the findings of the Kosovo Memory Book – identifying all those victims entitled to reparations and advocating for a more inclusive legislative frame.

150 The full name of the law is: "Law on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of the Kosova/o Liberation Army, Sexual Violence Victims, Civilian Victims of War and their Families". It will be referred to hereafter as the Law on Reparations

29. Symbolic reparations: the double-edge sword of memorialisation

29.1. The contribution of memorialisation to peace and justice[151]

Roses of Sarajevo (Degruson)

Memorial to the Muslim victims in Višegrad cemetery (Degruson)

Symbolic reparations can take the form of formal apologies, public commemorations (commemorative days, street names) and memorials (architectural memorials, museums). Memorialisation aims both to remember - ensure that the memory of past human rights violations is preserved - and commemorate - as a tribute to victims, an acknowledgement of facts preventing denial, and a sign for non-repetition.[152] In this respect, symbolic reparations contribute to the establishment of an undeniable historical record of the past, and to the intergenerational transmission of a common historical memory.[153] This, in turn, shapes future narratives, and therefore future behaviours, and so has the potential to promote tolerance, acceptance of the other, and reconciliation.[154]

151 Djordjević (2002)
152 'The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice' (2007)
153 Hamber (2000)
154 'Post-war Memorialisation and Dealing with the Past in the Republic of Kosovo' (2015)

Different memorialisation initiatives in history:
Former Yugoslavia[155]
• The memorial of the victims of Srebrenica in Potočari ; the roses of Sarajevo honouring victims of the siege ; the public apology by President of Montenegro Milo Djukanovic to the Croatian people in June 2000
South Africa
• Constitution Hill in Johannesburg, a former prison that is now South Africa's Constitutional Court, showing how spaces can be transformed after conflict to symbolize transition.
Argentina
• Every year the 24th of march sees great demonstration to mark the beginning of the 70s military dictatorship.

If handled with care and sensitivity, memorialisation can truly assist the TJ goals of exposing the truth, providing some form of justice to the victims, and serve as a flagship for future and current generations that embodies a non-violent rhetoric.[156] Unfortunately, it is often misused, instead hindering TJ goals.

29.2. Misuse and drawbacks of memorialisation

As a mechanism for representation of the past, memorialisation is a double-edged sword. While it has the potential to support TJ processes, it can also be very divisive. When they are left unregulated, they slip out of control, but when they are controlled, they often become political tools.

- **The problematic lack of control on what sort of memorials are built**

In the Balkans, hundreds of war memorials have been built since the war, with little to no control over how much public money is spent on them or whether they perpetuate ethnic divides. The competent administrative bodies (generally municipalities) are not careful enough, resulting in the sprouting of individually sponsored

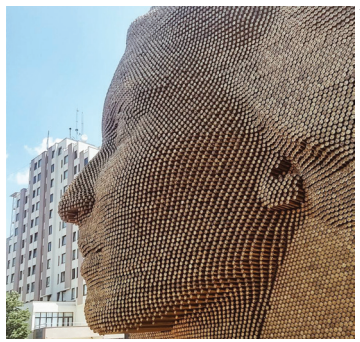
155 Djordjević (2002)
156 'Post-war Memorialisation and Dealing with the Past in the Republic of Kosovo' (2015)

memorials. This lack of control over what kind of monuments are built is problematic: with no supervision, they can offer selective views of history, be ethnically biased or inflammatory, celebrate war criminals, and undermine victims' self-esteem. And indeed, most monuments commemorate fighters, victims, so-called war heroes in a mono-ethnic way, preventing alternative narratives and with few to no attempts to promote inclusiveness and reconciliation. In Bosnia, for instance, most commemorative plaques to victims of the siege of Sarajevo have been financed independently by victims, veterans and private donors. The names listed have not been checked by competent authorities, allowing for duplicates and inconsistencies. Some of the listed people are in fact sometimes still alive. Whether these flaws are deliberate or not, they fuel a manipulation of figures that certainly serves a particular political agenda.

- **The controlled political manipulation of memorials**

Apart from this non-regulation, government erecting memorials sometimes use them as a tool to promote their legitimacy. By pointing fingers at 'the others' and imposing the rigid status of victims and perpetrators, memory is used as a battleground for their own agenda and is promoting their own vision of the past.[157] In this respect, it is interesting to notice that the shape and purpose of memorials vary according to the nature of the conflict. Indeed, in post-ethnic conflict contexts, the divided communities usually erect memorials that honour a narrowly defined ethnic social group and its so-called martyrs.[158] The narrative suiting the majority group is likely to be at the expense of the minorities, reinforcing its exclusion, and encouraging ethnic hatreds.[159] In Rwanda, the memorial erected to the memory of the Tutsis makes no mention of the 200,000 Hutu victims of subsequent retaliatory violence. In a society where Hutus are already marginalized due to the weight of the past, such denial is further divisive and exclusionary. Similarly, in Croatia, the government massively invested in a monument to the Croatian Victory in Knin, with no mention made of the ethnic cleansing of Serbs that took place, thereby denying these victims memory.[160] Similarly, up to 2002, more than 2,800 monuments erected during the Yugoslav period had been destroyed, in a move of de-memorialisation.[161] Indeed, memorials are also used to compete for the past, as was shown by the opposing commemoration ceremonies held for the WWI centenary in Bosnia. The Bosnian Serbs erected a statue honouring Princip as a war hero, the day before the centenary of the assassination he perpetuated which gave way to the war.[162] This illustrates how monuments can promote divisive versions of the past, exacerbating ethnic tensions, to such an extent that they are sometimes attacked or violated.

Memorialisation in Kosovo:[163]


164


165

The process of memorialisation in Kosovo illustrates the pitfalls of this enterprise, and the lack of inclusion of a memorialisation initiative within a TJ agenda.

- **No institutional approach to memorialisation:** In Kosovo, no inventory of monuments or record of the expenditure involved exist. Only the Adem Jasahri Memorial Complex in Prekaz has a legal base. The large majority of memorials are private initiatives whose purpose and meaning is unregulated, therefore promoting an individualistic message, with little effort to draw a collective memory of the war.

157 'Kafranbel Mural Raises Concerns on The Future of Memorialization' (2015)
158 'The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice' (2007)
159 'Post-war Memorialisation and Dealing with the Past in the Republic of Kosovo' (2015)
160 'Balkans Gripped by Chaotic Monument-Building Boom' (2013)
161 Djordjević (2002)
162 Jukic (2014)

- **Ethno-nationalist memorialisation:** Memorials in Kosovo reflect an ethno-centered vision of the past, honouring 'heroes' or 'martyrs', with no room for alternative narratives or the memory of 'the other side'. While Kosovo counts many days of remembrance for KLA fighters and Albanian victims (5th -8th March official commemoration to remember the Jasahri family and the KLA forces; 27th April National Day of Missing Persons in Kosovo in memory of the Mejë/Meja massacre; 5th May as the Day of the Martyrs of the KLA), there is no single remembrance day for all the victims of the war. This one-sided memorialisation, leaving no room for an alternative discourse or alternative victimhood, keeps alive the divisive feelings of the war, and precludes reconciliation.

- **Legendary memory: a**s is frequent throughout the Balkans, in Kosovo memorials vehiculate legends of victory and heroism with a surreal rhetoric. In this respect, many memorials do not reflect the true identity of those whom they represent, but instead sustain these myths. It has been noted, for instance, that Agim Ramadani, who on monuments is represented as a strong warrior, was in fact a quiet and rather short person.

- **Gendered memory:** the current state of things leaves little space to commemorate the role of woman in Kosovo's conflict and in the society as a whole. The recent Heroinat memorial, erected in June 2015, tries to correct this by paying tribute to victims of sexual violence in the war. However, this monument came as a political move to content public opinion, rather than to open a real debate on sexual violence. Moreover, once again it honours one ethnic category of victims.

The current memorialisation landscape in Kosovo presents a very narrow and one-sided historical narrative, promoting a partisan view of the past and thereby preventing reconciliation between communities. It is a missed opportunity for TJ.

Criminal prosecution of perpetrators and truth-seeking are necessities, but in themselves, not sufficient for bringing justice to victims. The right to just reparation is a separate and equally essential part of providing post-conflict justice to victims and promoting national processes of reconciliation. However, they alone can only partially meet all the psychological needs of victims, which will remain unsatisfied if not implemented in complementarity with other TJ instruments.[166]

163 'Balkans Gripped by Chaotic Monument-Building Boom' (2013) ; 'Post-war Memorialisation and Dealing with the Past in the Republic of Kosovo' (2015)
164 photo: http://lajmi.net/heroinat-veper-origjinale-apo-kopje/
165 photo: https://connormoriartykosovo.wordpress.com/2014/07/06/adem-jashari-memorial/
166 Hamber (2000)

CHAPTER 7: INSTITUTIONAL REFORM

As part of the TJ effort to address mass atrocities and the legacy of conflict, and because public institutions (such as the police, the military, and the judiciary) often become the instruments of human rights abuses during conflict, it is essential after transition to cleanse and reform them, in order to restore the rule of law, abolish impunity and restore civic trust.[167] Institutional reform therefore involves several enterprises. On the one hand, vetting is used to address individual deficiencies (by eliminating from public service or sanctioning abusive and corrupted officials who took part to unlawful acts). On the other hand, structural and legal reforms are enacted to address structural deficiencies of institutions, by making institutions abide by human rights standards and the rule of law. These different aspects are interrelated. For instance, reforming the Security Sector involves its vetting and structural redesign.

30. Addressing individual deficiencies through vetting processes

30.1. What vetting is: war crimes and human rights breaches as a criterion for institutional reform

As a preliminary remark, it must be said that vetting should not be confused with purges and lustration, although these terms are sometimes used interchangeably in the literature, and cover similar goals, albeit carried out slightly differently. Vetting, understood as the process of assessing an individual's integrity to determine his or her suitability for public employment, is an important institutional reform measure in transitional societies, as a way of reforming abusive institutions through the removal of those responsible for these abuses. There are two main rationales underlying a vetting process. Firstly, vetting aims to legitimize public institutions to

167 'Rule of Law Tools for Post-Conflict States: Vetting: an operational framework' (2006)

foster civic trust, through the exclusion of former abusers who have breached the trust invested in them by citizens. Secondly, vetting aims to prevent the recurrence of abuses by dismantling the abusive structures in public institutions, and installing accountability mechanisms.[168]

Vetting is thus a forward-looking process, turned towards building a better future for the institution, which in turn will support the transition, sustain peace and preserve the rule of law. Although vetting inherently carries a punitive aspect for positively vetted persons, it should not be seen as backward-looking, as this would amount to grounding vetting in some form of punishment or revenge for past behaviour. In fact, exclusion from public posts cannot be seen as an appropriate sanction for the commission of human rights abuses, and presenting it as such would highlight the impotence of the judicial system and fuel the perception of 'cheap justice'. Punishment indeed falls within the scope of criminal prosecutions, but not within that of vetting, although these two mechanisms are obviously complementary. Many post-conflict or post-authoritarian societies have used vetting, purges and lustration as tools of transition, including inter alia Argentina, El Salvador, East Germany, Greece, Poland, the Czech Republic, Hungary and Bosnia and Herzegovina (BiH). It needs to be noted that whether the transition is carried out towards a post-conflict or post-authoritarian state implies different settings for vetting.[169]

168 Bruhman C. (2015)
169 Bruhman C. (2015)

Vetting processes in Serbia[170]

- In 2003, the Serbian Parliament voted in the 'Accountability for Human Rights Violations Act', intended for the establishment of a **Commission for Investigation of Accountability for Human Rights Violations,** to conduct the vetting, in respect of human rights violations committed after 23 March 1976, of persons holding or applying for the highest positions in the political sphere, the judiciary and public administration.

- The Commission was never formed, as no consensus could be reached on its members, and in 2013, the application period of the Act expired. Since then, little or no progress has been made. Thus the need for vetting still remains.

- However, there seems to be no social consensus in Serbia on the necessity of facing the past, as is shown by the animosity towards the ICTY, the failure of the attempt to set up a Truth Commission or the fact that some individuals continue to be hailed as national heroes despite their indictment by the ICTY.

- This absence of consensus is reinforced by the fact that since there was no clear break with the past, persons currently in position of power are often people who were in power then, and would have a lot to lose were a vetting process put in place.

- Nevertheless, lack of institutional reform is a major obstacle to the process of Serbia's reconciliation with its neighbours, as persons suspected of involvement in crimes remain in prominent positions. This is particularly evident from the Operation Reka Report. A certain number of those persons who perpetrated Operation Reka are holding significant positions in Serbian institutions today. This is particularly the case of Momir Stojanović, who is currently Member of Parliament of the Republic of Serbia and Chairman of the Parliamentary Committee for Security Services Control, despite his clearly taking part in Operation Reka.[171]

170 Bruhman C. (2015)
171 'Operation Reka' (2015)

30.2. The features of a vetting process impacting on its efficiency

- **The issue of political will**

Political will to carry out a vetting process is crucial to its successful implementation. Considering, however, that vetting regulates access to positions of power and is a highly political undertaking, its implementation is likely to encounter strong resistance from individuals who risk losing power, specifically where government officials have not been replaced after conflict.[172]

- **Scope and features**

Determining the scope of the vetting process (how many people should be screened and sanctioned) is highly dependent on the resources and political will available.[173] It should thus be limited to and selective of some institutions and some individuals within them (usually at the higher hierarchical levels). As a general rule, the vetting process should be initiated as early as possible in the transition phase, in order to reduce the impact of human rights abusers on the design and building up of the new institutions. As regards positively vetted individuals, there is a wide range of possible sanctions, including, inter alia, suspension pending confirmation or appointment to another post; transfer; early retirement, etc. Vetting can be done via review (targeting serving employees of an institution) or (re)appointment (targeting candidates for service in a public institution).[174]

172 Bruhman (2015)
173 'Measures to dismantle the heritage of former communist totalitarian systems' (1996)
174 Mayer-rieckh & De Greiff (2007) ; Bruhman (2015)

A review process: Vetting the Police in Bosnia[175]

The 1995 Dayton Peace Agreement designated an International Police Task Force (IPTF), run by the UN Mission in Bosnia and Herzegovina (UNMIBH), to reform the police, drastically reducing its numbers and making it more ethnically representative. After registration of the pool of persons to be vetted (23,751 persons were registered), the officers were subjected to extensive background checks and performance monitoring by UNMIBH. An officer would not be certified if there were "grounds for suspicion" that he or she had failed to respect human rights. Approximately 90% were granted full certification. Overall, the UNMIBH police review process did not only lead to a verification of the suitability of individual police officers, it also improved the ethnic and gender representation, thus positively affecting police performance in certain minority return areas.

A reappointment process: Vetting the judiciary in Bosnia[176]

The post-1995 Bosnian judiciary was extremely weak. In 2002, three High Judicial and Prosecutorial Councils (HJPC) were set up and carried out a reappointment process aimed at ensuring the quality of prosecutors and judges, drastically reducing its size and ensuring better ethnic representation. Judges and prosecutors were required to submit detailed information, including about their wartime activities. However, conflict-related information was of limited use, and there was no comprehensive background review of conflict-related activities for all applicants. Nonetheless, as a result of this reappointment process, the ethnic composition of the system significantly improved, and public confidence in the judiciary rose from 60.2% to 74%.

- **Risks: political manipulation and potential disruptions**

Vetting is particularly prone to political manipulation and arbitrary interferences. This is due to the large-scale nature of the process, the often weak procedural guarantees and possibilities of oversight it offers, and the fact that what hangs in the balance is the matter of a certain degree of control over a public institution, an aim worth engaging in partisan politics for.[177] Vetting may also cause a governance gap by removing large numbers of public employees, thereby disrupting the functioning of public service. Finally, vetting can be destabilizating, as positively vetted persons may turn to criminality, organized crime or armed opposition. This is particularly alarming with regards to former security personnel who may have the criminal know-how and the means to use force, and whose trainings

175 Mayer-rieckh & De Greiff (2007) ; Bruhman (2015)
176 Mayer-rieckh & De Greiff (2007) ; Bruhman (2015)
177 Mayer-rieckh & De Greiff (2007)

often do not enable them to find another employment. Such risks should carefully be assessed prior to the start of the vetting process, and mitigated by combining vetting to other measures such as a disarmament and reinsertion programme (DDR), while at the same time weighing them against the rights of victims to justice through prosecutions.[178]

- **The importance of coherence and complementarity**

On the one hand, vetting may be only one aspect of a wide institutional reform aimed not only at relegitimising the institution, but also at reshaping it to render it more effective. This could include, inter alia, reducing the institution in scope, merging overlapping institutions, increasing the professional competences of its personnel and its composition and representation (gender, ethnicity, etc.). On the other hand, and more generally, vetting should be part of a wider TJ program which could consist, inter alia, of criminal prosecutions, truth commissions or symbolic gestures. Vetting may in this respect act as an enabling condition for criminal accountability: by removing those responsible for human rights violations, and thus opposed to change, vetting considerably weakens resistance to investigating and punishing abuses.[179]

Complementarity of means: reform of the armed forces in El Salvador[180]

From 1980 to 1992, El Salvador sustained a civil war between the military government and the FMLN guerilla movement. The war was brought to an end in January 1992 by a negotiated peace agreement aimed at installing democracy and overcoming militarism. Two mechanisms were put in place to this effect, namely the UN-sponsored and -staffed Commission on the Truth (Truth Commission) – entrusted with analyzing and reporting on the most egregious crimes and making binding recommendations – and the Ad Hoc Commission (AHC), tasked with vetting the officer corps of the armed forces. The AHC carried out the vetting of the armed forces on the basis of the past performance of each officer, and included a human rights criterion. After 4 months, the AHC recommended that 103 officers be transferred or dismissed, and this was almost completely complied with.

178 Bruhman (2015)
179 Bruhman (2015)
180 Mayer-rieckh & De Greiff (2007) ; Bruhman (2015)

31. Institutional Reform beyond Vetting: addressing structural deficiencies

31.1. The process of reforming the structure of public institutions: integrity and legitimacy building

In addition to vetting, efforts to avoid the recurrence of abuse in post-conflict contexts will implement integrity-building structural reforms in order to make them abide by human rights standards and the rule of law. This integrity-building will be done in two different ways. Firstly, by restructuring institutions to ensure their legitimacy, integrity, and independence (via the reform of organizational structures, information systems, and management practices), citizens' trust in them will be restored. Indeed, the absence of certain structural safeguards (such as effective separation of powers, and mechanisms against partisan interference, etc.) facilitates the commission of abuses and the lack of accountability of public institutions. Secondly, measures will be targeting individual members of institutions via the provision of educational measures (training programmes for public officials and employees on compliance with international standards), to increase their knowledge and understanding of professional standards. Additionally, legitimacy-building measures will also be taken to reaffirm the state's commitment to dealing with the legacy of abuses, endorse international standards of democracy and recognize its citizens as rights-bearers. This is generally achieved through the enactment of new laws, and amendments and ratification of international human rights treaties.[181]

31.2. The specific challenges of DDR and SSR

Because most abuses are generally committed by institutions possessing the use of force, that is, security forces and non-state armed groups, and because the post-conflict management of these institutions is one of the most pressing challenges in the immediate transition, most of the literature on institutional reform has been attached to studying Security Sector Reform (SSR). As part of SSR, one of the earliest security initiatives after conflict will indeed be

181 Mayer-rieckh & De Greiff (2007)

the Disarmament, Demobilization, and Reintegration (DDR) of former armed forces and paramilitaries into society, and potentially into regular state institutions. SSR will also seek to implement the demilitarization of the law enforcement sector, and the restriction of the role of the armed forces to external defense functions. Vetting will be a tool of SSR, in order to exclude criminals from public service, thereby building the integrity and legitimacy of the security system.[182]

While vetting concerns individual deficiencies, institutional reform beyond vetting involves looking at the structural deficiencies of public institutions, in a different but complementary way.

32. Institutional reform in Kosovo

32.1. Public trust in their institutions: the assessment criteria of institutional reform

In Kosovo, structural and legal reforms have been carried out in the immediate post-conflict timeframe as part of the state building effort, under the auspices of UNMIK and then EULEX. The 'Strengthening Division' of the latter was tasked to monitor, mentor, and advise local counterparts in the police, justice and customs fields, in order to help the respective institutions undertake the necessary reforms to adhere to internationally recognized standards and European best practices. In this respect, the Mission's achievements have received some praise. Since its entry into action, Kosovo rule of law authorities have made substantial progress, in particular the customs service and in the Kosovo Police, deemed very professional and one of the most trusted police force in the region.[183] Credit for these achievements mainly goes to Kosovo, but the help of EULEX played its part.[184] However, the area of justice remains very challenging, and a lot less progress has been achieved in this field, in particular regarding judicial independence.[185]

182 'Transitional Justice, DDR, and Security Sector Reform' (2010)
183 Global Corruption Barometer (2013)
184 EULEX Factsheet
185 'Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions' (2012)

Additionally, institutional reform is still missing in some aspects.[186] There has been an incomplete vetting process, and many of Kosovo's most prominent ethnic Albanian political leaders played an active role in the 1999 conflict as members of the KLA. While some of them have been indicted or are subject to investigation, many have simply remained in power and are prominent leaders today. In terms of restoring the trust of citizens in their institutions, it seems that the task has been left incomplete. On the one hand, perception of public institutions by minority groups is deemed to be in their disfavour. Most ethnic Serbs believe that there is a lack of genuine political will to protect their rights. Despite the extensive legislative and institutional system that was built to secure multi-ethnicity in Kosovo, it remains partly unapplied (as is shown by the difficulty in accessing public institutions and information in the Serbian language).[187] On the other hand, the ethnic Albanian population also distrusts public institutions, owing to the repeated corruption scandals. Public trust in their executive, legislative, and judicial institutions even seems to be decreasing in polls in recent months.[188]

186 'Kosovo Progress Report' (2014)
187 'Setting Kosovo Free: Remaining Challenges' (2012)
188 Public Pulse report (2015)

Vetting in Kosovo – a flawed and inefficient process[189]

- **The vetting in Kosovo has been based on 2 laws:**
  - Law No. 03/L-178 2010 on the Classification of Information and Security Clearances - defining the purpose and scope of vetting, categories for classifying information and the establishment of a vetting authority, the KIA
  - Law No. 03/L-063 2008 on the Kosovo Intelligence Agency (KIA) – whose work is supervised by a Parliamentary Oversight Committee (POC)

- **Issue 1:** the accessibility gap. No website, no spokesperson, no complaint mechanism available.

- **Issue 2:** nepotistic and clientelistic practices are concerning, as well as a misuse of vetting for political revenge.

- **Issue 3:** conflict of interest: to fulfill their obligations, POC members need the granting of security clearance over which the KIA has discretion, in practice leading to the subordination of the legislative body to the executive agency, and the disempowering of its capacity to oversee its activities.

- **Issue 4:** poor implementation of the laws has been recorded, as most negatively vetted individuals refuse to leave their positions and proceed to appeal, while the lack of resources prevents the processing of these appeals.

- **Issue 5:** the political atmosphere of lack of trust, lack of cooperation and personal grief is impeding the process.

32.2. SSR in Kosovo: KPC, KSF and KP

After the end of the war, one of the most pressing concerns was the redefinition of the role of the KLA. Both the civilian and military armed forces of Kosovo were installed under international supervision after the war, and served as grounds for the reinsertion of almost 27,723 former KLA combatants. On the one hand, what is today the Kosovo Police was formed from scratch by UNMIK (which included a large policing component) and became a governmental agency of Kosovo after 2008. The Kosovo Police continues to be perceived as the most trusted rule of law institution in Kosovo.[190] One of its major achievements has been the completion of successful initiatives to represent all ethnic communities in the decision-making process and in the practice of appointing Kosovo Serb police officials in minority communities, resulting in a greatly improved level of trust in the police.[191]

On the other hand, Resolution 1244, voted in June 1999, set up the demilitarization process and the creation of the Kosovo Protection Corps (KPC), a civilian formation, successor to the KLA, tasked with, inter alia, disaster response, demining, and humanitarian projects. After independence, KPC was disbanded and replaced by new and lightly armed Kosovo Security Forces (KSF). After vetting conducted by NATO, about 1,400 former members of the KPC were assigned to the KSF. Special recruitment guarantees were given to make it more ethnically representative; however, in contrast with the success of the KP in this respect, the KSF minority-safeguarding guarantees are not as advanced. Despite its exclusively civilian mandate, the question of a Kosovo army is nevertheless not off the table. In March 2014, the then Prime Minister Thaci declared such an army would be formed by 2019, with an exclusively defensive character, as Kosovo has no territorial aspirations; no progress has yet been done on the matter however.

The link between institutional reform and TJ as a whole is twofold: on the one hand, it may well be an enabling condition for other TJ measures (e.g. truth commissions, criminal prosecution or reparations).[192] On the other hand, institutional reform on its own will not suffice and needs to be part of a holistic approach to TJ.

189 'Kosovo's Vetting System: a Case for Further Reform' (2015)
190 'Kosovo Progress Report' (2014)
191 Bjeloš , Elek , and Raifi (2014)
192 'Rule of Law Tools for Post-Conflict States: Vetting: an operational framework' (2006)

GENERAL CONCLUSION

'One needs not to expect too much from justice, for justice is merely one aspect of the multi-faceted approach needed to secure enduring peace in transitional societies'.[193]

On the assumption that a post-conflict society must deal with its past, TJ, if it is to transition towards peace and democracy, cannot be solely geared towards pinpointing past wrongs, but has to create the conditions for the future.[194] It is therefore both backward-looking – in that it aims to bring accountability, redress and truth about the past - and forward-looking, by giving conflict survivors the symbolic and material means to move on – via reparations, institutional reforms and reconciliation initiatives.

The sensitivity of post-conflict contexts

Before assessing the impact of TJ, one needs to remember that it is a highly difficult and sensitive enterprise, taking place in a very complex, unstable, and recovering context. The crimes that TJ deals with are of such an atrocious nature that the process of addressing them will necessarily be incomplete and frustrating. It is hoped that their weight can be alleviated, but it is unlikely that one mechanism will suffice.[195] Moreover, victims' expectations after conflict – their claim for justice - are diverse, for war effects victims in many different ways, which will be shaped by the level and nature of atrocity, the cultural habits and individual temperaments and dispositions. While they often do encompass a demand for retribution, the commitment to punishment is neither absolute nor universal and is often accompanied by a strong need for material assistance or symbolic recognition. The justice restored by TJ needs to be connected to all justice dimensions, for they are complementary and mutually reinforcing.[196]

193 Goldstone (1995-6)
194 Lambourne (2008)
195 Orentlicher (2010) ; Lambourne (2008)
196 García-Godo & Sriram (2013)

TJ: a multi-faceted enterprise requiring an integrated approach[197]

Accordingly, it has been argued all along this manual that there is no single blueprint approach to how to implement TJ. This argument echoes some welcome evolutions in the field of TJ towards recognizing the importance of sequencing and contextualizing.[198] Indeed, this essay has shown how TJ practice varies from country to country, some predominantly choosing amnesties (South Africa), others preferring hybrid approaches (Rwanda and Sierra Leone), or more local approaches (Uganda). While the preference is still for international prosecutions, it is often combined with more 'local' or retributive mechanisms, in an attempt to overcome the overly rigid dichotomy that has prevailed until very recently. The application of TJ is becoming more creative, driven by a consciousness of the complementarity between tools, and requires solutions that are tailor-made.

Creating civic trust in Kosovo

In TJ, one of the key concepts is that of restoring civic trust after conflict - that is, the idea and acceptance of living together under the same state rule. The establishment of such positive relations requires both horizontal trust among citizens and vertical trust between citizens and their institutions.[199] All TJ elements have a trust-inducing potential - inter alia, prosecutions by reaffirming that no one is above the law, truth-telling by signalizing a desire to come clean, reparations by showing that citizens' rights violations are taken seriously, and vetting by embodying the transition.[200] Nonetheless, their contribution to the achievement of the more difficult notion of reconciliation, in the sense of building or re-building a sense of inclusive community, depends on many factors and in particular on the political will. In Kosovo, even though nation-building has definitely figured in post-conflict reconstruction, there has been very little success in building civic trust. On the one hand, the citizens profoundly distrust their public institutions and politicians, irrespective of their ethnicity.

197 Degruson (2014)
198 Davis L. (2014)
199 Mayer-rieckh & De Greiff (2007)
200 De Greiff (2011)

On the other hand, between the different ethnic communities there is no sense of belonging to the same nation, due to the physical separation of communities and high levels of mistrust.[201] This is particularly true when it comes to relations between ethnic Serbs and Albanians, two communities that have been artificially made to oppose each other by the war of the 90s, even though they lived together in Kosovo for centuries. By admitting that there are no unitary conceptions of victimhood or of justice, and therefore by addressing the needs of all survivors of the war, the TJ activities set up by the HLC Kosovo intend to rectify this constructed opposition, and to contribute to the reconciliation of formerly opposed communities in Kosovo, so that they can envisage a common future.

201 'Setting Kosovo free: Remaining Challenges' (2012)

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