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Transitional Justice in Kosovo

Discussion Paper

Prishtina, September 2008



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www.kipred.net

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Table of Contents

1. Introduction	4
2. Transitional justice – the concept and its main mechanisms	5
a) Criminal prosecutions for international crimes	7
b) Truth commissions.....	7
e) Remembrance and memorialization.....	11
f) Regional experiences.....	11
3. Background on the Kosovo conflict	13
4. Transitional justice in Kosovo.....	15
4.1. Main stakeholders and policies	16
4.1.1. International Stakeholders	16
4.1.2. Local Stakeholders	19
4.2. Main documents.....	23
4.3. Mechanisms for dealing with injustices and abusers	23
5. Conclusions and Recommendations.....	27

1. Introduction

Wars and state repression have left societies shattered and many people traumatized, displaced or missing. Kosovo is such a society. Deeply affected by serious violations of human rights, the issues facing the population of Kosovo as well as its institutions range from mistrust amongst the former foe ethnic groups, denial of past wrongs to deficiencies in institutional capability for and social acceptance of big changes. The shift from armed conflict and repression to a state of peace and functioning democracy requires from the society to “take a stand on the mass violations of human rights that occurred in the recent past”.¹ This paper takes on the pressing political, legal and moral problems that the society of Kosovo faces in its attempt to move from violent civil discord to civil stability, from what was perceived by the majority of the population as a brutally repressive regime to a functioning free society.

Declaring independence on February 17, 2008, Kosovo became the latest state to emerge out of the breakdown of Yugoslavia. As the country sets up the foundations for a new start, it is essential that it focuses on healing the wounds from the traumatic past and settling omnipresent grievances in the population. This historical turning point in its existence is the portal to the new role of Kosovo whose people still require answers and clarity about their past.

Dozens of questions linger amongst the population concerning the war, the victims, the missing, the perpetrators, the post-liberation mayhem in 1999, the governments, the individuals responsible. Lack of answers and clarity has caused confusion and turmoil ever since the end of the war. The Kosovo past itself is subject to contradictory interpretations from Kosovo Albanians on the one hand and Kosovo Serbs and Serbia on the other hand. These have been at the heart of the divisions leading to the war, and they continue to be a source of conflict between the two ethnic groups. In order to prevent a backlash for Kosovo’s democratic development and in order to lay the foundations of a normal society, constructive debate about the past is in the interest of all the people of Kosovo.

Lack of communication between the ethnic groups living in Kosovo causes lack of understanding and prejudice. Prejudice, as can be seen from the background section of this analysis, has led to ethnic hatred in Kosovo and it has caused the population untold suffering. Prejudice, blame, and hatred have dragged the country into war in 1999 and sparked the March 2004 conflict. The price has been enormous. Thousands have lost their lives and thousands remain missing. Hundreds of thousands have lost their property and millions are still dealing with trauma. Only by addressing these grievances will the population of Kosovo find the key to a peaceful future.

After a brief overview of the main historical events of the last decades in Kosovo the paper touches upon a range of issues which have been obstructing the proper development of the society of Kosovo and which continue to present obstacles to strengthening its fragile peace. The analysis takes into consideration and addresses the following questions: What is the concept of transitional justice and how do Kosovo’s background and current conditions relate to it? What are the main issues concerning the Kosovo population with regard to dealing with its past? Who are the main stakeholders and what measures have been employed in dealing with the past?

* The authors are grateful to Bob Deen and Robert Schupp from the office of the OSCE High Commissioner for National Minorities for their continuous support, to Caitlin Reiger, Dorothee Marotine, Mark Freeman and Dick Oosting from International Center for Transitional Justice for their invaluable comments, to Burim Ejupi for enormous assistance throughout the project, to Emilie Ceron for research assistance and to all those interviewed and participants in focus groups.

¹ The same applies to the former Yugoslavian republic of Croatia and Bosnia. HLC. “Transitional Justice in Post-Yugoslav Countries: Report for 2006”. Humanitarian Law Center; Documenta; Research and Documentation Center-Sarajevo.

Past injustices that remain unaddressed can easily become a source of new tensions and conflict, while impunity undermines trust in institutions and prevents the normalization of contacts between communities. While each community understandably views transitional justice and reconciliation from different perspectives, a debate on these mechanisms and how they could be best applied in Kosovo is of vital importance for all communities. At the same time, such a process of dealing with the past cannot take place without the involvement of all groups. Victims in Kosovo have many questions unanswered and many wounds that need care. The end to the violence has only led to a semblance of political stability, and the Kosovo Government has so far failed to assume a leading role in taking measures to provide justice to the many victims.

The international community is the key factor in Kosovo to provide security, justice and development, but short-term strategies as reactive measures continue to be the common working pattern for dealing with the past. A long-term approach is required for Kosovo to speed up of criminal prosecutions, initiate alternative mechanisms to support victims and their families and to establish a comprehensive method of engaging various parts of the society to discuss the legacies of the past and opportunities for the future. This requires an integrated, long-term approach as part of a broader government strategy.

Methodology

The paper's broader context of transitional justice with all the issues and concepts it embraces, was compiled through desk research consulting literature on transitional justice, International Center for Transitional Justice (ICTJ) publications, articles from peer reviewed journals discussing truth and reconciliation through various case studies etc. In order to present a clear picture of the Kosovo context and attempt to answer the questions referred to above, a series of interviews were conducted with government officials, members of the Kosovo Assembly, UNMIK Department of Justice representatives, representatives of civil society organizations active in Prishtina and Belgrade, representatives of victims' associations in Kosovo, local and international experts and activists on issues of human rights and dealing with the past, as well as representatives of international organizations working in Kosovo. Local newspapers and reports of human rights organizations were consulted to retrieve additional information on local perceptions. The UNDP Kosovo report on Public Perception on Transitional Justice was used to display the only statistical information existing in Kosovo regarding citizens' perceptions of different transitional justice mechanisms (prosecutions, truth-seeking, etc.) based on ethnicity. Furthermore, in the course of the analysis, a focus group with local experts on human rights issues, the justice system, missing persons and community integration was conducted to discuss and debate the challenges Kosovo faces in dealing with the past.

2. Transitional justice – the concept and its main mechanisms

Transitional justice is a multidisciplinary and victim-centered field of theory and practice to deal with legacies of mass abuses of human rights. It is linked to the fight against impunity and the broader domains of human rights and conflict resolution.² Its most immediate goals are to end impunity and restore dignity to victims, while the more long-term goals seek to contribute to conflict prevention through the restoration of civic trust, reconciliation, and establishment of the rule of law and democratic order.

² See, e.g., Kritz, Neil (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington, DC:US Institute for Peace Press, 3 vols. (1995). See also www.ictj.org.

Transitional justice focuses on the challenge that societies in transition – whether from war to peace, or from authoritarian rule to democracy – face in dealing with a legacy of mass abuse. The methods and approaches of transitional justice can be relevant to other situations as well, including to well-established democracies dealing with more distant legacies of abuse.

While the term “transitional justice” did not enter the modern political lexicon until the early post-Cold War period, its historical lineage can be dated back to the Nuremberg trials and even earlier. As a legal doctrine, though, the field of transitional justice traces its primary inspiration to the jurisprudence of UN treaty bodies and supranational regional human rights courts and commissions. The core parts of that jurisprudence have now been directly affirmed in many important UN documents such as the 1997, 2004, and 2005 reports of UN special rapporteurs on the fight against impunity, and the 2004 report by the Secretary-General on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.³

Although transitional contexts engender a wide range of moral, legal, and political dilemmas, the

In a transitional context dealing with the past is one of the most difficult challenges.

What is needed is a good faith effort to seek truth.

challenge of dealing with the past is among the most difficult. That is because there tend to be many policy and capacity limitations that constrain the set of choices for governments in confronting legacies of past abuse. These limitations may include a weak judicial system, endemic corruption, a fragile peace, very large numbers of perpetrators and victims, and legal or constitutional obstacles such as amnesty laws. In such contexts, full and prompt justice is virtually impossible, but what is required is a good faith effort to seek truth and as much justice, reparation and institutional reform as possible.

At an operational level, transitional justice is pursued through five main mechanisms: criminal prosecutions, truth commissions, victim reparations, security system reform and remembrance and memorialization⁴. In the design and implementation of such mechanisms, transitional justice focuses specific attention on the rights and interests of victims and their families, taking into consideration the particular needs and perspectives of children and women.

Practically and conceptually, the mechanisms of transitional justice need one another. For example, without truth-telling, institutional reform, or reparation efforts, the trial of a very limited number of perpetrators can be viewed as scapegoating or a form of political revanchism. Truth-telling, in isolation from efforts to punish abusers, reform institutions, and repair victims, can be viewed as nothing more than words. Reparation without any links to other transitional justice measures may be perceived as an attempt to “buy” the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims’ legitimate expectations of justice, truth, and reparation, is ineffective from the standpoint of accountability and unlikely to succeed in its own terms. Accordingly, the transitional justice approach emphasizes integrated or holistic strategies to deal with the past.

Practically and conceptually, the mechanisms of transitional justice need one another. The transitional justice approach emphasizes integrated or holistic strategies to deal with the past.

³ Report of the Secretary-General on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.

Available online: <http://daccess-ods.un.org/TMP/3868815.html>

⁴ The list is a modified version of the model presented from Natascha Zupan in her article “Facing the Past and Transitional Justice in Countries of Former Yugoslavia” in: Martina Fischer (ed.) *Peacebuilding and Civil Society in Bosnia-Herzegovina: Ten Years after Dayton*. Münster: Lit Verlag, pp. 327-342 (2006). Zupan’s model also includes the following mechanisms: Lustration, Community Based Reconciliation, Healing and Story-telling.

While there is no single formula for dealing with a past that was marked by mass and systemic abuse, transitional justice teaches us that the choices a society makes are more likely to be effective when they are based on a serious examination of prior national and international experiences. Such examination reduces the chance of repeating avoidable errors. Ensuring active consultation of, and participation by, victim groups and the public at large is another crucial factor. Without such consultation and participation, the prospects of designing and operating a credible and effective transitional justice policy are greatly diminished.

a) Criminal prosecutions for international crimes

Many consider trials and criminal prosecution⁵ as the most important form of transitional justice. It is indeed natural that this should be so given the grave character of the crimes involved in any conflict or period of authoritarian rule.

The main potential benefits of criminal justice can best be achieved when the prosecutions are carried out at the national level.

Ad hoc international and hybrid criminal tribunals have emerged in recent years to deal with those bearing the greatest responsibility for atrocities that were widespread in specific countries and regions such as Rwanda, the former Yugoslavia, Sierra Leone, and Timor-Leste. Furthermore, the creation of the International Criminal Court illustrates international resolve and willingness to try the most serious cases of genocide, crimes against humanity, and war crimes. Moreover, many prosecutions have been pursued in third states too, through reliance on legal principles such as universal jurisdiction or alternatively on the basis of states' specific treaty commitments.

From a transitional justice perspective, it is preferable that prosecutions are carried out at the national level, for it is at that level that the main potential benefits of criminal justice can best be achieved, namely: to assist in the deterrence of future violations, to express public condemnation of criminal conduct, to provide a direct form of accountability against the perpetrators of heinous crimes, and to contribute to the restoration of public confidence in the rule of law.

The recent and significant increase in criminal justice efforts at the national and international levels has been a crucial component in shaping the global debate on how to deal with legacies of mass abuse. Some analysts point out that the impact of criminal prosecution on educating the public about past injustices and achieving conflict transformation is likely to be limited⁶. Nevertheless, although its impact remains limited, the importance of criminal prosecution is deemed immense. This is certainly the case in the former Yugoslavia, where there have been many prosecutions (including through the International Criminal Tribunal for the Former Yugoslavia (ICTY)), but little use of other transitional justice mechanisms⁷. In fact, although many express dissatisfaction with the poor performance of courts their dissatisfaction is even greater with what is considered as an absolute lack of other means employed.

b) Truth commissions

Truth-seeking⁸ is a broad concept encompassing various methods of information gathering. As explained in the Encyclopedia of Genocide, truth-seeking can be pursued "through the creation

⁵ See, eg, Office of the UN High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Prosecution initiatives* (2006), <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>

⁶ Osiel, Mark. *Mass Atrocity, Collective Memory, and the Law*, New Brunswick, N.J.: Transaction Publishers (1997).

⁷ HLC. *2006 Report*. Op.cit, p.5.

⁸ See, e.g, Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Truth commissions* (2006), available at:

of truth commissions or other national efforts, such as engaging in major historical research, compiling victims' testimonials or oral histories, supporting the work of forensic anthropologists in determining the exact nature of victims' deaths, or exhuming the bodies of those killed.”⁹

The most well-known form of truth-seeking body in transitional contexts is the truth commission. Truth commissions are ad hoc commissions of inquiry established in, and authorized by, states for the primary purposes of investigating and reporting on key periods of recent past abuse, and of making recommendations to remedy such abuse and prevent its recurrence. There have been scores of truth commissions created around the world during the last few decades in places as different as Argentina, Haiti, Morocco, and Liberia.¹⁰ The most famous one remains the South African Truth and Reconciliation Commission (TRC), with its internationally-televised public hearings. The TRC is still the only truth commission to date which had the power to grant amnesties, but this has often been misunderstood and has led to the erroneous rejection of truth commissions as bodies that undermine justice efforts, even though the record of most truth commissions shows quite the opposite.

Public awareness and public debate about past abuse are an essential precondition to any meaningful reconciliation process.

Furthermore, truth commissions have a victim-centered approach and most modern truth commissions hold public hearings for victims. Such hearings appear to significantly increase public awareness and public debate about past abuse – an essential precondition to any meaningful reconciliation process. Inspired by the TRC as well as other important truth commissions that followed, most today also employ transparent and participatory procedures for selecting commissioners. Most also seek to actively consult and engage with local civil society and victims – before, during, and after their operations – in order to enhance the legitimacy and credibility of both the process and the final results.

Truth commissions exist for a designated period of time, have a specific mandate, exhibit a variety of organizational arrangements, and adopt a range of processes and procedures, with the goal of producing and disseminating a final report, including conclusions and recommendations. Ultimately, the goals of such commissions are to contribute to ending and accounting for past abuses of authority, to promote national reconciliation and/or bolster a new political order or legitimize new policies.¹¹

c) Reparations

Victim reparation¹² programs are state-sponsored initiatives that aim to contribute to repairing, on a large and substantial scale, the material and moral consequences of past abuse experienced by designated classes of victims. Such programs constitute important gestures of recognition and support by the state that serve to complement more accountability-oriented transitional justice mechanisms. They also help to fill the “fairness gap” that would otherwise result from, on one hand, the impossibility of universal and equitable financial redress through court proceedings, and on the other, the customary provision – through disarmament, demobilization, and

<http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>

⁹ The Encyclopedia of Genocide and Crimes Against Humanity (Macmillan Reference USA (2004), vol. 3, pp. 1045-1047. Retrieved from: <http://www.ictj.org>.

¹⁰ For a detailed list please refer to: Freeman, Mark, *Truth Commissions and Procedural Fairness*, Cambridge University Press (2006).

¹¹ For a detailed list of Truth Commissions around the world and their reports see the United States Institute of Peace Truth Commissions Digital Collection under: <http://www.usip.org/library/truth.html>

¹² For a detailed list please refer to: Freeman, Mark, *Truth Commissions and Procedural Fairness*, Cambridge University Press (2006).

reintegration programs – of financial benefits to perpetrators whose acts gave rise to the need for victim reparation in the first place.

Contemporary reparation programs usually provide compensation payments to victims and their families, together with privileged or dedicated access to certain public or private services, such as rehabilitative health care, pension benefits, and educational services. Modern reparation programs increasingly encompass various symbolic forms of reparation, too, including monuments and memorials to preserve and honor the memory of victims. Gender-sensitive and community-focused reparation measures are also beginning to be recommended and used.

Reparations may help fill the “fairness gap” that would otherwise result from, among others, the impossibility of universal and equitable financial redress through court proceedings.

In recent years there has been significant progress in developing international standards for the reparation of major crimes.¹³ The modern conception of reparation is very broad. It includes compensation, which is understood to include any economically assessable damage resulting from the crime, including “physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services”.¹⁴ The modern notion of reparation also encompasses the idea of “restitution” of rights and benefits, including “liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property”.¹⁵ The international standard of reparation also includes rehabilitation programs, such as “medical and psychological care as well as legal and social services,”¹⁶ as well as a wide range of symbolic measures such as individual and state apologies.¹⁷

Although it may not be counted as a solution by everybody, recognition of the victim’s status may contribute significantly to providing satisfaction to the victims. Legal backup for the status of victims accompanied by rehabilitation mechanisms will assist the national process and increase trust in institutions. Due to the lack of rehabilitation mechanisms for victims, their victimization can continue in society and may even endanger their security and cause displacement. This is often the case with victims of rape who are further persecuted by the society even by their own ethnic group. Material reparations provide additional means to assist the victim in dealing with his/her sufferings.

d) Security system reform

A country in transition out of conflict or abusive government inevitably has to reform its institutions to guarantee, as much as possible, the non-repetition of abuses. This is especially true when it comes to institutions that form part of the state security system.

There is a wide range of possible reforms a state could consider enacting in a transitional context, including the removal from public service of persons who have committed abuses, the

¹³ See especially: *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*, Resolution 60/147, United Nations General Assembly, 64th plenary meeting, December 16 of 2005, available at: <http://www2.ohchr.org/english/law/remedy.htm>

¹⁴ *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*, Op. Cit, para.20.

¹⁵ Ibid, para.11.

¹⁶ Ibid, para.21.

¹⁷ Ibid, para.22.

dissolution of abusive institutions or the establishment of new ones to better protect human rights, the creation of training programs in human rights, and the introduction of legal and constitutional amendments to improve governance.

In practice, the field of transitional justice places a special emphasis on “census and identification programs”¹⁸ and “vetting programs,”¹⁹ in particular in the police, army, and judiciary. The former type of program is, in essence, a technical audit of a public institution to verify its current state of membership, which has often become highly distorted by past conflict and mismanagement. Census and identification programs also seek to engineer a kind of “closure” of the institution’s formal boundaries so that subsequent reform processes can be more controlled and effective. These programs often represent a fundamental first step toward the restoration of the rule of law and good governance.

Vetting is designed to evaluate an individual’s competence or integrity. Vetting programs are integrity-focused personnel screening procedures which have as their central aim to transform specific public institutions – especially in the security sector – from instruments of repression and corruption into instruments of genuine public service. A standard vetting program involves

Vetting programs are integrity-focused personnel screening procedures. Their aim is to transform specific public institutions into instruments of genuine public service.

three main phases: registration in the program, which may be mandatory; assessment of the applicants on the basis of information provided on self-completed registration forms, as well as information obtained through credible independent sources; and certification or decertification of those deemed eligible or ineligible, as the case may be, to work in the public institution in question. Vetting mechanisms must comply with the

basic principles of procedural fairness. In this regard it is worth noting that such programs seek to ensure greater fairness than so-called “lustration” programs, which have been used, controversially, in much of Central and Eastern Europe. Although many refer to ‘lustration’ as having advantages since it is a faster mechanism allowing “those less culpable to avoid prison”²⁰, lustration is a collective measure taken against all people associated with the former state apparatus or its political establishment. This contradicts the principle of individual responsibility that transitional justice puts forward.²¹

The state apparatus which functioned during a period of repression must reform and thus conform the political transformations in order to re-gain the trust of citizen and all ethnic communities of a country. These institutions include most importantly the security sector and the judiciary. The reforms include opening of secret files and proper examination of individual activities during war times or repression prior to their (re-)engagement in public functions especially in the justice sphere. Furthermore, installment of the proper non-discriminatory legal framework as well as the thorough training of judges and prosecutors is crucial for the democratic and independent functioning of the justice system.

¹⁸ See ICTJ publication: <http://www.ictj.org/images/content/8/0/801.pdf>

¹⁹ Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Vetting: an operational framework*, April 2006,

²⁰ Bleeker, Mô and Sisson, Jonathan (Eds). *Dealing with the Past: Critical Issues, Lessons Learned and Challenges for*

Future Swiss Policy. Swiss Peace KOFF Series No. 2/2004, p.25.

²¹ HLC 2006 report, p. 19.

e) Remembrance and memorialization

According to the academic definition, remembering and honoring victims are parts of the general approaches to deal with abuses. These can be done through various measures “including consulting with victims to develop memorials and museums of memory, converting public spaces such as former detention camps into memorial parks and interpretive sites, and catalyzing constructive social dialogue about the past.”²²

Memory and memorialization are now commonly regarded as an important complement to the four more traditional transitional justice mechanisms. Many argue that collective memory helps establish an “official truth” for the next generations to come. This should then help preventing manipulation of numbers on sensitive matters such as victims and missing persons by politicians.

Collective memory helps establish an “official truth” for the next generations. This should help preventing manipulation of numbers on sensitive matters by politicians.

Formal and non-formal education can also generate fundamental development with regards to remembrance and reconciliation to counter a selective version of identity of the “new” society. However, the division of the education system along ethnic and national lines is often a big obstacle in establishing an all embracing system of values of tolerance, respect for human rights and democracy.

f) Regional experiences

Many countries have put in place transitional justice mechanisms to deal with the legacy of their past. From the German reparations to the Jews after World War II to the National Commission on Disappeared Persons in Argentina to the prosecution of the former President Charles Taylor before the Special Court for Sierra Leone, there are numerous examples of important processes in countries emerging out of an authoritarian regime or a period of conflict. Conversely, there are examples of negative consequences of the refusal or inability of a state to deal with its past, such as the recent renewal of violence in Timor Leste due in part to the lack of vetting of security agencies after 1999.

Countries of the former Yugoslavia have been addressing the legacy of the 1990s conflicts in different ways and with varying degrees of success. There are some important precedents which could be reflected upon before initiating any process in Kosovo. An example of each transitional justice mechanism will be highlighted below.

Prosecutions of war crimes committed during the conflict in the former Yugoslavia have been taking place at the national level in Bosnia and Herzegovina (BiH), Croatia, and Serbia, as well as at the international level through the International Criminal Tribunal for the former Yugoslavia (ICTY). Despite the unfavorable political context surrounding the prosecutions of war crimes perpetrators in Serbia by the War Crimes Chamber of the District Court in Belgrade, the trials are a significant contribution to the overall efforts in establishing accountability in the region. The War Crimes Chamber as well as the Office of the War Crimes Prosecutor of the Republic of Serbia were legally established in July 2003²³ and became operational within six months. A number of shortcomings and problems have been identified in relation to these institutions, such as resource deficits, inadequate cooperation between the prosecutor and the police, witness

²² The Encyclopedia of Genocide and Crimes Against Humanity, op.cit.

²³ Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, *Official Gazette of the Republic of Serbia*, no. 67/2003, July 1, 2003 (War Crimes Law).

intimidation, or obstacles to an adequate defense²⁴. However, the War Crimes Chamber and the Office of the War Crimes Prosecutor have developed their capacity in the last few years and are in a position to provide justice to many victims of war crimes.

National initiatives of truth commissions in the region have become a euphemism for failed attempts. In Serbia, President Kostunica established in 2001 the Yugoslav Truth and Reconciliation Commission, which revealed a number of key lessons of what not to do²⁵. The commission was not perceived as impartial because its composition was heavily Serbian and lacked enough representation from ethnic minorities, religious communities, and civil society. The commission was not considered as a credible initiative by civil society and political actors given the lack of consultation or debate around its creation. The mandate of the commission focused on the causes of the war and related atrocities rather than their effects and that could have only been a credible endeavor had the various ethnic communities been represented in the commission. In the end, the commission failed to deliver a report or make recommendations before it was wound up in 2003.

Reparations to victims of the war have taken place in various ways in the region, through financial compensation, restitution of rights, and the erection of memorials to victims. BiH conducted a very successful process of property restitution²⁶, resolving about 95% of the 200 000 claims submitted to local authorities²⁷. The process evolved from the adoption of different laws at the entity level to an institutional framework adopted by the international community, the Property Law Implementation Plan. The process started by conditioning the repossession of apartments upon the return of the claimants to those apartments, and later progressed to repossession without a return requirement, thus enabling the claimants to sell their property without forcing them to reside in an area where they could have faced discrimination as an ethnic minority. This evolution acknowledged that restitution of property was not the only precondition for voluntary return.

Institutional reforms in the region have been undertaken with the most success in Bosnia and Herzegovina in relation to the judiciary²⁸. Between 2002 and 2004, all judges and prosecutors of Bosnia and Herzegovina had to reapply for their position and undergo a vetting procedure that encompassed reviewing the suitability of each applicant, reducing the overall size of the judiciary, and ensuring adequate ethnic representation. The applications were reviewed by the High and Judicial Prosecutorial Councils, which were initially composed of nationals and internationals, and later of nationals only. About 200 judges and prosecutors out of 1 000 were not reappointed. Although there were attempts at political interference in the process and although the pool of applicants was limited in number, the reappointment process achieved its main goals and helped to rebuild the trust of citizens in the judiciary of BiH.

The success of initiating and implementing transitional justice mechanisms depends on an array of factors, one of them being the consultation, involvement, and strength of civil society. In the region of the former Yugoslavia, civil society has gained the experience and confidence necessary to initiate and conduct debates around the legacy of the past. The Research and Documentation

²⁴ See ICTJ report “Against the Current – War Crimes Prosecutions in Serbia (2007)” at <http://www.ictj.org/images/content/7/8/780.pdf>.

²⁵ See ICTJ report “Serbia and Montenegro: Selected Developments in Transitional Justice, October 2004”, pages 7-9 at <http://www.ictj.org/images/content/1/1/117.pdf>.

²⁶ See ICTJ report “The Contemporary Right to Property Restitution in the Context of Transitional Justice”, May 2007, pages 33-41 at http://www.ictj.org/static/PropertyRestitution/Rest_Pub_07.pdf.

²⁷ See website of the OSCE Mission to Bosnia and Herzegovina at http://www.oscebih.org/human_rights/propertyrepossession.asp?d=1.

²⁸ See “Justice as Prevention: Vetting Public Employees in Transitional Contexts”, Chapter 5 at <http://www.ssrc.org/blogs/books/pdfs/vetting/978-0-9790772-1-0-chapter5.pdf>.

Center in Bosnia and Herzegovina can serve as one of the better examples. This organization initiated the Human Losses Project in order to determine the exact number and names of victims of the war in Bosnia and Herzegovina and thus prevent their political manipulation. Through thorough investigation and cross-checking of information, a reliable database was established with details of each victim of the war. The project created a precedent that is being duplicated in Croatia and Serbia, and the methodology it used is now considered an international best practice.

Although not always well known, the various initiatives and experiences of transitional justice in the countries of the region should serve as a basis for discussion in Kosovo when putting in place mechanisms to address the past. Although Kosovo is unique, it might nevertheless learn some important lessons – both positive in negative – from neighboring countries which underwent national traumas of their own.

3. Background on the Kosovo conflict

After a long history of struggle for equality under Serbian rule, the Yugoslav constitution of 1974 gave Kosovo full legal authority over its own territory, raising its status from an autonomous province within Serbia to a nearly equal status with the other six republics of the federation.²⁹ Against the will of the Serbians, the constitution allowed Kosovo to be directly represented on the main political bodies of the federation. Moreover, it guaranteed Kosovo the right to its own constitution, which created all the necessary and legitimate institutions, including the assembly, government, judiciary and police. The status of a republic was, however, never granted to Kosovo. Despite these changes, the federation's economic negligence over Kosovo continued throughout the next decades, as did the treatment of Kosovo Albanians as second-hand citizens.³⁰ This contributed to an increased demand for a full republic. In 1981, what started as student protests for better conditions at the University of Prishtina quickly became large demonstrations throughout Kosovo with demands for equality, improvement of the economic situation and a Kosovo Republic.³¹ Serbian police forces ended the demonstrations with violence and brutality, and an estimated 1,000 people died.³² This had a crucial impact on the population, who continued with demonstrations and strikes throughout the next years. At this point, the polarization between Albanians and Serbs in Kosovo grew. These events remained a symbol of the visible rejection of Serbian rule by Kosovo Albanians, which continued to increase from then on.

In the 1980's Slobodan Milošević began his rise to power and by 1989 when he became President of Serbia his measures of keeping Kosovo under control included the unconstitutional revocation of Kosovo's autonomy and the installation of what was experienced by the majority of the population as an apartheid regime. Throughout the next decade, the state systematically suppressed Kosovo Albanians and suspended their institutions, shut down the education and health care system and expelled some 150,000 Albanians from their jobs in police, education, state companies, etc.³³ This led to the development of parallel structures in areas of education and health care organized by the Albanian 'shadow government'.

²⁹ Malcolm, Noel. *Kosovo: A Short History*. Papermac, London. p. 314-333 (1998); Judah, Tim. *Kosovo: War and Revenge*. 2nd Edition. Yale University Press, New Heaven, p. 38 (2002).

³⁰ Independent International Commission on Kosovo (IICK). *Kosovo Report: Conflict, International Response, Lessons Learned*. Oxford University Press, Oxford, p 37 (2000).

³¹ Malcolm, op.cit., pp. 334-336.

³² While Malcolm argues that these figure were probably exaggerated, he does agree that the death toll went well into the hundreds. *Ibid.*, p. 335.

³³ Malcolm, op.cit., p. 349.

In 1995, the decision to exclude the Kosovo question from the Dayton negotiations added to the already deep frustration among the Kosovo Albanians who witnessed the strengthening of a different stream of resistance, which came to be known as the Kosovo Liberation Army (KLA, in Albanian UÇK). Many Kosovo Albanians were now certain the united peaceful resistance was not going to bring freedom and that military action was now the only option.³⁴

In 1997 and 1998 the KLA started organized attacks on Serbian police forces in central Kosovo. The clashes with the police intensified and spread throughout the country as the Serbs started deadly attacks on Albanian villages, committing atrocities on civilians while trying to capture KLA fighters.³⁵ In the spring of 1999, the conflict took an explosive turn when the Serbian army started a wide scale campaign of killings and mass deportations, causing a flood of half a million refugees into neighboring countries.³⁶

In response, NATO launched its air attack on Serbia which lasted 78 days until June 9th, 1999, when Milošević capitulated and pulled out all Serbian troops.³⁷ In the mean time, Serbian forces executed their last planned campaign by attacking the civilian population with killings and organized expulsion, leading to an exodus of 850,000 refugees out of Kosovo³⁸ and increasing the death toll to more than 10,000 people.³⁹

That same day, the Security Council adopted Resolution 1244, installing an international protectorate over Kosovo. During 2000, until order was established and while KFOR organized the KLA disarmament a large number of Kosovo Serbs as well as the Roma, Ashkali and Egyptian (RAE) community were victims of revenge acts such as brutal harassment and discrimination by Kosovo Albanians.⁴⁰ A small number

During the war more than 10,000 people died and 850,000 sought refuge abroad. In 2000 a large number of Kosovo Serbs and of the RAE community were victims of revenge acts.

of Kosovo Serbs remained or returned and joined enclaves, mostly in northern Kosovo, where they form the majority. Although minor participation in the established political structures occurred, Kosovo Serbs boycotted the new system from 2003 till 2007 and established their own parallel system particularly in education and health. With the political status lingering and the economic situation far from improving, the

Kosovo Albanians' frustration grew. The frustration escalated during violent riots in mid-March 2004, when protesters attacked Kosovo Serbs causing 19 deaths (11 Albanians and 8 Serbs), burning property and Serb religious monuments, and causing the displacement of some 4,000 Serbs and Roma.⁴¹ This was another revelation of the deep-rooted ethnic division in the society. In the political realm, this triggered the international community to speed up the process of finding a final solution for the status of Kosovo. Internationally mediated final status talks between Kosovo and Serbia were launched in 2005, initially at a technical working-group level pertaining to issues of returns and missing persons, until end of 2007. The talks did not produce any results and the main outcome was the Comprehensive Proposal for the Kosovo Status

³⁴ Blumi, Isa. Ethnic Borders to a Democratic Society in Kosova: The UN's Identity Card, pp. 224-226. In: Bieber, Florian and Daskalovski, Zidas (Eds.), *Understanding the War in Kosovo*, London: Frank Cass, (2003).

³⁵ Judah, op.cit., pp. 139-140.

³⁶ IICK, op.cit., pp. 88-92.

³⁷ Clark, Wesley K. (General). *Waging Modern War: Bosnia, Kosovo, and the Future of Combat*. 1st Edition. Public Affair, USA, pp. 173-195, 347-369 (2001).

³⁸ Other numbers show 590.000 internally displaced and some 4.000 persons missing. IICK, op.cit., p. 90.

³⁹ Institute for War and Peace Reporting (IWPR). *The Kosovo Numbers Game*. Balkan Crisis Report No. 92. (12.11.1999)

⁴⁰ Kramer, Helmut and Džihčić, Vedran. *Die Kosovo-Bilanz: Scheitert die internationale Gemeinschaft?*. LIT Verlag, Wien, p. 37 (2005).

⁴¹ UNHCR. *Serbia and Montenegro: Kosovo*.

Settlement which embraces the highest level of protection for the Serbian minority in Kosovo. In February 2008 Kosovo declared independence with Kosovo Serb enclaves and Serbia vehemently opposing it.

4. Transitional justice in Kosovo

In Kosovo, peace is considered a settled achievement, however fragile it may be. Justice on the other side is so deeply dependent on the perception of individuals and ethnic groups that it presents the very threat to the fragile peace. What is considered justice now in 2008, after the declaration of independence, may differ from what was considered justice in 1999. Whereas for the majority, independence is considered the ultimate justice and thus presents an elimination of threats (i.e. that they will be put under Serbia's rule again), for Kosovo Serbs it may presents a renewal of threats (i.e. that they will be victims of revenge).⁴²

The political situation that settled after the war did not address the justice factor.

The ending of the war in Kosovo by international intervention influenced the lack of strict division of winners and losers of the conflict.⁴³ After the war in 1999, since the justice and security sector as well as institutional set-up were practically non-existent in Kosovo, the UN mission was responsible to establish and assemble structures through urgent and interim means. The political situation that settled after the war, did not address the justice factor, did not address the massive human rights violations and a number of highly sensitive issues including missing persons. As many local experts agree, justice was sacrificed for the sake of stability.⁴⁴ These make Kosovo's conditions even more difficult in the sphere of dealing with the past and made Kosovo a country "ethnically divided politically and geographically with minority populations clustering together."⁴⁵

Certain initiatives to address grievances of the war seem to enjoy a low level of legitimacy among the population. First, inter-ethnic dialogue is hindered by the ancient inter-ethnic hatred and

The past is not confronted openly with the involvement of both state inquiries and personal accounts of the conflicts.

mistrust. It is commonly perceived by Serb minority and partially by international administration that Kosovo Albanians can not judge fairly and objectively inter-ethnic crimes⁴⁶. Second, the society at large seems to consider the mere possibility that human rights violations, injustices and wrongs will never be addressed. Indeed there is a lack of information, discussion and dialogue concerning the past, not

only in the society in general but also amongst Kosovo Albanians themselves. Until now there has been no public discussion on the trials conducted over war crime cases and massive violations of human rights during or after the war in 1999. The popular perception of lack of information is reinforced by UNMIK's and PISG's blockade of any discussion that presented this "potential risk to stability".

⁴² Focus Group. March 2008.

⁴³ Agon Vrenezi. Interview. February 2008

⁴⁴ Focus Group. March 12, 2008.

⁴⁵ Hehir, Aidan. Autonomous Province Building. Identification Theory and the Failure of UNMIK. International Peacekeeping, Vol.13, No.2, pp. 200-213 (June 2006).

⁴⁶ The reaction of the Kosovo government to former ICTY prosecutor Del Ponte's allegations of a massive organ trafficking operation targeting Serbs by Kosovo Albanian fighters in 1999 was not made to reassure the Serbian minority and international community in this respect. Indeed, Hajredin Kuci, Deputy Prime Minister declared that "we have more important issues to deal with than with Del Ponte slander". Quoted from BalkanInsight, UN: No evidence of Kosovo Organ Trafficking, 16 April 2008, retrieved from <http://balkaninsight.com/en/main/news/9441>.

Furthermore, another harmful perception has also developed of the exclusivity of the right of each major ethnic group to be accounted as the victim. When asked whether members of their ethnicity have committed war crimes, Kosovo Albanians deny this claim by 78%.⁴⁷ As is the case with post-conflict countries of former Yugoslavia, the past is not confronted openly with the involvement of both state inquiries and personal accounts of the conflicts.⁴⁸ Other similarities between Kosovo and the other former Yugoslav countries include that “domestic war crimes trials fail to address the scale of atrocity and courts fail to deliver even-handed justice for war crimes suspects in their jurisdiction, disregarding ethnic and national belonging.”⁴⁹

The presence of more than one fraction of responsibility has often turned into a shifting-blame game.

4.1. Main stakeholders and policies

Since 1999, accountability for human rights violations committed in Kosovo during and after the war has been addressed by a series of actors. The levels to which these violations were addressed vary to a great extent between the different institutions. The presence of more than one fraction of responsibility has often turned into a shifting-blame game. Often the differentiation between local and international has been caused by the unusual layers of power, responsibility as well as expertise. This has certainly affected the public’s perception of one or the other’s incapability of conducting their work properly and thus has created a general dissatisfaction. This negative perception was aggravated by the lack of public debate and information on the work by the various actors in the field of truth-seeking and accountability for human rights violations.

4.1.1. International Stakeholders

a) International Criminal Tribunal for the former Yugoslavia

The ICTY was established in 1993 by UN Resolution 827 and presents one of the most important mechanisms for transitional justice in the former-Yugoslavian countries. Its mandate is to bring to justice persons responsible for serious violations of international humanitarian law in the territory of the former-Yugoslavia.⁵⁰ All countries of the former-Yugoslavia are duty-bound to cooperate with the ICTY and should collect and keep evidence, and arrest and detain war crime suspects.⁵¹ After the declaration of its “completion phase” by the UN Security Council more than 10 years after its establishment, a number of big trials will remain unresolved.⁵² This assumption is strengthened by the mass belief that few preconditions for war crime prosecution and trials are in place in the countries of former Yugoslavia to enable closing of these cases which will certainly “foster a culture of impunity”.⁵³ In Kosovo, only Kosovo Serbs believe up to 56% that war crime trials conducted in the ICTY contribute to achieving justice. Kosovo Albanians and other non-majority communities believe that war crime trials conducted in Kosovo would contribute more to achieving justice.⁵⁴ This disbelief of the ICTY work is supported by many Kosovo Albanians who regard ICTY’s indictment of two former KLA

⁴⁷ UNDP Report, op.cit., p. 16.

⁴⁸ Rangelov, Iavor. EU Accession Conditionality and Transitional Justice in the Former Yugoslavia, LSE

⁴⁹ Ibid.

⁵⁰ For more information on mandate and cases see: www.un.org/icty.

⁵¹ Zupan

⁵² I.e. Ratko Mladic and Goran Hadzic who are still at large.

⁵³ Zupan. Op.cit.

⁵⁴ UNDP Report, p. 22.

members (out of seven indicted) a shocking attempt to balance the role of the parties engaged in the war in Kosovo and thus equate the victims with the perpetrators. For a large part of Kosovo Albanians, “The bitter truth for the moment remains that ten years after the war the Hague Tribunal, until now, has indicted two Albanians and no Serbs.”⁵⁵ This illustrates the widespread feeling amongst Kosovo Albanians of ICTY inefficiency on one hand and its partiality on the other⁵⁶.

The most notorious trial at the ICTY was the case of former President Slobodan Milošević which started in 2001. When Slobodan Milošević died in his cell in March 2006, his trial ended without a verdict leaving his legacy of war unpunished. As Tim Judah, the renowned Balkans analyst, phrases it: “Now there will never be a judgment from outside the region, which former Yugoslavs might one day be able to look to as impartial.”⁵⁷ The trial of former President Slobodan Milošević received massive coverage throughout Kosovo and his death without a verdict was a disappointment to many. On the other hand, former Kosovo Prime-Minister Ramush Haradinaj, a former KLA Commander was charged with war crimes by the Hague Tribunal in March 2005. His indictment was heavily criticized by Kosovo Albanians. On April 2008 however, after a three-year trial, Haradinaj was acquitted and released by the Hague Tribunal⁵⁸. Kosovo Albanians celebrated his release as the final proof that the Albanian fight during the war was just. The perception on the Serbian side was that of partisan justice.

b) UNMIK

In the immediate aftermath of the war in 1999, setting up a functioning judicial system was one of the most critical challenges for the UN mission. As rightly noted, “the failure to address past and ongoing violations promptly and effectively, and to create a sense of law and order, can impede the broader objectives of the operation.”⁵⁹ In fact, as is documented by series of international organizations as well as local actors in the last eight years, this is precisely what happened in Kosovo. The installation of the UN protectorate could not prevent chaos in a country where the justice and police apparatus left together with the occupying regime. As the Secretary-General would account in a report to the Security

Council in July 1999 “The security problem in Kosovo is largely a result of the absence of law and order institutions and agencies. Many crimes and injustices cannot be properly pursued.”⁶⁰

UNMIK was mandated to establish a new Emergency Judicial System, develop it into a functioning judiciary and oversee its independence. In addition, OSCE was tasked with the

⁵⁵ Palokaj, Augustin. ‘Drejtësia e Del Pontes’. Koha Ditore. 7 April 2008, p. 10.

⁵⁶ A number of Serbs have been indicted for crimes committed in Kosovo, even if none of them are actually Kosovo Serbs.

⁵⁷ Judah, Tim. Milošević’s legacy of discord. BBC. 11 March 2006. Retrieved from: <http://news.bbc.co.uk/2/hi/europe/4797564.stm>.

⁵⁸ It is worth noting the presiding judge’s statement that “The Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe”. See <http://www.un.org/icty/pressreal/2008/pr1232e-summary.htm>

⁵⁹ Strohmeier, Hansjörg. Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor. *The American Journal of International Law*, Vol. 95, No.1, pp. 46-63 (2001)

⁶⁰ Secretary-General report to Sec. Council “On the Interim Administration Mission in Kosovo”, S/1999/779 on 12 July, 1999 cited in Amnesty International Report “Kosovo (Serbia): The challenge to fix a failed UN system.” January 2008.

mandate to build the legal institutions and monitor the justice system.⁶¹ UNMIK had also established the Office for Missing Persons and Forensics (OMPF) within its Pillar I on Police and Justice, to help with expertise on examining human remains.

A while into the mandate, prisons became overcrowded with Serb detainees protesting long detentions without trials. The ICTY could only try cases of criminals indicted of the worst atrocities on the widest scale. The idea of establishing the international-led Kosovo War and Ethnic Crimes Court (KWECC) as the local arm of the ICTY was abandoned after a few months due to resistance from Kosovo Albanian lawyers and judges who feared lack of ownership in the future court as well as complications of an additional layer between the domestic judicial system and the ICTY.⁶² Soon after, UNMIK established Regulation 2000/6 and appointed the first international prosecutor and international judge in the Mitrovica District Court after a violent incident in which a Kosovo Albanian judge released alleged criminals.⁶⁴ After continuous calls for attention from Kosovo Serbs in prolonged detention and from the OSCE Legal System Monitoring Section (LSMS) for increased efforts for objectivity which mono-ethnic trials composed of only Kosovo Albanians were not conducting, UNMIK increased the presence of International Judges and Prosecutors (IJPs) in committees to prevent Kosovo Albanians from over voting them in war-crime cases.⁶⁵ However, the number of maximum eight IJPs serving in Kosovo was extremely small to handle the vast amount of cases and their short-term mandate of only six (6) months did not help their local counterparts.

Even eight years after being stated evaluation seems to stand that UNMIK “failed to develop any coherent strategy for the justice sector, including war crimes cases. It opted instead for a dithering approach that proved catastrophic for defendants and victims alike, particularly Kosovo Serbs.”⁶⁶ On the other side, almost a decade after the re-establishment of a local judiciary system, due to the [allegedly] ethnic bias in the judiciary, the UNMIK Department of Justice continues to regard the Kosovo judicial system unfit to handle war crimes and inter-ethnic crimes.⁶⁷ However, some actors in Kosovo would dispute this, arguing that the international approach has been influenced by prejudice of international judges and prosecutors who, due to lack of professional contact with their local counterparts, will unfortunately transfer this erroneous approach to the next international mission in Kosovo (EULEX). Furthermore, the independence of the UNMIK judicial sector has been questionable over the last years by various reports arguing that being

Even eight years after it is evaluated that UNMIK “failed to develop any coherent strategy for the justice sector, including war crimes cases”.

⁶¹ The Kosovo Judicial Institute which trained judges and prosecutors was firstly an OSCE supported organ which became an independent institution only in 2005.

⁶² Periello, Tom and Wierda, Marieke. ICTJ: Lessons from the deployment of International Judges and Prosecutors in Kosovo. March 2006.

⁶³ UNMIK Regulation 2000/6 of 15 February 2000 on the Appointment and Removal from Office of International Judges and Prosecutors. Retrieved from: http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_06.htm

⁶⁴ Ibid.

⁶⁵ Hartmann, Michael. United States Institute of Peace. International Judges and Prosecutors in Kosovo: a New Model for Post-Conflict Peacekeeping. 2003; This is regulated by UNMIK Regulations No. 2000/64 on Assignment of International Judges and Prosecutors and Regulation No. 2001/2 Amending UNMIK Regulation No. 2000/6, As Amended, on the Appointment and removal from office of International Judges and International Prosecutors.

⁶⁶ Marshall, David and Inglis, Shelley. The Disempowerment of Human Rights Based-Justice in the United Nations Mission in Kosovo, Harvard Human Rights Journal, p. 101 (Spring 2003). See also Amnesty International, Serbia (Kosovo): The challenge to fix a failed UN justice Mission (January 2008), retrieved from <http://www.amnesty.org/en/library/asset/EUR70/001/2008/en/EUR700012008en.html>.

⁶⁷ Voice of America, Interview with head of UNMIK’s Department of Justice Robert Dean in the article ‘Gjyqësori i përgatitur për statusin e ri’ published in Infopress on January 14, 2008.

subject to the executive arm of the UNMIK Administration, ultimately tainted the International Judges and Prosecutors Programme.⁶⁸

By late 2008, it is expected that international judges and prosecutors from the EU will be replacing the UN mission in Kosovo. This will require another transition period until the new judges and prosecutors are familiarized with the political and judicial circumstances and cases. According to the Acting Head of UNMIK Department of Justice, cited in Amnesty International's 2008 report, the backlog created in the last eight years of UNMIK administration of the justice system, will have to be addressed by the European Security and Defense Policy mission.⁶⁹

c) EULEX

Although lower staff in comparison to UNMIK, the EULEX mission is foreseen to put tremendous importance to their monitoring, mentoring and advising function over the justice system. However, this will be done without a capacity-building approach. Their plans on this sector are to cover all district courts and thus will technically present a much better approach compared to the UNMIK one which applies a central approach.⁷⁰ Whereas some argue that a positive element distinguishing the EULEX mandate from UNMIK is that the new European judges and prosecutors will work under the umbrella of the Kosovo Judicial Council, others fear that EULEX will undermine existing Kosovo institutions. An example of this is the plan for EULEX to have a special office for third party complaints, thus undermining the institution of the Ombudsperson.⁷¹

4.1.2. Local Stakeholders

a) Kosovo Assembly

The Kosovo Assembly has not been very active on matters concerning transitional justice. The only addressed issue in the Assembly is that of missing persons. This issue is covered under the

The Kosovo Assembly has not shown an interest on matters concerning transitional justice.

mandate of the Commission on Human Rights, Gender Balance, Missing Persons and Petitions. In the last years, the Commission has continuously called for more responsibility from the Kosovo Government. However they have not developed any strategies or initiated any specific measures to open the debate on the issue of missing persons in the

Assembly. The latest such request concerns the functionalizing of a Government Commission on Missing Persons.⁷² Moreover, issues of return and communities are also addressed through the Commission for the Rights and Interests of Communities and Return. Until now, no reports from the executive branch have been requested by this commission with regards to progress and strategies for return and reintegration.

⁶⁸ Amnesty International. "Kosovo (Serbia): The challenge to fix a failed UN justice mission", January 2008, p. 36-37.

⁶⁹ Ibid.

⁷⁰ Anna Myriam Roccatello. Interview. February 2008

⁷¹ Focus Group. March 2008; The Ombudsperson selection has been a highly controversial issue in the last three years with a blockade of the selection of the Ombudsperson as well as UNMIK resistance to allow it to accept complaints against UNMIK, KFOR or other international organs which have immunity.

⁷² Transcript of session held on March 3rd, 2008 of the Commission on Human Rights, Gender Balance, Missing Persons and Petitions. Kosovo Assembly. Prishtina.

b) Government

In 2004, during the internationally mediated dialogue between Prishtina and Belgrade on technical issues, both governments agreed on the establishment of a Working Group on Missing Persons which held its first meeting in March 2005. The government representatives of both parties were mediated by the International Committee of the Red Cross (ICRC) and the Kosovo delegation was accompanied by UNMIK. Although both governments verbally accepted the responsibility to keep the working group going, no real progress was made regarding sharing sensitive information (most of the meetings were held behind closed doors).⁷³ The political changes of this year (Kosovo's declaration of independence, the resignation of the Serbian government and the following electoral campaign in Serbia) have delayed progress and the Kosovo government had not appointed a representative of the Prishtina Working Group until April 2008. The latest meeting has been held at the end of April 2008, in Belgrade after a pause since December 2007.⁷⁴ Obstacles for the continuation of this group include Serbia's refusal to accept Kosovo's new status. However, the ICRC continues to emphasize that the nature of this cooperation is humanitarian and thus should be continued.⁷⁵

After the adoption of the Constitution, a Consultative Council for Communities (CCC) has been established under the auspices of the President of Kosovo.⁷⁶ The CCC has the mandate to act as a liaison mechanism between the communities and the government.⁷⁷ A similar mandate applies also to the Office for Communities to be established within the Office of the Prime Minister. No decisions have been made yet on what representatives of communities will be involved in this office. The government argues that the Office for Communities will serve as a promoter of communities' rights which will receive vast attention from the government.

c) Ministry of Communities and Return

The issue of returns remains critical for the minority communities in Kosovo. Until now, nine years after the war, less than 18,000 out of 250,000 Serbs, Roma and other minority refugees and displaced persons have returned.⁷⁸ In addition to security, obstacles with property rights settlement hinder faster progress in this regard. Despite government allocation of funds for rebuilding/providing housing for the returnees as well as large financial support from international donors for this issue, the government has failed to establish a link between its assistance for returns and reintegration and reconciliation.

The government has failed to establish a link between its assistance for returns and reintegration and reconciliation.

⁷³ Idriz Gashi, Interview. March 2008.

⁷⁴ Balkan Insight. Talks on Kosovo Missing Persons to Resume. 21 April, 2008. Retrieved from: <http://balkaninsight.com/en/main/news/9531/> , <http://www.balkaninsight.com/en/main/news/9677/>

⁷⁵ Ibid.

⁷⁶ Article 60. Draft Constitution.

⁷⁷ Ibid. Article 60.3.1.

⁷⁸ Human Rights Watch. Kosovo: Build a New State on Rule of Law. February 15, 2008. Retrieved from: <http://www.hrw.org/english/docs/2008/02/15/Serbia18053.htm>

d) Ministry of Labor and Social Welfare

The Ministry of Labor and Social Welfare established the Martyrs Families and War Invalids Department⁷⁹ tasking it with the responsibility of regulating the scheme of benefits and reparations for a number of categories of war victims as ordered by UNMIK Regulation 2000/66 on Benefits for War Invalids of Kosovo and for the Next of Kin of Those who Dies as a Result of the Armed Conflict in Kosovo. Currently these schemes are put in place in conformity with the Kosovo legal framework. In 2006 the Kosovo Assembly adopted the 'Law on Status and Rights of the families of Martyrs, KLA War Invalids and Veterans, and the Families of Civilian Victims of War'.⁸⁰ The Law covers the following victims' groups:

- Veterans of KLA and their families
- Invalids of KLA
- War hostages
- Missing KLA soldiers
- Civilian victims
- Civilian hostages
- Civilian missing persons

This legal framework is the sole legal mechanism addressing and recognizing the issue of victims. However, its biggest shortfall is "the inability to differentiate between war veterans and invalids on one hand and [civilian] victims on the other".⁸¹ By putting all these different categories of people in one 'package', the Law declares all victims, including civilians and missing persons into martyrs.⁸² This is certainly not satisfactory for family members of the missing. According to the union of Associations of Families of the Missing, it was unacceptable for the families of missing persons to have only one law try to settle the whole problem arguing that "the issue is too sensitive and requires a special law".⁸³

e) Kosovo Courts

The departing UN mission will hand over the files and documentation of unsolved 'sensitive' cases to the Kosovo justice system. The Kosovo government has declared the EU mission 'a helping hand to lighten the workload' of the Kosovo justice system. This may portray a lack of initiative for solving Kosovo's issues by people from Kosovo themselves. However, this may also be the negative result of a decade long tradition of being seen unfit and unable by the 'international experts' to solve the society's problems. These years have inherited a new confusion among the local judiciary, over their choices to be courageous and take on high-risk cases or to serve the existing system where the UN or EU mission are the ones who make the decisions or leave without being accountable if they did not make the right decisions.

The majority considers that criminal prosecution and procedures as the most important mechanisms for achieving justice.

⁷⁹ Ministry of Labor and Social Welfare web-site: <http://www.mpms-ks.org/index.php?id=1>

⁸⁰ The Law Nr. 02/L-2 was adopted by the Kosovo Assembly in February 2006 and was signed by the SRSB in May 2006. However, it cannot be found under the UNMIK Official Gazette of Regulations.

⁸¹ UNDP Report, op.cit., pg.29.

⁸² Focus Group. March 2008.

⁸³ Haki Kasumi. Interview. 22 April 2008.

Although a renowned expert on transitional justice, Pablo De Greiff, considers criminal justice “a struggle against perpetrators rather than an effort on behalf of victims” for the Kosovo ethnic groups the perception is somewhat different.⁸⁴ For many victims of different ethnicities in Kosovo prosecution and sentencing of criminals, be it in Belgrade’s District Court Special Chamber on War Crimes or a District Court in Kosovo by an international prosecutor; do provide a sense of satisfaction and relief.⁸⁵ Nevertheless, mistrust of the major ethnic groups in Kosovo over the Kosovo and Serbian courts show a different angle. Only 9% of Kosovo Serbs trust Kosovo Courts and merely 3% of Kosovo Albanians believe the war crime trials conducted in the Belgrade District Court are according to international standards.⁸⁶ Statistics show that the majority considers criminal prosecution and procedures as the most important mechanisms for achieving this justice.⁸⁷ The majority of the Kosovo population, an exact 90%, also considers punishment of all perpetrators of war crimes and human rights violations in the Kosovo recent past a crucial element of justice.⁸⁸ However, associations representing families of the missing declare the opposite. According to them, in all cases trials must be conducted where the crime was committed and “trials in Belgrade are unacceptable”.⁸⁹

In the latest examples of inter-ethnic criminal cases, one of the legal proceedings in Prishtina for the March 2004 riots ended in January 2008, two years after they had been initiated from the accusations raised by an international prosecutor in 2004. The Prishtina District Court, led by international prosecutors, sentenced 5 Kosovo Albanians to a total of 23 years imprisonment for breach of security, inciting hate and unrest. Reparations were also requested, to rebuild the victims’ property, in the amount of 50.000 EUR from all accused.⁹⁰ The local Municipal and District Courts also brought criminal charges, conducted trials and convicted some 145 people for the various crimes in the March riots.

Prosecution and convictions related to the March riots also belong to the majority of cases which were not publicly discussed or debated although it could have presented a trigger for discussion for the transitional justice sphere in Kosovo.

f) Civil Society and Media

The extremely rare initiatives in spheres falling under transitional justice can be found with civil society attire. According to many analysts, Kosovo lacks a homegrown brand of human rights activities courageous enough to take on the tasks related to dealing with the past. Projects on truth-finding and data gathering of victims are mostly done low-key and get little support from the government.⁹¹ Public debates on the extremely sensitive political/judicial issues of war criminals are non-existent. Minority integration and inter-ethnic dialogue are now perceived as superficial phrases used from non-governmental organizations solely for purposes of attracting funds. Projects with regards to information gathering about victims and legal assistance and representation of victims

Projects on truth-finding and data gathering of victims are mostly done low-key and get little support from the government.

⁸⁴ DeGreiff, Pablo. The Handbook of Reparations

⁸⁵ Bekim Blakaj Interview. Humanitarian Law Center – Prishtina.

⁸⁶ UNDP Report, p.21

⁸⁷ Ibid.

⁸⁸ UNDP Report, p. 21.

⁸⁹ Haki Kasumi. Interview. 22 April 2008.

⁹⁰ Koha Ditore, 26.1.2008, p.9.

⁹¹ On example of this is the Council for the Defense of Human Rights and Freedoms project on writing the monograph of victims of the Kosovo war which includes all communities of Kosovo.

and their families in judicial procedures are handled by the Prishtina branches of Belgrade based organizations.⁹² While most of these pitfalls are faced amongst both Kosovo Albanian and Kosovo Serb civil society entities, the latter suffers from a number of additional shortcomings, not least of which being a small number of viable and well-established NGOs. On the other hand, for the last years the media sector in Kosovo has chosen the role of being solely the transmitter of information rather than defender of truth and contributor to the debate on issues of inter-ethnic relations. Cases of trials for of human rights violators during the war, held in Kosovo, were not utilized to stir a larger form of debate amongst the intellectuals in the society as well as the affected (victims). The Media Center in Caglavica was established in 2007 and is a rare example of a pragmatic approach towards direct communication with Kosovo Serbs.

4.2. Main documents

There is considerable attention paid in Kosovo to legislative efforts. Whilst such attention often goes only as far as enactment is concerned, importance of having good documents in place can be hardly overemphasized. The Comprehensive Proposal for the Kosovo Status Settlement offers some guidance for dealing with war crimes and human rights abuses. The Proposal specifically obliges Kosovo to “fully respect the process of reconciliation among all its Communities and their members”.⁹³ As such, this document leaves it in the hands of Kosovo institutions to develop the strategy on how to deal with reconciliation and other aspects of past injustices. According to the document, Kosovo shall “develop a comprehensive and gender-sensitive approach for dealing with past, which shall include a full range of transitional justice initiatives”.⁹⁴

The silent crisis of inter-ethnic relations requires much more attention and support which would be best if secured by the Constitution.

In addition to this guidance that the Proposal provides for Kosovo institutions, it indirectly fosters certain segments of transitional justice, primarily through encouraging integrity, legitimacy and accountability of institutions.

Another key document is the Constitution of the Republic of Kosovo, which came into force on 15th of June 2008. Under its provisions on “Responsibilities of the State”, the draft Constitution calls for “a spirit of tolerance, dialogue and support reconciliation among communities”.⁹⁵ This is the sole instance where the draft Constitution addresses the topic of reconciliation and inter-ethnic dialogue. According to many civil society experts on these issues, this is far too few.⁹⁶ With such grave problems between Kosovo Albanians and Kosovo Serbs and with absolute lack of effective dialogue between the different communities living in Kosovo, the society needs a much stronger voice in its Constitution. The silent crisis of inter-ethnic relations requires much more attention and support which would be best if secured by the Constitution.

4.3. Mechanisms for dealing with injustices and abusers

In former Yugoslav countries a variety of mechanisms were used including compensation, restitution, establishment of the fate of the missing, and opening memorials whereas restoration

⁹² Two of these organizations working for inter-ethnic dialogue and supporting truth-finding are the Humanitarian Law Center and the Youth Initiative for Human Rights. Both based in Belgrade.

⁹³ Article 2.5 of Ahtisaari Proposal

⁹⁴ Ibid.

⁹⁵ Draft Constitution of the Republic of Kosova. Article 58.2 ‘Responsibilities of the State’.

⁹⁶ Focus Group. March 2008

of property rights and financial reparations were mostly provided for the majority population (the “winners” of the war).⁹⁷

Truth-seeking - Perceptions among Kosovo Albanians and Kosovo Serbs on the sources ‘delivering’ the truth about war crimes committed during the war in Kosovo vary to a great extent. Whereas Kosovo Albanians consider court proceedings of war crime trials the most reliable source to establish the truth, Kosovo Serbs do not agree that war crime trials can contribute to truth-finding.⁹⁸ There is also a perception amongst the population, both in Kosovo as well as in Serbia, that the truth lies on the other side of the border. Sometimes, pieces of the whole truth are hidden amongst the actors that were directly involved in the conflict.⁹⁹

There is a lack of ‘support by the political structures for the prosecution of war crime suspects... and inadequate measures for witness protection’.

War crime prosecutions, as a method of obtaining truth, were used in former Yugoslavia countries, including Bosnia and Herzegovina, Croatia and Serbia, through special prosecutors’ offices and special chambers to deal solely with the most serious war crime cases.¹⁰⁰ Besides improving court proceedings and trials of war crimes this also improved the trust of the citizens in judicial mechanisms. However, all three countries had “insufficient support by the political structures for the prosecution of war crime suspects irrespective of their nationality, and inadequate measures for witness protection”.¹⁰¹ Similar issues are present in Kosovo as well.

Another issue is the continued presence of an international mission in Kosovo. Whereas the establishment of the Kosovo War and Ethnic Crimes Court did not function soon after the war, the model can be taken into consideration again in the current conditions. However, it is fundamental that even if it functions with a mixed group of local and international judges and prosecutors, its independence from the Kosovo Government as well as the executive powers of the EU mission must be secured.

Missing persons - The sense of completion that may prevail for many Kosovo citizens due to the new political changes, does not apply to families of missing persons. For them there is no completion until information about their fate is revealed and until their whereabouts are found.¹⁰² Their pain knows no ethnic division and this is recognized to some extent by the society who supports resolving the fate of the missing regardless of ethnic background.¹⁰³ Helping the local institutions in their quest for information and truth regarding missing persons, the ICRC regularly publishes and distributes a report with the list of persons unaccounted for in their attempt to find information.¹⁰⁴ According to the Coordinating Council of Associations of Families of Missing Persons, the resolution of Kosovo’s political status has further complicated the issue of missing persons in relation to Belgrade in addition to the arguments that the

⁹⁷ “Transitional Justice in Post-Yugoslav Countries: Report for 2006”. Humanitarian Law Center; Documenta; Research and Documentation Center-Sarajevo, p. 7.

⁹⁸ UNDP Public Perceptions on Transitional Justice: Report on Transitional Justice Opinion Polling Survey Conducted in April – May 2007 in Kosovo.

⁹⁹ Interview. March 2008.

¹⁰⁰ “Transitional Justice in Post-Yugoslav Countries: Report for 2006”. Humanitarian Law Center; Documenta; Research and Documentation Center-Sarajevo, p. 6.

¹⁰¹ Ibid.

¹⁰² The UN marked International Day of the Disappeared is August 30th, whilst Kosovo marks its own Day of the Missing on April 27.

¹⁰³ UNDP Report, p.7.

¹⁰⁴ Melinda Bytyqi and Idriz Gashi interview. ICRC-Kosovo. March 2008.

Prishtina Working Group on Missing Persons is not preparing properly before facing the Belgrade Working Group.¹⁰⁵ According to the same, Kosovo Albanians are forgetting their pain and thus not fighting hard enough to find the truth.¹⁰⁶ On this subject, many human rights activists argue that “the anguish of a Kosovo Albanian mother is the same as that of a Kosovo Serb mother”.¹⁰⁷

Recognition of Victims' Status and Reparations - As was referred to repeatedly in the previous sections, transitional justice is essentially victim-centric. Its measures are centralized towards officially recognizing the harm victims had to endure and assisting their healing process through truth-seeking and accountability of perpetrators. In Kosovo however, the judicial measures as well as reparation mechanisms are perceived to have been neglected by international administration whose mandate was seen as primarily concentrated in preserving security¹⁰⁸.

Material reparation is highly supported in the population as a mechanism which should be applied for all victims regardless of ethnicity.

Those who have suffered the most in the society of Kosovo are the victims of injustices, whose rights to have information about their missing relatives, to be recognized as victims by the governing institutions or to receive reparation for their losses are still unfulfilled.

With regards to compensation, the process must be made on an individual basis for physical, psychological and material damages.¹⁰⁹ In Kosovo, a relatively small number of citizens seem to support non-material measures to ease the suffering of victims including recognition of victim's status, rehabilitation and re-socialization programs.¹¹⁰ On the other hand material reparation is highly supported in the population as a mechanism which should be applied for all victims regardless of ethnicity.¹¹¹

With regards to compensation, the process must be made on an individual basis for physical, psychological and

Memorials – Most of the infrastructure destroyed by the war has been rebuilt. Visual evidence of the recent past is thus limited to very few structures that were not destroyed and memorials. With regards to memorials honoring victims, mostly small scale monuments have been set up to honor KLA soldiers. Many cities and towns have small memorial sites to honor victims as is the case of Gjakova which recently revealed a memorial called “Wall of Pain” with the names of all deceased and missing persons.¹¹² Until now, no major initiative has been developed to honor all victims of the war and the past years. Amongst the citizens, only 15 % of the population believes that these memorials can assist in easing the victims' suffering.¹¹³ However, so far it can hardly be a memorial in Kosovo that is accepted by the “other side”, leaving thus much space for exploration of memorials as a transitional justice tool.

¹⁰⁵ Haki Kasumi. Interview. April 22, 2008.

¹⁰⁶ Ibid.

¹⁰⁷ Focus Group. March 2008.

¹⁰⁸ Focus Group, March 2008.

¹⁰⁹ UN Secretary General 1997 cited in Thiesse, Gunnar. Supporting Justice, Co-Existence and Reconciliation after Armed Conflict: Strategies of Dealing with the Past. Berghof Handbook 2004. Retrieved from: <http://berghof-handbook.net>

¹¹⁰ 37 % of Kosovo Albanians and 39 % of Kosovo Serbs consider rehabilitation programs the most adequate whereas 29% K-Albanians and 27% of K-Serbs consider recognition of victims' status as appropriate as well. Ibid.

¹¹¹ Kosovo Albanians and Kosovo Serbs support material reparations with 80% and 87% respectively. UNDP Public Perceptions on Transitional Justice.

¹¹² Koha Ditore, ‘Kujtohen të pagjeturit’. 27 April 2008.

¹¹³ UNDP Report, op.cit., p.30.

Security sector reform – In this field the outcome is mitigated. However, the declaration of independence could create a momentum for a new impulse in this sector. No vetting procedures have been put in place, neither of the police, nor of judges and prosecutors¹¹⁴. The absence of a vetting process does not help to overcome the crisis of trust in security institutions, which is characteristic of a post-conflict society¹¹⁵. Indeed, security institutions in Kosovo still have to consolidate their legitimacy and to increase the trust citizens have for them¹¹⁶.

Before the declaration of independence, the situation in Kosovo was specific, for according to UNMIK regulation No. 1244 and the Constitutional Framework the field of security was a reserved power of UNMIK and NATO. Any local involvement, let alone oversight, was almost inexistent. In 2005, a significant step has been made. The then-SRSG Søren Jessen-Petersen launched an Internal Security Sector Review in order to increase the local ownership of the security sector. A very positive aspect of this review is the extensive consultation of the population of Kosovo. This allowed to take into consideration a larger range of threats and to design a security sector based on the need of the public. Further, the declaration of independence led to the adoption of the Constitution of Republic of Kosovo. This fundamental text as well as Ahtisaari's plan lay the ground for Human Rights-based security structures.¹¹⁷

In the field of civilian control of security institutions, progress has been made first timidly from 2005 on, and to a larger extent after February 2008. The Parliamentary Committee on Security established in 2005 contributed to a nascent Parliamentary oversight on security issues. The new constitutional and legal frameworks resulting from the declaration of independence make possible a more thorough role of the Assembly committees in the oversight of the security institutions.

¹¹⁴ See UNMIK Administrative Instruction No. 2006/18 implementing UNMIK Regulation 2006/25 on a Regulatory Framework for the Justice System in Kosovo. It foresees that a one-time and comprehensive so-called vetting procedure should be put in place for the re-appointment of judges and prosecutors. However, the procedure does not include investigation of possible human rights abuses in the past.

¹¹⁵ ICTJ, *Challenging Legacies of Impunity*, 2006/2007, p. 24.

¹¹⁶ The Kosovo Protection Corps (KPC) suffers from a great lack of confidence among the minorities¹¹⁶. The Kosovo Police Service (KPS) seems to enjoy a satisfactory level of trust among the public, but it is still considered as politicized and corrupted¹¹⁶. The distrust of the public towards the judiciary institutions is problematic: a survey conducted in 2006 revealed that those who consider the judiciary to be “unfair” or “very unfair” are almost twice the number of those who have trust in the system. See UNDP, *Kosovo Internal Security Sector Review*, 2006, p XVIII and p. 67.

¹¹⁷ Not only security institutions must “operate in full transparency and in accordance with internationally recognized democratic standards and human rights”, but they must also reflect the ethnic diversity of Kosovo. See Constitution of the Republic of Kosovo, art 125, 126, 127 and 129. See also annex VII of the Comprehensive Proposal for the Kosovo Status Settlement.

5. Conclusions and Recommendations

Having gone through decades of repression and having experienced war may not make Kosovo a unique case. Many countries have similar histories. The population of Kosovo has faced apartheid, displacement and trauma. Many nations have had this misfortune as well. Most countries emerging from conflict and transitioning from war to peace require historical moments of political transformation to accept changes and new values. “When a society ‘turns over a new leaf’ or ‘gets a fresh start’, mechanisms of transitional justice can help strengthen this process”.¹¹⁸ For Kosovo, a fresh start was June 1999. However, the society experiences a protracted period of chaotic conditions while new infrastructure, education, justice, security and government structures are being established.¹¹⁹ Declaring independence is the other historical moment for Kosovo. It is also its historical chance to make a more concerted effort to work towards settling the many injustices committed before, during and after the war.

Independence is considered by many Kosovo Albanians as the final price paid to seal the grief caused by the past. In various interviews and broadcasted programs after the declaration of independence, Kosovo Albanian families of victims and invalids of the war declared their satisfaction that the past was now sealed and a new chapter was opened with a blank page.

However, considering the lack of open discussion about the past, the closing of the last chapter may not be acceptable to many. The issue of missing persons is still a big burden to the families who feel abandoned by the institutions in their search for the truth. In mid-2007, the majority of the population considered resolving the fate of missing persons a condition to achieve justice.¹²⁰ This will not have changed a year later.

Kosovo is still developing its institutions and in order to strengthen democracy at all levels it must use dealing with the past as “an instrument in the promotion of new social norms in the areas of justice, good governance, and human rights.”¹²¹ The recognition that there is a grave need of the citizens for information, truth and open discussion, would present a giant leap for the society of Kosovo. The Kosovo Government must recognize the public’s perception of the various forms of transitional justice and take these into account for developing strategies which can be well understood and accepted by the population. Various forms of financial reparations should be taken into account in the government’s measures to compensate victims of human rights violations. Material reparations may include delivery (one-time payments) as well as financial schemes (government bonds/pensions).¹²² Furthermore, whatever mechanisms are incorporated in Kosovo, to assist the population in handling past injustices and to improve inter-ethnic relations, the RAE communities must in no way be excluded.

Lastly, time is regarded by many analysts as a prerequisite for working with a society awakening from long inflicted trauma. In Kosovo’s case, this must not be considered as an excuse to conceal issues of the recent past which require further debate. Many unsolved concerns about accountability and especially truth-finding will continue to burden the citizens and thus the government as well unless proactive attention is given to them.

In initiating a comprehensive program of action to address the abuses of the past, Kosovo is in a unique position to set an example to the whole region. Among measures that could be carried out in the near future, some are enlisted below.

¹¹⁸ The Encyclopedia of Genocide and Crimes Against Humanity (Macmillan Reference USA, 2004), vol. 3, pp. 1045-1047. Retrieved from: <http://www.ictj.org>.

¹¹⁹ Focus Group. March 2008.

¹²⁰ This majority was the response of K-Albanians, K-Serbs and members of other minorities as well. The support from all communities stands at 96%. Ibid.

¹²¹ Bleeker, op.cit., p.3.

¹²² DeGreiff, op.cit., p.3.

1. Kosovo explore the best possibilities for determining the causes, the nature and extent of the abuses inflicted on the population since the 1990s, including the possible use of regional initiatives.
2. To prepare for this, the Kosovo government in conjunction with the international community shall mount an extensive program of public information, consultation of and cooperation with civil society.
3. The Kosovo government shall instigate a comprehensive program of reparations.
4. All such transitional justice measures as are initiated shall scrupulously respect the expectations, concerns and needs of all communities in Kosovo.
5. Initiate discussions/a debate amongst victims of different ethnicities to reconcile views on victim-hood and ease the inter-ethnic animosity.



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