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Transitional Justice and the Right to Know the "Truth":

The case of Kosovo in a Comparative Perspective.

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Introduction

The ever-growing interest in human rights issues of the last decades, brought to pose the attention to the causes and consequences of situations where gross violations of human rights occurred. This is what transitional justice seeks to address.

In a video report published last 23rd September, created by the International Centre of Transitional Justice and called "Side by Side with Victims", the Deputy Executive Director of the Centre, A.N. Roccatello, states that the main aim of transitional justice is to rebuild a society, institutions, trust and respect of individuals' rights, that witnessed massive violations of human rights. So, in the wake of such moments, the first questions that a society is called to answer is "How can we move forward? How can we restart to live together again after a huge period of hate?". The answer, somehow, is provided by transitional justice tools, namely through the creation of new measures of justice. Therefore, one of the biggest success with this regard is the acknowledgment by the society that what happened should not happen again. In this video, the attention is focused on the testimonies of victims of human rights violations coming from different realities, like Yemen, Nairobi, Uganda, Sierra Leone, Tunisia and Colombia, that, in a way, represent the latest cases of intervention through transitional justice means of the last years.[1]

The term "transitional justice" refers to a concept of justice that can be found in societies that experienced periods of political transition that generally come after the end of military dictatorships or totalitarian regimes in order to restore peace, freedom and a democratic government.[2] Overall, during these hard periods in the course of history, societies experience human rights violations on large-scale, genocides, persecutions and repressions, broadly speaking these periods produce a huge quantity of war crimes. When

[1] ICTJ, *Side by Side with Victims*, available at https://www.ictj.org/multimedia/video/side-side-victims, accessed 25th September 2019.
[2] Teitel, R.G., *Transitional Justice*, Oxford University Pres, 2002. pag.16.

the regime changes, the new established government is immediately called to fix the atrocities committed by their predecessors.

Likewise, transitional justice includes a set of judicial and non-judicial measures for redress to mass violations of human rights within a society. These set of "special" measures do not want to substitute traditional justice tools, but in this specific context, the ordinary justice system probably wouldn't be able to implement an adequate answer.

The central themes of transitional justice, though, are basically a combination of an application of human rights policies, posing the attention on the acknowledgment of the dignity of citizens and, overall, of human beings.

Among the main actions that transitional justice provides, the most significant and notable are: the support for the compliance with the rule of law, the right to access to justice, the promotion of reconciliation of former enemies and to recreate and rebuild trust in institutions.[3]

The above-mentioned actions are practically implemented through criminal prosecutions, truth-seeking processes, reforms and reparations. These measures shall not be considered as mutually exclusive the one with the other, but as a set of complementary measures that, according to the context, can be all applied.

When a society experience a hard moment in history, namely a gross violation, the consequence is that there is a huge sense of vulnerability fragileness of the society that shall be filled with an adequate program of recovery. The result is an unstable and under-resourced society. In particular, one of the biggest shortcoming is, with no doubt, a very scarce system of protection of human rights. With this regard, transitional justice and its mechanisms pave the way for a real and tangible improvement and implementation for the protection of human rights and human dignity.

Following this line of thought, what transitional justice aims to obtain is a double effect that is both oriented to the past than to the future. The ultimate intention is to deal with the past in order to move to a better future by avoiding the repetition of the atrocities

[3] ICTJ, *What is Transitional Justice*? Available at: https://www.ictj.org/about/transitional-justice , accessed 13th September 2019.

experienced in the past. This ambitious aim is not a utopia, and this was proved by the positive results that were obtained in the course of history, especially thanks to the public processes in front of the Truth Commissions. In this sense, there was a decisive contagion effect that allowed closer countries to take into consideration and eventually to undertake actions of transitional justice in the aftermath of a hard period. This is, for examples, what is easy to notice in Latin America, since the establishment of Truth Commissions were a recurring experience for most of the countries that shared a common period of hard military dictatorship and abuses. The implementation of these mechanisms helped and facilitated their path and transition to democracy.

Among all the actions that can be taken in the framework of transitional justice, the most recurrent is the establishment of a Truth Commission. The most famous case is the Truth and Reconciliation Commission established in South Africa after the period of the Apartheid regime, namely in 1996, but it is not the first time in history that a truth-seeking mechanism like that was established.

The origins of the Truth Commissions trace back to the eighties, when in 1983 the first recognized Commission was set up in Argentina, however, there are other traces of previous Commissions, even if not officially recognized, that started to exist in the seventies, as the one in Uganda.

Truth Commissions are non-permanent and non-judicial bodies that are created to establish a common version of the facts. They are non-permanent since their duration is limited in time, so their investigations may last only for a few months up to two years, if the mandate is not extended. Moreover, they are non-judicial since the outcome of their investigations are not binding, so they can only issue recommendations, reparations and reforms that are up to the government for their implementation.[4]

Their aim, so, is to identify the roots and the causes of the abuses, through investigations public hearings which involve both the victims (or the victims' families) than the perpetrators. These processes are generally broadcasted and the Commission, at the end of the mandate, produce a final report that is publicly distributed. This process is crucial since it allows victims not to be forgotten and to have their stories heard and being

[4] ICTJ, *Truth Commissions*, available at: https://www.ictj.org/gallery-items/truth-commissions , accessed the 13th September 2019.

acknowledged officially. So, they are based on the assumption that telling the truth is a form of healing, since in these cases, the sufferance cannot be attributed only to the individuals involved, but it shall be considered in a broader perspective, namely as a social experience.[5]

This form of therapeutic testimony, allows the victims or the victims' families to gradually let the past go, and eventually to focus on the building of a milder future.

Therefore, the purpose of this analysis is a comparison between different experiences of Truth Commissions. The starting point, as mentioned above, will be the most famous case study, namely the South African Truth and Reconciliation Commission, and then the research will focus mainly on the Truth Commissions set-up in Latin America and it will analyze, case by case, the outcomes of the investigations trying to point out the main elements of success and that can be applied to other cases. On the other hand, the weaknesses of such Commissions will be also considered, just to have a broader and more complete perspective. The ultimate aim of this thesis, though, is to consider, in the light of the hypothetical establishment of a Truth Commission in Kosovo, what are the positive features that derive from previous experience that may bring success to this mechanism.

So, the thesis will be divided as such: after this brief introduction to the topic, the first chapter will be a theoretical one, providing the guidelines and tools for the interpretation of what will come next. So, it will start by exploring the main pillars of transitional justice, and the history of the latter. Then, it will explore the actors and the main challenges. A further section will be centered on the right to know and the main mechanisms of transitional justice, namely hybrid tribunals, Truth Commissions and two case studies (South Africa and Rwanda) and finally amnesties and reparations.

The second chapter instead, will be entirely devoted to Kosovo, more in detail it will be an overview of its Constitutional System. At the beginning, there will be a description of the historical background, crucial in order to understand the following

[5] Minow, M., *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Chapter four, Boston, 1998.

stages. After the parenthesis on the roots of the war and the origins and consequences of the ethnic conflict, the attention will move to the judicial system, and then to the constitutional transition that brought to the adoption of the last Constitution in 2008. A further part will concern the Constitutional Court in Kosovo and it will mention some cases that the Court was asked to judge, then there will be sections for the constitutional rigidity and institutional reforms in Kosovo. An interesting part will be the one related to the Truth-Seeking Initiatives which includes the Kosovo Memory Book and the RECOM Initiative that will be explained in detail. The last section of the chapter will describe the War Crime Trials and it will include, not only the trials in front of the International Criminal Tribunal for Former Yugoslavia, but also those held in Kosovo and in front of the Serbian Courts.

The third chapter will be the central one and the most significant within the framework of this analysis. It will be divided into two parts. It will first introduce the different "*Comisiones de la Verdad*" (Truth Commissions) set up in Latin America and then it will start analyzing case by case the different Commissions: Argentina, Chile, El Salvador, Peru and Panama. Moreover, it will compare the common features to all the Commissions and esteem whether those mechanism lacked something that should be improved. The following section will describe instead the Non-Official Commissions, so the one of Bolivia, Brazil, Colombia and Paraguay. For Non-Official Commissions, it is meant those structures that are created via an independent initiative, so without the government approval and a without a specific legal mandate. The second part of the chapter, though, will retake the topic of Kosovo and will focus on its Soon-to-be Special Court. It will explain the difficult and controversial path whose final aim is to create the Truth and Reconciliation Commission for Kosovo.

Finally, the fourth and last chapter of the dissertation will be entirely devoted to a conclusive and rather personal analysis in the light of what have been analyzed in the previous chapters. It will provide a point of view concerning the research question of the thesis, namely if it is always effective to apply such mechanisms in a given society but also, specifically, in the context of Kosovo. So, the final reflection will include also the consideration based whether the creation of a Truth Commission in Kosovo could be a window of opportunity, so considering a balance between its "costs and benefits" and

providing a final personal vision, taking also in consideration the potential weaknesses of this Commission.

The last section, though, will also answer the research question of this thesis, namely: is it worth it to establish a Truth Commission in Kosovo? Could it be a window of opportunity for a final and lasting ethnic reconciliation? Could this transitional justice mechanism build a shared version of the events caused by the war, for the achievement of a better future based on cooperation and mutual trust?

In conclusion, the choice of this only apparently unusual comparison dates back to the most meaningful experiences of the last year of university. The first was a Summer School in Kosovo, in partnership with the Italian Army, that allowed me to get in touch to a reality that I scarcely knew. During a visit to the Humanitarian Law Centre in Pristina, I came in touch with all the documents and developments that expressed the inability to establish a Truth and Reconciliation Commission. A very significant moment, was that for the first time, the director of the Centre, explained to us with a total neutral tone, the difficulties deriving from the ethnic conflict in the creation of the Commission. Thanks to his help, I came back home with a huge quantity of useful material of the Centre that was crucial and that encouraged my research and that stimulate my curiosity.

The second important training experience that completed my comparative analysis was a six-month internship in the Embassy of the Republic of Panama to Italy, where, thanks to the diplomatic colleagues, I found out that the use of a Truth Commission as a form of recovery after periods of military dictatorship, was a recurring experience from the eighties up to now in the whole Latin American region. They contributed to my research by providing me important materials especially with regard to the Commission established in Panama, so it is for this reason that the section devoted to the latter will include more detailed information. Therefore, these experiences were drivers that pushed me to undertake the development of this analysis.

Nevertheless, what pushed me towards the direction of this comparison, was the possibility to deeply analyze the successful and ineffective mechanisms that drove these Commissions and consider, when possible, if some of the successful best practices and guidelines could be applied for the hypothetical realization of the project of a Truth Commission in Kosovo.

CHAPTER ONE
TRANSITIONAL JUSTICE: THE POLITICS OF MEMORY

Introduction

Transitional Justice is a broad concept that includes various perspectives and definitions. Form a judicial perspective, it can be defined as set of judicial and non-judicial measures that a country adopts in the passage from a hard moment of violence and human rights abuses to a more democratic regime and a constitutional transition. Generally speaking, in the wake of these moments in history, the society that suffered these atrocities is left fragile and vulnerable so it is crucial that this system poses at the center of its actions and policies the right redress for victims.[6]

Another definition of transitional justice that can be provided is as an ethical and political issue that societies face in the passage from a totalitarian to a democratic regime and that deals with the legacies of mass atrocities, repression and human rights violations. Furthermore, by transition it is not meant only a change of government or a process of liberalization from an authoritarian regime, but literally the shift from a non-democratic regime to a democratic one. The judicial system of Transitional Justice operates within a limited period of time, since the ordinary judicial system would not be capable to give an adequate response to the atrocities committed.[7]

Likewise, if we consider also Teitel's definition of transitional justice, namely 'the conception of justice associated with periods of political change, characterized by legal responses to confront the wrong-doings of repressive predecessor regimes'[8], it is underpinned the correlation among transitional justice, political change and transition to democracy, as a consequence he addresses to those regimes that gradually, through this transition, became more democratic than they used to be. Moreover, transitional justice,

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[6] ICTJ, *What is Transitional Justice?* available at https://www.ictj.org/about/transitional-justice accessed 20th September 2019.

[7] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*. Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

[8] Teitel, R. *Transitional Justice Genealogy*, 16 Harvard Human Rights Journal, 2003.

was generally associated to the description of a moment in which justice was different from ordinary times, in the sense that in some cases some "compromises" were reached and considered acceptable due to the special circumstances in which this kind of justice operates, and therefore sometimes lowering the standards of rule of law. However, in some periods of history, when transitional justice became more developed than it was before, it seems that it has lost its connection with its inherent temporary nature, and this allow scholars and actors of transitional justice to raise some questions, such as the aims, the beginning and the precise end of this process. With this regard, it is also important to stress that the state is not the only actor involved in the process of transitional justice, but it is only one among a variety of other relevant characters that act simultaneously. So, the actions are carried on by state and non-stat actors, like NGOs or agents for cooperation.[9] Apart from the state, though, as an active actor, the progressive internationalization of transitional justice involved international actors like UN agencies, international NGOs and development partners, whose programs were focused on human rights protection and peacebuilding though granting technical advice and assistance to governments, in order to reach a greater respect for the rule of law standards.[10]

A far more recent consideration of Naomi Roht-Arriaza sees transitional justice as a 'set of practices, mechanisms and concerns that arise following a period of civil conflict or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[11] So, on account of this line of thought, scholars have considered two kinds of transition: the first is from an authoritarian regime to a democratic one and secondly the transition from war to peace.[12] Nevertheless, these two scenarios, do not embrace all the current situations that faces transitional justice.

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[9] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.
[10] Ibidem.
[11] Roht-Arriaza, N., *The New Landscape of Transitional Justice*, Naomi Roht-Arriaza and Javier Mariezcurrena editions, CUP, Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice, 2006, chapters 1-2.
[12] Campbell, Fionnuala Ni Aolàin and Colm, T*he Paradox of Transition in Conflicted Democracies*, 27 Human Rights Quarterly, 2005, pag 172-212.

The actions of transitional justice are basically towards two complementary directions: they are backward-looking, namely they deal with events that occurred in a recent past, but at the same time the actions are forward-looking, since they are aimed at preventing the recurrence of these events.[13]

The societies, in looking back, try to understand the collective failure, in particular of national public authorities, in containing violence and attempting to reestablish the values of the rule of law and democratic principles. Therefore, it is important to say that transitional justice operates in a very unstable and sensitive context. This complexity shows the need to resort to different tools of transitional justice, that shall be applied to the society according to the different and complex context. With this regard, one should emphasize that within the framework of transitional justice, no unique and single solution is universally valid, but a case-by-case approach that deals more with the peculiarity of a given society is needed.

During the twentieth century, two kinds of transition have been analyzed: the first one is a result of the collapse of the old regime, as in Portugal, Central and Eastern Europe and Argentina, while the other occurred when there was a negotiation between the old regime and the income democratic new elite, as it was in Spain, Latin and Central America and South Africa.[14]

In Europe, three waves of transitional truth and justice took place. The first was in the aftermath of the Second World War. In this post-war period, some important initiatives started to be taken. On the one hand domestic trials, and, on the other hand, international tribunals as the Nuremberg International Military Tribunal, which tried several war criminals.[15]

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[13] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

[14] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*, Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

[15] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*, Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

The second wave, instead, took place in Southern Europe and saw three key countries passing from a very different but similar repressing and an authoritarian regime to a democracy that become stable in a short period of time. This was the case of Greece, Portugal and finally Spain. In these three countries trials, purges and amnesties took place in order to redress to the bloodshed of the dictatorships. Finally, the third wave began in Latin America in the 80s and extended to Africa and Asia in the 90s but also in Eastern Europe. It was thanks to Latin America that the model of "truth commissions" started to emerge, and the "Trial of the Century" held in Argentina in 1984, was the first trial in which the members of a military government were held responsible for the violation of international norms and inappropriate use of power.[16]

The central pivot in the field of Transitional Justice, though, is the "truth", considered as one of the fundamental rights of societies, and as a key element to build a democratic path for the future. The "right to know the truth", has been defined as a form of social empowerment, that allows people to understand the reasons of their social constraint and of course prevents the recurrence of such abuses. The truth allows the fight against the social oblivion and any kind of justifications of the facts committed.[17] The astonishing speed of development of transitional justice as a separate branch and field of study and research, was also stressed by the UN Secretary General Kofi Annan in 2004, which defined Transitional Justice as:

«*The full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. It consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations.* »[18]

Therefore, thanks to the recognition by the UN of transitional justice as a standalone set of legal mechanisms, this paved the way for it to become respected as a field of practice and study. This highlighted the value of truth-telling and truth-seeking and

[16] *Ibidem*.
[17] *Ibidem*.
[18] United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616, New York, 2004.

allowed truth commissions to become a valid response in a post- war period of a country, especially if gross violation occurred during that period.[19] Moreover, it was the first time that within the UN system, the concept of transitional justice and the one of rule of law were linked.

In this first chapter, some theoretical aspects will be analyzed, as the above described definition and context in which Transitional Justice is in force, from which it is easy to draw a first conclusion, namely that the definition of transitional justice is itself still in transition. So, first it will be explored the link between transitional justice and democracy, with a focus on human rights and the main pillars of transitional justice. Second, there will be a shift towards the actors that are involved in the application and creation of such measures and the continuous challenges that transitional justice faces. Ultimately, it will be analyzed, except from the concept of the "right to know", the developments of these tribunals, the Truth Commissions, their strengths and weaknesses and the *Ad Hoc* Tribunals. The chapter will end with a final focus on amnesties and reparations.

[19] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

1.1 TRANSITIONAL JUSTICE AND DEMOCRACY: THE PILLARS OF TRANSITIONAL JUSTICE

In order to define the pillars of transitional justice, one should explain which were the main historical facts that allowed this discipline to gain importance and that brought scholars coming from different fields of studies to cooperate rather than work individually. Hence, until the mid 90s, transitional justice was defined as "justice after atrocity". Scholars with a political science or a legal background, came to the conclusion that, on the one hand, when the Cold War came to an end, a new wave of interest and protection of human rights started, and from here, perpetrators could be held accountable for violations and abuses committed. Broadly speaking, in this particular context, the perpetrators are public authorities, such as policemen, military staff, public servants and sometimes corrupted judges. On the other hand, as soon as the Cold War faded, it allowed for the majority of the countries the transition to democracy and so counties were able to implement policies to consolidate democracy.[20] Therefore it can be argued that, when the attention was no longer on the interests of the polarized world of the period of the Cold War and when the international community realized that the continuous violations constituted a "threat to international peace and security", it was in this moment that it was agreed to create an international and permanent court to deal with what was defined and considered as an international crime, namely the International Criminal Tribunal for former Yugoslavia.[21]

Likewise, even if the Universal Declaration on Human Rights and the Geneva Conventions were negotiated and signed in the aftermath of the Second World War, their effective applicability arrived with the end of the Cold War, so this reinforce the common belief that that period was really important for the implementation of transitional justice measures.[22]

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[20] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

[21] United Nations Security-Council, *Resolution 808, S/RES/808*, 22 February 1993, New York, 1993.

[22] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

By the way, transitional justice includes various measures, some can be defined as tangible, and include criminal prosecutions, reparations and truth-seeking, while others are immaterial measures, and they just have a symbolic but important meaning, as memorials, bank holidays and monuments. This variety of tools reflects many of the goals and aims that Transitional Justice aims to carry on, always maintaining the focus on the past to build a better future.

Likewise, the choice of the measures of transitional justice that shall be taken and pursued by a society, it is very important because it may have a huge influence and affect other countries, that may be closer to the given country geographically or ideologically. In other words, cross-contamination is a possible explanation to the decision-making process of a country that decides to join the practices of transitional justice.[23]

Furthermore, if we consider all the tools that were mentioned before, one can divide them into four main pillars, that take the name of the Pillars of Transitional Justice.[24]

The first pillar includes all the forms of criminal prosecutions after the collapse of the un-democratic regime, liable for the gross violation of human rights. The importance of the criminal prosecutions on the one hand legitimize and create trust in the new authority in charge, spreading also a democratic culture. Then it reinforces the criminal liability for past violations, especially for the citizens. On the other hand, if one takes into account a human right perspective, the criminal prosecutions bring redress to the victim and their suffering is finally recognized. In addition to that, it is a representation of respect with regard to the victims and allow them to access to one of their fundamental rights: justice. Lastly, criminal prosecutions may also bring peace stability and, in some cases, even reconciliation between former enemies, this is also because once a guilty is individualized, the responsibility is no longer bared by the entire mass.

For what concerns the various types of criminal prosecutions, it is possible to divide them into three major groups: international trials, local (or domestic) trials and hybrid ones, that mix elements of both national than international prosecutions.[25] In the course

[23] *Ibidem*.

[24] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

[25] Some examples of International Trials are: The *Nuremberg Trials*; The *International Criminal Tribunal for the Former Yugoslavia* (ICTY); The *International Criminal Tribunal for Rwanda*

of history, it was proved that the prosecutions held in the domestic sphere were the most effective ones, but societies of course shall have a strong legal structure and capacity to bear such trials, this is the reason why they rely, in most of the cases, to international tribunals.[26]

The second pillar consists in all the measures concerning the truth-seeking processes. For truth-seeking it is meant the achievement of a common version of history, especially regarding the violations occurred in the past in a given society. This can be defined as a core element of transitional justice, since it is a necessary condition to fulfill in order to move forward and, with no doubt, it can prevent that these violations may occur again. The essence of the truth-seeking process is in the Truth Commissions, that are in a way the instrument thanks to which the victims can obtain redress in the aftermath of the post-violence mourning. Truth Commissions are non-judicial bodies set up to investigate causes and consequences of human rights abuses occurred in a rather recent past. They generally include the participation of both victims than perpetrators, and the latter may ask forgiveness to the victims or victims' families telling the truth about what happened. Generally, these mechanisms are aimed at a public acknowledgement of sufferance, and the final outcome is the creation of a report that documents the findings of the Commission and eventually its recommendations.[27] Furthermore, the outcome of the work of the Truth Commissions is a neutral truth that does not allow political manipulations and revisionism. The strengths and weaknesses of such commissions will be analyzed further on.

The third pillar concerns reparations. It is an essential element of Transitional Justice basically for two reasons: first, it is considered as a symbolic concession for the

(ICTR) and the *International Criminal Court*(ICC) established in 2002. Local prosecutions, such as the *War Chamber of the Belgrade District Court* or the *Section for War Crimes within the State Court* in Bosnia. Finally, the hybrid (or mixed tribunals) are for example: The *Special Court for Sierra Leone* (SCSL), the trials held in Kosovo by the *EU Rule of Law Mission* (EULEX), or the courts created in Timor-Leste, Cambodia and Bosnia (ICTJ, 2018).

[26] International Centre for Transitional justice, *Criminal Justice*, available at: https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice accessed 20 February 2019.

[27] ICTJ, *Truth Commissions*, available at https://www.ictj.org/gallery-items/truth-commissions , accessed 21st September 2019.

loss of the victims and an important memorial to those they remember; secondly since it is proved that, in the majority of the cases, armed conflicts strike poor and vulnerable people, reparation can be a vehicle to re-create people's dignity and gain importance within a society.

The prevailing tool of reparation is the monetary one, but one should not underestimate that there are several others that have, though, a very high social and psychological impact, as the guarantee of non-repetition, rehabilitation and satisfaction.

For what concerns the symbolic reparations, as memorials, bank holidays or apologies and acknowledgements, they may be helpful both for the establishment of facts than as a mere honor and commemoration for the victims.[28]

The fourth and last pillar is probably the most complicated one to put in place, namely institutional reform, through a process of trust-building in them. For institutional reform, thus, it is meant a radical change and reform in those institutions held responsible for the gross human right violations during the period of the conflict. Such reforms shall build state's institutions founded on the principle of the respect of human rights and should guarantee that those moments would never occur again. Therefore, there shall be a crucial role of the rule of law and purges for the perpetrators. This reform shall focus on the fact that the citizens are right-bearers and they shall be confident in these institutions.[29]

Apart from these pillars, another tool that one should underpin is amnesty. To grant an amnesty basically means to pardon officially the prosecutor. The role of the amnesties, though, changed overtime: at the beginning, they were used to strengthen the respect of the human rights, while, since the 90s, they become more the symbol of a "privilege" for the perpetrator rather than a protection for the victim.[30] As a matter of fact, if we consider

[28] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

[29] Among the various measures of institutional reforms, it is possible to classify them in individual deficiencies, which aim is to eradicate corrupt officials; structural deficiencies that involves reforms in various sectors: security, disarmament and new laws and amendments, and finally the educative measures. (Humanitarian Law Centre Kosovo, 2015)

[30] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

the amnesties granted in the Truth and Reconciliation Commission in South Africa, they were granted to those perpetrators whose cooperation was active during the process, therefore it was seen as a kind of reward. Eventually, those amnesties were only given to a 15% of those who applied for it.[31]

Generally, the overall result of all these techniques and tools, is the forgiveness. In fact, thanks to the fundamental contribution of the Truth and Reconciliation Commission in South Africa, it has become a constitutive element of transitional justice. It is strictly linked to the acknowledgment and it is a progressive process in which the perpetrator admits the crime he committed and eventually seeks the forgiveness of the victim, in fact, if the victim accepts the apology she can forgive and the reconciliation takes place. Even though forgiveness can be seen as a positive element for the final outcome of a transitional justice process, not all the scholars and theories have seen this as positive. Basically, forgiveness is an agreement, because on the on hand the victim gives up the right to continue to complaint, whereas on the other hand the perpetrator promises not to repeat again abuses and violations. This mechanism is what was generally at the end of a process of an ordinary truth commission. For some scholars, though, as Derrida argues, forgiveness is a "calculated transaction" more a strategic move and rather meaningless. Moreover, the risk of forgiveness can be that governments use this device but without promoting any substantial change.[32]

For what concerns the adherence to the rule of law in periods of extraordinary political uncertainty and chaos, one should state that, in front of such situations, there is a dilemma that societies face, since in these periods rule of law cannot be considered as universal. Hence, this dilemma is composed by, on the one hand, the willingness to comply with a rule of law that belongs to the past, and on the other hand one that is forward-looking, namely there is a certain degree of continuity generally evident in the legal form, but at the same time it allows a normative change.

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[31] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*, Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

[32] Derrida, J., *On Cosmopolitanism and Forgiveness*, Mark Dooley and Michael Hughes Editions, Routledge, 2001.

According to the examples in history of those democratic regimes that experienced such critical moments of choice, this happens because societies tend to change and adapt their understanding of justice, and to transform according to the evolution of the social and political background. But this phenomenon, of course does not happen only in periods of transition of justice, but it happened in various moment of political transition in history. With this regard, it is important to mention that this dilemma arouse in the moment of the passage from monarchies to republics, but also in the post war periods. The scholars, therefore, consider that in these moments of meaningful political instability, the traditional understandings of the rule of law is generally questioned. In some cases, a possible way of construction of rule of law is offered by international law, so local courts address to international ones, since international law is seen as enduring and continuous, as it happened in the postwar period. Moreover, it is important to add that, in the aftermath of a conflict, one of the most important issue to determine, especially in peace agreements, is the rule of law.[33]

Furthermore, there are two different way of connecting transitional justice with the importance of rule of law, first if we consider transitional justice as a way to address gross violations of human rights, this acknowledgement constitutes an opportunity to give relevance to the legal process, second, others suspect whether transitional justice is the first test needed in order to establish the rule of law.[34] Even if some others believe that there is a common belief that thanks to transitional justice, the perpetrators are held accountable for their wrong actions and this contributes to the creation of the rule of law.[35] As a consequence, three main directions are taken by the reconstruction of rule of law: the restoration of law as an authority, the recreation of trust and confidence of the public in the law and finally the establishment of equality before the law.[36]

Finally, if we compare that actions of transitional justice with the rule of law reconstruction, we can see that, while the first has a temporary nature, whose main aim is

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[33] Teitel, R., *Transitional Justice*, Oxford University Press 2002.

[34] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

[35] Stromseth, J., Wippman, M., Brooks, R., *Can Might Make Rights? Building the Rule of Law after Military Interventions*, CUP, 2006.

[36] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

to establish special tribunals and implement the process of accountability and international institutions; the latter, though, has a permanent nature, aimed at the prioritization of national judicial and permanent institutions.

1.2 ACTORS AND CHALLENGES OF TRANSITIONAL JUSTICE

With regard to the actors that contribute to the structure of transitional justice, we can see that there are various levels of cooperation among actors that are on the one hand international, especially driven by the United Nations actions and by the Non-Governmental Organizations, then at regional and local level the civil society. Needless to say, in certain cases, a society cannot bear the burden of building a system of transitional justice within their domestic structure, therefore it is mostly in these cases that the international actors play a more intensive role, so to bridge the gap of domestic institutions, even because sometimes they lack neutrality and impartiality and there is a high risk of being politicized or interest-driven. For example, if we consider the Latin American area, the Inter-American Commission on Human Rights (IACHR) has proved that in that area and especially in El Salvador, Chile, Argentina and Uruguay, the amnesties granted were violating the provisions stated by the American Convention of Human Rights (ACHR), therefore implementing political and legal support to the efforts of these countries against impunity.[37]

First, when it is mentioned the United Nations in this field, one should underline the huge quantity and network of peace operations, rights and development agencies that, according to the UN charter principles- that is to say to maintain peace and security through peaceful means- these operations all go towards the creation and willingness of a peaceful, inclusive and fair society. Therefore, the link between the UN actions and transitional justice is that, through transitional justice societies consolidate peace especially in the aftermath of a conflict. The UN engagement, though, touches all the pillars of transitional justice, namely its big efforts in issues such as the promotion of human rights protection, the prohibition of the use of force, criminal accountability, importance of rule of law and sustainable development are continuously in progressive development even if, overtime, substantial progresses were made.[38]

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[37] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*, Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

[38] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

Then, as mentioned before, the first time in which a United Nations resolution of the Security Council used the term "transitional justice" was in 2004. They essentially stressed the importance of the role of transitional justice in the processes of rule of law and in peacebuilding and peacekeeping operations. For example, if one considers the UN peacekeeping operations held in Kosovo and East Timor, their principal mandate was to address transitional justice and to maintain peace and security.[39]

Furthermore, in the Report of the Security Council of 2004, there is an annex called "Guidance Note" which provides a list of 10 guidelines with a focus on the approach that the UN shall adopt towards transitional justice, and that expressed also the centrality of the victim's right especially supporting women and children's rights. The aim of this Guidance Note was to strengthen the cooperation of the United Nations with regard to the pillars and mechanisms of transitional justice but also to broaden the list of peacebuilding measures and priorities. In the list, it is possible to find: a deeper consideration of the root causes of the conflicts, addressing to the victim's rights but considering also the economic, cultural and social rights violations, or while coordinating the disarmament and reintegration initiatives doing it in order to reinforce positively the activities of transitional justice. All these initiatives belong to the UN efforts to build peace in an even more effective way.[40] The report marked an important turning point, and it found an impressive progress in the first 15 years of its existence, especially in the field of gender equality and investigations of gender and sexual-based violence.

Moreover, a few years later, namely in 2011, the Secretary General issued another report in which it reaffirmed on the one hand the important role of transitional justice within the UN agenda and on the other hand it stressed the serious threat to peace and security at international level that may constitute past violations, conflicts and corruption.[41]

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[39] *Ibidem.*

[40] United Nations Security-Council, *'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice'*, March 2010.

[41] United Nations Security-Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General'*, S/2011/634, paragraph 18, 12 October 2011-

Likewise, the right to truth in a certain sense, creates an obligation on the state, that is responsible to do all the possible efforts to ascertain what really happened in order to give answers first to society then to the families of the victims. Several courts used international treaties to prove domestic amnesties or limitations to be inapplicable. Some other domestic legal systems resorted to international precedents, as the Nuremberg Trials, in order to justify the need for accountability for past crimes and atrocities. Therefore, an international "component" is evident, even in domestic schemes such as the Truth Commissions. They have been proved to be highly influenced by other previous international efforts.

After the Cold War, there was a general mistrust that an international body or court can bring a justice in a situation of structural and systemic unfairness, hence the idea of the creation of an international court that shall deal with international crimes and impunities was abandoned for several decades, until 2002, namely the year in which the International Criminal Court was founded, thanks to a significant push of diplomats and politicians, which believed that challenging impunity for torturers and dictators was essential to make them stop doing violations.[42]

Within the UN system, the leading entity that is designated to cope with transitional justice is the United Nations Human Rights Office of the High Commissioner (OHCHR). At the global level, the OCHCR count the collaboration of UN and non-UN actors that operate within the framework of transitional justice. Notable among them are: UN Women, Un Entity for Gender Equality, UNDP and the Department of Peacekeeping Operations (DPKO). Their scope is to monitor whether the minimum standards of transitional justice are meet, such as the developing policies, identification of best practices and definition of countries' guidelines to satisfy such standards. Moreover, in 2011, The Human Rights Council implemented a resolution which designated a Special Rapporteur on the promotion of truth, justice, reparation and that guarantees the non-recurrence. This Special Rapporteur had to gather information, identify good practices and give advices in specific situations in which happened violations of human rights on

[42] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*, Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

large scale but also violations of international humanitarian law. It had to last for a period of three years, but after its first mandate it was renewed for other three years.[43]

Nevertheless, there is an ever-growing number of other international organizations involved in issues related to transitional justice, especially the so called regional organizations. The link between these organizations and the UN, and, the growing concern of the European Union and African Union allowed to create strong connections and partnerships for cooperation within the transitional justice framework. With this regard, in 2015 the EU adopted a policy framework that supported transitional justice. The aim of the latter was to enhance the ability of the EU to play an ever-active role in engagement with both its member states than regional and international organizations. This framework is built on the one hand taking into account the UN activities and strategies of transitional justice, and on the other hand following the EU existing policies that support the International Criminal Court. Similarly, the African Union, plays a fundamental role in the promotion of transitional justice in Africa.

As a matter of fact, regional organizations are very important actors in the promotion and development of transitional justice, since they have the possibility to operate in a more effective way and considering the real local reality of a society or a place, it is so for this reason that they continue to develop new policies, and as a consequence, the UN will increasingly rely on them since a more specialized work in an area is useful to prepare the expertise that follow and operate in such area.[44]

If we consider, though, the peculiarity of the UN, of being an intergovernmental body, it works closely with its member states in order to be efficient in the promotion and support of transitional justice. One of the areas in which it is possible to see a stronger cooperation is in the criminal proceedings, when violations of international criminal law occur. The creation of the ICC in the early 2000s was accomplished to deal with the most exceptional criminal cases, and it was intended to be a court of last resort, namely one could bring a clause in front of the ICC only after having exhausted all the domestic legal

[43] United Nations Human Rights Council, *Resolution Adopted by the Human Rights Council: Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, A/HRC/RES/18/7 12 October 2011.
[44] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

remedies and jurisdiction. By the way, not all the states have the possibility to trial international crimes in domestic courts, this is mainly because during the period of reconstruction after conflicts, societies may lack the capacity of having the proper expertise that acts under the jurisdiction of international law and knows how to behave and document appropriately the evidence and the violations. In these case, the UN intervenes and it uses its inter-governmental agencies to create partnerships and build the expertise that they lack. Therefore, the actions of the UN are taken not only at the international level, but they also act at national and regional level, trying to fill the gaps that the member states have.[45]

As a result of the spread of mechanisms dealing with large scale past abuses, this contributed to the enlargement of sectors of transitional justice. Not many studies describe the active role played by international Non-Governmental Organizations, that now are about to achieve important policy objectives. They operate within a framework of advocacy mixed with operational activities. With this regard, it is of notable importance to mention the ICTJ, namely the International Centre for Transitional Justice, created in 2001 in New York. The aim of this NGO was to provide state expertise that was able to follow periods of transition with the proper tools. Its first actions were in the contexts of Latin American and South African transitions. The success of the strategies adopted by the ICTJ, allowed it to change its structure from human rights NGOs toward an understanding of the struggle against impunity. This new model of NGO, is composed by qualified expertise with a strong legal background.[46]

With regard to the other parts involved in the processes of transitional justice, one should reflect on the role of the civil society too, since the process of intervention with a past marked by atrocities affects all the dimensions of a society. In the last 25 years of evolution of transitional justice, civil society had the possibility to play a more central role since there is a wider peacebuilding function rather than the mere legal intervention that characterized the first years of this doctrine. The way in which civil society can

[45] *Ibidem*.
[46] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

contribute to the transitional justice processes is for example in the engagement of stakeholders and in carrying different form of expertise into transitional justice mechanisms. Moreover, during period of hard repressions, the civil society assumes a role of peacebuilder by carrying on justice on behalf of the victims of violations of human rights. Therefore, it is possible to state that, since transitional justice operates within a context in which democracy is still not established and full operating, civil society in this moment of transition is like a "guardian" which is in charge to assure that the state fulfills its obligations in the field of human rights and all the democratic principles needed to build the state and the sense of citizenship. Likewise, the more the civil society was strong before the period of transition, the more it will be engaged in the creation of the democratic path of his nation.[47]

Nevertheless, according to Lawther, Moffet and Jacobs, the most common actors of civil society involved in transitional justice are mainly eight:

I. **Religious organizations**: in their missions, they have an important responsibility in creating peace;
II. **Human Rights NGOs**: they are traditionally engaged in all the forms that involve human rights abuses and accountability measures and with transitional justice this area has increased the operations of these organizations;
III. **Peacebuilding NGOs**: on the one hand, transitional justice critiques the historical approach that adopt these organizations, and on the other hand, peacebuilding NGOs argued that transitional justice deals insufficiently with the root causes of the violations, and advised to deal more with these concerns.
IV. **Psycho/medical NGOs**: deal with particular needs and services required by the victims and victimized communities. This engagement includes individual or group psychological therapies as well as medical assistance.
V. **Gender Justice NGOs**: those Non-Governmental organizations that caught the opportunity to shape the transitional justice agenda by including gender justice issues (as sexual violence and abuses);

[47] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

VI. **Community-based organizations (or victim organization):** namely those groups of victims that organized themselves in order to cope with the abused suffered.

VII. **Social movements:** important role in defining the popular language related to the worries of the population. These movements have been proved to be more in direct contact with the concerns of societies rather than a generic NGO.

VIII. **Coalitions[48]:** derive from different interests shared by certain groups of civil society. For example, those coalitions of civil society organizations more focused on peace vs those more focused on justice and accountability, especially in those context in which these principles are presented as opposing goals.

Considering, though, this eight different groups, there are also eight different roles of civil society in transitional justice. These are the following: mobilizing actions; monitoring and transparency; targeted advocacy; official support; public engagement; service provision and victim support; peace building; reconciliation and development; and finally, truth telling, commemoration and memorialization.[49]

In the end, there is no doubt about the role-player that civil society has in transitional justice processes. Its influential function was both positive than negative though, but the debate whether transitional justice mechanisms shall be driven by local knowledge and needs is still ongoing.

Now, after having considered the main actors that operate in the context of transitional justice, this last part of this section will be devoted to the challenges that faces transitional justice.

First, it is important to say that all the mechanisms and measures mentioned in the first section of this chapter, both those tangible than non-tangible, none of them are perfect. We can divide, though, those challenges in mainly two groups: the first is the one which comprises the limits and the second is the one that is focused on the risks, due to the sensitive context in which transitional justice operates.

[48] For Coalitions, the authors intend groups of individuals belonging to civil society that share similar interests.

[49] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

For what concerns the limits, if one considers the prosecutions for examples, it is possible to state that this mechanism is designed for those societies in which the violation of the law is an exception. In some conflicts like the one if former Yugoslavia, the violation of the law was not an exception but a norm, therefore in civil conflicts like this, prosecutions are not only a huge quantity, difficult to bear, but they also imply time and resources that are very difficult to obtain. This has brought overtime to proceed in courts with a great selectivity of the cases. Moreover, prosecutions also constitute a limit themselves, since are only a partial way to deal with gross and systematic violations of human rights. And the impact of those prosecutions depends whether they are held domestically or abroad. Then, reparations also have some limits. First, they can be perceived as unfair by some group of victims, and they may imply the risk of create political tensions. Second, those victims that are left outside from the reparation process, can end up being very frustrated and may create new groups of marginalized people.[50]

The risks, on the other hand, are strictly linked to the limits above mentioned. This is because the main risk is to create an ever-growing situation of instability than it was before. If a delicate political balance is created, it is very easy to alter it. This is also because it is very easy to go against the national leadership in such situations. Then another risk, is not to attend the expectations of the public. When in a difficult context a transitional justice mechanism starts, the general expectations of victims, families and society in general are really high, and at the same time it is very easy not to satisfy such expectations. These expectations arise also from the various previous experiences of transitional justice methods that come from other countries that in a similar situation of post-conflict or human rights abuses adopted. So, not only these expectations shall be satisfied in any case, but also societies require that, under certain circumstances the same tools that were successful in other societies, shall be used in their context too. Therefore, it is a very great responsibility to explain and convince that in transitional justice one cannot use the "one size fits all" doctrine, because each situation in which transitional justice is applied has its own peculiarity and circumstances that, needless to say, are different from case to case. So, the path that is followed by a given society shall be chosen in accordance with some variables, especially cultural and social variables. Transitional

[50] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

justice, moreover, is really victim-dependent and context-specific, so it is very easy to misuse it and pursue a wrong management of its techniques. Moreover, the variety of instruments that transitional justice possesses have the characteristics of being complementary, so there is not one better than other. [51]

1.3 THE RIGHT TO KNOW AND THE MECHANISMS OF TRANSITIONAL JUSTICE: FROM TRIBUNALS AND TRUTH COMMISSIONS TO AMNESTIES AND REPARATIONS

The so-called "right to know the truth" about what happened during a hard period of repression and human rights violations, is something recognized to all society and individuals as one of the fundamental rights after a mourning. It is presented as a branch of the right to access to justice to individuals, so it does not constitute a right *per se*. This sort of right is exercised in front of a court during a trial, but when these situations occur, it is very unlikely that a huge quantity of people can be brought to trial in front of a court, due to the process of selectivity of the cases. Therefore, it can be stated that these above-mentioned trials are only a partial way to accede to the truth. This right to know is fundamental in order to build a common and shared version of what happened and what were the extent of the war. This is essential in order to move forward ad also for reconciliation.[52]

Another aspect that is important to mention is the continuity of the judges and public officials with the old regime. This means that, in several societies, when a change of regime occurred, many civil servants stayed in their original charge, therefore this made really difficult the work of the courts since this meant that an impartiality in judging the cases could not be granted. So, this could constitute a real problem because, in a way, no fair trials could be done.

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[51] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.
[52] *Ibidem*.

In this section, it will be analyzed all the instruments that contribute to truth-seeking, starting from trial proceedings in tribunals of different kind, records of victims' casualties or declassification of archives, until the one that is considered the most effective and used on large-scale in these moments of transitions: The Truth Commissions.

First, it is important to say that the right to know the truth it is not only the mere outcome of a trial, but it is part of the construction of a common vision of the system of violence that can explain the victims, losses and atrocities committed during a given period of time.

Second, immediately after a period of conflict, it is very likely that the new leadership that takes the power may identify which ethnic groups are the innocent victims and consequently which can be considered the responsible perpetrators. This process, of course, can be easily manipulated according to the political will and orientation, therefore it is basically for this reason that a neutral reconstruction of the truth is necessary. This necessity comes from the fact that, in order to allow a society to know the truth in a complete manner, the context and the truth shall not leave room for interpretation, since this interpretation is identified with ideological fantasizing and myth-making, that generally derives from the new political authorities.[53] The Balkan situation, though, is a remarkable example with this regard, especially for what concerns the manipulation of the truth and the creation of myths from the political leaders.

If we go back to the past historical events, the predecessors of the modern Truth Commissions and Hybrid Tribunals, are the famous Nuremberg Trials.

First it is important to recall that the composition of the members of the commissions shall be acknowledged as neutral and suitable from the society. So, it is not relevant whether the members are international or national, what matters is that all the

[53] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

opposing parties involved in the conflict must recognize these members as fair representatives of the different views.[54]

The above-mentioned trials were held in Nuremberg, Germany, between 1945 and 1949, in the aftermath of the Second World War. These trials processed the Nazi leaders and the people held responsible for the crimes committed during the wartime (military officers, doctors, Gestapo secret state police officers, lawyers...). Thirteen processes were made, all of them were defined as crime against world peace and humanity. The Nazi leader, Hitler, was never processed in front of the Nuremberg Tribunal[55] since he committed suicide before being judged responsible for crimes. In this sense, the huge contribution made by these famous trials is that they are considered a milestone toward the creation of a permanent and international court, and, needless to say that it was the first time in the course of history and in a post war period that it was given importance and processed crimes as genocide and crimes against humanity. Moreover, these trials led to the creation of the UN Convention on Genocide, the Universal Declaration of Human Rights, both of 1948 and to the Geneva Convention of 1949. In addition, Nuremberg one was the Tokyo Tribunal that worked within 1946 and 1948 and that had the same function of the Nuremberg Tribunal but for Japanese crimes committed during the wartime. The following actions taken in this direction were the establishment of tribunals for crimes and atrocities committed in the former Yugoslavia (ICTY), created in 1993 and lastly the International Criminal Tribunal for genocide committed in Rwanda in 1994 (ICTR).[56]

The final outcome of all these international trials heled under the above mentioned International Criminal Tribunals was the creation of the world's first permanent international institution, namely the International Criminal Court (ICC), created with the

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[54] OHCHR, Rule-of-Law Tools for Post-Conflict States, Truth Commissions, available at https://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf , 2006, accessed 22nd September 2019, pag.13.

[55] The composition of the judges of the Nuremberg Trials were all part of the Allied nations, so United States, Great Britain, Soviet Union and France. They all contributed with a judge and a prosecution group. The presiding judge was the English Lord Justice Geoffrey Lawrence. (Encyclopedia of International Military Trials, International Military Tribunal at Nuremberg, available at: https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg accessed 22nd September 2019.)

[56] Historical definitions, *Nuremberg Trials*, 2010, available at https://www.history.com/topics/world-war-ii/nuremberg-trials accessed 14th April 2019.

Rome Statute stipulated in 1998 and that entered into force in 2002, year of the establishment of the Court. This court has the power to investigate and judge individuals who have been charged with crimes that represents a big concern of the international community. Among these it is possible to find: crimes committed during the war, genocide, aggressions and crimes against humanity. Their fight against impunity is still ongoing, especially in the prevention of such international crimes. Since this is a court of last resort, it always seeks the cooperation of the national courts, especially in terms of policy coordination. So, it can be argued that the ICC is not only an institution that deals with transitional justice but it also seeks to deal with global justice, and this sometimes generates conflicts and challenges, since some interests may be considered overlapping. Finally, it can be stated that the major contribution that the ICC gives to broaden transitional justice's interests is the participation of victims and the issue of reparations that can be considered as fundamental mechanisms.[57]

Coming back to the process of truth seeking, so the mechanisms that are used in order to access to the right to know the truth, and how to punish the criminal liability, there are certain tools that are used in order to achieve this purpose. Therefore, this section will be divided into four parts, and these are the following: Hybrid Tribunals, Truth Commissions and their points of strengths and weaknesses, then Amnesties and Reparations.

[57] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

1.3.1 HYBRID TRIBUNALS

The creation Hybrid Tribunals arose in various and different contexts. They are defined hybrid since they comprise a mixture of domestic and international elements, this is why they are also called "Mixed Tribunals". Nonetheless, they have the same characteristic of the traditional criminal courts, namely to redress gross violations and violence in various countries. Generally speaking, these tribunals are established when the domestic tribunals and legislation have not adequate means to rely solely on their own resources. The only difference among the hybrid tribunals and the ICTY, ICC or ICTR is basically that the latter are ruled by international law but seeks the cooperation of domestic courts for policy making reasons, while the former mixes elements of international law and justice with important aspects of national justice. This mixture is reflected under different levels: first, the personnel that works in these kind of tribunals is composed by both domestic and international officials, ad these can be found in judges or defense council or prosecutors etc.

For what concerns the jurisprudence that these tribunals offer, it is also a mix of domestic and international provisions, such us combining treaties and customary and domestic legislation. The international component plays a crucial role in shaping the international standards required for each process and it also allow that local society may be heard with regard of how the court is working.

However, for what concerns the impact that these courts have on national and international criminal jurisprudence, it depends both from the quality of the judges than the precedents in legal context, so, certain systems result more affected than others. Despite this, hybrid courts have also some limits, for examples the lack of publications, as gazette or legal decisions, and so the impossible access to its jurisprudence. For examples, there was a judge in the district of Mitrovica in Kosovo that claimed not to have access to the jurisprudence of Kosovo's Supreme Court, so the law should be interpreted only taking into account commentaries. [58]

[58] OHCHR, Rule-of-Law Tools for Post-Conflict States, Maximizing the Legacy of Hybrid Courts, 2008, available at https://www.ohchr.org/Documents/Publications/HybridCourts.pdf accessed 22nd September 2019, pag 39.

Anyway, these tribunals even if they are similar in terms of purpose, they differ in legal basis, form and structure. On the one hand there are those tribunals, as the one for Sierra Leone (SCSL) and Cambodia, that are the outcome of negotiations between the UN and domestic actors, so sovereign states, in order to find a common path to address the violations experienced. In some of these cases it was a resolution of the UN Security Council that give birth to the court. On the other hand, as in the case of the tribunal for Kosovo (UNMIK) and East Timor (UNTAET), they started to exist thanks to the UN authorities in order to establish rule of law and good practices of governance in situations in which there was a huge political turmoil and disorder. Another group of tribunals can be identified when a domestic court decides to incorporate some international features, as the Bosnian War Crimes Chamber. In any case, despite these differences, the overall aim of the creation of these hybrid courts were to address a unique political and social context that generally verifies immediately after wars or gross violations and abuse. The benefit of hybrid tribunals to the cause of transitional justice is with no doubt the fact that are held domestically. In this way, they differ from international tribunals, since they are situated generally miles away from the place where the violation occurred. The language that is spoken in those international criminal proceedings is also different from the mother tongue of the victims and perpetrators. All these elements allow these structures to be seen as far and distant from local population that in most of the cases result alienated by these international proceedings. This creates mistrust, lack of familiarity and increments the creation of a sense of remoteness. Likewise, these international courts are seen as bodies headed by foreigners that generally do not understand the locals and have no rights to judge them. Therefore, these social aspects shall not be underestimated, but they shall be considered of utmost importance since they determine the credibility of courts in these contexts. Therefore, one the one hand hybrid tribunals help to establish democratic practices and reinforce the actions of transitional justice, on the other hand they eliminate skepticism that is the feeling that arise when, under these fragile conditions, a local population receive a judgment made by an international court. Simply put, if a society sees that the personnel belongs to their same ethnic group, it will be easier for them to accept decisions. Finally, the domestic component of the officials in a hybrid tribunal is what makes them really effective and an exceptional tool in the promotion of transitional justice. We can say that, the international component of those tribunals, has the unique

function of control and enforcement of the principle of adherence to the rule of law that the tribunals have to comply with.[59]

1.3.2 TRUTH COMMISSIONS STRENGHTS AND WEAKNESSES

Truth Commissions (TCs) become one of the principal tools of transitional justice and an essential mechanism that promote peace. The TCs are panels of investigation created to determine facts. Their main characteristics are the fact of being independent and non-judicial. The evidences that they want to bring to light include the causes and the roots of the past violations both of humanitarian law than human rights abuses. The TCs mechanisms include various steps: from the investigations, consultations, interviews to creation of public archives. All these steps are led via public hearings. The TCs are at the basis of truth telling and this tell us that truth is backward looking. According to Marks and Chapman, after periods of intense conflicts, to give voice to the victims, posing them questions, therefore placing them first, it is an important step to interpret the abuse that took place.[60]

The first documented and official Truth Commission was created in Argentina in December 1983. Its name was the Argentina's National Commission on the Disappearance of Persons and was established by President R. Alfonsin. The important report created by this TC, namely the "Never Again" report (original title: Nunca Màs), illustrated all the violations that occurred during the military dictatorship. Apart from this first Latin American example, over 30 TCs around the world were created, among which the most famous is the South African Truth and Reconciliation Commission.

It is possible to argue that, truth commissions present both strengths than weaknesses. For what concerns the benefits that they bring it is possible to mention for example that truth telling is an opportunity for perpetrators to apologize for what they did and to show regret. This can improve the civic trust and facilitate the reintegration of those wrongdoers to their communities. On the other hand, for those combatants who

[59] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.
[60] Marks S., and Chapman, A., *International Human Rights Lexicon*, OUP, 2005.

decide to take place in such trials, they can distance themselves from those who were responsible for these violations. Moreover, TCs have the power to interrupt cycles of violence and generate restorative justice. Restorative justice is that doctrine that supports that redress can be brought to victims not through punishment but in a restorative way, namely speak about the past is the necessary and right recovery. The power of telling, can both evidence a common view of the past than the truth.

Desmond Tutu[61], speaking about the creation of the TCs and the use of amnesties, used these words:

"While allies could pack up and go home after Nuremberg, we in South Africa had to live with one another"

This sentence symbolized the importance of reconciliation of societies as one of the main objective to reach within the existence of a Truth Commission. Therefore, the use of these commission is crucial also for the centrality role of the victims during these processes, giving a "voice to the voiceless".[62]

The experience of the South African Commission, shows two different aspects: on the one hand that the justice provided by trials is often symbolic, very expensive and slow, and, on the other hand that Truth Commissions is cheaper, gives voice and centrality to the victims, and above all is more effective. Furthermore, in TCs there is not the process of selectivity that characterizes trials, but the victims are heard, they can tell their stories and in a certain way this contribute to the recreation of their dignity.

An appropriate use of TCs may bring several benefits also to transitional justice in general. First it can bring to reforms of the government, both legal than institutional, that may assure the non-repetition of past abuses. Second, it may contribute to establish reparation programs that create compensations for victims. Third, another result can be criminal prosecutions for the perpetrators, after the outcome of the trial of the Commission. Fourth, and last, as in the case of South Africa, it can start to generate and

[61] Archbishop Desmond Tutu, was an important human right activist in South Africa, and one of the major contributor to the creation of the Truth and Reconciliation Commission in South Africa, of which he was appointed head of such commission by President nelson Mandela. He won the Nobel Prize for Peace in 1984 for his role in the fight and opposition to apartheid in South Africa. He also promoted the idea of South Africa as the "Raimbow Nation". (Encyclopaedia Britannica, s.d.)

[62] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

initiate a new birth of civic trust generally in previous segmented societies, and as a consequence, disseminate trust in the institutions. [63]

If we consider, for instance, the Truth Commission established in 2011 in Peru, whose aim was to inspect the violations committed by insurgents and state officials, it produced a Report in 2003, in which there were condemned all the atrocities committed. The establishment of this TC, though, contributed to the beginning of a period of reforms which included: a program of reparations, criminal prosecutions and political reform. All these aspects, were the main pillars of the democratic path and transition that took place in Peru.

For what concerns the limits of these Commissions, they are all linked to the high expectations that they may create in society and people. This is also due to the principle of "contamination" namely that those close countries that experiences violence and abuses during the last years and that used as a method of redress the TCs and that successfully achieved a balance and a democratic transition process raised expectations. So, when those expectancies are not met, the limits of Truth Commissions are highlighted.

1.3.3 ACHIEVEMENTS AND LIMITS OF TRUTH COMMISSIONS AND CASE STUDIES

The benefits for victims that come from TCs not always are easy to identify. On the one hand, it can be beneficial for victims to tell their stories, on the other hand, it has been proved that for some victims this process was quite traumatizing since it allowed them to bring back old facts, anxiety and pain and eventually causing new distress. So, in order to understand the advantages or disadvantages for victims, these situations shall be considered in a long-term perspective. If we consider some examples, while In South Africa more than a half of the people after the processes held in the Truth and Reconciliation Commission, were angrier than before, the same experience in El Salvador and the findings of the Commission received a huge support from the local community.

[63] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

Furthermore, the debate on Truth Commissions includes also the variable that TCs can be used and perceived as a political tool. This generally happens when, for examples, these situations verify: when TCs are perceived as too critical for the government, or they are too political sensitive, or when they are used to legitimize a new government and discredit the old regime as it happened in Uganda.[64]

In any case, one of the biggest limits of TCs is that they have a very scarce power of implementation, in the sense that they lack the power to implement the reforms that they suggest or they are highly dependent on the political support of the ruling elite, therefore once again they are quite always politicized. Finally, it is possible to argue that the benefits of truth sometimes are questionable. [65]

1.3.4 CASE STUDY: THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA

The background facts according to which the South African Truth and Reconciliation Commission was established were the 44 years of Apartheid regime, from 1948 up to 1992. In this period, all the black South African inhabitants were deprived of their basic rights: political, social and economic ones. Approximately 200,000 South African blacks were arrested, among which there was Nelson Mandela, who stayed in prison for 27 years. When in 1994 the negotiations between the National Party (NP) and the African National Congress (ANC) ended, Nelson Mandela become President, since the ANC won the elections.

One year later, in 1995, the South-African Truth and Reconciliation Commission was established. It was based in Cape Town and the hearings started in 1996. This Commission, though, was the outcome of a political agreement. Its task was to investigate the events that occurred from March 1960 until December 1993. The Commission shall

[64] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.
[65] *Ibidem*.

so prepare reports and eventually issue recommendations on amnesties and compensations.

The peculiarity of this Commission was its membership. They represented the whole South African society: it was composed of 7 Blacks, 6 Whites, 2 Colored and 2 Indians. The chairman was Archbishop Desmond Tutu. The first report was produced after three years and included the testimony of 20,000 people. In this report, the Commission and the drafters tried to paint a full picture of the crimes committed during the Apartheid period. This allowed, to a certain extent, victims and perpetrators to live in a pacific way together.

Despite the fact that this Commission obtained great results and achievements, it was subject to limits and a harsh criticism. First, it has a limited mandate, so, because its creation was due to a political compromise, only a restricted number of cases and victims were heard in front of the Court, generally those who suffered the hardest violations. This in a certain way demonstrate that there was not an equal treatment for all the cases. Second, it can be argued that it only provides a "partial" truth, since man political leaders, for one reason or another, did not take part in the trials. Third, it was stated that there was a discrepancy in the treatment of victims and perpetrators: 5,392 of the latter were refused the amnesties and very little actions were pursued against them afterwards, on the contrary of the 90,000 victims that applied for reparations, less than 1/3 obtained reparations. For those who obtained it, they arrived very late due to insufficiency of resources.

Despite that, the Truth and Reconciliation Commission in South-Africa is considered as a unique model and example of democratic transition and as a landmark case. Regardless the limits and criticism highlighted, it disclosed many truths and lots of people participated in it. Even if the limits leave room for controversies and debate on the efficiency of "Truth for Reconciliation", with no doubt they drafted several guidelines for the success of TCs. Therefore, these recommendations were pointed out: first, being independent from the government and transparency are key factor for success. Second, the role of the victims must remain the crucial one and central. Third, TCs shall be flexible and shall adapt to the needs of society and fourth and last TCs shall be used in complementarity with all the other instruments of Transitional Justice in order to build an

effective strategy. As it will be demonstrated in the next case study, namely the Rwanda case, when the principle of complementarity of the means is put in place, more effective results were obtained.[66]

1.3.5 CASE STUDY: THE NATIONAL UNITY AND RECONCILIATION COMMISSION IN RWANDA

The factual background in which this Commission was establish was the aftermath of the Civil War that started in 1994, between the Hutu ethnic majority and Tutsi ethnic minority. Basically, in only three months, 80.000 people were killed, the majority of them were Tutsis, Twas and Hutus more moderates. This was made by the hand of Hutu ethnic group.

First, in order to face this hard genocide, the Security Council of the United Nations created the International Tribunal for Rwanda in 1994. Moreover, also domestic remedies were established, as the Gacaca Courts, tried to process the responsible perpetrators who took part in these massacres. Finally, in 1999 the National Unity and Reconciliation Commission (NURC) was established, in order to put an end to the menace of genocide and to create the basis for a peaceful cooperation and life of all the ethnic communities. [67]

It is important to say that, since the previous commissions and tribunals investigated deeply trying to find the truth and the reason why of such violence, the NURC did not have a function of "truth-investigator", but it focused more on the creation of peace and

[66] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.
[67] Rombouts, H., Victim Organizations and the Politics of Reparation: A case-study on Rwanda, Intersentia, 2004, pag.86.

reconciliation, issuing programs aimed at a nonviolent cohabitation and tolerance of Rwanda's population. Moreover, clubs for reconciliation were promoted and created in universities and schools, in order to involve people and induce them to participate actively in this process of trust-building. In 2001, it was published a report in which there were reported the outcomes of the NURC. There were explained the origins of his ethnic conflict and the roots of violence in Rwanda after the genocide. The important work and contribution of this Commission was the collaboration in the draft of a law on the oppression of discrimination and it also had the task to revise all the existent laws and to verify whether they were compliant with the principle of reconciliation.

The achievements of all these variety of tools of transitional justice used in a complementary way, allowed the local population of Rwanda of being part of just one unique ethnic group today, that see no longer the racial distinction between Hutus and Tutsis. This is reflected, for example, in the existence of one single armed force, and the racial identity in identity cards is no longer reported.[68]

[68] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

1.3.6 AMNESTIES AND REPARATIONS

The word **amnesty** comes from the Greek "amnesia" that means forgetting. Amnesties have always been considered as a tool to restore peace and stability in the aftermath of civil wars, violations, domestic conflicts and democratic transitions. Overtime, surveys have demonstrated that amnesties still are a fundamental part of the political and legal measures that are taken into consideration in order to restore peace and stability of a society. Hence, starting from 1945, more than 500 amnesties have been recorded, and they are considered as a key ingredient in the resolution of a conflict.[69]

A group of legal experts created "The Belfast Guidelines on Amnesty and Accountability". Its aim is to support those who are seeking to make or estimate decisions on amnesties, during or immediately after a conflict or a mass repression. These guidelines include the identification of the obligation of states in protecting basic and human rights, clarify the legal status of amnesties, promote public participation.[70]

There are several forms of amnesties that one should consider, and these include immunities, indemnities and pardons.[71] If we go back to the last decades, it is possible to identify that the beginning of the diffusion of amnesties dates back to the campaign against impunity carried out, first of all, in Latin America as an answer to the gross human rights abuses, as torture, murders and assassinations and disappearances that took place during the dictatorship in Argentina, Chile Guatemala, Uruguay, Peru and Nicaragua.

According to the definition provided by the United nations and by sources of international law, amnesties are: the possibility of barring the judgment, and, in some

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[69] Mallinder L., *Amnesty, Human Rights and Political Transition*, Hart Editions, 2009.

[70] United Nations, T*he Belfast Guidelines on Amnesty and Accountability,* available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.pdf , Editor: Transitional Justice Institute of Belfast, University of Ulster 2013, accessed 26th April 2019.

[71] Amnesties can take so three different shapes, for immunity it is meant that legally established condition that grant a person to be exempt from prosecutions; for indemnity, though, it is meant a legal exemption from liabilities provoked by an act made by someone; finally, for pardon it is intended that situation in which a person is released from a wrongful act or a punishment. (American Heritage Dictionary of the English Language, Fifth Edition, 2016, Houghton Mifflin Harcourt Publishing Company.)

cases, civil actions against people or categories of people that pursued a criminal behavior before the granting of the amnesty.[72]

The main aims for approving an amnesty are: the non-recurrence principle, truth-finding mechanism, create long-term stability and balance and promote socio-economic reforms.

Many questions are posed when the topic of amnesties is discussed. The first doubt is about their effectiveness, in the sense that if they were considered as a positive and useful tool in situations of transitions after conflict and in the maintenance of peace and stability. The lawyers that created the Belfast Guidelines argue that amnesties are a crucial measure in negotiations for peace.

The second concern is whether the demand for justice focuses too much on past as opposed to what is needed for the future. From the point of view of the drafters of the Belfast Guidelines, it is more important to end violence through a political decision and implement reforms that deals with the causes of the war.[73]

Reparations, instead, symbolize a remedy for the consequences of large-scale violations during transitions. They can be defined as victim-centered and basically their intent is to compensate for the pain suffered from the victims during these hard times. In 2005, the UN drafted the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG), in which it is expressed that the aim of reparations is to "promote justice through reparation". But, as many aspects previously analyzed in transitional justice mechanisms, reparations too can be subjects of politicization or can be shaped with social and moral controversies, since they are complex constructs.

[72] OHCHR, *Instrumentos del estado de derecho para sociedades que han salido de un conflicto-Amnistias*, 2009, available at https://www.ohchr.org/documents/publications/amnesties_sp.pdf , accessed 26th April 2019.

[73] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

Notwithstanding the ever-growing importance of reparations at international level, it would be impossible to provide reparations to all the victims who suffered a violation in times of war or dictatorship. Unfortunately, only a small number of victims can be heard in front of a court, and generally the selection of the cases to be heard is done according to the hardest violation suffered. This, in a certain way, create a kind of discrimination for all the other victims that do not have the possibility to be heard and to have their case adjudicated in front of a court, but, as the Timor-Leste Truth Commission report states: "[w]e are all victims but not all victims are equal. We must acknowledge this reality and lend a hand to those who are most vulnerable"[74] This explains in a way the case-to-case approach, but this does not mean that granting an unequal access to courts by only judging those most important and vulnerable cases does not create dissatisfaction among the victims.

If we consider the reparations that have a political connotation, that mostly belong to a political project, their purpose is generally to provide means for the construction or reconstruction of the new ruling political elite and trying to avoid repeating the same mistakes committed by the previous regime. Moreover, reparations can also be powerful means to build or rebuild civic trust within the society, because a state in granting reparations confirm the centrality of the suffering of the victims and it considers it as a priority in the moment of the democratic transition.

The victims eligible for reparations are those individuals or group of individuals that suffered of a collective form of violence or victims of armed conflicts. If one takes into consideration the definition of victim provided by the UNBPG, it is possible to argue that it is a very broad definition since it includes not only individuals or group of victims but also families, and those who, even indirectly, were involved and suffered from these situations together with the direct victim. But, as mentioned before, in order to make reparations more suitable, they concentrate on the most catastrophic violations of civil and political rights, as torture, sexual abuse, disappearance and extra-judicial killings. For examples, the truth commissions in Sierra Leone and Timor-Leste stated that reparations shall be provided to those victims who suffered the most harmful violence and as a result they became more vulnerable than others: amputees, orphans, tortured people, sexual abuses, widows and many others.

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[74] Chega!, *Commission for Reception, Truth and Reconciliation in East Timor*, 2005.

Individual reparations generally differ from the collective ones. On the one hand, individual compensations are always intended to be monetary, this is because it may contribute to the victim's building of a better future and projects. On the other hand, if individual reparations are intended to be material, the collective ones are generally symbolic. These symbolic recognitions have the purpose to remember and repair the collective harm of the group who suffered a violation. These symbolic means may include: memorials, apologies, monuments, awards of recognition, bank holidays and promises of non-reoccurrence of the past atrocities.

Likewise, these reparations shall be approved and given by the perpetrators to victims of wrongful acts, and this is generally dictated by the law, that perpetrators shall follow. This was also confirmed by the Nairobi Declaration of 2007 and the UN Basic Principles on Reparations of 2005 which stress the above-mentioned fact that any responsible for a violation shall grant a reparation to the victim or group of victims.[75] So, if one takes into consideration also the psychological aspect, reparations are a crucial part in the building of a democratic society since they mean a public acknowledgement of the harm suffered by the victims.

Finally, the reparation mechanisms allow them to be issued and ordered through various means: truth commissions, courts, programs of reparations and domestic procedures. If these programs are not present in a society they are delivered through specific courts for redress. So, in the end, after having considered all these aspects it is possible to remark that issuing reparation for victims is a part of human rights law, since it is a right for a victim to have direct access to remedy. This also helps to the democratic path-building of a nation who sorts out from atrocities and wars, therefore constituting a means of solidarity, reconciliation and public acknowledgment in a hard moment of transition. So, this is a concrete step towards the pursuit of justice.[76]

[75] UNBPG, *UNBPG Pars 15 and 16 and paras 5 and 6 Nairobi Declaration 2007*, 2007.

[76] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

1.3.7 THE ETHIC OF POLITICAL RECONCILIATION

In order to consider this topic from a broader perspective, it is important to give an overview to the ethic dimension of transitional justice and consider this aspect as a measure to deal with the past. Here, again, the analysis starts from the concept of truth. With this regard, truth is considered as the starting point since it is the only principle that may break cycles of violence and, through this, it can pave the way for an optimistic future.[77]

Considering, though, an ethic perspective, this allow to reflect and pose some questions, whether what is the right punishment for a human rights violator or about the restorative effect of Truth Commissions and many others. But the central question is, with no doubt, the role of justice in the wake of mass abuses. One of the approaches proposed in order to answer this ambitious question is the holistic one. For holistic approach, it is meant a consideration of reality where all is connected in a way. In this sense, any kind of reality cannot be understood if one considers only one part of it, but one should consider all its parts and components and consider it as an organic and integrated whole.[78]

So, giving a holistic approach to justice means to consider actions of redress that are complementary, aimed at increasing the protection for those people who suffered the lack of the latter for a long period. According to Daniel Philpott, the author of the book "Just and Unjust Peace", there are six different ethic practices that add to political practice an ethical dimension. These are: the creation of fair institutions and good relations between states, acknowledgments, reparations, punishment, apology and forgiveness.[79]

Here, the author also introduces the concept of "ethic of political reconciliation", arguing that it not only concerns human rights and rule of law, but a multitude of practices

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1. Recovery of Historical Memory Project, *Guatemala: Never Again!* Maryknoll, NY: Orbis Books, 1999, xxv.

[78] Collins Dictionary, *Definition of Holism*, available at: https://www.collinsdictionary.com/it/dizionario/inglese/holism , accessed 18th September 2019.

[79] Philpott, D., *Just and Unjust Peace, An Ethic of Political Reconciliation*, Oxford University Press, 2012. Pag. 4.

that have the ultimate aim to restore the political injustices imposed. Moreover, he stresses the importance of a strong democratic constitutional transition that not only contributes to a better future of a society, but also helps to repair past wounds and violence. Another peculiar aspect to mention is religion. In all the ancient religious traditions, reconciliation is always present. It is often described as an element that is going to restore peace and political orders in societies that suffered a tremendous past. So, since the impact of religion on a society is really high, both for the devoted people than for the importance that governments and nations give to it, it represents an important aspect aimed at reconciliation.[80]

Other supporters of political reconciliation are International Organizations, as the World Bank or the United Nations, and NGOs, which communicate through a secular language. For examples, the UN from 1987 to 1994, increased dramatically its budget for their actions of building peace after conflicts, since this latter practice has been proved to be more difficult than military campaigns and victories.

Moreover, the involvement of civil society in the peacebuilding process was really active. With this regard, many non-politicized organizations (as religious groups, NGOs, tribal communities…) contributed to this process bringing important results and considering the six ethic practices.

However, it is important to define what political injustices are according to an ethic perspective. These are unjust actions, regimes, laws and constitutions that are created in the name of a political program or ideal. Broadly speaking, they breach the natural relationship among communities and between states, they manipulate the ordinary behavior of citizens. The perpetrators of these crimes are generally: agents of the states, as policemen and soldiers, which enforce these unjust laws, commit war crimes so all those violations that have a political purpose.[81]

The wounds that produce political injustice are several. For examples, a first degree of wounds can be the one related to the memories of the event, so due to the violation of human right that the victim suffered. At a second stage, other wounds consist in the emotions, judgements and events and culminate in further acts of injustice.

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[80] Philpott, D., *Just and Unjust Peace, An Ethic of Political Reconciliation*, Oxford University Press, 2012. Pag. 8-9.
[81] *Ibidem.*

So, if one considers rights as a matter of respect, they are emphasized when a society enforces laws that protect and guarantee these rights. When, so, a perpetrator violates rights, he disregards the status and the recognition of the victim under the law that is in force. So, the ultimate aim of the ethic of political reconciliation seeks to redress are wounds.[82]

Another aspect to consider in this ethic dimension is political reconciliation and how is it linked to human rights and democracy. If one considers that in human rights there are implicit elements of democracy, as elections, a strong and independent judiciary system and the importance of rule of law, it derives that citizens recognize their rights including the one of political participation. So, this implies, in a way, that the political realm is not a standalone sphere but it is all part of a whole.

The major drawback of this short explicative analysis is that justice drives political actors to understand the urgency of dealing with the past in their political programs. Within this framework, the punishment of perpetrators is an essential component of the reconciliation process and it is compatible with forgiveness.[83]

Needless to say, for reconciliation is not intended a mere situation in which enemies become friends and allied, it means instead a collective participation of both perpetrators than victims and civil society in order to build a permanent and effective system of peace. So, the ethical perspective must be considered as a promise to rebuild a broken political order.[84]

[82] Philpott, D., *Just and Unjust Peace, An Ethic of Political Reconciliation*, Oxford University Press, 2012. Chapter Three, pag. 30-33.
[83] Philpott, D., *Just and Unjust Peace, An Ethic of Political Reconciliation*, Oxford University Press, 2012. Pag. 287.
[84] *Ibidem*.

FINAL REMARKS

This first chapter explored the theoretical part linked to transitional justice as a discipline. The aim was to provide a general explanation on the main tools and practices of transitional justice in order to better understand the next and core part of this research. The chapter started with various definitions of transitional justice and the history of the subject, then it moved the main pillars, the actors, so the international and local ones, in order to arrive to the central part of the chapter namely the right to know and the importance of Hybrid Tribunals and Truth Commissions. The final part, instead, was devoted to amnesties and reparations as a final result of the trials held in commissions and tribunals. A last paragraph instead was devoted to the ethic dimension of transitional justice and, more in detail, of the political reconciliation, in order to define these concepts in a broader perspective.

The focus on this first chapter was, with no doubt, to the importance and the popularity of Truth Commissions, providing also two famous and fundamental case studies namely South African case and Rwanda case. The points of strengths and weaknesses of TCs will be the starting point of a reflection that will stretches out in the next chapters that will be mostly focused on the history of Kosovo and their difficulty to achieve a common version of history and the past atrocities. This first chapter, though, was aimed at preparing and to use the tools explained in this section to better understand the complexity of the case of Kosovo and their struggle for the "right to know" and the creation of a Truth Commission to have all their cases heard and adjudicated by an impartial commission that will probably generate a feeling of reconciliation and ethnical balance.

The next section will start by exploring the recent historical background of the conflict in Kosovo, then their constitutional transition and institutional reform. It will also include a series of case studies of trials held in the ICTY and the war crimes held in Kosovo. Finally, it will move to the essence of this work, namely the attempts and the struggle of Kosovo to build an effective justice system which shall be based on facts and a common version of the truth.

CHAPTER TWO
AN OVERVIEW OF KOSOVO'S CONSTITUTIONAL SYSTEM

1. Introduction

In order to understand the relation between Kosovo and transitional justice, one should consider the latter as the ensemble of arrangements aiming to foster the reconciliation of a country with its past "enemies", namely those responsible for gross violations of fundamental rights under the past regime.[85]

To this extent, it is crucial to recall the rivalries of Kosovo's region, that characterized the last decades. The controversial relation between the two major ethnic communities that live in Kosovo, namely Albanian and Serbian, that eventually lead to the conflict that is going to be explained in this first section of the chapter.

The aim of this second chapter, though, is to analyze the main aspects of Kosovo's judicial and constitutional system.

The first part will be focused on the historical background, namely the steps of conflict, the intervention of the international community and the consequent democratic shift and constitutional transition. Another part will be devoted to the new Constitution of Kosovo and the evolution of the role of the Constitutional Court.

The last sections of this chapter will be devoted to the issue of the institutional reform as one of the main pillars of transitional justice and its concrete application in this precise context. Then, there will be a last shift towards the aspects of war crime trials and two initiatives held in Kosovo: the Kosovo Memory Book and the RECOM Initiative, so examples of truth-seeking measures and collection of memories. Finally, the last section will concern the War Crime Trials, starting from those adjudicated by the ICTY, namely the International Criminal Tribunal for the Former Yugoslavia, followed by those held in Kosovo and in front of the Serbian Courts, with all their achievements and limits.

[85] ICTJ, *What is Transitional Justice*?, available at: https://www.ictj.org/about/transitional-justice, accessed 23rd September 2019.

1.1 HISTORICAL BACKGROUND

The rivalries between Albanians and Serbians date back to the early years of life in Kosovo's region, at the end of the twentieth century. With this regard, it has been defined as a "dispute territory" in the last decades. The tensions were basically of religious nature, since the members of the Serbian Community in Kosovo claimed that the Muslim Albanians were in control of an area sacred to the Serbs. This dispute was fueled by the fact that the International Community stated that this issue could not be assured through peaceful means.[86]

The tensions between these two ethnic groups were enhanced on the one hand by the rival and opposite propaganda and various legends that the one said against the others. Moreover, they have always had, over the last century, different views, positions and considerations of the historical facts. This contributed to the increase of rigidities among the two communities and this brought to militarization, narrow-mindedness and eventually to the conflict.[87]

During the leadership of Josip Broz Tito[88], due to the dictatorship and the "federal" arrangements, the region was characterized by a period of calm and very few tensions, but as soon as he died, in the whole Balkan region started to spread nationalisms and insurgencies.

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[86] Auerswald, D.P., Auerswald, P., Duttweiler, C., *The Kosovo Conflict: a diplomatic history through documents*, Cambridge Mass, 2000.

[87] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Pag 215-216, Pristina 2015.

[88] J.B. Tito was an important politician and military leader who drove the definitive rupture between the USSR and the Yugoslavia in 1948. He was one of the main political leader who drove the project of the Non-Allied Countries. After this event, he succeeded in improve the relations with the Western countries. He promoted a draft of the Yugoslavian Constitution in 1974 and was elected President of the Republic from 1953. (Enciclopedia Treccani, s.d.) His period of leadership was carachterized by a political stability, and, thanks to his carismatic behaviour he succeeded in a project of unity of Yugoslavia, that disappeard as soon as he died in 1980.

The consequent relevant figure to remember in Kosovo's historical background was Slobodan Milošević.[89] The period of his leadership, that gradually brought to the "Greater Serbia", so this project of incorporation the regions both populated by Serbs than those who were traditionally important for Serbia, was characterized by a mass manipulation of the ruling elites. Due to his utopian project of the "Greater Serbia", the anti-Serbian feeling exploded in Kosovo, where the perception of being deprived of autonomy and independence increased. This plan caused a period of repressions against the Albanians that brought riots and revolts led by the Albanian Community in Kosovo. The demonstrations that, at the beginning, were carried on in a pacific way, turned to be violent approximately in 1996, and this caused the creation of the KLA/ UÇK, namely the Kosovo Liberation Army. The actions of the KLA turned immediately violent: they started a period characterized by a series of assassinations, of Serbian politicians, Police forces, members of the parliaments and ultimately Albanians who decided to cooperate with the regime. [90]

The overall result was a period of reprisal pursued by the Serbian armed forces. They started to response to the KLA attacks basically by doing the same actions: attacks towards Albanian politicians and public demonstrations in random places. These tensions become even harder two years later, in 1998 when the Drenica area[91] was attacked by the Serbian Armed forces. The so called "Drenica Massacre" was notable because the region was characterized by the presence of Kosovan of Albanian ethnicity, therefore the Serbian armed force started attacking this area and their target were only civilians. [92]

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[89] He was Serbia's president in the period of 1989 until 1997. He was responsible for having involved Serbia in a series of conflicts with the other Balkan's states. Furthermore, he was president of the Republic of Yugoslavia from 1997 until 2000. While he was president of Serbia, he wanted to restore Serbia's control to the autonomous provinces of Kosovo and Vojvodina, so he replaced the local representatives with some of his supporters in these two areas, and eventually modified the Constitution in order to limit their independence and autonomy. His strict policies ended up with the creation of an anti-Serbian feeling. His famous program "**Greater Serbia**" was aimed to create a unique state that included all the regions and area that should belong to Serbia and populated by Serbs. (Encyclopaedia Britannica, 1998)

[90] Ramet, S.P., Simkus, A., Listhaug, O., Civic and Uncivic Valies in Kosovo: *History, Politics and Value Transformation, Introduction*, The American Historical Review, 2016.

[91] The Drenica area, called in this way due to the River Drenica, in central Kosovo, which extends at the left of Pristina, the capital of Kosovo. This area was famous for being characterized by the presence of Kosovan of Albanian culture. The notable "**Drenica Massacre**" took place in this area, by the hand of the Serbian armed forces. (Balkan Insight Transitional Justice, 2017)

[92] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Pag 215-216, Pristina 2015.

The Albanians become even more radicalized and their contribution to the KLA was ever growing. They also received a huge flow of armaments from Albania to Kosovo in 1997.

The 28th February 1999 can be defined as a turning point of the war, since the conflict became an **internal armed conflict** [93], following the laws of war principle, and in particular article 3 and Protocol 2 of the four Geneva Conventions of 1949 and Customary rules of war.

Unfortunately, both parts decided not to respect the rules of war: grabs, burglaries, murders and demolitions took place in the whole region both by the KLA than by the Serbian forces. Likewise, not only they violated the laws of the war but also, they largely infringed International Humanitarian Law. They took hostages, did executions and expelled both Serbians than Albanians from their houses.[94]

The International Community decided to intervene after two important massacres in 1998 and in 1999: the Racak massacre the 15th of January 1999, in a village in the middle of Kosovo populated by Albanians, in which 45 people died[95] and the Gornje Obrinje massacre in September 1998, that saw the killing of twenty one people, all belonging to the same Albanian family, in a forest in the village called Gornje Obrinje.[96] These massacres were with no doubt the outcome of the period of politics of hate promoted by the President Milosevic.

The following step was the international conference called the **Rambouillet Conference** in February 1999, whose aim was to find and examine the possible peaceful solutions to this war. But the evidence showed that, all these options were a failure since a peace agreement was not reached.

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[93] An internal armed conflict is a situation in which international humanitarian law can be applicable in order to limit the means of the armed conflict and to limit and protect people-not involved in the conflict- by the impact of the war. (source: International Committee of the Red Cross, *Internal conflicts or other situations of violence-what is the difference for victims?* Available at: https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm accessed 23rd September 2019.)

[94] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Pag 215-216, Pristina 2015.

[95] Wilesmith, G., ABC News, *Kosovo's Racak massacre 20 years on: memorials, but still no justice for victim*s, https://www.abc.net.au/news/2019-01-15/kosovo-racak-massacre-yugoslavia-balkans-serbians-bosnians/10715936, accessed 12th May 2019.

[96] BBC News, *World: Europe Massacre evidence in Kosovo*, http://news.bbc.co.uk/2/hi/europe/183396.stm , 30 September 1998, accessed 12th May 2019.

On 24th March 1999, NATO intervention was crucial. NATO started bombing after the refusal of Belgrade to find an agreement to put an end to the violence committed in Kosovo. They started bombing through air strikes that lasted for 77 days. The 9th of June 1999 the war was over and the **Kumanovo Agreement** was signed.[97]

The Kumanovo Agreement was a military technical agreement (a cease fire agreement) that started to provide stability in the region of Kosovo. Its name comes from the city in Macedonia in which this document was signed. It was agreed that the armed forces of Serbia and Yugoslavia should withdraw from the territory of Kosovo. It took 11 days to free the region.

The provisions of the agreement, in detail were:

- The hostilities between KFOR (NATO's Kosovo Force) and FRY (Federal Republic of Yugoslavia) shall come to an end;
- The definition of a 25 km of air safety zone and a 5-km ground zone near Kosovo's boundaries. FRY forces could not trespass those limits without NATO's permission;
- Within the 11 days of withdrawal, Kosovo's territory shall be cleaned of all the rests of the war (mines, traps, etc.).[98]

[97] Roberts, A., *NATO's Humanitarian War Over Kosovo's Survival*, vol. 41 n.3, 1999.
[98] Humanitarian Law Centre Kosovo, *An Overview of War Crime Trials in Kosovo in the Period 1999-2018,* pag 283-288, Pristina 2018.

1.1.2 THE CONSEQUENCES OF WAR

During the wartime, loads of crimes against civilians were committed. They were subsequently defined as war crimes since they occurred during the period of the armed conflict and occupation.[99]

The further stage, immediately after the Kumanovo Agreement, was the **Resolution 1244** on Kosovo, drafted and approved by the UN Security Council the 10th of June 1999. This was ratified the day after the Kumanovo Agreement. The resolution provided a framework for the end of the conflict in Kosovo. It also authorized the presence of the International Community (civilian and military) that should help to provide ad disseminate administrative support and security. A part of the resolution is also devoted to the refugees and internally displaced. The international presence shall ensure the return of the latter in Kosovo, once the military forces will withdraw. The last task of the international presence of civilians was to facilitate the definition of the imminent status of Kosovo through a political mechanism.[100]

Furthermore, the resolution provided that Kosovo would be under the jurisdiction and mandate of the ICTY (the International Criminal Tribunal for Former Yugoslavia), based in The Hague.

The text of the Resolution resulted highly contradictory because, on the one hand, it reaffirmed Serbia's sovereignty over the region and, on the other hand, it supported and promoted the need for a self-government autonomously managed by Kosovars. So, the Resolution delegate the control of the region to UNMIK Mission of the United Nations

[99] For war crime, it is meant a serious breach of the Geneva Convention, as tortures, causing injuries. The Prosecutions of war crimes are ruled under article 158 of the Customary International Humanitarian Law, which states that a state must investigate the war crimes committed by its nationals in their territory or where a state has jurisdiction and, if necessary, bring actions against the perpetrators. (ICRC, IHL Database, Customary IHL. Rule 158. Prosecution of War Crimes. Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 accessed 23rd September 2019.)

[100] UN Resolution 1244, 1999. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement

and KFOR Military force of the NATO. This task was really difficult and several months passed before NATO forces could start to control the territory in a proper way.[101]

It was also established a judicial system that was the requirement to start prosecuting crimes during the armed conflict.[102]

1.1.3 ORGANIZATION OF THE JUDICIAL SYSTEM

As soon as the resolution was ratified by the Security Council of the United Nations, a few days later, in June 1999, the UNMIK Mission started. UNMIK stands for the United Nations Mission in Kosovo. Its task was to create and develop a temporary jurisdiction and the judicial system. Thus, this can be defined as a turning point in the institutional framework of Kosovo, since the UN protectorate and the Resolution 1244 provided a new legal order precisely for the region of Kosovo. Within the framework of the UN Mission in Kosovo, several fields were covered: from the judicial, the legislative and the executive that combined local and international administrators.

For what concerns the security level, KFOR administration (under NATO) was responsible for that, as well as UNMIK Civilian Police that was appointed directly by the UN Secretary General. But this new structure did not provide for Kosovo the possibility to be considered as an independent state, since on the one hand the Resolution, that was applied under Chapter VII of the UN Charter, did not guarantee the application of democratic process of state-building, and on the other hand, there was little room for local actors. In fact, when a first attempt of democratic elections was made, the majority of the

[101] Osservatorio Balcani e Caucaso Transeuropa, *I problemi della Gestione Internazionale del Kosovo post-bellico*, available at https://www.balcanicaucaso.org/Materiali/I-problemi-della-gestione-internazionale-del-Kosovo-post-bellico-33160 accesssed 23rd September 2019.
[102] Humanitarian Law Centre Kosovo, *An Overview of War Crime Trials in Kosovo in the Period 1999-2018,* pag 283-288, Pristina 2018.

actors involved were strictly linked to Belgrade, both for the Parliament and for Government and President.[103]

It is possible to claim that, UNMIK embodied the greatest authority in the region at that time. On the 28th June 1999, the JAC (the Joint Advisory Council) was created by the Special Representative of the Secretary General, whose task was to select both the judges and the prosecutors. Its mandate lasted for only three months during which 55 judges and prosecutors were proposed.

In October 1999, the JAC was replaced by the IAC: The Interim Advisory Committee, composed of 300 judges and prosecutors. Among these members, there was a scarce number of Serbs, since, due to pressures from Belgrade they were forced not to participate in the new Judicial System of Kosovo.

This constituted a problem for basically two reasons: first because the majority of the responsible for the war crimes were Serbs, and second because in this way the ethnic minorities were not duly represented. Therefore, the panels were constituted mainly by Albanians. Due to this, in February 2000, the Special Representative of the Secretary General recommended the engagement of international judges and prosecutors to guarantee fairness and neutrality of trials. This was what happened from May of the same year.

However, even if this new mechanism succeeded to work properly, bringing good results, the idea and the need for the establishment of a domestic Special Court for war crimes was still an open issue. This was mainly because all the ethnic communities in Kosovo shall be represented. Unfortunately, this project was discarded by the end of 2000 due to insufficiency of funds.[104]

The contribution of UNMIK was crucial in the field of trials for war crimes against civilians. At the beginning, immediately after the end of the war, the investigations were only carried on by investigators of the ICTY. Consequently, a big contribution was made by the UNMIK Civilian Police together with the Kosovo Police (established in 1999).

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[103] Peci L.,-Dugolli, I.,- Malazogu, L.. *Negociating Kosovo's final status*. Paris: Sciences Po, Centre de Recherches Internationales, 2006.

[104] Humanitarian Law Centre Kosovo, *An Overview of War Crime Trials in Kosovo in the Period 1999-2018,* pag 283-288, Pristina 2018.

The latter started giving fundamental contributions only with the passage of jurisdiction from UNMIK to EULEX (the European Union Rule of Law Mission in Kosovo) and so to local institutions.

The EULEX Mission started in Kosovo region during the second half of 2008, even if it fully began to operate in April 2009, and it replaced UNMIK Mission and tasks.

The mandate of EULEX Mission remained more or less the one of the previous UN Mission, therefore monitor, training and advice for police, judiciary, customs and a jurisdiction over war crime judgments. Within their mission, they implemented and promoted transparency in trials, some KLA higher members were tried. But, even if some positive results were achieved, the EULEX Mission did not completely meet the expectations of their operation, and this brought to the creation of Specialized Chambers and the Special Prosecution Office based in The Hague. [105]

In detail, EULEX Mission was established to last until the 14th June 2014, even if it was extended for two years, namely until the 14th June 2016. Its principal task was the transfer of expertise. Even if the time expired, the Mission continued to exist for two more years but with a different mandate, reducing its executive capacities, and maintaining the role of advice and counselling.

They made significant efforts to allow local judges to take part in trial panels in charge of adjudicating war crimes, this is also because there was a kind of transferal of discontent from the previous UN Mission in Kosovo, since local people expected to have a fully functioning judicial system and not only a transfer from one international mission to another.[106]

[105] Humanitarian Law Centre Kosovo, *An Overview of War Crime Trials in Kosovo in the Period 1999-2018,* pag 285-287, Pristina 2018.
[106] *Ibidem.*

2. CONSTITUTIONAL TRANSITION IN KOSOVO: FROM 1991 TO 2008.

In order to introduce the change of constitution in Kosovo, it is essential to mention what constitutional justice is.

Drafting a new constitution, in many occasions, is the outcome of a period of political change and it is always linked to the concept of democracy. In this way, a new constitution represents a step towards the enforcement of a new liberal political order. However, the change of the regime is not the only precondition to have a constitutional change. Generally, as mentioned before, a new Constitution marks a new era in the democratic history of a country. For examples, this is evident in Brazil, where all the times of its change of Constitution are turning points in its democratic history.[107]

Transitional constitutions are at the same time oriented to the past but also to the future, in order to build a solid structure and avoid the recurrence of the hard periods that characterized the moment before the democratic transition.

Overall, the new constitutions, contain, as an intrinsic value, the sufferance and injustices experimented during the old regime and a strong recognition of human rights and democracy. In some cases, there is also a part devoted to the peaceful cohabitation of different ethnic groups, especially if an ethnic war characterized or was one of the main issue occurred during a conflict.[108]

The independence of Kosovo was declared on 17th February 2008 and the new Constitution started producing legal effects the 15th June of the same year. The drafting of a constitution for a country means the creation of the legal basis needed in order to fully exercise the powers of a state. Therefore, a new Constitution is always the outcome of a compromise and of several choices made in the field of the legislative, the judiciary and the executive. But let's consider all the various steps that gradually brought to the actual Constitution.

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[107] Elkins, Z. Constitutional Transition, *The Oxford Handbook of Public Choice*, Volume 2, 2019.

[108] Teitel, R., *Transitional Justice Genealogy,* 16th Harvard Human Rights Journal, 2003.

The first important document to recall with this regard was the *Kacanik* Constitution of 1991. It was drafted by the Albanian political elites in Kosovo in the period of the dissolution of Yugoslavia and under Milosevic regime. In this period, an attempt of declaration of independence occurred.

Subsequently, some years later, there was a huge debate whether the Rambouillet Agreement could be used as a drafted constitution but, according to the purposes of this document, it provided to the Serbian Government enough power as not to establish any other parallel form of government that may interfere with the Serbian one or that may allow the Kosovo region to gain more autonomy. Nevertheless, what happened was that the UN administration, that thanks to the resolution 1244 was authorized to create permanent institution and transfer of powers, was allowed to create a "Constitutional Framework for Kosovo", drafted by the UNMIK Administration in 2001, for the creation of local institutions, based on the principle of separation of powers, and human rights tool that shall meet the international standards. This is the reason why it was created by international advisors not by Albanians or Serbs. The Constitutional Framework was also defined as an informal constitution since Kosovo still wasn't a state but an internationally administrated state.[109]

Then, during the summer of 2007, a new document was drafted: The Comprehensive Proposal for the Kosovo Status Settlement, drafted by the *Ahtisaari* Commission[110]. It was very similar to the Dayton Peace Agreement, that is to say the Constitution of Bosnia and Herzegovina that derived from Annex Four to the Dayton Peace Agreement.[111] The difference between these two was that the relevant Annex of the Dayton Agreement was considered as a real constitution while the Kosovan one no.

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[109] Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15.5.2001, Chapter III.

[110] The *Ahtisaari* Commission was established by the UN Security Council in order to finally find an agreement on Kosovo's legal status. The name of the Commission derives from its Finnish President that promotes the plan of action. Its members were, Martti Ahtisaari, the chair of the Commission (from Finland), Kurt Biedenkopf (Germany), Emma Bonino (Italy), Hans Van Den Broek (Netherlands), Bronislaw Geremek (Poland),Anrhony Giddens (United Kingdom), Marcelino Oreja Aguirre (Spain), Michel Rocard (France) and Albert Rohan (Austria), so all international members. (source: Emma Bonino webpage: http://www.emmabonino.it/campagne/turchia/ accessed 23rd September 2019.)

[111] OSCE, Dayton Peace Agreement, 1995.

The latter was only a document composed of some general principles (including constitutional values like secularism and multiethnic principles) and twelve annexes.[112]

From a broader perspective, the Proposal, contains the main pillars on which the 2008 Constitution is founded, such as minority protection and human right principles.

The last step, though, was that 21 constitutional drafting experts met in the end of February 2008 and composed the "Constitutional Working Group" that later changed its name into the "Constitutional Commission of Kosovo" immediately after the independence. This commission was divided into 10 distinct working groups, each one focusing on a different part of the Constitution (for example: The Preamble, Fundamental Rights or Funding Principles). This allowed the drafting of a text that was subject to a public consultation session that started by the second half of February to 4th March 2008. This draft introduced some substantial changes, such as some principle, as the human rights, that were more in conformity with the European Union standards and with the ECHR.

The final version of the Constitution was ready the 2nd April 2008 and adopted the 9th April of the same year by the Kosovo Assembly.[113] Specifically, this is what differentiate Kosovo from Bosnia and Herzegovina, so the fact that the latter have never ratified a real and own constitution.

At first glance, there was a specific attention in drafting this new constitution, especially concerning the issue of the protection of human rights. This arouse as one of the main concerns of the international community since in post-conflict societies this should be as one of the initial point in structuring a new constitution. The directives concerning human rights shall be in line with the international standard, in particular with the European Convention on Human Rights. Since Kosovo still is not part of this Convention due to the fact that its statehood is not officially and universally recognized,

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[112] United Nations, *Comprehensive Proposal for the Kosovo Status Settlement*, S/2007/168/ Add.1, 26 March 2007, reproduced at http://www.unosek.org/docref/Comprehensive_proposalenglish.pdf

[113] Marko, J., *The New Kosovo Constitution in a regional Comparative Perspective*, Review of Central and East European Law 33, pag. 437-450, Martinus Nijhoff Publishers, 2008.

therefore it cannot ratify any of these international treaty or conventions, also because still it is not part of the Council of Europe. For this reason, the same provisions that are written and agreed in these milestones agreements and conventions shall be incorporated in Kosovo's constitution, in order to adhere to the international norms. According to this, the 2008 Constitution of Kosovo sets out human rights principles as a foundational cornerstone, starting from the Preamble in which it is stressed the fact that all citizens are free and equal before the law. [114] Furthermore some 39 articles of the Constitution concern only human rights, from article 21 to article 62. They include the right of equality before the law (article 24), the right to life (article 25), the right to personal integrity (article 26), the right to liberty and security (article 29) and so on.[115]

Another peculiarity of the 2008 Constitution, is the protection of the ethnic minorities. According to the Constitution, they shall be overrepresented in public administration, in the sense that they benefit of the safeguard of not being the majority of the population. Moreover, they have the right to speak and use their original language, preserve their cultural habits, education and media, so everything that may guarantee the promotion and support of their identity and culture.[116]This is because the situation of the ethnic minorities in Kosovo basically represents rather a singular situation. [117]

For what concerns the Government of the Republic of Kosovo, its government type is a parliamentary republic. The president is the head of the state elected by parliament, and the prime minister exercises all the executive duties of the government. The period in which the executive stay in charge is five years. The Supreme Court of Kosovo, instead, is one of the two courts that is in charge of take decisions on specific matters of the region. The members of the Supreme Court are appointed by the President, and they serve until the retirement. The second court is the Constitutional Court, whose members are nominated by the Assembly but appointed by the President of the Republic. They stay in charge for nine years. Finally, the legislative branch is composed by 100 members elected

[114] Preamble, paragraph III, *Constitution of the Republic of Kosovo*, 2008.
[115] *Constitution of the Republic of Kosovo*, 2008.
[116] *Constitution of the Republic of Kosovo, Chapter Three*, Articles 57-62, 2008.
[117] De Hert, P., Korenica, F., *The new Kosovo Constitution and Its Relationship with the European Convention on Human Rights: Constitutionalization «Without » Ratification in Post-Conflict Societies, 2016.*

through proportional representation and other 20 members that represents ethnic minorities. Their task is to ratify treaties, pass laws, appointment of the prime minister, president and judges. They are elected every three years.[118]

For what concerns the political parties, Kosovo counts ten major political parties namely the Alliance for the Future of Kosovo (AAK); the New Kosovo Alliance (AKR); Turkish Democratic Party of Kosovo (KDTP); Democratic League of Dardanija (LDD); Democratic League of Kosovo (LDK), Reformist Party ORA (ORA); Democratic Party of Kosovo (PDK); Green Party of Kosovo (PGJK); Liberal Party of Kosovo (PLK) and Albanian Christian Democratic Party of Kosovo (PShDK).[119] Despite these traditional parties, what came out from the last parliamentary elections of two years ago, the result highlighted that the majority of the winner parties are Albanians, as the PANA Coalition, LA Coalition, Vetevendosje, Social Democratic Party of Kosovo and Serb List, a Serbian party. [120]

[118] Election Guide, Democracy assistance and Election News, http://www.electionguide.org accessed 23rd September 2019.
[119] Balkan Analysis, *Major Political Parties*, available at http://www.balkanalysis.com/kosovo/major-political-parties/ accessed 23rd September 2019.
[120] Balkan Insight, *Government Parties Starting Down Challenging 2018*, available at https://kosovotwopointzero.com/en/government-parties-staring-challenging-2018/ accessed 23rd September 2019.

2.1 THE CONSTITUTIONAL COURT OF KOSOVO

Usually, constitutional courts are set up to guarantee the support of a democratic regime, even in a democracy recently established, and they shall be considered as courts that hold a legal superiority, since, according to the Kelsenian Model of 1920, the constitution has a supremacy role,[121] so they are generally considered to be outside from the judicial power.[122] In this particular case, the Constitutional Court in Kosovo, was established in 2009, one year after the publication of the Constitution and the declaration of independence. It can be considered as one of the most influential court in the whole region, since up to 2015 issued more or less 900 decisions.[123] In this section, it will be analyzed some of the most relevant cases adjudicated by this court, and this will reinforce the thesis that it strongly contributed to the transition to democracy of the region. [124]

First of all, the constitutional court's principal function is to ensure that all the principles stated in the Constitution of 2008 are granted, as the protection of ethnic minorities, gender equality, fundamental and human rights and so on. Therefore, the Constitution of Kosovo describes the Constitutional Court in article 112 as final authority for the interpretation of the Constitution.[125]

Of course, the decisions and interpretations of the Court are binding for all the citizens and institutions active under the jurisdiction of Kosovo.[126]

For what concerns the composition of the Court, before the Constitution of 2008, it was composed by nine judges, three of them shall be international judges, so foreigners.

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[121] European Commission for Democracy through law, Venice Commission, *Seminar on "Models of Constitutional Jurisdiction*", 2008.

[122] Ginsburg, T., Judicial Review *in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press 2003, 2.

[123] Constitutional Court of the Republic of Kosovo, *Decisions*, available at http://gjk-ks.org/en/decisions/ accessed 23rd September 2019.

[124] Doli, D., Korenica, F., Rexha, A., Promising Early Years: The Transformative Role of the Constitutional Court of Kosovo, Working Paper Series Editors, Published by Analitika-Centre for Social Research, 2016, Sarajevo. Pag: 16-65.

[125] Art. 112, Paragraph I, *Constitution of the Republic of Kosovo*, 2008.

[126] Art. 116, Paragraph I, *Constitution of the Republic of Kosovo,* 2008.

The latter, shall be appointed as a result of a consultation between the International Civilian Representative and the President of the European Court of Human Rights.[127]

The other six local judges were respectively: four Kosovars of Albanian ethnicities, one Kosovo Serb and the last Kosovo Turk.

This composition was intended to be only provisional, since it was established during the period of the supervised independence, so before the ratification of the Constitution. The only difference is that, in article 114, the Constitutional Court from 2008 is composed by nine local judges, which shall possess not less than ten years of professional experience.[128]

The presence of these three international judges, also called the "hybrid membership", very close to the one of Bosnia and Herzegovina, was seen by the majority of the Kosovars as a prestigious peculiarity for the Constitutional Court. This is basically because they were seen as more impartial and neutral than the local ones and often with more professional experience, especially in countries that are experiencing democratic process.

According to other interpretations, this international composition was considered, in some cases, as point of weakness of the Court.[129] This is basically because these judges were reluctant in expressing dissenting or concurring opinions. This may be explained due do the fact that, there are certain circumstances in which the judges have little competence or knowledge not only of the newly adopted of the Constitution of Kosovo, but also and most of all of the context in which they are operating.

The jurisdiction of the Court checks the constitutionality of the norms adopted by the president, the Prime Minister, the Government, the Assembly or the Municipalities or by ordinary courts. Furthermore, it has jurisdiction over the constitutionality of referendums and the declaration of the State of Emergency.[130]

Let's consider now some relevant cases that were adjudicated by the Kosovo's Constitutional Court.

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[127] Capussela, A.L., *A Critique of Kosovo's International Constitutional Court, European Diversity and Autonomy Paper*, EURAC Research, 2014.

[128] Art. 114, Paragraph I, *Constitution of the Republic of Kosovo*, 2008.

[129] Capussela, A.L., *A Critique of Kosovo's International Constitutional Court, European Diversity and Autonomy Paper*, EURAC Research, 2014.

[130] Art. 113, Paragraph II, III, V, *Constitution of the Republic of Kosovo*, 2008.

The first landmark case is the **President Sejdiu Case**.[131] This case is considered important since it was the first case decided by the Constitutional Court.

But let's first discuss the facts. It was June 2010 when Naim Rrustemi and 31 representatives of the Assembly of Kosovo claimed, in front of the Constitutional Court, that the President of the Republic of that time, Mr. Sejdiu, was holding at the same time the office of President of the Republic and the President of the LDK, namely the Democratic League of Kosovo, hence violating the Constitution. [132]

The article that was claimed to be violated is article 88[133], which clearly expresses the prohibition of the President to exercise other public functions at the moment of his mandate. [134]

Furthermore, this claim was done according to articles 113 and 44 of the Constitution of Kosovo, which affirm that a minimum of 30 Members of the Parliament may start a referral whether the President violated some principles of the Constitution. The final result of this judgment was the forced resignation of the President, dissolved the coalition of the government and provoked elections in advance. The justification of the Court was that it touched crucial constitutional values and that not taking actions with this regard could damage the confidence of the citizens towards the authority of the Laws of Kosovo.[135]

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[131] See Constitutional Court of the Republic of Kosovo, *Sabri Hamiti and other Deputies, Judgment in Case no. Ko 29/11, 22 February 2011* <www.gjk-ks.org/repository/docs/ko_29_11_agj_om_ang. pdf> accessed 1 August 2019

[132] *Constitutional Court of the Republic of Kosovo, Naim Rrustemi and 31 Deputies of the Assembly of the Republic of Kosovo vs. His Excellency President of Kosovo Fatmir Sejdiu, Judgment, Case no. KI 47/10, 28 September 2010* <www.gjk-ks.org/repository/docs/ki_47_10_eng_1.pdf> accessed 2nd June 2019.

[133] Article 88 of the Constitution of the Republic of Kosovo clearly states that after the elections, the President is not authorized to exercise other public functions or political party functions (Art. 88 Constitution of the Republic of Kosovo, 2008.)

[134] Art. 88, Paragraphs I-II; *Constitution of the Republic of Kosovo,* 2008.

[135] Droli, D., Korenica F., and Rexha, A., *Promising Early Years: The Transformative Role of the Constitutional Court of Kosovo*, Working Paper Series Editions, Sarajevo2016, pag 28, 37.

The second case important to mention is the **Brussels Agreement Case**, also known as the Kosovo-Serbia Agreement of 2013. The Constitutional Court was asked to deliver a judgement both in 2013 and in 2015 with regard to the constitutionality of this agreement.

The relation between Kosovo and Serbia has always been characterized by several tensions, both for ethnic reasons than historical ones. Therefore, this Agreement was a clear attempt to harmonize the relations between Serbia and Kosovo. This normalization of the relation was also pushed by the European Union, whose mission was to begin a dialogue procedure in order to promote cooperation between these two neighbors. The help of the EU was crucial for both, also in the light of a future fulfilment of the requirements to accede in the European Union. [136]

Even if Serbia and Kosovo reached various technical agreement after 2010, this was considered the first General Agreement that seeks cooperation and regularity, and that allow both of them to get a step closer to Europe.

The task of the Court in this case was to check the constitutionality of this agreement with the Constitution of Kosovo, since the Constitution provides that, in order to approve and pass an international agreement, two thirds of the members of the Assembly shall ratify it.[137]

The contested provisions were respectively: violation of principle of unity of the state, territorial integrity and the principle of equality before the law, the principle of local self-government

So, the Court declared the case admissible, but decided unanimously that the Court has the power to examine the Law on Ratification of agreements, but it is not entitled to check the constitutionality of an international agreement *per se* with the Constitution. So, the case was declared to be out of the field of jurisdiction of the Constitutional Court of Kosovo.[138]

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[136] EEAS Press, '*EU Facilitated Dialogue for the normalization of Relations between Belgrade and Prishtina'* <www.eeas.europa.eu/dialogue-Prishtina-belgrade/index_en.htm> accessed 3 June 2019.

[137] Article 18, Paragraph I, *Constitution of the Republic of Kosov*o, 2008.

[138] Constitutional Court of the Republic of Kosovo*, Visar Ymeri and 11 other Deputies of the Assembly of the Republic of Kosovo* (n 165) paras. 34, 35.

The third case that the Court was asked to judge was the Agreement, between Serbia and Kosovo, on the **Association of Serb Majority Municipalities** in 2015. Overall, the aim of the agreement was for the municipalities with a Serb majority to gain more autonomy from the Kosovar central government and to foster local economy. The agreement also aimed to better coordinate the interests of the Serbian Community in Kosovo with the central government of Serbia.

As soon as this Agreement was reached, this created political turmoil in all the region of Kosovo. The population claimed that this document was unconstitutional, since it infringed the principle of multi-ethnicity and that it may undermine the autonomy of the government in Kosovo. [139]

In the end, the Court stated that the Agreement on the Association of Serb Majority Municipalities was violating some constitutional principles, in particular, the principles of: equality before the law, fundamental and communities' rights[140].

Finally, the last case to mention is the **Prizren Municipality Emblem Case**[141]. Overall, this case is similar to the last mentioned, since it was a matter of representation of the smaller ethnic communities in Kosovar region, as the Constitution states. The doubt of constitutionality in this case, refers to the logo of the Municipality of Prizren, which, according to the Court, did not represent the ethnic minorities. This logo pictured an image of the League of Prizren Building and the word "Prizren" in Albanian language. This building is a symbol for the Albanians since it represents the fight for independence from the Ottomans that was reached in 1878. The claim, though, was that this logo only represented the Albanian ethnic group of Prizren and not all the others, even if minorities.

The Court, after having considered this case admissible, reached the decision that the logo was unconstitutional, by stressing the fact that the logos of the Municipalities

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[139] Original text of the Agreement on the Association of the Serb Municipalities: <http://eeas.europa.eu/statements-eeas/docs/150825_02_association-community-of-serb-majority- municipalities-in-kosovo-general-principles-main-elements_en.pdf> accessed 3 June 2019.

[140] Droli, D., Korenica, F., and Rexha, A., *Promising Early Years: The Transformative Role of the Constitutional Court of Kosovo*, Working Paper Series Editions, Sarajevo2016, pag 53-54.

[141] *Prizren* is the name of a city in the southern part of Kosovo, which is characterized by a majority of Albanian-Kosovar population.

shall preserve the characteristics of the other ethnic minorities, also as a matter of respect for all the citizens.[142]

Therefore, the Court, in adjudicating these cases, marked an important step in the direction of the protection of the rights of the communities, and the representation of the multiethnic nature of the latter.

2.2 CONSTITUTIONAL RIGIDITY IN KOSOVO

In the course of history, constitutions have always been classified according to their characteristics, so for examples constitutions can be written or unwritten and rigid or flexible. The latter distinction is made with regard to the possibility to follow a procedure that allow to change the constitution, therefore when a constitution is rigid, this means that, in order to change or amend its principles, one should follow the special procedure codified in the constitution. Rigid constitutions are more common than the flexible ones. When a constitution is rigid, though, it presents one or more articles devoted to de procedures of amendment. Except from this provision, there are some core principles of a constitution that cannot be modified, otherwise it would damage its purposes. An example of rigid constitution is the one of the United States, which has been amended formally twenty-seven times. On the contrary, the most common example of flexible constitution is the one of the United Kingdom.[143]

Having a rigid constitution guarantees, in the majority of the cases, a strong stability of the constitutional regime. When a constitution is rigid, though, it means that it is less likely to be subject of the dynamics of politics and society. On the other hand, constitutional rigidity shows how a constitution is difficult to modify through the amendment procedures.

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[142] Constitutional Court of the Republic of Kosovo, *Cemaijl Kurtisi and The Municipal Assembly of Prizren, Judgment in Case no. Ko 01/09, 18 March 2010* <www.gjk-ks.org/repository/docs/ko_01_09_ ven_ang.pdf> accessed 3 June 2018.

[143] Ryan, M.-Foster, S., *Unlocking Constitutional and Administrative Law*, Routledge, 2014, pag. 16.

Specifically, in Kosovo, many scholars agree that the Constitution is the outcome of an international initiative, thanks to the supervision of international actors that were in the region in the moment of the drafting. This is partially true, since the international features are very strong and visible, but it is also important to say that, except from this component, the crucial part of the Constitution of Kosovo of 2008 is the representation and preservation of the multiethnic feature of the region. [144]

The point is that, the Constitution of the Republic of Kosovo proclaims in one of its articles, that the sovereignty of the Region derives and belongs to the people, and this is reflected through the representatives directly elected and chosen by the people. Therefore, following this line of thought and according to the principle of sovereignty of the people, they are the only one that are allowed to amend the Constitution. However, the only authorized organs that have the power to initiate an amendment procedure are: The Government, the President and ¼ of the deputies of Kosovo's Assembly.[145] Therefore, this means that people are cut off the process of amendment of the Constitution, or that they can be consulted only via referendum.[146]

According to the Constitution, article 144 defines the procedures for the amendments to the Constitution. Therefore, the Government, the President and one fourth of the Assembly's deputies have the power to propose changes and amendments to the constitution. The condition to respect, as stated in paragraph II, is that no one of these amendments proposed shall diminish the rights expressed in the second chapter of the Constitution of Kosovo.[147]

The Constitution of Kosovo is defined as a very rigid constitution, and its rigidity is expressed through article 144, which defines the amendment procedures in its three paragraphs. This allows to the Constitutional Court of Kosovo to be central in the system of control of the actions of the President, the Parliament and the Government, whose actions may be manipulated by the majority.

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[144] Korenica, F., and Doli, D., *Constitutional Rigidity in Kosovo: Significance, Outcomes, and Rationale*, Pace International Law Review Online Companion, January 2011, at.1, pag.3-4-5.

[145] Article 144, Paragraph I, *Constitution of the Republic of Kosovo*, 2008.

[146] Korenica, F., & Doli, D., *Calling the Kosovo's Constitution: A Legal Review*, 22 Denning l.j. 51, 63 2010.

[147] Art. 144, Paragraphs I-II-III-IV, *Constitution of the Republic of Kosovo*, 2008.

For example, in the above-mentioned case, *Rrustemi et al v. President of the Republic,* the outcome of the judgement of the Constitutional Court was that the President was violating the Constitution since he was both President of the Republic of Kosovo than President of a political party. The President of the Republic, in his defense during the resignation speech, claimed that thanks to a previous agreement among political forces, being President of both was allowed and not unconstitutional.[148]

Finally, the work of the Constitutional Court has proven that its jurisdiction has the power to control the work of both the executive than the legislative branch, as in the case of the President, that an alliance violated the principles of the Constitution. This of course shaped and contributed to the way in which the following agreement and alliances are made for the future.

However, as mentioned in the section before, one of the most important aspects of having a rather rigid Constitution in this specific context and in the delicate moment of transition to democracy, is the important relation between constitutional rigidity and protection of human rights. The rigid constitution, in a way, assures that the rights and privileges of the ethnic groups are preserved and respected, thanks to the composition of the Members of the Parliament.[149]

The Constitution of Kosovo, in its third chapter called "Rights of Communities and Their Members" devotes six articles exclusively on the rights of the ethnic minorities and their representation in the institutions and government. In particular, article 61and 62 are expressed the modalities of the representation of the municipalities. For examples, the position of Vice President shall be covered by the candidate that does not belong to the majority but who gained the highest number of votes during the elections to the Municipal Assembly. This is because his task is to become a mediator and a promoter of inter-Community dialogue and to give voice, during the Assembly's sessions, to the needs of the Municipalities and ensure their right's protection. In the unlucky event in which the Assembly decides not to consider the Vice President's acts or decision, he can bring a

[148] Financial Times, 28 September 2010 Retrieved from: Kosovo President Resigns: http://www.ft.com/cms/s/e383958c-ca48-11df-a860-00144feab49a, accessed: 7 June 2019.

[149] Fisnik Korenica and Dren Doli, *Constitutional Rigidity in Kosovo: Significance, Outcomes, and Rationale*, Pace International Law Review Online Companion, January 2011, at.1, pag 23-24.

claim in front of the Constitutional Court to express a violation of the constitutional rights.[150]

3. INSTITUTIONAL REFORMS AND VETTING PROCESS IN KOSOVO

The institutional reforms are necessary every time, after a period of abuses, institutions were directly or indirectly the tools used to commit such atrocities. Therefore, a reform in institutions, that may be partial or total, is fundamental in order to rebuild civic trust and the rule of law.[151] Simply put, the adoption of a new constitution or new institutional reforms, are not magic tools that allow to forgive and forget war crimes or abuses, the focus here is that these changes and shifts into a more democratic and trusted system shall come together with a purge, namely to get rid of those people held responsible for abuses, crimes and violations from the newly established system.

Therefore, in order to rebuild civic trust, the reform shall include the prosecution of those high-rank officials that were involved in committing abuses and that breached the faith invested and given by the local population. Through this action, and as all the purposes of the actions of transitional justice, there is a focus on the past, so to punish the perpetrators of the crimes but also the future is central in this action, since the main aim is to prevent the recurrence of abuses and to generate a new life for institutions.

In Serbia, for instance, in 2003 the Parliament voted for the creation of a Commission that shall be responsible for the investigation of the abuses of human rights that occurred after 1976 which involved people working or applying for high-rank positions in the public sector as administration, judiciary or politics. Nevertheless, this commission was never activated since there was no agreement among the Members of the Parliament, and after 10 years from this proposal, the Act that shall provide the formation of this Commission expired. There are many explanations about the non-activation of this important Commission, but the most plausible is that since in Serbia there was not a net interruption with the past, it was very likely that the same persons who hold that high-rank position at that time, were the same who stayed in charge during the

[150] Article 62, Paragraphs I-II-III-IV-IV, *Constitution of the Republic of Kosovo*, 2008.
[151] OCHCR, *Rule of Law Tools for Post-Conflict States: Vetting: an operational framework*, 2006.

period in which the Commission was supposed to be created. In other words, people who were assumed to be judged by the Commission were the same that hold the power. [152]

By the way, this lack of reform in Serbia is one of the worst obstacles for the reconciliation of Serbia with its neighbors.

According, though, to this case study, the lack of political will means the impossibility to implement the vetting process. This process, on the contrary, should be initiated as soon as possible in a moment of transition, in order to give the right shape on the new institutions of the post-transition period.

The main principles that shall be reestablished during this kind of reform are with no doubt the independence, legitimacy and above all the general trust in institutions. This is also achieved through some promises or commitments that the state is willing to undertake, such as the possible ratification of human rights treaties or the creation of new laws in respect of human rights or amendments to the constitution if the latter is poor in the protection of such rights.[153]

As all of the transitional justice measures, the vetting process' risk is that is very likely to be politically manipulated, this is due to its large-scale nature process. Among the other risks, one may find the possibility of a "void in administration", since many perpetrators held a high-rank charges in politics or administration. This of course will lead to a malfunction of the public service and a possible creation of a strong political opposition.[154]

For what concerns institutional reforms aimed at lustration in Kosovo, they took place immediately after the period of the war, thanks also to the assistance of UNMIK and EULEX Missions. These monitor and advice actions were really important also for what concerns the diffusion of the European and international standards that Kosovo has to meet in order to begin to build its path in the direction of the EU and UN.

Since Kosovo's rule of law authorities' role was very weak, the task of the international community was to strengthen the role of the judiciary, local police and the

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[152] Bruham, C., *Research on Vetting in Serbia" HLC research Draft Papers*, 2015.
[153] Mayer-Rieckh A., De Greiff P., J*ustice as Prevention: Vetting Public Employees in Transitional Societies*, ICTJ, 2007.
[154] *Ibidem*.

customs services. The progress achieved, with this regard, was the role of the Kosovo Police, that become highly trusted and professional.[155]

One of its major successes was the equal representation of all the ethnic communities in the executive process and also the inclusion of all the ethnic minorities in the Kosovo Serb Police, and this, by all means, generate a greater sense of trust.[156]

Far more difficult was the achievements in the field of justice, especially for what concerns its independence. This is also because the vetting process of Kosovo, carried on by the judicial branch and addressed to all the members of the public administration, police and also to the judicial system,[157] is still incomplete due to the fact that many Albanian leaders that were responsible for the abuses during the conflict are still in power and only a minority of them have been processed or investigated. Moreover, the insufficiency of funds to implement the processes and the majority of the investigated official refused to leave their charges, and this shows a very scarce level of impact of the laws. [158] This means that, the civic trust cannot be restored totally, since the population still consider institutions as corrupted. This is especially true when, during a vetting process, the responsible considered guilty for the abuses and, as a consequence, the perpetrators are removed from their charges, this generates a general sense of impunity.

Another issue still open is that the Serbian ethnic group claims that there is a scarce protection of their rights, even if the Constitution and the statehood of Kosovo are founded on the principle of multi ethnicity. This is reflected, for example, in the fact that information and communications of the public institutions are not translated into Serbian language.[159]

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[155] Transparency International, *Global Corruption Barometer*, 2013

[156] Bjelos M., Elek B., Raifi F., *Police Integration in North Kosovo: Progress and Remaining Challenges in Implementation of the Brussels Agreement*, Belgrade Centre for Security Policy and Kosovar Centre for Security Studies Joint Report, 2014.

[157] Independent Balkan News Agency, *A vetting process may be conducted in Kosovo,* 16/10/2017, Elton Tota, available at: https://balkaneu.com/a-vetting-process-may-be-conducted-in-kosovo/ accessed 24th September 2019.

[158] CRDP, *Kosovo's Vetting System: A Case for Further Reform*, 2015.

[159] International Crisis Group, *Setting Kosovo free: Remaining Challenges*, Europe Report n.218, 2012.

Therefore, even if these efforts constitute a big contribution in a democratic transition of a state, several steps still have to be done. A certain fact is that, institutional reform is in continuity with other transitional justice measures like Truth Commissions or reparations, so that the reforms constitutes a precondition for the application of the other means.[160]

3.1 TRUTH-SEEKING INITIATIVES IN KOSOVO

After having analyzed respectively the historical background, the constitution transition and the meaning of an effective institutional reform, before arriving to the trials adjudicated both in the region of Kosovo than Serbia and International Courts, it is important to consider two notables local initiative that were carried on in Kosovo during the last years. These are the Kosovo Memory Book and the RECOM Initiative.

First, the Kosovo Memory book as the name suggests, is a project which purpose is the creation of a collection, composed of several volumes, recording and documenting all the human losses occurred during the war, therefore from 1998 to 2000. This initiative was carried on jointly from the Humanitarian Law Centre in Kosovo and in Serbia. The most interesting fact is that, this book constitutes one of the first attempts of creation of a record book, and this has brought the Kosovo Memory Book to become a truth-telling and a peace-building measure.

This initiative comes from the willingness to give dignity to the victims and to provide the reconstruction of a collective memory and of course to reinforce the other mechanisms of transitional justice.

The Kosovo Memory Book is a real database and monument to the victims of war crimes which seeks to provide the basis for the process of prosecution, reparations and all the measures in order to find the truth.[161]

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[160] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Pristina 2015.

[161] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 2: Pag 225-231, Pristina 2015.

Such database is crucial in order to allow people and families of the victims not to forget about what happened. In this sense, the Kosovo Memory Book has a memorial and symbolic function, therefore it tends to avoid any exploitation from political parties and oblivion. Moreover, each Municipality has its section.

Before the editing of this Memory Book, there was no data collection about the losses and sufferings that occurred in the last two years of the nineties, therefore this initiative represents a first attempt with regard to the creation of an impartial and fair collection of data, regardless of the ethnicity of the victims, since it comprehends both Albanian than Serbian victims. This means that the status of victim is attributed to all those civilians that were victims of war, without distinction of religion nor ethnicity.

The database is full of details about the circumstances and reasons in which all happened, for examples all victims were given an ID number and linked to an ID event number, then it is specified the role of the person, so whether he was a victim, a witness and so on, and time and space details. Furthermore, there is a detailed list with all the names of the war victims (no victim is left without name and identification). Likewise, the war victims can be civilians, soldiers and police officials.[162] Nevertheless, a victim can be defined as war victim only if it is a clear evidence that there is no doubt of reliable information and connection of that victim to the war.

Then, there is a section devoted to possible victims and victims that are not involved in war and these two last categories have several parts that are left in blank since there are several anonymous victims. These sections are, of course, always in progress and updated on the website of the Kosovo Memory Book. Overall, as the Memory Book shows, the majority of the victims are of Albanian ethnicity, and the remaining are Serbs and minor percentages of the other ethnic communties, as it is shown in the chart below taken from the statistics part of the website.[163]

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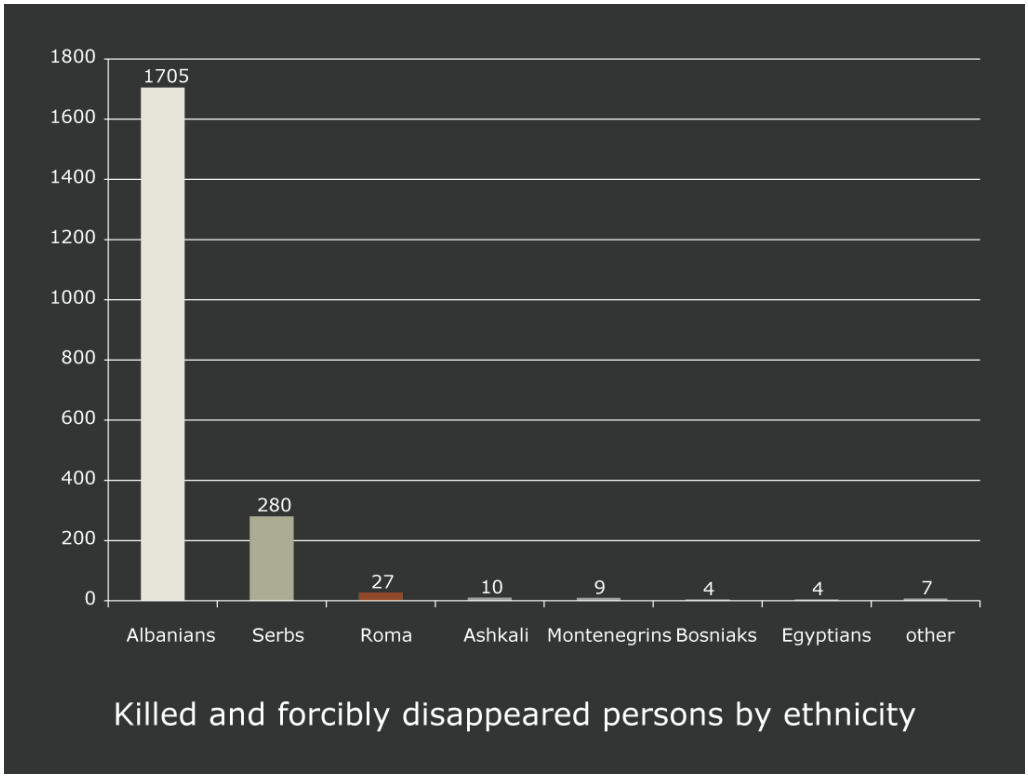
[162] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 2: Pag 228-229, Pristina 2015.

[163] Kruger J. And Ball P., *Evaluation of the Database of Kosovo Memory Book,* Human Rights Data Analysis Group, 2014.



(Source: Kosovo Memory Book Website, available at: http://www.kosovskaknjigapamcenja.org/?page_id=46&lang=de accessed 24th September 2019.)

This huge work and research was made by the Humanitarian Law Center in Kosovo, financed by Fehmi Agani Association, French Catholic Committee Against Hunger and for Development (CCFD), Civil Rights Defenders, Kosovo Foundation for Open Society (KFOS), National Endowment for Democracy (NED), US Institute of Peace (USIP), USAID, IKV Pax Christi, The Government of the Kingdom of Norway, The Embassy of the Federal Republic of Germany, the Embassy of the Great Britain and the European Commission.[164] The methodology used for collecting data was mainly field research, media sources, trials and court data and documents, reports, NGOs papers and so on. All these data included in the Kosovo Memory Book are very interesting and useful for what

[164] Kosovo Memory Book Website, *Financial Support*, available http://www.kosovskaknjigapamcenja.org/?page_id=55&lang=de , accessed 24th September 2019.

will concern the RECOM Initiative that will be explained in the next section, since the purpose of the latter is to create a local compromise that allow to share a common view on the past based on a shared version of the facts.

For what concerns the findings, thanks to the contribution of 31,600 documents it was allowed to record the death or loss of 13,549 people, mostly, as mentioned before, of Albanian ethnicity. The war victims recognized as such were respectively 10,334 among civilians, members of the armed forces and international personnel. Moreover, there are still 1,603 victims that cannot be defined as war victims yet, because they have not been identified yet.

In the end, it is possible to argue that, the accuracy and methods used for the realization of this Memory Book, allow it to gain respect and to be a faithful memory of all the atrocities and losses committed during the years that cover this book.[165]

Secondly, for what concerns the RECOM Initiative, namely the Inter-State Commission for Establishing and disclosing the Facts about all Victims of War Crimes and Human Right Abuses in the Territory of the Former Yugoslavia from1991 to 2001[166], this process started in 2006 with the intent to become a local truth-seeking measure. Its efforts are driven by a RECOM Coalition which counts more than 1900 supporters all coming from states of the Former Yugoslavia. This initiative, though, seeks to promote regional cooperation as a key element for transitional justice especially because in the Balkan region very few was made in this direction, both for a scarcity of regional initiative then for a scarce feeling of belonging.

What this initiative seeks to create is a shared version of the facts and to stimulate the public debate. For example, they wanted to continue the work started by the Kosovo Memory Book and list a permanent list of the people that lost their lives during the war. At the basis of this initiative too, there is the willingness to avoid political abuse and manipulation of the facts.[167]

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[165] Kruger J. And Ball P., *Evaluation of the Database of Kosovo Memory Book,* Human Rights Data Analysis Group, 2014.
[166] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 5: Pag 282, Pristina 2015.
[167] RECOM Initiative, *Voice!*, 2012.

The RECOM Coalition was created in 2008, in Pristina, and it counts more or less 2000 civilians involved, as victims' associations, journalists, artists, historians, professors and human rights associations. Their activities started in 2011 when they launched a campaign for the creation of RECOM. They collected 542,000 signatures belonging to people of all ethnicity, that showed their enthusiasm for this initiative.[168]

Their work continued with the creation of RECOM Statutes, edited by four jurists and two historians of the Coalition. In these documents, it is defined the Mission of the initiative, the international norms to adhere, the definition of the Kosovo's legal system and a list of the previous initiatives. It was adopted as a draft in March 2011.[169]

This draft copy was sent to the Presidents of the ex-Yugoslav States for a final revision and a check of constitutionality in the establishment of the RECOM.

Once this revision was concluded, there was a last check made by the Coalition in order to verify whether the alterations made by the Presidents had preserved the core elements of the Initiative. In 2014 this process was over and the Statute reached a final version.[170]

Having a look on the RECOM Initiative's Website, the latest news show that the European Commission mentioned the Initiative in its 2019 Report on Serbia, as a tool that promotes integration, cooperation and stability and above all that deals with the inheritances of the past. This initiative, together with all the others that see Serbia involved, is an essential part of the process of Integration to the European Union.[171]

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[168] Civil Rights Defenders, *Memo: The RECOM Initiative- The Case for Support of the European Union,* 2009.
[169] *RECOM STATUTE*, 2011.
[170] RECOM Initiative, Voice!, 2015.
[171] RECOM Initiative's Website, European Commission in Serbia Report 2019 mentions RECOM, 13 June 2019, https://www.recom.link/ec-in-serbia-report-2019-mentions-recom/ , accessed 15th July 2019.

4. WAR CRIME TRIALS

This las section of the Chapter, analyzes the War Crime Trials, first considering the work of the ICTY, namely the International Criminal Tribunal for Former Yugoslavia, then those held in Kosovo and finally the trials in front of the Serbian Courts.

First, it is important to recall that the creation of the ICTY was made it possible by the Resolution 827 of the United Nations Security Council adopted on 25 May 1993, and was active from 1993 until 2017.[172] Its task, though, was to deal with those crimes, atrocities and horrors that took place in the Region of the Balkans during the Nineties.[173]

The Tribunal adjudicated four crimes that took place in the Former Yugoslavia and also covered the crimes committed in the Region of Kosovo from 1999, when the conflict shifted into an internal armed conflict. Therefore, since this crucial year, the International Tribunal inspected five cases, three of them, respectively, dealt with crimes committed by Serbian Authorities and the remaining two involved two Albanians, leaders of the Kosovo Liberation Army (KLA).[174]

The first case was the one involving *Slobodan Milosevic*, the President of the Federal Republic of Yugoslavia from 1997 until 2000. He was accused of having committed several crimes among which forced deportation, creation of an environment of fear and oppression, sexual harassment, murder of Kosovo Albanian Civilians, destructions of properties. He died when the process was still ongoing, in 2006, therefore this mark the end of his process.[175]

The second case was *Sainovic et al.* (N. *Sainovic, D. Ojdanic, N. Pavkovic, V. Lazarevic, S. Lukic and M. Milutinovic).* They were in order: The Prime Minister of the Republic of Yugoslavia, Chief of the General Staff of the Army of Yugoslavia,

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[172] United Nations Security-Council, *Resolution 827, 25 May 1993*, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf accessed 24th September 2019.
[173] ICTY Website, http://www.icty.org , accessed 15th July 2019.
[174] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 3: Pag 234-236, Pristina 2015.
[175] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 3: Pag 236, Case Sheet S. Milosevic, Pristina 2015.

Commander of the 3rd Army of Yugoslavia, Chief of the Staff of the Corps of Pristina of the Yugoslavian Army, Head of the Serbian Minister of Internal Affairs for Kosovo and the President of Serbia.[176]

Their crimes were: deportation, murders and persecutions on various grounds (political, racial…) and violations of the laws of war. The final sentence was an imprisonment of respectively: 18, 15, 22, 14 and 20 years. The only one absolved was Milutinovic, the President of Serbia.

The third one was *Vlastimir Dordevic,* the Assistant Minister of the Serbian Minister of Internal Affairs that was responsible for the crimes of deportation, murder, prosecutions on various grounds and violation of the laws of war. He was also attributed the responsibility of the above-mentioned Operation Reka. He was condemned of 18 years of jail. [177]

The fourth case was *Limaj et al*. (*F. Limaj, I. Musliu and H. Bala*), they were Commanders of the Kosovo Liberation Army. At the end, the only one who was sentenced for 13 years of jail was Bala, while the other two were absolved due to lack of sufficient proofs. [178]

Finally, the last case was Case *Haradinaj et al*. (*R. Haradinaj, I, Balaj and L. Brahimaj*). The first was the Commander of the Kosovo Liberation Army, and the others were Members of the KLA and responsible for different parts of the region. The first two were absolved due to scarcity of proofs while the third was sentenced to 6 years of jail.[179]

[176] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 3: Pag 237, Case Sheet Sainovic et al, Pristina 2015.
[177] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 3: Pag 237, Case Sheet Dordevic, Pristina 2015.
[178]Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 3: Pag 237, *Case sheet "Anton Lekaj*", Pristina 2015.
[179] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 3: Pag 238, Case sheet Haradinaj et Al., Pristina 2015.

The overall result of the activities of the International Tribunal[180] in Kosovo are not easy to understand, since it is not so easy to establish whether it has meet the expectations of fairness and justice that was estimated by people. The biggest critique and problem was probably that there was too much selectivity in the adjudication of the cases and to reconcile the different ethnic communities and that was much more focused on the perpetrators than on the voices of the victims, therefore constituting an imperfect and symbolic delivery of justice.[181]

Second, for what concerns the Trials held in Kosovo, it is necessary to state that it was created a hybrid structure in order to deal with this kind of international justice. In fact, these trials are part of the UNMIK Mission in Kosovo, the United Nations administration in Kosovo, and consequently as a part of the EULEX Mission (European Union Rule of Law Mission). These missions tried to shift the nature of the Court from international to national, since the first were subject of critiques and debate. With this regard, a hybrid system was seen as a compromise, so a system which preserve some peculiarities of the domestic legal system mixed with some international elements and standards. This, of course, had two main intents the first was to bring justice to the victims and the second but not less important was to foster the local capacities in order to develop a category of experts that, in a close future, could deal with those legal aspects.[182]

According to a study carried out by the Humanitarian Law Centre in Kosovo, in the period between 1999 and 2015, 99 perpetrators were heard in front of a court in Kosovo. But even though this number is quite significant, there have been several concerns about the effectiveness of the EULEX impact in the region. This is basically for the same

[180] For what concerns the members of the ICTY, the Tribunal is composed of an Appeals Chamber, formed by five international judges coming from France, Guyana, Malaysia, China and Columbia. Then, the Tribunal has three Trial Chambers, each one composed of three judges. The first Trial Chamber has judges from Portugal, Egypt and USA; the three judges of the Second Trial Chamber are from Italy, Zambia and Australia. Finally, the Third Trial Chamber consist of three judges coming from UK, Morocco and Jamaica. (source: ICTY, *New Composition of Chambers*, available at http://www.icty.org/en/press/new-composition-chambers accessed 24th September 2019.)

[181] Clark, J.N., *The limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina,* Journal of International Criminal Justice, Vol.7, pag. 463-487, 2009.

[182] EULEX factsheet, 2014

reasons mentioned previously, as the processes that were partially ineffective, the problem of the length of time, the rate of unaccountability of victims remains really high, the distance from the voice of the victims, the lack of preparation and expertise of war crimes and the selectivity. Moreover, one of the original intent of this hybrid system, namely the possible take off of the judicial system in Kosovo, failed to be reached. There was a big gap between the preparation of the foreign and domestic judges, and this is clearly exemplified by the fact that the local judges in many occasion ended up just with the approval of the decision proposed by the international judges.[183]

This resulted in a general feeling of mistrust in the EULEX Mission declared from the Kosovo's population.

Finally, the Trials in front of the Serbian Courts represent the last effort to bring justice within the domestic territory. The cases trialed, regarding the crimes of war committed in Kosovo's territory, were five in which a total of 10 individuals were held responsible and convicted. These were all ethnic Serbs.[184]

Overall, these processes were subject to hard criticism. Apart from the above mentioned general causes of inefficiency of the processes, it is possible to add the excessive length of the latter, the very small number of cases that had the possibility to be heard in front of the Court, also if compared to Bosnia and Herzegovina. Moreover, there was an evident reluctance to adjudicate high-ranking official showed by a predominance low-ranking individuals indictments, that of course is translated in a lack of willingness to put under investigation those involved in such crimes.[185]

The inefficiency gap was amplified too by the non-recognition of the independence of Kosovo by Serbia, the lack of resources and nonetheless the reluctance of cooperation from Kosovo Albanian with the Serbs.

[183] HLC Report, *High Profile trials: Justice delayed,* 2014.
[184] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice- Concepts, Mechanisms and Challenges,* Chapter 3: Pag 255-256, Pristina 2015.
[185] Amnesty International Publications, *Serbia: Ending Impunity for Crimes against International Law,* 2014.

FINAL REMARKS

Generally speaking, the issue of criminal prosecutions in post-conflict societies is very hard to manage and Kosovo represents a very good example and case study. In a way, it represents the difficulty of coordination and conciliation of national and international elements and the crucial role and perception of victims, that not in all the cases and circumstances are considered as the focal point of the trials and justice.

The purpose of this chapter was to give a concrete picture of the reality of Kosovo, first exploring its important and hard historical background in order to better understand the peculiarity of the judicial system and enter the core of this research, namely to compare Kosovo in a transitional justice perspective with other judicial systems, in particular those of Latin America and analyze the main obstacles that Kosovo is facing, in order to reach an efficient system of truth and reconciliation and the establishment of a Special Court or Commission that may deal only with this issue.

Likewise, after having analyzed the background and the conflict that took place at the end of the Nineties, the ethnic communities living in the region and the role of the International Community, the focus shifted towards the democratic and constitutional transition, with all the process of adoption of the new constitution, the role of the Constitutional Court and the aspect of Constitutional Rigidity.

Then the analysis moved to the institutional reform, considered as one of the pillars of transitional justice and as a tool to restore civic trust.

The last section was then devoted to the local initiatives of truth-seeking carried on in Kosovo, namely the Kosovo Memory Book and the RECOM Initiative and finally the big issue of the War Crime Trials analyzed in the three dimensions described before.

The next chapter will be the core of the analysis, since it will be divided into two parts and it will be focused on the comparison of Latin America's successful cases and Commissions with the Soon-to-be special court of Kosovo and the difficulty in the latter context to reach an agreement and a common vision of the past that allow the establishment of a Truth Commission.

CHAPTER THREE:
TRANSITIONAL JUSTICE IN A COMPARATIVE PERSPECTIVE

Introduction

The purpose of this chapter is to focus on a comparative analysis that involves the Truth Commissions that were established in Latin America and the soon-to-be Truth and Reconciliation Commission that is about to be established in Kosovo and all the difficulties and limits of its achievement. Therefore, the aim here is to analyze the benefits, successes and limits obtained by these projects in Latin America and, in a broader perspective, consider whether some of the guidelines applied in these Commissions could be beneficial for Kosovo too. Therefore, the aim of this chapter is to analyze and consider whether some of the features of the Truth Commissions set-up in Latin America might be applicable for the possible creation of a Truth Commission in Kosovo. However, this analysis can also be intended as a way to discover whether some aspects of the transitional justice system of Latin America shaped, in a way, the same system in Kosovo.

This chapter, though, will be divided as such: a first part will be devoted entirely to Latin America and its Truth Commissions, comparing different countries in which they were established and where they produced achievements and important results, namely Argentina, Chile, Guatemala, El Salvador, Peru and Panama. In another section, there will be also a mention to those Commissions that are considered "not official" as the ones established in Bolivia, Brazil, Colombia and Paraguay.

The second part instead, will focus on Kosovo and all the considerations and impediments for the realization of this Special Court, therefore an analysis of the controversies that derives from this and if its realization will actually be beneficial for a final reconciliation of the ethnic communities.

This comparative analysis will be useful in order to enter the framework of the final part of this research that will be explored in the last chapter of the thesis, so all the possible best practices applicable to the case of Kosovo, the guidelines that shall eventually be followed and a final and conclusive reflection whether societies in transition to democracy and that suffered hard violations of human rights and loss of people always try benefit from these mechanisms provided by transitional justice.

1. *COMISIONES DE LA VERDAD*: A RECURRING EXPERIENCE IN LATIN AMERICA

The Truth and Reconciliation Commission set-up in South Africa in 1995, was not the first official commission crated in the course of history. The first Truth Commission officially recognized, though, is the one established in Argentina. As of that moment, many Truth Commissions have been created in Latin American region, many of them presents some similarities, while other are highly different, according also to the context in which they were established.

This way of no judicial investigation, aimed at analyzing the abuses committed during the dictatorships or wars increased dramatically over the last decades, in fact more than thirty countries decided to create one of these commissions. The aim of these temporary courts is to analyze a short period of time in which these violations took place and create a report stating the final results and issuing some reforms or recommendations that may be useful.

First it is important to recall that the common background of these countries is the military dictatorship that broke out, even if in different periods of time, in a very similar way. Paraguay was victim of this dictatorship in 1954, followed by Brazil in 1964, Peru in 1968, Uruguay in 1972, Chile in 1973, Argentina and in 1976 Bolivia.[186]

[186] Cuya, E. *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 22th of July 2019.

The creation of these Commissions has various nature: it can be created and assigned to a group of Human Rights experts appointed by Governments, as it is the case of Argentina, Chile and El Salvador, or in other cases according to negotiations, political compromises or legal mandate.

The common characteristic in all the commissions that will be analyzed here, is that they are very far from the model provided by the South African Commission, since it was founded on the principle of "amnesty for the truth".[187]

The principal Truth Commissions that were created in Latin America are of the following:

- **Argentina**: "*Comisión Nacional Sobre la Desaparición de Personas* (CONADEP)", established in December 1983 and that investigated the abuses occurred from 1976 up to 1983.
- **Chile**: "*Comisión Nacional para la Verdad y Reconciliación*", established in 1990 and that covered the period from 1973 to 1990.
- **El Salvador**: "*Comisión de la Verdad para el Salvador*", founded in 1992 and that analyzed the period from 1980 to 1992.
- **Guatemala**: "*Comisión para el Esclarecimiento Histórico (*CEH)", created in 1994 and which investigates the period from 1958 to 1994 approximately (the mandate of the creation does not clarify specifically which is the exact period covered).
- **Peru**: "*Comisión de la Verdad y Reconciliación* (CVR) » established in July 2001 and that covered the period from 1980 until 2000. [188]
- **Panama**: "*Comisión de la Verdad*" established in 2001, for the investigations of the crimes committed during the military dictatorship started in 1968 with the *coup d'état* and that ended with the invasion of the United States in 1989.[189]

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[187] International Review of the Red Cross, *Comisiones de la verdad: resumen esquematico,* Priscilla B. Hayner, N. 862 of the Original Version, pag.1-3, June 2006.

[188] International Review of the Red Cross, *Comisiones de la verdad: resumen esquematico,* Priscilla B. Hayner, N. 862 of the Original Version, pag.4-7, June 2006

[189] La Estrella de Panamá, *La Comisión de la Verdad*, http://laestrella.com.pa/panama/nacional/comision-verdad/23777305, June 2014, accessed the 22th July 2019.

But let's proceed gradually with the analysis of some of the above-mentioned countries which produced the major results.

1.2 ARGENTINA

The first country that is important to mention is Argentina, since, as mentioned before, this represents the first case of official truth commission recognized. One of the first constitutional actions of President Alfonsin was to establish the Truth Commission (CONADEP) whose task was to investigate the violations of human rights that took place between 1976 and 1983, namely the period of the military dictatorship.

So, in a short period of time, the population of Argentina came in touch with the facts and the horrible data and numbers regarding that period and that in a first moment didn't want to recognize and accept. After nine months of hard work and initial difficulties that were faced thanks to the help of public institutions and group of human rights activists, the Commission produced a report called "*Nunca Más"* that was especially focused on the amount of disappeared people, forced exile, torture and murders committed by the Armed Forces. The report illustrates also that in Argentina existed 340 illegal centers of detention, headed by High Commissioners of the Armed Forces, where the detained were treated with inhuman means, humiliations and tortures. In the report, it is also a specific section that argues that the methods of tortures used were unknown to the rest of the world for their high degree of atrocity. [190]

In most of the cases the bodies of the tortured people were hidden and destroyed so that it was impossible to identify and recognize them. Among the list of perpetrators (more or less 1315 people considered responsible) there were, judges, doctors, journalists,

[190] Verbitsky, H. *"La posguerra sucia",* Ed. Legasa, Bs.As., 1985, pag. 30, 1985. El *"Documentos Final"* de las FF.AA. Published entirely in DIAL N 83, Barcelona, 20th of May 1983, pag.1-8.

priests which cooperated with the military troops in this dirty war.[191]

The members of the Commission were 13, all Argentinian nationals. They analyzed 9.600 cases of disappearance, an unknown number of victims of torture and long detention.[192] The ultimate aim of the Report was of course to avoid the repetition of such events and violations and to prevent and inform the current and future society about the facts. Moreover, it proposed to continue the investigation but through judicial proceedings, an economic assistance to the victims or victims' families, and new laws that may declare as crimes against humanity the forced disappearance of people.[193]

1.3 CHILE

The Truth Commission established in Chile, namely the "*Comisión Nacional para la Verdad y Reconciliación*", started to exist in the aftermath of the moral and political defeat of Pinochet. The new elected President, President Patricio Aylwin, was a member of the opposition and he expressed clearly his engagement in the fight against abuses and in particular in the protection of human rights. Therefore, through a Supreme Decree in 1990, he established the Truth Commission with the purposes of clarification and elucidation about the worst violations of human rights that took place over the last years and with the ultimate aim to contribute to the reconciliation of the Chilean. The Commission, though issued recommendations, reparations, and clarified the victims and

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[191] CONADEP, *"Nunca Más"*, pág. 254.

[192] International Review of the Red Cross, *Comisiones de la verdad: resumen esquematico,* Priscilla B. Hayner, N. 862 of the Original Version, pag.4-7, June 2006

[193] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 23rd of July 2019.

the perpetrators of such abuses. [194]

This investigation took place within a time frame of nine months and it counted upon the collaboration of members of the International Community, International Organizations and Human Rights Associations. Moreover, the members of the Commission had the possibility not only to hear the victims and families of the victims within the territory of Chile, but also to travel around the countries where most of the Chilean escaped, due to the hard repression during the period of Pinochet. This was possible thanks to the official registries that the Chilean Embassies and Consulates abroad had, and that contained the list of people, complaints, lawsuits of all those people that left Chile.

As in the case of Argentina, here the Commission also produced a final report that in this context was divided into three parts: the first section recorded the facts regarding the violations of human rights (it covered 1094 pages), the second part was devoted to the recommendations for the damages, and the third part was considered almost as a standalone part, called "*Victimas*" which listed the biography of the 2,279 people that the Commission proved that disappeared or died as a consequence of a violation of their human rights.[195]

Another important success of the Commission were the investigations about the DINA, namely the so-called *Direccion de Inteligencia Nacional*, that is to say the National Intelligence Directorate, so a secret Chilean Police. It was one of the core projects within the system of repression of Pinochet that operate since its creation in 1973 until 1977, year in which it was replaced by the CNI (*Centro Nacional de Informaciones*).

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[194] International Review of the Red Cross, *Comisiones de la verdad: resumen esquematico,* Priscilla B. Hayner, N. 862 of the Original Version, pag.15, June 2006

[195] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 28th of July 2019.

Their main actions comprised: censorship (mostly of all the information and propaganda that was in opposition with the regime), tortures, kidnapping and disappearances. Their horrible actions not only took place within the national boundaries of Chile, but also reached the United States, Argentina, Italy, Paraguay and other countries. [196]

It is important to say that, in the light of the achievements of the Commission, in 1992 the Chilean Government created the so-called "*Corporación Nacional de Reparación y Reconciliación*", a body that shall execute the recommendations issued by the Commission, especially for what concerns the material reparations of the damages caused.[197]

1.4 EL SALVADOR

La "*Comisión de la Verdad para el Salvador"* was active for a total time of eight months, where the last two were devoted entirely for the elaboration of the final report on the achievements of the Commission. The title of the final report is: "*De la Locura a La Esperanza" La guerra de 12 años en El Salvador".* This report was published by the United Nations and it is important to stress the fact that, unlike the first two commissions examined before, this is the first one in which all the three Members of the Commission are not nationals of El Salvador.

This Commission is the result of the Peace Agreements of El Salvador (Acuerdo de Paz de Chapultepec, signed in Mexico in 1992). The mission of the Commission was to clarify the truth and the facts of the abuses that took place from 1980. Therefore, among the main objectives of the Commission there is the need to generate trust in a possible

[196] DINA en Chile https://www.memoriaviva.com/criminales/organizaciones/DINA.htm , accessed the 28th July 2019.
[197] *Informe de la Comision Nacional de Verdad y Reconciliacion*, Instiuto Nacional de Derechos Humanos, https://bibliotecadigital.indh.cl/handle/123456789/170 accessed the 28th July 2019.

positive change and to foster the transition to a national reconciliation. As in all the above-mentioned cases, the Commission had to investigate and to issue recommendations. Above all, the Commission was in charge to investigate all those violent acts committed by members of the Armed Forces that were never examined before. [198]

The Truth Commission in defining the applicable judicial measures, claimed that during the conflict in El Salvador, the government should have applied some international norms mixed with the national ones, for the protection of human rights.

First, the Commission focused its attention on the investigations of abuses committed from State Agents against political opponents. Second, the inquiries were addressed to those members of the Liberation Movement (FMLN) against their opponents, therefore murders of mayors, judges, military staff and so on. In doing so, the Commission stated that nobody that hold the power during those years covering public charges, was able to control the military dominance of the society.[199]

The final recommendations that the Truth Commission issued were: reforms of the legislation, depuration of the Armed Forces and public administration and to disqualify for a minimum period of ten years, those people covering political charges, which were held responsible for violations of human rights.

For what concerns the final results that El Salvador tried to achieve, it is possible to claim that they still are very far from a final reconciliation. This is due to the fact that it was established an official schedule of actions for reparations, such as scholarships, granting lands and economic compensations. All these initiatives were only achieved partially, in other words only the minimum required. Likewise, this allowed the

[198] Informe *"De la Locura a la Esperanza"* de la Comisión de la Verdad para el Salvador.

[199] International Review of the Red Cross, *Comisiones de la verdad: resumen esquematico,* Priscilla B. Hayner, N. 862 of the Original Version, pag.16, June 2006

Government of El Salvador to be criticized for the fact of not having meet the agreements and the schedule.[200]

1.5 PERU

After twelve years of military government, a civil war took place in Peru. This war was on the one hand against the extremist group called "*Sendero Luminoso*", basically the Peruvian Communist Party, and on the other hand, the Peruvian Government. The victims of this war that died by the hand of the terrorist group not only were members of the Armed Forces, but also civilians as countrymen, and common people. Likewise, State Forces committed various crimes, as tortures, mass and forced deportation, disappearances and genocide against the Peruvian population. The total amount of deaths of this civil war counts 30,000 people and 5,000 disappeared persons.

Therefore, in different moment of history, the State created some Truth Commissions, in order to condemn those responsible for these mass violations of human rights. One of the first Commissions established was called "*Comisión Uchuraccay*", but as many of these commissions, it was very unlikely that they went in depth searching for the truth, since many of the people found responsible for such crimes in many occasions became untouchable due to the protection of the Armed Forces. Moreover, it happened more than once that many of the witnesses or people who delivered information regarding the investigations, immediately after disappeared or were killed by unknown groups or by National Forces.

Now I will focus on the two Commissions established in Peru in 1983 and in 1986 that were useful in order to investigate some important crimes.

[200] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 28th of July 2019.

The "*Comisión Investigadora de la muerte de los periodistas en Uchuraccay"* was established in January 1983. This Special Commission was created in order to face the national scandal of the murder of eight journalists and a guide in an Andean location called Ayacucho. This place was well known as a violent land and it was for this reason that it was under military control. The journalists were in this place with the purpose to investigate some recent terrorist attacks facts which saw the death of various members of "*Sendero Luminoso"* group by the hand of some countrymen. What the journalist thought was that there was a hidden strategy that was carried out by the members of *Sendero Luminoso*, that tortured, killed and were responsible for the disappearance many countrymen. Therefore, they wanted to find out if the version of the murders, provided by the Military Authority, corresponded to the truth. Moreover, with the passing of time, their hypothesis become more tangible, since they were closer to the truth and this was what brought the journalists to decide to travel in Uchuraccay in order to prove this evidence. But the more they were closer to the truth, the more they were getting closer to death. [201]

This massacre generated a great disappointment for all the Peruvians, and several calls were made in order to investigate and to express clearly what happened to the journalists. In January 1983 the President of the Republic, Fernando Terry, established the Commission for the facts happened in Uchuraccay. Its mandate lasted only for one month. The Commission visited the place where the crimes took place only for 4 hours, therefore they conducted the investigations not from there directly. This was basically because, after this scandal, that area become even more violent and dangerous, so it was not recommended to stay there for more than four consecutive hours. In addition to that, there was another problem: the language. In that area, the local population mostly speak

[201] Arenas, M.C., *"Uchuraccay en la Historia"*, Memoria Anual 1993 del Colegio de Periodistas del Perú, Lima, pag. 18, 1993.

"Quechua" and very few spoke fluently Spanish.

The final report of the Commission was delivered in March of the same year. This, in a way, showed how was it difficult to get in touch with the real facts of that scandal and that there still was a hidden truth, mostly because the State and the Government, that were controlling and administrating that difficult area, didn't want to get too involved in these facts and they want to come clean from it.

The final version, in fact, was that the people who killed the journalists and the guide, they did it by mistake, since they thought that they were a detachment of "*Senderista*s" seeking revenge. [202]

The report also pointed out two other things: first, according to the analysis of the Commission, the journalists were attacked all of a sudden, therefore without having the possibility to explain or to have a dialogue on their mission there. Needless to say that, if a dialogue had been granted, it would have avoided the bloodshed. This lack of communication was certainly due to the tense atmosphere of that period. In fact, there is the absolute certainty of the Commission that their murder was due to the suspect that the journalists might have been a group of terrorist.[203]

What came next was that a few months later from the end of the work of the Commission, a military group found out some important material and documents of the journalists that of course could have been crucial for the investigation, such as film rolls, images and so on.

Finally, it is possible to say that this Commission did not achieve the expected results and this generated a general feeling of mistrust on the work of the latter. Ten years later the facts of the journalists, a march of protest was organized by a group of journalists claiming the truth and asking the Government an economic compensation for the families

[202] Revista *"Oiga"*, *"Informe sobre Uchuraccay"*, texto completo, Lima, Perú, 7 de marzo de 1983, pag. 25 a 36, 1983.

[203] Revista "Oiga", Lima, Perú, 7 de marzo de 1983, pag. 25 to 36, 1983.

of the victims that was never granted.[204]

The second Commission that is important to analyze is the one stablished in August 1986, namely the "*Comisión investigadora de las masacres en los Penales"*. This Commission was established after the facts that saw the death of 250 political prisoners in Peruvian jails, the 18th and 19th of June 1986. The responsible for this massacre were the Republican Police (*Guardia Republicana*) and the Peruvian Army (*Marina de Guerra del Peru*).

The massacre took place in the prisons of *San Pedro* (*Lurigancho*) and San Juan Bautista de la Isla "*El Fronton*" (*El Callao*). The victims were more than two hundred people that were accused or/and sentenced for issues linked to terrorism. In that period, in many prisons there were riots and revolts organized by the prisoners.

At that time, the cities of Lima and Callao were declared in a state of emergency due to the tensions. Basically, in those prisons there were the majority of those people accused of internal terrorism. The judicial and penal system was paralyzed and characterized by the absence of the minimum standards of living in prisons, tortures and abuses and an excessive length of the judicial proceedings.

Those who tried benefit from this situation were the members of the group *Sendero Luminoso*, which considered those prisons as centers for political actions. According to this view, the prisoners considered themselves as "prisoners of war" and their aim was to maintain a permanent position of fight as to eventually reach the *status* of prisoners of war. With this regard, *Sendero Luminoso* had a strong power of control and influence over the area of Lima where the jail was located, and this brought to a significant loss of

[204] Revista *"SI"*, "*Las versiones de Uchuraccay*", Lima, Perú, 16 de marzo de 1987, pag. 75, 1987.

the authority of the State. [205]

During the morning of 18th June 1986, a group of prisoners of El Fronton started their protest by taking a worker of the jail as hostage, in order to gain attention and be heard. This protest started in the blue pavilion of the prison *El fronton* and soon propagated towards the closest prison of Lurigancho and El Callao. In order to avoid the exploitation and manipulation of the intent of those protests, President Alan Garcia did not allow to journalists, families and lawyers to get closer to these three centers. In the meantime, the heads of the State took the decision of the massacre, and even if the following days the rebels surrendered, it was too late.

Colonel Rolando Cabezaz, the head of the Republican Police (*Guardia Republicana*), ordered to kill 124 prisoners and they shoot them in the head. Then, the blue pavilion of the prison El Fronton was bombed, and it killed 118 people. Even those who tried to escape during the bombing were killed in their attempt to escape. The first justification provided by the State was that "there was no choice".

Subsequently, in the analysis of the facts, the IDL (*Instituto de Defensa Legal*) claimed that the authorities in doing what they did were abusing of their power and violence in a non-appropriate and excessive way, even if it was the result of the environment of violence and tensions that characterized Peru at that time. [206]

The Commission took one year before its establishment. It was appointed by the Congress and since the beginning it was very difficult to conduct the investigation in a linear way. This was due to the fact that the Members of the Parliament did not want to realize a serious and independent investigation which will eventually lead to the authors of the massacre.

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[205] Informe Final de la Comisión Investigadora del Congreso sobre los Sucesos de los Penales, https://lum.cultura.pe/cdi/sites/default/files/documento/pdf/19.-Penales-de-Lima-y-Callao%2C-sucesos-ocurridos-1-208.pdf accessed 1st August 2019.

[206] Cáceda, C.C., Eguiguren Praeli F.,y Talavera Rospigliosi, M.,. *"Los Sucesos de los Penales: Nueva abdicación de la autoridad democrática. Un enfoque jurídico"*. Instituto de Defensa Legal, Lima, September 1986.

The investigations brought to light that some days before the massacre, some members of the Government threatened to death the prisoners. Among them there was the President of the Republic, Alan Garcia Perez, the Vice Ministry of the Internal Affairs, Augustin Mantilla and the ministries of war and the army as Julio Pacheco Concha.[207]

Since there was no agreement between the members of the Commission, in the end two final reports were issued. The first was signed by the Members of the Parliament of the Government party and the other issued by the President of the Commission and Members of Parliament of the opposition, which represented the minority, and that clearly expressed and justified the massacre as a mere measure of safety that was underestimated by the rest of the population. Moreover, the measure of the massacre was also taken in prevention of future repression and danger for the workers of the prison.

Likewise, the Commission listed a set of recommendations both judicial than political and administrative among which it is notable to mention:

- The total democratization of the State;
- A new planning of the National Defense which shall include new strategies for peace, modern institutional background and revision of the new laws of the System of National Defense;
- Accomplishment with the International Standards and Norms on the protection of human rights;
- A set of required reforms, especially in the field of the judiciary, penal system, prisons and system of detention in general.

Moreover, among the other recommendations, some important considerations were made on the role of the Police and Armed Force and the Public Minister, which shall achieve a status of interdependence with the other powers of the State. [208]

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[207] Armes, R., et al. *"Perú 1986: Informe al Congreso sobre los sucesos de los Penales."*, Lima, February 1988, pag. 289- 305, 1988.

[208] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 1st August 2019.

The report signed by the majority of the Congress, did not accept penal responsibility of the President of the Republic and other members of the Executive Power.

In the aftermath of this case, seven years after the massacre, the Inter-American Court of Human Rights, as a result of years of diplomatic and judicial negotiations, issued a sentence about the massacre of El Fronton, ordering to the Peruvian Government to compensate the family of three of the victims. [209]

1.6 PANAMA

The Truth Commission created in the Republic of Panama is one of the most recent. It was established by the end of January 2001, and it investigated the massacres, violence and disappearance due to the military dictatorship that took place in Panama from 1968, namely the year of the military coup d'état (*golpe de estado militar*) and the beginning of the military dictatorship of Omar Torrijos, until 1989, year of the invasion of the United States in Panama. The work of the "*Comisión de la Verdad de Panamá*" lasted for sixteen months and counted a number of 189 examined cases. The final result, as all the above mentioned Latin American countries, was a report which was able to illustrate 110 documented cases, and this was considered a big step forward towards the direction of the democratization of the country. [210]

One of the major limits of this Commission is that it started to work too many years after the moment of the facts, more or less 30 or in some cases 40 years later the crimes, and this meant that many of the witnesses and victims were already dead or had not the possibility to testimony on the facts. Another problem was that many of the places of the tortures didn't exist any longer at the moment of the beginning of the investigation or changed their function, so this did not allow to examine them in a proper and effective

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[209] Comisión Andina de Juristas, *"Informativo Andino"*, N 98, *"El caso Neira Alegría y otros, contra el Estado Peruano"* por la masacre de El Frontón, pág. 5, Lima, 30 de enero de 1995.

[210] Tu Comunidad, Panama, http://tucomunidad.com.pa/2018/04/informe-de-la-comision-de-la-verdad-cumple-hoy-16-anos/ accessed the 2nd August 2019.

way. [211]

Very few Panamanians and families of the victims received compensation for the damages and the cruelty felt, because there is still not a total reconciliation and a final version of the facts that is shared by the whole population. Moreover, due to the strict agreements and obligations between Panama and Washington, the compensation program was even more difficult to realize after the period of the invasion. This raised several doubts about the fact whether the money for the compensation shall be granted by the Government of Panama or by the United States, in order to compensate for the damages and losses caused during their invasion. There is still a part of the population which considers the US invasion as a right and necessary thing after the *coup d'état*, and another part who still fells damaged and suffers for what happened. [212]

Therefore, the ultimate attempt of the Republic of Panama to create such Commission was in line with the programs of the neighbors of Latin American countries. As described before, in some cases these Commissions, as in El Salvador and Guatemala, brought to light important truths, not only for the victims, but also for the reconciliation of opposite groups in the country.

The final report of the Commission is divided into three different periods. The 116 victims are divided into these three sections. The first period stretches from 1968 until 1972, and it includes all the killed people of the area of Chiriquí, countrymen of Coclé, members of left-wing groups and anti-military groups of people. [213]

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[211] *La Comisión de la Verdad*, La Estrella de Panama, 8 June 2014, http://laestrella.com.pa/panama/nacional/comision-verdad/23777305 accessed the 2nd August 2019.

[212] *Panamá crea una Comisión de la Verdad para investigar la invasion estadounidense*, Univision Noticias, Politicas, 22nd July 2016, https://www.univision.com/noticias/relaciones-internacionales/panama-crea-una-comision-de-la-verdad-para-investigar-la-invasion-estadounidense accessed the 2nd August 2019.

[213] La Prensa, Judiciales, *Perfil de las victimas de la epoca mas oscura de Panamá*, 30th Agust 2017, https://www.prensa.com/judiciales/Perfil-victimas-epoca-oscura-Panama_0_4837766214.html, accessed 2nd August 2019.

PRIMER PERIODO DE OCTUBRE DE 1968 A OCTUBRE DE 1972

DESAPARECIDOS Y ASESINADOS DE LA DICTADURA MILITAR 1968-1989

FLOYD W. BRITTON MORRISON

EDAD: 32 años.

HECHOS: Asesinado y desaparecido. Arrestado en su casa el 12 de octubre de 1968. Fue visto por última vez en Coiba donde fue torturado.

LINDBERGH AUGUSTO GANTE

EDAD: 36 años.

HECHOS: Murió en Piedra Candela, provincia de Chiriquí, el 12 de octubre de 1968. Era activista del Partido Panameñista.

MARCO AURELIO ROSAS MARTÍNEZ

EDAD: 22 años.

HECHOS: Desaparecido desde noviembre de 1968, en la provincia de Chiriquí. Pertenecía al Partido Panameñista.

EVERETT C. KIMBLE GUERRA

EDAD: 21 años.

HECHOS: Desaparecido desde el 1 de diciembre de 1968, en David, provincia de Chiriquí. Participó de la resistencia armada de esa provincia.

CRUZ MOJICA FLÓREZ

EDAD: 50 años.

HECHOS: Murió el 3 de diciembre de 1968. Los Pozos, Renacimiento, provincia de Chiriquí. Militante del Partido Panameñista.

ALONSO SABÍN CASTILLO

EDAD: 19 años.

HECHOS: Desaparecido desde diciembre de 1968, en Piedra Candela, Renacimiento, provincia de Chiriquí. Simpatizante del Partido Panameñista.

DANIEL ESPINOZA

EDAD: Desconocida

HECHOS: Murió, en Piedra Candela, provincia de Chiriquí, 1968. Simpatizante del Partido Panameñista.

RAMÓN MOJICA

EDAD: 26 años.

HECHOS: Murió frente al cuartel de Piedra Candela, provincia de Chiriquí, el 9 de enero de 1969. Miembro del Partido Panameñista.

ARIOSTO GONZÁLEZ

EDAD: 42 años.

HECHOS: Murió en Los Pozos, provincia de Chiriquí, 1969. Militante en el Partido Panameñista.

GENARO CÉSAR SARMIENTO VEGA

EDAD: 26 años.

HECHOS: Murió en la cárcel Modelo, Panamá, el 20 de enero de 1969.

HERIBERTO MANZZO QUINTERO

EDAD: 30 años.

HECHOS: Murió en Las Huacas de Quije, Coclé, el 1 de febrero de 1969. Dueño de un negocio de cajetas en Nuevo Arraiján. Simpatizante del Panameñista.

DORA CEFERINA MORENO JAÉN

EDAD: 26 años.

HECHOS: Murió en las Huacas de Quije, Coclé, el 1 de febrero de 1969. Corredora de Aduanas. Activista del Partido Panameñista y de Boinas Negras.

JAVIER E. GUERRA GONZÁLEZ

EDAD: 20 años.

HECHOS: Desaparecido, en las Huacas de Quije, provincia de Coclé, 1 de febrero de 1969. Trabajador manual. Simpatizante del Partido Panameñista.

DANIEL EMILIO HEART PÉREZ

EDAD: 24 años.

HECHOS: Desaparecido, en Las Huacas de Quije, provincia de Coclé, el 1 de febrero de 1969. Estudio actuación en el instituto de Bellas Artes de México.

JOSÉ ENRIQUE PIMENTEL

EDAD: 22 años.

HECHOS: Desaparecido, en Las Huacas de Quije, Coclé, el 1 de febrero de 1969. Mecánico de automóviles. Simpatizante del Partido Panameñista.

CESÁREO ELIGIO NÚÑEZ

EDAD: 26 años.

HECHOS: Desaparecido, en Las Huacas de Quije, Coclé, el 1 de febrero de 1969. Trabajaba en el Ministerio de la Presidencia. Del Partido Panameñista.

LUIS CASTRO QUINTERO

EDAD: 54 años.

HECHOS: Desaparecido, Boquete, provincia de Chiriquí el 12 de febrero de 1969. Simpatizante del Partido Panameñista.

JAVIER SÁNCHEZ

EDAD: 42 años.

HECHOS: Desaparecido en la ruta de Agua Buena de David, provincia de Chiriquí. Febrero de 1969. Miembro del Partido Panameñista.

EULOGIO RIVERA DELGADO

EDAD: Desconocida

HECHOS: Desaparecido en Las Trancas de Sioguí, distrito de Bugaba, provincia de Chiriquí, el 17 de marzo de 1969. Campesino, sin militancia política.

CANDELARIO TORRES S.

EDAD: 43 años.

HECHOS: Murió en Breñón, Renacimiento, provincia de Chiriquí, el 23 de abril de 1969. Miembro líder del Partido Panameñista.

HIPÓLITO QUINTERO D.

EDAD: 39 años.

HECHOS: Murió en Uracillo, Río Indio, Coclé, en 1969 Campesino, activista del Partido Demócrata Cristiano y del Frente Popular contra la Dictadura.

TOMÁS PALACIO SALINAS

EDAD: 40 años.

HECHOS: Desaparecido en el Parque de Cervantes, David, Chiriquí. El 16 de junio de 1969. Campesino de origen ngäbe. Miembro del Partido Republicano.

IGNACIO SALINAS

EDAD: 34 años.

HECHOS: Desaparecido en David, Chiriquí, el 16 de junio de 1969. Pertenecía al sindicato de Chiriquí Land Company. Sin militancia política.

RUBÉN MORALES

EDAD: 20 años.

HECHOS: Desaperecido en David, Chiriquí, el 16 de junio de 1969. Ngäbe-Buglé. Trabajaba como jornalero. Pertenecía al sindicato de Chiriquí Land Co.

ALBERTO MORALES

EDAD: 19 años.

HECHOS: Desaparecido en David, Chiriquí, 16 de junio de 1969. Trabajaba como jornalero. Del sindicato de Chiriquí Land Co. Sin militancia política.

JOSÉ DEL CARMEN TUÑÓN

EDAD: 60 años.

HECHOS: Murió en la cárcel Modelo, Panamá, el 27 de julio de 1969. Era miembro del Comité Central del Partido Comunista de Panamá y sindicalista.

BELISARIO GANTES BATISTA

EDAD: 26 años.

HECHOS: Murió en Cerro Azul, Panamá, el 7 de agosto de 1969. Era obrero y ebanista. Miembro del grupo Vanguardia de Acción Nacional (VAN).

ENCARNACIÓN GONZÁLEZ

EDAD: 59 años.

HECHOS: Desaparecido. Detenido el 9 de agosto de 1969 en Cerro Azul, Panamá, por ser un dirigente campesino y supuesto guerrillero.

EVER QUINTANAR GUZMÁN

EDAD: 17 años.

HECHOS: Desaparecido el 12 de agosto de 1969. Estudiante de secundaria, dirigente de la juventud católica de la iglesia Cristo Redentor.

MANUEL ALBERTO DÍAZ ADAMES

EDAD: Desconocida

HECHOS: Murió, en Sioguí, Bugaba, provincia de Chiriquí, el 17 de agosto de 1969. Miembro de la Resistencia Chiricana.

JOSÉ MANUEL MORANTES M.

EDAD: 34 años.

HECHOS: Desaparecido en Sioguí, distrito de Bugaba, Chiriquí, el 17 de agosto de 1969. Sin militancia política conocida.

JULIO VILLARREAL DE LAS CASAS

EDAD: 28 años.

HECHOS: Desaparecido en Sioguí Abajo, Chiriquí, el 17 de agosto de 1969. Miembro del Partido Panameñista.

LUIS ANTONIO QUIRÓZ

EDAD: 27 años.

HECHOS: Desaparecido en Bugaba, provincia de Chiriquí, el 19 de agosto de 1969. Miembro del Partido Panameñista.

CARLOS GONZÁLEZ CABALLERO

EDAD: 32 años.

HECHOS: Desaparecido en Cerro Punta, provincia de Chiriquí, el 7 de octubre de 1969. Sin militancia política.

NARCISO CUBAS PÉREZ

EDAD: 31 años.

HECHOS: Murió el 3 de Nov. de 1969 en la cárcel Modelo. Pertenecía al movimiento de unidad revolucionaria y al Frente de Resistencia Popular.

JULIO SAMUDIO SILVERA

EDAD: 25 años.

HECHOS: Desaparecido en la provincia de Chiriquí, el 5 de noviembre de 1969. Simpatizante del Partido Panameñista.

JUAN DEMÓSTENES ARAÚZ MIRANDA

EDAD: 16 años.

HECHOS: Desaparecido en la cárcel de David, Chiriquí, el 13 de Dic. de 1969. Estudiante del Instituto Nacional, simpatizante del Partido Panameñista.

ANEL SALDAÑA ARAÚZ

EDAD: 27 años.

HECHOS: Desaparecido por la Farmacias Arrocha de Transístmica, ciudad de Panamá, el 20 de diciembre de 1969. Miembro del Partido Panameñista.

RUBÉN ÓSCAR MIRÓ

EDAD: 58 años.

HECHOS: Murió el 31 de diciembre de 1969. Era abogado, seguido por los servicios de inteligencia de la época por fallido golpe. Duro crítico de Omar Torrijos.

LEOPOLDO ALLEN SERRACÍN

EDAD: 27 años.

HECHOS: Murió en Sierra de Bocas del Toro, 1969. Simpatizante del Partido Panameñista.

BENJAMÍN MIRANDA C.

EDAD: 19 años.

HECHOS: Desaparecido en Alto Quiel, Renacimiento, provincia de Chiriquí, en 1969. Simpatizante del Partido Panameñista.

CECILIO SERRACÍN F.

EDAD: 30 años.

HECHOS: Desaparecido en el Cuartel de David, provincia de Chiriquí año 1969. Miembro del Partido Panameñista.

HÉCTOR MANUEL CANDANEDO

EDAD: 39 años.

JORGE TULIO MEDRANO

EDAD: 18 años.

WALTER SARDINA IGUINI

EDAD: 28 años.

HELIODORO PORTUGAL

EDAD: 36 años.

ANDRÉS EMILIO FISTONICH

EDAD: 29 años.

FÉLIX GONZÁLEZ SANTIZO

EDAD: 29 años.

ELÍAS GONZÁLEZ SANTIZO

EDAD: 28 años.

Source : Comité de Familiares de Desaparecidos de Panamá (https://www.prensa.com/judiciales/Perfil-victimas-epoca-oscura-Panama_0_4837766214.html)

The second period includes the people killed from 1972 until 1983. According to the Commission, in this second period, there was an inappropriate use of force at various level. The victims of the second period were mostly young people, as university students and rebels. [214]

[214] La Prensa, Judiciales, *Perfil de las victimas de la epoca mas oscura de Panamá*, 30th Agust 2017, https://www.prensa.com/judiciales/Perfil-victimas-epoca-oscura-Panama_0_4837766214.html, accessed 2nd August 2019.

SEGUNDO PERIODO DE NOVIEMBRE 1972 A DICIEMBRE DE 1983

DESAPARECIDOS Y ASESINADOS DE LA DICTADURA MILITAR 1968-1989

REINALDO SÁNCHEZ TENAS

EDAD: 35 años.

HECHOS: Desaparecido. Miembro de la Guardia Nacional, fue dado de baja por diferencias con uno de sus superiores. No lo vieron desde el 24 de mayo de 1975.

JUAN LEKAS

EDAD: 34 años.

HECHOS: Desaparecido desde 1975. Era del grupo VAN y del Frente de Resistencia Popular. Torturado y exiliado a Grecia. La última vez lo vieron en Venezuela.

BETTZY MARLENE MENDIZÁBAL

EDAD: 19 años.

HECHOS: Murió en enero de 1976. Su cuerpo fue encontrado cerca de la playa en Mariato, Veraguas.

JORGE ENRIQUE FALCONETT

EDAD: 22 años.

HECHOS: Desaparecido desde enero de 1976, en Mariato, Veraguas.

JAIME ALBERTO FREDERICKS

EDAD: 36 años.

HECHOS: Murió el 26 de junio de 1976, cuando fue supuestamente confundido con un delincuente. Un miembro de la Guardia Nacional le disparó.

ALFREDO SERRACÍN GARZÓN

EDAD: 36 años.

HECHOS: Muerto. Bajo Mono, Boquete, Chiriquí, marzo de 1976. Simpatizante del Partido Panameñista y miembro de la resistencia chiricana.

RITA IRENE WALD

EDAD: 17 años.

HECHOS: Desaparecida. Dirigente del grupo Solidaridad Estudiantil Democrática del colegio José A. Remón Cantera, se oponía al tratado canalero.

GERARDO OLIVARES VELÁSQUEZ

EDAD: 30 años.

HECHOS: Muerto, cerca del campamento juncal, isla penal Coiba, Veraguas. 17 de junio de 1977.

JORGE ANTONIO CAMACHO CASTRO

EDAD: 21 años.

HECHOS: Murió en la protesta contra la visita del presidente Carter a Panamá, quien ratificaría los tratados de 1977. Era líder estudiantil y dirigente del FER-29.

DEMÓSTENES RODRÍGUEZ ÁLVAREZ

EDAD: 20 años.

HECHOS: Murió el 14 de junio de 1978, en las protestas por los tratados Torrijos-Carter. Militaba en el Frente Antimperialista Universitario (FAU).

ROMÁN RIVERA MONTENEGRO

EDAD: 45 años.

HECHOS: Murió el 17 de junio de 1978, tras ser detenido y golpeado en la cárcel, cuando viajaba para una concentración contra los tratados Torrijos-Carter.

BERARDO CASTILLO GONZÁLEZ

EDAD: 46 años.

HECHOS: Desaparecido. El 12 de septiembre de 1977. Participaba en actividades contra la firma del tratado Torrijos-Carter en Panamá.

CECILIO HAZLEWOOD

EDAD: 26 años.

HECHOS: Murió recluido en la isla penal de Coiba, Veraguas, el 9 de octubre de 1977. Ponde pagaba una condena de 12 años por delito de homicidio.

MARISOL DEL CARMEN AGUILAR

EDAD: 16 años.

HECHOS: Murió el 19 de mayo de 1979. La encontraron flotando en las aguas del río Chagres, Colón, con una bolsa en la cabeza y la cara desfigurada.

MACARIO BLANQUICET

EDAD: 25 años.

HECHOS: Murió el 12 de junio de 1979, fue detenido por la Guardia Nacional y acusado de participar en protestas en Colón.

DELIA PERRY ROSE

EDAD: 29 años.

HECHOS: Fue impactada de bala en su casa en 1979, durante unas protestas en Colón. El disparo fue hecho por un miembro de la Guardia Nacional en la refriega.

JOSÉ DE LA ROSA CHÁVEZ PERALTA

EDAD: 38 años.

HECHOS: Falleció en 1979 a consecuencia de una herida en el pecho por un disparo del asistente de un inspector de la antigua Dirección de Investigación de Chitré.

TOMÁS ROJAS HINESTROZA

EDAD: Desconocida

HECHOS: Murió en diciembre de 1979, tras ser detenido, supuestamente por robo. Un testigo dijo que estaba en una celda del servicio de inteligencia G-2, en Panamá.

JORGE GALVÁN

EDAD: Desconocida

HECHOS: Desaparecido desde 1979. Estaba detenido en las celdas del G-2, en Panamá.

NICOLÁS MORENO NIETO

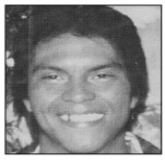
EDAD: 28 años.

HECHOS: Murió tras ser detenido, en 1981. Fue acusado de violación. Un miembro de la Guardia Nacional lo golpeó, Chiriquí.

PRIMITIVO GONZÁLEZ M.

EDAD: 33 años.

HECHOS: El 27 de enero de 1983 falleció a causa de una hemorragia provocada por heridas con un arma de fuego, en Chiriquí.



FÉLIX ANTONIO SERRANO

EDAD: 21 años.

HECHOS: Fue encontrado muerto en abril de 1983, trabajaba en el Cuartel de la Compañía Victoriano Lorenzo, en Amador. Tuvo diferencias con sus superiores.

DIOMEDES GONZÁLEZ S.

EDAD: 34 años.

HECHOS: Murió en Cerro Punta, provincia de Chiriquí, 23 de octubre de 1983. Era campesino activista del Partido Panameñista.

INFOGRAFÍA LA PRENSA: DANIEL GONZÁLEZ | FUENTE: COMITÉ DE FAMILIARES DE DESAPARECIDOS DE PANAMÁ

Source : Comité de Familiares de Desaparecidos de Panamá (https://www.prensa.com/judiciales/Perfil-victimas-epoca-oscura-Panama_0_4837766214.html)

The third and last part of the report refers to the period from 1984 to 1989, year of the military invasion of the United States of America in Panama. The Commission, here, points out cases of "selective crimes" and armed riots caused by the military. In this period, the dictator Manuel Antonio Noriega was in power.

TERCER PERIODO DE ENERO DE 1984 A DICIEMBRE DE 1989

DESAPARECIDOS Y ASESINADOS DE LA DICTADURA MILITAR 1968-1989

JOSÉ ÁNGEL GUTIÉRREZ

EDAD: 30 años.

HECHOS:
Falleció en mayo de 1984, cuando fue a la Asamblea Nacional al conteo de votos. Resultó herido de muerte tras confrontaciones. Estaba inscrito en el Molirena.

JOSÉ DE LA CONCEPCIÓN ROJAS

EDAD: 35 años.

HECHOS:
Murió al ser impactado de bala cuando regresaba a su casa, por disturbios que se dieron entre la Av. Central y Plaza 5 de Mayo en 1984.

EDWIN AMAYA AMAYA

EDAD: 34 años.

HECHOS:
Desaparecido. Fue detenido por la Guardia Nacional en 1984, en Chiriquí.

SILVERIO ALFONSO BROWN TURTON

EDAD: 33 años.

HECHOS:
Fue detenido el 4 de Ago. de 1984 tras acusación de robo y secuestro. Murió de un disparo bajo custodia del Departamento Nacional de Investigación.

HUGO SPADAFORA

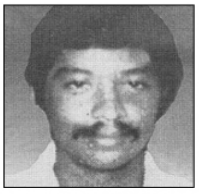
EDAD: 45 años.

HECHOS:
Fue asesinado el 13 de septiembre de 1985, en Costa Rica. El hecho fue investigado al día siguiente por autoridades de Costa Rica, debido a que los restos fueron abandonados en un sitio fronterizo entre aquel país y Panamá. Spadafora venía realizando una serie de denuncias contra el dictador Manuel Antonio Noriega, por sus vinculaciones con el narcotráfico internacional.

YITO BARRANTE MÉNDEZ

EDAD: 22 años.

HECHOS:
Murió de un disparo el 14 de marzo de 1986 durante una marcha de protestas del Conato en Panamá. No participaba en la manifestación.



EDUARDO ENRIQUE CARRERA SIERRA

EDAD: 24 años.

HECHOS:
Simpatizante de la Cruzada Civilista. Murió de un disparo por parte de un agente de la Guardia Nacional en el Valle de Antón, en 1987. Discutía sobre política.

NELSON EDDIE MARTÍNEZ CUBILLA

EDAD: 37 años.

HECHOS:
Desaparecido el 7 de agosto de 1987 en Chiriquí. Dos agentes de la Guardia Nacional lo llevaron supuestamente a un hospital. Nunca más lo vieron.

ARMANDO MORÁN NÚÑEZ

EDAD: 35 años.

HECHOS:
Murió el 30 de agosto de 1987. Estaba trabajando, pero recibió un disparo cuando se desarrolló una protesta por parte de la Cruzada Civilista en Colón.

VALENTÍN POVEDA AGRIEL

EDAD: 42 años.

HECHOS:
Murió de un disparo por parte de un agente. Había sido denunciado de abusar de una joven en 1987, en Herrera. Recibió el impacto en el portal de su casa.

CARLOS EFRAÍN GUZMÁN BAÚLES

EDAD: 49 años.

HECHOS:
Murió de un balazo en la cabeza en Sept. de 1987 en San Miguelito. Simpatizante de la Cruzada Civilista. Participaba en una manifestación.

DANIEL SIMONÉ HERNÁNDEZ

EDAD: 44 años.

HECHOS:
Asesinado y desaparecido en Piedra Candela, Chiriquí, el 30 de enero de 1988. Participó en la resistencia armada de Chiriquí.

ALCIBIÁDES VÁZQUEZ OJO

EDAD: 27 años.

HECHOS:
Murió de un disparo por parte de agentes del G-2 el 17 de marzo de 1988, un día después del fallido golpe de Estado a Manuel Antonio Noriega, en Panamá.

DIEGO VILLARREAL SERRANO

EDAD: 34 años.

HECHOS:
Murió en febrero de 1989 en Chiriquí. Fue detenido, torturado y asesinado por agentes de las Fuerza de Defensa, en presencia de varias personas.

CÉSAR AUGUSTO CAJAR BATISTA

EDAD: 56 años.

HECHOS:
Murió de un disparo el 8 de mayo de 1989 en su casa en Calidonia. Ese día se registró una

NICOLÁS JOHANNES VAN KLEEF FILEZ

EDAD: 52 años.

HECHOS:
Murió en mayo de 1989 en Chiriquí. Era sacerdote. Recibió un disparo de un miembro

MANUEL ALEXIS GUERRA MORALES

EDAD: 22 años.

HECHOS:
Murió de un disparo por miembros de los Batallones de la Dignidad, el 10 de mayo

FÉLIX AUGUSTO VÁZQUEZ MEDINA

EDAD: 62 años.

HECHOS:
Murió en mayo de 1989. Laboraba para Lewis Galindo en Panamá. Estaba dentro de un yate

LUIS ANTONIO GONZÁLEZ S.

EDAD: 21 años.

HECHOS:
Murió por perdigones el 3 de agosto de 1989. Era universitario. Ese día había protestas en la

Source : Comité de Familiares de Desaparecidos de Panamá (https://www.prensa.com/judiciales/Perfil-victimas-epoca-oscura-Panama_0_4837766214.html)

As the images of the pages of the report count, there were 110 cases analyzed. Six additional cases were added in 2003, so it reached a total amount of 116 cases.

1.7 COMMON CHARACTERISTICS AND GENERAL CONCLUSIONS ON THE TRUTH COMMISSIONS IN LATIN AMERICA

After having considered the findings of the Official Truth Commissions established in Latin America it is possible to draw some conclusions about their common features and results obtained.

First, there are some situations that required the establishment of a Truth Commission, and this was crucial when the judicial power failed to enforce the laws in front of conditions of violations of human rights. Nevertheless, in this specific context of Latin America, as analyzed before, many countries decided to adopt this solution, and every Commission shows different processes of organization, evolution and democratic transition.

All the efforts of the Truth Commissions, in a way contribute to the processes of national reconciliation, to know the hidden truth of massacres and violence and to pave the way for possible sanctions, compensations and recommendations for the responsible of such violations. Even in those situation in which it was proven the impossibility or the difficulty to sanction the perpetrators, the work and the findings of the Commission were converted as a mechanism for impunity, an official tool useful to overcome the past injuries and build a new future.

Likewise, in order to build an effective and successful Commission, a country does

not only need the help of Human Right Groups or of the International Community, a crucial role is also played by the popular movements as political, religious, academic and rural organizations as well as trade unions. The search for the truth has more possibilities of being obtained if the efforts derive from the majority of the society.

One of the main point of reflection is this, the evidence proves that the more a Commission is established in the aftermath of the violations, the more probable is that it would produce some important results. This means that, in order to get in touch with the real truth and facts, a Commission shall be established in the period immediately after the cessation of the violence. At the same time, the investigations carried out during the process of violence, are more likely to be only partial and incomplete. This is basically because it is more dangerous to identify the perpetrators of violations of human rights in a public way.

Finally, the independent Commissions have more possibilities to know the truth and the facts rather than those Commissions whose members are members of the government or accused of being responsible for the violations. Therefore, the investigations carried out at a global level and that cover all the levels of violence had a greater impact on the restoration of peace rather than the incomplete investigations and partial solutions and measures. [215]

[215] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 3rd of August 2019.

1.8 PAST, PRESENT AND FUTURE OF THE TRUTH COMMISSIONS: BETWEEN EVOLUTION AND INSTABILITY

It is important to stress the fact that, in Latin America, the political transitions that took place during the Eighties share the awareness that the military power was very strong and, above all, there was an unprecedented interest in human rights. The overall result was that the democratic political leaders, once that took the power, knew very well that in order to be considered good leaders and, in order to gain public consent, they shall create a compromise with the protection of human rights. Therefore, trying not to search for the truth and justice for the crimes committed during the dictatorship, would have meant going towards a social dissent and reject. [216]

Moreover, the transitions in Latin America that took place during the Eighties, were carried on under the intellectual and political impact of the Spanish transition that took place during the Seventies. So, the Spanish model of transition, "*la transicion pactada",* was an "agreed transition" that did not have the shape of a fair process, and it was the only comparative reference that the democrats that were leading the transition in Latin America had.

The first models of Truth Commission lacked some high-quality tools that instead were the characteristics of the Commissions established during the Nineties, as the Commission in Guatemala (CEH) and the Truth and Reconciliation Commission in South Africa. These two Commissions represent a modern shift to the roles and conception of the Truth Commission, since their powers were wider compared to the previous ones. For examples, according to the mission of these two Commissions, the search for the truth had an independent value with regard to the judicial process. This

[216] Nino, Carlos. "Response: The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina". En Kritz, Neil (ed.). *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*, p. 421.

meant that it was possible to consider the concept of justice in a wider and deeper way and not necessarily linked to the judicial action. [217]

In addition to that, the Truth and Reconciliation Commission established in South Africa, enriched the concept of truth, that, until that moment, only referred to a factual description of what happened. Then, this Commission decided to lead all the hearings in a public manner. Likewise, in South Africa, the establishment of the Commission was made possible thanks to a law approved by the Parliament. This was the first time that something similar happened, since before this moment the Commissions were created thanks to Executive Decrees. In South Africa, there was a specific amendment to the Constitution that illustrates the Truth Commission. [218]

What came next was the urgency to identify and promote best practices, new techniques and modern mechanisms to promote and build peace, human rights and humanitarian law, as an answer to the new Commissions. In the field of transitional justice, instead, there was the need for a new effort that shall categorize and systemize the new lessons that came from the latest Commissions, so to develop minimum standards to meet based on international law. This was codified in 2004, year in which the United Nation Secretary General issued a Report on Transitional Justice and this codified some guidelines, organizational assets and specific recommendations for the creation of Truth Commissions, as well as institutional reforms aimed at the prevention of violence. [219]

Therefore, the creation and the existence of these newly codified standards, brought to the condition that the latest Commission would be created only if all these requirements are meet, so only if they guarantee the sufficient conditions for its success. These higher standards, generated new challenges, since many established Commissions

[217] Gonzalez Cueva, E., *Hacia Donde van las Comisiones de la Verdad?*, pag 342-343.
[218] Truth and Reconciliation Commission of South Africa. *Final Report*, vol. I, cap. 5, 1998.

[219] ONU - Secretario General. "*El Estado de derecho y la justicia de transición en las sociedades que sufren o han sufrido conflictos*". Informe del Secretario General, 3 de agosto de 2004.

faced serious problems or failed since they could not fulfill and guarantee the respect of these advanced standards. For examples, in Indonesia, the Government approved in 2005 a new law which established a Truth Commission. This was the result of a period of 6 years of negotiations, that started in the period of transition between the old dictatorship and the new democratic regime, and it was based on the same principles of the Truth and Reconciliation Commission of South Africa, so "truth in exchange of amnesty". Since, during the years of negotiations these standards changed and this included also the question of constitutionality of the Commission, the Constitutional Court in Indonesia, examined the progress of international law and determined that the law was violating the rights of the victim and so declared it unconstitutional.[220]

Likewise, in the Democratic Republic of Congo, the Commission that was created included the direct participation in the processes of the armed forces that participated in the civil wars. The inclusion of the representatives of those groups that were considered responsible for the violations, lead to the situation in which the victims did not want to participate any longer and refused to testimony in front of the Commission. [221]

Another significant case with this regard was the Commission created in Honduras in the context of the *coup d'état* against President Mel Zelaya in 2009. This Commission was the result of an agreement between the parts involved in the conflict. In addition to that, the Commission took the shape of a non-independent body and this was perceived by the population and brought to the decision of the latter to create a parallel Commission headed by the civil society.[222]

Overall, what is crucial to understand is that, the diffusion of best practices and high standards shall not result in the creation of a unique model that may be applicable regardless of the context and the background. This should not happen because it would

[220] Corte Constitucional de Indonesia, Decisión 006/PUU-IV/2006, 7th December 2006.

[221] Borello, Federico. "*A First Few Steps. The Long Road to a Just Peace in the Democratic Republic of the Congo*". ICTJ - October 2004.

[222] Honduras - *Informe final de la Comisión de la Verdad y Reconciliación* "*Para que los hechos no se repitan",* 2011.

dramatically reduce the margins of creativity and flexibility that instead is fundamental in this perspective. The other risk of the imposition of a unique model is that there are some countries that still suffer of a lack of means and resources, especially those poor countries that are slowly emerging from a dictatorship or from a catastrophic war. This, indeed, happened in the case of Liberia.

When recently it was established the Truth and Reconciliation Commission in Liberia in 2005, the mandate of the Commission was very wide. This embraced basically all the kind of violations of human rights and infringement of international humanitarian law. The result was that the mandate of the Commission was extremely vast. The powers and functions of the Commission described technically and in a written form were very strong but they resulted very weak and vulnerable in the moment of its concrete implementation.[223]

Moreover, the point was that this Commission did not seem to present the cultural peculiarities of Liberia. This was evident especially in the fact that, the assumptions for the Commission were: the establishment of a wide institution, in which the participation of a high number of witnesses was guaranteed and the creation of a final written report. If one considers and knows about the traditions and cultural features of Liberia, one shall not underestimate that their narrative traditions are mainly oral and it is also a land where there is still a high rate of analphabetism, so considering these variables was crucial. [224]

In the end, after having analyzed the last features and all the Official Truth Commission established in Latin America so far, it is possible to draw some final considerations about the impacts and the result obtained with regard to the principles promoted by transitional justice.

First, one of the main achievements of the Truth Commission was the determination of the truth about the past. Not only the Commissions help to codify the truth that shall be investigated, but also the assumed truth.

Then, another result is that the report and the findings of the Commission are public, not only for the victims and victims' families but also for the entire society.

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[223] Liberia - *Asamblea Legislativa Nacional Transicional, "Act that establishes the Truth and Reconciliation Commission of Liberia*". 12th May 2005.

[224] Gonzalez Cueva, E., *Hacia Donde van las Comisiones de la Verdad?*, pag 353-354.

Moreover, this fostered the creation and participation of human rights organizations, even in places where, before that moment in time, did not exist.

Another important achievement was that the findings left room for a public debate about the past in those contexts where there was an active and strong social participation. In other cases, it produced the opposite result, as in the case of El Salvador, where the process of amnesty did not produce any further discussion about the past. This is exemplified by the fact that the final report of the Truth Commission is not accessible for the population of El Salvador. [225]

Among the other expectations, there was with no doubt the fact that the perpetrators will assume the responsibility for their violations. The point here is that it cannot be considered as one of the biggest achievements, but as an aspect that is still ongoing. This is mainly because the Commissions, as mentioned various time, have not binding powers, but they can only issue recommendations. So, their instability is due to the fact that they are non-permanent organs, so, by definition, they cannot be as stable as permanent bodies.

Moreover, since their mandate is just temporary, sometimes they lack the proper time to incriminate or to bring the investigations until the end. This is reflected through the situations in which the people considered responsible for the violations keep holding the position they were covering when committing the crimes.

Hence, for what concerns another fundamental point in the agenda of transitional justice, namely issuing recommendations, the impact of the latter still is not so decisive. This is partially because, the reparations have not an executive feature and this allow them to be highly dependent on the degree of public and political willingness to implement them. This is also easy to notice in the field of institutional and legal reforms. The Commissions recommend this kind of reforms, but has no executive power on their realization. [226]

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[225] Beristain, Carlos Martin., *Las Comisiones de la Verdad en Americal Latina, una valoracion de su impacto*. Escola de Cultura de Pau. Pag 1-3.

[226] Beristain, Carlos Martin., *Las Comisiones de la Verdad en Americal Latina, una valoracion de su impacto*. Escola de Cultura de Pau. Pag 1-2-3.

1.9 NON-OFFICIAL COMMISSIONS

In this last section devoted to the Commissions established in Latin America, I will focus on the non-official Truth Commission established in the region. They have this name since they were created without governmental initiative, so without a precise legal mandate.

The characteristics of "Unofficial Truth Projects", except from being a non-governmental initiative, are that they represent a useful tool to build a strategy for justice and accountability of the facts. Moreover, they possess the same features of official Truth Commissions but with the difference that their actions are rooted in civil society. So, since the governments are left outside these processes, the main drivers of these bodies are victim groups, universities, societal organizations and so on. The points of strengths of these commissions are that, in certain context, there is a high level of complexity for the set-up of an official Truth Commission due to political constraints, therefore the creation of a Non-Official Commission represents a flexible and appropriate initiative for a local context. Another positive aspect is that, compared to criminal trials, the commissions build their processes on victims' testimonies and voices.[227] Still, what differentiates an official by a non-official commission is that when a newly established government wants to diversify itself from the previous one, in a moment of societal recovery it decides to establish an official Truth Commission. So, it is possible to argue that Non-Official Commissions are replacements of an official commission when a government lacks the possibility to create the latter; it can be considered, sometimes, as a precursor to an official Truth Commission and, finally, under certain circumstances, official and non-official commissions are complementary initiatives.[228]

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[227] Bickford, L., *Unofficial Truth Projects*, 2014, pag.1-4. Available at: http://recom.link/wp-content/uploads/2014/12/Unofficial-Truth-Projects-L.Bickford-ff-26.09.07..pdf , accessed 24th September 2019.

[228] See Bilbija, Ksenija, Jo Ellen Fair, Cynthia E. Milton, and Leigh A. Payne (eds), *The Art of Truth-Telling about Authoritarian Rule* Madison, Wisconsin: University of Wisconsin Press, 2005.

Perhaps, one of the most important characteristics, also of these kind of commissions, is the production of the final report. This is one of the features that is taken from modelling a non-official commission to an official one. The report is crucial since it seeks to take notes from the analysis of a turbulent past and issue advices for a peaceful future. Needless to say, that it contributes to the creation of the official story of a national history.[229]

Specifically, in this section, will devote some paragraphs to the Non-Official Commissions of Bolivia, Brazil, Colombia and Paraguay.

1.9.1 BOLIVIA

The Commission created in Bolivia is called "*Comité impulsor del Juicio contra García Meza".* In the aftermath of eighteen years of military dictatorship, in 1982 Bolivia shifted towards democracy again with the election of President Suazo. The situation that the new President had to face was the management of a huge numbers of victims, tortured and disappeared people during the period from 1965 until 1982. This was due to the fact that the period of the dictatorship of General Suarez that started with the *coup d'état* in 1971, is considered as one of the hardest bloodshed period in the whole history of Bolivia. The Commission investigated, though, more than 1400 cases of illegal detention of people, cases of tortures, massacres, 6000 exiles and forced disappearance of more than 70 people. [230]

Moreover, the Comité assumes that, during the dictatorship of the 16 days of Colonel Busch, the Government Police killed 76 people in La Paz, 140 people disappeared and 204 people were seriously injured. So, as soon as the democracy was

[229] Bickford, L., *Unofficial Truth Projects*, 2014, pag.20-26. Available at: http://recom.link/wp-content/uploads/2014/12/Unofficial-Truth-Projects-L.Bickford-ff-26.09.07..pdf , accessed 24th September 2019.

[230] Oruro, J., *"Sociedad y Política"*, Lima, November 1980, pag. 38.

reestablished, there was no consent about what to do with the crimes of the dictatorship, specifically, there was no consent on which crimes shall be investigated. In 1982, President Suazo signed a Supreme Decree in which he created the "*Comisión Nacional de Desaparecidos*". This Commission analyzed 14 cases of political prisoners killed in 1972 under the government of Banzer and the disappearance of 22 people in the period of Garcia Meza. [231]

During the first months of democratic transition, the consent was only reached on the necessity of investigation for the crimes committed during the period of General Meza, period in which several massacres of political dissident, forced disappearances tortures and illegal expulsion took place. After this initial period, everything changed, and new public interest in knowing the truth and to punish the responsible for the violations was predominant. Groups of students of law, lawyers, journalists, victims' families worked with the Comité for 5 years with the aim of processing and investigating more than 30.000 pages about the facts happened during the dictatorship and elaborate the accusations. When finally, the Congress of the Republic condemned the dictator, Garcia Meza escaped and was hosted by the other ex-dictator Suarez in one of his *hacienda*s. After five years he was catch in Brazil. During those years, he threatened the groups of human rights and members of the government, with the aim to gain silence and protection that may delay the process. [232]

Further findings of the Comité brought to light many truths, as the ones related to the terrorist attacks that were frequent in the country, censorship and bombing of the principal offices of journals, political parties, religious and cultural movement and the terrorist attack towards an airplane that contained several lieders of the political

[231] Cuya, E. *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 6th of August 2019.

[232] *"Justicia y Dignidad"*, APDHB, Sucre, 1992, pág. 12.

movement UDP. Through these investigations it was confirmed the assumption that all these attacks were made in order to destabilize the government and to show the incapacity of the latter in the fight against terrorism. It was also founded a black list listed by Colonel Gomez in which there were the names of the people that he wanted to get rid of them, as a bishop, a socialist deputy, the ex-president a leader of a trade union and some ministries.[233]

After more than six years of judgement, in 199 the Judicial Power of Bolivia succeeded in condemning General Meza and Gomez. Their sentence was fixed for 30 years of jail. Apart from them, other 50 people were condemned.

Even though this Commission was not created through a legal mandate, its work was quite useful and efficient. The main achievements resulted in the progressive willingness from a huge part of the public institutions to fight for the truth and the common acknowledgement of the assumption that the period of the dictatorship represented the darkest and hardest moment in the history of Bolivia. As the word of the Comité states: "*Hemos creído que el daño que la dictadura le hizo al país fue inmenso, pero estamos convencidos, sobre todo, que la impunidad de esa dictadura sería un daño mucho mayor"*. (We believed that the damage of the dictatorship in the country was huge, but we are sure, most of all, that the impunity of this dictatorship would have been an even bigger damage).[234]

[233] *"Justicia y Dignidad"*, APDHB, Sucre, 1992, pag.39.
[234] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 6th of August 2019.

1.9.2 BRAZIL

In Brazil, the investigation for the abuses committed during the military dictatorships, were carried on by members of the Archdiocese of Sao Paulo and the Catholic Church. Their work lasted for more or less five years and was conducted in an anonymous and secret way. It started in 1979 and ended in March 1985. During this time, the Commission analyzed 707 case files of processes brought in front of the Supreme Military Tribunal. The result of this huge work was the creation of a book called "*Brazil Nunca Mais"* of more than 500 pages.

This report, not only describes the violent and cruel forms of tortures and punishments, but also includes historical data on the origins of the military regimes, the development of the repressions and the escalation that lead to the violation of human rights. A fundamental contribution was the one provided by the United States official Dan Mitrione, who showed a method aimed at obtaining confessions and truth. Thanks to this experimental method, he trained hundreds of military agents and Brazilian policemen in Belo Horizonte and used as a test the poor boys and homeless founded in the street of the city. [235]

Moreover, the report illustrates the different techniques of tortures for the victims, which sometimes include the use of reptiles, insects, animals, chemical products and a section is also devoted to the tortures inflicted to the most vulnerable part of the population: children and women, which were mostly victims of sexual abuses. [236] Likewise, from page 291 to 293 there is a complete list of disappeared people. In its first publication in 1985, *Brazil Nunca Mais* did not include in its list, the names of the military and police agents involved in the violations of human rights, but these names were included in the final publication of the report that was accessible at global level. In addition to that, a list of 444 military and police agents that was not mentioned in the various editions of the report was published by the Archdiocese of Sao Paulo in 1985 in

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[235] Arquidiócesis de Sao Paulo, *"Brasil Nunca Más"*, pag. 32.

[236] Arquidiócesis de Sao Paulo, *"Brasil Nunca Más"*, pag. 43-50.

the Diary *Folha de Sao Paulo* in *Joarnal do Brasil.*[237]

A peculiar fact is that, after the publication of the various volumes of the Report *Brazil Nunca Mais,* the armed forces edited and published a response document called "*Brazil Sempre"* which justified their actions especially by stating that their actions were necessary in order to save the country from internal chaos and the threat of the Communism. Another interesting fact is that this report does not include a section of recommendations, as many of the previously analyzed report did, as in the case of Argentina, Chile and El Salvador. This means that there is no mention about reforms for the police or military. The major takeaway of the Report is about the respect for the memories of the victims, the absence of burial that denies for the families of the victims the right to venerate their deaths and so on. [238]

What came next was the approval, in 1995 of a law that guaranteed an economic compensation for the victims' families of 136 disappeared people during the military dictatorship. [239]

Even all these efforts, the families of the disappeared people in Brazil are still claiming clarifications about the truth and the real facts and that the final punishment of the perpetrators. Finally, together with the "Never Again Torture Movement" (*Movimiento Tortura Nunca Mais*), the families of the victims published at the end of 1995 the book "*Dossier Dos Mortos e Desaparecidos Politicos a partir de 1964*".

[237] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 6th of August 2019.

[238] *"Brasil Nunca Más*", Arquidiócesis de Sao Paulo, pag. 272.

[239] CENCOS, 140. México D.F., September 1995, pag. 26.

1.9.3 COLOMBIA

In 2005 the Supreme Court of Justice ordered the creation of a Truth Commission to investigate the events that occurred during the operations of takeover and retake of the Palace of Justice, in events that occurred on November 6 and 7, 1985.

In these two days the M-19 guerrillas took the building and kidnapped magistrates of the Supreme Court, the Council of State, employees of the offices, the cafeteria and public that at that time took part in the consultations during the processes.

In the retake operation more than 80 people died and another 13 disappeared.

The Commission was attended by the former presidents of the Court José Roberto Herrera, Nilson Pinilla and Jorge Aníbal Gómez, who after an investigation of more than a year concluded that those responsible for the holocaust was the President of that time, Belisario Betancur, and the National Army, for its disproportionate action that did not seek to guarantee the life of the hostages.[240]

Two years ago, in 2017, a new Decree was approved in Colombia and it foresee the creation of a Commission. It was created as part of the peace agreement signed two years ago between the Government of Juan Manuel Santos and the former guerrilla - now disarmed and turned into a political party -, the Commission for the Clarification of Truth, Coexistence and Non-Repetition is an entity of extrajudicial character. In other words, it is not intended to provide legal truth, but will work in coordination with the Special Jurisdiction for Peace (JEP), the transitional justice system, and the Unit for the Search for Persons Disappeared, which together constitute the System Integral of Truth, Justice and Reparation contemplated in the pact. The findings of the Commission will have a historical, ethical and human nature, but not judicial, and will be presented in the final report with the purpose of paving the way for the non-repetition. [241]

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[240] *ICTJ: Comisiones de la Verdad en America Latina*, Caracol Radio 1 of June 2015, https://caracol.com.co/radio/2015/06/01/nacional/1433169240_787228.html accessed 6th August 2019.

[241] El Pais Internacional, Colombia pone en marcha su Comisión de la Verdad, S. Torrado, Bogotá 30th November 2018,

1.9.4 PARAGUAY

In 1954, after a short period of constitutional government, the Paraguayan Armed Forces, through a *coup d'état* took the power overthrowing President Chavez. Two members of the Army took the power, first General Pereira then General Stroessner, who stayed in power for 35 years. The period of the government headed by Stroessner was a period of terror for the whole Paraguayan society, in which everything was censored and forbidden, leaving the entire nation with no freedoms. [242]

Stroessner was proud of having converted his country into the most anti-communist nation in the world With that vision, he tried to eliminate all the political opponents, through torture, kidnapping, disappearance and murders. He strived to make Paraguay a sanctuary for anti-communist activists from various parts of the world. There he centralized his archives on terrorism system of the countries of the South American cone, under the name of "Operation Condor". [243]

There, the violations of human rights did not only involve local people but they also affected foreigners that were escaping from prosecutions coming from Argentina, Brazil, Chile, Bolivia and Uruguay. As a result, during the Argentinian dictatorship, 54 Paraguayan citizens disappeared during the "dirty war" by the hand of Argentinian Government under no clear circumstances. [244]

In June 1990, the *Tribunal Permanente de los Pueblos,* (Permanent Peoples Tribunal, TPP), assured that Paraguay, from 1954 until February 3, 1989, was governed by a fierce dictatorship that systematically and seriously violated fundamental human

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https://elpais.com/internacional/2018/11/30/colombia/1543537126_296840.html , accessed 7th August 2019.

[242] Revista *"Acción"*, pag. 21 a 24, October 1974, Asunción, Paraguay.

[243] *"La operación Cóndor: El terrorismo de Estado de alcance transnacional"*, in *"Memoria"* N 5, Dokumentations und Informationszentrum Menschenrechte in Lateinamerika, Nürnberg, 1993, pag. 38.

[244] The entire list of the disappeared Paraguayan in Argentina was published by the World Church Council (Consejo Mundial de Iglesias) in its Report "*The Human Rights situation in Paraguay"*, February 1988, Geneva, Pag. 14

rights, as well as economic and social rights as well as cultural aspects of the Paraguayan people. "When non-governmental organizations began to disseminate reports on the repression of the dictatorship, during the Permanent People's Court Session, it was confirmed that the "*Stronismo*", a modern form of despotism, had an absolute power in the country, and established a sort of "*mafia*", in favor of a restricted oligarchic group. This "mafia", made up of public officials, acted under the dictatorship considering itself above the laws, as if the laws were valid only for ordinary citizens and not for people invested in public functions.[245]

Since its creation in 1976, the Committee of Churches for Emergency Aid, (*Comité de Iglesias para Ayudas de Emergencia, CIPAE*) with the support of several International Organizations, developed a systematic process of registration and documentation of the acts of violence that took place in the country. CIPAE, since its creation, took the precaution of protecting most of the archives in safe houses, making double copies, and even microfilming the documentation. Fundamental was the contribution of Rev. Charles Harper, of the World Council of Churches in Geneva, who gave his full support to the work carried out by CIPAE. Moreover, the CIPAE in 1984 commissioned its collaborators to systematize information about violence and its effects in Paraguay. There was a lot of fear that repressive forces would try to silence these actions of the Human Rights Organizations. Therefore, there were many difficulties in accessing basic documentary sources, since a huge feeling of fear paralyzed the families of the victims.

The result of the investigations was published in 2008 in a collection of four volumes under the general title of "*Paraguay: Nunca Mas*" (Paraguay: Never Again), where are recorded numerous acts of human rights violations occurred during Stroessner dictatorship. In Volume I of Paraguay Never Again, it is indicated that 360 thousand people, out of a total of three million inhabitants, passed through Stroessner prisons. The Report also estimates the number of Paraguayans forced to go into exile at 1.5 million.[246]

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[245] Cuya, E. *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed 7th August 2019.

[246] CIPAE, *"Paraguay Nunca Más"*, pag. 212.

When in 1989 Stroessner was overthrown by another *coup d'état* the number of complaints grew drastically. They were all for violations of human rights that took place during his large mandate.

At the end of 1993, the archives of the repressive system of the governments of the Southern Cone of America, which were classified as "The archives of Terror", were discovered by chance. There was abundant documentation that explains hundreds and even thousands of cases of Argentinean, Uruguayan, Bolivian, Paraguayan, Chilean and Brazilian exiled and political detained, many of whom disappeared by the hands of the security services of those countries.[247]

On January 20, 2009, in the framework of a meeting, the President of the Republic of Paraguay, Mr. Fernando Lugo Méndez stressed the need to create and establish an independent program for the protection and reparation of Human Rights, in order to continue the work initiated by the above mentioned non-official Truth and Justice Commission, whose mandate ended with the delivery of the Final Report "Anive Haguä Oiko" in 2008.[248]

On January 23, 2009 with the Resolution Nº 179/09, the *Difensoria de Pueblo* created the General Directorate of Truth, Justice and Reparation, by virtue of the need to safeguard the integrity of documents, infrastructures and ensure the diffusion of the Final Report of the Commission and the implementation of the recommendations illustrated in the Report. [249]

[247] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 7th of August 2019.

[248] Direccion General de Verdad, Justicia y Reparacion, Defensoria del Pueblo, Paraguay, http://www.verdadyjusticia-dp.gov.py/historia/ accessed 7th August 2019.

[249] Informe Final, Capitulo Conclusiones y Recomendaciones, Justicia y Verdad Paraguay, http://www.derechoshumanos.net/lesahumanidad/informes/paraguay/Informe_Comision_Verdad_y_Justicia_Paraguay_Conclusiones_y_Recomendaciones.pdf accessed 7th August 2019.

1.9.5 FINAL REMARKS ON THE FIRST PART OF THE CHAPTER

The aim of this section was to analyze in a wider perspective the context in which all the official and non-official Truth Commission were established. The common features, with no doubt, are that they were proposed and created after a period of dictatorship or cruel war in which there was a public and common willingness to know the truth about the facts and to punish the responsible for such violations. All of these Commissions produced a final Report that represents a kind of public written document thanks to which a state can promote the important principles of common knowledge and non-repetition, since they constitute a testimony on some past situations that shall not be repeated again.

The other important fact to stress is that, in terms of results, the Commissions that were created in the immediate aftermath of such gross violations produced biggest results, on the other hand, it was proven the difficulty of other Truth Commissions to clarify facts and truth, because of their late establishment. The lesson to learn here is that, the more a Commission delays to be established in time, the less effective will it be, since it is more likely that witnesses, memories and places would gradually disappear.

Moreover, the ever growing higher standards of the Commissions are a big question mark for the future of such Commissions. If we assume that a Truth Commission starts to exist in a country that, in the majority of the cases is a poor country, which means that has scarce means to invest on these projects, is it always worth it to devote energies and huge quantities of money in such projects? This question is the starting point of a wider reflection that will stretch in this second part of this chapter, that will focus once again on Kosovo, and it will continue in the fourth chapter of this thesis where a deeper analysis will be made, after this occasion of comparison.

Needless to say that, even if Latin America and Kosovo are two completely different realities, both for their geopolitical position than for the context and history, they will be compared only for what concerns the aspect of transitional justice, since both experienced a passage from a hard moment to democracy.

2 KOSOVO AND ITS SOON-TO-BE SPECIAL COURT

In the aftermath of the conflict in Kosovo, many concrete criminal procedures and initiatives began to took shape. The most important among them was the project of the creation of a Special Court, also called "Special Chambers" which shall deal with the atrocities committed during and after the conflict by the hand of the KLA (Kosovo Liberation Army). Among its functions, it includes the investigations regarding several acts of offences as tortures, organ trafficking, maltreatment of prisoners and so on.

The Court will be a hybrid one, so placed abroad. Regardless its placement, it will operate according to local necessities, so taking into consideration the protection of witnesses, and a set of guarantees for the victims.

As of the end of 2015, still very few information was given about the precise structure of the Court, as well as about the work and the techniques. Unfortunately, this is a clear sign of an absence of transparency. [250]

This initial lack of transparency, of course, created a general sense of discontent among the victims and the society, which claimed that it is essential to build this structure spreading the mission of its work, the purposes, the tools so in total transparency and in order to generate a public interest of the public and from abroad.

Despite the good initiative, there have been several criticisms on the creation of this Special Court. First of all because it seems to undermine, once again, Kosovo's sovereignty. This idea comes from the fact that the majority of people claim that Kosovo's judicial decisions are not taken in an independent way. [251]

Likewise, since the region of Kosovo has always been subject to the imposition of judicial structures, that most of the times resulted ineffective and inappropriate, this time the fear of another failure is really high. Therefore, it is possible to argue that Kosovo's citizens are tired of international measures of justice imposed by the International Community, since it failed to deliver the right means and methods of justice overtime. Moreover, the question of the selectivity of the war crimes to judge is another impediment

[250] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice: Concepts, Mechanisms and Challenges*, Pristina, December 2015, pag 250.
[251] UNDP Kosovo, *Public Pulse Report IX*, 2015.

to deliver a fair and proportionate system of justice. Apart from these explications, a valid judicial system would be useful also to improve the image and reputation of Kosovo from abroad.

Other two important dimensions to mention are first of all the victims. So not only a Special Court will be a productive tool for the image and stability of Kosovo, but also and above all it would count for the victims. The second aspect to consider is that, as of now, the common believe in Kosovo was that the majority of the crimes were committed by the hands of the Serbs, not considering that a huge part of such violations were made by the members of the KLA.

So, the impact of the new Special Court will be highly dependent on the guarantees that will be provided. The fear of the repetition of the inefficient experiences of EULEX and the ICTY mark negatively the beginning of the operations of the new Court, but despite that there is a good predisposition to see and estimate whether the lessons from the past will be taken into consideration as points of departure and challenges for a new chapter in the field of justice. [252]

2.1 THE PARTICIPATION OF THE EUROPEAN UNION IN THE TRANISTIONAL JUSTICE STRATEGY OF KOSOVO

Transitional justice shall be an essential component in the state building process of Kosovo, but this aspect was proved not to be a priority during the period of administration of the International Community, as the one of the United Nations (UNMIK Mission) and the European Union Rule of Law Mission (EULEX). When Kosovo and the EU signed the SAA (Stabilization and Association Agreement), one of the point was that, in order

[252] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice: Concepts, Mechanisms and Challenges*, Pristina, December 2015, pag 251-252.

to fulfill the requirement for a further access to the EU, Kosovo shall prioritize the pillars of transitional justice and make it one of its first concerns. As a consequence, in 2015 Kosovo approved a National Transitional Justice Strategy. It is also important to recall the fact that transitional justice is considered as an answer to the problems that derive in moment of transformation of a country. [253]

One of the direction of the actions of the European Union, since 2004, is the continuous involvement in the administration of crisis especially in territories affected by violent conflicts and post-conflict dimensions. The aim is to reestablish peace and democracy, promote an independent judicial system, institutional and legal reforms and truth and reconciliation mechanisms after periods of war.[254]

According, though, to these years of experience, the task of the EU shall be to build a strategy that mixes up transitional justice tools and a restorative approach, in order to foster the dialogue in favour of the reconciliation of the ethnic communities, supporting and promoting dialogue, group activities and interethnic communication and so, overall speaking, trying to involve as much as possible local population. All this strategy shall be carried on from the lessons learned from the domestic and international experience, but also with the support of other international actors and their guidelines, as the ones provided by the United Nations. [255]

[253] Istrefi, R. *European Union Support and Transitional Justice Processes in Kosovo*, Europolity vol.11 n.2, 2017, pag 137-138.

[254] *European Union Regulation n. 230/2014 of the European Parliament and Council of 11 March 2014 establishing an instrument contributing to stability and peace*. http://ec.europa.eu/dgs/fpi/documents/140311_icsp_reg_230_2014_en.pdf , accessed 8 August 2019.

[255] Istrefi, R., *European Union Support and Transitional Justice Processes in Kosovo*, Europolity vol.11 n.2, 2017, pag 158-159.

2.2 TOWARDS THE ESTABLISHEMENT OF A TRUTH AND RECONCILIATION COMMISSION: A CONTROVERSIAL PATH

As of 2006, several articles and papers were published on the establishment of a Truth Commission in Kosovo. Overall, the authors of these articles were those people, generally working in an International Mission based in Kosovo (EU, UN, OSCE), that explored the feasibility of a possible Commission in Kosovo.

The basic and shared assumption was that at there is not a common version of the truth that all the ethnic communities share, about the fact that occurred before, during and after the conflict. It is for this reason that a Truth Commission is needed.[256] However, the question is, why only a Truth Commission may mark an important step toward the recognition of a credible and accepted truth? The answer lies in the fact that the official status and mandate of a Truth Commission allows it to gather and access to official information and sources. Therefore, Kosovo should first eliminate the credibility and the diffusion of the myths in order to start working for the reconciliation of the truths.[257]

The two biggest communities in Kosovo, namely Albanians and Serbs, strongly rely on the fact that the guilt and the responsibility for the abuses lies on the other side, therefore considering their own community innocent by stressing their status of victim and at the same time strengthen their hate for the "perpetrators".

Another important aspect that it is pointed out is that there is a huge credibility gap in the judicial institutions of Kosovo. This is mainly because, the judiciary was not able to manage disputes in the wake of the conflict, therefore a Truth Commission could help to rebuild trust and credibility in trials, political community and generates a rebirth of the judiciary that could be considered as a method of dispute solving. [258]

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[256] Sverrisson, H.B., *Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?,* Peace Conflict and Development, Issue 8, January 2006, pag. 2.

[257] Hayner, Priscilla B., *Unspeakable Truths: Confronting State Terror and Atrocity*. New York and London: Routledge, 2001.

[258] OSCE: *Kosovo's War Crimes Trials: A Review*, Pristina: OSCE, September 2002.

Needless to say, a country and all its ethnic communities cannot be forced to share and to agree on a truth that is defined by a Truth Commission, but the active participation of the local community and representatives of all the ethnic groups is fundamental to obtain a truth that is closer to the real version of the facts. Therefore, according to Sverisson, a member of the OSCE Mission in Kosovo in the early 2000, the success or failure of a possible Truth Commission in Kosovo, depends on the definition of the concept of "success", since a Commission shall be intended as a contributor to peace and reconciliation of a country but not as a creator. It can pave the way to a society to an inter-ethnic dialogue and co-existence but it cannot do this on his behalf. So, one should act in a realistic way, by avoiding utopian expectations. [259]

Therefore, during the first years of 2000 an OSCE Report underlined the difficulty to draw some lines that may represent the structure and functions of the possible Truth Commission in Kosovo. This was basically the same problem that was highlighted in the previous section by the Humanitarian Law Centre in Kosovo. The only guidelines that OSCE proposed were: the shape of the Commission shall be given through consultations that involve both local that international NGOs and civil society, as well as local opinion makers and international experts. Another important aspect to consider is the name of the Commission, the latter shall be decided, negotiated and debated as to result the more suitable to the context. Another important question to debate and to reach a compromise is the one related to amnesty and pardon. The model of the Truth and Reconciliation Commission in South Africa provides a clear example in which pardons and amnesties were granted to all the perpetrators of political crimes that testified in front of the Commission and that provided relevant versions of the facts. Therefore, it is easy to misunderstand that amnesties are a constitutive and indispensable element of a Truth Commission. [260] Of course, many other Commissions used the tool of the Amnesty in a limited manner or other did not used it at all.

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[259] Sverrisson, H.B., *Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?,* Peace Conflict and Development, Issue 8, January 2006, pag. 13-14.

[260] See Article 20 of the South African Promotion of National Unity and Reconciliation Act No 34 of 26 July 1995, available at http://www.doj.gov.za/trc/legal/act9534.htm Accessed on 26 August 2019.

So, according to the considerations made between 2002 and 2006, namely in the aftermath of the end of the war, it was recognized that Kosovo reached the right political maturity to start a debate whether the creation of a Truth Commission may be helpful or not, thanks to the political actions of both Serbs than Albanians politicians. Probably, an effort of reconciliation through an official body could strengthen the role of the institution and build a solid structure for a permanent and peaceful co-existence of the communities of Kosovo.[261]

The years that followed these OSCE considerations left room for a debate on the establishment of a Truth and Reconciliation Commission. However, the only thing that changed was the perception that the project of this Commission was strictly linked to a political tool for the actual President of Kosovo, Hashim Thaci and not as an attempt to build an inter-ethnic dialogue between Albanians and Serbs.

What the President promotes in carrying on this initiative is, instead, a confrontation about what happened during the war and a final reconciliation and dialogue among the divided ethnic communities of Kosovo, two decades after the war, as to move forward and not remained stuck in the past. So, the purposes of the Commission, according to an adviser to President Thaci, would be to deal with the right to know and the right to justice. It was stressed several times that some of the biggest issues that fuels these hostilities are the myths and narratives that circulates among generations. This is even more evident in the new generations, so the ones born after the war, who were raised with a feeling of hate and threat towards the other community in spite of an inclination for coexistence and cooperation.

In May 2018, a step forward in the creation of such Commission was made: it was set up a preparatory team[262]. But, as soon as this team was created, several questions were raised. The first was about the real aim of the Commission, which for the majority of the

[261] Sverrisson, H.B., *Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?,* Peace Conflict and Development, Issue 8, January 2006, pag 23-24.

[262] The Preparatory Team consists of nine members: two members from the office of the President, one member from the Government, another one from the Assembly and five members taken from civil society. Source: Pristina Insight, *Kosovo President establishes Truth and Reconciliation Commission Preparatory team*, 14th December 2017, accessed 27 August 2019.

people was seen as a personal political project of President Thaci, then it was questioned its transparency, that is to say it was not established in a clear way what the Commission wants to achieve and the last doubt was about the inclusion of the Serbs in the process. The last question was raised, of course, because they have a different version of the narrative of the conflict. [263]

Among the other criticism that were brought to light with this initiative, there are the ones carried on by the victims' families of missing persons. A general feeling that is spread is that the actions of the Commission will left behind the open issue of the missing and displaced persons since there is no interest from both communities in investigating these facts. For examples, in the mediation of the European Union, the so-called "Brussels Dialogue", namely between Pristina and Belgrade, there was no mention about the issue of the missing people.

The normalization of the relations between Kosovo and Serbia is one of the main topics in which the European Union is insisting over the last years, since it became a fundamental precondition for the access of both countries in the European Union. Moreover, it is considered a fundamental step to deal with the controversies of the past, solving the open questions and border disputes. Therefore, the establishment of the Commission will be a clear sign from Kosovo that they are speeding up the process.

Likewise, some members of the political opposition stressed that one of the biggest impediments for the work of the Commission, as analyzed in some previous cases of Latin American Truth Commissions, is that several years have passed since the end of the abuses and the efficiency and testimonies in trials and processes would be less effective than if it was established in the aftermath of the war. So, one should pose the attention on the fact that an adequate justice shall be provided before too long, as long as the witnesses maintain a clear memory and stay alive.[264]

Moreover, if one considers the impact that the ICTY had on this regard, it can be argued that it was minimal, since it was not focused on the restoration of victims' dignity

[263] Balkan Insight, *Can Kosovo's Wartime Truth Commission Achieve Reconciliation?*, S. Haxhiaj, Pristina, June 27,2018, pag 1-2.
[264] Kabashi-Ramaj, B., *Deconstructing Reconciliation in Kosovo: How to move forward in a way that is efficient and in line with the demands of the main carriers of reconciliation, the people of Kosovo*, Centre for Research, Documentation and Publication, Pristina 2008. Pag. 8-9.

and was not authorized to compensate victims. So, any other restorative initiative for the reconciliation and truth-seeking process could do better than the International Court.

So, in conclusion, as the director of the Humanitarian Law Centre in Kosovo Bekim Blakaj stresses, the requirements for the Commission for its well-functioning should be a total impartiality and independence, so to be accepted by both sides. Moreover, he insisted on the fact that the findings of the Commission may be rejected from Serbia because it may misshape the perception of the Serbs in Kosovo in a negative way, and if this happens, it would be even more difficult to complete the reconciliation procedure.[265]

An essay edited by the Centre for Research, Documentation and Publication in Pristina, suggests a change in the direction of the policies. Up to now political leaders have always implemented a "top-down" approach, that is to say that no voice was given to the population nor to the victims. This approach is wrong since in order to achieve reconciliation the population and victims shall be considered as protagonists not as passive receivers of policies and reforms. Needless to say, this top-down approach weakens the role of the institutions and political leaders that are considered not able to lead a similar process. So, what is recommended by this research called "Deconstructive Reconciliation" is that the Government of Kosovo together with the International Community shall foster a "bottom-up" approach, so the exact contrary of what they have been developing up to now. This new kind of method could, not only rebuild confidence towards the institutions, but also pose the attention to the socio-economic necessities and grave tensions of both Albanians and Serbs. [266]

Finally, the main concerns on the establishment of this Truth and Reconciliation Commission are still debated today. Among the main controversies it is possible to find the uncertainty of the participation of the Serbs in the investigation, as well as the possibility that the Truth Commission will be subject of political manipulation and lastly

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[265] Balkan Insight, *Can Kosovo's Wartime Truth Commission Achieve Reconciliation?,* S. Haxhiaj, Pristina, June 27,2018, pag 4-9.

[266] . Kabashi-Ramaj, *Deconstructing Reconciliation in Kosovo: How to move forward in a way that is efficient and in line with the demands of the main carriers of reconciliation, the people of Kosovo*, Centre for Research, Documentation and Publication, Pristina 2008. Pag. 6-7-8.

the Commission would not probably receive support from the leaders of the former Yugoslavia. [267]

Nevertheless, the project of the fact-finding Commission will probably become concrete in 2021, according to the last news. The period of action will be, though, from 2021 until 2025. This project, whether will it be realized, is really ambitious. It consists in a big effort but it is supported by 94% of the Kosovar population, including both Albanians than Serbs. [268]

[267] Balkan Transitional Justice, *Balkan Govts Dodge Signing Truth Commission Declaration*, https://balkaninsight.com/2018/07/10/west-balkans-states-not-singing-recom-declaration-07-09-2018/ , 10th July 2018, accessed 27 August 2019.
[268] UNDP, *Perceptions on Transitional Justice in Kosovo*, 2012.

2.3 FINAL REMARKS ON THE SECOND PART OF THE CHAPTER

What comes out from this second half of the third chapter is the controversial debate about the establishment of a Special Court in Kosovo that shall deal with the abuses and tortures committed during the period of the war. Many critiques have been raised so far about various issues related to this project, the first is with no doubt the absence of transparency and a clear definition of the structure, program and objectives of the Court, and this is both highlighted by both the Humanitarian Law Centre in Kosovo than by some OSCE reports published before the end of the first decade of 2000.

Another important point to underline is the common fear that this Commission will represent another attempt to impose inappropriate judicial structures as it already happened in the past. This is also due to the fact that the Court would be a hybrid court, so, similar to the previous inefficient experiences that were carried on by the International Community, namely without taking into account local necessities but only imposing international unproductive models. In concrete, the support given by the European Union for the development of a transitional justice process in Kosovo produced scarce results, especially in the period of the European Union Rule of Law Mission (EULEX). Even if the EU requires a strong commitment in the development of transitional justice in the region, as a precondition to fulfil in order to access to the European Union, more efforts shall be made in continuity with the one that are already ongoing.

Here, it is also explained why it is given all this importance to the establishment of a Truth Commission in this context, and the answer is that, thanks to the official status and mandate that only a Truth and Reconciliation Commission may have, it can gather and accede to information and data that otherwise will remain unknown. This could help to avoid the diffusion of myths and legends that are generally created and fueled by one ethnic community with regard to the other.

The attention is also focused on the perception and transmission of the truth to the future generations, so the work of such Commission should start from providing, thanks to the crucial help of the local community, a common and shared final version of the truth and the facts that shall be the one that will be handed down through the generations.

A strong and decisive role of the Commission will, definetly, regenerate trust in the institutions and the politicians that were seen as inappropriate in the management of this scenario.

The recent developments of the last two years point out that the Court still hasn't been established. It will probably be created in 2021 with a very high level of expectations. The new concerns with this regard are linked to the doubt whether the Commission will be a political mechanism that will favor President Thaci. Among the other common criticism, it is possible to find the scarce interest concerning the missing people, the belief that the more the time is passing, the less effective will the Commission be, due to a multitude of factors. Other important aspects to consider are the need for independence and impartiality of the Commission in order to examine carefully and in a neutral way the facts. The active participation of the Serb community in the investigation is still a doubt that keeps in going on.

However, the only certainty, by far, was the creation of a preparatory team composed by 9 persons last year. This, actually, marks an important step forward in the concretization of this initiative.

So, after this wide section that compared these two very different realities but with something in common, namely the application of the mechanisms of transitional justice as an answer and a recovery from the period of atrocities experienced in the paste decades, what will come next will be the last section of this analysis. On the fourth and last chapter of this thesis, the research will focus on the pros and cons of the experiences of Truth and Reconciliation Commissions, especially in the light of what was analyzed and described in this chapter.

It will be examined whether some of the most successful experiences, especially the Latin American ones, may transfer some best practices and models to the soon-to-be Special Court in Kosovo, and this will bring to a final consideration whether is it really worth it to create a Commission in Kosovo, having in mind and taking as a starting point the basis and development described in the second section of this third chapter.

CHAPTER FOUR:
TRUTH COMMISSIONS: ARE THEY ALWAYS EFFECTIVE?

After all the examples provided in this research, this conclusive section will be devoted to some final considerations and remarks and it will be divided as such: a first part will consider some important questions about the functioning and mechanisms of the Truth Commission, in the light of the successes and limits of the Commissions mentioned in the previous chapter, with a particular focus on the ones established in Latin America. A second part, though, will address the possible guidelines and best practices that could be applied in the creation of a Truth Commission in Kosovo, on the one hand, by applying the elements of success of the previous Commissions and, on the other hand, the third and last section will consider the points of weaknesses that this decision may bring, considering the specific context of Kosovo.

1. GENERAL REMARKS

One of the biggest doubt about the establishment of a Truth Commission, so in the aftermath of a tragic period or event, is whether is it really worth it. In some cases, one should consider that it represents a big effort for a society that recently experienced atrocities and violations to re-open a painful wound. This is especially true in the case in which, for examples, the establishment of a Truth Commission comes very late, as in the previously analyzed case of Panama.

However, even if some Commissions produced positive results, and are considered as landmark cases that brought and contributed to peace and stability within a damaged society, there are still many open issues to consider and eventually to correct in order to propose a well-functioning mechanism of transitional justice.

First of all, it is easy to notice that the members of the Truth Commissions set up in Latin America have two different characteristics: the members of the majority of them

are nationals of the country in which the Commission is established, while others have a partial or total number of the members that are foreigners. This feature may be determinant for the success or failure of the purposes of the Commission. For examples, the Truth Commission set up in El Salvador was one of those who had all its three members that were not nationals of El Salvador.[269] Broadly, the results of the Commission were really scarce, since the schedule that was proposed at the end of the work of the Commission was not met. Of course, the unsuccessful experience of El Salvador does not only rely on the composition of the members of the Commission, but one can reflect whether this could represent a questionable element. The importance of having local members of the Commission is basically because on the one hand it may have a major impact on the local populations, and on the other hand because they know the context and the historical facts of the society in which they are operating, as to take more effective decisions or recommendations. Despite the nationality of the members of the Commission, not considering the cultural and local aspects of a territory may led to an unsuccessful outcome. This is for examples what happened in Liberia. Even if the members of the Commission were nationals, so they knew the peculiarities of the society, the results of the Truth Commission there had a minimal impact. One of the aspect that was mostly criticized was the scarce skills and competences of the staff.[270]

Another important question to consider is the duration of the Commission. Since they are non-permanent structures, the lasting of their mandate varies from the one to the other.

Generally, most of them operate within a time frame of less than one year, while others just for two or three months. There is no absolute certainty of a link between the duration of a Commission and its effectiveness, but in some cases due to lack of resources and staff, the investigations result scarce and superficial and they do not bring to light the expected results of reconciliation and stability. So, when the conditions are met it would

[269] Cuya, E. *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 22th of July 2019.

[270] Amnesty International. *Liberia: Truth, Justice and Reparation: Memorandum on Truth and Reconciliation Act 2006*. Available at https://www.amnesty.org/en/documents/afr34/005/2006/en/ , Accessed 3rd September 2019.

be better to benefit from all the disposal time as to achieve better results. Otherwise, for the future Commissions, one should take into account the possibility to establish a unique duration for the investigations regardless the context and the means, as a test. In this way, a Commission could probably guarantee a deeper investigation even in those cases where it is not required and the results obtained are already sufficient. This proposal, in a way, would reduce the degree of flexibility of a Commission and brought to a standardization of the processes, but it would maximize the results. Moreover, this scheme could be included in the new set of high-level requirements that shall be fulfilled by modern Commissions, as to raise the standards and the payoff.[271]

A further aspect that catch the attention is with no doubt the moment of the establishment of the Commission, namely immediately after the moment of the democratic transition or some years later. It was proven that those Commissions set up immediately after the period of the violations and the transition to democracy produced the most successful results. The problems related to the late-establishment of a Commission are several, first this can re-hurt a society that just passed a moment of recovery, second the places where the tortures and violations took place, with the passing of time, may probably have changed their function so this means that no investigation on the field could be made. Third, for what concerns the witnesses and the testimonies, if a Commission starts its investigations several years later (as in the case of the Republic of Panama where the investigations started thirty-forty years later the abuses committed), this may cause an impossibility to testimony or to investigate the facts since many people who witnessed or experienced the situation after all these years are probably dead or are unable to remember clear details and versions of the facts. Therefore, an evident detail is that this constitutes a limit for a Commission, since the more it delays in its establishment, the less productive it will be. Hence, this will also constitute a starting point for a consideration about a possible establishment of a Truth Commission in Kosovo, due to the fact that, as of today too many years have passed since the end of the gross violations that took place during the war.

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[271] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*. Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

Furthermore, one of the main aims of the establishment of a Truth Commission should also be to eliminate the feeling of general mistrust in the institutions and, overall, towards people covering public charges that were in charge during the period of the massacres. This sometimes results complicate, since this new trust cannot be rebuilt because the same persons considered responsible for the violations keep holding their position during the investigations. In addition, this implicate that many witnesses refused to testimony as a way to express their disappointment.[272]

Another aspect that probably contributes to this fact is that the Commissions have no binding powers, due to the fact that they are non-judicial mechanisms. Therefore, this means that the recommendations that they issue are taken into consideration in a milder way. Unfortunately, this aspect weakens the role and the decisions taken by the Commissions which sometimes should rely on the political willingness of a government to realize the implementation of the recommendations proposed.

This is also reflected through the issue of the reforms and reparations. In many cases, the economic compensations that are promised and that are the outcome of the results and schedules coming out after the work of a Truth Commission, are not granted or are only partially granted. In the case in which they are only partially granted this means that they are given only to a very restricted and selected cases with regard to the huge amount of cases analyzed and situations that need reparations. For examples, in Peru when it was established the Commission for the massacre that took place in the prisons and where 250 people lost their lives, after seven years only to three families of the victims was granted a compensation from the Peruvian Government. Therefore, it is possible to argue that all the initiatives that come out from the findings of a Commission have not an assured impact but their implementation is highly dependent on political willingness.

Another lesson to learn from this mechanism of transitional justice is that through the Truth Commission there is a high commitment in strengthening the importance of human rights. Overall, the societies that come out from moments of gross violations of

[272] Derrida, J., *On Cosmopolitanism and Forgiveness*, Mark Dooley and Michael Hughes Editions, Routledge, 2001.

human rights had a very scarce protection of the latter. Therefore, the construction of a strong net for the protection of human rights represents a priority in the aftermath of these periods also as a means to consolidate the democratic path. So, the centrality of human rights in these processes shall be highlighted as one of the most positive aspects. The International Community, as well as domestic reformers shall consider the improvement of human right practices as a central goal especially for a society in transition.

Having a strong net of human right protection policies is a sort of investment. This is basically because it also has indirect effects on the democratic transition, to foster the economic development and in the management of the conflict resolution.

Regrettably, during the era in which Milošević was in power in former Yugoslavia, he promoted a period of hate that was translated in the highest moment where the worst violations of human rights took place. This period not only was characterized by physical hate but also by the spread of a language of hate that was evident in the speeches, media and press.[273] So, it is possible to argue that the violations of human rights affect in a very negative way the conflict management of a society and slow down the economic development and the process of democratization. Likewise, a concrete example of abuse of human rights could be the lack of a fair electoral process. This undermines on the one hand the democratization of the society, and on the other hand the popular trust in the democratic institutions.[274]

The last two points to consider, before drawing the final conclusions on the effectiveness of these mechanisms are first of all the new high requirements and standards that should be fulfilled before the establishment of a Commission and the future of the Truth Commissions, so their hypothetical development also due to these new criteria.

First, for what concerns the issue of the new high-quality tools and standards, one may argue that this is a peculiarity of the new wave of Truth Commissions, especially the one established in the nineties. This is mainly because, higher requirements may be a precondition for a better success but this imply new challenges.

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[273] CRDP, *Kosovo's Vetting System: A Case for Further Reform*, 2015.
[274] S. Horowitz, A. Schnabel, *Human rights and societies in transition: Causes, consequences, responses.,* United Nations University Press, 2004. Pag 266, 413-415. Available at https://collections.unu.edu/eserv/UNU:2440/pdf9280810928.pdf , accessed 5th September 2019.

The mandate and the powers of the more recent Commissions are wider, however, this on the one hand means that the direction taken by the new Commissions may be the one of a unification of the models, so less flexibility and creativity but a mandate more similar for all the Commissions, regardless the external context but only taking into account the mission and the obligations to meet. In any case, this new concept of Truth Commission does not guarantee the expected success, but instead in many cases brought to a partial failure due to the inadequacy to the operating context.

An example that is mentioned in the previous chapter is the one of the Commission in Liberia created in 2005. The problem here was that, due to the large-scale tasks of the Commission, the outcome was that in the moment of the practical application of these tools, the effective powers of the Commission were very weak and made it very vulnerable. Moreover, this kind of model did not fit the cultural peculiarities of Liberia and this, of course, represented a limit for its well-functioning.

Second, another aspect that is strictly linked to the new structure and powers of the Truth Commission, is the future of the latter. Simply put, these new trends and features create new models of Commissions. For examples, it will be possible to find in the next few years some "Double Truth Commissions", that may join two different societies who seek truth and justice. Another example could be the establishment of "Regional Truth Commissions" so a joint commission that analyzes many realties of violations at the same time. These new organizations allow those societies that lack means and resources to establish in a shared manner a temporal structure. The forecast of the results and achievements is not easy to predict, but it is sure, by far, that a shared commission will be less careful in the details, investigations and analysis with regard to a singular one.

The RECOM Initiative, namely the Regional Commission established in the territory of Former Yugoslavia in order to investigate human rights violations committed during the last decade of the nineties, it is a clear example of one of these new forms of joint commission.[275]

[275] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*. Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

So, after having considered these aspects that come to mind immediately after the analysis proposed in the previous chapter, and linked to the functioning and malfunctioning of the Truth Commissions within the system of transitional justice, some last reflections will be devoted to their values and effectiveness.

In short, these non-permanent structures have the power to investigate and bring to light some unknown truths about past abuses. Sometimes, as analyzed before, these Commissions start to work few years later the establishment of a new democratic regime, so not many years after the violations. This may bring to a positive and successful outcome, since, in order to close the terrible chapter that a society experienced and where the violations took place, a faster recovery is the best option. The question here is, though, for those societies that, for one reason or another, decide to set up a Commission many years after the end of the abuses, this may result more complicated, especially in terms of effects on the society. This is basically because, one should consider whether, after thirty or forty years from the end of the sufferance, is it really worth it to reopen a wound that may restart bleeding again. But the fact is that, if one considers the overall results achieved from societies that experienced the work of a Truth Commission, it is possible to state that it is always a good opportunity for a society to try benefit from such mechanisms. First because they are non-permanent structures, so even if their efforts won't bring substantial results, within few months the investigations come to an end and this means that it avoids to waist too much time and resources. Second, as expressed in the previous lines, an action taken within the framework of transitional justice is an action taken towards the strengthening of the importance of the human rights system. Third, the implementation of transitional justice tools and measures are a key ingredient for the democratic development of a society and a government that comes out from a dark moment where gross violations took place in a period of war.

So, it is possible to claim that even if societies after too many years could not be ready to reopen a painful chapter of their own history, this may result beneficial for the access to their right to know the truth and clarification about the facts.

2. TOWARDS THE SET-UP OF A TRUTH COMMISSION IN KOSOVO: A WINDOW OF OPPORTUNITY? GUIDELINES FOR SUCCESS

Finally, the purpose of this thesis and its main focus was to analyze first the main aspects, history and pillars of transitional justice then to shift the attention to the measures introduced by countries that had a positive or relatively positive experience with mechanisms of transitional justice, especially Truth Commissions. In particular, what was examined in detail was the impact of the models of Truth Commissions in many countries of Latin America. So, the ultimate purpose was to explain, in the light of a possible establishment of a Commission in Kosovo, some useful guidelines or best practices that may ensure, even if partially, success. It is important to mention, before starting this last analysis, that the case of Kosovo would be a case of late establishment of a Truth and Reconciliation Commission, since, more or less, twenty years have passed since the end of the abuses. Here I will proceed as such: a first part will concern the positive sides of reaching an agreement on the set up of a Truth and Reconciliation Commission in Kosovo, so all the possible best practices, guidelines for success and benefits that this decision may bring. Then, at a second stage, I will try to point out the possible negative sides not only for the creation of a Commission, but also related to the scenario of the late establishment of the latter, just to have a broader perspective.

So, to begin with the positive aspects that may be taken into account, needless to say that one of the first places is covered by the importance of protection of human rights. One of the principal aspect that has always been monitored and protected in both domestic than international programs is the promotion for the respect of human rights. In this way, the international missions in particular, seek to support local institutions to comply both with domestic legislation than international standards. For examples, for what concerns the OSCE Mission in Kosovo, what they stress is that the field of human rights protection involves also economic, social, gender equality and cultural rights.[276]

[276] OSCE Mission in Kosovo, *Human rights*, available at: https://www.osce.org/mission-in-kosovo/human-rights accessed 6th September 2019.

As a matter of fact, the programs still are not contributing to a substantial progress for the protection of human rights, since it is proceeding in a very slow way. Moreover, the tensions between Serbs and Albanians in the territory of Kosovo still exist. In addition to that, the other communities living in the region still continue to face discriminations.

Another program that attempted to improve the standards was the HRAP (Human Rights Advisory Panel), an independent body that was created within the framework of the UNMIK Mission of the United Nations in Kosovo and that worked between 2006 and 2016, when it ceased its operations. This project had the aim to investigate the claims of people or group of people who argued to be victim of a violence of human rights by the hand of UNMIK. This was created also to help and facilitate the investigations of UNMIK on the abuses of human rights, that, as of its establishment, resulted ineffective. [277]

All these initiatives mark a fundamental step in the direction of the protection of human rights but still lot of things have to be done, and this bring to light the possible positive effect that a Truth Commission could bring.

If one considers the creation of a Truth Commission as an opportunity to quantify and categorize the missing, killed and displaced persons, the results of the investigations could be an important document for the public awareness on the magnitude of the past events. In this sense, the outcomes of the results of the cases heard by a Commission, may constitute an important document that is similar to a biography of the killed people in the analyzed cases, as it was shown in the section devoted to the Republic of Panama and the findings of its Commission. The images provided, the faces and the details of the circumstances of the killed people have a very strong impact both for an impartial reader than for a person involved or touched by the facts. Despite that, this hard impact is necessary in order to create public concern for the non-repetition principle.

This, in a way, may also foster the engagement in such process of the local population. As mentioned various time, one of the key element for the success of a hypothetical Truth Commission is the involvement of the local population in the procedure. As usual, the decision to include local actors in the activities of recovery of a society is always a good idea. This also raises the question about the importance to have

[277] Amnesty International, *Kosovo: UNMIK's Legacy, The failure to deliver justice and reparation to the relatives of the abducted*, 2013.

local Members of the Commission because they will be more capable to deal with the investigations, the hearings and final judgments, due to the fact that they are part of the reality they are judging.

The problem of the local engagement arose especially in the moment when it was criticized the scarce participation and the non-inclusion of the Kosovar Serbs to the hearings.

The result of the involvement of resident people, though, could be beneficial above all for the contribution for what concerns the version of the truth that will be spread for the future generations. So, this may eradicate the feeling of hate that still is persistent from one ethnic community towards the others and this of course may shape the future vision of the people and the generations that did not live or did not experience the war or the management of the post-war.[278]

Another element that is considered as a component for a successful agenda is a transparent schedule. This is valid for both the issues related to the composition and functioning of the commission than about the aims and achievements to meet. The more this body will be transparent, the more it rebuilds civic trust among the population. Since it was already criticized for the lack of transparency in its first steps, this is a crucial element that cannot be underestimated in order to gain confidence and credibility from the society.

Then, other two positive features that are important to mention are: the normalization of the relations between Albanians and Serbs and the access to the European Union. These two aspects are highly related the one to the other, since the first is a precondition for the second. Since the relations between the two major communities living in Kosovo region still are not normalized, one may argue that the contribution of the work of a Truth Commission may help to standardize their connection. However, in order to enhance relations, one should insist on the recreation of a sense of belonging

[278] Sverrisson, H.B., *Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?,* Peace Conflict and Development, Issue 8, January 2006, pag. 2.

between the communities.[279] This derives from a general mistrust that shall be disintegrated little by little. This reconciliation is crucial in order to envisage a common and positive future based on cooperation. As already said, this is a fundamental precondition for the possibility to have a chance to join the European Union in the next few years. Since the EU now promotes the pillars of transitional justice as some elements to possess and to develop, especially for a society that is starting her process of democratization, as long as the relations are full of tensions, there won't be any possibility to fulfil the requirements for the access to the European Union. So, set up a Commission will help to foster this pillar of the agenda and probably will fasten the process of incorporation in the European Union.[280]

As of now, other guidelines for the success of a Truth Commission can be listed.

First, in this context the importance of complementarity of all the tools of transitional justice is of notable importance. This is translated into the necessity to build a strategy, a compromise among all the aspects of transitional justice, so reparations, recommendations, reforms, access to fundamental rights, so not only focusing on justice because this is just an aspect of a multitude of factors that shall work together.

Moreover, this strategy shall be built on the basis of the independence from the government, that is to say that the neutrality of the government shall be granted. This is because, especially in the establishment of these Commissions, there is a high risk for political manipulation and exploitation and this, especially in the contest of Kosovo, may fuel rivalries between communities.

Second, victims shall remain the central focus of this process. This should be clear from all the means of transitional justice especially during the processes. In this sense, the testimony of the victims is the first source of evidence that shall be taken into account in the analysis of the facts. Then, another key factor for the success is the flexibility and awareness of the society in which one is operating. This factor is something that will

[279] EEAS Press, '*EU Facilitated Dialogue for the normalization of Relations between Belgrade and Prishtina'* <www.eeas.europa.eu/dialogue-Prishtina-belgrade/index_en.htm> accessed 3 June 2019.

[280] Istrefi, R. *European Union Support and Transitional Justice Processes in Kosovo*, Europolity vol.11 n.2, 2017, pag 137-138.

attract the society to take part in the process actively, and to foster their sense of belonging but also resentment. This reflects the singularity of the application of transitional justice measures and shows how the solutions adopted are tailor-made rather than unique models applied to different situations.

Besides the fact that Kosovo is a clear example of a territory highly internationalized due to the presence of international missions and therefore it is subject to a top-down process of transitional justice mainly centered on retributive measures of justice implemented by the hybrid domestic systems and the ICTY. Therefore, the establishment of a Truth Commission is basically an attempt to address the previous failures and mistakes of the international missions as the one of the ICTY, UNMIK and EULEX who did not manage properly the post war crimes and situation in the region.

Nevertheless, in this context, there is a clear and practical example of the above-mentioned principle of complementarity of means of transitional justice, namely the Kosovo Memory Book. In this perspective, this initiative represents the most complete, consistent and impartial resource that reports all the people that lost their lives during the conflict. Hence, this symbolizes an example of complementarity since it offers an approach that has these two characteristics: victim-centered and bottom-up, that is to say that in maintaining the central focus on the victims, it also provides a direct involvement for the families of the victims and survivors during the research. This initiative was very important in the process of reconstruction of the truth since the internationally led process in Kosovo was more centered in maintaining and guaranteeing stability rather than providing truth about the facts. So, with this regard, there was a very little attempt in bringing justice to the victims.

Moreover, the predominant ethno-nationalist approach in Kosovo increased the divisive nature of the post-conflict and incremented the feeling of self-victimization. Simply put, this reinforced the overlapping memories and the different factions of public beliefs and myths that characterized the last decades.[281]

[281] Visoka, G., *Arrested Truth: Transitional Justice and the Politics of Remembrance in Kosovo*, Journal of Human Rights Practice n.8, 2016, Oxford. pag 62-80.

A Truth Commission, though, should create the preconditions for new shared narratives and ethnic reconciliation. So, the promotion of politics of truth and peace is one of the main drivers for the construction of a conciliatory unity. This unity shall be characterized by a non-politicized nature and forward-looking perspective, two fundamental features in order to cope with past violations of human rights. Finally, it is of notable importance to remind that the importance of a Truth Commission, with this regard, is mainly due to the fact of its official status and mandate that may allow deeper investigations carried on in an official way.

3. RISK FACTORS AND POTENTIAL WEAKNESSES OF TRUTH COMMISSIONS

After having considered the positive aspects and benefits that a Truth Commission in Kosovo may bring, now it is also important to mention the negative aspects that may derive from this decision.

First, regardless the official status of a Truth Commission, its non-permanent nature strengthens its non-binding powers and decisions. This means that, when a commission issues recommendations, compensations, recovery schedules and programs, they are not legally binding, but only proposals. This, of course, weakens the role of the Commission, since it is not considered as a decisive body. So, the scarce power of implementation of the reforms proposed means that they are highly dependent on the political support of the ruling class. This link to the political willingness is harmful since it means that if the decision taken by the Commission are too critical for the government they are less likely to be implemented. It is well known that governments want to get out as clean as possible from such processes. [282]

Second, the benefits of truth are sometimes questionable: the process of investigation of the facts may reopen a painful scar, and it can be traumatizing to bring back old facts. Moreover, it can recreate anxiety, pain and it may cause new distress. In

[282] OHCHR, Rule-of-Law Tools for Post-Conflict States, Truth Commissions, available at https://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf , 2006, accessed 22nd September 2019, pag.13 and 39.

some cases, instead, it can create new anger, especially when the expected results are not met.

Third, as already stated, in Kosovo we are in front of a situation of an eventual late-establishment of the Truth Commission. This means that, as of today, twenty years have passed since the end of the conflict and the abuses. Anyway, this causes some problems that have already been mentioned various time and that bring doubts about its successful realization. The function of the places where the torture and the abuses took place may have changed their function, to begin with. In other words, this makes it more difficult to reconstruct the facts and to investigate in the precise locations where the abuses occurred. This represents a limit for the examination of the cases that may result in a non-exhaustive final analysis. Then, this can be an excessive painful event and trauma even for the new generations that do not know what kind of sufferance their society experienced two decades ago.

Fourth, another risk is the composition and the nature of the Commission. As examined before, Kosovo was subject to several impositions of foreign structures especially in the judiciary field. This arose from the help given by the International Community but, as far as possible, all these attempts resulted to be inefficient and inadequate. So, the fear is really high of another useless structure imposed by outside rather than from domestic forces. So, a local component is a key requirement for the functioning of a structure like a Truth Commission, as to take into consideration the local necessity and that eventually may be judged by local judges that considers the peculiarity of the society in the analysis.

The other fear is the imposition of other models that resulted efficient and successful in other society, so to apply the structure of a "unique model" suitable to different situations.

What is more to consider is the latest introduction of higher standards for the last Commissions set up in the nineties. There were many cases in which these new requirements resulted to be too ambitious and the outcome was a failure of the work of the Commission. Therefore, the risk here is really high since the more the time is passing, the higher the standards will continue to become.[283] Sometimes this increasing level of

[283] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

standards enhance the possibility and the fear for the application of a "unique" model of Truth Commission and, more in general, of a broad-based transitional justice measures as it happened in Liberia. The biggest mistake, there, lied on the fact that there was no consideration at all for the cultural peculiarities and features of Liberia. This is probably due to the fact that there was a high pressure for the set-up of the Commission that they opted for a standardized model that probably was successful in another context and society, rather than a personalized one, in order to speed up the process and to fulfill the new standards.[284]

Another variable to consider is the involvement of the government in building up a Truth Commission. In other words, these mechanisms have a really high risk of becoming a political tool and, above all, that political leaders may use this fact as an element of their political agenda only to attract electors and not really supporting this initiative. A further aspect to consider is another recurring mistake committed in the management of the creation of the judging members of a Commission, namely involving some members of the government, that were accused to be responsible for the past violations, as members of the Commission. This created in a way an obstacle especially for what concerns the witnesses since, in many cases, they refused to testify in public or during the hearings, considering it ridiculous and a disrespectful situation. Actually, this means a huge lack of respect in a very delicate situation of transition, but since it is a quite recurring mistake, one should be aware that, even in the "latest generations" of Commissions, it may happen that a relative or a person close to a perpetrator could take part in the composition of a Truth Commission.

In addition to that, transitional justice and its measures shall not be considered as a "magic tool" that fixes what is not working within a society. It may assist a struggle for justice and equal rights and opportunities but not solve it so easily. Transitional justice and its measures shall be considered as the application of human rights policies in an unusual context.

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[284] Bilbija, Ksenija, Jo Ellen Fair, Cynthia E. Milton, and Leigh A. Payne (eds), *The Art of Truth-Telling about Authoritarian Rule* Madison, Wisconsin: University of Wisconsin Press, 2005

FINAL REMARKS

To sum up, this section analyzed the pros and the cons for the possible set-up of a Truth Commission in Kosovo on the basis of the Truth Commissions analyzed in the previous sections of this wider analysis.

I would like to underline that the three sections of this last chapter merely analyze all aspects that arose from the cases analyzed throughout the thesis, so they include basically some personal considerations based on the evidence described in the previous chapter, and analyzed in a more critical manner.

In the first part, though, after a paragraph devoted to some general remarks, it was analyzed the benefits and the best practices applicable to the context of Kosovo, taking into consideration especially the outcomes of the experiences in Latin America, namely the other part of the comparison. What came out from here, is that many guidelines can be applicable to this context, and this might also improve the system of human right protection in the region of Kosovo.

Nevertheless, the third part of the chapter includes some points of weaknesses and negative aspects that shall be considered as limits and possible failure of the actions of the Commission, in the light of the latest developments and common mistakes committed in other situations.

Overall, to draw the final conclusions of this research, what this analysis wants to stress is that, in order to give a right interpretation and to fully esteem the impact of the means of transitional justice, and in particular of a Truth Commission, one should consider its benefits in a long-term perspective. This means that, as all the processes of recovery after tremendous facts, the positive drawbacks and main advantages are not easy to notice in a short period of time. On the other hand, it would result superficial only to analyze the positive sides for the establishment of a Truth Commission, because the aims of this compared perspective were not only to identify the key factor for success of a hypothetical Truth Commission in Kosovo, but also to estimate the factors that may eventually led to its failure.

Having this in mind, my final consideration, after having analyzed all these theoretical and practical aspects, is that in Kosovo, right now, there are the right basis for the establishment of a Truth Commission, since, my point of view is that the benefits would be more than the liabilities. Needless to say, in the framework of this analysis it could not be underestimated the possible factors that may led to its malfunctioning or that may make it a useless mechanism.

According to the perspective that comes out from the evidence, the set-up of a Truth Commission in Kosovo may bring some important results and achievements. First it would emphasize the priority of the importance of human rights. This shall represent a real investment for the well-being and the relations of the region. Then, what I think is that even the late establishment of the Commission won't represent a big impediment. This is basically because, in this specific context, this does not mean to reopen a painful wound, because their scar hasn't stop bleeding yet, even twenty years after the conflict.

With regard to the high-quality requirements, this may be considered as a further challenge. Simply put, the ability there, in the light of the previous experiences, should consist in finding a balance between a certain degree of flexibility and creativity and some standards that could allow to get a better performance for the functioning of the Commission.

My ultimate observation is that, generally speaking, it is always a good opportunity to benefit from these mechanisms. Basically, this may drastically help to improve the normalization of the relations between Albanians and Serbs. This is crucial in the light of the future and possible access to the European Union, since one of the requirements is that the past ethnic controversies should be solved in order to move together towards a common and shared vision of the past occurrences.

Another important focus that shall be a driver of this process are the future generations. They shall consist a special category to protect and that shouldn't experience the same intense and tense relations and atmosphere that their relatives felt.

The main characteristics of the Commission, though, shall preserve the features of impartiality, neutrality and objectiveness and maintain the focus on the centrality of the victims. Finally, this project would eventually lead to a decisive and lasting reconciliation.

Conclusion

In the end, what was analyzed in this research aimed to provide first, form a broader perspective, the useful notions and guidelines for the understanding of the purposes and actions of transitional justice, intended as the politics of memory. With this regard, it is important to underpin the relations among political change, transition to democracy and transitional justice. So, transitional justice shall be intended as a way to deliver justice in a different manner with regard to ordinary times.

A common mistake is to consider the state or a society as the only actor involved in the processes of transitional justice. It is crucial to bear in mind that transitional justice involves a multitude of actors, so it is the outcome of a cooperation of the International Community, NGOs, human rights groups and development partners and, of course, the state in question. The focus of the first section, though, is the role and the cases of Truth Commissions within the framework of transitional justice.

Moving on, in order to start the comparison proposed in this thesis, it was crucial to discuss about the reality of Kosovo, which involves both the background history of the conflict that took place at the end of the last century, then an overview to the judicial system. An important part was also devoted to the role of the Constitutional Court, in the light of the adoption of the new Constitution in 2008, and considering the evidence, it was interesting to analyze the application of the Court's decisions to concrete cases, as the one of the Municipality of Prizren, and how it is stressed the real importance and enforcement of the principle of the respect of the ethnic communities, even the smaller ones, that is one of the core principles of the Constitution of Kosovo, and that is at the basis of the ethnic reconciliation and peaceful cooperation and coexistence.

Nevertheless, except from these first concepts introduced, the main focus of the thesis is developed in the third chapter, where, after having analyzed every singular Truth Commission set-up in Latin American region, the final considerations include the common characteristics and so the main points of strengths of these mechanisms. At the

basis of their success, there is the official status of the Truth Commission, namely an official mandate expressed through a legal directive or a government initiative.[285]

Moreover, of notable importance, what all these different but similar experiences have in common, is the strengthening of the importance of the protection of the human rights system. Nonetheless, another significant aspect to emphasize is the involvement of the local population in these processes, that may allow to get not only a better performance and result but also an intense interest in the investigations that are considered as a part of a process of recovery of a society. So, the Latin American experiences teach us that all the components of a society shall participate in the process, so all kind of groups from the religious and academic ones to the human right activists, trade unions and rural organizations. This was proved to be a key ingredient for success.

A highly debated question is the period of the establishment of a Court. The evidence proves that, if a Commission is set-up in the aftermath of a period of abuses, the possibilities of success are higher than if it is created many years or decades after the end of the violations. But this depends also on how these abuses, after a huge quantity of time, are still a bleeding wound.

On the other hand, transitional justice is the "politics of compromise", since for a new government it is very convenient to focus immediately on fixing the past mistakes of their predecessors. This allow to gain popular consent and credibility, so sometimes it lacks own free will. Nevertheless, the most important thing is that the Commissions shall maintain a certain degree of flexibility that should not be lost in order to adapt to new standards and to implement successful models of other societies.

The successes of Latin America, however, do not assure a similar ending also in the context of Kosovo. Here the fear is really high for the umpteenth inadequate and useless imposition from outside of a judicial system that does not fit to the real necessities of the society. Therefore, the expectations for the creation of this Soon-to-be Special Court are really high, but appropriate.

The last stages of this reflection suggest whether is it really worth it to set-up a Truth and Reconciliation Commission in Kosovo, so the answer of my research question

[285] ICTJ, *Truth Commissions*, available at: https://www.ictj.org/gallery-items/truth-commissions , accessed the 13th September 2019.

that was: "is it worth it to establish a Truth Commission in Kosovo? Could it be a window of opportunity for a final and lasting ethnic reconciliation? Could this transitional justice mechanism build a shared version of the events caused by the war, for the achievement of a better future based on cooperation and mutual trust?"

So, in order to answer these questions, the view that comes out from the evidence of this analysis is that this could probably bring some positive results. First of all, it will strengthen democracy and respect for human rights that were largely violated. Second, it will reaffirm the importance of finding a common vision of the past, both for the victims than for the future generations, in order to defeat the feeling of hate that is passed down through generations. Third, the principle of "social acknowledgment" will be affirmed. In other words, it is crucial that, when gross violations occur, the society as a whole acknowledges what happened to its victims. This constitute part of a national narrative, and it is the key ingredient for the direction of a common future. This concept will be reinforced thanks to the production of the final report of the investigations and result of the Commission, that in this sense it will constitute an impartial public archive and document, accessible to all, that authorizes to focus on the future unburdened by the past.[286]

Thus, the main characteristics of this Soon-to-be Truth and Reconciliation Commission shall be: a victim-centered system, based on a bottom-up strategy for the implementation of policies aimed at a final and permanent ethnic reconciliation. This hypothetical system should count on the impartiality and non-interference of the government, the latter should only be considered as a supporter and promoter of this transitional justice strategy in order to avoid the feared political manipulation. Within this framework, even the fact that the Commission won't have binding powers in the enforcement of its recommendations and decision, could be defeated by a strong local and popular willingness to realize this project that is struggling to become tangible from too many years.

[286] M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Chapter four, Boston, 1998.

So, as it was mentioned in the last chapter of this thesis, in this context the implementation of this mechanisms twenty or more years after the end of the abuses, won't represent a further problem, since this society still suffers from the same disease. Despite the fact that this decision may represent an additional challenge, it will be worth it, both for a final and decisive democratic shift, for the respect of human rights, permanent ethnic reconciliation, and to create a new future class of people with a higher and funded trust in their domestic institution.

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Executive Summary

Introduction

In the wake of the atrocities and mass violations of human rights committed during the second half of the twentieth century, such as war crimes, genocides and ethnic cleansing, mostly by the hand of public officials, a new way to deliver justice was needed, which ideally comprehends a set of special measures to address and pose the attention to the causes and consequences of violations. This is what transitional justice seeks to address.

The term transitional justice refers to a concept of justice delivered in non-ordinary times. Overall, it is applied to societies that experienced periods of political transition so, that generally shift from a military dictatorship or a totalitarian regime to a democratic government.[287]

Transitional justice, however, includes a set of judicial and non-judicial measures for redress. In this way, these "special" measures do not substitute the traditional justice means, but they are more suitable in those contexts where the ordinary justice systems wouldn't be able to deliver an adequate response. Therefore, the assumption that drives transitional justice is that a society, in order to move on, needs to face its past abuses in order to try to tackle its past, by avoiding the repetition of the atrocities experienced previously. So, what transitional justice aims to obtain is a double effect that is both oriented to the past and to the future.

The evolution of transitional justice during the last decades is notable. In this regard, it has evolved from being a simple tool for democratization and protection of human rights to a crucial constituent of peacebuilding operations, and it became one of the main pillar of the mission of many international organizations.[288]

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[287] Teitel, R.G., *Transitional Justice*, Oxford University Pres, 2002. pag.16.

[288] Kora, A., *Violence de masse et Résistance-Réseau de recherche- Transitonal Justice : A New Discipline in Human Rights*, SciencesPo, available at : https://www.sciencespo.fr/mass-violence-war-massacre-resistance/fr/document/transitional-justice-new-discipline-human-rights-0 , 18th January 2010, accessed 26th September 2019.

Among all the actions that can be taken in the framework of transitional justice, the most recurrent is the establishment of a Truth Commission. Truth Commissions are non-permanent and non-judicial bodies that are created to establish a common version of the facts. They are non-permanent since their duration is limited in time, so their investigations may last only for a few months up to two years, if their mandate is not extended. They are non-judicial since the outcomes of their investigations are not binding, so they can only issue recommendations, reparations and reforms that are up to the government for their implementation.[289]

Their aim, so, is to identify the roots and the causes of the abuses, through investigations and public hearings which involve both the victims (or the victims' families) and the perpetrators. These processes are generally broadcasted and the Commission, at the end of its mandate, produces a final report that is publicly distributed. This process is crucial since it allows victims not to be forgotten and to have their stories heard and being acknowledged officially.[290]

The purpose of this thesis is to offer an analytical comparison of the experiences of several Truth Commissions. The starting point will be the most famous case study, namely the South African Truth and Reconciliation Commission, and then the research will focus mainly on the Truth Commissions set-up in Latin America and it will analyze, case by case in an attempt to point out the main drivers of success which may ideally be applied to other cases, while trying also to point out the potential weaknesses of such Commissions, in order to have a broader and more complete perspective. The ultimate aim of this analysis is to answer to my research question that comes out from the focus of this thesis on Kosovo, namely: is it worth it to establish a Truth Commission in Kosovo? Could it be a window of opportunity for a definitive and lasting ethnic reconciliation? Could this transitional justice mechanism build a shared version of the events caused by the war, for the achievement of a better future based on cooperation and mutual trust?

[289] ICTJ, *Truth Commissions*, available at: https://www.ictj.org/gallery-items/truth-commissions , accessed the 13th September 2019.

[290] Minow, M., *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Chapter four, Boston, 1998.

1. Transitional Justice: The Politics of Memory

Transitional Justice is a broad concept that includes various perspectives and definitions. Form a judicial perspective, it can be defined as set of judicial and non-judicial measures that a country adopts in the passage from a hard moment of violence and human rights abuses to a more democratic regime and a constitutional transition. Generally speaking, in the wake of these moments in history, the society that suffered these atrocities is left fragile and vulnerable so it is crucial that this system poses at the center of its actions and policies the right redress for victims.[291]

The actions of transitional justice are basically towards two complementary directions: they are backward-looking, namely they deal with events that occurred in a recent past, but at the same time the actions are forward-looking, since they are aimed at preventing the recurrence of these events.[292]

The societies, in looking back, try to understand the collective failure, in particular of national public authorities, in containing violence and attempting to reestablish the values of the rule of law and democratic principles. Therefore, it is important to say that transitional justice operates in a very unstable and sensitive context. This complexity shows the need to resort to different tools of transitional justice, that shall be applied in the society according to the different and complex context. With this regard, one should emphasize that within the framework of transitional justice, no unique and single solution is universally valid, but a case-by-case approach that deals more with the peculiarity of a given society is needed.

It can be argued that the central pivot in the field of Transitional Justice, though, is the "truth", considered as one of the fundamental rights of societies, and as a key element useful to build a democratic path for the future. The "right to know the truth", has been defined as a form of social empowerment, that allows people to understand the reasons of their social constraint and of course prevents the recurrence of such abuses. The truth allows the fight against the social oblivion and any kind of justifications of the facts

[291] ICTJ, *What is Transitional Justice?* available at https://www.ictj.org/about/transitional-justice accessed 20th September 2019.
[292] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

committed.[293] Transitional justice includes various measures, some can be defined as tangible, and include criminal prosecutions, reparations and truth-seeking, while others are nonmaterial measures, and they just have a symbolic but important meaning, as memorials, bank holidays and monuments.

Likewise, the choice of the measures of transitional justice that shall be taken and pursued by a society, is very important because it may have a huge influence and affect other countries, that may be closer to the given country geographically or ideologically. In other words, cross-contamination is a possible explanation for the decision-making process of a country that decides to join the practices of transitional justice.[294] If we consider all the tools that were mentioned before, one can divide them into four main Pillars of Transitional Justice.[295]

The first pillar includes all the forms of criminal prosecutions after the collapse of the un-democratic regime, liable for the gross violation of human rights. It is possible to divide criminal prosecutions into three major groups: international trials, local (or domestic) trials and hybrid ones, that mix elements of both national than international prosecutions.[296]

The second pillar consists in all the measures concerning the truth-seeking processes. For truth-seeking it is meant the achievement of a common version of history, especially regarding the violations occurred in the past in a given society. The essence of the truth-seeking process is in the Truth Commissions, that are in a way the tool thanks to which victims can obtain redress in the aftermath of the post-violence mourning.

The third pillar regards reparations. It is an essential element basically for two reasons: first, it is considered as a symbolic concession for the loss of the victims and an important memorial to those they remember; secondly since it is proved that, in the majority of the

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[293] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*, Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

[294] Lawther, C., Moffet, L., Jacobs, D., *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Research Handbooks in International Law, 2017.

[295] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

[296] Some examples of International Trials are: The *Nuremberg Trials*; The *International Criminal Tribunal for the Former Yugoslavia* (ICTY); The *International Criminal Tribunal for Rwanda* (ICTR) and the *International Criminal Court*(ICC) established in 2002. Local prosecutions, such as the *War Chamber of the Belgrade District Court* or the *Section for War Crimes within the State Court* in Bosnia. Finally, the hybrid (or mixed tribunals) are for example: The *Special Court for Sierra Leone* (SCSL), the trials held in Kosovo by the *EU Rule of Law Mission* (EULEX), or the courts created in Timor-Leste, Cambodia and Bosnia (ICTJ, 2018).

cases, armed conflicts strike poor and vulnerable people, reparation can be a vehicle to re-create people's dignity and gain importance within a society. The prevailing tool of reparation is the monetary one, but one should not underestimate that there are several others that have, though, a very high social and psychological impact, as the guarantee of non-repetition, rehabilitation and satisfaction. On the other hand, symbolic reparations, as memorials, bank holidays or apologies and acknowledgements, may be helpful both for the establishment of facts than as a mere honor and commemoration for the victims.[297] The fourth and last pillar is probably the most complicated one to put in place, namely institutional reform, through a process of trust-building in them. For institutional reform, thus, it is meant a radical change and reform in those institutions held responsible for the gross human right violations during the period of the conflict. Such reforms shall build state's institutions founded on the principle of the respect of human rights and shall guarantee that those moments would never occur again. Therefore, there shall be a crucial role of the rule of law and purges for the perpetrators. This reform shall focus on the fact that the citizens are right-bearers and they shall be confident in these institutions.[298]

For what concerns the actors that contribute to the structure of transitional justice, it would be superficial just to consider the state as the only active participant in a process of transitional justice. On the contrary, there are various levels of cooperation among actors that are on the one hand international, especially driven by the United Nations or European Union actions and by the Non-Governmental Organizations, then at regional and local level the civil society. Needless to say, in certain cases, a society cannot bear the burden of building a system of transitional justice within their domestic structure, therefore it is mostly in these cases that international actors play a more intensive role, so to bridge the gap of domestic institutions, even because sometimes they lack neutrality and impartiality and there is a high risk of being politicized or interest-driven.[299]

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[297] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice. Concepts, mechanisms and challenges*, HLC Kosovo, Pristina, 2015.

[298] Among the various measures of institutional reforms, it is possible to classify them in individual deficiencies, which aim is to eradicate corrupt officials; structural deficiencies that involves reforms in various sectors: security, disarmament and new laws and amendments, and finally the educative measures. (Humanitarian Law Centre Kosovo, 2015)

[299] De Brito, A.B., Gonzalez-Enriquez, C., Aguilar, P., *The politics of memory, Transitional Justice in Democratizing Societies*, Oxford Studies in Democratization, Series editor: Laurence Whitehead, 2001.

Nevertheless, one should also recognize that the civil society plays a fundamental role within the framework of transitional justice mechanisms.

The principal tools that transitional justice uses in order to access the right to know the truth are mainly four: Hybrid Tribunals, Truth Commissions, Amnesties and Reparations. Hybrid Tribunals comprise a mixture of domestic and international elements and are established when the domestic tribunals and legislation have not adequate means to rely solely on their own resources; Truth Commissions, as mentioned before, are panels of investigation created to determine facts. Their main characteristics are the fact of being independent and non-judicial. The evidences that they want to bring to light include the causes and the roots of the past violations both of humanitarian law than human rights abuses. Their mechanisms include various steps: from the investigations, consultations and interviews to the creation of public archives. All these steps are led via public hearings.[300] Amnesties, though, are a debated issue, since most scholars doubt about their effectiveness and about their maintenance of peace and stability in a situation of transition. Generally speaking, an amnesty is a decision taken by a government to forgive perpetrators that committed wrongful or illegal acts, without punishing them.[301] Finally, reparations, symbolize a remedy for the consequences of large-scale violations during transitions. They can be defined as victim-centered and basically their intent is to compensate for the pain suffered from the victims during these hard times. However, since they are granted on the assumption that not all the victims are equal, reparations are generally given to those victims that suffered the hardest atrocities.[302] Therefore they can be monetary, as in the majority of the cases, or symbolic as memorials, bank holidays and promises.

2. An overview of Kosovo's Constitutional System

Before entering the topic of Kosovo's constitutional and judicial system, it is useful to recall its historical background, especially of the last decades. The rivalries between Albanians and Serbians, so the largest ethnic communities living in Kosovo, date back to

[300] Marks S., and Chapman, A., *International Human Rights Lexicon*, OUP, 2005.
[301] Cambridge Academic Content Dictionary, *Definition of Amnesty*, Cambridge University Press.
[302] Chega!, *Commission for Reception, Truth and Reconciliation in East Timor*, 2005.

the early years of life in that region, at the end of the twentieth century. With this regard, it has been defined as a "dispute territory" in the last decades. The tensions were basically of religious nature, since the members of the Serbian Community in Kosovo claimed that the Muslim Albanians were in control of an area sacred to the Serbs. This dispute was fueled by the fact that the International Community stated that this issue could not be assured through peaceful means.[303] The conflict in Kosovo, though, took place between 1996 and 1999. During these years, both Albanians than Serbs did not respect the rules of the laws of war, therefore the International Community decided to intervene after two important massacres in 1998 and in 1999: the Racak massacre the 15th of January 1999[304], in a village in the middle of Kosovo mostly populated by Albanians, and the Gornje Obrinje massacre in September 1998, where twenty members of the same Albanian family were killed.[305] After these two violent events, there was an international conference in February 1999, called the Rambouillet Conference, that sought to find peaceful solutions to the war, but was unsuccessful. On 24th March 1999, NATO intervention was crucial. NATO started bombing after the refusal of Belgrade to find an agreement to put an end to the violence committed in Kosovo. They started bombing through air strikes that lasted for 77 days. The 9th of June 1999 the war was over and the **Kumanovo Agreement** was signed.[306] The Kumanovo Agreement was a military technical agreement (a cease fire agreement) that started to provide stability in the region of Kosovo. It took 11 days for the armed forces of Serbia and Yugoslavia to free the region. [307]

The United Nations Security Council, after the Kumanovo Agreement drafted and approved the Resolution 1244 on Kosovo, the 10th June 1999. The resolution provided a framework for the end of the conflict in Kosovo. It also authorized the presence of the International Community (civilian and military) that should help to provide ad

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303 Auerswald, D.P., Auerswald, P., Duttweiler, C., *The Kosovo Conflict: a diplomatic history through documents*, Cambridge Mass, 2000.

304 Wilesmith, G., ABC News, *Kosovo's Racak massacre 20 years on: memorials, but still no justice for victim*s, https://www.abc.net.au/news/2019-01-15/kosovo-racak-massacre-yugoslavia-balkans-serbians-bosnians/10715936, accessed 12th May 2019.

305 BBC News, *World: Europe Massacre evidence in Kosovo*, http://news.bbc.co.uk/2/hi/europe/183396.stm , 30 September 1998, accessed 12th May 2019.

306 Roberts, A., *NATO's Humanitarian War Over Kosovo's Survival*, vol. 41 n.3, 1999.

307 Humanitarian Law Centre Kosovo, *An Overview of War Crime Trials in Kosovo in the Period 1999-2018,* pag 283-288, Pristina 2018.

disseminate administrative support and security.[308] As soon as the resolution was ratified by the Security Council of the United Nations, a few days later, in June 1999, the United Nations Mission in Kosovo (UNMIK) started. Its task was to create and develop a temporary jurisdiction and the judicial system. The contribution of UNMIK was crucial in the field of trials for war crimes against civilians. At the beginning, immediately after the end of the war, the investigations were only carried on by investigators of the ICTY. Consequently, a big contribution was made by the UNMIK Civilian Police together with the Kosovo Police (established in 1999). The latter started giving fundamental contributions only with the passage of jurisdiction from UNMIK to EULEX (the European Union Rule of Law Mission in Kosovo) and so to local institutions.[309] The EULEX Mission started in Kosovo region during the second half of 2008, even if it fully began to operate in April 2009, and it replaced UNMIK Mission and tasks. Its principal undertaking was the transfer of expertise, however they made significant efforts to allow local judges to take part in trial panels in charge of adjudicating war crimes, this is also because there was a kind of transferal of discontent from the previous UN Mission in Kosovo, since local people expected to have a fully functioning judicial system and not only a transfer from one international mission to another.[310]

The process of constitutional transition in Kosovo happened gradually. Kosovo declared its independence on 17th February 2008 and the new Constitution started producing legal effects on 15th June of the same year. The drafting of a constitution for a country means the creation of the legal basis needed in order to fully exercise the powers of a state. The previous steps, before the final Constitution of 2008 were: the Kacanik Constitution of 1991 drafted by the Albanians political elites in Kosovo during Milosevic regime. Then, some years later, there was a debate whether the Rambouillet Agreement could be used as a constitution but it was never approved since it gave too much authority to the Serbian Government. What happened then was that the UN administration, that, thanks to Resolution 1244, was authorized to create permanent institution and transfer of powers, and was allowed to create a "Constitutional Framework for Kosovo", drafted by

[308] UN Resolution 1244, 1999. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement.
[309] Humanitarian Law Centre Kosovo, *An Overview of War Crime Trials in Kosovo in the Period 1999-2018,* pag 283-288, Pristina 2018.
[310] *Ibidem*.

UNMIK Administration in 2001, for the creation of local institutions, based on the principle of separation of powers, and human rights tool that shall meet the international standard.[311] Then, during the summer of 2007, a new document was drafted: The Comprehensive Proposal for the Kosovo Status Settlement, drafted by the *Ahtisaari* Commission. From a broader perspective, the Proposal, contains the main pillars on which the 2008 Constitution is founded, such as minority protection and human right principles. The last step, though, was that 21 constitutional drafting experts met in the end of February 2008, and divided themselves into 10 different working groups, started working on different parts of the constitution. This allowed the drafting of a text that was subject to a public consultation session that started in the second half of February until 4th March 2008. This draft introduced some substantial changes, such as some principle, as the human rights, that were more in conformity with the European Union standards and with the ECHR. The final version of the Constitution was ready the 2nd of April 2008 and adopted the 9th April of the same year by the Kosovo Assembly.[312] The Constitutional Court of Kosovo is composed by nine judges as defined in article 114 of the Constitution. The jurisdiction of the Court checks the constitutionality of the norms adopted by the president, the Prime Minister, the Government, the Assembly or the Municipalities or by ordinary courts. Furthermore, it has jurisdiction over the constitutionality of referendums and the declaration of the State of Emergency.[313]

Another important element that arises from the Constitution of 2008 is the constitutional rigidity one. When a constitution is rigid, though, it presents one or more articles devoted to de procedures of amendment. In this particular case, this provision is expressed in Article 144.[314]

Other important topics to discuss within the framework of transitional justice measures and in the specific context of Kosovo are institutional reform and the vetting process. They are necessary every time, after a period of abuses, institutions and their personnel were directly or indirectly the vehicles used to commit such atrocities. Therefore, a reform

[311] Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15.5.2001, Chapter III.

[312] Marko, J., *The New Kosovo Constitution in a regional Comparative Perspective*, Review of Central and East European Law 33, pag. 437-450, Martinus Nijhoff Publishers, 2008.

[313] Art. 113, Paragraph II, III, V, *Constitution of the Republic of Kosovo*, 2008.

[314] Article 144, *Constitution of the Republic of Kosovo*, 2008.

in institution, that may be partial or total, is fundamental in order to rebuild civic trust and rule of law.[315] Simply put, the adoption of a new constitution or new institutional reforms, is not a magic tool that allow to forgive and forget war crimes or abuses, the focus here is that these changes and shifts into a more democratic and trusted system shall come together with a purge, namely to get rid of those people held responsible for abuses, crimes and violations in the newly established system. Therefore, in order to rebuild civic trust, the reform shall include the prosecution of those high-rank officials that were involved in committing abuses and that breached the faith invested and given by the local population. Through this action, there is a focus on the past, that is to say to punish the perpetrators of the crimes but there is a focus on the future too, since the main aim is to prevent the recurrence of abuses and to generate a new life for institutions. On the other hand, the vetting process' risk is that is very likely to be politically manipulated, this is due to its large-scale nature process. Among the other risks, one may find the possibility of a void in administration, since many perpetrators held a high-rank charges in politics or administration. This of course will lead to a malfunction of the public service and a possible creation of a strong political opposition.[316]

Within the framework of truth-seeking local actions, two important initiatives should be mentioned, namely the Kosovo Memory Book and the RECOM Initiative, that are considered as databases that record the data and statistics of human losses, victims and disappeared people. Finally, for what concerns the war crime trials, one should consider three different dimensions, that is to say the trials of the International Criminal Tribunal for Former Yugoslavia, then those held in Kosovo and finally the trials in front of the Serbian Courts.

3. Transitional Justice in a comparative perspective

The core part of this analysis is to focus on a comparative perspective that examines the Truth Commissions that were established in Latin America and the soon-to-be Special Court that is about to be established in Kosovo and all the difficulties and limits of its

[315] OCHCR, *Rule of Law Tools for Post-Conflict States: Vetting: an operational framework*, 2006.
[316] Mayer-Rieckh A., De Greiff P., J*ustice as Prevention: Vetting Public Employees in Transitional Societies*, ICTJ, 2007.

achievement. Since the creation of the Truth and Reconciliation Commission in South Africa in 1995, many Truth Commissions have been created in various countries of Latin America, many of them presents some similarities, while other are highly different, according also to the context in which they were established. The principal Truth Commissions that were created in Latin America are the following: Argentina (CONADEP) in 1983 and it represents the first case of creation of an Official Truth Commission; Chile in 1990; El Salvador in 1992, Guatemala (CEH) in 1994, Panama in 2001 and Peru (CVR) in 2001.[317] Even if these commissions were set-up under different circumstances, all their efforts contribute to the processes of national reconciliation, to know the hidden truth of massacres and violence and to pave the way for possible sanctions, compensations and recommendations for the responsible of such violations. Likewise, another drawback is that, in order to build an effective and successful Commission, a country does not only need the help of Human Right Groups or of the International Community, but a crucial role is also played by the popular movements as political, religious, academic and rural organizations as well as trade unions. The search for the truth has more possibilities of being obtained if the efforts derive mostly from the society.

Moreover, the evidence proves that the more a Commission is established in the aftermath of the violations, the more probable is that it would produce some important results. This means that, in order to get in touch with the real truth and facts, a Commission shall be established in the period immediately after the cessation of the violence.[318]

All of these Commissions produced a final Report that represents a kind of public written document thanks to which a state can promote the important principles of common knowledge and non-repetition, since they constitute a testimony on some past situations that shall not be repeated again. Furthermore, the independent Commissions have more possibilities to know the truth and the facts rather than those Commissions whose representatives are members of the government or accused of being responsible for the violations. Therefore, the investigations carried out at a global level and that cover

[317] International Review of the Red Cross, *Comisiones de la verdad: resumen esquematico,* Priscilla B. Hayner, N. 862 of the Original Version, pag.1-7, June 2006.

[318] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 3rd of August 2019.

all the levels of violence had a greater impact on the restoration of peace rather than the incomplete investigations and partial solutions and measures.[319]

In Latin America, not only were created Official Truth Commissions, but also Non-Official Truth Commissions. They have this name since they were created without governmental initiative, so without a precise legal mandate. The characteristics of "Unofficial Truth Projects", except from being a non-governmental initiative, are that they represent a useful tool to build a strategy of justice and accountability of the facts. Moreover, they possess the same features of official Truth Commissions but with the difference that their actions are rooted in civil society. So, since the governments are left outside these processes, the main drivers of these bodies are victim groups, universities, societal organizations and so on. The points of strengths of these commissions are that, in certain context, there is a high level of complexity for the set-up of an official Truth Commission due to political constraints, therefore the creation of a Non-Official Commission is a flexible and appropriate initiative for a local context. Another positive aspect is that, compared to criminal trials, the commissions build their processes on victims' testimonies and voices.[320] In Latin American region, though, these Unofficial Projects were created in: Bolivia, Brazil, Colombia and Paraguay.

The other part of the comparison, here, is again Kosovo. In the aftermath of the conflict in Kosovo, many concrete criminal procedures and initiatives began to took shape. The most important among them was the project of the creation of a Special Court, also called "Special Chambers" which shall deal with the atrocities committed during and after the conflict by the hand of the KLA (Kosovo Liberation Army). Among its functions, it includes the investigations regarding several acts of offences as tortures, organ trafficking, maltreatment of prisoners and so on. As of the end of 2015, still very few information was given about the precise structure of the Court, as well as about the work and the techniques. Unfortunately, this is a clear sign of an absence of transparency.[321]

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[319] Cuya, E., *Las Comisiones de la Verdad en America Latina*, Serie III, Impunidad y Verdad, Revista Memoria, 1996, http://www.derechos.org/koaga/iii/1/cuya.html, accessed the 3rd of August 2019.

[320] Bickford, L., *Unofficial Truth Projects*, 2014, pag.1-4. Available at: http://recom.link/wp-content/uploads/2014/12/Unofficial-Truth-Projects-L.Bickford-ff-26.09.07..pdf , accessed 24th September 2019.

[321] Humanitarian Law Centre Kosovo, *Manual on Transitional Justice: Concepts, Mechanisms and Challenges*, Pristina, December 2015, pag 250.

This initial lack of transparency, of course, created a general sense of discontent among the victims and the society, which claimed that it is essential to build this structure spreading the mission of its work, the purposes and the tools so in total transparency and in order to generate a public interest of the society and from abroad. Despite the good intentions of the initiative, there have been several criticisms on the creation of this Special Court. First of all because it seems to undermine, once again, Kosovo's sovereignty. This idea comes from the fact that the majority of people claim that Kosovo's judicial decisions are not taken in an independent way.[322] Likewise, since the region of Kosovo has always been subject to the imposition of judicial structures, that most of the times resulted ineffective and inappropriate, this time the fear of another failure is really high. Therefore, it is possible to argue that Kosovo's citizens are tired of international measures of justice imposed by the International Community, since it failed to deliver the right means and methods of justice overtime. The need for the establishment of a Truth Commission is embodied in the basic and shared assumption that there is not a common version of the truth that all the ethnic communities share, about the fact that occurred before, during and after the conflict.[323] In fact, the two biggest communities in Kosovo, namely Albanians and Serbs, strongly rely on the fact that the guilt and the responsibility for the abuses lies on the other side, therefore considering their own community innocent by stressing their status of victims and at the same time strengthen their hate for the "perpetrators. According, though, to the considerations made between 2002 and 2006, namely in the wake of the end of the war, it was recognized that Kosovo reached the right political maturity to start a debate whether the creation of a Truth Commission may be helpful or not, thanks to the political actions of both Serbs than Albanians politicians. Probably, an effort of reconciliation through a body with an official mandate, could strengthen the role of the institution and build a solid structure for a permanent and peaceful co-existence of the communities of Kosovo.[324] Moreover, the normalization of the relations between Kosovo and Serbia is one of the main topics in which the European Union is insisting over the last years, since it became a fundamental precondition for the

[322] UNDP Kosovo, *Public Pulse Report IX*, 2015.

[323] Sverrisson, H.B., *Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?,* Peace Conflict and Development, Issue 8, January 2006, pag. 2.

[324] *Ibidem.*

access of both countries in the European Union. Moreover, it is considered a fundamental step to deal with the controversies of the past, namely solving the open questions and border disputes. Therefore, the establishment of the Commission will be a clear sign from Kosovo that they are speeding up the process.[325]

Finally, the main concerns on the establishment of this Truth and Reconciliation Commission are still debated today. Among the main controversies it is possible to find the uncertainty of the participation of the Serbs in the investigation, as well as the possibility that the Truth Commission will be subject of political manipulation and lastly the Commission would not probably receive support from the leaders of the former Yugoslavia.[326] Nevertheless, the project of the fact-finding Commission will probably become concrete in 2021, according to the last news. This project, whether will it be realized, is really ambitious. It consists in a big effort but it is supported by 94% of the Kosovar population, including both Albanians than Serbs. [327]

4. Truth Commissions: are they always effective?

One of the biggest doubt about the establishment of a Truth Commission, so in the aftermath of a tragic period or event, is whether is it really worth it. In some cases, one should consider that it represents a big effort for a society that recently experienced atrocities and violations to re-open a painful wound. This is especially true in the case in which, for examples, the establishment of a Truth Commission comes very late, as in the analyzed case of Panama.

Overall, to draw the final conclusions of this research, what this analysis wants to stress is that, in order to give a right interpretation and to fully esteem the impact of the means of transitional justice, and in particular of a Truth Commission, one should consider its benefits in a long-term perspective. This means that, as all the processes of recovery after tremendous facts, the positive drawbacks and main advantages are not easy to notice in a

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[325] Kabashi-Ramaj, B., *Deconstructing Reconciliation in Kosovo: How to move forward in a way that is efficient and in line with the demands of the main carriers of reconciliation, the people of Kosovo*, Centre for Research, Documentation and Publication, Pristina 2008. Pag. 8-9

[326] Balkan Transitional Justice, *Balkan Govts Dodge Signing Truth Commission Declaration*, https://balkaninsight.com/2018/07/10/west-balkans-states-not-singing-recom-declaration-07-09-2018/ , 10th July 2018, accessed 27 August 2019.

[327] UNDP, *Perceptions on Transitional Justice in Kosovo*, 2012.

short period of time. On the other hand, it would result superficial only to analyze the positive sides for the establishment of a Truth Commission, because the aims of this compared perspective were not only to identify the key factor for success of a hypothetical Truth Commission in Kosovo, but also to estimate the factors that may eventually led to its failure.

According to the perspective that comes out from the evidence, the set-up of a Truth Commission in Kosovo may bring some important results and achievements. First it would emphasize the priority of the importance of human rights. This shall represent a real investment for the well-being and the relations of the region. Then, one may argue that even the late establishment of the Commission won't represent a big impediment. This is basically because, in this specific context, this does not mean to reopen a painful wound, because their scar hasn't stop bleeding yet, even twenty years after the conflict. With regard to the high-quality requirements, this may be considered as a further challenge. Simply put, the ability there, in the light of the previous experiences, should consist in finding a balance between a certain degree of flexibility and creativity and some standards that could allow to get a better performance for the functioning of the Commission. The main characteristics of the Commission, though, shall preserve the features of impartiality, neutrality and objectiveness and maintain the focus on the centrality of the victims. Finally, this project would eventually lead to a decisive and lasting reconciliation.

Conclusion

The last stages of this reflection suggest whether is it really worth it to set-up a Truth and Reconciliation Commission in Kosovo, so the answer of my research question that was: "is it worth it to establish a Truth Commission in Kosovo? Could it be a window of opportunity for a final and lasting ethnic reconciliation? Could this transitional justice mechanism build a shared version of the events caused by the war, for the achievement of a better future based on cooperation and mutual trust?"

So, in order to answer to these question, the view that comes out from the evidence of this analysis is that this could probably bring some positive results. First of all, it will strengthen democracy and respect for human rights that were largely violated. Second, it

will reaffirm the importance of finding a common vision of the past, both for the victims than for the future generations, in order to defeat the feeling of hate that is passed down through generations. Third, the principle of "social acknowledgment" will be affirmed. In other words, it is crucial that, when gross violations occur, the society as a whole acknowledges what happened to its victims. This constitute part of a national narrative, and it is the key ingredient in building a common future. This concept will be reinforced thanks to the production of the final report of the investigations and result of the Commission, that in this sense it will constitute an impartial public archive and document, accessible to all, that authorizes to focus on the future unburdened by the past.[328]

Thus, the main characteristics of this Truth and Reconciliation Commission should be: a victim-centered system, based on a bottom-up strategy for the implementation of policies aimed at a final and permanent ethnic reconciliation. This hypothetical system should count on the impartiality and non-interference of the government, the latter should only be considered as a supporter and promoter of this transitional justice strategy in order to avoid the feared political manipulation. Within this framework, even the fact that the Commission won't have binding powers in the enforcement of its recommendations and decision, could be defeated by a strong local and popular willingness to realize this project that is struggling to become tangible from too many years.

So, in this context the implementation of this mechanisms twenty or more years after the end of the abuses, won't represent a further problem, since this society still suffers from the same disease. Despite the fact that this decision may represent an additional challenge, it will be worth it, both for a final and decisive democratic shift, for the respect of human rights, permanent ethnic reconciliation, and to create a new future class of people with a higher and funded trust in their domestic institution.

[328] M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Chapter four, Boston, 1998.