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Implementing Transitional Justice

A Study of South Africa and Bosnia and Herzegovina on the Relevance of Context

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ABSTRACT

When states emerge from violent conflicts or authoritarian oppression, there is a need to address violations of human rights and the underlying causes of the conflict. Without accountability and acknowledgement to the committed crimes, the grievances may linger and continue to boil under the surface and pose a risk of re-emergence of conflict. Transitional justice encompasses the mechanisms at hand for dealing with the past and its memories, consisting of both retributive and restorative, i.e. judicial and non-judicial mechanisms. By studying the cases of South Africa and Bosnia and Herzegovina, this thesis illustrates the two paths of transitional justice, and demonstrates the importance of context on the choice, implementation, and operation of such mechanisms.

It is also evident, through studying the two cases, that no type of mechanism alone can address the many challenges and damages that follow conflict. To address the manifold of issues, there is a need for a comprehensive understanding and implementation of transitional justice.

PREFACE

The motivation for this thesis set its roots in South Africa. It was while living in South Africa that I was drawn to and developed a keen interest for the field of transitional justice. It was also during my stay, that my interest for the country and its fascinating history grew. A friend from my childhood and her family, refugees from Bosnia and Herzegovina, sparked my interest in the country and in finding out the reasons a country so close to Norway could produce refugees. My fascination with Bosnia and Herzegovina resurfaced during my internship with the Permanent Norwegian Delegation to the OSCE, convincing me of the topic for my thesis. I find this field of research tremendously interesting and one I believe deserves greater attention in academia and in practice when handling post-conflict situations.

It has been a demanding, educational, and enriching process on all levels. To this end, I would like to reflect on the people who have supported and helped me so much throughout this period. I would particularly like to single out my supervisor, Professor Hans Otto Frøland, for his encouragement, positive way of being, and for good supervision. I would also like to thank my parents and my sister, my role models, for their kind words of encouragement and sympathetic ear. You are always there for me. My one and only Thomas deserves a great thank you. You have endured my doubts, worries, and never-ending stress. I also owe my gratitude to Tarik Ndifi.

P.S. If you have read this, you have at least read one page of my thesis. Thank you too, dear reader.

ABBREVIATIONS

| | |
|----------|---|
| ANC | the African National Congress |
| BiH | Bosnia and Herzegovina (name changed from Republic of Bosnia and Herzegovina to Bosnia and Herzegovina with GFAP) |
| GFAP | the General Framework Agreement for Peace |
| EU | European Union |
| ICTY | the International Criminal Tribunal for the former Yugoslavia |
| ICT | International Criminal Trials |
| IDC | the Investigation and Documentation Center |
| IDP | Internally Displaced Person |
| NATO | North Atlantic Treaty Organization |
| NGO | Non-governmental organization |
| NP | National Party |
| RS | Republika Srpska (the Serb entity in Bosnia and Herzegovina created by GFAP) |
| TRC | the South African Truth and Reconciliation Commission |
| UN | United Nations |
| UNMIBH | United Nations Mission in Bosnia and Herzegovina |
| UNPROFOR | United Nations Protection Force |
| UNSC | United Nations Security Council |

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Appendix 1: Overview of Truth Commissions

1 INTRODUCTION: ADDRESSING TRANSITIONAL JUSTICE

It is said that the first casualty of war is truth¹. In the aftermath of violent conflicts, the winners write the history and the losers are left behind with questions, trauma and grievances. The likelihood of a growing desire for revenge lingers and risks resulting in new violence. To mitigate the harmful feelings, the aspects of acknowledgement and accountability need to be addressed. There is a need to break the circle of violence and address the past to achieve the ultimate goal of positive peace. The argument of this thesis is that societies that have endured human rights violations and abuses, need to address their past and to address this past, multiple measures are needed and should be sought for. How do post-conflict societies deal with its past? How can the conflictual relations be transformed? And what are the options at hand?

Transitional justice encompasses the many measures devised by states in transition from war to peace or from authoritarian rule to democracy-based systems, whereby the legacies of large scale or systematic human rights violations are addressed. The UN Security Council (UNSC) defines transitional justice as a

“(...) range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof” (UNSC) 2004: para 8).

Transitional justice thus encompasses both retributive justice, i.e. judicial mechanisms, and restorative justice, i.e. non-judicial mechanisms, in responding to the memory of past atrocities. The choices states in transition face boil down to two questions: whether to remember or to forget - the aspect of acknowledgement - and whether to prosecute or to pardon perpetrators - the aspect of accountability.

Galtung (1969;1985) maintains that conflict resolution and sustainable peace requires a pursuit of the twin objectives of preserving or obtaining ‘negative peace’ i.e. the elimination of physical violence and building ‘positive peace’ i.e. the presence of social justice together with the

¹ The quote is attributed to Aeschylus (525 BC – 456 BC), a Greek playwright of tragedies.

alleviation of, if not the elimination of the underlying causes of conflict, through addressing the structural violence. Hence, this illustrates that addressing post-conflict societies should consist of the promotion of political and socioeconomic justice, as well as of legal justice to combat cultures of impunity and to set up structures to ensure respect for human rights and the rule of law. This is a comprehensive and holistic approach for peaceful societies and implies a commitment to establishing the political, social, economic, legal, security, structural, and psychosocial conditions necessary for replacing a culture of violence with a peaceful society. By extension, transferring this understanding to the field of transitional justice would imply implementing mechanisms of both retributive and restorative justice in dealing with the past and reaching positive peace. A non-judicial tool that has emerged within transitional justice are truth commissions. The UNSC defines truth commissions as “(...) *official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centered approach and conclude their work with a final report of findings of fact and recommendations*” (UNSC 2004: para 50). The most important objectives of truth commissions are to explore the factors that led to violence, acknowledging the atrocities that occurred and identifying the parties in the conflict, willing to share the incidents without fear or favors to establish a common history all parties to the conflict are willing to share. Truth commissions are thus set up to assist in uncovering the truth, pain and suffering of the victims, while trying to understand the motives of the offenders. While it is a long and painful process, nevertheless, the bringing together of estranged communities by truth commissions is an important step in avoiding future violence as well as in finding the path to truth, justice, and ultimately peace. It may seem ambitious, even unrealistic, but it is a journey numerous countries in transition have undertaken² (Hayner 2002; 2011; UNSC 2004:17).

Transitional justice mechanisms are shown to be significant in transitions with positive effects, in contributing to a sense of justice and in overcoming detrimental relations. Reconciliatory measures, such as apologies and confessions are shown to have positive effects in transitional societies (Gibson: 2002; David & Choi:2006; Blatz, Schumann & Ross 2009; David:2011;2016). Moreover, there are research findings concluding that delivering truth and providing financial reparations to victims and those left behind can offset some negative effects of for instance amnesties (Gibson & Gouws 1999;2003; Backer 2010). However, as this thesis

² See appendix

will expose, the outcomes depend on context and implementation. The choices made regarding transitional justice mechanisms vary depending on the context in which they have been applied and in the objectives the state aimed for in addressing the past. Delivering justice in a post-conflict or post-authoritarian state is complicated by the nature of conflict, the institutional context, underlying structural issues, and political context on one hand. And, on the other hand, the need to simultaneously uphold the rights of victims to justice whilst equally effecting reconciliation and moving society away from the divisions of the past. But in general, if transitional justice mechanisms are implemented, the goals are ideally to investigate past crimes, identify and penalize human rights violations, provide reparations to victims, establish a record of the gross violations, prevent future abuses, and promote reconciliation.

The purpose of this thesis is to introduce the field of transitional justice encompassing retributive justice and restorative justice. It examines how the memory of the past, consisting of widespread and systematic violations of fundamental human rights, can be dealt with. To achieve its goal, the present work seeks to shed light on the alternative paths by examining the case of South Africa, which transitioned from apartheid to a democratic state in 1994, and chose a restorative justice path by setting up the Truth and Reconciliation Commission (TRC) in 1995. The second show case is Bosnia and Herzegovina (BiH), which suffered an inter-ethnic conflict between 1992 and 1995, and has mainly followed a retributive path with the International Criminal Tribunal for the former Yugoslavia (ICTY) established by the UNSC in 1993. This thesis aims to understand the different approaches in the two cases, by illustrating the context and explaining the effects and results that followed in each of them.

1.1 LITERARY REVIEW

Literature on transitional justice encompasses several academic fields including, history, sociology, law, and political science. Much of the published material adopts a theoretical or prescriptive orientation and attempts to explain and understand what transitional justice implies in its various mechanisms (Mobekk 2005; Freeman 2006; Gates, Lie & Binningsbø 2007; Lambourne 2009; Herman, Martin-Ortega & Sriram 2013; Buckley-Zistel, Beck, Braun & Mieth (eds.) 2014; David 2017).

An alternative view is taken by scholars who argue in favor of retributive forms of transitional justice as most efficient and consider retribution as a moral imperative (Clark 2008; Aggestam & Björkdahl 2013). And in their view, prosecution of perpetrators is a deterrent measure

(Minow 1998; Skaar & Andreassen 1998). Yet another group of scholars argues in favor of restorative forms of transitional justice, focusing on reconciliation within societies, rebuilding trust and viewing the transition and transitional justice as a collective process (Menkel-Meadow 2007; Clark 2008; Aggestam 2013; Bakiner 2016). However, there is a tendency growing among scholars calling for the implementation of both retributive and restorative mechanisms during transition to achieve lasting positive peace (Drumbl 2000; Mobekk 2005; Lambourne 2009). The empirical studies tend to consider the experience of single cases, or in comparison. The more analytical and empirical studies focus on geographic regions that have experienced significant political change in the past thirty years, and tend to only highlight single countries (Cohen 2007; Laplante & Theidon 2007; Smith 2009; Stan 2009). Many of the studies concentrate on a single mechanism of transitional justice, in particular comparisons of truth commissions. Relatively few studies span different regions or different types of mechanisms in practice. Considering availability and quality of information, certain transitional justice processes are well-documented while others remain obscure because they may be incomplete, disrupted, or delayed, resulting in information asymmetry.

In sum, there are theoretical studies concerning the phenomena of transitional justice as a whole and its mechanisms mostly from a retributive or restorative perspective, as well as empirical and comparative studies on the benefits of and constraints on transitional justice policies.

The transitional process in South Africa was very public in nature. This openness and the fact that the TRC is considered to be one of the more successful ones, made it become a reference point for transitional justice and truth commissions in particular. Many aspects of the TRC have been studied, however most of the research has been on the results achieved. The various ways in which the TRC can be discussed academically include the amnesty process (Doxtader & Villa-Vicencio (eds.) 2003; Phakathi & van der Merwe 2008), the religious, and the political perspectives (Shea 2000; McGregor 2001; Wilson 2001). The transitional justice in BiH on the other hand, has primarily taken the form of retributive justice led by the international community with the establishment of the ICTY. The ICTY has been the focal point of scholarly literature on transitional justice in BiH (Clark 2009a;b; Martin-Ortega 2013; Simić & Volčić (eds.) 2013; Ivković & Hagan 2016a;b), the ICTY and reconciliation (Selimovic 2010; Kostic 2012; Meernik & Guerrero 2014), and refugee returns (Nalepa 2012).

As noted above, very few studies cross regions and types of mechanisms in empirical studies. Moreover, by ignoring the context, many defenders and critics of both restorative and

retributive justice have limited their analysis to the symbolic dimension of transitional justice. There seem to be no studies comparing and analyzing the cases of South Africa and BiH. Thus, the contribution of this thesis to the transitional justice literature is by introducing the different approaches of restorative and retributive justice through the contextual examination of the cases of South Africa and BiH. The analytical approach is to analyze the cases' contextual differences and the effect of context on the selection and implementation of transitional justice mechanisms in the two countries. The present work also contributes to the small, but growing, literature arguing in favor of a combined and comprehensive approach consisting of both restorative and retributive mechanisms when implementing transitional justice.

1.2 RESEARCH PROBLEM, THEORETICAL DESIGN AND METHODOLOGY

The overarching research question this thesis addresses is *“What were the political and historical conditions that promoted and blocked restorative justice and retributive justice in South Africa and Bosnia and Herzegovina?”*

To address the question, the thesis seeks out the contextual conditions causing South Africa to decide on implementing a truth commission and BiHs retributive approach. Thus, the effect of context on the selection and implementation of transitional justice mechanisms is the main analytical approach of this thesis. While transitions offer opportunities for addressing the past, they also hold continuities with the past which may pose obstacles that can discourage and/or block such endeavors. In other words, the context defines the objectives of a transitional justice process.

In *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (2017), edited by Roger Duthie and Paul Seils, the contextual factors affecting the post-conflict response are the nature of conflict; underlying social and economic structural issues; institutional context; and political context.

The nature of conflict includes disparities in the armed actors involved and their motivations, coupled with the type and scale of violence (Duthie 2017:11-12). The more extensive the repressive actions are, the more likely it is that the perpetrators will tend to form a bloc opposing transition. War may be the result of failed, weak or collapsing states and not an instrument of state repression, while in others the state may remain intact and be responsible for a large portion of the atrocities (Kerr 2017:127). No conflicts are the same, but we can identify

categories of conflicts based on shared characteristics. The context of violence can vary widely, including inter-state wars, intra-state wars with non-state armed conflicts, one-sided violence, military coups, foreign intervention, elections-related violence, revolution, wars of independence, and ethnic conflict - all of which can involve widespread human rights abuses and pose challenges for transitional justice processes. As most conflicts fall into several of the abovementioned categories, it is useful to consider the variables that are likely to affect the implementation of transitional justice mechanisms, such as the role of the state, the characteristics of the main protagonists, regional and international dimensions, the applied level of violence, and its impact on the civilian population.

In the aftermath of mass atrocities, the scale of cases tends to prevent prosecution of individual cases, even if domestic courts are functioning, since courts and legal institutions may be perished, judges and legal professionals fled the state or disappeared, and/or the state apparatus has little or no legitimacy left. In these cases, there may here be a practical need for international criminal justice. Kerr (2017:127), maintains that intra-state wars present challenges that may not be as salient as in the aftermath of repression by an authoritarian regime as the nature and dynamics of the conflicting parties in intra-state conflicts are often messy, complex and shifting. It can be characterized by weak and diffuse organization or be relatively organized armed groups with a coordinated military strategy. Complex natures of conflict often complicate distinctions between combatants and non-combatants, and questions of responsibility, potentially creating methodological difficulties for mechanisms such as truth commissions when attempting to investigate patterns of violence. Another characteristic typical to complex intra-state conflicts, is that they tend to have a different balance of horizontal violence to vertical violence, with overlapping groups of perpetrators and victims, further complicated by past cycles of violence. In conflicts characterized as affected by horizontal violence, the violations tend to be more widespread and committed by all sides, by and against citizens, with perpetrators and victims overlapping opposed to or alongside the vertical violence committed by state authorities against its citizens. Duthie (2017:18) has remarked that horizontal violence can lead to particularly sharp social divisions, as perpetrators and victims in the aftermath of conflict may live as neighbors. Denney and Domingo (2017), argue that local justice processes can be appropriate in contexts of greater horizontal violence, because the objectives of such processes differ from national-level transitional justice by focusing on rebuilding trust and the social fabric between citizens at the community level, rather than between citizens and state

institutions³. However, in the aftermath of conflicts characterized by large-scale violence, local justice processes may be problematic or inadequate re acknowledgement, accountability, and reform. The direct violence may be ended, but positive peace not reached. Bell (2017), argues that every violent conflict has a “meta-conflict”, i.e. a conflict over what the conflict is about, where each conflicting party accepts or argues for a different set of solutions. Following this argument would mean that such competing narratives over the morality and legitimacy of actors and their actions may have serious effects and challenges for transitional justice.

Underlying social and economic structural issues involves contexts of gross discrimination, marginalization, and inequality, which also may be the drivers of conflict, facilitating human rights violations and generating challenges for responding to them (Duthie 2017:12). Widespread human rights violations highlight the importance of addressing the structural context to achieve the transitional justice’s objectives and positive peace. However, as Duthie (2017:12) notes, a vital danger for transformation processes is low levels of trust within society, which may result in transitional justice mechanisms to be perceived as targeting specific groups. Another major challenge in addressing the structural context is the danger of an implementation gap, which occurs when proposed measures go partly unimplemented.

The institutional context includes local, national, and formal institutions. At the level of formal, national-level institutions, constitutions can provide an important part of the context (Duthie 2017:14) as they may contain a framework for administering transitional justice. This entails that they may comprise enabling norms and mandate, but may also impose constraints. It is, thus, natural that constitutions created during transition will be affected by the nature of the transition. Collapsed, fragile and/or corrupt institutions often characterize transitions and, pose challenges to transitional justice processes which both shape and are shaped by them. Some of the questions that should be addressed in this context are the following: Is sufficient local infrastructure in place? Will the state establish a truth commission? Are domestic courts still functioning? Corrupt institutions can negatively affect transitional justice directly if, for instance, networks resist accountability processes in pursuance of protecting themselves, or indirectly, if the institution undermines the trust in public institutions that transitional justice mechanisms seek to foster (Duthie 2017:15). Waldorf (2017) maintains that domestic criminal

³ Local justice processes following such widespread violence have been done in for instance Northern Uganda and Sierra Leone and have involved several local and cultural practices with focus on reintegrating former combatants, especially former child soldiers, community involvement, and reconciliation (Duthie 2017:18).

trials may contribute to the rule of law by delegitimizing past violations, expressing norms, increasing the capacity of the justice sector, recognizing the rights of victims, and fostering trust in justice institutions. However, if measures, such as trials, are perceived to be selective or unfair it is unlikely that institutional trust will be achieved.

The context is often one of political rupture which brings a new configuration of forces that may challenge the old regime (Sandoval 2017). The past is bound up with the process of political settlement and negotiations. In this context, opportunities are created to transform the structures that permitted the atrocities to take place. Bell (2017:92) argues that justice measures are often part of a “tapestry of tradeoffs” made as part of an agreement on the new configuration of power. With political context comes both changes in and disagreement over power dynamics, significantly affecting the form and viability of addressing the past. Tradeoffs, in this context, are an integral element of transitional justice. Duthie (2017:12) notes that, transitional justice also comprises spaces in which justice and change can be advocated. Hence, when endeavoring transitional justice, it is important to consider the incentives for and interests of several actors, including the state, non-state armed groups, civil society, political parties, labor unions, victim’s groups, and religious actors, to name a few.

Moreover, the nature of the political settlement affects the political context, depending on the way in which the authoritarian regime ends. Be it through collapse or negotiation, and the balance of power that results, affect the political context. Did the conflict end through governmental collapse, negotiated agreement to hand over authority, through a peace accord or through military victory? When struggle for political change produced no unequivocal victor, negotiations often characterize the transition and the key point under negotiations is often the question of accountability. The resulting power balance is here a very important aspect to the political context. It controls the interrelationship of tradeoffs throughout negotiations and, in turn, shapes the way to address the past. Bell (2017:96) argues that for the conflict parties to agree to any compromise, they need to reach some sort of “meta-bargain” regarding the underlying causes to the conflict. It tends to be a partial bargain, by agreeing to disagree as to the nature of the state, but agreeing to create political institutions enabling them to govern together and continue to address their disagreements in a peaceful manner. This negotiation is essential as to how the past will be addressed. It may implement a form of separation between

the protagonists in different state or sub state formations⁴. In turn, this would render it problematic to create shared institutions across jurisdictions relevant to the conflict, including transitional justice mechanisms. On the other hand, the meta-bargain can result in power-sharing, continuing the political difficulty for actions and agreement to establish joint institutions for addressing the past, because the new settlement will depend on the protagonists at the heart of the conflict (Bell 2017:96-97). In such a context, attempts towards dealing with the past may pose a risk to destabilize the peace with its search for societal accounting of the committed violence. The potential to destabilize peace processes, the often limited power of victims, continuities with the previous government, and the differing interests of various actors affect transitional justice. Bell (2017:87), claims that each time the past surfaces, it provokes resistance, ignites debates, and mobilizes new constituencies around justice claims. Generally, it is considered to be crucial that civil society participates in peace processes, be it through NGOs or other organized representation, in order to balance the interests of parties who formed groups already during the violent conflict. However, victim constituencies are often themselves divided along the conflict lines and pose conflicting narratives and demands.

Bellal (2017) states that the fear of criminal prosecution may be among the factors asserting non-state armed groups to continue the violence, and that amnesties might often be the only way to bring them to the negotiating table. According to Bellal, it is important that amnesties are based on widespread consensus, accompanied by non-judicial measures. Opalo (2017) argues that political parties can serve as focal points around which all stakeholders, including the general public, can express their views. They may thus play an important role in shaping public opinion. This said, in practice, political parties emerging from conflicts or their aftermath, often underpin, rather than overcome, wartime cleavages (Duthie 2017:22). They often represent the political wing of former groups involved in the conflict and are inclined to radical positions. Thus, political parties can provide platforms for building political consensus that may be required for transitional justice to achieve its goals. But conversely, conflictual party politics can create incentives for political leaders to politicize the transitional justice process, by encouraging groups to approach transitional justice as collectives. This is a danger, particularly, when this is backed by ethnic groups.

⁴ As settlements in the Israel-Palestine conflict, and East Timor with Indonesia.

Finally, international actors and the nature and degree of the internationalization of the conflict are important factors within the context affecting transitional justice. Mass atrocities spilling beyond borders often provoke international intervention. In contrast, functional and fairly powerful states can more easily resist international intervention. International intervention in transitions affect the balance of power and should as such be considered part of the political bargaining over transitional justice. Bell (2017) suggests that international criminal law can be perceived as taking on a strategic instrumentalist role, used by actors to punish individuals considered to disrupt the transition and peace process⁵. The internationalization of the conflict and its aftermath are influenced by the types of sticks and carrots used by the external actors to pressure towards transitional justice. International actors often have the power to make the parties accept terms in exchange for political and financial support. The degree of internationalization will also determine whether international criminal processes are employed (Bell 2017:97).

To reach a conclusion on the impact of context on the two cases, this thesis engages in qualitative historical methodology and the use of synchronized comparative method. In chapter three and four, the context that transpired in South Africa and BiH will be empirically explored, followed by comparison and analysis of the contextual effect on the particular transitional justice processes in chapter five. This thesis is a “Small-N” study as it only examines two cases, relating them to the general theoretical framework of transitional justice and specifically the effect of context, provided by Duthie and Seils (2017) on the selection and implementation of transitional justice mechanisms as the main analytical approach. The qualitative approach with “thick description” is employed as each case is documented in considerable detail since “*this level of specificity is both feasible – given the limited number of cases- and integral to the analysis. In the context of examining differences in transitional justice processes, the small-N comparative case study approach is suited to examining different institutions, sectors, or communities, whether across countries or within a single country. The cases would be selected not only to reflect the institutional differences of interest but also to illustrate their impact in practice via meticulous examination of relevant historical processes*” (Backer 2009:54).

⁵ As with the ICC and members of the Lord’s Resistance Army in Uganda and President Omar Al-Bashir in Sudan; the Special Court for Sierra Leone and former Liberian President Charles Taylor and the Revolutionary United Front; and the ICTY and former Serbian president Milošević (Bell 2017: 90-91;98-99).

The thesis employs both a descriptive/empirical and normative inquiry into the field of transitional justice. This way, both the mechanisms and the effects of transitional justice are being addressed. Comparative case study was employed and a historical approach as a process of describing, analyzing and interpreting the case of South African and BiH. Thus, the thesis is an empirical comparative study and will be dealt with in a descriptive, normative, and analytical manner. Research for this thesis was done using multiple data pools, including primary and secondary sources like UN documents and the final report by the TRC, scholarly literature, as well as public opinion surveys.

Chapter two introduces the theoretical understanding of transitional justice and considers what mechanisms transitional justice may encompass. Moreover, the chapter offers a conceptual understanding of trials and tribunals as tools for retributive justice and truth commissions as a restorative justice tool, while also asking why they are established, what the objectives are, and advantages and disadvantages. Thus, the chapter introduces the theoretical approach of transitional justice and provides the conceptual tools I bring along in the contextual presentation of the cases and in the subsequent analysis comparing the cases.

Chapter three addresses the case of South Africa with a historical background and the path towards the establishment of the TRC. The chapter seeks to offer answers to why and how a truth commission was chosen, how it operated, and what the public perception and aftermath have been. With chapter four the focus shifts to BiH, also with a short historical background, followed by an overview of the ICTY and popular response. The chapter seeks to shed light on the establishment and choice of the ICTY and the context surrounding its work. There is thus an element of historical process tracing implemented in its own right, of the contextual climate in which the historical processes in the two cases transpired, to examine the causal mechanisms at work. The chapters are based on existing scholarly literature and public opinion surveys to describe the historical context. And on targeted aspects, I apply narrow reading of primary documents such as the final report of the TRC and UN documents to draw out details and aims of the mechanisms.

Chapter five applies comparative method to compare the contexts of the two cases, by utilizing the context aspects introduced in chapter one. There are two forms for comparative analysis, offered by John Stuart Mill (1843/1961:253-258), the method of agreement, where the cases under study differ in every aspect, except the outcome being studied. In other words, one seeks

to find a common factor in cases that are otherwise different that has resulted in the outcome they have in common. The other form is the method of difference, involving studying two cases similar in all respects except the outcome and one common factor. In other words, where the phenomenon that one seeks to explain only occurs in one case, while the cases otherwise are similar except the one factor which also is absent where the phenomenon does not occur. This enables us to maintain that the phenomenon can be attributed to this particular factor.

However, the formal characteristics formulated by Mill pose difficulties in practice. They only allow us to study the effect of *one* causal factor at a time. In other words, they enable us to find one cohesion- one decisive similarity and one decisive difference. Further, the rigid methods are not sensitive to multiple causations. In practice, it is impossible to find cases entirely similar or different but in one aspect. When comparing cases, there are often a combination of multiple factors providing conditions for a consequence to come into force. The two methods therefore only serve as a starting point for comparison. In this thesis, I compare and analyze in depth the contextual effect on the particular transitional justice processes, suggesting several differences and similarities, and outcomes resulting from several different conditions and their combinations in order to reflect on the meaning of context. I thus employ the method of agreement and method of difference combined, to draw conclusions on the relevance of context. The comparison will provide the key to understand, explain, and interpret the diverse historical outcomes and trajectories (Ragin 1987:6). With the contextual analysis in chapter five, the chapter seeks to address the questions why was restorative justice chosen in South Africa and retributive justice in BiH? Is restorative and retributive justice processes mutually exclusive? Should there have been additional mechanisms in addition to the TRC in South Africa and the ICTY in BiH?

2 CONCEPTUAL APPROACH

What is transitional justice and what mechanisms does it encompass? This chapter will dwell upon understanding the concept of transitional justice. Additionally, a conceptual understanding of trials and tribunals as tools of retributive justice and truth commissions as a restorative justice tool within transitional justice is provided. It will also discuss the perceived advantages and disadvantages of retributive and restorative justice. As the arguments presented draw upon theories connected to hypothetical contexts of expectations and outcomes, the conceptualizations do not take into consideration the influence conflicts' context may have on the choice and implementation of transitional justice mechanisms.

Mechanisms of transitional justice were developed as alternatives to existing national trials and represented a major institutional innovation of the twentieth century (David 2017:151). As noted in the introduction, the definition provided by the UNSC encompasses both judicial and non-judicial mechanisms in responding to past atrocities. However, when taking a historical glance to the time before the concept of transitional justice appeared, the prime response to injustices of war was essentially retributive in nature⁶. Justice in the aftermaths of violent conflicts alternated between punishment and/or reparation. In the 1980s and 1990s, this paradigm started to shift due to of different dynamics of regime change, different patterns of large-scale human rights violations and different power constellations after transitions (David 2017:152). One may thus understand the emergence and development of the field of transitional justice as a reaction to global developments, including the aftermath of World War II with large-scale reparation programs and a very limited number of war crime trials. Moreover, after transitions or returns to democracy such as in Southern Europe during the 1970s, Latin America in the 1980s, and in Asia, Central and Eastern Europe, and Africa in the 1990s⁷. In this historical shift of responses to injustices, an increasing international understanding emerged, voicing the need for transitional justice mechanisms and demanding alternative methods of justice (Freeman 2006:4-5; Herman et al. 2013:51). It was rarely possible to prosecute perpetrators of former regimes when former rulers remained politically or societal powerful after transition; official denials of atrocities; and the secretive form of modern repression with its reliance on

⁶ See Elster, J. (2004). *Closing the Books: Transitional Justice in Historical Perspective*. New York: Cambridge University Press. In his book, Elster traces transitional justice in its retributive form back to the transition from oligarchy in Athens in 411 B.C.

⁷ For a detailed account of the history of transitional justice, see Elster, J. (2004). *Closing the Books: Transitional Justice in Historical Perspective*. New York: Cambridge University Press.

surveillance, clandestine operations and secret police raised public demands for alternative measures such as acknowledgement and truth, that served to some degree as proxies for judicial justice and reparation (David 2017:152). The contexts of transitions differ. However, transitions have one thing in common, which led to the development of the field of transitional justice – namely the legacy of widespread repression and violence. In short, transitional justice developed as a response to contexts with a level of atrocities that were considered to be not sufficiently addressed through the existing tools of justice. Moreover, the emergence of transitional justice revived traditional notions of justice such as confession, apology, forgiveness, healing, reconciliation, and truth (David 2017:152). One of the mechanisms that emerged in this respect was truth commissions which will be discussed in the sub-chapter on restorative justice.

2.1 THE MECHANISMS IN TRANSITIONAL JUSTICE

The issues that transitional justice mechanisms seek to address vary. In general, they include human rights violations, such as extrajudicial execution, torture, forced labor or enslavement, war crimes, disappearances, crimes against humanity, and may have been committed by private persons, militias, non-state armed groups, corporations, or state security forces (Herman et al. 2013:52). The atrocities may be random or targeted against ethnic groups or political affiliations.

As Mani (2002:4) argues, if the injustices of conflicts are not redressed and addressed, *“it is unlikely that people will place their trust in the new peaceful dispensation and participate in efforts to build peace”*. For people and societies to move on, the past and the wounds of survivors need to heal. And for this healing to take place, the past needs to be addressed and officially acknowledged. The same accounts for the underlying causes and grievances, in order to avoid resentment building up and possibly manifesting itself in future violence. How can this be done? What options do states in transition have? There is no blueprint for transitional justice, no ultimate guidelines, and the body of empirical evidence that would substantiate large policy aspirations remains modest. This said, the existing overview of empirical findings allows to draw tentative conclusions regarding the importance of transitional justice. Corroborating demands for transitional justice before, during and after transition is significant in completing successful transitions as has been shown in surveys. These include among others, surveys conducted after the regime change in South Africa (Gibson & Gouws 2003; Gibson 2004a; 2004b), in Zimbabwe (Bratton 2011) and decades after the civil war in Spain (Aguilar, Balcells,

& Cebolla-Boado 2011). Research has shown that reconciliatory measures, such as confession and apology, have also positive effects (Gibson 2002; David & Choi 2006; Blatz et al. 2009; David 2016; 2017), including nonpolitical settings (Exline & Baumeister 2000). Moreover, experimental evidence from a handful of culturally diverse states supports the potential of transitional justice mechanisms in contributing to a sense of justice and overcoming detrimental relations. There is experimental evidence on the effect of criminal trials, dismissals, confession, apologies and financial compensation on outcomes considered important in divided societies dealing with their pasts (Gibson 2002; David 2011;2017). And findings concluding that delivering truth and providing financial reparations can offset negative effects of amnesties (Backer 2010; Gibson & Gouws 1999;2003). This said, the effects of transitional justice measures are not always tangible. Intangible outcomes may, for instance, be personal empowerment and catharsis, or in contrast, the feeling of re-victimization after giving testimony. In this way, all political acts such as speeches, laws, and policies carry symbolic meaning to people as they convey messages and signal certain attitudes concerning the past, in turn communicating justice or injustice.

The aims of the approaches vary depending on the context in which they are implemented, and a state may have several objectives in addressing past abuses, but in general and ideally, the goals are to determine the truth through the establishment of a record of crimes that affected the society, investigate past crimes, penalize those responsible, consider providing reparations to victims, and prevent future abuses. In short, to recognize the dignity of individuals, redress and acknowledge gross human rights violations and prevent them from happening again (ICTJ 2017). Nevertheless, the outcomes of transitional justice depend on the context and implementation.

Let us now turn to the mechanisms themselves. Transitional justice mechanisms take several forms and the approaches used may, as noted, be judicial or non-judicial in nature and with differing levels of international involvement. Traditionally, the mechanisms of transitional justice have been divided into the following four types: Criminal prosecutions through international tribunals, domestic courts or ad hoc courts; Rule of Law and Security Sector reforms; Fact-finding bodies; and Reparations in the form of collective or individual, financial, symbolic or material (ICTJ 2017). It is important to keep in mind that the different methods should not be considered as alternatives for one another as they at times do overlap. There is no best way, no single recipe for post-conflict rehabilitation measures, as they should be tailor-

made and context-specific. While the question of how to deal with the legacy of violence is an unavoidable policy issue when in transition, there is disagreement about the merits and perils of the different mechanisms. From a general perspective, the transitional justice mechanisms can be divided into retributive and restorative justice, again with, sometimes blurred boundaries between the two. Nevertheless, this distinction makes it easier to understand the different forms of mechanisms that may be applied as tools for transitional justice.

2.2 RETRIBUTIVE JUSTICE

The mechanisms of retributive justice are based on prosecution and may take the form of institutional mechanisms. These include foreign courts, national courts, international tribunals, special or Ad hoc tribunals, and hybrid domestic tribunals employing a combination of domestic and international justice, with a combination of standards and personnel from both systems (Herman et al. 2013:52). One may argue that retributive justice assesses retribution as a moral imperative for the evolving of a just peace in conflicts that have been characterized by gross violations of human rights and mass atrocities (Aggestam and Björkdahl 2013:3). Thus, the understanding in retributive approaches is deontological, as it considers the prosecution of perpetrators as a moral duty. It may also be viewed as utilitarian as it is assumed that punishment and prosecution of perpetrators is preventive and deterrent for the future (Skaar & Andreassen 1998:19; Mani 2002:34). This would, in turn, strengthen the rule of law and undermine the culture of lawlessness and thus mark a distinction between the old and the new regime. One might argue that this could, in turn, strengthen the trust in the legal apparatus. Retributive justice further emphasizes the need to hold perpetrators accountable for their crimes (Clark 2008:340). In this view, states are bound by an international duty to prosecute abuses under prior regimes, while amnesties are considered illegitimate, and where states are unwilling or unable to prosecute, international institutions should be set up to oversee prosecutions. Moreover, as Correa (1992:1457) argues, selective prosecution may bolster reconciliation and be an effective method in eliminating an organization that systematically violated human rights.

International and local criminal trials and tribunals originated as an alternative when domestic prosecutions were not possible due to legal and political constraints. Some scholars view international criminal trials (ICTs) as a path to peace (Akhavan 1998), while others do not observe any impact of domestic and international trials on human rights and peace (Meernik 2005; Meernik, Nichols & King 2010), and yet others consider criminal trials to have a deterrent effect (Akhavan 2001; Sikkink 2011), or no evidence of such an effect (Ku & Nzelibe 2006;

Cronin-Furman 2013). Some consider trials as a step towards a universal jurisdiction (Schabas 2011), while others consider ICTs as geographically and culturally detached from their local contexts (Stover & Weinstein 2004; Wu 2013), or as instruments of western domination and racism (Hagan 2003; Corkalo, Ajdukovic, Weinstein, Stover, Djipa & Biro 2004). Another concern is that international tribunals lack democratic authorization on the part of the people who are subject to them. Other disadvantages with international trials include, for instance, the geographical distance from its victims, as the court hearings and prosecutions might take place too far away from the concerned societies. Also, the disjuncture between the resources spent on trials in relation to the investment in societal reconstruction is of concern from a distant point of view. Finally, the often comparatively lenient sentences handed down by international institutions in relation to domestic trials can exacerbate feelings of injustice. In this sense, one might argue that where feasible, domestic trials are better placed as they might increase local ownership and the involvement of concerned communities. Domestic trials may also, where the judicial system was compromised by the conflict or previous regime, rebuild and restore credibility in the legal institutions and, thereby, build the credibility of the new state apparatus. However, domestic trials *due* to their proximity to the conflict and the political context can, on the other hand, further undermine credibility and exacerbate divisions in society if carried out in a politicized manner. When taking in use domestic courts, one might note that the prosecutors must overcome a legacy of official immunity, as the perception that prosecutions are political retributions may create turmoil.

Other disadvantages of retributive justice during transitions in general is that victims' call for retributive justice and prosecutions may hamper reconciliation, result in further divides in society, and cause renewed unrest and relapses into conflict. Moreover, the political situation may be fragile so that trials may destabilize the peace agreement or obstruct the transition process by, for instance, perpetrators fearing prosecution to violently oppose the successor regime (Walsh 1996; Skaar & Andreassen 1998:20)⁸. New regimes may avoid measures of retributive justice to avoid putting their positions at risk by angering the outgoing regime and its supporters, and avoid violence because of perceived persecution. On the other hand, this may also be a reality if *nothing* is done.

⁸ Argentina may here serve as an example. After the judicial process against the military junta had started in 1984, there was three attempts on military uprisings during a short period (Skaar & Andreassen 1998:19-20).

Civil society expects change during transitions, during which accountability is an important underpinning. If not done, this, too, may threaten the stability and send a signal to perpetrators that impunity reigns. In practice, however, Hayner (2011:8) argues that there has been little success with many of the attempts to prosecute and punish perpetrators for their actions under a prior regime. Political transitions may include political compromise with some sort of immunity from prosecution and even the continuance in power or incorporation of perpetrators into the new government. Where there are trials, they are often few and perpetrators may remain unpunished for their actions. Moreover, the judiciary may be in disarray with corrupt or politically compromised judges, or in lack of resources or expertise for often vast numbers of atrocities and perpetrators (Hayner 2011:8-9).

Further, many connect retributive justice with vengeance. Mobekk (2005:277) claims that this can be avoided if the processes and trials are conducted properly. In this sense, a judicial process may reduce vigilante justice, vengeance, and violence instead of heightening the chances for it. Aggestam and Björkdahl (2013) argue that addressing past atrocities and holding perpetrators accountable for crimes and violence committed is considered critical for any just and durable peace settlement. They point out that even if retributive justice has its focus on the perpetrators, it is considered essential for victims that justice is done in the form of trials which may satisfy demands for retribution, and thereby curtailing desires for revenge by institutionalizing a retributive response. This in turn, they argue, minimizes the risk of relapse into conflict (Minow 1998; Aggestam & Björkdahl 2013:3-4). However, punishments may have dual effects in the sense that it both may reduce desires for revenge, but may also increase it in cases of lenient sentences⁹. Another concern is that retributive justice focuses on the perpetrator and may lead to re-victimization, adding to the suffering of the victims and focus on individual guilt and not patterns of widespread abuse. Mobekk (2005:279-280) however, argues that truth telling, both in the form of trials and truth commissions, has its advantages. Telling the truth to a body of authority may, in this regard, change the victim's own situation and punish the perpetrator. Retributive justice is focused on the perpetrator, but this may also be what the victims want. Courts are not able to deal with the traumas experienced by individuals, but they may be vehicles to reduce fear and contribute to the feeling of justice being done by punishing the perpetrators and, thus, contributing to reconciliation. But this depends on how the judicial

⁹ The latter was the case regarding former political prisoners in the Czech Republic. David and Choi (2009) suspected that due to generally lenient punishments for communist crimes in the Czech Republic, punishment increased desires for retribution among some victims (David & Choi 2009:182).

settlement is done. Is the process generally perceived as just? Are all assumed perpetrators punished? Are perpetrators from all sides punished?

One may argue that retributive justice can contribute to reconciliation by seeing that justice is done by establishing the truth about committed crimes and by individualizing guilt (Clark 2008:332). This may, however, be problematic as “justice” is difficult to define. There is no universal understanding of justice and it is important to keep in mind that the meaning of justice has different meanings for different people. The meaning of justice is a broad category and goes beyond the notion of legal justice. It incorporates individual, political and social aspects for victims. Thus, the broad understanding of justice has been described as

“(...) an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions, and while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant” (UNSC 2004, para. 7).

This understanding of justice extends beyond retributive justice and encompasses a theory of restorative justice as well. Thus, not everyone considers justice to be the same thing. Individualization of guilt through criminal trials differentiates between perpetrators and innocent bystanders, underlining that individual perpetrators and not entire groups as perpetrators need to be held accountable (Kritz 1996; Valji 2009). However, this is very difficult in practice. A country may have thousands of perpetrators, and in most cases, it would be impossible to hold trials of this volume as it would immobilize the judicial system. No tribunal can prosecute absolutely everyone who is assumed to have committed illegal acts during the conflict. As Bass (2000:300) puts it, *“tribunal justice is inevitably symbolic: a few war criminals stand for a much larger group of guilty individuals”*. Thus, one can view this individualization of justice as a *de facto* way of pardoning the guilty. When only a few are punished, the broader extent of guilt remains unknown. This may result in entire groups viewing each other as collectively guilty, in turn having the exact opposite effect of what the argument of individualization started out as. Moreover, this means that there will, basically, always remain a large “impunity gap” in societies where mass violence or a large-scale horizontal conflict took place. This is yet another argument in favor of establishing several complementary initiatives when addressing the past.

To sum up, it is natural for societies to expect change and consequences for committed crimes. Retributive approaches are necessary for individualizing guilt if the courts can prosecute all perpetrators from all sides, and it may be an effective deterrence against future abuses. Addressing the past with trials may strengthen the trust in state- and legal apparatus. If possible, domestic trials are ideal due to their proximity to the society in question and to support the feeling of local ownership, if the process is not politicized. The dangers are that it may cause renewed unrest and violence in a polarized society. Retributive mechanisms may satisfy desires for revenge by institutionalizing a retributive response and individualization of guilt is necessary to avoid entire groups in society blaming one another. However, this is difficult when dealing with mass atrocities.

2.3 RESTORATIVE JUSTICE

While the term “restorative justice” is used in different settings, in this thesis, the definition provided by Menkel-Meadow is taken as the point of reference;

“[Restorative Justice is] a social practice that provides a structured and participatory environment and space to communicate, explain, acknowledge, apologize, make restitution and re-compensate. Most importantly, it is a collective process that intersubjectively determines how to deal with the past as well as the future. As such it promotes community building, legitimacy and the development of new social, political and legal norms” (Menkel-Meadow 2007:163-165).

Hence, restorative forms of transitional justice, assess crime as a violation of people’s relationships. The search for justice, in this sense, consequently involves the victims, perpetrators, and society in its focus on rebuilding trust among affected people and, thereby, restoring their relationships. The underlying assumption is that this is achieved through direct dialogue and recognition, which, in turn, may transform perceptions of the past and the future and enhance moral responsibility and empathy through mutual reciprocity (Aggestam 2013:38-39). Accordingly, the focus is on the victims and the perpetrators. The transitional process is considered to be a collective process that seeks to promote community building and the development of new social, political and legal norms. From the perspective of restorative justice, there are four pillars in focus: reconciliation, reparation, reintegration and restoration.

Restorative justice is, hence, rather an idea and philosophy than process. Truth commissions are probably the most concrete mechanism that fall under restorative justice, which the remainder of the current chapter will focus on.

Truth commissions originate in the 1980-90s as a response to cases of enforced disappearances and other gross human rights violations committed during military dictatorships in Latin America. It was also a path chosen as efforts of prosecution were stymied by the continuing power held by former military regimes and the threat they posed to nascent democracies. Since the 1990s, the establishment of truth commissions has been considered in virtually every transitional context (Valji 2009; Bisset 2012:27; David 2017:155-156).

While there is no single universal definition of truth commissions, the Thesis largely builds on the definition suggested by Hayner (2002) who is considered to be the leading authority in this field. She defines truth commissions as bodies that are focused on assessing the past gruesome events, set up to investigate a pattern of abuses over a period rather than examining a specific event, are temporary bodies in operation for about six months to two years with the intention to conclude with a public report. Last, but not least, truth commissions are officially sanctioned by the incumbent government and empowered by the state (and sometimes also by the armed opposition, as in a peace accord)¹⁰. Other elements characterizing truth commissions are that they often are created as a central component during political or post-conflict transition, to investigate politically intentioned or targeted widespread violations and abuses (Hayner 2002:14;17). An important remark is that although this definition of truth commissions only refers to bodies established by the state, the role of civil society during transition is also critical. For instance, unofficial commissions can play a key role in giving victims a voice and contributing to accountability and truth¹¹; including in addressing each country's different historical, cultural and political context.

Why are truth commissions established? The basic tenets highlighted by Hayner (2002:24-31, 2011:20-23) and the Office of The United Nations High Commissioner for Human Rights (OHCHR 2006), sums up the main objectives of truth commissions as follows; (i) to discover, clarify and formally acknowledge past abuses; (ii) to address the needs of victims; (iii) to contribute to justice and accountability/ to “counter impunity” and advance individual accountability; (iv) to outline institutional responsibilities and recommend reforms and; (v) to

¹⁰ “(...) bodies that share the following characteristics: (1) truth commissions focus on the past; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a truth commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; and (4) these commissions are officially sanctioned, authorized, or empowered by the state (and sometimes also by the armed opposition, as in a peace accord)” (Hayner 2002:14).

¹¹A key example is Guatemala's Recovery of Historical Memory Project (REMHI) which was set up by the Catholic Church prior to the establishment of the official Commission for Historical Clarification (CEH), and in response to the CEH's mandate which denied it from naming names. REMHI conducted 7000 victim interviews and produced a comprehensive 4-volume report which served as a valuable foundation for the CEH's own investigations (Valji 2009).

promote reconciliation and reduce tensions resulting from past violence. In the aftermath of conflicts, questions about what happened, and the fate of victims often remain unanswered. Political and legal realities may stand in the way for criminal justice as a response to periods of systematic human rights abuses. In such contexts, especially if domestic institutions fail to address the topic adequately, truth commissions can play an important role by providing acknowledgement and accountability. If the truth commission is properly established and effectively run, it can be a tool to start reform processes, reparations to victims, acknowledge the crimes committed, document human rights violations and provide disclosure and information regarding the disappeared to their families, thus addressing the needs of victims. Other advantages of truth commissions have been argued to be that they can provide a measure of impartial, historical clarification to atone for false accounts of the past and give a voice to the voiceless victims (Mobekk 2005:267). By providing a platform for victims to tell their experiences, truth commissions may contribute to formal acknowledgement of grievances (Minow 1998:58). They may also be of practical help, for instance where family members of disappeared victims seek clarity on the legal status of the disappeared, or with civil matters such as access to bank accounts, or processing a will, which cannot be settled in cases where there is no death certificate¹².

Moreover, there is a right to know the truth, which has been affirmed by regional courts, treaty bodies, and domestic and international tribunals. Victims and survivors have the right to know the truth related to the events and about the fates of enforced disappearances. These rights are enshrined in the international convention of Declaration on the Protection of All Persons from Enforced Disappearance (1992)¹³, The Basic Principles and Guidelines on the Right to a Remedy and Reparations (2005)¹⁴, and the international convention on Protection of All

¹² Such practical issues often add to the suffering of the ones left behind. In Argentina, the state created a new legal status of “forcibly disappeared”, in practice equivalent to a death certificate. This allowed the processing of civil matters and was applied to all those documented by the truth commission (Hayner 2011:22).

¹³ Maintaining that, “*the right to a prompt and effective remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty, and/or identifying the authority ordering or carrying out the deprivation of liberty*”. “*(...) In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found*”. “*Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned*” (UN 1992: Art. 9, 10).

¹⁴ Stating states obligation for “*Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities*”. “*Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions*

Persons from Enforced Disappearances (2006)¹⁵. However, but must an obligation to investigate the truth of the past be imposed at all costs? Can this lead to morally problematic outcomes and consequences? One might argue that there are social and historical conditions in which such work “stirs up” resentment and conflicts within a society which had been thought overcome. Is this a legitimate concern? Or is our desire for the Truth so important that it necessarily and always outweighs these consequentialist worries regarding truth commissions’ negative consequences? Although few, there are cases where there is no public interest in digging into the past¹⁶. In cases where there is broad consensus to such a path, should we accept a policy of reconciliation through silence and forgetting? Hayner (1996:176-177) questions whether the right to truth should be an unbending obligation in cases where the victims are not interested or ready to re-enter the atrocities. She refers to several reasons to why victims sometimes do not wish to focus on the past, including the fear of sparking conflicts anew or that support systems may not yet be in place such as mechanisms to deal with re-awakened trauma. Nevertheless, it is not easy to determine where a truth commission should be prescribed. Often, societies are split between groups wanting the truth revealed, while others do not. Hayner (1996:177) also argues that it is in such circumstances where denial of the past is most likely to result in conflict. Here, yet another question arises: whose truth? In societies emerging from complex conflicts with several fractions, there are often several “truths” and narratives. In such cases, which truth should be sought?

The limitations of truth commissions’ lie in the mandates they are given and the political will of the government. The mandates of truth commissions set its subject matter, length of operation, its primary objectives and investigatory powers, and geographic scope (Bisset 2012:29). Some are in their mandates given strong search and seizure powers, can recommend prosecution or amnesty, name individual perpetrators, hold public hearings and/or are given subpoena powers. Others may not compel witnesses to testify, and must, therefore, conduct their investigations in secret. In their cases, the only release of information is through their final

pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations” (UN 2005: pt. 22B, C; 24).

¹⁵ Maintaining that “states Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains”. “(...) each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to (...) information”. “(...) each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains” (UN 2006: Art. 15;18;24).

¹⁶ This has for instance, been the case in Mozambique, where there has been broad agreement that digging into the past, might only ruin what reconciliation and peace achieved (Hayner 1996:176).

report which often suggests recommendations for policy changes and further investigation. In general, truth commissions do not have the power to punish in a legal sense, nor to institute reforms or make policy changes. Some truth commissions investigate acts by the armed opposition or government forces, while others are limited to investigate specific abuses such as disappearances. Mandates also limit their duration, while the scope of investigation is often quite vast, spanning at times several decades related to thousands of individuals making it virtually impossible to ensure that all sources of information are investigated. Further, mandates which incorporate amnesties, bear the danger of allowing for perpetrators to immediately walk free after testifying, while the victims are left behind and waiting for reparations (Mobekk 2005:268). Consequently, the risk of dissatisfaction is inherent to this approach. If, on the other hand, amnesties are not incorporated in the mandate, the findings may lead to criminal prosecutions. Notwithstanding, truth commissions seldom lead to trials¹⁷.

It is important to keep in mind that truth commissions themselves do not have the power to institute reforms or make policy changes. Such implementations depend on the political will and interest of the government. When responding to past atrocities, a state may have diverse motives, such as to punish perpetrators, pay respect to victims, repair or address damages, reform institutions as a preventive approach, or promote reconciliation and healing. It may also be considered the best tool at hand in cases where an entrenched amnesty law ousts the jurisdiction of courts to try the perpetrators of the atrocities¹⁸. Conversely, a successor government may also choose to establish a truth commission to highlight its concern for human rights and show their democratic bona fides to gain the favor of the international community, or in response to pressure from the international community (Freeman 2006:37; Hayner 2011:8; David 2017:155). Further, it may be to control the investigation by, for instance, appointing commissioners, which would not be too critical, or to voice their own narrative for political gains. A commission may be established for the government to effectively “outsource” the responsibility to a third party, giving the government “a break”, in which any unsatisfying results would be attributable to the commission only. A truth commission may also be set up as a less “threatening” method, due to their limited power, than trials and less expensive than compensation (Freeman 2006:37). Since truth commissions are much less politically sensitive

¹⁷ An example would be El Salvador where five days after the final report of the truth commission was published, full amnesties were given to the perpetrators.

¹⁸ An example would be Chile, where the Supreme Court systematically blocked the attempt by Aylwin - the president after Pinochet- from investigating crimes, which led him to create a truth commission that documented three thousand human rights violations and recommended extensive reparations (Elster 2004:64-65).

than trials, they do not pose a direct threat to the concerned perpetrators, often resulting in truth commissions being set up by new governments as the only instance to deal with the past (Mobekk 2005:270). It is often considered the least disruptive process and body of which the recommendations can be ignored. When this is the case, disillusionment ensues¹⁹, and disillusionment may be exacerbated by a lack of media attention (Mobekk 2005:269-270). Nevertheless, such recommendations are useful as they provide roadmaps for change and create pressure points from which civil society and the international community may push for reforms. They may inspire activism in civil society by triggering creations of victims' organizations, promote public debate, and civil society mobilization around its findings and recommendations. Related to this, Bakiner (2016) has pointed out that the pressure in the aftermath of truth commissions have resulted in delayed adoptions of its recommendations into policy where they were at first ignored.

In sum, the advantages, when established with the necessary political will, is that truth commissions can hold perpetrators accountable, facilitate acknowledgement for victims, shed light on the role of bystanders and beneficiaries, morally sanction the violations, and provide recommendations for other peacebuilding activities. Further, they move beyond the narrow focus on criminal culpability for past violations to also examine the moral dimensions. The disadvantages are that they may be established to avoid prosecutions, may entrench impunity, discredit a political grouping, or be held hostage to the balance of power and political manipulations as they are susceptible to the broader political context²⁰, and the recommendations made by them may, and are often, ignored. Truth commissions are not implementing bodies, hence, it is not enough to only establish them, but the governmental authorities must turn the commission's recommendations into action and take their findings into account politically.

This chapter provided the arguments concerning the role of retributive and restorative approaches in advancing the political and moral goals of conflict transition. The conceptualizations do not take into consideration the influence of the conflicts' context. These will be traced by studying the South African and BiH experience in the next two chapters.

¹⁹ This was the case in Haiti, when all the recommendations by the truth commission were ignored as it was deemed that the process on its own was sufficient (Mobekk 2005:269).

²⁰ Such as the commission set up in the Democratic Republic of Congo which did not hear a single case from victims and its commissioners included representatives of the warring parties responsible for atrocities (Valji 2009).

3 SOUTH AFRICA

South African political history is permeated with direct- and structural violence through the state's repressive legislation until 1994. This chapter offers a brief introduction to South Africa's intra-state violent past and its transition from apartheid to a democracy in 1994. It will address the political and historical conditions that induced South Africa to create a truth commission as a transitional justice tool. The core questions of this chapter are why and how did South Africa choose to address its past through a truth commission, and how was it perceived by society?

The combination of international sanctions and boycotts isolating South Africa together with a growing resistance led by the African National Congress (ANC), forced the apartheid regime that ruled the country between 1948 and 1994 to negotiate a transition to an inclusive understanding of democracy. A lasting solution called for the accommodation of both sides in the new order. The negotiated settlement was a "tapestry of tradeoffs" characterized by the power balance of the apartheid regime still in power. The TRC was a compromise in a fragile political context, securing that all parties would be treated equally by its investigations and its power to grant individual amnesties, while revealing and acknowledging the past. The TRC had strong powers of investigation and was mandated to investigate human rights violations between 1960 and 1994 to establish a complete picture as possible of the violations. However, as it granted individual amnesties, while only having the power to recommend financial reparations, there was an imbalance when the government fell short of and was slow in implementing their recommendations, resulting in frustration among victims.

The TRC was one of several mechanisms set up to deal with the issues that had risen in the balance between settling the past and building a new society. The constitution had a chapter on institutions to protect democracy where the new parliament was to appoint commissions for human rights, gender equality, ombudsman and Auditor General. All of which had great judicial powers and independence from the state powers. There was also set up a commission regarding forced resettlement and to compensate its victims (Holtedahl & Tjønneland 1998:179). In 1994, the new government passed a limited land reform to resolve through mediation the land claims of those forcibly removed in 1913 as part of the state's land use policy. Moreover, the 1996 Constitution enshrined economic rights for all citizens, including the rights to housing, health

care, and education. The following year, the government enacted a series of laws to implement these rights and beginning in 2001, social service spending increased (Fletcher et al. 2009:184). However, the remainder of this chapter will focus on the TRC and address how it commenced and on how it was justified and legitimized.

3.1 APARTHEID

The systematic state-sponsored racial discrimination defined the underlying conflict in South Africa. This system was deeply rooted in the colonial model of governance and, for centuries, the distribution of political and economic power in South Africa manifested along racial lines²¹. When the National Party (NP) in 1948 assumed power, these general trends were put into system in a more rule-based and formal manner, resulting in the institutionalized racial segregation known as apartheid (Christie 2000:10-11). Apartheid permeated all sectors of social, political and economic life, enabling the white minority to monopolize political and economic power and to relegate the black majority to a subordinated and politically powerless position. Sustaining the system involved political violence and state terror to regulate race and preserve racial “purity” and the hierarchies that upheld white power and privilege (Chapman & van der Merwe 2008:5; Posel 2011).

The structural violence in South Africa was immense. The majority of South Africans were denied their fundamental rights, including the right to vote, appropriate education, satisfactory housing, and accessible health care. Organizations and individuals opposing the state were banned and banished. Some 16.5 million were criminalized and harassed during 70 years under the pass laws²², 4 million were forcibly removed from homes and land, and 300 apartheid laws were created to control and disadvantage blacks from the cradle to the grave (Christie 2000:13)²³. Further, it is estimated that as many as 200,000 were arrested between 1960 and 1992, many of whom were tortured while in detention, and over 80,000 opponents of apartheid

²¹ For instance, the Native Land Act implemented in 1913, reallocated land to the white minority, leaving 7% of the land to the black population. The Act was to bring with it segregation forcing away African farmers from their land, resulting in the creation of masses of unemployed workers now available as cheap labor for the mining industry (Christie 2000:12).

²² A form of internal passport system to segregate the South African society, severely limiting the movements of non-whites.

²³ Some of the worst crimes against humanity were the implementation of the Prohibition of Mixed Marriages Act of 1949 which made marriage between whites and people of other colors illegal; The Population Registration Act of 1950 which classified people according to race on a national register; the Group Areas Act of 1950 allowing the government to implement physical separation between races with the consequence of the government forcibly relocating primarily blacks by deporting them to “homelands” or native reserves and implementing pass laws to control peoples movement; the Bantu Authorities Act of 1951 provided for the establishment of separate rural areas called Bantustans where most Africans were to live according to their tribal identity; the Separate Amenities Act of 1953 mandated the reservation of separate and unequal buildings, conveniences, and services for each racial group; and the Native Resettlement Act of 1956 made sure blacks were removed from areas too close to the white areas (Christie 2000:20).

were detained without trial between 1960 and 1990, including ca 10,000 women and at least 15,000 children (TRC Report 1998 vol. 2:187; Christie 2000:21; Chapman & van der Merwe 2008:6). The violence was, what Posel (2011:345-346) calls “an open secret” - it was both secret and widely known with the understanding that to enforce white supremacy, coercive tactics were necessary. At the same time, it should be discreet, albeit with sporadic, frequent bursts of state brutality as both a reassurance for its supporters and a deterrent for its opponents. Thus, the state-led violence was never official, but its effect was indeed tangible.

The system of apartheid sparked an immense internal resistance met with police brutality, administrative detention, torture, and limitations on freedom of expression. Soon, each act of repression by the state gave rise to a reciprocal act of resistance. The ANC, formed in 1912 to fight against the Native Land Act, became the most active in the growing resistance during the 1950s against apartheid. The movement organized strikes, demonstrations and civil disobedience, met with further mass arrests, leading to greater popular support for the ANC in the fight against apartheid²⁴ (Davenport & Saunders 2000:383-385). Among the many demonstrations, the demonstration in Sharpeville March 1960 turned violent when police killed 69 and wounded 180 of the demonstrators. The Sharpeville-massacre was a turning point in the fight against apartheid. Together with the subsequent banning of their organizations, arrests and detentions forced the ANC underground, forming a militant army in 1961, Umkhonto weSizwe - the spear of the nation, led by Nelson Mandela. The massacre had also strengthened international opposition towards the system (Beck 2000:143-144; Davenport & Saunders 2000:413-420).

The architects of apartheid began to see power and legitimacy slipping away from them during the 1980s. The economy was falling apart due to strikes²⁵ organized by an increasingly militant black labor movement, boycotts and international economic sanctions. Many townships had become ungovernable “war zones” to the degree where officials of the regime would only enter in armored vehicles (Christie 2000:16-17). After Frederik Willem de Klerk took power in 1989, he canceled the state of emergency, lifted the ban of political parties and released political prisoners, including Mandela (Lodge 2011:481; Clark & Worger 2016:118-119).

²⁴ The response by the government was to implement the Suppression of Communism Act in 1950, meant to hinder the spreading of communism, but so wide in nature, it allowed the state to react towards anyone who they considered a threat (Davenport & Saunders 2000:384-385).

²⁵ For a detailed overview of strikes and rebellions against the apartheid regime, see Lodge, T. (2011) “Resistance and Reform, 1973-1994”. In Ross, R., Mager, A.K. & B. Nasson (eds.), *The Cambridge History of South Africa Volume 2 1885-1994* (p.409-491). New York: Cambridge University Press.

The power balance also favored the liberation movements, with the NP being politically weak at the social level, and the ANC well-positioned to use its networks, support and mobilize people in resistance. In the late 1980s and early 1990s, the ANC gained support of the overwhelming majority which mobilized to defy the apartheid regime. The conflict had in a sense become internationalized as it had sparked reactions of sanctions and boycotts. This effective international campaign, together with the political and social rupture, left South Africa in isolation, forcing the regime to abandon the project of apartheid. The only hope at this point was some sort of peaceful negotiation between the government, civil society and political groups, namely the ANC.

3.2 TOWARDS TRANSITION

The transition towards democracy and the negotiations at its center was a difficult process, characterized by conflicts and continued violence²⁶. The continuation of political violence after 1990 also helped to prompt the willingness to compromise between the main protagonists; the government and the ANC (Lodge 2011:481). South Africa's past was bound up with the process of political settlement and negotiations towards the end of apartheid. The two sides realized that a lasting solution called for the accommodation of both sides in the new order. In the early stages of pre-negotiations, guarantees against conviction had to be given to exiles to return and participate in the talks. Moreover, political prisoners had to be released to participate (Bell 2017:89). Preparing for these releases, the state had to deal with criteria of what constituted a political offender and thus, these negotiations began to tell a story of the nature of the conflict. This created a pathway dependency for how the past would be dealt with as the process unfolded. In this way, it also started discussions in society with for instance the government pursuing to provide amnesties to human rights violators and the resistance by the ANC and its supporters. In agreement with the National Peace Accord, which tried to create a climate for talks, signed by forty civil society parties, the government agreed to set up the "Goldstone Commission" - a Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation to investigate political violence, thus stabilizing the society during the talks (Bell 2017:89). The investigation also placed focus on questions of state accountability, reinforcing pressure to deal with the past. Also the ANC commenced investigations into its own abuses

²⁶ Between 1990 and 1994, over 14,000 had been killed. For a more detailed account of the violence during the 1990s up until the elections, see Clark & Worger 2016.

(ANC 1992; TRC 1998:vol.1,ch.1:10), showcasing their goodwill to determine internal potential human rights abuses.

The abovementioned initiatives shaped the understanding on how the aspects of amnesty and accountability could be taken into account in the transition ahead. The decision on how to address the past was also affected by the way the state transformation took place. The negotiations were a “tapestry of tradeoffs” between the national government, led by the NP, the ANC, civil society and the resulting power imbalance. NP leaders and other powerful white-dominated institutions, e.g. the security forces, made amnesty a nonnegotiable core of their demands (Gibson 2002:541). The compromise was an interim constitution, named “National Unity and Reconciliation”, adopted in 1993, outlining the principles by which the new democracy was to be organized and to guide the process of dealing with the past. The constitution was considered a historical bridge between the conflictual past and a future based on peaceful coexistence and respect for human rights and development for all, independent of race, gender, class or belief²⁷ (Holtedahl & Tjønneland 1998:177-178; Eriksen 2016:137-141). In April 1994, the first comprehensive and free election took place and Mandela was sworn in as the country’s first democratically elected president²⁸.

In the public debate on how to address the past, the victims of apartheid, in general, expressed their wish for accountability and acknowledgement of the human rights violations of apartheid. Victims also expressed desires for responsibility and reparations, as well as to know the fates of the disappeared, while some yearned for retribution (Christie 2000:13; van der Merwe 2008). The first call for a truth commission came in 1992 from Professor Kader Asmal, an ANC member²⁹.

²⁷ “This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past” (Constitution of the Republic of South Africa Act No. 200 of 1993).

²⁸ Approximately 91% of the registered voters cast their votes and the ANC won with 62.6% of the votes (Clark & Worger 2016:128).

²⁹ Asmal’s call for a commission became a proposal by the ANC following an investigation of accusations that the ANC-in-exile had perpetrated human rights violations in some of its camps. The ANC had set up its own internal commissions in response confirming the violations. The view was however, that these violations should be seen against the background of gross human rights violations in South Africa over a longer period, in which a truth commission was suggested. Thus this was a proposal by a government-in-waiting calling for an investigation of human rights violations by both its own members and by the previous regime (TRC 1998: vol.1,ch.4, para.6-7).

During the discussions, members of the white Afrikaans church and the security forces argued in favor of “moral equilibrium”. This meant that they wanted atrocities committed by the state and their agents to be regarded equal to those committed by the liberation forces. Another account, typically the ANC understanding, was that the regime under the NP was fundamentally evil and that there was a need for a reckoning over this perceived criminal form of governance. The ANC insisted that the mechanism implemented would establish a historical record that would stand in tension with the transitional compromises (Christie 2000:14; Leebaw 2003:37).

South Africa faced three options in addressing its past and the balance of power during transition directly affected the outcomes. The first was collective amnesia. Naturally, the NP favored this option, however, it was rejected as it was considered to result in further victimization by denying people’s experiences. The second option was some form of Nuremberg-style trials³⁰. However, the political context excluded this option. The Nuremberg trials in postwar Germany were possible as the Allies had the power to ensure prosecutions (van Zyl 1999:648). In South Africa, on the other hand, the transition occurred in a context in which the apartheid regime still maintained considerable political power and was in control of the security forces. The negotiated compromises, such as temporary power sharing, precluded this option i.e. it was a negotiated transition. This option was also complicated by the nature of conflict as the violations spanned several decades, making it unclear who would be put on trial, whether it should extend as far as 1948 only covering the era of institutionalized apartheid, and whether this option would hold senior ANC figures responsible for violent acts as well.

Moreover, it was considered important to include the white minority, of many at the time refused to recognize apartheid era repression as criminal, into the settlement and agreement, and the apartheid security forces to accept the change of power. At the time, trials were not a tangible option and pushing for it would have destabilized the transition due to the opposition from the police and security forces. Measures of retributive justice were avoided in the negotiations to avoid angering the former regime and its supporters, and to avoid further violence. Another reason making domestic prosecutions not viable was the fact that South Africa could not afford the time and money³¹ of large-scale prosecutions, despite its

³⁰ The Nuremberg trials were a series of trials held in the aftermath of World War II, with the purpose of bringing Nazi war criminals to justice.

³¹ As most of the perpetrators were former state employees, the government would be obliged to pay for the legal defense costs, making it too costly to handle thousands of political trials. An example is the trial against former Minister of Defense, Magnus Malan, and other high-ranking members of the Defense Force. A specialized investigative unit of over 30 detectives and 6 civilian analysts spent more than 9 months investigating and preparing the indictment, the trial lasted another 9 months, and defense’s legal costs exceeded 9 million rand, and resulted in acquittal of all 17 accused. The trial against Eugene de Kock, a former police colonel, lasted over 18 months, cost taxpayers over 5 million

institutional infrastructure being in place and domestic courts functioning³², however, unreformed. The third option was to set up a truth commission with a reconciliatory and nation-building nature. The ANC and civil society expressed a need to know about the past in order of establishing a culture of respect for human rights and to avoid future repetitions (TRC 1998:vol.1,ch.1,para.21-23;26-29; Christie 2000:68-69). The government, strongly opposed this third option and the security forces were pressuring for unconditional amnesties to be provided to all soldiers and police officers. However, civil society played a very important role by pushing for the establishment of a truth commission and balancing the self-interest of the negotiating parties. Finally, after significant input from civil society, including two international conferences³³ and after hundreds of hours of hearings, the third option was chosen as the best alternative and compromise.

The issue of amnesty was the final obstacle to transition. Only a few months before the elections, the generals in command of the police warned the ANC that they would not support the electoral process if the establishment of a new government meant it would be set to prosecute and imprison members of the police force. The former government and its security forces were reassured that they would not automatically be prosecuted if the power changed hands. The compromise over the amnesty issue was met when the NP agreed to the condition of full disclosure as long as it also applied to members of the liberation movements (Leebaw 2003:34-35). The ANC accepted the inclusion of amnesty because the previous regime would not grant themselves amnesty, meaning the agreement was that only the new government had the right to forgive the crimes of the old (van Zyl 1999:651). The provision and criteria for permitting amnesties was left to the ANC, which tied amnesties to accountability in the form of truth telling as a compromise (Bell 2017:93). The compromise was thus that the commission would have the power to grant amnesty to individuals who disclosed the truth and admitted

rand, and resulted in a single conviction. In addition to these figures was the costs of large teams of state attorneys and advocates and supporting hundreds of state witnesses in very expensive witness protection programs (the de Kock trial used over 100 state witnesses to secure a single conviction. Several of the witnesses under this trial were placed on witness protection programs in Denmark and the UK) (van Zyl 1999:652-653).

³² One might also argue that the domestic court was at the time dysfunctional, as only 4% of those who committed crimes spent over two years in prison (van Zyl 1999:652).

³³ Sponsored by the Institute for the Study of Democratic Alternatives (IDASA) were influential in framing the Act. It was a forum for human rights advocates and national leaders involved in transitional justice around the world to share ideas and experiences with local leaders and contribute to the theoretical basis for the TRC. National leaders from Latin America and Eastern Europe (José Zalaquett, Joachim Gauck and Adam Michnik who had been involved in truth commissions and lustration programs), representatives from Human Rights Watch, local NGO's, representatives from churches, South African intellectuals, members of government- many of those present were human rights advocates who had moved on into positions of state power, now seeking to promote nation-building and development of rule of law hand in hand with healing where the proposed therapeutic potential of truth commissions resonated with the perspectives of the new South African leaders who were becoming associated with the TRC during this phase, with backgrounds such as doctors, therapists, and religious leaders (Leebaw 2003:37-39).

their guilt, while, at the same time, revealed and acknowledged the past to promote reconciliation. This resulted in a minimized chance for members of the army, police and the state apparatus to boycott or even sabotage the transition.

Early on it was stipulated that amnesty hearings would occur behind closed doors. But here as well, the pressure from society and human rights organizations, ensured that the TRC legislation allowed for public access and full participation by survivors (Phakathi & van der Merwe 2008:117-118). The argument was that there was a need for understanding and not vengeance, a need for reparation but not retaliation, and to advance reconciliation and reconstruction, *“amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past”* (Constitution of the Republic of South Africa Act 200: 1993, section 251). The Promotion of National Unity and Reconciliation Act of 1995 (hereafter, “the Act”) created the Truth and Reconciliation Commission (TRC) to facilitate this process³⁴. Thus, the agreement on the direction and nature of transition also determined the shape of the main holistic mechanism chosen, namely the TRC, seen as a necessary “bridge” between the past and the future. The compromise was by all parts in the negotiations viewed to be an important balance between the wish for reconciliation and prosecution of perpetrators (Holtedahl & Tjønneland 1998:179).

3.3 THE TRUTH AND RECONCILIATION COMMISSION

Following a public nomination process, with 299 nominees, and public interviews of 25 shortlisted candidates by a selection committee, 17 commissioners³⁵ were appointed by the newly elected President Mandela to head the TRC, with Archbishop Desmond Tutu appointed as its Chairperson. The commissioners were constituted into three interconnected committees: the Amnesty Committee, the Human Rights Committee, and the Reparations and Rehabilitation Committee. In addition, there was an Investigation Unit to assist the committees and a Research Department (Chapman & van der Merwe 2008:9). The TRC set up its national office in Cape Town and regional offices in Johannesburg, East London, and Durban (TRC 1998:vol.1,ch.3, para 7-16). In total, the TRC had over 300 in staff and a budget of US\$18 million annually during the first two and a half years (Hayner 2011:28).

³⁴ The Truth and Reconciliation Act followed months of discussion, 300 hours of committee hearings and a five-hour debate in the national assembly. The far right (Freedom Front) voted against on the basis that the cut-off date for amnesty was set to December 1993, meaning the violence from the extreme right towards the elections would not qualify for applying amnesty. The Inkatha-party also voted against fearing a lack of political balance and neutrality in handling the amnesties (Holtedahl & Tjønneland 1998:181).

³⁵ The commissioners represented various ethnic and religious groups and came from a variety of professions; among them were medical doctors, lawyers, psychologists, church leaders, historians, and human rights advocates (Chapman & van der Merwe 2008:9).

The TRC was mandated to investigate gross human rights violations perpetrated between 1960 and 1994, including abductions, torture and killings. To establish a complete picture of the violations by both the state and the liberation movements through investigations and hearings. The investigations included also, to the extent possible, the causes, nature, and extent of these violations. The commission was empowered to recommend reparations and institutional reforms to prevent future violations and had the authority to grant amnesty as long as two conditions were met: first, that the applicant made full disclosure of all relevant facts of the crime, and second, that the crime was politically motivated. The activities, findings, and recommendations were to be published in a final report³⁶. Moreover, the TRC was endowed with the powers of search and seizure, subpoena, hold public hearings, and create a witness protection program (the Act 1995: section 29;31-33;35)³⁷. Since the mandate did not state how the TRC should perform its functions, the commission had the flexibility to decide for themselves. However, bore the challenge to design in a short period of time systems that adequately addressed the extensive priorities (TRC 1998: vol.1, ch.6,para.5).

The TRC took testimony of some 21,000 victims, reporting nearly 38,000 gross violations of human rights³⁸, of which 2,000 appeared in public hearings³⁹. The TRC received 7,112 amnesty applications, of which 849 were granted with another 5,392 cases being refused and others withdrawn (TRC 2017). The TRC released its final report in October 1998⁴⁰ (Hayner 2011:31).

The TRC process was very public from its onset to its final report⁴¹. To achieve publicity and involvement of civil society, which, in turn, would result in a feeling of popular ownership, the

³⁶ For a more detailed account of the TRC's objectives and functions, see the Act 1995: 4-5; section 3&4, and TRC 1998:vol.1,ch.4,para. 32; vol. 1, ch.6, para 1.

³⁷ The TRC gave rise to a new, more powerful truth commission model and several truth commissions established since have possessed these attributes. For example, the commissions of Nigeria (1999), Grenada (2001), East Timor (2001), Ghana (2002), Sierra Leone (2002), DRC (2004) and Liberia (2005) were all endowed with powers of subpoena. The commissions of Nigeria (1999), East Timor (2001), Ghana (2002) and DRC (2005) were given powers of search and seizure and the commissions of Nigeria (1999), Grenada (2001), Peru (2001), East Timor (2001), Ghana (2002), Sierra Leone (2002), Morocco (2004), Paraguay (2004), DRC (2004) and Liberia (2005) possessed the power to conduct public hearings (see Freeman 2006:Appendix 1, Table A.1).

³⁸ 90% of them were black, most women and the greatest number of these approached the TRC on behalf of dead men to whom they were related (TRC 1998:vol.1,ch.6, app.2, para.29).

³⁹ The Human Rights Violations Committee organized the public hearings known as human rights violations hearings. These hearings were held in eighty communities across the country lasting one to three days where ca ten to twelve survivors told their story each day. The TRC selected cases from those given to them based on how they reflected some of the main events and incidents in that area (Chapman & van der Merwe 2008:9-10).

⁴⁰ The first five volumes were released in October 1998, while the remaining two volumes were released in March 2003.

⁴¹ International visitors were hosted and shared their thoughts on the work of the Reparation and Rehabilitation Committee and some members were invited to conferences abroad as a way of increasing the international exchange of ideas. In 1996, contact was established with national academics to get their thoughts regarding policy development. Moreover, assistance from various church structures was significant. And to avoid or minimize re-traumatization of victims, the committee was assisted by NGO's (TRC 1998:vol.1,ch.10,para. 9-12).

TRC developed and adopted a media and communications strategy where it partnered with other organizations, developing an advertising campaign and distributed booklets to spread information about the TRC (TRC 1998:vol.1,ch.9,para 31). Radio and television news often shared recent revelations of the hearings, testimonies were often televised, and most newspapers ran stories on the TRC every day. On national radio, over four hours of hearings were broadcast daily, and the weekly-televised show “Truth Commission Special Report” became South Africa’s most-watched news show (Holtedahl & Tjønneland 1998:195; Mobekk 2005:270). The public hearings were the most visible part of the work of the TRC. These consisted of individual testimonies of victims, ‘section 29’ hearings where witnesses and alleged perpetrators were subpoenaed to establish the whereabouts or fate of victims and the identity of the perpetrators. Also, the sectoral and institutional hearings⁴², which aimed to understand the individual and institutional perspectives and to establish the moral and political accountability of institutions and individuals raised the public's interest.

Despite the strong powers at its disposal, the TRC did not use them often and has been criticized for holding the mission of reconciliation above that of finding the truth and prosecutorial justice⁴³. It only employed its search and seizure powers and subpoena powers a handful of times and to avoid upsetting various parties, the TRC delayed or did not issue subpoena or search orders against several vital institutions and persons (Hayner 2011:28). The greatest innovation and the most controversial power of the TRC was its ability to grant individual amnesty⁴⁴ in cases where perpetrators in a public hearing disclosed the full truth of the crime and demonstrated that it was an act with a political objective and not for personal gain. The amnesty process was important in eliciting truth about past atrocities, where the primary sources were the perpetrators who, without the option of amnesty, would probably not have told their story. Through the TRC and its amnesty process, foot soldiers could come forward and expose the chain of command, thus, facilitating the identification of commanders in the hierarchy. Perpetrators that did not feel threatened to come forward, were often offered up by those who carried out their orders enabling some to be called to account based on the evidence provided.

⁴² Focusing on the legal system, the faith communities, the business and health sectors, children and youth, women, and prisons. In cases where individuals or organizations refused to attend hearings, were subject to legal action and were liable to imprisonment and/or fines. An example was P.W. Botha who refused, was brought before the judiciary and was summoned to answer questions regarding the role of the state security council (TRC 1998:vol.1,ch.4,para.34-35; Holtedahl & Tjønneland 1998:188).

⁴³ It was also the first truth commission to have its powers and decisions challenged in court. The TRC was involved in numerous battles, including when three prominent victims’ families questioned the constitutionality of its amnesty powers. The cases were however decided in the TRCs favor (Hayner 2011:30).

⁴⁴ Granting amnesty to perpetrators of serious human rights crimes violates the rights of victims to redress and is inconsistent with a states’ obligation under international law to punish perpetrators of such crimes (Mobekk 2005:268).

The existence of likelihood of criminal prosecution might have enhanced an avoidance strategy among perpetrators in favor of non-judicial proceedings, which could be observed in South Africa to some degree. Even if the TRC was a restorative approach, it also had judicial powers, notably in the form of amnesties. At the same time, the TRC and the South Africa's criminal justice system worked in tandem. The willpower of the criminal justice system to prosecute certain crimes generated threats that, on their end, stimulated perpetrators to cooperate and appear before the TRC, thereby creating preferences of public exposure and shame over the risk of being held liable in a criminal court. The public and individual nature of the amnesties upheld the idea of individual accountability. At the same time, the allocation of responsibility was not limited to amnesty applicants. It can, thus, be argued that it could, in fact, have had a wider distribution of blame and acknowledgement of violations than would have been the case in a process solely oriented around prosecutions. The information gathered and exposed during the amnesty process helped the TRC in compiling a "complete a picture as possible of the nature, causes and extent" of past violations. The information gathered also helped in formulating recommendations with the goal of preventing future repetitions (Holtedahl & Tjønneland 1998:195; TRC 1998,vol.1,ch.5,para.66&67; Hayner 2011:30).

The establishment of the TRC may be understood as an attempt to restore moral equilibrium to the amnesty process. As noted in the subchapter on restorative justice, having the power to grant amnesties in the mandate of truth commissions bares the risk of victims feeling left behind waiting for reparations while perpetrators given amnesty walk free. Moreover, the fact that the Amnesty Committee was given the power of implementing amnesties, while the Reparation and Rehabilitation Committee could only make recommendations, created dissatisfaction and bitterness (TRC 1998:vol.1,ch.5,para.9). This meant that many victims saw only perpetrators gaining benefit from participating in the process, while, e.g. the payment of reparations was uncertain as they were compelled to wait until Parliament accepted or rejected the TRC's recommendations. During the work of the TRC, urgent interim reparations of R2000 were granted to some victims⁴⁵, but payments were delayed and the first payments were made in July 1998 (TRC 1998:vol.5,ch.5,para.55 & 60). Reparations to victims were considered essential to counterbalance amnesty. The TRC recommended in its final report that, prosecution be considered in cases where amnesty was not sought or denied, and that reparations be made

⁴⁵ To victims or their relatives and dependents with urgent medical, emotional, educational, material and/or symbolic needs (TRC 1998:vol.5,ch.5,para.56).

available to each victim⁴⁶ if alive or equally divided among relatives and/or dependents who had applied for reparations if the victim was dead (TRC 1998:vol.5,ch.8:309; ch.5,para.67)⁴⁷.

Despite the controversies, the TRC had significant support and trust from the people during its operation. The context it found itself in required a difficult balance between the interests of the old regime, the new one, and all parts of society. In this regard, both, President Mandela and Archbishop Tutu, were important in their support of the transitional process and the TRC as a mechanism as they were both respected leaders. Since the TRC's commissioners were selected in an extensive and public process, they were respected, and the fact that the TRC's establishment was decided by Parliament with cross-party added to its legitimacy (Holtedahl & Tjønneland 1998:186). The support was also evident in the assistance provided by municipal governments and civil society organizations through providing accommodations, arranging workshops, psychological support, and spreading information (TRC 1998:vol.1,ch.12,para.43-47).

Nevertheless, the work of the TRC was complicated and challenged by the political context. The former government had, in an attempt to eliminate parts of the nation's memory, systematically destroyed a significant amount of documents to remove incriminating evidence, seriously affecting the investigative work and research by the TRC ⁴⁸ (TRC 1998:vol.1,ch.8,para.1). Besides, several representatives of the old regime, with former Prime Minister and President, Pieter Willem Botha in the lead, opposed to cooperate with the Commission (Holtedahl & Tjønneland 1998:186). In parliament, the NP condemned the TRC as a "witch hunt", and a Democratic Party representative feared the creation of a revisionist official history that would be based on "moral relativism", justifying the ANC's atrocities⁴⁹. Former president F.W. de Klerk tried to avoid being named in the final report through litigation.

⁴⁶ The TRC confined the number of victims eligible for reparations into victims who personally had made statements to the TRC, victims identified through the amnesty process, and victims named in a statement made on behalf of and in the interests of specific persons (TRC 1998:vol.1,ch.4,para.136).

⁴⁷ The recommended monetary package was based on a benchmark amount of R21,700, the median annual household income in SA in 1997. The recommended amount per victim was between R17,029 and R23,023 per annum over a period of six years, depending on urban or rural living situation and number of dependents. The grant was to be funded and administered by the President's Fund to an estimated 22,000 victims, and the total cost was estimated to be R477,400, 000 per annum/ R 2,864,400,000 over six years (TRC 1998:vol.5,ch.5,para. 69, 73-75: p.187).

⁴⁸ There was, however, some cooperation and assistance to this end by for instance the National Intelligence Agency (NIA), the South African Secret Service (SASS), the Department of Correctional Services, Ministry of Justice, the National Archives, the Minister of Safety and Security, Secretariat of the South African Police Service (SAPS) and the Commissioner of Police (TRC 1998:vol.1,ch.8,para. 46,55,75,79).

⁴⁹ To the latter, ANC representatives responded by reminding their opponents that the fight against apartheid was a just war and that they had ample support for this claim in international legal documents (the General Assembly of the UN had labeled apartheid as a crime against humanity and the UNSC as a crime against the conscience and dignity of mankind. Apartheid was also characterized as a crime against humanity in judgments of the International Court of Justice, the International Law Commission, and the International Criminal Tribunal for the Former Yugoslavia (Leebaw 2003:42-43).

The ANC was also unhappy with the TRC's conclusions and attempted to block the entire report. The court ruled in favor of the TRC only hours before its release (Hayner 2011:31). Thabo Mbeki, in his capacity as president of the ANC, expressed the ANC's "serious reservations" about the TRC's process and final report (Mbeki 1999).

What were the effects and accomplishments of the TRC? Despite the process being somewhat hurried with limited time and staff, the TRC investigated a thirty-four year period, from 1960 to 1994, and examined over 50,000 cases⁵⁰ (TRC 1998:vol.1,ch.6,para.3). With the information and evidence collected through investigations, hearings, victim statements, and the amnesty process, the process drew up the broad patterns of human rights violations during the period under investigation, as well as it contributed to restoring the victims' dignity and, thereby, assisted with their societal rehabilitation. The collected information also helped in the analysis of institutional responsibility and root causes of the past violence, providing the bases for its recommendations of reforms.

The gathered information was central in fulfilling its function of official acknowledgement of human rights abuse and in establishing a complete picture as possible of the past. Its findings and recommendations were detailed and comprehensive, where the primary findings were that the predominant portion of gross violations of human rights was committed by the former government authorities through their security and law-enforcement agencies. It also uncovered that the state in the period from the late 1970s to the early 1990s was involved in criminal acts by planning, undertaking, condoning and covering up unlawful acts, including the extrajudicial killings of political opponents, both inside and outside South Africa (TRC 1998:vol.5,ch.6, para.77). By facilitating the official and public acknowledgement of the crimes committed, the TRC sought to restore the dignity of victims. By holding accountable and naming individual perpetrators and intellectual authors who provided operational or political authority for the crimes, and by making recommendations aimed at preventing future violations, the TRC sought to help restore trust in these institutions (TRC 1998:vol.1,ch.5,para22; van Zyl 1999:657-658).

In addition, the work of the TRC helped uncover the fate of hundreds of victims whose deaths and disappearances had remained mysteries, and identified patterns of abuse, such as the widespread torture suffered by detainees of whom many were held without trial. The TRC also

⁵⁰ Most violations reported took place after the banning of parties (1990-1994), followed by the years in which states of emergency were in force (1983-1989), 1976-1982 and 1960-1975 (TRC 1998:vol.1,ch.6 app.,para.25).

addressed accountability for violations from a broader perspective by examining the responsibility and roles played by various institutions and professions in facilitating or resisting human rights abuse through institutional hearings⁵¹ (Holtedahl & Tjønneland 1998:195; van Zyl 1999:657-658). The final report of the TRC condemned both the apartheid government and the ANC for committing atrocities. It also covered the historical and structural background of regional trends and individual cases, the broader institutional and social environment of apartheid, reaffirming the widely accepted view that apartheid was a crime against humanity under international law.

The very destruction of the apartheid system, public exposure, and being called to account before the nation and the world may have served as more effective deterrents than retributive mechanisms would in this case. The biggest accomplishment was that the TRC was able to facilitate a story-telling process, giving victims and perpetrators a voice through establishing a platform to tell their personal accounts. The public nature of the hearings and findings of the TRC enabled information to spread across the country, effectively countering opposed narratives that would deny the established facts. At the same time, the TRC's focus on the state emergency period in the 1980s had little focus on everyday societal discrimination. This may have decreased both the feeling of ownership to the process and the feeling of responsibility. The paradox is that a lot more information was revealed on what the ANC leadership was responsible for, which reflects the attitudes the central conflicting parties had toward the TRC. The final report also had some characteristics in the way it constructed the historical records by presenting both sides of the conflict, as if they were two legitimate perspectives, thus reflecting to some degree the compromises and concessions of the transition and the political pressure under which it was operating. Since the TRC pushed for a form of justice that would facilitate reconciliation and truth through engaging the public in a process of restorative justice through public accountability, reparations, and hearings, there was still a wish among survivors for justice both in the form of restorative and retributive.

In 2000-2011, Gibson (2005) conducted a survey where he found that 75.9% of blacks, 61.2% of Asian origin, 36.6% of whites, and 45.1% of coloreds' strongly or somewhat approved of

⁵¹ The entire fourth volume of the report is devoted to the institutional hearings. Here, the report takes a very critical view, stating that the organized legal profession "*connived in the legislative and executive pursuit of injustice*" by supporting the NP's bid for legal legitimacy (TRC 1998:vol.4, 101). The media is criticized for appeasing the state and failing to maintain its independence (TRC 1998:vol.4, 188), several faith communities, notably the Dutch Reformed Church as "*agents of oppression*", and argues that the military chaplaincy openly gave legitimacy to abuses and functioned to filter out dissent within the military (TRC 1998:vol.4, 71). Business in general and the mining industry in particular is described as being instrumental in designing apartheid policies and argues that "*the brutal suppression of striking workers, racist practices and meager wages is central to understanding the origins and nature of apartheid*" (TRC 1998:vol. 4, 34).

and judged the TRC favorably. Most respondents considered apartheid a crime against humanity, across races⁵². In the same survey, again across races, the majority of respondents attributed the blame to the NP, white Afrikaners and white English speakers. Moreover, the majority ascribed the abuses to individuals rather than state institutions (Gibson 2005:345-346;353). This indicates a direction towards a collective memory across races. Moreover, Gibson (2002;2004a) also found that 57.3% of all respondents, approved, to at least some degree, the amnesty process and 33.5% considered the process as fair. Why would one support a process considered unfair by the majority? It might seem many approved of it because it was considered as contributing to a peaceful transition. Most respondents considered the TRC essential to avoid civil war during the transition (with 65% among the black respondents, 47% among the Asian, 36% among the coloreds, and 18% of the white respondents). Reparations, giving victims a voice, and apologies were shown to have a positive effect on perceiving amnesty as fair (Gibson 2002:545). On the other hand, in 2002-2003 and 2008, Backer (2010) conducted a longitudinal study on victims of human rights violations in the Cape Town area. He found that there was a marked *decline* in support of the TRC process. The initial approval of amnesty as a macro-political process dropped from 57.5% to 20.4% (Backer 2010: 8–11) and the assessment of the fairness of amnesty dropped from 18.3% to 8.5%. Backer's other models suggested that the efficiency of the reparation scheme and a positive appraisal of delivering truth to the victims' families were positive predictors of the change in approval of amnesty.

Based on these findings, it may seem that the victims, even if considering amnesty as unfair, initially were willing to support the process possibly considering amnesty as a path to political stability and peace. This willingness, however, dropped in the years to come. Backer (2010:11) found that 54% of the respondents indicated that they would support criminal accountability even at the expense of political stability. This change of heart may have been a result of realizing that significant changes to their lives would not necessarily follow political change and a realization that the amnesty process was done at their expense when reparations did not follow as hoped for. One might argue that, if the promise of truth and reparations were upheld in the way they were meant to, victims would more likely continue to support the amnesty process. It seems dissatisfaction with the amnesty process weighed on the individual perceptions of the TRC, strongly affected by the governmental follow up.

⁵² Whites disagreed the most with nearly one quarter of the respondents (Gibson 2005:353).

As noted in chapter two, political will, support and implementation of recommendations are crucial for transitional justice. The aftermath of the TRC has been marred by lack of follow through. President Mandela apologized on behalf of the state, and despite the Amnesty Committee denying amnesty in numerous cases and the report recommending trials, few trials were actually held. In 2007, President Mbeki instituted a process to grant special pardons in addition to the amnesties granted by the TRC. This was continued by Mbeki's successors, Presidents Motlanthe and Zuma. As a result, a network of civil society organizations chose to challenge this process in domestic courts (USIP:n.d.; Valji 2009).

The TRC had recommended continuation of exhumations and reburials (TRC 1998:vol.5,ch.5,para.81) and the establishment of a body to oversee the implementation of reparations, policy proposals and recommendations (TRC 1998: vol.5,ch.8, para.23). However, only in 2006, after pressure from civil society, the government established a body to monitor the implementation of recommendations - particularly reparations and exhumations. Further, a missing person's taskforce was established to exhume and rebury victims and to continue investigations of disappearances (USIP:n.d.).

As noted earlier, the financial reparations recommended by the TRC came too little, too late. In 2003, President Mbeki announced that the government would compensate victims with a one-off payment of R30,000 as reparations for the gross violations suffered during apartheid. Payouts began in November 2003, and after some delays, the majority of payments had been made over the next four months⁵³(Colvin 2006:209; Ntlatleng 2012). This minimalist approach to reparations, which is also less than a South African court would have awarded in a civil claim, was met with criticism from NGOs and victims' groups as both insufficient and as justice, in the legal sense, sacrificed for political and monetary convenience (Fletcher et al. 2009:185). Further, the government continued to make modest progress towards introducing social and legal reforms to address the deep and persistent economic and social inequalities that continue to divide South Africa's society (Fletcher et al. 2009:185). In the words of Tutu, without victims seeing real material transformation in their lives, "*you can kiss reconciliation and forgiveness good-bye*" (Tutu 1999:229).

⁵³ Important to keep in mind that the individual reparations are only to those who were labeled as victims of the TRC, namely those who suffered physical, mental, or emotional injury and who either testified before or registered with the TRC prior to the release of its final report in 2003. The state is obliged to provide compensation and restitution and reparations.

In 2015, 57.2% of the total number of respondents in a survey stated to believe that the TRC provided a good foundation for transformation, with 59.2% believed South Africa to have made progress on the road to national reconciliation since the end of apartheid. 69.7% of the respondents indicated there was still need for reconciliation and that they must continue pursuing it as a national objective, while 71% agreed that they must continue striving for a united South Africa (Hofmeyr & Govender 2015:1,4-8). South Africa has become a new country, with a wide recognition of past violations and, at the same time, a very limited number of calls for revenge and violence towards previous perpetrators. Still much needs to be done to overcome structural inequality. There are still major challenges related to inequality, poverty, unemployment, and education. The TRC, through its final report, remembering the past injustices underscored the incomplete transition and established a basis for further change.

4 BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina (BiH) was engulfed in war from 1992 to 1995, when it was ended through the involvement of the international community and the signing of the General Framework Agreement for Peace (GFAP)⁵⁴. In 1993, while there was still a full-fledged war, the UNSC decided to establish an international tribunal, the ICTY as a transitional justice mechanism.

Different from the South African example, transitional justice efforts in BiH have been dictated by external actors, rather than from the Bosnian society itself. I believe that the decision to create the ICTY and thus choosing the path on behalf of BiH, affected domestic interests as to how the past should be addressed. This bore, from the outset, the risk of rendering domestic mechanisms to a degree unnecessary, if not undesired. This was evidenced in the slow progress and failures at the national level to reach real and enduring social change. While there have been various attempts to implement truth commissions, none of these has reached the same level of attention as the ICTY⁵⁵. The Investigation and Documentation Center (IDC) established in 1992, based on collected data and statistical analysis, published an estimated number of people killed during the war. The findings were validated by independent international experts, including from the ICTY, but the IDC has struggled to gain support from the survivors in BiH, as it was not viewed as neutral and the estimate was not believed by the Bosniaks being lower than what their leaders had presented⁵⁶. Reparations have been pursued through courts, rather than any broad, state sponsored reparations program. In 2004, to address the abductions and

⁵⁴ Also known as the Dayton Peace Agreement, initialed on 21 November 1995 and signed in Paris on 14 December 1995 between Croatia, BiH and the Federal Republic of Yugoslavia (GFAP 1995).

⁵⁵ The establishment of the Association of Citizens for Truth and Reconciliation in 2000 (Kerr 2005:323). In 2004, victims' groups and politicians in Republika Srpska (RS) demanded a commission to investigate the fate of Serbs during the siege of Sarajevo, it was set up in 2006 (Subotic 2009:149-150). In 2006, an idea emerged to establish a regional truth commission, in 2008 the intergovernmental Coalition for RECOM (Regional Commission Tasked with Establishing Facts About the War 1991-2001) was set up by regional civil society leaders. The Coalition has adopted a statute, held regional conferences, a media campaign, and collected signatures that evidenced the organizational and individual support for a truth commission in 2011 gathering 545,000 signatures, of which 122,540 in BiH (RECOM 2015a;b; Rowen 2013:126). The only commission that this far has concluded its work, although established by an order from the internationally appointed BiH Human Rights Chamber to RS to disclose the full truth of the massacre in Srebrenica, is the Srebrenica Commission. Set up in 2003, it produced a final report in 2004 and completed its work in 2005 by handing over a list containing 19,473 civilians and armed forces of Bosnian Serb troops suspected of involvement to, the BiH War Crimes Chamber. While falling short of calling it a genocide, helped establish the number of killed by disclosing 32 previously unknown locations of mass graves, and concluded that "*grave crimes*" had been committed in 1994, when several thousand Bosniaks had been "*liquidated in a manner which represents a grave violation of international human rights*". It was followed by a public apology by RS officials. The public as however sceptic towards the commission and did not buy the apology as legitimate as it was issued after international pressure (Wood 2004; Subotic 2009:150-152; Dragovic-Soso & Gordy 2010:204).

⁵⁶ It is here important to note that at the time, leaders from different nationalist groups presented differing figures, reaching from 30,000 to 300,000 dead and missing- depending on whether they wished to minimize or exaggerate (Rowen 2013:131).

disappearances during the conflict, a Law on Missing Persons was adopted⁵⁷. There have also been comprehensive vetting efforts by the UN Mission in BiH (UNMIBH), especially of police officers as they took part in the conflict as soldiers, and of judges and prosecutors. The processes have overall been obstructed by ethnic divisions, lack of political will, governmental support based on politicizing the process with an agenda of using truth commissions as a vehicle for telling their own side of the story, and lack of national debate, adequately consulting local NGOs (Kerr 2005:323; Freeman 2004:7-8; Subotic 2009:147-150).

This short overview of transitional justice efforts shows that the attempts have been sporadic, unfocused and for the most part internationally driven. The lack of political will, lack of national debate and adequate consulting local NGOs was an additional obstacle from the very beginning. Most importantly, discussions were drowned in politicized agendas of political elite of the different ethnic groups with support running along ethnic lines, creating an implementation gap. The BiH context is characterized by selective remembrance, denial, and victimization into one of collective and mythologized victimhood that hinders transitional justice.

The remainder of the current chapter offers a brief historical introduction to BiH, before it addresses the process of transition from conflict and the political and historical conditions that incited retributive justice with the establishment of the ICTY. Why and how did the UNSC set up the ICTY? In which context has it been operating in, and what was the popular response? Under international pressure to act, and as negotiations between the conflict parties, each of them supported by either Western states or the Russian Federation, and continued atrocities spreading, the UNSC decided to establish the ICTY as an ad hoc international criminal tribunal. The ICTY was set up in The Hague with goals of contributing to peace and reconciliation by providing individual criminal justice, serve justice to victims, and establish an inconvertible historical record. It has been able to create a body of evidence, contributing to a historical record, and served individual criminal justice. Being a retributive mechanism, the Tribunal fell short of addressing the needs of victims. Ethnic tensions, conflicting narratives about the past, and political elites manipulating the situation through politicizing the process, exacerbated by the fact that it took several years before the ICTY reached out to the public, have deeply affected not only the process but also the public perception of the ICTY to be polarized along ethnic

⁵⁷ Drafted in a working group consisting of government officials, the ICRC, the International Committee on Missing Persons, and the governmental Commission on Missing Persons. It required authorities to provide families and relevant institutions with information and to establish a "Missing Persons Institute" to carry out the responsibilities under the law (Freeman 2004:10). In 2003, approximately 70% of the estimated 31,500 missing persons have been accounted for (ICMP 2017).

lines. This has made the goal of reconciliation a difficult task. The underlying causes to the conflict are yet to be addressed and positive peace is not reached.

4.1 A HISTORY OF ETHNIC TENSION

At the beginning of the 1990s, the Socialist Federal Republic of Yugoslavia was one of the most developed countries in Eastern Europe, with an ethnic diversity across its whole territory. The non-aligned federation consisted of the republics of BiH, Serbia, Croatia, Macedonia, Slovenia, Montenegro and the two separate regions of Kosovo and Vojvodina as autonomous provinces within the Republic of Serbia. Simultaneously with the collapse of communism and resurgent nationalism in Eastern Europe in the late 1980s and early 1990s, Yugoslavia underwent a period of intense economic and political crisis. The government weakened in parallel with growing political and militant nationalism with the propagation of independence for, especially the Croatian and the Slovenian republics, while the Serbian leadership claimed greater powers within the central government. In this chaotic period, nationalist rhetoric was used to erode the common Yugoslav identity and unity, and fueled mistrust and fear among the different ethnic groups (ICTY: n.d. a).

It is a region of historic turmoil which has since recorded time been contested, invaded, and ruled successively or concurrently by Macedonian, Roman, Byzantine, Slav, Bulgar, Venetian, Austro-Hungarian, Ottoman, and the Nazi German empires. Through history, what I consider an ethnic defined nationalism has blossomed in a context of different religious and historical experiences. Before World War II, there were ethnic tensions surrounding the then, monarchist Yugoslavia, and its multi-ethnic make-up and relative Serbian dominance. Already in the perception of the state, there were differing views, where the Croats and Slovenes envisioned a federal model with greater autonomy. The tensions and bitterness in the territory led to massive bloodshed during World War II, between the Ustaše regime⁵⁸, the Chetnik movement⁵⁹, and the Partisan movement⁶⁰, with Josip Broz Tito as the latter's commander. These conflicting views of; on the one hand, the Ustaše and Chetniks aiming to create an unprecedented ethnically "pure" society, the Communists fought to preserve BiH's centuries-old multi ethnic coexistence

⁵⁸ The Ustaše, members of a Croatian fascist movement, ethnically cleansed 1.5 million Serbs, killed hundreds of thousands of Serbs, Jews and Roma (Scharf 1997:23).

⁵⁹ A Serbian nationalist guerilla force formed during World War II to resist the Axis invaders and Croatian collaborators. Primarily fought a civil war against the Yugoslav communist guerillas, i.e. the Partisans (Britannica 2017a).

⁶⁰ A guerilla force led by the Communist Party of Yugoslavia during World War II against the Axis powers, their Yugoslav collaborators, and the Chetniks. As revenge for the Croat atrocities, the Partisans killed over 100,000 Croatian prisoners when the Ustaše surrendered in 1946 (Scharf 1997:24; Britannica 2017b).

and restore its traditional internal and external borders (Hoare 2007:308). With the Partisans being the victors, they took control of BiH in 1944-45 and formed the Socialist Federal Republic of Yugoslavia.

Tito, who became the president of Yugoslavia in 1953, kept Yugoslavia together through stern repression and his policy of “brotherhood and unity”. The death of Tito in 1980 set in motion a chain of political events that fermented the collapse of Yugoslavia. In the vacuum of a strong political leader and a deterring economy, the abovementioned tensions which had not been addressed, re-emerged with the feeling of unity disintegrating (Clark 2014:21-22).

Under the newly elected President Slobodan Milošević, Serbia was gaining a stronghold on Yugoslavia with an aggressive nationalist agenda of reviving Serbia within Yugoslavia and promising to protect all Serbs. To justify the use of force to annex territory⁶¹, Milošević used propaganda via the state-owned media, and played on Serb fears and feelings of victimization, going back to the defeat by the Ottomans in 1389 and how Serbs were treated by the Ustaše during World War II (Scharf 1997:25). Milošević began to arm, train, and finance Serbian paramilitary troops in Croatia and BiH, and Serbs in both countries were armed by Yugoslav and Serbian military and paramilitary forces more than six months before the war in BiH erupted (Burg & Shoup 2000:130). In June 1991, Croatia and Slovenia declared independence, starting what would become a decade of hostile fragmentation and armed conflict⁶².

Radovan Karadžić, the leader of the largest Serb fraction in the Yugoslavian parliament made a genocidal threat in January 1992 that independence would “*make the Muslim people disappear, because the Muslims cannot defend themselves if there is war*” (cited in Hoare 2007:353). Nevertheless, in February/March 1992, BiH held a referendum for independence where more than 64% of its eligible voters participated, with 99.7% of them voting in favor of a sovereign and independent BiH⁶³. The independence was internationally recognized in April 1992, and on the same day, the Bosnian Serb assembly proclaimed a separate Republic of the Serb people (today's Republika Srpska/RS). The Serbian leadership deemed the referendum

⁶¹ In 1989, the government of Serbia adopted amendments to its constitution allowing the Serbian government to dominate the provinces of Kosovo and Vojvodina, giving Serbia three out of eight votes in the Yugoslav presidency.

⁶² The same month, Slovenia experienced a short-lived armed conflict, the Ten-Day War as the Yugoslav People's Army (JNA) attempted to prevent their succession. Conflict spread to Croatia wherein the Serb ethnic minority, backed by the JNA, sought to create a Serb state by force. Croats in the Republika Srpska Karjina underwent ethnic cleansing until a ceasefire was reached in 1992 (Scharf 1997:24).

⁶³ The Bosnian Serb assembly members advised Serbs to boycott the referendum. The Serb political leadership used the referenda as a pretext to set up roadblocks in protest.

illegal and Serb forces began to attack Croatian and Bosniak populations in northeast and southern BiH aiming at connecting Serb-populated regions to Serbia. Through overwhelming military superiority and a systematic campaign of persecution of non-Serbs, they quickly asserted control of more than 70% of the country (Čuvalo 2007:civ; Pittman 2016). As BiH comprised the ethnically most mixed population of all former Yugoslav Republics, including inter-marriages, the ownership of large areas of the territory was in dispute. Its strategic position made it subject to Serbia and Croatia urging to assert dominance over large portions of its territory⁶⁴. With the violent Serbian reaction to the referendum, the conflict had turned into a full-fledged regional conflict.

The type and scale of violence and human rights violations were widespread and devastating, with a strategy primarily directed towards the civilian population by driving them out through ethnic cleansing to create largely ethnically homogenous territories. It is estimated that more than 100,000 people were killed and two million forced to flee, with thousands missing until today⁶⁵. The atrocities culminated in July 1995 in Srebrenica, when Serb forces under the command of Ratko Mladić organized the single worst atrocity in Europe since World War II, in an act of genocide slaughtering ca 8,000 Bosniak men and boys during a few days (ICTY: n.d. a; Subotic 2009:124).

The Yugoslav War was the first violent conflict of this dimension on European soil after World War II that made it difficult for political leaders of any country to assess what kind of conflict it was and how it should be dealt with. Two schools of thought emerged. The first one considered the war as a case of aggression against a UN member, with a tradition of multiethnic tolerance, by ultranationalist forces using genocide for territorial conquest. The Serbian leadership was considered to be the aggressor, and the BiH government and society being the victim. In their view, the war was a challenge to world peace that required an effective international response⁶⁶. The other school of thought saw it as a civil war with no aggressors and victims, with all warring parties equally to blame. Supporters of this view were likely to

⁶⁴ The conflicting parties were the Bosnian Serbs and Serbia against Bosniaks and Bosnian Croats. The conflict changed in 1993 when the Bosnian-Croat and Serbian-Croat leaders agreed on a partition of most of the BiH territory. The tables now turned as the Croatian Republic of Herzeg-Bosnia also waged war against BiH (Flessenkemper 2013:147). Already in 1991, the leaders of Serbia and Croatia met in a secret meeting where they agreed to divide the territory, leaving a small enclave for Bosniaks (ICTY:n.d. a).

⁶⁵ The numbers have been subject to controversy (Smith 2010:108).

⁶⁶ This aggressor-victim school of thought was supported by Bill Clinton when a candidate (and at times as president), a bipartisan majority in the US Congress, the majority of the UN General Assembly, the Islamic Conference, and (not surprisingly) the BiH government (Goldstein & Pevehouse 1997:517).

accept ethnic nationalists on all sides as the legitimate leaders, to see autonomy for each ethnic group as more important than preserving a multiethnic society, and view the conflict as an inevitable occurrence of ancient hatreds⁶⁷. The dilemma was containment versus accommodation. And to choose between intervention and negotiating or to let the parties fight it out. The latter, considering the circumstances, would have been to the detriment of BiH, which is why the Western European states and the US, in principle supported by the Russian Federation, chose the first option and intervened, resulting in the first UN peacekeeping mission in Croatia and BiH during the war.

4.2 EXTERNALLY ENFORCED PEACE

The UN and the European Community/Union attempted to mediate peace from the onset of war. With the goal of political settlement, the recurrent efforts to broker a lasting ceasefire and a framework for peace were met with little success (Scharf 1997:28). International response during the first year was cautious as US President George Bush focused on domestic issues and European powers hoped negotiations could bring settlement without a costly intervention, while the UN Protection Force (UNPROFOR) pursued humanitarian assistance⁶⁸. Between 1992 and 1995, six peace blueprints were put on the table⁶⁹. The conflicting desires and demands of the Bosniaks, Bosnian Croats, and Bosnian Serbs, together with influence from Croatia and Serbia, disrupted and delayed settlement. The negotiations and all actions throughout the war was also characterized and complicated by conflicting views of the conflict and conflicting solutions, dividing the international parties. The Europeans, the US and the Russian Federation preferred a political solution that would allow them to withdraw their troops, over redressing the violations of political and moral principles committed during the war by using force (Čuvalo 2007:cviii). The US first opposed partition of BiH and argued for the use of force⁷⁰, lifting the arms embargo against BiH and supported the government's demand for further territory, sustaining their hopes for Western intervention⁷¹. Following escalations of the conflict the

⁶⁷ This school of thought was supported by presidents Bush and (sometimes) Clinton, the great powers in the UNSC (especially Russia), UN Secretary-General Boutros-Ghali, the European Union, and (not surprisingly) Serbia (Goldstein & Pevehouse 1997:518).

⁶⁸ The UNPROFOR deployment grew during the conflict from 1,500 troops in 1992, to 23,000 troops by the summer of 1995 (Čuvalo 2007:cvi).

⁶⁹ The Carrington-Cutiliero plan of March 1992, the Vance-Owen plan of April 1993, the Stoltenberg-Owen plan of September 1993, the European Union action plan of fall 1993, the Contact Group plan of July 1994, and the US- led plan of summer-fall 1995 (for a detailed account, see for example Scharf 1997 or Burg & Shoup 2000).

⁷⁰ The threats of a NATO option being still alive, followed pressure from one hundred prominent individuals, led by Margaret Thatcher and George Shultz, including leading figures from education, politics, science, philanthropy, and culture, which published an open letter to the US President in September, urging the US to lead a military intervention against the Serbs (Burg & Shoup 2000:278).

⁷¹ For instance, July 1993, the US opted for air strikes, calling for NATO to launch on its own initiative, without prior UN approval, while its allies were still resisting the use of force. This raised the spirits of the President of BiH, Izetbegović, which "froze" his participation in the talks

international community decided to take action. There was an increasing NATO involvement and occasional air strikes, but both the US and the Europeans remained unable to project power into the conflict in a credible manner, as their strategy, presented as “coercive diplomacy”, had no coercive power behind it (Burg & Shoup 2000:263). Thus far, rather than act in the tradition of geopolitical balance-of-power politics, the Europeans had avoided significant military involvement and refrained from effort to impose settlement. The divisions among the negotiators, over the use of sticks and carrots sent out mixed signals to the warring parties and, thus, strengthened their resistance to compromise. Only after the US took leadership of the established Contact Group that discussed the conflict at the international political level, the tables turned.

With US diplomacy in 1994, the BiH government, Croatia and Bosnian Croats agreed to enter into a common federation (Čuvalo 2007:cvi-cix). This ended the fighting between them and provided a counterweight to Serb military power through a joint command, while isolating the Bosnian Serbs politically and economically⁷². In December 1994, former US President Jimmy Carter secured a four-month ceasefire, which ended most of the fighting and provided space to coordinate military⁷³ and diplomatic efforts. The initial US decision to use air power was in response to the danger of UN withdrawal⁷⁴. A UN withdrawal would mean that US troops would have to be directly involved in the fighting, in protecting the allied troops in their withdrawal. The actual use of US air power to end the conflict occurred only after dramatic changes in the military situation on the ground by Croat-Bosniak military successes, altering

in Geneva and demanded the withdrawal of Serb forces from the surroundings of Sarajevo. Meanwhile, countries with ground troops in BiH, such as Great Britain and Canada continued to oppose air strikes. NATO members with troops on the ground wished air power to only be used to protect UN forces, fearing Serb retribution and the NATO ministers retained the “dual key” arrangement that gave the UN Secretary-general final authority over the use of air power. Izetbegović appeared before the UNSC and called for NATO air strikes, but he spoke to deaf ears (Burg & Shoup 2000:267-268;278).

⁷² Both had much to gain of such an agreement as the BiH forces were starting to struggle with the two-front war, and Croatia was facing sanctions. Further, as they had fought for a long time, several territorial issues concerning western Herzegovina was resolved in favor of the Croats. Croatia was also secured economic and political support from the US as Croatia’s President, Franjo Tuđman, later stated that the US had secured Croatia’s support by offering assurances for Croatian territorial integrity and promising Croatia an international loan for reconstruction, membership in the Council of Europe, and membership in the Partnership for Peace program of NATO (Burg & Shoup 2000:293).

⁷³ With both open and covert military efforts. The Clinton administration, which the whole time had argued for lifting the arms embargo on the BiH government, unable to lift it, had withdrawn from efforts to enforce the arms embargo, to the distress of Europe. Moreover, already in 1992, the US had learned that Iran was smuggling arms to BiH through Turkey and BiH government officials reported that by 1993, arms and money for arms were being smuggled through Turkey from Malaysia, Brunei, Saudi Arabia, Pakistan, and other shipments from Argentina and Hungary. The Clinton administration knew of this, but did not act against it. In 1996, it was revealed that Clinton had participated in a decision in 1994 to inform Croatia that the US would not stand in the way of Iranian arms shipments through Croatia. In 1995, reports in the media revealed Iranian shipments of weapons and the arrival in BiH of Iranian Revolutionary Guards to provide training in their use, as well as US knowledge and implicit acceptance of these actions (Burg & Shoup 2000:307-308).

⁷⁴ Following escalated violence, ineffective NATO air power against the Serbs in May 1995, and the ensuing hostage crisis where the Serbs took 400 UN troops as hostages in response to the limited force against them, raising the prospect of withdrawal. At an international conference on peacekeeping, Boutros-Ghali stated, “*If there is not the political will among the protagonists, we cannot achieve peace. Must we stay for an indefinite period, like Cyprus, for 30 years?*” (Crossette 1995).

the political-strategic balance among the warring parties, as territorial issues that had blocked political settlements were now being settled by the parties themselves, by force⁷⁵. The use of coercive diplomacy through engaging directly with an extensive air campaign against the Bosnian Serbs, together with offering the Bosnian Serbs political compromises, such as the institutionalization of the Bosnian Serb Republic and ensuing a de facto partition, created the necessary conditions to get all parties to the negotiating table (Burg & Shoup 2000:317-318). The closely coordinated efforts between the US and the European governments resulted in a ceasefire in October 1995. In the meantime, Milošević had seized control over the negotiating positions of the Bosnian Serbs⁷⁶.

In the peace negotiations in Dayton, the President of Croatia, Franjo Tuđman, which was also considered a hardliner together with Milošević, represented Bosnian Croats and Bosnian Serbs, while President Alija Izetbegović represented the internationally recognized government of BiH. The peace agreement was signed December 1995⁷⁷, dividing the territory in 49%-51% into two ethno-territorial zones, the smaller Republika Srpska for the Bosnian Serbs and the slightly larger Federation for the Bosniaks and Croats, which would be led by a three-member collective presidency, representing each of the three ethnic groups (Scharf 1997:86-88). Without direct and forceful pressure from the international community, the warring parties would most likely not have agreed to any settlement. It was thus the combination of accommodation and use of force -coercive diplomacy- when the West finally were coordinated, which resulted in negative peace and a negotiated partition rather than military defeat. However, none of the three parties in BiH viewed it as a permanent or preferred solution. Instead, each

⁷⁵ The ceasefire had given the Bosniaks and Croats time to improve their offensive and defensive operations as they had undergone a complete reorganization of their armies and during the summer and fall of 1995 Croatian offensive retook Krajina, while a dual offensive inside BiH overran large territories held by Serbs (Hoare 2007:395-397).

⁷⁶ Milošević imposed an agreement to the Bosnian Serbs, establishing a joint Bosnian Serb-Yugoslav delegation to conduct further negotiations. The delegation consisted of three Yugoslavs, including Milošević, and three Bosnian Serbs, and gave Milošević the authority to resolve any deadlock, and made all decisions of the delegation binding on the Bosnian Serbs (Burg & Shoup 2000:335).

⁷⁷ The peace agreement also included references related to the ICTY. GFAP required the parties to “*cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law*”; the parties “*shall cooperate fully with...the International Tribunal for the Former Yugoslavia*”; “*comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, [and] surrender of*” persons who were indicted. The last two were contained in the new Constitution of BiH, and incorporated in GFAP as well; “*all competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to... the International Tribunal for the Former Yugoslavia*”; “*no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina*” (GFAP 1995:Article 9; Annex 1-A, Article X; Article IX (g); Annex 4, Article II (8), Article IX (1)).

had to be compelled into accepting it. It produced a fragile peace with all sides continuing their pursuit of incompatible goals by other means than military⁷⁸.

The governance structures negotiated in Dayton are, to a large extent, still in place. Ethnicity as the basis for political identity, decision-making, and representation is institutionalized in all governmental bodies and national and federal institutions, including the Parliamentary Assembly and the Presidency. The system which was set up, rather than offering incentives for interethnic cooperation, creates incentives to engage in conflictual behavior as the combination of territorial and ethnic criteria for eligibility and decision-making encourages competition for parliamentary seats based on ethnicity.

4.3 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

After the experience during the first years of the fighting, where the international community was unable to stop the violent conflict from escalating, it was more determined to, at least, holding the perpetrators accountable in the aftermath of the atrocities. One important aspect that should be kept in mind is that there was also growing number of international representatives who called for a Nuremberg-like tribunal⁷⁹.

In July 1992, the UNSC started out with a warning by adopting a resolution stating that perpetrators committing war crimes would be held individually responsible (UNSC, S/RES/764). The first resolution was followed by a second in August 1992, that called upon states and international humanitarian organizations to submit information in their possession regarding war crimes committed in Yugoslavia (UNSC, S/RES/771). The latter was a step towards laying the foundation for future prosecutions, and came only a few days after the broadcast of the conditions at the Omarska concentration camp⁸⁰, which caused an international outcry. In February 1993, the UNSC adopted unanimously Resolution 808 to establish an international tribunal “*for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991*”

⁷⁸ Bosnian Serbs continued to expel non-Serbs from territories they held during the negotiations, Bosniaks refused to let Croats return to their homes taken by the BiH army, or to let Serbs return to Sarajevo. And all parties manipulated the voter registration regulation during the 1996 elections to ensure ethnic majorities in the communities they wished to control (Hoare 2007:398-399).

⁷⁹ By the US, the rapporteurs appointed by the CSCE, the Special Rapporteur appointed by the UNHCR to investigate the human rights situation in the former Yugoslavia, and Cyrus Vance and Sir David Owen (the latter proposed a peace plan in 1993, which failed) (Scharf 1997:51).

⁸⁰ Independent Television News (ITN) journalist Penny Marshall and her cameraman, Jeremy Irvin, accompanied by Channel 4 journalist Ian Williams and Ed Vulliamy from the Guardian were the first journalists to report on the camps (Vulliamy 1992; Al-Thawra News n.d.).

(UNSC, S/RES/808). This was a departure from the legacy of the Nuremberg and Tokyo tribunals, which were created only after the end of hostilities⁸¹.

There were two options at hand for how a tribunal could be established. The first was to draft a convention open to all governments to ratify. Because governments would have to pass implementing legislation to provide evidence and surrender suspects to the tribunal, there was a strong argument for this individual exercise of consent through ratification. It would however, take time to first negotiate a treaty and wait until enough countries had ratified it. It was also highly likely that Serbia would oppose, whose participation was critical. The other option was for the UNSC to establish the tribunal as a subsidiary body, under the peace enforcement provisions of the UN Charter, Chapter VII. The advantages to this option was that it would ensure that it was quickly established⁸², and that the establishment under its Chapter VII powers would create obligations on all states. The disadvantages were that there was a possibility that a permanent member would veto the statute and the fact that the UNSC had never before created a subsidiary judicial body raised concerns about its competence (Scharf 1997:54-54). The drafting of the ICTY statute and recommendations on how it would be established was left to the Secretary General, thus avoiding long and contentious negotiations. In May 1993, the draft statute was sent to the UNSC, suggesting the latter option, for it to be in The Hague, that the tribunal be established under its Chapter VII powers, and be composed of three organs: the Chambers, comprising of three Trial Chambers and an Appeals Chamber, the Office of the Prosecutor, and the Registry as the administrative division servicing both organs (ICTY Statute 1993:art.11). As the conflict had intensified, the five permanent members of the UNSC agreed that there should be no amendments and no further discussion on the statute for the tribunal (Scharf 1997:60). Also in May 1993, the UNSC, again unanimous, adopted the proposed Statute of the ICTY⁸³, notably while facing opposition by all the warring countries of the former Yugoslavia (Arzt 2006:227). Following a nomination process, where forty-one candidates from thirty-eight countries were considered by the UNSC, a shortlist of twenty-three candidates was submitted to the General Assembly in August 1993. The following month the General Assembly elected the eleven judges to the Chambers of the ICTY (Scharf 1997:63).

⁸¹ As Pittman (2016) notes, it is a sobering thought that if the UNSC had waited until the end of hostilities in the region, the Tribunal would not have been established earlier than 2001.

⁸² With only a majority vote in the UNSC, including the affirmative vote of the five permanent members.

⁸³ Thus, establishing “*an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace*” (UNSC 1993, S/RES/827).

The ICTY was established as an instrument of policy, but one that was uniquely judicial in nature⁸⁴. Its purpose was to “*contribute to the restoration and maintenance of peace*” in the context where conflict was ongoing (UNSC 1993, S/RES/827). Both, Resolution 827 and the ICTY Statute, required cooperation and judicial assistance from States (UNSC 1993, S/RES/827:pt.4; ICTY Statute 1993:art. 29)^{85, 86}. This was critical to the success of the Tribunal since it had no power, to physically enforce its orders and decisions. The ICTY was given primary jurisdiction and its Statute mandated the Tribunal to “*prosecute persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991*” (ICTY Statute, art.1). It was to possess jurisdiction over war crimes (as both grave breaches of the Geneva Conventions of 1949 and violations of the laws and customs of war), crimes against humanity, and genocide (ICTY Statute 1993:art. 2-5). And responsibility for these crimes rests with any person who “*planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime*”⁸⁷ (ICTY Statute 1993: art.7(1)). The ICTY was created as a subsidiary organ of the UNSC (Charter of the United Nations 1945: Ch.V,art. 29; ICTY Statute 1993:art.34) and operates with full judicial personality⁸⁸. Its size and budget have varied over time, but at its peak in 2008, it had 30 judges from 27 countries, 1,146 staff members from 82 countries, and a biannual budget of more than US\$300 million (UN Doc. A/63/210-S/2008/515 2008: paras. 32;111;114).

The arguments in favor of the ICTY regarding BiH, was that lasting peace and reconciliation was impossible without some form of accountability for the ordering and commission of the committed crimes. It was argued that retributive justice would contribute to peace by providing

⁸⁴ The ICTY is considered the first truly international criminal tribunal as it applies international humanitarian law and was created by the UNSC acting on behalf of *all* member states rather than only a number of states as was the state of affairs, regarding for instance the International Military Tribunal at Nuremberg (Pittman 2016).

⁸⁵ The Statute provides that “*states shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law*” (ICTY Statute 1993:art. 29(1), and that states “*shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to, (a) the identification and location of persons, (b) the taking of testimony and the production of evidence, (c) the service of documents, (d) the arrest or detention of persons, and (e) the surrender or the transfer of the accused to the International Tribunal*” (ICTY Statute 1993:art. 29(2).

⁸⁶ Some wished the Rules of Procedure be submitted to the UNSC for approval, while others felt this would undermine the independence of the tribunal. As a compromise, Resolution 827 invited states to submit proposals regarding its rules for the judge’s consideration (Scharf 1997:62-63).

⁸⁷ Moreover, under the doctrine of “superior responsibility,” “*the fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof*” (ICTY Statute, art. 7(3)).

⁸⁸ See Agreement Between the United Nations and the Kingdom of The Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, (1994:art. III).

a forum through which a measure of justice could be achieved for victims, the attribution of individual criminal accountability, and that it would establish an inconvertible historical record. It was argued that this would help promote reconciliation among the ethnic groups, prevent recurrence of violent conflict, and act as a deterrent for the continuance of the present violence (Akhavan 1998; Williams & Scharf 2002). The ICTY was envisioned as a measure aimed at the restoration and maintenance of peace in recognition of an explicit link between international criminal justice and international peace and security. Thus, the ICTY mission was fourfold: bring to justice persons allegedly responsible for serious violations of international humanitarian law, to render justice to the victims, to deter further crimes, and to contribute to the restoration of peace by promoting reconciliation.

Most observers were skeptical of the ICTY when it was created as they considered it to be window-dressing in order to disguise the lack of international willpower to take more targeted action against what was happening (Forsythe 1994; Kerr 2005). However, over the years the Tribunal gained international legitimacy and prosecuted several high-ranking war criminals. As of August 2016, the Tribunal had over the course of its institutional life indicted 161 persons, of which the proceedings for 154 accused was concluded. Of the total of 161, 13 were transferred to national authorities for prosecution, and 37 died in the meantime or had their indictments withdrawn. 83 of the indicted persons were sentenced, 19 were acquitted, and two were sentenced but awaiting appeal. Among the indicted were perpetrators from the highest levels of military and political responsibility, including Milošević, Karadžić, and awaiting final verdict in November 2017 in the case of Mladić (ICTY 2016)⁸⁹. Legal proceedings at the ICTY are expected to conclude at the end of 2017 (Ristic 2017)⁹⁰.

As noted in chapter two, there is an argument maintaining that selective prosecution may be an effective method in eliminating individuals or organizations that violated human rights, and further bolster reconciliation. To this end, the ICTY was also an instrumentalist move to effectively remove individuals perceived as blocking the negotiations. Despite distress about the wisdom of such a move expressed by, among others, the UN Secretary General, indictments were published against Karadžić and Mladić in July 1995 (ICTY 1995). Thus, the fact that the

⁸⁹ The ICTY passed its first genocide conviction in 2001 of the Bosnian Serb commander Radislav Krstić, accused of supervising the Bosnian Serb massacre of Bosniaks in Srebrenica in 1995 (ICTY 2001, IT-98-33-T).

⁹⁰ As the ICTY will conclude its work, the UNSC issued Resolution 1966 in 2010, creating the International Residual Mechanism for Criminal Tribunals (now called Mechanism for International Criminal Tribunals (MICT)), a new tribunal created to address residual issues of both the ICTY and the International Criminal for Rwanda (ICTR). It will address and oversee retrials, appeals, referral of further cases to domestic courts, location and access, and continuing confidentiality of documents and protective measures for witnesses (UNSC 2010, S/RES/1966).

ICTY was established while the war was still ongoing contributed to ending the violence by the exclusion of key individuals through indictments. The removal from public and political life of perpetrators and old-regime spoilers made room for change serving to some degree as an agent of lustration as well. However, both during and after the conflict, suspected war criminals remained at the heart of thwarting progress. While GFAP was the conclusion of hostilities, its focus on ending the war and preserving the state meant that the wartime institutions and personnel would remain frozen in time for a long time. The International Community had tied their own hands as GFAP allowed the three major political parties⁹¹ that represented the ethnicities to participate fully in the postwar elections, thus legitimating them as genuine political actors (Subotic 2009:156-157). The background for this was that it was believed that comprehensive reforms could only be sold to the public through their trusted national leaders. It helped stop the conflict in the short term, but in the long term, it also tied the hands of the ICTY, which was severely affected as it empowered old-regime elites, hindered progress and rather was part of fueling interethnic destruct. The way nationalist political elites hijacked the situation by politicizing the situation was twofold. Firstly, they were still in power to control the extent of cooperation with the ICTY, and secondly, they misused the physical and psychological gap between the ICTY and the local communities.

As to the latter, there was a high public demand for transitional justice. Despite BiH being largely ethnically divided politically and in its society, the slow return of IDPs, refugees, and the presence of war survivors living in the same state and at times living in the same communities as perpetrators, made calls for transitional justice more urgent and vocal (Subotic 2009:153). However, the ICTY being created as an ad-hoc court in The Hague and without proper consultation with the concerned society, meant that there was a substantial distance both physically and psychologically between the people devastated by war and the ICTY. This gap between the ICTY and the local communities was taken advantage of and manipulated by politicians, in effect robbing the population of the historical record that trials can create⁹². Additionally, during the first years of the ICTY's existence, the trials and public declarations were only published in English (Fischer 2011:408), leaving all education on the subject to the local media and regional leaders, who reinterpreted the ICTY and its work in line with their

⁹¹ The Croatian Democratic Movement, Party of Democratic Action, and Serb Democratic Party.

⁹² For instance, regarding the Serbian defendant Biljana Plavsic who pleaded guilty, serving her sentence in Sweden, illustrates that most of the population do not know that she was responsible for ethnic cleansing, but they know there is a sauna in the prison (Mladjenovic 2004:63).

personal preconceptions, and thus often mislead the public⁹³, including by spreading rhetoric against the ICTY. Nevertheless, learning from its mistakes, the ICTY started to broadcast its proceedings by radio, while selected trials (such as the one against Milošević) have also been televised. And finally, in 1999 the ICTY established an Outreach Program to counter the propaganda through using live audio and video web broadcasts in the local languages, TV interviews, press releases to regional media, conferences, and roundtables with national officials, victims' groups, and NGOs (ICTY n.d. b; Arzt 2006:230). The realization of how important local outreach has had positive impact. For instance, the conferences organized to present findings enabled people to see firsthand what happened in their specific area and was forced to face the truth (Sadovic, Farquhar, Tosh & Anderson 2006). Moreover, survivors that have followed the TV broadcasts of ICTY trials gained emotional relief and hope, through the Tribunals validation, confirmation of facts, and alleviation of shame (Mladjenovic 2004:61-63).

As to the disruptive conduct by politicians in power regarding cooperation with the ICTY, it has strongly affected the Tribunal's work. When the ICTY was established, Milošević was in control of Serbia, which refused to acknowledge the ICTY as a legitimate international body and denied investigative assistance to it, even when prosecutors were interested in cases of atrocities against Serbs. Serbian authorities obstructed the investigators' access to sites of alleged atrocities, prevented the collection of evidence and some witnesses and victims withheld testimonies in fear of reprisals⁹⁴ (Subotic 2009:39-40). The RS Parliament only in 2001 passed a law on cooperation with the ICTY, which nevertheless continued until the first suspect of war crimes was handed over by RS authorities to the Tribunal in 2005 (BBC 2005)⁹⁵. To induce cooperation from Serbia, Croatia, and BiH, the international community tied material benefits to institutional cooperation. Much of the following monetary aid, thus, had strings attached in the form of cooperation with the ICTY, by apprehending and transferring war-

⁹³ A comprehensive survey conducted in 1999, six years after the ICTY was founded, showed that BiH NGOs daily working with issues of war crimes and reconciliation were uninformed about the processes of international justice and had many misconceptions about the role of the ICTY and about war-crimes (Subotic 2009:133).

⁹⁴ Serbian lawmakers persistently refused to amend laws to accept command responsibility, a critical element of jurisprudence concerning war crimes and human rights. In 2005, a few NGOs had discovered evidence of new mass graves in Serbia filled with the bodies of Kosovo Albanian civilians killed in 1999. Instead of opening investigations, Serbian authorities covered up the findings and began a campaign of silencing and intimidating witnesses by forcing them to sign statements admitting that they do not feel pressure to disclose what happened (Subotic 2009:52).

⁹⁵ The work of the ICTY was complicated, as the Bosnian Serbs mostly did not act independently of Serbia. The work was complicated and delayed by some of the alleged perpetrators hiding in Serbia, some were Serbian citizens, and some were BiH citizens hiding in the RS, allowing Serbia to claim deniability about arresting them on its territory (Subotic 2009:128).

crimes suspects, provide documentation, assist in locating suspects and witnesses, and allow access to the ICTY investigators (Subotic 2009:41).

However, some politicians managed to also manipulate and politicize cooperation, while the facts surrounding the indictments were never discussed in public. For instance, handing over Milošević to the ICTY was presented to the public as an entrance ticket to Europe and that the refusal of doing so would lead to the suspension of aid. Perpetrators on all sides surrendering was viewed and presented as supreme patriotism, as acts of devotion to their country, followed by promises of monetary assistance to their families by the Serbian state (Kerr 2005:229). Croatia's cooperation has also been selective, reluctantly, and insufficiently, with international pressure. The last ICTY indicted was transferred from Croatia in 2005, effectively fulfilling their obligations and followed by promises of EU membership (Subotic 2009:83). Finally, also the nationalistic leaders on all sides in BiH continue to mythologize interpretations of the past and the number of victims to remain in power.

In parallel with manipulative politicians, there were and still are, significant differences in understandings of the conflict among the population in BiH. Public stories of the war have always been incommensurable, compounded by a widespread culture of denial and selective memory among the ethnic groups regarding the war and committed crimes. The impression among many people of Serb ethnicity is that they fought in self-defense against expansionist and Islamist tendencies, perceiving international involvement and the ICTY as victor's justice and anti-Serb. The Bosniak's demand for justice has, in general, been focused on the shared understanding that they were victims of the conflict, while many Croats object to the idea that Croats should be tried for war crimes during a war in which they were defending their "homeland" (Subotic 2009:154-155; Irvine & McMahon 2013:221). Even as late as 2013, Bosniaks more often than the other ethnic groups considered the war as aggression (77.4%), while Croats shared this opinion, they tended to regard it as a defensive or liberating war (30.5%), and Serbs as a civil war (61.5%). Moreover, the majority of Bosniaks (61.5%) and Croats (61.1%) hold Serbia responsible for the war⁹⁶, while the majority of Bosnian Serb respondents (61.3%) hold the international community responsible (Office of the UN Resident Coordinator in BiH 2013:20-21). The collective nature of the conflict, comprising of various crimes, including genocide, and the use of ethnic cleansing throughout the war, made the

⁹⁶ Noteworthy that it is Serbia that is mainly held responsible and not Bosnian Serbs. Only 9.8% of the Bosniak respondents think of the Bosnian Serbs as responsible, while 13.8% of Croat respondents do (Office of the UN Resident Coordinator in BiH 2013:20-21).

responses to the crimes and desire for justice also appear to be group-based rather than individual in nature. Every group considers themselves harmed as an ethnic group, by (an)other ethnic group(s). This also had an effect on the perception of the ICTY.

The domestic political effect of the ICTY trials are also felt very differently in the two BiH entities, the Federation and the RS, polarized along ethnic lines. Meernik (2005) analyzed the dynamics of conflict and cooperation among the ethnic groups in BiH based on statistical data from 1996-2003 and found little evidence of the ICTY having a positive impact on societal peace, rather the opposite. Often, ethnic groups responded with increased hostility toward one another after an arrest or judgement of a fellow ethnic suspect (Meernik 2005:147;277). According to a large-scale survey conducted in 2002, trust in the ICTY was at 51% in the Federation, and only 4% in RS (IDEA:2002:7). A survey from 2008 found that 42% of the respondents (61% from the Federation and 9% in RS) considered the ICTY as helping the reconciliation and strengthening peace, while 43% (71% in RS) felt it did not serve the interest of the region and just kept past conflicts alive (Gallup Balkan Monitor 2008:48). The trend continues in Ivković and Hagans (2016b) 2007 survey, with a positive progression, where they found that 63.8% of the respondents preferred the ICTY as an appropriate jurisdiction (39.8% Croats, 77.8% Bosniaks, 27.9% Serbs), while a total of 67.3% of the respondents view the ICTY as fair (43.1% Croats, 81.5% Bosniaks, 29.5% Serbs)⁹⁷ (Ivković & Hagan 2016b:211-214). An obstructing effect of the fact that it took the ICTY several years before focusing on public outreach and spreading information of its process is evidenced in the disillusionment that ensued. Initially, every ethnic group had imagined that the ICTY would prosecute perpetrators from the other groups, provoking anger and resentment towards the ICTY when it started indicting people from all three groups, in turn inciting negative and positive reactions on sentences whether perceived as too lenient or strict, based on ethnicity⁹⁸. This illustrates that justice and ethnicity is deeply intertwined, creating a context in which it is very difficult to achieve cross-ethnic consensus that justice is being served. The meaning of justice is shaped by one's allegiance to an ethnic group, and each group in BiH has entirely different interpretations of the meta-conflict.

⁹⁷ Notably while local courts are viewed significantly less fair. 38.4% think of BiH courts as fair, while 8.4% consider RS courts fair (Ivković & Hagan 2016b:214).

⁹⁸ For a more detailed overview illustrated by specific court cases and following reactions, see Subotic, J. (2009). *Hijacked Justice: Dealing with the Past in the Balkans*. Ithaca: Cornell University Press.

As to the general perception of the ICTY, due to the Tribunal being both culturally and geographically detached from the local context, it has often been negatively perceived. For instance, it uses the Anglo-Saxon trial system, involving guilty pleas and bargaining, which confused people who are not used to this unique law system, which is often considered to be offensive to victims (Subotic 2009:132). The general impression is that there were too low sentences, that the percentage of acquittals was too high, that plea bargains were overused, and not enough perpetrators indicted and sentenced (Clark 2014:59:62:65). Moreover, the decision to prosecute more high-ranking perpetrators and leaving low ranking suspects to local courts have embittered survivors. Many claim that there was more satisfaction to prosecutions of direct perpetrators, who often still live free and among victims, than trials of party officials whose responsibility was more removed from the daily lives of victims (Subotic 2009:134; Clark 2014:61). Moreover, there has also been dissatisfaction towards the ICTY regarding lack of transparency and general frustration with international involvement, and human rights and women's organizations criticized the ICTY of focusing too strongly on perpetrators and their protection, neglecting the needs of the victims, and that those affected by atrocities are only heard as witnesses (Fischer 2011:408).

In sum, the ICTY was to contribute to peace and reconciliation by providing accountability through individual criminal justice, acknowledgement by serving justice to victims, and establish an irrefutable historical record. As noted in chapter two, courts may be a vehicle for reducing fears and contribute to the feeling of justice being done. However, this depends on how it is done, whether it is perceived as just, if both foot soldiers and those responsible higher up in the chain of command and perpetrators from all sides are punished. In the case of BiH, it is a mixed result. Whether it is perceived just depends on ethnic affiliation, with the feeling among victims often being that not enough foot soldiers are being punished. Nevertheless, the ICTY indicted perpetrators from all sides and of all ranks, including military and militia commanders and politicians.

The ICTY, indeed, served an invaluable historical purpose by creating a body of evidence of the crimes committed during the war. On the other hand, as it is a retributive form of transitional justice, the focus has been on the perpetrators and individual guilt, resulting in a gap as to addressing the needs of victims. The establishment of the ICTY was imposed from the UNSC rather than being homegrown. This, together with the existing ethnic tension and conflicting narratives of the past has led to a situation characterized by mistrust polarized along ethnic

lines, making it difficult for the ICTY to create reconciliation. The work of the ICTY has also been obstructed by the nationalist political elites who have hijacked the process and contributed to a difficult environment for the ICTY, exacerbated by the fact that it took several years before the ICTY properly reached out to the public. The underlying causes to the conflict are yet to be addressed, and until this is done, BiH is yet to achieve positive peace.

5 COMPARISON AND CONCLUDING REMARKS

The current chapter seeks to compare the two cases from a contextual approach taking in use the aspect of contexts noted in chapter one.

The nature of conflict involves the type and scale of violence and the disparities and motivations of the warring parties. To this end, the war in BiH was an ethnic conflict fueled by ethnically defined nationalism and territorial in nature. Compared to South Africa, it was a very complex conflict characterized by both vertical violence by the state against its citizens, and horizontal violence with overlapping groups of perpetrators and victims, further complicated by past cycles of violence between the different ethnicities and political fractions, resulting in sharp social divisions where the ethnic oppositions have been bolstered by war. It was, at different stages, an intra-state war between ethnic nationalists and their disparities as well as an inter-state conflict with the involvement of Croatia and Serbia, through arming and financially supporting the paramilitaries and militias. The armed groups were relatively organized with a coordinated military strategy with ethnic cleansing at its heart, involving widespread and systematic violence, by all sides, which affected the whole population of BiH. Thus, the large-scale nature of the violence coupled with its complexity, prompted the need for large-scale redress, rendering international criminal justice suitable and salient.

Conversely, the complexity of the conflict and the meta-conflict in BiH, characterized by competing narratives over the morality and legitimacy of the conflict and its actors, has challenged transitional justice. It has been argued that local justice processes might be more appropriate in contexts of greater horizontal violence, since many victims and perpetrators live in the same communities characterized by social divisions, as local processes tend to a larger degree to focus on rebuilding trust at community level. However, as the detrimental effects of the war are far too extensive, it would probably not have been adequate. Then again, it would have been a suitable option to working in tandem with the ICTY, in order to have a broader reach in handling the many consequences the war resulted in.

In comparison, in South Africa, the violence of apartheid was an instrument of state repression rather than a result of state-collapse, based in centuries-old colonial and racist model put into a legally binding system. The conflict was intra-state with most of the violence being vertical in

nature, with state authorities acting against the majority of the population, but also against non-state armed opposition and civil liberation movements. The horizontal violence was far less than what could be observed in BiH. The large-scale violence created thousands of victims and perpetrators, and made it practically impossible to opt for transitional justice purely based on prosecutions. The historical record generated by prosecutions would have been inadequate to unveil and condemn the systematic abuses, and individualization of guilt would most likely have been dealt to only a handful of perpetrators. Prosecutions in this case would also be too costly and time-consuming, rendering the TRC to be more suited. The conflict in South Africa was also less complex, with regard to perpetrators, external intervention and regional role, than in BiH, offering an easier landscape to maneuver within for the TRC.

The impact and scale of direct violence was rooted in generations of structural inequality, marginalization, and gross discrimination based on race, affecting the majority from cradle to the grave, resulting in immense structural differences along racial lines. There was, and still is, a need to address this structural context to achieve positive peace through closing the gap between the rich and the poor. To this end, the TRC was an appropriate tool to provide recommendations on reform and reparations. The recommendations on all aspects in its final report were detailed and comprehensive, effectively pinpointing what needed to be done. Thus, the path of restorative justice in the form of the TRC was more suited for this task, while retributive justice would not have addressed this very important aspect in the South African society. The TRC, therefore, was an important mechanism to achieve justice by identifying and acknowledging actions as criminal. However, once the work of a truth commission is completed, the government must use its information to implement the recommendations.

However, in South Africa, there is still an implementation gap. Since also financial reparations have been paid at a rather slow pace and less than recommended, the state left the impression that the amnesty process condoned human rights violations by protecting perpetrators from prosecution. This was evident in the significant decline in public support of the TRC process.

While the underlying socioeconomic grievances were an important part of the conflict in South Africa, the conflict in BiH was based on ethnically defined nationalism. This has resulted in very low levels of trust between ethnic groups within the Bosnian society. The ICTY, not addressing the underlying causes which led to war, has in turn been directly affected by its complexities, as it has been met with suspicion and perceived as targeting specific groups.

The institutional context pertains the state of local, national, and formal institutions. The local infrastructure and formal institutions in South Africa were still in place during and after its transition. However, it was a difficult context for the TRC to work within this environment as some state institutions were difficult or rejecting to cooperate. Moreover, as the constitution was created during transition and negotiations, it was very influenced by the nature of transition and the resulting power-balance, in turn affecting the TRC. This was evident in the inclusion of amnesty in its mandate. Further, criminal justice systems are designed for societies in which the violation of law is the exception and not the rule. Once it becomes the rule and atrocities are widespread with numerous perpetrators and victims, the criminal justice system simply cannot cope. It can thus be argued that in South Africa, the absence of an amnesty agreement would most likely have made no real difference in the number of perpetrators successfully prosecuted due to the large number of cases and perpetrators. Coupled with a large quantity of evidence destroyed, which would most likely have led to acquittals of perpetrators, resulting in perceptions of arbitrary justice, damaging victims' trust in the system.

Moreover, as courts are dependent on cooperation from security agencies such as police and the army, relying solely on trials would not have been apt in South Africa's fragile political situation. This said, the TRC and the criminal justice system did work to a degree in tandem. Then again, many perpetrators, especially the ones higher up in the system, did not feel threatened to come forward. Had there been a designated parallel criminal process to complement and provide backup to the amnesty process, it is likely that many more perpetrators would have come forward and not doubted the ability and will of the state to pursue them. Thus, a dedicated prosecuting unit would most likely have provided a greater incentive for perpetrators to come forward. Nevertheless, the public and individual nature of the amnesties upheld the idea of individual accountability. At the same time, due to the nature of the TRC, the allocation of responsibility was not limited to amnesty applicants. It can, thus, be argued that it may, in fact, have had a wider distribution of blame and acknowledgement of violations than would be the case in a process solely oriented around prosecutions.

In BiH, by contrast, the institutional context was less prominent. The scale and nature of war had physically destroyed domestic institutions, many legal professionals were killed or displaced, institutions were corrupted and influenced by interested parties, all together challenging the process of transitional justice. It has been argued that domestic criminal trials may contribute to the rule of law by delegitimizing past violations, fostering trust, and healing

in society. As opposed to South Africa, for prosecutions to take place in national courts in BiH was at the time not deemed feasible or appropriate as the war was still ongoing and for many years after the war, there was a high likelihood of prosecutions being compromised by ethnic bias and political considerations. It is unlikely that without the ICTY, BiH would have begun any serious prosecutions. The nature of national institutions, characterized by ethnic bias, has undermined the public trust, in turn also strongly affecting the environment in which the ICTY is operating. Affected by politicians, both the ICTY and domestic institutions are perceived to be selective, biased, and unfair, thus making it difficult to achieve general institutional trust. In sum, the ICTY being perceived as biased, bore the risk of stirring up anger and renewed unrest in the course of its work. The TRC, on the other hand, despite controversies, had during its operation significant support by both society and to a large extent the newly formed government. Also, the support from the two prominent leaders, Mandela and Tutu, was important for the Commission's operation.

The political context is affected by the nature of the political settlement, depending on how the conflict ended and the resulting power balance, which, in turn, controls the interrelationship of tradeoffs throughout negotiations, shaping how the past is addressed. The transition in South Africa, the choice of restorative justice and the following characteristics of the TRC was strongly affected by the political context. The apartheid regime was losing power and legitimacy. The combination of international boycotts and sanctions together with political rupture where ANC was challenging the regime, forced the latter to leave the apartheid project and to negotiate towards a peaceful transition of the state structure. There was an insistence by the ANC and civil society to address the past, excluding collective amnesia. At the time, trials were not a tangible option and pushing for it would have destabilized the transition due to the fragile political situation and opposition from the police and security forces. It was also excluded to avoid angering the former regime and its supporters, avoid further violence, and to include the white minority into the settlement, as well as the apartheid's security forces, to accept the change of power. The need to unveil the past and establish a culture of respect for human rights, aiming to avoid repetitions, was pushed through in the form of the TRC, albeit with the sitting regime opposing it. The compromise was the inclusion of power to grant individual amnesties and the amnesty compromise was met when the NP agreed to the condition of full disclosure as long as it also applied to members of the liberation movements. Both sides benefited of the inclusion of amnesty in the mandate of the TRC.

The answer to the question how the past should be addressed is a fundamental decision which determines how the conflict is going to be prevented from re-emerging. In South Africa, the decision was to implement the TRC as a mechanism rather than any other form. Considering the perspective on “meta-conflict” noted above and suggested by McGarry and O’Leary (1995), this link arises because of the interconnectivity between the discussion of the past and the negotiations on how to end the conflict. It is essential to resolve the meta-conflict, in order to resolve the conflict itself. While there would most likely be conflicting views of a conflict’s causes, the meta-conflict drives the conflict resolution process and needs to be identified, agreed upon and addressed.

The establishment of the TRC was part of a complex relationship with the ad hoc approaches to their past that needed to be put in place for the talks to move forward, with the meta-negotiations at the center of the transition. At the end of the day, to connect the meta-conflict, an amnesty clause was added to the peace agreement and the interim constitution. In addition, guarantees were given against conviction to enable exiles to participate in the talks. But on the other hand, the transition was also characterized by contestation, where the conflict ended through a negotiated agreement, affected by the balance of power between the negotiating parties. Hence, the transition was a tapestry of tradeoffs in a challenging context of how to settle the past without upsetting the transition where the apartheid regime was still in power, resulting in an uneasy compromise with justice. Thus, it was a brokered transition, where it was needed to enlist the military’s support and cooperation in the new regime, where the ANC made a Faustian bargain to secure majority rule, where amnesty was traded for peace and the leaders of apartheid got the possibility of freedom from prosecution in exchange for power sharing. However, it is important to keep in mind that the TRC was not a simple choice of the most appropriate mechanism. It was rather an invention of necessity in response to the political constraints and opportunities at the time. The political and historical circumstances that prevailed at the time of South Africa’s transition made it virtually impossible for the ANC to refuse to agree to some form of amnesty. The price of a negotiated peaceful transition was trading with the oppressive government, and its most visible tradeoff was the inclusion of amnesty which was an essential mechanism to reach this goal. In this context, the TRC was an important mechanism to avoid collective amnesia.

In contrast, the creation of the ICTY for BiH, was a result of failing negotiations to end the violence, combined with growing pressure from the international community to do so, and a

response to recurring reports of atrocities. The process of the ICTY's establishment under the peace enforcement provisions of the UN Charter's Chapter VII was relatively fast and placed obligations to cooperate. The cases also illustrate the fact that the scale of conflict affects its internationalization. While South Africa considered itself and proved to be a self-reliant state able to orchestrate transitional justice, BiH was a collapsed state in the midst of an internationalized war with a regional character, rendering it dependent on international support and implementation of the transitional process.

The international intervention in BiH was a crisis where Western Europe and the US saw the need to end the conflict. The establishment of the ICTY was, in fact only one way of dealing with the past, aiming to restore peace and reconciliation but not a means in itself to end the conflict. Thus, the international approach to reach cooperation with the ICTY was, as with the rest of the negotiations during the conflict, enforced by coercion and the policy of issue linkage where each step of cooperation would, at the very late stages of the process, be rewarded with steps closer to EU and NATO membership, financial aid, and the removal of sanctions. Transitional justice was turned into a trading currency between local elites and the international community. One might argue that the result was effectively removing the issue of addressing past wrongs from the public debate and whether the fact that the ICTY was used as a political lever undermines the integrity of the judicial process it is mandated to conduct. The way it was presented as a business transaction and not an issue of justice and wrongdoing, and the facts surrounding the indictments never being discussed in public, was disturbing for the concerned population. Transitional justice in BiH has, in this way, been politicized by its internationalization.

In consequence, the international community has, in effect, given the ruling elites an escape hatch not to deal with the legacy of its past domestically, but to delegate the problem to somewhere else. As European integration was used to stimulate cooperation with the ICTY, two goals were reached by the states to cooperate by turning over perpetrators; showing that they were cooperative to get their rewards, while presenting it to the public as a patriotic sacrifice and necessary evil. And as long as politicians themselves refused to honestly confront the past and acknowledge the crimes committed by members of their own ethnic group, denial at the grassroots level is likely to persist. This has clearly not engendered reckoning of the past and has done nothing to denounce the ideologies that brought on the conflict to begin with. The meta-bargain reached in BiH was agreeing to disagree as to the nature of the conflict, while the

international actors pushed through an agreement on political institutions. A separation of the territory into two entities was implemented and included power-sharing. This rendered it practically and politically difficult to create shared institutions and agreements for addressing the past, as the system depends on the protagonists during the war, by allowing the nationalist parties to continue holding power. If international norms and institutions are accepted because of coercion, compliance will be shallow and poses a risk of being misused by domestic elites for ulterior political purposes. This is what could be observed in BiH where politicians of all sides hijacked the scene of transitional justice and manipulated it in their favor.

Moreover, it has been argued that the long-term impact and efficacy of transitional justice is greatest when emerging from local social movements. The case of South Africa illustrated this through demonstrating the importance of civil society's voice and political power. In BiH, by contrast, the multilayered conflict resulted in victim constituencies themselves being divided along ethnic lines, in turn posing conflicting narratives and demands throughout the transition process. It can thus be argued that, while the South African public expressed their reactions and views on transitional justice through the liberation movement and the ANC, the political parties in BiH underpinned the threefold division of society. In this context, where the conflict and guilt was collectivized and politicized with all ethnic groups considering themselves victims of the other group(s), the individualization of guilt by the ICTY remained difficult. The ICTY could, still, help establish some facts of the conflict. However, facts alone will not help forming a shared narrative about the past as can be seen in today's political statements by many of the ruling parties in the region.

It is important that people accept that there is contrasting truths and that they develop an understanding and empathy of the other's views. If a truth commission was set up, one advice would be to be careful in calling it a truth commission, and maybe rather a body that engages society in dialogue, giving victims on all sides a voice. Moreover, the facts gathered by the ICTY may be tapped into in the future, hopefully with more domestic political will to tackle the past and when new generations may show a renewed interest in the legacies of their history.

As to the accomplishments of the TRC, it investigated a long period and a wide number of cases thus uncovering the fates of numerous victims and providing truth and closure for the ones left behind. The vast amount of information collected enabled the TRC to draw up the broad patterns of human rights violations during the investigated period. However, while the TRC

engaged the public in its process of restorative justice through public accountability and truth-telling, the wish for retributive justice was not adequately met. This frustration was, in turn, exacerbated by the limited governmental follow-up regarding the payment of monetary reparations. Considering the ICTY, on the other hand, among the indicted were perpetrators from the highest levels, largely leaving prosecutions of lower ranking perpetrators to domestic courts and of which many still walk free, creating an impunity gap, which embittered victims. It has been essential in attributing individual criminal accountability, but the individualization of guilt has been disrupted by the differing narratives of history and the war, polarized along ethnic lines. A criticism of retributive justice has been that it may hamper reconciliation and result in further divides in society. In the case of the ICTY, one might argue that this has been the case. The trials fueled and reinforced the competing narratives. While the ICTY has individualized guilt, in the context of opposing narratives, the trials have wider ramifications as the judgements often contradict the ethnic groups own versions of truth. Evidently, the facts uncovered by the ICTY challenge the narratives as they are resisted and continue to be denied. In this sense, one might argue that the ICTY has contributed to entrenching rather than overcoming the ethnic divides. If the ICTY had acted earlier and done more regarding public outreach, it probably would have gained more legitimacy within society and, thus, contributed to reducing denial. Moreover, the theory of individualizing guilt has been challenged in BiH as the ICTY has indicted a small fraction of the many perpetrators. The goal of individualizing guilt is to circumvent risks of collectivization of guilt. The ethnic groups in BiH, however, knowing that many are still at large continue to collectivize guilt to entire groups. They have reached their own conclusions as to whom is guilty, in turn generating mistrust.

Moreover, the ICTY functioned as an instrumentalist move to remove individuals disrupting negotiations and created space for change as old-regime spoilers were removed from public and political life. However, wartime nationalist political parties still hold office and the physical and psychological distance between the ICTY and the people have been taken advantage by politicians. The ICTY as a product of externally enforced settlement has general public trust and support, and served an important role by creating a body of evidence of the crimes committed and has to some degree been able to reach out to the public and survivors that have followed the TV broadcasts of the ICTY trials have gained emotional relief through its acknowledgement. On the other hand, it has fallen short of addressing the needs of victims, which have only been given a voice through serving as witnesses during trials. Negative peace is achieved, but there is still a long way to positive peace in BiH.

In conclusion, the goal of this thesis was to show that transitional justice outcomes depend on context and implementation. As evidenced by the two cases of South Africa's Truth and Reconciliation Commission and the International Criminal Tribunal for the former Yugoslavia, characterized by contextual differences, the selection of mechanisms and their implementations are, indeed, strongly affected by the context in which they were implemented and operated. Transitions offer opportunities for addressing the past, but they are also intertwined with the past which may stand in the way of such endeavors. It could be observed that the context affects the agreed objectives of transitional justice, and that the process of implementing its mechanisms, in turn, affects the specific responses and mechanisms. Transitional justice processes cannot be transferred from one (post-) conflict situation to another, but must be developed out of their specific contexts and in accordance with the given societal and cultural dynamics of the concerned society. There is no rule or easy answer as to which path to choose or model to follow. Past experiences certainly provide a guidance to states facing similar choices in the future, but no general rule can precisely dictate the maneuvering within the complexities of contexts surrounding each case. Nonetheless, governments can learn from the two discussed cases about how to set up a sophisticated investigation and that external initiatives can support transitions, but that these processes would preferably be shaped and agreed by the stakeholders themselves.

As evidenced in chapter two, there is a tendency to set up retributive justice against restorative justice, promoting one over the other. There is, however, a complementary nature to these mechanisms and it is about time to end this conceptual confusion and policy of mutual exclusion. Mass atrocities and armed conflicts have an extensive impact on societies and call for comprehensive responses tailored to and informed by the context of each transition to maximize combined effect and minimize tensions, to achieve the multiple goals of transitional justice. Where the legacy of conflict has resulted in sharply contested and divided versions of the past, there is a need for truth-seeking mechanisms. Nationalist myth-making distorting history fuels conflicts, and mechanisms to prevent the distortion of facts and history is needed to prevent returns to violence. It is difficult for any single mechanism to succeed in establishing a widely accepted narrative, acknowledgement and accountability. A combination, consisting of both retributive and restorative mechanisms, would result in a more comprehensive and holistic approach and understanding of transitional justice, enabling a more effective handling of its complex and differing needs. Trials, on the one hand, are important for accountability by establishing individual criminal guilt. They may also eradicate the perception that whole

communities or ethnic groups are responsible for the atrocities. At the same time, they are often not equipped or intended to give victims the needed attention or attribute moral or political responsibility. Restorative mechanisms cannot alone establish a shared and absolute truth or change behavior or institutions. However, they can bring a sense of closure resulting from knowing the fates of loved ones, pinpoint the responsibility of groups, produce findings and recommendations, and engage society in dialogue. Thereby, with time, they can contribute to establishing national unity, which is of significance for the collective narrative and truth. They may also establish patterns of abuse, bring official acknowledgement and redress, and focus on the needs of victims.

As noted in the introduction, very few studies cross regions and types of mechanisms in empirical studies. Moreover, by ignoring the context, many defenders and critics of both retributive and restorative justice have limited their analyses to the symbolic dimension of transitional justice. Thus, this thesis has contributed to the field of transitional justice by examining both types of mechanisms, in the light of South Africa and BiH, coupled with analyzing with a contextual approach the effect of context on the selection and implementation of transitional justice mechanisms. The thesis has also contributed to the small, but growing, literature arguing in favor of a combined and comprehensive approach when implementing transitional justice.

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Appendix 1: Overview of Truth Commissions

| Country | Name of truth commission | Time of operation | Dates covered | Created by | Focus of inquiry | Outcome |
|-------------|--|-------------------|---------------|------------|-------------------------------------|---|
| Uganda (1) | Commission of Inquiry into the Disappearance of People in Uganda since the 25th January 1971 | 1974 | 1971-1974 | President | Disappearances | Report not made public |
| Bolivia | National Commission for Investigation for Forced Disappearances (Comisión Nacional de Investigación de Desaparecidos) | 1982-1984 | 1967-1982 | President | Disappearances | Disbanded |
| Argentina | National Commission on the Disappeared (Comisión Nacional sobre la Desaparición de Personas, CONADEP) | 1983-1984 | 1976-1983 | President | Disappearances; torture; detentions | Report |
| Zimbabwe | Zimbabwe Commission of Inquiry into the Matabeleland Disturbances | 1983-1984 | 1983 | President | Killings of dissidents | No official report, unofficial NGO report published |
| Uruguay (1) | Investigative Commission on the Situation of “Disappeared” People and Its Causes (Comisión Investigadora sobre la Situación de Personas Desaparecidas y Hechos que la Motivaron) | 1985 | 1973-1982 | Parliament | Disappearances | Report |
| Philippines | Presidential Committee on Human Rights | 1986-1987 | 1972-1986 | President | Various | Disbanded |
| Uganda (2) | Commission of Inquiry into Violations of Human Rights | 1986-1995 | 1962-1986 | President | Various | Report |
| Poland | | 1989-1991 | 1945-1991 | Parliament | Murders | Report |

Appendix 1: Overview of Truth Commissions (cont.)

| | | | | | | |
|------------------------|---|-----------|------------|---------------------------|---|--------|
| Chile (1) | National Commission on Truth and Reconciliation (Comisión Nacional de Verdad y Reconciliación or the “Rettig Commission”) | 1990-1991 | 1973-1990 | President | Disappearances | Report |
| Nepal (1) | Commission of Inquiry to Locate the Persons Disappeared During the Panchayet Period | 1990-1991 | 1961-1990 | Interim government | Torture; disappearances; extrajudicial executions | Report |
| Chad | Commission of Inquiry into the Crimes and Misappropriations Committed by the Ex-President Habré, his Accomplices and/or Accessories (Commission d’Enque^te sur les Crimes et De’tournements Commis par l’Ex-Pre’sident Habre’, ses co-Auteurs et/ou Complices)) | 1991-1992 | 1982-1990 | President | Various | Report |
| South Africa (ANC) (1) | Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees (“The Skweyiya Commission”) | 1992 | 1979-1991 | African National Congress | Treatment of detainees in ANC camps | Report |
| Germany (1) | Study Commission for Working Through the History and the Consequences of the SED Dictatorship in Germany (Die Enquete-Kommission des 12. Deutschen Bundestages “Aufarbeitung von Geschichte und Folgen der SED-Diktatur in Deutschland“) | 1992-1994 | 1949-1989 | Parliament | Various | Report |
| El Salvador | Commission on the Truth for El Salvador (Comisión de la Verdad Para El Salvador, CVES) | 1992-1993 | 1980- 1991 | UN- brokered peace accord | Various | Report |
| Rwanda (1) | International Commission of Investigation on Human Rights Violations in Rwanda | 1993 | 1990-1993 | Non-official commission | Various | Report |

Appendix 1: Overview of Truth Commissions (cont.)

| | | | | | | |
|------------------------|--|-----------|----------------------------|--|--|---------|
| | Since October 1, 1990 (Commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis le 1er Octobre 1990) | | | created by agreement of Rwandan civil society groups and four international NGOs | | |
| South Africa (ANC) (2) | Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse against ANC Prisoners and Detainees by ANC Members ("The Motsuenyane Commission") | 1993 | 1979-1991 | African National Congress | Treatment of detainees in ANC camps | Report |
| Honduras (1) | Independent inquiry undertaken by the National Commissioner for the Protection of Human Rights | 1993-1994 | 1980-1993 (disappearances) | President | Ombudsman to monitor compliance by the Honduran government with human rights standards; disappearances | Report |
| Ethiopia | Office of the Special Prosecutor | 1993-1997 | 1974-1991 | President | Various | Report |
| Sri Lanka | Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons (Three "Zonal Commissions": three commissions for different geographic parts of Sri Lanka and one "All Island" Commission to follow-up investigations) | 1994-1997 | 1988-1994 | President | Disappearances | Reports |
| Burundi | International Commission of Inquiry for Burundi (Commission d'Enquête Internationale sur les violations des droits de l'homme au Burundi depuis le 21 octobre 1993) | 1995-1996 | 1993-1995 | United Nations Security Council | Various | Report |

Appendix 1: Overview of Truth Commissions (cont.)

| | | | | | | |
|---------------------------------|--|----------------------------------|-----------|--------------------------|--|---------------|
| Haiti | National Commission for Truth and Justice (Commission Nationale de Vérité et de Justice) | 1995-1996 | 1991-1994 | President | Various | Report |
| Germany (2) | Study Commission for the Overcoming of the Consequences of the SED Dictatorship in the Process of German Unity (Enquete-Kommission "Überwindung der Folgen der SED-Diktatur im Prozess der Deutschen Einheit"): 1995-1998. | 1995-1998 | 1949-1989 | Parliament | Various | Report |
| South Africa (3) | Truth and Reconciliation Commission | 1995-2002 | 1960-1994 | Parliament | Various | Report |
| Ecuador (1) | Truth and Justice Commission | 1996-1997 | 1979-1996 | President | Various | Disbanded |
| Guatemala | Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico) | 1997-1999 | 1962-1996 | UN-brokered peace accord | Various | Report |
| Morocco (1) | Independent Arbitration Commission | 1998 | 1956-1998 | Royal decree | Compensate victims of arbitrary detention and forced disappearance | Press release |
| United Kingdom/Northern Ireland | The Bloody Sunday Inquiry | 1998-2005 | 1972 | UK Prime Minister | Loss of life in connection with civil rights march | Report |
| Lithuania | The International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania | 1998-2007 | 1940-1990 | President | Various | Reports |
| Estonia | Estonian International Commission for Investigation of Crimes Against Humanity | 1998-2007 (succeeded by Estonian | 1939-1991 | President | Various | Report |

Appendix 1: Overview of Truth Commissions (cont.)

| | | | | | | |
|-----------------|--|--|------------|-------------------------|---------------------------|-----------------|
| | | Institute of Historical Memory) | | | | |
| Burkina Faso | | 1999 | 1983-1997 | President | Various | Report |
| Uzbekistan | Commission for the Promotion of the Memory of Victims | 1999 | 1800s-1992 | President | Political repression | Report |
| Rwanda (2) | National Unity and Reconciliation Commission (Commission Nationale d'Unité et de Réconciliation) | 1999-present (became a permanent body in 2002) | 1990-1993 | Parliament | Various | Various reports |
| Nigeria | Human Rights Violations Investigation Commission (later called The Judicial Commission for the Investigation of Human Rights Violations) | 1999-2002 | 1966-1999 | President | Various | Report |
| Lebanon (1) | Official Commission of Inquiry | 2000-2001 | 1975-1990 | President | Disappearances | Report |
| Uruguay (2) | Commission for Peace (Comisión Para la Paz) | 2000-2003 | 1973-1985 | President | Disappearances | Report |
| Lesotho | | 2000-2001 | 1998 | Parliament | Election-related violence | Report |
| South Korea (1) | Presidential Truth Commission on Suspicious Deaths of the Republic of Korea | 2000-2004 | 1975-1987 | President | Deaths of activists | Report |
| Mexico | | 2001 | 1970-1982 | Human Rights Commission | Disappearances | Report |
| Lebanon (2) | | 2001-2002 | 1975-1990 | President | Disappearances | No report |
| Panama | Panama Truth Commission (Comisión de la Verdad de Panamá) | 2001-2002 (additional follow up office until 2004) | 1968-1989 | President | Various | Report |

Appendix 1: Overview of Truth Commissions (cont.)

| | | | | | | |
|--|--|-----------|-----------|--------------------------|---------------------|-----------------------------------|
| Peru | Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación, CVR) | 2001-2003 | 1980-2000 | President | Various | Report |
| Grenada | Truth and Reconciliation Commission of Grenada (TRCG) | 2001-2006 | 1976-1991 | Governor-General | Various | Report |
| Federal Republic of Yugoslavia (Serbia and Montenegro) | Commission for Truth and Reconciliation, also called the Yugoslav Truth and Reconciliation Commission (Komisija za istinu i pomirenje) | 2001-2003 | 1980-2000 | President | War crimes | Disbanded as Yugoslavia dissolved |
| Ghana | National Reconciliation Commission | 2002-2004 | 1957-1993 | Parliament | Various | Report |
| Timor-Leste | Commission for Reception, Truth, and Reconciliation (Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste, CAVR) | 2002-2005 | 1974-1999 | UN-brokered peace accord | Various | Report |
| Sierra Leone | Truth and Reconciliation Commission | 2002-2004 | 1991-2002 | Peace accord | Various | Report |
| Central African Republic | Truth and Reconciliation Commission | 2003 | 1960-2003 | National Conference | Various | Recommendations |
| Zambia | | 2003-2005 | 1972-1991 | President | Torture | Report |
| Bosnia and Herzegovina | Srebrenica Commission | 2003-2004 | 1995 | Parliament | Srebrenica massacre | Report |
| Algeria | Ad Hoc Inquiry Commission in Charge of the Question of Diasaperances | 2003-2005 | 1992-2002 | President | Various | Report not made public |
| Chile (2) | National Commission on Political Imprisonment and Torture (Comisión Nacional Sobre Prisión Política y Tortura, "Valech Commission") | 2003-2005 | 1973-1990 | President | Torture | Report |
| Lebanon and Syria | | 2004-2005 | 1975-1990 | Both governments | Disappearances | Report |

Appendix 1: Overview of Truth Commissions (cont.)

| | | | | | | |
|---------------------------------|---|-----------|---------------------------------|---|--|------------------|
| Democratic Republic of Congo | Truth and Reconciliation Commission (Commission Verité et Réconciliation) | 2004-2006 | 1960-2003 | UN-brokered peace accord followed by national legislation | Various | Public education |
| Greensboro, North Carolina, USA | Greensboro Truth and Reconciliation Commission | 2004-2006 | Events around November 3, 1979 | Civil society, with mayoral involvement in member selection | Events around November 3, 1979 | Report |
| Morocco (2) | Equity and Reconciliation Commission (Instance Equité et Réconciliation, IER) | 2004-2006 | 1956-1999 | Royal Decree by king | Various | Report |
| Paraguay | Truth and Justice Commission (Comisión Verdad y Justicia, CVJ) | 2004-2008 | 1954-2003 | Parliament | Various | Report |
| Indonesia and Timor-Leste | Commission of Truth and Friendship | 2005-2008 | 1999 | Bilateral | Violence in Timor-Leste | Report |
| South Korea (2) | Truth and Reconciliation Commission (Committee on Clearing Up Past Incidents for Truth and Reconciliation, 진실화해를위한과거사정리위원회) | 2005-2010 | 1905-2005 | Parliament | Various | Report |
| Liberia | Truth and Reconciliation Commission of Liberia | 2006-2009 | 1979-2003 | UN-brokered peace accord followed by national legislation | Various | Report |
| Canada | Truth and Reconciliation Commission of Canada | 2008-2015 | 1874-1996 | Parliament | Indian Residential schools | Several reports |
| Ecuador (2) | Truth Commission to Impede Impunity (Comisión de la Verdad para impedir la impunidad) | 2008-2010 | 1984-1988 (“and other periods”) | President | Various | Report |
| Mauritius | Truth and Justice Commission | 2009-2011 | 1638-present | Parliament | Legacy of slavery and indentured labor, socioeconomic class abuses | Report |

Appendix 1: Overview of Truth Commissions (cont.)

| | | | | | | |
|-----------------|---|--------------|---|---|---|------------------------------|
| Togo | The Truth, Justice, and Reconciliation Commission in Togo | 2009-2012 | 1958-2005 | President | Various | Report |
| Kenya | Truth, Justice and Reconciliation Commission (TJRC) | 2009-2013 | 1963-2008 | UN-brokered peace accord followed by national legislation | Various | Report |
| Honduras (2) | Truth and Reconciliation Commission (Comisión de la Verdad y la Reconciliación) | 2010-2011 | Events leading up to and following the June 28, 2009 coup | President | Coup-related violence | Report |
| Solomon Islands | Truth and Reconciliation Commission (TRC) | 2010-2011 | 1998-2003 | Parliament | Various | Unofficially released online |
| Brazil | National Truth Commission | 2012-2014 | 1946-1988 | Congress/President | Various | Report |
| Tunisia | Truth and Dignity Commission | 2014-ongoing | 1955 | President | Tribunal also using non-judicial mechanisms | |
| Nepal (2) | Truth and Reconciliation Commission | 2015-ongoing | 1996-2006 | Parliament | Various | Ongoing |

(Sources: Hayner 1994,2011; Backer 2009; USIP 2011).