

# Democratizing Transitional Justice

Towards a Deliberative Infrastructure  
for Dealing with the Past in Kosovo

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**Towards a Deliberative Infrastructure for  
Dealing with the Past in Kosovo**

Gëzim Visoka and Besart Lumi

# Table of Contents

## Colophon

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<b>Abbreviations</b>	<b>6</b>
<b>Key Findings</b>	<b>7</b>
<b>Introduction</b>	<b>9</b>
<b>Methodology and Data</b>	<b>12</b>
<b>Justice without Strategy:</b>	
<b>A Review of Dealing with the Past Initiatives in Kosovo (1999-2020)</b>	<b>13</b>
International and hybrid war crimes courts in Kosovo	14
Truth-seeking and documentation initiatives	18
Reparations	23
Guarantees of non-recurrence and institutional reforms	25
<b>Towards a Deliberative Infrastructure for Dealing with the Past in Kosovo</b>	<b>32</b>
1. Strategic vision and national understanding on dealing with the past	32
2. Repository of knowledge on transitional justice	34
3. A bottom-up and victims-centred national strategy for dealing with the past	35
4. Towards an institutional infrastructure for dealing with the past	37
<b>Conclusion: Reflections Beyond Kosovo</b>	<b>42</b>
Lesson 1: No peace agreement without transitional justice provisions	43
Lesson 2: Timing and political will central to the success of transitional justice processes	44
Lesson 3: Dealing with the past without strategy undermines transitional justice processes	45
Lesson 4: Deliberative approaches to DwP key to overcoming blockages to truth and justice	46

# Abbreviations

CDHRF	Council for the Defence of Human Rights and Freedoms
CoE	The Council of Europe
EU	The European Union
EULEX	The EU Rule of Law Mission in Kosovo
HLC	Humanitarian Law Center
I4P	Infrastructure for Peace
ICO	The International Civilian Office
ICTY	The International Criminal Tribunal for the former Yugoslavia
IMWG-DwPR	Inter-Ministerial Working Group on Dealing with the Past and Reconciliation
KFOR	Kosovo Force (NATO)
KLA	Kosovo Liberation Army
KMB	The Kosovo Memory Book
KRCT	The Kosova Rehabilitation Centre for Torture Victims
KSC	The Kosovo Specialist Chambers
NATO	The North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OMPF	Office for Missing Persons and Forensics
OSCE	The Organization for Security and Cooperation in Europe
PACE	The Parliamentary Assembly of the Council of Europe
PK	Partners Kosova
RECOM	Regional commission for the establishment of facts about war crimes and other serious violations of human rights
SITF	The Special Investigative Task Force
SPOK	The Special Prosecution Office of Kosovo
TRC	Truth and Reconciliation Commission
UNMIK	The United Nations Interim Administration Mission in Kosovo

# Key Findings

- ◆ Twenty-one years since the end of violent conflict in Kosovo, the country has not managed yet to devise a national strategy on transitional justice due to lack of political will and commitment among national and international stakeholders to genuinely engage with the legacies of the past.
- ◆ Instead, the side-by-side transitional justice initiatives that proceeded have suffered from a lack of coordination and harmonisation, politicisation and personalisation by political leaders, and most importantly did not manage to ensure adequate representation and inclusion of affected communities (victims and survivors of the conflict).
- ◆ This study suggests that Kosovo needs an integrated and deliberative infrastructure for transitional justice to ensure the legitimacy and efficiency of efforts for dealing with the past in Kosovo.
- ◆ The study proposes a four-step approach, which includes:
  1. Generating a citizen-informed national understanding on the principles and ethics for dealing with the past and transitional justice in Kosovo;
  2. Developing an integrated knowledge base and repository of existing sector-specific strategies, initiatives, and mechanisms for transitional justice in Kosovo;
  3. Developing a bottom-up and victims-centred national strategy; and
  4. Designing an integrated institutional infrastructure for dealing with the past.
- ◆ Ultimately, Kosovo's experience offers four lessons: 1) there should be no peace agreement without transitional justice provisions; 2) timing and political commitment is central to the success of transitional justice processes; 3) justice without strategy can undermine transitional justice processes; and 4) deliberative and victim-centred approaches to dealing with the past and institutional infrastructure may hold the key to overcoming blockages to truth and justice.

# Introduction

Dealing with the past (DwP) is one of the most challenging yet important segments of conflict transformation and peacebuilding in conflict-affected societies. Violent conflicts not only result in human losses and physical destruction, but also take a heavy toll on the political and social fabric of the society. This results in profound grievances and a prevailing sense of injustice. In order to move on, societies have to face their past, namely engage with various forms and approaches for remembering and acknowledging the past injustices, offering a measure of justice to the victims and survivors and all other affected communities through retributive and restorative justice, as well as providing assurances that past injustices will not happen again through structural and institutional reforms.<sup>1</sup> Yet, dealing with the past remains one of the most complex aspect of post-conflict reconstruction. Among many other competing priorities, such as dealing with humanitarian urgencies, establishing law and order, and building of functioning institutions and public services, dealing with the past is often overlooked. With insufficient political commitment among the national political leaders, initiatives for DwP often end up being utilised by national governments for their own political agendas and often are forged by external donors and implemented through non-governmental organisations (NGOs) with some involvement of affected communities.

As a result of this, transitional justice measures are increasingly criticized for being understood and implemented as a template or toolkit, namely a narrow set of measures to be applied uniformly wherever widespread violations of human rights have occurred, without much consideration of local contexts and conflict victims and survivors.<sup>2</sup> Most importantly, DwP initiatives are often set up in relative isolation from each other, without a comprehensive overarching strategy to ensure positive societal impact country-wide. A comprehensive approach to DwP demands a coherent strategy in which each element of the strategy acknowledges the need for, and provides the space for other initiatives.<sup>3</sup> A careful consultation would ensure that people who have been affected by the conflict are listened to, so that the transitional justice programmes best reflect their actual experiences, needs, and entitlements. As the former UN Secretary-General Kofi Annan stated in 2004: “the most successful transitional justice experiences owe a large part of their success to the quality and quantity of public and victim consultation carried out”.<sup>4</sup> Yet, in practice meaningful participation of affected communities in designing and implementing DwP initiatives has not been

<sup>1</sup> For an in-depth academic and policy discussion see: Ruti G. Teitel, *Transitional Justice*. Oxford: Oxford University Press, 2002; Colleen Murphy, *The Conceptual Foundations of Transitional Justice*, Cambridge: Cambridge University Press, 2017; Olivera Simic, *An Introduction to Transitional Justice*, London: Routledge, 2016; and UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004.

<sup>2</sup> Roger Duthie and Paul Seils, “Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies”. New York: International Centre for Transitional Justice, 2017.

<sup>3</sup> OHCHR, “Rule-of law tools for post-conflict states: National consultations on transitional justice”. New York and Geneva, 2009. Available at: [https://www.ohchr.org/Documents/Publications/NationalConsultationsTJ\\_EN.pdf](https://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf).

<sup>4</sup> UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, p. 1.

taken seriously neither by international nor national authorities.<sup>5</sup>

Since 1999, efforts for dealing with the past and pursuit of transitional justice in Kosovo have been inconsistent and inadequate. War crimes have been tried by international courts (ICTY), through institutions (UNMIK and EULEX) and in national courts. The focus on war crimes trials neglected the importance of truth-seeking and documentation, commemoration aspects, as well as the significance of reparations and compensation. With these elements being mostly absent, recognition for all the victims and survivors of the conflict (affected communities) is also neglected. Discarded initiatives and institutional mechanisms were unable to offer guarantees of non-recurrence and undertake effective institutional reforms, or investment into means of advancing coexistence and reconciliation. The 2012 Inter-Ministerial Working Group on Dealing with the Past and Reconciliation (IMWG-DwPR) concluded its work unsuccessfully in 2016 without producing a national strategy on transitional justice as its work was hampered by a lack of meaningful domestic political commitment and capacity, and insufficient involvement of affected communities. The establishment in 2016 of the Kosovo Specialist Chambers (KSC) has pushed issues of the wartime past back to public debate and is impacting inter-ethnic relations negatively. Further, a Truth and Reconciliation Commission (TRC) is currently under preparation, which certainly has the potential to provide a wider recognition of a common historical record by the diverse communities and potentially contribute to reconciliation. Yet, the KSC and preparatory efforts for establishing a TRC operate completely separate from each other in the same challenging context with potentially negative societal impact. In addition to governmental structures and mechanisms, several civil society organisations (CSOs) in Kosovo have been working for many years on issues related to DwP through project-based initiatives on restorative justice, documentation and monitoring of war crimes trials, psycho-social support for affected communities, missing persons, inclusive memorialization, and storytelling.

Despite all these initiatives, Kosovo still struggles to deal with its wartime past; there are several 'exclusive' truths blocking people from trusting each other, lack of information on many wartime events or the whereabouts of missing persons, and there is still mainly a system of impunity for (war) crimes or corruption. What explains the lack of an integrated approach to DwP in Kosovo? Have the existing initiatives and institutions managed to seriously respond to diverse citizen's needs in the current context? What are the prospects for developing an integrated, comprehensive, and deliberative strategic framework and institutional infrastructure for DwP in Kosovo? This study aims to shed light on these pertaining questions by analysing previous DwP initiatives and mechanisms in Kosovo and the extent to which they have been inclusive towards affected communities, and exploring a potential way-out and solution to overcoming the existing flaws.

We find that twenty one years since the end of violent conflict, Kosovo has not managed to devise a national strategy on transitional justice due to lack of political will and capacity among all stakeholders to genuinely engage with the legacies of the past. What has proceeded are side-by-side initiatives by state institutions and non-governmental organisations (NGOs) who have mostly been top-down and project-based without sufficient coordination and involvement of affected communities. These initiatives are characterised by: 1) insufficient interest on the side of international community to include transitional justice issues at the heart of peace and dialogue

talks; 2) incomplete, politicised and personalised efforts by national political leaders; short-term interventions by NGOs with limited outreach and involvement of affected communities; 3) insufficient knowledge about the work and impact of existing initiatives; most importantly, 4) have overlooked the importance of bottom-up and victim-centred approaches to DwP. As a result of these parallel, fragmented, and often overlapping initiatives we now risk overlooking important aspects of the wartime past and unintentionally promote a culture of impunity, ignorance, and misrecognition, thus harming the affected communities and undermining in the long run the prospects for sustainable peace and reconciliation in Kosovo.

To remedy these flaws, we argue that Kosovo needs an integrated and deliberative infrastructure for transitional justice that promotes the democratic legitimacy and efficiency of efforts for DwP in Kosovo. In this context, the concept of deliberation entails decision-making processes on DwP based on democratic discussion, wide consultation, and inclusion of affected communities. Drawing on the information provided by the respondents and comparative analysis from other countries, we envisage that democratization of efforts for DwP in Kosovo should go through four stages. First, we propose that Kosovo needs to generate a citizen-informed national understanding on the principles and ethics for DwP in Kosovo. These principles and ethics should guide the work of all national and international stakeholders working on DwP in Kosovo. They should promote the rights, needs, and interests of affected communities; ensure gender balance; and promote de-ethnicization, depoliticization, and de-personalisation of DwP initiatives. Second, we propose developing an integrated knowledge base and repository of existing sector-specific strategies, initiatives, and mechanisms for transitional justice in Kosovo to ensure transparency, enable dialogue, and promote evidence-based decision-making. Third, we propose developing a national strategy on DwP which is informed by citizen deliberations and participation of affected communities to ensure the democratic legitimacy and accuracy of actions for DwP. Finally, to ensure that national understanding, knowledge dissemination, and strategic framework is implemented there is a need for an integrated institutional infrastructure which would be responsible for supporting the existing and future initiatives for DwP in Kosovo.

Our proposed approach to designing a deliberative infrastructure for DwP in Kosovo contains important elements and lays out in a cohesive framework the required future effort for addressing the unresolved legacies of the conflict in Kosovo. However, it is ultimately up to relevant governmental and non-governmental stakeholders, including the affected communities, to take the lead in realising it in practice. Certainly, the political context in Kosovo at the moment – the uncertainty and instability surrounding the government reshuffle in early 2020 – may not be conducive for prioritising DwP. But, the proposed vision here contains sufficient scope for transitional justice by putting the pieces together in order to build a solid infrastructure for DwP in Kosovo.

This study proceeds as follows. Following this introduction and the presentation of the methodological approach, the first section reviews key transitional justice initiatives in Kosovo in order to examine their core features and explore their achievements and shortcomings. The second section outlines a proposal for a deliberative infrastructure for DwP in Kosovo, which consists of four main steps followed by an elaboration of the comparative merits and potential limits. Finally, the study concludes with four reflections from Kosovo which can serve as lessons for other conflict-affected settings.

<sup>5</sup> Rosalind Shaw and Lars Waldroff, With Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, Redwood City, CA: Stanford University Press, 2010.

# Methodology & Data

This study reviews the existing efforts and initiatives for dealing with the past and pursuing transitional justice in Kosovo and explores potential pathways for future enhancement of transitional justice processes.

In achieving the first goal the study offers a descriptive overview of the success and shortcomings of past transitional justice processes in Kosovo. In reviewing the past mechanisms and initiatives the study has drawn on official policy and legal documents as well as has utilised a broad range of reports and studies that assess the performance and impact of transitional justice processes in Kosovo. In exploring the prospects for developing a future pathway for transitional justice in Kosovo, the study relies on information collected for this study which comprised 22 interviews with governmental and non-governmental stakeholders and two focus group discussions with Kosovo Albanian and Serb citizens conducted during March and April 2020.

We had originally envisaged five focus group discussions but due to the spread of coronavirus (Covid-19) and the subsequent lockdown in Kosovo we were unable to complete them. The interview and focus group evidence has not only been utilised to explore the suggestions of respondents on the future design of transitional justice processes in Kosovo but also to explore afresh their perception about past efforts. In offering insights for the future pathways and reflections beyond Kosovo, the study takes a normative stance based on the empirical and comparative evidence on how Kosovo should design a future infrastructure for dealing with the past. Finally, the findings of this study have been shared and discussed with a group of civil society organisations who work primarily in the fields of transitional justice, human rights, and peacebuilding. This has ensured the validation of the findings and the examination of the viability of the proposed ideas.

# Justice without Strategy

A Review of Dealing with the Past Initiatives  
in Kosovo (1999-2020)

The violent conflict of 1998-1999 in Kosovo has resulted in 13,535 casualties (both civilian and uniformed), of whom 10,812 were ethnic Albanians (80%), 2,197 were ethnic Serbs (16%), and 526 were Roma, Bosniaks and members of minority communities (4%).<sup>6</sup> Among those casualties, 10,317 were civilians deaths or missing persons, of whom 8,676 were Albanians, 1,196 Serbs, and 445 Roma and others.<sup>7</sup> It is estimated that from the 3,218 casualties among armed formations, 2,131 were members of the KLA and Armed Forces of the Republic of Kosovo (FARK), whereas 1,084 members of Serbian military, paramilitary and police forces, and 3 members of NATO's Kosovo Force (KFOR; the NATO-led international peacekeeping force in Kosovo). Among the casualties, 1644 persons are still unaccounted (as of May 2020).<sup>8</sup> The violent death of civilian victims amounts to war crimes and crimes against humanity, which are prohibited by international criminal law, international humanitarian law and the law of armed conflict. In addition to casualties the conflict has had devastating consequences for the material and physical as well as the political, economic, and psychosocial aspects of Kosovo society.

These legacies of the conflict continue to dominate a perception that without bringing perpetrators to justice, knowing what happened, and offering support to those affected by the conflict, the society will not be able to reconcile from its violent past and move on to build a sustainable peace. Since the end of the conflict, dealing with the past and pursuing transitional justice has been a scattered process which has lacked a strategic vision, genuine involvement of the affected communities, and institutional sustainability. What has taken place in Kosovo during the past twenty-one years can be best described as an accumulation of parallel, overlapping, and side-by-side initiatives and mechanisms which have been short lived and widely contested. This section reviews the main initiatives and mechanisms for dealing with the past and in pursuit of transitional justice in order to examine their core features and explore their main achievements and shortcomings.

<sup>6</sup> Humanitarian Law Center, 'The Kosovo Memory Book', Pristina, 2011. Available at: <http://www.kosovomemorybook.org>.

<sup>7</sup> Humanitarian Law Center, 'The Kosovo Memory Book'.

<sup>8</sup> Ibid. There are no available and accessible data on the status of missing persons, namely if they were civilian or armed persons at the time of their abduction or disappearance. The Law of Missing Persons does not discriminate on or explicitly differentiate the war-time status of missing persons.

## International and hybrid war crimes courts in Kosovo

The placement of Kosovo under international administration and failure of a peace settlement between Serbia and Kosovo resulted in the imposition of different transitional justice mechanisms from outside without a consensual and comprehensive framework for DwP. The first attempt to promote transitional justice in the former Yugoslavia, including Kosovo, was the UN's International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY focused its prosecutorial strategy on "high level civilian, police, and military leaders, of whichever party to the conflict who may be held responsible for crimes committed during the armed conflict in Kosovo".<sup>9</sup> Between 1999 and 2017, the ICTY indicted and tried a small number of high-ranking Serb military and political officials for war crimes in Kosovo, including a former president, prime minister and ministers, as well as the key military, security and intelligence leadership. Concerning Kosovo Albanians, the ICTY tried separately two KLA regional commanders, Ramush Haradinaj and Fatmir Limaj (and their associates), both of whom were acquitted after lengthy trials. However, Haradin Bala and Lah Brahimaj who were associates of Ramush Haradinaj were found guilty and sentenced to 13 years, respectively six years' imprisonment. While the ICTY enjoys wide recognition for advancing international criminal justice, its legacy in the Western Balkans remains contested because ethnic communities remain polarised, victims are dissatisfied, and many perpetrators remain not prosecuted.<sup>10</sup> The ICTY is primarily criticised for prolonged trials, appeals, and retrials, limited cooperation from state authorities, problems with witness protection and difficulties retaining the accused in custody.<sup>11</sup>

Parallel to the ICTY, the UN Interim Administration Mission in Kosovo (UNMIK) led its own war crimes investigations and trials in Kosovo.<sup>12</sup> Until 2004, UNMIK's war crimes trials relied on former Yugoslav legislation until it drafted its own on criminal laws for Kosovo. However, UNMIK has experienced systematic failures to adjudicate war crime cases in Kosovo evident from delays in handling cases, a lack of continuity within judicial personnel, a lack of training and capacities to deal with war crimes cases, and insufficient protection of witnesses and judges.<sup>13</sup> Between 2000 and 2008, UNMIK prosecutors filed only 10 cases in which 19 Albanians, three Serbs, and one Montenegrin were indicted for war crimes.<sup>14</sup> This inability to prosecute large number of alleged cases and suspects has undermined UNMIK's credibility in Kosovo.<sup>15</sup> A respondent also raised concerns regarding missing testimonies on sexual violence during conflict which were lost in the UNMIK's achieves.<sup>16</sup> After the declaration of Kosovo's independence in 2008, UNMIK reconfigured and downsized its mandate

<sup>9</sup> ICTY, Statement by Carla Del Ponte, 'Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the Investigation and Prosecution of Crimes Committed in Kosovo', The Hague, 29 September 1999.

<sup>10</sup> For a scholarly and critical discussion see: Janine N. Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*. London: Routledge, 2014.

<sup>11</sup> ICTY, 'Report of the President on the Conference, Assessing the Legacy of the ICTY', The Hague, 27 April 2010. Available at: [http://www.icty.org/x/file/Press/Events/100427\\_legacyconference\\_pdt\\_report.pdf](http://www.icty.org/x/file/Press/Events/100427_legacyconference_pdt_report.pdf)

<sup>12</sup> For a relevant discussion see: Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination*, New York: Springer, 2015.

<sup>13</sup> OSCE, 'Kosovo's War Crimes Trials: An Assessment Ten Years On (1999–2009)', Pristina, May 2010, p. 6. Available at: <http://www.osce.org/kosovo/68569?download=true>.

<sup>14</sup> HLC, 'An Overview of War Crime Trials in Kosovo in the Period 1999-2018', Pristina, October 2018, p.412,

<sup>15</sup> Focus Group 1, 06 March 2020, Pristina, Kosovo.

<sup>16</sup> Interview U. 27.05.2020. Pristina, Kosovo. See also: Amnesty International. Kosovo: UNMIK's legacy: The failure to deliver justice and reparation to the relatives of the abducted', p. 10. 2013. London, UK. Available at: <https://www.amnesty.org/download/Documents/16000/eur700092013en.pdf>

and handed over to the EU's newly established Rule of Law Mission in Kosovo (EULEX) information regarding a total number of 1,187 acts of suspected war crimes, including an additional 50 cases that were ready for indictment.<sup>17</sup> Between 2009 and 2018, EULEX prosecutors have filed 22 cases in which 39 Albanians, 11 Serbs, one Montenegrin and one from Roma, Ashkali and Egyptian communities were indicted for war crimes.<sup>18</sup> In most cases, EULEX was part of a domestic hybrid court panel consisting of local and European judges, which were supported by international prosecutors and police and the Special Prosecution Office of Kosovo (SPOK).<sup>19</sup> Although perceived more effective than UNMIK, EULEX is also criticised for lengthy proceedings and failure to undertake effective witness protection measures.<sup>20</sup> Yet, compared to UNMIK, EULEX has supported Kosovo authorities to set up a war crimes department within the Special Prosecution Office, which is still led by EULEX. Similarly, the Kosovo Police have set up a war crimes investigation unit.

Since 2018, the Special Prosecution Office of Kosovo (SPOK) has taken an active role in investigating and prosecuting war crimes and other violations of international humanitarian law and criminal law. The 2019 Strategy of War Crimes that guides the work of the SPOK seeks to ensure greater commitment of Kosovo authorities in investigating and prosecuting war crimes in the country. While it aims to enhance the coordination and cooperation with all other relevant institutions in Kosovo, the SPOK operates separately from the Kosovo Specialist Chambers and Special Prosecutor's Office (KSC), which operate under Kosovo law but is located in The Netherlands. However, the work of Kosovo judicial institutions is hampered by the lack of capacities and resources to investigate and prosecute a large number of war crimes cases. The work of Kosovo courts is also undermined due to a lack of access to the material evidence of war crimes that was previously collected by ICTY or other organisations. While the EULEX has transferred around 900 cases of war crimes and 200 cases of missing persons to Kosovo authorities, the evidence provided it has been insufficient to prove criminal responsibility resulting in the dismissal or termination of numerous investigations.<sup>21</sup> Still, there are positive examples. For instance, as a result of close cooperation of KRCT with the Special Prosecution Office and Kosovo Police, two Kosovo Serbs were recently charged for sexual violence during the conflict.<sup>22</sup> This notwithstanding, there are also concerns about the capacity of Kosovo's judiciary and police to handle war crimes cases, including an insufficient number of prosecutors. Moreover, the lack of judicial cooperation with Serbia where most of the alleged war criminals reside continues to hinder the ability to investigate and try war crimes cases.<sup>23</sup> Consequently, the only ways in which suspects can be pursued across jurisdiction is via international arrest warrants which are dependent on the suspected party leaving their country of jurisdiction. Moreover, significant concerns remain about the willingness of Kosovo courts to investigate, prosecute, and judge war crime cases involving former KLA members, shaped by

<sup>17</sup> UN Security Council, 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo', UN Doc. S/2009/149, 17 March 2009, para. 19.

<sup>18</sup> HLC, 'An Overview of War Crime Trials in Kosovo in the Period 1999-2018', Pristina, October 2018, p. 41. Available at: <https://www.hlc-kosovo.org/wp-content/uploads/2018/10/HLC-Kosovo-An-overview-of-war-crime-trials-in-Kosovo-1999-2018.pdf>.

<sup>19</sup> Assembly of Kosovo, 'Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office', Pristina, 3 August 2015. Available at: <http://www.kuvendikosoves.org/common/docs/ligjet/03-L-052%20a.pdf>.

<sup>20</sup> Amnesty International, 'Kosovo: Time for EULEX to Prioritize War Crimes', United Kingdom, 2012, p.4. Available at: [https://www.amnesty.eu/wp-content/uploads/2018/10/260412\\_EULEX\\_Report.pdf](https://www.amnesty.eu/wp-content/uploads/2018/10/260412_EULEX_Report.pdf);

<sup>21</sup> Special Prosecution Office of Kosovo, 'Strategy of War Crimes', Pristina, Feb 2019, p. 5. Available at: <http://www.kpk-rks.org/assets/cms/uploads/files/Statistika%20dhe%20Raporte/Strategjia%20e%20Komunikimit/Strategjia%20e%20Krimave%20t%C3%AB%20Luft%C3%ABs/STRATEGY%20OF%20WAR%20CRIMES.pdf>.

<sup>22</sup> Written contribution by KRCT, 26 May 2020.

<sup>23</sup> Interview D. 05 March 2020, Pristina, Kosovo.



inconducive social and political context in the country. These handicaps have led to an extensive amount of uncompleted war crime case files that hinder victim's' access to justice.

Since 2019, Kosovo courts have the opportunity to pursue trials in absentia for the purpose of combating the impunity of the crimes committed in the territory of Kosovo, especially cases of individuals who are not in the territory of Kosovo.<sup>24</sup> This in particular enables courts to proceed with indictments of crimes committed by the individuals who currently reside in Serbia, but cannot be extradited due to refusal of Serbian authorities and lack of legal cooperation between two countries. However, trials in absence aren't conducted yet as Kosovo's Ministry of Justice is seeking clarity from the Venice Commission<sup>25</sup> whether this type of trials should be extended also to non-war crimes cases and post-war period.<sup>26</sup> Trials in absence are not seen by everyone as contributing to justice, as they are seen as "one sided and does not help in healing of victims, because they are just dragged to the courts but they get disappointed and frustrated because criminals are not being sent behind bars".<sup>27</sup> While Kosovo courts have indicted and sentenced a limited number of war crimes suspects, there has been insufficient follow-up and engagement with the victims' families and survivors of those crimes.<sup>28</sup> While a handful of local NGOs and media have monitored the work of courts, there is a lack of communication and outreach of judicial institutions with affected communities. This notwithstanding, it is a positive signal that the SPOK's war crimes strategy aims to "increase level of public awareness of the need for investigating and prosecuting war crimes and other violations of international humanitarian law".<sup>29</sup>

The Kosovo Specialist Chambers (KSC) represent the latest attempt of the international community to address a strand of alleged war crimes that remain highly contested in Kosovo. The Specialist Chambers were established in 2015 under Kosovo law to investigate and try crimes against humanity, war crimes and other crimes alleged in a report issued by the Council of Europe's Parliamentary Assembly (PACE) and released on 7 January 2011 (known as the Marty Report). The Marty Report raised two broad allegations of unaddressed criminal wrongdoings. The first one concerns disappearances, detentions and killings of ethnic minorities and ethnic Albanian political opponents in Kosovo.<sup>30</sup> The second allegations concerning murders committed to facilitate the harvesting and trafficking of human organs. The negative reaction to the Marty Report in Kosovo, coupled with weak judicial capacity to investigate war crimes and insufficient witness protection measures pushed the EU to establish in 2011 a Special Investigative Task Force (SITF) to conduct an independent investigation into the war crimes and organised crime allegations raised by the Marty Report. SITF's preliminary findings matched most of the allegations raised in the Marty Report, which paved the way for the establishment of the Specialist Chambers in 2015. The

24 Official Gazette of the Republic of Kosovo, Law No. 06/L-06/L-091 on Amending and Supplementing the Criminal Procedure Code, Pristina, Kosovo, 04.07.2019. Available at :<https://gzk.rks-gov.net/ActDetail.aspx?ActID=20500>.

25 The European Commission for Democracy through Law - better known as the Venice Commission as it meets in Venice - is the Council of Europe's advisory body on constitutional matters: [https://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation&lang=EN](https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN).

26 Kosova Post, 'Interview with Minister Haxhiu', February 2020. Available at: <https://kosovapost.net/per-kodin-e-ri-penal-kerkohet-opinion-i-komisionit-te-venedikut-flet-ministrja-haxhiu-video/>.

27 Interview G. 10 March 2020, Pristina, Kosovo.

28 Ibid.

29 Special Prosecution Office of Kosovo, 'Strategy of War Crimes', p. 7.

30 Parliamentary Assembly of the Council of Europe, 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo', Doc. No. 12462, 07 January 2011. Available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12608&lang=en>.

mandate of the Specialist Chambers, which are located in the Hague while still part of Kosovo's legal system, was to secure "independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo" deriving from the Marty Report and the SITF.<sup>31</sup> The type of war crimes that the Specialist Chambers is set to try include: "murder; extermination; enslavement; deportation; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; persecution on political, racial, ethnic or religious grounds; enforced disappearance of persons; and other inhumane acts."<sup>32</sup>

While the Specialist Chambers have the potential to make a positive societal impact in Kosovo by offering a measure of justice to the victims, they have been criticised for being biased against Kosovo Albanians, secretive, harmful to Kosovo's judicial sovereignty, and a geopolitical instrument of Kosovo's opponents.<sup>33</sup> The Specialist Chambers were established at a time when the track record of previous internationalised and hybrid criminal justice mechanisms in Kosovo and the Western Balkans have not been wholly successful in bringing justice to the victims and contributing to reconciliation. In December 2017, 43 Members of the Assembly of Kosovo launched an initiative to revoke the Law on the Specialist Chambers and Specialist Prosecutor's Office.<sup>34</sup> This initiative raised serious concerns about Kosovo political leaders' commitment to prosecute and judge the aforementioned crimes and honour Kosovo's related international obligations. Although the court was formally established in 2016 and witnesses are increasingly being called, it still has not issued any indictments. It took the Specialist Chambers almost four years to become operational and launch formal investigations. Since 2019, the Specialist Prosecutor's Office interviewed over one hundred potential suspects and witnesses, most of whom were members of the Kosovo Liberation Army. Only in February 2020, the President of the Specialist Chambers announced a decision for assigning a pre-trial judge, which indicates that the first round of indictments may take place in the near future.<sup>35</sup> However, the details of such indictments remain for now confidential, until a decision for prosecution is announced publicly.

Over the years, the Public Information and Communication Unit of the Specialist Chambers has conducted numerous consultative meetings with international stakeholders, selected civil society groups, diverse communities, and the media outlets in Kosovo. But, public misinformation and lack of knowledge about the Specialist Chambers remains widespread in Kosovo.<sup>36</sup> There is a general perception that without wide popular legitimacy proceedings and judgements of the Specialist Chambers are unlikely to bring the desired societal change in Kosovo.<sup>37</sup> The overwhelming majority of Albanians in Kosovo consider pressure from Kosovo's international allies as the main reason why the Assembly of Kosovo agreed to establish the Specialist Chambers. As an externally imposed mechanism, the Specialist Chambers have faced strong political and social rejection in Kosovo accompanied by robust counter-narratives and media campaigns criticising the investigations, proceedings, and

31 Assembly of Kosovo, 'Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office', Art. 1.

32 Ibid., Art. 13.1

33 Focus Group 1, 6 March 2020, Pristina, Kosovo.

34 European Commission, 'Kosovo 2018 Report, 2018, p. 17. Available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-kosovo-report.pdf>.

35 Kosovo Specialist Chambers, 'Decision Assigning a Pre-Trial Judge', 14 February 2020, The Hague, The Netherlands. Available at: [https://repository.scp-ks.org/details.php?doc\\_id=091ec6e980281f0e&doc\\_type=st\\_l\\_filing&lang=eng](https://repository.scp-ks.org/details.php?doc_id=091ec6e980281f0e&doc_type=st_l_filing&lang=eng).

36 Kosovo Specialist Chamber, 'Outreach Program', The Hague, 2020, p.7. Available at: [https://www.scp-ks.org/sites/default/files/public/content/outreach\\_programme-en.pdf](https://www.scp-ks.org/sites/default/files/public/content/outreach_programme-en.pdf).

37 See: Aidan Hehir, 'Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and Its Implications', Human Rights Review (2019) 20:267–287.

eventual verdicts. There is a widely held perception in Kosovo that transitional justice mechanisms are utilised by the international community to sabotage local actors and coerce them to endorse externally imposed policies. In particular, the narrow mandate of the Specialist Chambers to try only alleged KLA crimes is seen as selective justice and most likely will not contribute to domestic stability and normalisation of relations with Serbia.<sup>38</sup> The Serb community in Kosovo is divided when it comes to the likely impact of the Specialist Chambers. Most of them fear it is unlikely that the Specialist Chambers will bring justice to those who committed serious war crimes.<sup>39</sup>

Most respondents to this study have highlighted the importance of trials for offering a measure of justice to the war victims and survivors. However, the legacy and impact of international and hybrid courts in Kosovo remains highly contested.<sup>40</sup> From all the 48 cases of war crimes filed by UNMIK, EULEX and Kosovo courts, only 111 persons were indicted, from whom 39 were convicted and another 38 acquitted.<sup>41</sup> From those, 61 were Albanians, 44 Serbs, five Montenegrin and five from Roma, Ashkali and Egyptian communities.<sup>42</sup> War crimes trials tend to polarise relations between ethnic groups in Kosovo further. International and hybrid war crimes courts are seen by both Albanian and Serb communities in Kosovo as mechanisms to hold the other side accountable for wrongdoings, to cultivate a culture of victimhood, and to expand the political power of nationalist hardliners. Within each ethnic community those prosecuted for war crimes are perceived as heroes and trials of ingroup members are highly unpopular often sparking public protests. Ingroup glorification, however, offers unintentionally blanket legitimacy to some of the war crimes convicts, who have simultaneously been accused for corruption or misuse of public office.

## Truth-seeking and documentation initiatives

Knowing the truth of what happened during the violent conflict and what legacies the conflict has left behind are essential for ensuring a closure from the past and moving forward. In Kosovo, most of the initial truth-seeking work revolved around the issue of missing persons. Also, documentation of human rights violations has been undertaken by local civil society groups and international organizations. While most of the bodies of missing persons have been identified, there are still 1644 persons missing. Shedding light on the fate of missing persons by recovering, identifying and disposing of mortal remains and collecting data about these remains is an important part of truth-seeking efforts and eventual reconciliation.<sup>43</sup> However, the investigation of missing persons in Kosovo has been heavily criticized because of shifting administrations, inconsistent reporting and case management, and a lack of initiative in following through with

criminal investigations.<sup>44</sup> Most of the missing persons in Kosovo have been found in different locations within Kosovo, while a large number has also been found in Serbia. Between 2002 and 2008, the UNMIK's Office for Missing Persons and Forensics (OMPF) provided information about the fate of missing persons in Kosovo. Although the OMPF made good progress, such as signing several protocols with Serbia, on exhumation and repatriation of Kosovo Albanian remains from Serbian territory, the lack of information about potential grave sites and the lack of staff and resources which impeded the speed of exhumation and identification processes. In 2006, the OMPF was absorbed within the new Ministry of Justice and two main bodies were created to foster local ownership over the problem of missing persons. Earlier, in 2004, a Working Group on Missing Persons was established to share information with its counterpart in Serbia to locate potential gravesites across borders and inform families accordingly. Nevertheless, limited progress was made regarding the sharing of information partly due to the lack of real political will on both sides to ensure that all missing persons are found.<sup>45</sup> Since 2011, Kosovo has a special law on missing persons which aims to protect the rights and interests of missing persons and their family members, who were reported missing during the period from 1 January 1998 to 31 December 2000 as a consequence of the violent conflict in Kosovo during 1998-1999.<sup>46</sup> In 2019, a concept document on missing persons was approved by the Government of Kosovo which seeks to review the legislation and institutional support for the families of missing persons in Kosovo.<sup>47</sup>

Despite many challenges, EULEX took a leading role in identifying the bodies and sites where missing persons were buried, and when circumstances permitted they mediated mutual legal assistance between Kosovan and Serbian authorities.<sup>48</sup> Despite many diplomatic efforts, Serbian authorities have refused to provide information about the bodies of missing persons fearing that the exposure of truth will further weaken its claims over Kosovo and would result in the prosecution of those responsible for such human rights abuses who are free at large in Serbia.<sup>49</sup> In 2008, the Government of Kosovo established a Commission on Missing Persons along with supporting forensic mechanisms, which have so far played only a limited role in identifying the bodies of missing persons and supporting their families.<sup>50</sup> Since 2008, the Assembly of Kosovo has established a designated Committee for Human Rights, Gender Equality, Missing Persons and Petitions. Despite the creation of the Coordinating Council of the Association of Families of Missing Persons in Kosovo in 2011, such associations are yet to formulate a coherent call to action. Additionally, family associations of Serb and Albanian communities continue to act in isolation from one another, splintering their cause.<sup>51</sup> An exception to this being the Missing Persons

38 Gëzim Visoka, *Assessing the Potential Impact of the Kosovo Specialist Court*, Utrecht and Hague, NL: PAX and Impunity Watch, 2017, p. 27. Available at: <https://www.paxforpeace.nl/publications/all-publications/assessing-the-potential-impact-of-the-kosovo-specialist-court>.

39 Visoka, *Assessing the Potential Impact of the Kosovo Specialist Court*, p. 28. See also: Michael James Warren, Kushtrim Koliqi, Nenad Maksimović, Marlies Stappers, *Public Perception of the Kosovo Specialist Court: Risks and Opportunities*, CPT, Integra, Impunity Watch and PAX, Pristina, 2017. Available at: <https://www.paxforpeace.nl/publications/all-publications/public-perception-of-the-kosovo-specialist-court>.

40 Anna Di Lellio and Caitlin McCurn, 'Engineering Grassroots Transitional Justice in the Balkans: The Case of Kosovo', *East European Politics and Societies*, Vol. 27, No. 1, 2013, pp. 129-48.

41 HLC, *An Overview of War Crime Trials in Kosovo in the Period 1999-2018*, Pristina, October 2018, p. 413, Available at: <https://www.hlc-kosovo.org/wp-content/uploads/2018/10/HLC-Kosovo-An-overview-of-war-crime-trials-in-Kosovo-1999-2018.pdf>.

42 HLC, *An Overview of War Crime Trials in Kosovo in the Period 1999-2018*, p. 411.

43 Interview D. 05 March 2020, Pristina, Kosovo.

44 Hana Marku, 'The Road to Justice: Missing Persons in Kosovo from a Policy Standpoint', Center for Research Documentation and Publication, Pristina, 2012.

45 International Commission on Missing Persons, 'Missing Persons from Kosovo: Conflict and Aftermath', Pristina, Kosovo, 2017. Available at: <https://www.icmp.int/wp-content/uploads/2017/05/Kosovo-stocktaking-ENG.pdf>.

46 Kosovo Law on Missing Persons (No.03/L-023) on 31 August 2011.

47 Office of Prime Minister, Pristina, May 2019. Available at: <http://kryeministri-ks.net/wp-content/uploads/2019/07/Koncept-Dokumenti-per-Personat-e-Zhdukur-per-publikim.pdf>.

48 Amnesty International, 'Burying the Past: 10 Years of Impunity for Enforced Disappearances and Abductions in Kosovo'. Report No. EUR 70/007/2009., London, 2009. Available at: <http://www.amnesty.org/en/documents/eur70/007/2009/en/>.

49 Interview D. 05 March 2020, Pristina, Kosovo. See also: RIDEA, *The Issue of Missing Persons in the Context of an Eventual 'Grand Finale' between Kosovo and Serbia*, September 2019. Available at: [http://www.ridea-ks.org/Articles/3/Images/29-01-2019/433438\\_The\\_Issue\\_of\\_Missing\\_Persons\\_in\\_the\\_context\\_of\\_an\\_eventual\\_'Grand\\_Finale'\\_between\\_Kosovo\\_and\\_Serbia.pdf](http://www.ridea-ks.org/Articles/3/Images/29-01-2019/433438_The_Issue_of_Missing_Persons_in_the_context_of_an_eventual_'Grand_Finale'_between_Kosovo_and_Serbia.pdf).

50 International Commission on Missing Persons, 'Missing Persons from Kosovo'.

51 Marku, 'The Road to Justice: Missing Persons in Kosovo from a Policy Standpoint'.

Resource Centre (MPRC) which seeks to “bring together families of missing persons from all ethnic backgrounds, encouraging cooperation among them with an aim of sharing knowledge towards enlightening the fate of missing persons in Kosovo”.<sup>52</sup>

In Kosovo, documentation of war crimes and the narratives of affected communities is scattered. Since 2011, the Government of Kosovo established the Institute for War Crimes Research as a public research institution to function under the Ministry of Justice.<sup>53</sup> The purpose of the Institute was the collection, systematization, processing and publication of data on crimes against peace, war crimes, crimes against humanity and acts of genocide committed in Kosovo in the period 1998 until June 1999. However, the Institute was unable to contribute to documentation and truth-seeking largely due to limited state support, which resulted in weak capacity, resources and coordination with other transitional justice actors in Kosovo and limited engagement with the affected communities.<sup>54</sup> As such, the Institute has also played a modest role in the documentation of war crimes in Kosovo and publication of evidence which is mostly used for commemoration rather than investigation of those documented crimes. It is reported that it has collected around 12,000 documents on war crimes.<sup>55</sup> The institute operated with a budget smaller than quarter of a million euros. The Institute never received any support from the international donors<sup>56</sup>, and was eventually was closed in 2018.

A majority of respondents, including those from victim and survivor communities, have recognised the significant contribution of civil society organisations in addressing the legacies of the violent past.<sup>57</sup> CSOs in Kosovo and wider in the region have undertaken a wide range of DwP initiatives, including the attempt to establish a regional truth commission, and national efforts to document the conflict casualties monitor war crimes trials, support for the victim communities and the identification of missing and disappeared persons. Most significant regional initiative has been RECOM, the Regional Commission Tasked with Establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia from 1 January 1991 to 31 December 2001. RECOM was envisaged to be an official, intergovernmental commission to be jointly established by the successors of the former Yugoslav republics. However, due to a multitude of unresolved political disputes among the countries in the region, RECOM has not been endorsed by the governments. The Coalition for RECOM, led by a group of NGOs in the region, was established to lobby for the endorsement of the Statue of RECOM by the national governments in the Western Balkans, and produced a detailed implementation roadmap and action plan.<sup>58</sup> While RECOM as ambitious regional initiative has not yet materialised, it has played a major role in supporting various DwP and transitional justice projects and initiatives in the region.

Among the most significant initiatives include the ‘Kosovo Memory Book’ (KMB) undertaken by the Humanitarian Law Center (HLC) as the first and most serious effort to document human

casualties during the war in Kosovo. The record is based on 31,600 documents and over 10,000 witness statements, thereby providing a precise and detailed account of all human casualties, including their personal details, a short summary of their life and death, and references to the sources documenting the narrative. Since the early 1990s, Council for the Defence of Human Rights and Freedoms (CDHRF) has played an important role in collecting testimonies on human rights abuses and war crimes committed in Kosovo, which was used during ICTY and hybrid war crimes courts in Kosovo. Then there is the Kosova Rehabilitation Centre for Torture Victims (KRCT), which provides psychological support to survivors and valuable assistance to overcome institutional weaknesses and distrust of affected communities.<sup>59</sup> They have also engaged in advocacy efforts for legal recognition of survivors of sexual violence from the wartime. The Kosovo Women’s Network lobbies for the rights and interests of women in Kosovo including those affected by sexual violence during the conflict.<sup>60</sup> Other organisations, such as INTEGRA, Youth Initiative for Human Rights (YIHR), Forum ZFD, New Social Initiative, Kosovo 2.0, Balkan Investigative Reporting Network (BIRN), and Partners Kosova have undertaken various projects to advocate for the rights and interests of affected communities, promote inclusive memory and document the narratives and experiences of affected communities as well as work with all ethnic groups through street actions, art-based and educational initiatives, media, and social dialogue.<sup>61</sup>

While it is acknowledged that civil society groups in Kosovo have contributed significantly to documentation and truth seeking, some respondents raised several concerns about their work. A Kosovo-Albanian civil society activist admitted that: “Civil society can help in changing the perspective but I don’t see much potential because most organisations are run from the same people and are consumed, they worked for many years and are not able to see beyond what they have been doing.”<sup>62</sup> Furthermore, this activist stated that: “If they do not follow the donor agenda, NGOs are unfortunately threatened with cutting of the funds” adding that for this reason “I think it is important to turn to citizen-driven approaches to dealing with the past.”<sup>63</sup> Similarly, a Kosovo-Serbian journalist stipulated that: “civil society organisations sometimes are in a bubble and only work with some people”, adding that what is missing is having “more people, from different villages, cities, who can tell what they think.”<sup>64</sup> While the associations of those most affected by the conflict (missing persons, survivors, political prisoners, and veterans and invalids) do play an important role in representing the needs and interests of their members, respondents have also highlighted the exclusionary silencing function these groups may have on individuals. As a respondent stated, victims often feel underrepresented claiming that “certain associations” have been adversely limiting their participation, as the leaders of such associations have patronised the organisation and have lost touch with those who they are representing.<sup>65</sup> Thus, there should be a distinction between victims/survivors

52 Oral History Kosovo, Pristina 2019, Available at: <https://mprc-ks.org/about-us/>; <https://oralhistorykosovo.org/>.

53 Office of Prime Minister, Pristina, June 2011. Available at: [http://www.kryeministri-ks.net/repository/docs/Vendimet\\_e\\_mbledhjes\\_se\\_19-te\\_te\\_Qeverise\\_2011.pdf](http://www.kryeministri-ks.net/repository/docs/Vendimet_e_mbledhjes_se_19-te_te_Qeverise_2011.pdf).

54 Balkan Transitional Justice, ‘Kosovo War Crimes Institute Accused of Inaction’, Pristina, June 2014. Available at: <https://balkaninsight.com/2014/06/25/kosovo-war-crime-institute-lags-in-work-experts-say/>.

55 Interview T. 21 April 2020, Pristina, Kosovo.

56 Ibid.

57 Interview S. 01 April 2020, Pristina, Kosovo.

58 See: Coalition for RECOM, Draft Statute of RECOM, 28 October 2014. Available at: <http://recom.link/wp-content/uploads/2014/11/SR-Izmene-Statuta-FINAL-12.11.2014-ff.pdf>. See also: Coalition for RECOM, Roadmap, May 2018. Available at: <http://recom.link/wp-content/uploads/2018/06/RECOM-Roadmap-ff-1.pdf>; and

Coalition for RECOM, Proposal for the Action Plan for RECOM, May 2018. Available at: <http://recom.link/wp-content/uploads/2018/06/Annex-Action-Plan-ff.pdf>.

59 Consultation with civil society groups in Kosovo, 20 May 2020, Online. See also: <http://krct.org/>.

60 Consultation with civil society groups in Kosovo, 20 May 2020, Online. See also: <https://womensnetwork.org/>.

61 See for example: Integra, ‘I want to be heard’, Pristina, 2009. Available at: <https://ngo-integra.org/publication/1%20Want%20to%20be%20Heard%20-%20Memory%20Book.pdf>; Forum ZFD, ‘Living with the Memories of the Missing’, Pristina, 2019. Available at: <http://www.dwp-balkan.org/kcfinder/upload/files/LWMTM/Final%20ENG%20web.pdf>. These CSOs have also used the ICTY archives containing primary and secondary documents on all conflicts in the former Yugoslavia for commemoration purposes.

62 Interview C. 03 March 2020, Pristina, Kosovo.

63 Interview C. 03 March 2020, Pristina, Kosovo.

64 Interview R. 31 March 2020, Pristina, Kosovo.

65 Interview O. 30 March 2020, Pristina, Kosovo.

communities, established victim associations, and NGOs dealing with victims.<sup>66</sup>

In 2017, the incumbent President of Kosovo, Hashim Thaçi, launched the process to establish a Truth and Reconciliation Commission (TRC) to “promote truth and reconciliation and the protection of human rights”.<sup>67</sup> So far, only a preparatory team is established which is composed of individuals from government and civil society, as well as independent experts, whose role is to design the legal, institutional and operational aspects of the Commission for Truth and Reconciliation.<sup>68</sup> The preparatory team has an ambitious goal for an eventual TRC: “to document and establish facts of violations of human rights that took place during the recent violent past, restoring dignity of victims of all communities, and to contribute to societal transformation to prevent repetition of violations and abuses suffered”.<sup>69</sup> The preparatory team has pledged to promote inclusiveness, transparency, and integrity as guiding principles in establishing the TRC. In this spirit, they have organised public consultations with several stakeholders in Kosovo to discuss the scope and mandate of the TRC. In 2020, the preparatory team has drafted the normative act on the TRC, which outlines the mandate, composition, and responsibilities of this body which is envisaged to be established in the near future. Among its core aims is to promote a bottom-up process for uncovering the truth about gross human rights abuses by “enabling persons to provide their perspectives and motives for such violations responsible for the commission of human rights violations”.<sup>70</sup> In particular, it aims to “reach out and identify victims and the victim community, and to provide victims with opportunities to express, publicly or privately, their version of violations or harm experienced and to express their needs”.<sup>71</sup> This is envisaged through open and closed hearings and other field consultations and interactions with affected communities.<sup>72</sup>

Despite the efforts to establish the TRC, there are still concerns on the viability and sustainability of this initiative. While the efforts of the preparatory team to consult with relevant stakeholders at this early stage are recognised, some segments of civil society have mentioned the importance of broadening the inclusion of all affected communities in this process.<sup>73</sup> This noted, the preparatory team already envisages to broaden the involvement and reach out to the affected communities in the coming months, and to enhance public awareness on the purpose, mandate and scope of operation of TRC.<sup>74</sup> There is also a pending question about the prospects of achieving reconciliation through TRC under the conditions where the victim communities aren’t sufficiently consulted, such

66 Interview D. 05 March 2020, Pristina, Kosovo.

67 President of Kosovo, ‘Draft Regulation on the Commission for Truth and Reconciliation’, Pristina 20 April 2017.

68 The President of Kosovo, ‘Decision on the Appointment of the Preparatory Team’, Pristina, 2018. Available at: [https://president-ksgov.net/repository/docs/2019\\_10\\_16\\_125802\\_DECISION\\_ON\\_THE\\_APPOINTMENT\\_OF\\_THE\\_PREPARATORY\\_TEAM\\_15102019.pdf](https://president-ksgov.net/repository/docs/2019_10_16_125802_DECISION_ON_THE_APPOINTMENT_OF_THE_PREPARATORY_TEAM_15102019.pdf).

69 The President of Kosovo, ‘Declaration on the Appointment of the Preparatory Team’, Pristina, 2018, p. 2. Available at: [https://president-ksgov.net/repository/docs/2019\\_01\\_17\\_143401\\_DECLARATION17119.pdf](https://president-ksgov.net/repository/docs/2019_01_17_143401_DECLARATION17119.pdf).

70 The President of Kosovo, ‘Draft Normative Act No XX/2020 on the TRC’, Article 19.1.1.3, p. 13. Available at: [https://president-ksgov.net/repository/docs/2020\\_01\\_28\\_103348\\_Normative\\_Act\\_eng\\_for\\_web\\_jan2020.pdf](https://president-ksgov.net/repository/docs/2020_01_28_103348_Normative_Act_eng_for_web_jan2020.pdf), article 19.1.1.3, pg. 13.

71 The President of Kosovo, ‘Draft Normative Act No XX/2020 on the TRC’, Article 34.1.1.1, p. 22. Available at: [https://president-ksgov.net/repository/docs/2020\\_01\\_28\\_103348\\_Normative\\_Act\\_eng\\_for\\_web\\_jan2020.pdf](https://president-ksgov.net/repository/docs/2020_01_28_103348_Normative_Act_eng_for_web_jan2020.pdf).

72 Interview H. 12 March 2020, Pristina, Kosovo.

73 Interview B. 03 March 2020, Pristina, Kosovo. Focus Group 1, 06 March 2020, Pristina, Kosovo.

74 Integra and New Social Initiative (NSI), ‘Public perception survey and public dialogue about future Truth and Reconciliation Commission (TRC) of Kosovo’, 2020, p. 6. This poll shows that the majority of respondents (72%) have never heard of the initiative for a TRC for Kosovo.

as among minority communities, a large number of whom are currently living in Serbia.<sup>75</sup> Others have casted doubts whether the TRC initiative has emerged with the purpose of counterbalancing responsibility and mitigating the eventual impact of the Specialist Chambers on the current political establishment.<sup>76</sup>

Moreover, there are concerns that the TRC initiative was launched without a broader vision of how to engage existing initiatives, such as RECOM, or build on the Inter-Ministerial Working Group On Dealing with the Past and Reconciliation (IMWG-DwPR), which ceased to exist without a formal decision soon after the TRC initiative was launched.<sup>77</sup> A majority of respondents have also identified the association and personalisation of transitional justice initiatives with specific political leaders as a major obstacle for building a sustainable institutional infrastructure for DwP in Kosovo. When the architect of the initiative leaves the office, successor governments tend to launch their own initiative, which undermines the continuity and success of any effort to deal with the past in Kosovo. A governmental official admitted that: “almost all initiatives depend on the person who starts them, and when that person changes position or leaves, the initiative ends as well”.<sup>78</sup> In response to these concerns, some respondents have proposed a greater role for the Assembly of Kosovo with regard to the TRC to ensure wider political legitimacy and consensus as well as broader ownership for non-majority communities.<sup>79</sup> As a Kosovo Serb respondent stated: “the problem is those who are proposing these mechanisms, and since these initiatives are not going through the Parliament they tend to lack legitimacy”.<sup>80</sup>

## Reparations

Reparations are considered a crucial aspect for providing victims restitution, compensation, rehabilitation and guarantees for non-repetition of previous crimes. Serbia has not paid any reparation for damages and loss of life caused by its military and police campaign in Kosovo. There is a wide spread perception of denial of war crimes and misrecognition of victims’ rights.<sup>81</sup> In absence of formal reparation from Serbia, the Government of Kosovo provides reparations in the form of pensions and other privileges to KLA war veterans, invalids, and families of martyrs; the civilian victims and the survivors and victims of sexual violence during the conflict; as well as political prisoners and physically injured civilians. Assistance to these categories is regulated by specific laws and is implemented by specific institutional structures. The 2014 Law on Reparations tend to favour mostly Kosovo Albanian victims, while civilian victims belonging to other ethnic groups are excluded as they are affiliated with the ‘enemy forces’ or with the crimes affecting them falls outside the time frame covered by the law.<sup>82</sup> The monthly income of KLA related categories of beneficiaries is almost twice the amount of what civilian victims or families of missing persons

75 Interview G. 10 March 2020, Pristina, Kosovo.

76 Interview P. 30 March 2020, Pristina, Kosovo.

77 Interview B. 03 March 2020, Pristina, Kosovo. More on IMWG-DwP see page 27.

78 Interview D. 05 March 2020, Pristina, Kosovo.

79 Interview L. 25 March 2020, Pristina, Kosovo.

80 Interview Q. 30 March 2020, Pristina, Kosovo.

81 Consultation with civil society groups in Kosovo, 20 May 2020, Online.

82 See: Humanitarian Law Center, ‘War Reparations for Civilian Victims: What Access for Communities’, 2016, p. 87-88. Available at: [https://www.hlc-kosovo.org/wp-content/uploads/2018/07/HLC\\_Report\\_final-REPARACIJE-eng.pdf](https://www.hlc-kosovo.org/wp-content/uploads/2018/07/HLC_Report_final-REPARACIJE-eng.pdf).

receive.<sup>83</sup> Around 38,000 KLA veterans benefit from a basic monthly pension from whom over 90% are male and Kosovo Albanians.<sup>84</sup> There is credible doubt that the number of KLA veterans may have been doubled compared to those who actually took part actively in the resistance war, as a current indictment case by Kosovo prosecutors reflects.<sup>85</sup>

After over a decade of negligence by international and national authorities in Kosovo, the Assembly of Kosovo in 2014 granted legal recognition to survivors of sexual violence during the conflict, which paved the way for offering the survivors of conflict-related sexual violence the status of civilian victims and offered reparations in the form of a monthly pension. Until 2014, survivors and victims of sexual violence were not recognised as a category in any law providing reparation for military and civilian victims of the war. This was deeply troubling as these crimes amount to the war crime of torture and have been found to have been so systematic as to constitute crimes against humanity.<sup>86</sup> The amendment provided both female and male survivors with public acknowledgement and the right to apply for administrative reparations.

Nevertheless, they had to wait until 2018 to be able to apply for the status of survivor of war-time sexual violence and receive compensation in the form of a monthly payment, as well as some other limited forms of reparation.<sup>87</sup> In 2018, the Government Commission for the Verification and Recognition of Sexual Violence Victim Status in Kosovo was established to advocate for continuous institutional support and societal acceptance for those affected by sexual violence during the conflict. It is estimated that around 20,000 women and young girls have been sexually abused during the conflict.<sup>88</sup> However, these figures are contested as there isn't sufficient evidence to prove such abuses.<sup>89</sup> It is estimated that so far only 1,438 women in total receive a pension.<sup>90</sup> Although the current provision marked an important step forward for victims of sexual violence, the law has still been criticized as falling short of international standards for victims of crimes under international law.<sup>91</sup> It falls short of providing appropriate restitution and restore survivors original situation before the gross human rights violations took place, including access to property and rehabilitation services.<sup>92</sup> Firstly, the time limit for eligibility ends on 20 June 1999, thus discriminating against those who were raped thereafter, predominantly Kosovo Serbs, Roma and some Albanian women. There are fears that among non-dominant minority communities, such as Roma women, they did not come forward to seek reparation fearing in-group or societal stigma,

pressure, and exclusion.<sup>93</sup> Secondly, those who already receive another war-related payment are prohibited from receiving two pensions and have to choose which benefit they want to receive.<sup>94</sup>

Despite these challenges, respondents were very positive on the advocacy process and the development of legal and institutional infrastructure for recognising and supporting the survivors of sexual violence during the conflict.<sup>95</sup> The entire process involved all relevant stakeholders, including the affected communities and managed to generate not only political consensus but also wide local and international admiration.<sup>96</sup>

## Guarantees of non-recurrence and institutional reforms

Guarantees of non-recurrence are central to DwP and building a peaceful future. They represent a wide range of institutional and political measures taken to ensure that past human rights abuses will not occur again. This often entails reforming political, judicial, and security institutions. Although Kosovo did not have fully-independent institutions prior to the violent conflict and thus does not bear the responsibility for gross human rights violations committed by Serbian state institutions before the war, under international tutelage and supervision a broad range of activities have been undertaken that guarantee non-recurrence of past human rights violations in the territory of Kosovo. The international peacebuilding agenda in Kosovo focused on supporting multi-ethnicity through accommodating and appeasing the Serb community via expanded local self-governance, sustainable return of displaced people, institutional privileges, and special protection of religious and cultural heritage.<sup>97</sup> Under UNMIK and later based on the Ahtisaari Proposal<sup>98</sup>, Kosovo has designed a constitutional and political system which ensures wide political representation and enhanced rights for minority communities at the national and local level. This involves multi-ethnic police, security forces, and courts which have institutional provisions in place to respect human rights, including women's and minority rights. Following the declaration of independence in 2008, Kosovo took up obligations to deal with the past through designing a national strategy for transitional justice. Under the leadership of the Ministry of Justice, an Inter-Ministerial Working Group on Dealing with the Past and Reconciliation (IMWG-DwPR) was established in 2012 whose role was to take "into consideration the views of victims of all communities in Kosovo" which would feed into a National Strategy on Transitional

83 These categories include: KLA war veterans, invalids, and families of martyrs.

84 Kosovo Agency of Statistics, 'Welfare Statistics', Pristina, 2019, p. 33. Available at: <https://ask.rks-gov.net/media/5336/statistikat-e-mirëqenies-sociale-tm4-2019.pdf>.

85 Kosova Press, 'OVL-KLA: Over 2000 People Removed from the Beneficiary List for War Veterans Pensions', Pristina, March 2020. Available at: <https://kosovapress.com/ovl-uck-mbi-2-mije-persona-jane-larguar-nga-lista-e-perfituesve-te-pensionit-si-veterane/>.

86 Amnesty International, 'Wounds that burn our souls: Compensation for Kosovo's Wartime Rape Survivors, But Still No Justice', London, 2017. Available at: <https://womensnetwork.org/wp-content/uploads/2018/10/20171213144511741.pdf>.

87 This has come a result of continuous lobbying efforts by CSOs, such as KRCT, who have effectively managed to persuade the Government of Kosovo in December 2017 to approve the budget in support of survivors of sexual violence.

88 Serbeze Haxhiaj, 'The Enduring agony of wartime rape', Pristina, 2017. Available at: <https://balkaninsight.com/2017/05/29/agony-of-wartime-rape-victims-endures-in-kosovo-05-28-2017-1/>.

89 Interview N. 26 March 2020, Pristina, Kosovo.

90 Interview E. 10 March 2020, Pristina, Kosovo.

91 Interview K. 20 March 2020, Pristina, Kosovo.

92 Interview P. 30 March 2020, Pristina, Kosovo.

93 Consultation with civil society groups in Kosovo, 20 May 2020, Online.

94 Interview K. 20 March 2020, Pristina, Kosovo.

95 Interview P. 30 March 2020, Pristina, Kosovo.

96 Denis Foundation, 'Ukrainian SEMA members develop their vision to bring justice to survivors by learning about the compensation procedure in Kosovo', Available at: <https://www.mukwegefoundation.org/2019/10/ukrainian-sema-members-develop-their-vision-to-bring-justice-to-survivors-by-learning-about-the-compensation-procedure-in-kosovo/>.

97 Gëzim Visoka, *Shaping Peace in Kosovo: The Politics of Peacebuilding and Statehood*, Basingstoke: Palgrave Macmillan, 2017.

98 The Ahtisaari Proposal is a short acronym for the UN's Special Envoy for Kosovo Martti Ahtisaari 'Comprehensive Proposal for the Kosovo Status Settlement' issued on March 2007 in an effort to reach a final settlement between Kosovo and Serbia. After two years of negotiations, Ahtisaari Proposal, which proposed supervised independence for Kosovo, was rejected by Serbia and was not presented to the UN Security Council in anticipation of Russia's and China's veto. Subsequently, Kosovo with the support of the United States and the majority of the European Union member states, declared independence on 17 February 2008 and took on obligations to implement this Proposal, which was supported by an International Civilian Office and lasted until September 2012. For more details see: UN Security Council, 'Comprehensive Proposal for the Kosovo Status Settlement', UN Doc. S/2007/168/Add.1, 26 March 2007.

Justice.<sup>99</sup> The IMWG-DwPR comprised members from 12 ministries and eight civil society representatives. It was meant to be a focal point that would facilitate and support “dialogue and cooperation between targeted groups, state institutions, non-governmental organizations and the international community”.<sup>100</sup> In particular, the IMWG-DwPR had an extensive outreach mandate by “conducting consultations by giving the targeted groups a space to voice their concerns and supporting the possibility of ownership” as well as “encouraging participation of the representatives of the affected population as well as NGOs by allowing them to take part in designing and implementation of transitional justice initiatives”.<sup>101</sup> Beyond devising the rules of procedure and a work plan which envisaged a wide range of public consultation, the IMWG-DwPR fell short of realising its mandate. Ultimately, the IMWG-DwPR officially ceased to function in 2018 after not managing to develop a national strategy on transitional justice.

As a civil society activist argued, perhaps the only positive aspect of this initiative is that it kept the conversation alive on the need for a proper and strategic approach to transitional justice.<sup>102</sup> It has neither managed to consult the affected communities nor draft the much anticipated strategy which was originally planned to be completed in 2017. The IMWG-DwPR faced many challenges including internal procedural and substantive problems such as inadequate leadership and management, lack of political ownership, poor representation and participation of Kosovo’s minority communities and a general failure to engage the broader public. The IMWG-DwPR was supposed to promote inclusiveness, gender sensitivity, comprehensiveness and wide public consultations as core criteria guiding the process of dealing with the past and reconciliation in Kosovo. The Work Plan of IMWG-DwPR envisaged to hold at least three consultations with relevant stakeholders on each aspect of transitional justice (truth, justice, reparations, and guarantees of non-occurrence and reforms). This Work Plan clearly recognised that “consultations and discussions are intended: to ensure that the strategy meets the real needs of categories of victims and society in general as well as create opportunities to explore what the state can provide in order that it will also be acceptable by victims and society”.<sup>103</sup> However, as it was later revealed, “no information has been given on what further steps are envisaged for conducting consultations”.<sup>104</sup>

The prevailing impression among the respondents is that the design and mandate of IMWG-DwPR was imposed by the international community and the government of Kosovo with no prior consultation with civil society organisations and affected communities, such as association of victims and missing persons. As a civil society activist stated: “the inter-ministerial working group was a request by the internationals in Kosovo - it was an initiative from the outside, that’s why it didn’t meet the expectations...this initiative failed because it was an idea from outside and it didn’t start naturally”.<sup>105</sup> Moreover, the IMWG-DwPR lacked proper leadership to oversee

the implementation of the action plan. The group met irregularly. A former member of the group admitted that: “The IMWG-DwPR failed to prepare the strategy because the group was large and there was no political will for it to succeed. The group was chaired by the Office of Prime Minister and had two deputies – this structure was not very clear and resulted in many uncertainties.”<sup>106</sup>

Both civil society and government representatives lacked expertise and capacity to handle the comprehensive and complex mandate of the IMWG-DwPR. Similarly, the international expertise was insufficient to guide the work of this body.<sup>107</sup> Tensions and disagreements among and between government and civil society representatives on ownership of the process and expertise also undermined the work of the IMWG-DwPR. A civil society activist and former member of IMWG-DwPR confessed that “There was no leadership and no dedication. The Office of Prime Minister was supposed to chair the IMWG-DwPR, but they changed few people in this position, which shows there was no commitment for this initiative to succeed”.<sup>108</sup> In addition, the Government of Kosovo failed to commit the necessary resources to carry on the consultative activities of the IMWG-DwPR, while the donor assistance notably experienced several shortcomings. A government official admitted that “there was a reoccurring mistake: institutions didn’t take into consideration the opinion of the victims and citizens, who were often left out and their voice wasn’t heard.”<sup>109</sup> Moreover, minority communities were only superficially included in the work of the IMWG-DwPR. Finally, the IMWG-DwPR was largely detached from other transitional justice processes in Kosovo, thus failing to take a leading role in coordinating and integrating different efforts for DwP and reconciliation in Kosovo.

The Albin Kurti government, which came to power in February 2020 but lost the vote of no-confidence in the Assembly of Kosovo a month later, did not envisage a new national strategy on transitional justice. Instead, in the full government programme (adopted on 06 March 2020) it promises to strengthen the existing institutional capacities for investigating, trying, and documenting war crimes. Their vision entails channelling transitional justice measures through the Ministry of Justice and reorganise its own inhouse institutional setting to enhance the collection of data on war damages and assists other transitional justice mechanisms and initiatives.<sup>110</sup> On May 2020, the Ministry of Justice established a working group to conduct an analysis of the modalities for establishing a new war crimes research institute.<sup>111</sup> A similar institute based in the Ministry of Justice was made redundant two years ago by the former government.<sup>112</sup> In addition, it envisages to accede to Geneva Conventions, including the Genocide Convention, and prepare a lawsuit against Serbia at the International Court of Justice.<sup>113</sup>

Beyond the Government of Kosovo, the Assembly of Kosovo has played a limited role so far in realising DwP. Beyond holding the government to account and approving legislation, it has mostly

99 Government of Kosovo, 'Draft Decision on the Establishment of Inter-Ministerial Working Group on Dealing with the Past and Reconciliation',

Doc. No. 03/77, 04 June 2012, p. 3.

100 'Draft Decision on the Establishment of Inter-Ministerial Working Group on Dealing with the Past and Reconciliation', p. 3.

101 Ibid, p. 4.

102 Interview M. 25 March 2020, Pristina, Kosovo.

103 Government of Kosovo, 'Work Plan for Drafting the National Strategy on Transitional Justice in Kosovo (2015-2017)', p. 2.

104 See: Nora Ahmetaj and Thomas Unger, 'Kosovo's Framework for Dealing with the Past at a Turning Point' Civil society review of the progress towards a National Strategy on Transitional Justice', Impunity Watch, CPT, Integra and PAX, Pristina, April 2017, p. 8. Available at: [http://www.impunitywatch.org/docs/Civil\\_society\\_review\\_report\\_final\\_ENG\\_8.51.pdf](http://www.impunitywatch.org/docs/Civil_society_review_report_final_ENG_8.51.pdf).

105 Interview P. 30 March 2020, Pristina, Kosovo.

106 Interview T. 21 April 2020, Pristina, Kosovo.

107 For example, interviewees have raised concerns about the limited impact of a UNDP-led project to support the IMWG-DwPR to draft an inclusive, victim-centred and gender-sensitive transitional justice strategy. For more details see project summary: UNDP, 'Support to Transitional Justice in Kosovo'. Available at: [https://www.ks.undp.org/content/kosovo/en/home/operations/projects/democratic\\_governance/support-to-transitional-justice-in-kosovo.html](https://www.ks.undp.org/content/kosovo/en/home/operations/projects/democratic_governance/support-to-transitional-justice-in-kosovo.html).

108 Interview G. 10 March 2020, Pristina, Kosovo.

109 Interview D. 05 March 2020, Pristina, Kosovo.

110 Interview S. 01 March 2020, Pristina, Kosovo.

111 Ministry of Justice, Decision 45/2020, 13 May 2020. Available at: <https://md.rks-gov.net/desk/inc/media/4909C5D9-68F3-4CE0-BDD9-533A367E6C19.pdf>.

112 See discussion in pages 19-20 of this study.

113 Koha Ditore, 'Kurti's Government 45 page programme', 6 March 2020. Available at: <https://www.koha.net/arberi/212049/ekskluzive-programi-45-faqesh-i-qeverise-kurti/>.

engaged in rhetorical debates promoting mono-ethnic narratives and agendas. The constitutional division of powers has limited the ability of the Assembly of Kosovo to play a more active role in overseeing and holding the judicial institutions in Kosovo dealing with war crimes accountable. The government and the presidency have pursued their own initiatives bypassing the Assembly of Kosovo fearing that political factions within the legislative body would end up in endless discussions and block any progress.<sup>114</sup> Similarly, lack of legal powers to oversee the work of international missions and mechanisms operating in Kosovo before and after independence in 2008 have hindered the possibility of the Assembly of Kosovo to play a more active role in ensuring the democratic accountability of internationalised and hybrid war crimes courts in Kosovo.

In 2019, the Speaker of the Assembly of Kosovo announced the establishment of an international tribunal to try Serbia's crimes committed during the Kosovo war. The initiative envisaged an ad hoc parliamentary commission to draft a resolution and other legal documents for the establishment of the tribunal.<sup>115</sup> As part of this initiative the idea of creating a state commission consisting of government, opposition, and minority parties, KLA war associations, judicial institutions, civil society and academia was also discussed. Its role would be to collect evidence on war crimes and devise an action plan. While the initiative was supported by the President and the then-Minister of Justice, and the Kosovo Albanian associations of missing persons, it has not been implemented yet since the national elections of October 2019 changed the composition of the parliament and the government. Moreover, legal experts have casted doubts on the seriousness of this initiative arguing that there are legal limitations and lack of international support for such an initiative.<sup>116</sup> The initiative appears to be more about counterbalancing the Specialist Chambers with the hope that in the future its mandate which currently targets only KLA-alleged war crimes would be expanded to include also unresolved cases of war crimes committed by Serbian police and military forces.<sup>117</sup>

Efforts for the normalisation of relations between Kosovo and Serbia under EU's auspices since 2011 can also be considered as measures intended to offer guarantees for non-recurrence of past crimes. As part of technical and political dialogues between Kosovo and Serbia, several important agreements were reached on regional cooperation and representations, integrated border management, regulation of customs, return of cadastral records and civil registry, and recognition of university diplomas. However, the entire process of normalisation of relations between Kosovo and Serbia has been characterised as a process of making half-heartedly compromises during technical and political talks. This normalisation process so far has not contributed to substantial improvement of inter-ethnic relations in Kosovo.<sup>118</sup> The EU's approach to normalisation of relations between Kosovo and Serbia has been top-down and mainly focused on the national levels. Although the EU adopted its framework on transitional justice in 2015, it avoided integrating it in the Kosovo-Serbia dialogue.<sup>119</sup> Since the start of the dialogue, sensitive topics, such as missing persons or cross-border cooperation on war crimes investigation, have been put aside by the EU

114 Interview C. 03 March 2020, Pristina, Kosovo.

115 Radio Free Europe, 'The initiative for the Tribunal on Serbian crimes is formal', Pristina, 6 May 2019. Available at: <https://www.evropaelire.org/a/tribunal-per-krimet-e-serbise-ne-kosove-/29924688.html>.

116 Gazeta Express, 'Veseli's idea for Serbian crimes court is considered against the law', Pristina, 2019. Available at: <https://www.gazetaexpress.com/ideja-e-veselit-per-gjykatet-per-krimet-serbe-po-konsiderohet-kunderligjore-x-x/>.

117 Interview C. 03 March 2020, Pristina, Kosovo.

118 Interview P. 30 March 2020, Pristina, Kosovo.

119 Interview C. 03 March 2020, Pristina, Kosovo.

fearing that such topics would derail the confidence building measures and the efforts for gradual normalisation of bilateral relations.<sup>120</sup>

Local actors, affected communities, and civil society groups in both Kosovo and Serbia have not been involved in the discussion on how to normalise these relations that affect their everyday lives which was set as the primary intention of the dialogue. The most recent report of the Kosovo-Serbia Policy Advocacy Group summarising the perception of citizens on the ground found that "the overall process of technical dialogue has been accompanied by a lack of transparency from both governments and this has contributed to the limited level of information among citizens about the process and its outcomes."<sup>121</sup> Consequently, the lack of involvement has resulted in the lack of local legitimacy, which has undermined the effectiveness of the entire process. Citizens' needs, interests, and perspectives are loosely represented and mediated by the technocrats on both sides and have been negotiated by political representatives.

Despite these institutional and legal measures, the lack of a comprehensive peace agreement and normalized relations between Serbia and Kosovo continues to feed nationalism and hinder reconciliation between ethnic groups on both sides of the border.<sup>122</sup> Oriented toward retributive justice, hybrid judicial institutions in Kosovo have been objects of contention and resistance by at the political and societal levels, significantly enabling the emergence of ethno-nationalist dynamics of commemoration and mono-ethnic documentation of war crimes attuned mainly towards in-group power consolidation and the de-legitimation of others. The rehabilitation of convicted war criminals into political life and their protection by state institutions in Serbia, and to certain extent in Kosovo, provide no guarantee for non-recurrence of gross human rights abuses. Most of the transitional justice measures taken by Kosovo authorities and the international community in Kosovo have been separate from any interactions with Serbian counterparts. The parallel and uneven dynamics and processes of DwP on both sides of the border have ultimately undermined the prospects for a genuine engagement with the legacies of the violent past, and neither offers the war victims' families and survivors closure, nor contributes to reconciliation and moving forward.<sup>123</sup>

*"Unless there is a true reconciliation between the political elites there can't be reconciliation between the ordinary people, because as long as there are these narratives reproduced by politicians you cannot have a trickle down process in which the narratives of conflicts are changing."<sup>124</sup>*

In absence of a final agreement between Kosovo and Serbia, rhetoric of recurrence of war and ethnic violence continues to be promoted by certain political figures in Serbia and Kosovo. In particular, since the current President Aleksandar Vučić came to power, Serbian authorities have started a full scale campaign to rehabilitate war criminals by granting them access to

120 Interview R. 31 March 2020, Pristina, Kosovo.

121 Kosovo - Serbia Policy Advocacy Group, 'Pristina - Belgrade Technical Dialogue Agreements: Perceptions on the Ground', February 2020, Pristina, North Mitrovica, Belgrade, p. 5. Available at: <http://k-s-pag.org/en/kosovo-serbia-dialogue-pristina-belgrade-technical-agreements-perception-on-the-ground>.

122 Gëzim Visoka, 'Everyday Peace Capture: Nationalism and the Dynamics of Peace after Violent Conflict', Nations and Nationalism, Vol. 26, No. 2, 2020, pp. 431-466.

123 Interview P. 30 March 2020, Pristina, Kosovo.

124 Interview Q. 30 March 2020, Pristina, Kosovo.

media and public institutions as well as promoting their warmongering discourse.<sup>125</sup> So far, no guarantee of non-recurrence is coming from the prosecution of war crimes by Serbian authorities. The Humanitarian Law Center found in 2019 that “no progress in war crimes prosecutions can be reported for the 44 months since the adoption of the National Strategy”.<sup>126</sup> Moreover, the report found that “attitudes towards war crimes and war crimes trials in Serbia, the past several months have been marked by the continued public promotion of convicted war criminals”.<sup>127</sup> Also concerning reports were published on Serbia’s cover-up of crimes during the conflict in Kosovo which were “planned and ordered by the most senior political and police leadership of Serbia continue to send negative messages to the victims and affected communities.”<sup>128</sup>

A majority of Kosovo Albanian respondents to this study have placed apology for past crimes and recognition of Kosovo’s statehood by Serbia at the heart of dealing with the past and reconciliation for the sake of future peace. An official apology by the Serbian authorities for war crimes and damages in Kosovo would substantially contribute to move forward.<sup>129</sup> As a respondent stated: “When we speak of ‘forgiveness’, it’s difficult to forgive if there is nobody asking for apology. That is why it’s important that Serbia first asks for forgiveness.”<sup>130</sup> A Kosovo Albanian civil society activist stated: “It would help a lot if Serbia recognizes Kosovo, everything else would be easier. If Serbia recognizes Kosovo, Serbia also recognizes the past.”<sup>131</sup> Among the Kosovo Serb community there is a prevailing perception that for them dealing with the past is accepting the blame for the crimes committed by the former Serbian regime.<sup>132</sup> This acceptance of blame doesn’t come from any sense of justice but a reflection of their powerlessness as a minority community in Kosovo to determine the terms of transitional justice. On the question of recognition, a Kosovo Serb respondent stated: “when we speak of reconciliation, Serbs are not ready to reconcile and accept Kosovo’s independence. Thus, political agreement is much easier than reconciliation.”<sup>133</sup> Among the Kosovo Serb respondents there was a wide perception that the most pragmatic way of dealing with the past is avoiding talking about the past. Others argued that “dealing with the past in Kosovo today has a systemic fault because it’s not the past...we still live in those processes that we need to face... conflict is still ongoing, and we are unfortunately deep in it.”<sup>134</sup>

This overview and the perception of respondents indicates that DwP and TJ initiatives in Kosovo have had a limited impact largely because there was a lack of political will among all stakeholders in Kosovo and Serbia to genuinely face the past. This lack of political will to engage seriously and through sustained effort to face the past was manifested through ad-hoc and project-based

initiatives, which lacked sufficient cooperation and coordination. Political will was also manifested among the international and national political leaders to undertake effective institutional and policy measures to address the legacies of the past. Most importantly, there wasn’t sufficient victim-centred and survivor-centred initiatives which would take into account the socio-political status and psychosocial and economic situation.<sup>135</sup> Moreover, DwP initiatives have insufficiently incorporated gender aspects of affected communities.<sup>136</sup> In particular, DwP initiatives have insufficiently engaged with the question of how the legacies of the conflict - ranging from sexual violence during conflict and male-dominated political scene in the post-conflict Kosovo – continue to impact on the socio-economic status, discrimination and injustices of different identity groups in Kosovo. Consequently, Kosovo so far has failed to properly deal with the wartime legacies and move forward to a better and just future for all its citizens.

125 See, Milica Stojanovic, ‘War Criminals Prepare to Run in Serbian Elections’, BIRN, 25 May 2020. Available at: <https://balkaninsight.com/2020/05/26/war-criminals-prepare-to-run-in-serbian-elections/>.

126 HLC, ‘Fifth Report on the Implementation of the National Strategy for Prosecution of War Crimes’, Belgrade, Serbia, 2019, p. 7. Available at: [http://www.hlc-rdc.org/wp-content/uploads/2019/12/Fifth\\_Report\\_on\\_the\\_Implementation\\_of\\_the\\_National\\_Strategy\\_for\\_Prosecution\\_of\\_War\\_Crimes.pdf](http://www.hlc-rdc.org/wp-content/uploads/2019/12/Fifth_Report_on_the_Implementation_of_the_National_Strategy_for_Prosecution_of_War_Crimes.pdf).

127 Humanitarian Law Center, Fifth Report on the Implementation of the National Strategy for Prosecution of War Crimes, p. 7.

128 Humanitarian Law Center, ‘Dossier: The cover-up of evidence of crimes during the war in Kosovo: THE CONCEALMENT OF BODIES OPERATION’, Belgrade, 31 January 2017. Available at: [http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije\\_OPERACIJA\\_SKRIVANJA\\_TELA\\_eng.pdf](http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije_OPERACIJA_SKRIVANJA_TELA_eng.pdf).

129 Focus Group 1, 06 March 2020, Pristina, Kosovo.

130 Interview D, 05 March 2020, Pristina, Kosovo.

131 Interview A, 02 March 2020, Pristina, Kosovo.

132 Focus Group 2, 11 March 2020, Gracanica, Kosovo.

133 Interview Q, 30 March 2020, Pristina, Kosovo.

134 Focus Group 2, 11 March 2020, Gracanica, Kosovo.

135 Interview C, 03 March 2020, Pristina, Kosovo.

136 Impunity Watch and BIRN, ‘Balkan Chronicle: Gender equality, transitional justice, and the international community’, The Hague and Sarajevo, 5 December 2019. Available at: [https://www.impunitywatch.nl/docs/PolicyBrief\\_Balkans\\_Chronicle\\_Gender\\_Equality\\_TJ\\_Intl\\_Community\\_eng.pdf](https://www.impunitywatch.nl/docs/PolicyBrief_Balkans_Chronicle_Gender_Equality_TJ_Intl_Community_eng.pdf).



# Towards a Deliberative Infrastructure for Dealing with the Past in Kosovo

The analysis so far in study pointed out to the need for an integrated and comprehensive approach to transitional justice in Kosovo. This section proposes a four-step approach for developing a deliberative infrastructure for DwP in Kosovo. The four steps include:

- 1 Generating a citizen-informed national understanding on the principles and ethics for DwP in Kosovo;
- 2 Developing an integrated knowledge base and repository of existing sector-specific strategies, initiatives, and mechanisms for DwP in Kosovo;
- 3 Developing a bottom-up and victims-centred national strategy for DwP; and
- 4 Designing an integrated institutional infrastructure for DwP.

## 1. Strategic vision and national understanding on dealing with the past

Kosovo so far has not managed to generate a national understanding for dealing with the past. As the analysis in this study shows, international and national authorities as well as civil society groups have pursued their own initiatives of transitional justice through parallel and often overlapping initiatives without an overall vision. As a respondent stated: “strategies are good to have in order to know what you want to do - but there are too many players in the game

and there needs to be a consensus”.<sup>137</sup> The key to a joint vision on transitional justice is a general understanding, which then enables sufficient commitment and engagement from all involved parties. As a respondent reflected:

*“We should as a country have a state vision on what we should do in dealing with the past processes. There should be coordination because until now we have witnessed a lack of cooperation across institutions. There has also been overlapping of activities by different people and institutions.”<sup>138</sup>*

Thus, the first step is to generate a national understanding on the principles and ethics for dealing with the past and pursuing transitional justice in Kosovo. This could take the form of key principles which are endorsed and implemented voluntarily by all stakeholders working on these topics/ issues in Kosovo. These principles and ethics should be informed by citizen preferences and also supported by political leaders. As the majority of respondents have highlighted, key to a sustainable approach to transitional justice in Kosovo is to promote three elements: 1) the primacy of victim-centred and survivor-centred approaches; 2) greater gender equality and sensitivity; and 3) de-ethnicization, depoliticization, and de-personalisation of DwP initiatives. As one respondent stated:

*“Politicians should not be the main actors in transitional justice initiatives and talking to victims, it would be better to have experts, people who have lost people from the war, because they are more acceptable for all audiences and they are more credible. Politicians can have a role but it's not smart to have politicians visible in dealing with the past initiatives.”<sup>139</sup>*

Among the existing initiatives there have been attempts to engage the relevant stakeholders in generating a joint vision and principles for dealing with the past. Thus, there is already a base and awareness of the importance of citizens involvement which needs to be capitalised and developed properly. For example, there is an on-going civil society initiative, facilitated by the Swiss Embassy in Kosovo, to develop a number of principles guiding the work of institutions and NGOs when dealing with the past and affected communities.<sup>140</sup> This initiative aims to develop principles on dealing with the past in Kosovo to inform and guide the work of political representatives, policymakers on “how to engage with victims, survivors, past events and historical narratives” as well as “prevent harmful discourse and actions related to the legacy of the conflict”.<sup>141</sup> Among the proposed principles, is the recognition of victims’ and survivors’ integrity and dignity, and greater, more equal and fairer involvement of them in all transitional justice initiatives. In this document, there is also a recognition of the importance of gender dimensions and avoidance of glorification of those accused or convicted or war crimes, avoidance of hate speech and collective attribution of wrongdoings, and more evidence based and ethical reporting, including the protection of the identity of witnesses.

While the above - mentioned initiative to devise the principles on dealing with the past offers a solid basis for a normative and ethical engagement on the topic of dealing with the past, it needs

<sup>137</sup> Interview L. 23 March 2020, Pristina, Kosovo.

<sup>138</sup> Interview P. 30 March 2020, Pristina, Kosovo.

<sup>139</sup> Interview R. 31 March 2020, Pristina, Kosovo.

<sup>140</sup> Interview B. 03 March 2020, Pristina, Kosovo.

<sup>141</sup> ‘Principles on Dealing with the Past for the Kosovo Context’, internal draft document, May 2020.

to ensure wider popular and political engagement and ownership to ensure wider legitimacy and consensus among all segments of society. The development of the principles and ethics for transitional justice should take place through a wide consultative process with all segments of society. These principles should be drafted in a language which is understandable and informed by local victims groups and communities. These principles and ethics forming the strategic vision on DwP could be generated through bottom-up, deliberative consultations and participatory action research involving a broad range of citizens coupled with the engagement of relevant experts and policy-makers. Then, there should be a comprehensive campaign for the endorsement of this strategic vision by all relevant stakeholders, accompanied with an appropriate mechanism for tracking and monitoring the compliance with and honouring of the principles and ethics for transitional justice in Kosovo. Principles on transitional justice should also include the perspectives of minority communities to ensure wider legitimacy and acceptance. Kosovo Serb respondents have highlighted their concern that any initiative that comes from Kosovo institutions, no matter how good it is, it is not easily accepted.<sup>142</sup> Therefore, more participatory and inclusive methods for devising these principles may overcome the top-down, externally-devised, template-like solutions that do not fit the specific needs and interests of all ethnic groups in Kosovo.

## 2. Repository of knowledge on transitional justice

Although there have been numerous side-by-side initiatives for transitional justice in Kosovo there is no central place where all knowledge and data on this topic is stored. A number of respondents have highlighted that the lack of an integrated knowledge base on transitional justice in Kosovo has undermined the prospects for connecting better the existing initiatives and avoiding overlap.<sup>143</sup> Donors often ended up supporting similar initiatives without much cost-effectiveness and harmonisation with existing initiatives.<sup>144</sup> We also noticed that even among the respondents there was lack of knowledge or gaps on how much they know about other ongoing initiatives. Thus, a central repository of knowledge on transitional justice would be essential not only for documenting the work of existing mechanisms and initiatives but also to ensure that policy making is informed by publicly available data and knowledge. This repository could contain information on laws, reports and statistical data of state institutions, court cases, reports and studies produced by think-tanks, NGOs and other research from the academic community, as well as other publicly available data and information on transitional justice in Kosovo and beyond. This repository could also host oral histories, stories from citizens, and other undocumented and unheard audio-visual content that capture the experiences and suffering as well as resilience of all ethnic groups in Kosovo.

There is already a large amount of documentation collected by different governmental mechanisms and NGOs, which need to be brought together into a collective repository. For instance, the Humanitarian Law Center office in Kosovo, the University of Pristina Law Faculty, CDHRF database, and the Missing Persons Resource Centre have their own libraries and repository of resources, which could be brought together into a centralised, interactive, and accessible knowledge base. In the digital age, this repository could take the shape of a digital knowledge base available to all citizens and affected communities in all official languages in Kosovo. Obviously, the sustainability

<sup>142</sup> Interview Q. 30 March 2020, Pristina, Kosovo.

<sup>143</sup> Interview S. 01 March 2020, Pristina, Kosovo.

<sup>144</sup> Interview G. 10 March 2020, Pristina, Kosovo.

and durability of this repository requires financial support and solid institutional support as well as management by an adequate and politically independent authority.

## 3. A bottom-up and victims-centred national strategy for dealing with the past

The analysis in this study finds that one of the main reasons why efforts for dealing with the past in Kosovo has had a limited impact is that there was a lack of a strategic vision and a comprehensive framework to guide the work of state institutions and non-governmental organisations, and a lack of including efforts undertaken by victim groups. A bulk of criticism about the shortcomings of past initiatives refer to the failure to develop a national strategy on transitional justice and the prevalence of side-by-side and project-based initiatives without sufficient coordination, harmonisation and long-term view. Thus, the importance of devising a national strategy on transitional justice is widely recognised among the respondents of this study. As a governmental official stated:

*“Kosovo should have a national strategy on transitional justice because this is a long and complex process, and a strategy helps creating a vision for the public institutions. Ultimately, for the strategy to succeed it must be led by public institutions.”<sup>145</sup>*

Among respondents of this study, there is a wide consensus that a national strategy should integrate the four broadly defined pillars of transitional justice, namely: war crimes trials, truth-seeking, reparations, and guarantees of non-recurrence and institutional reforms. Most importantly, respondents, highlighted the importance of devising a national strategy that is informed by the needs and interests of citizens and that derives from a deliberative, inclusive and bottom-up process.

So far, DwP initiatives have mostly been initiated from outside where consultation with a small group of NGOs is seen as sufficient for calling them as participatory and citizen-driven. Analysis in this study has pointed out the promises and perils of representative politics in the context of transitional justice. Operating solely through representative groups, such as political parties, civil society organisations, and associations of affected communities there is a risk of overlooking the needs and interests of victims and survivors of the conflict coming from all identity and geographic backgrounds. Often project-based initiatives are designed around short-term and time-specific deliverables which risk overlooking participatory processes and the significance of legitimacy and ownership by the beneficiary and affected communities. Therefore, it seems appropriate to suggest that future efforts for dealing with the past should explore deliberative approaches which directly engage the citizens and affected communities and avoid polarisation and exclusion that emerged from representative structures.<sup>146</sup> The process of how strategies, a framework of principles and actions are designed are as important as the mechanisms and the subsequent outcomes.

<sup>145</sup> Interview T. 21 April 2020, Pristina, Kosovo.

<sup>146</sup> Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up', *Journal of Law and Society*, Vol. 35, No. 2, p. 266. See also:

Roger Duthie and Paul Seils, 'Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies'. New York: International Centre for Transitional Justice, 2017.

Taking into account these issues, deliberative democratic discussions on dealing with the past as an alternative approach could offer better grounds for determining what past legacies are to be tackled. Deliberative transitional justice enhances the prospects for more reciprocity between the state and non-state actors and the affected communities as there is greater chance for public accountability as well as a sense of equality, care and responsibility. As Colleen Murphy, a scholar on transitional justice, argues: “democracy is a necessary component of transitional justice because it is necessary for relationships to be relationships among equals”<sup>147</sup> This entails the opportunity for citizens to design themselves transitional justice initiatives that recognize the voices of affected communities and give them a sense that a measure of justice for and recognition of past suffering has taken place. The Office of the UN High Commissioner for Human Rights also recognised the benefit of bottom-up processes and national consultations, as they play a crucial role in: “ (...) determining the best formal role for victims to play, highlighting the experience of otherwise neglected victim groups, identifying culturally appropriate truth-telling mechanisms, determining the role in proceedings of cultural practices, defining elements for a criminal prosecutorial strategy, adjusting inappropriate procedures, deciding on the time period to be covered by various transitional justice mechanisms and how best to craft recommendations on such matters as reparations”<sup>148</sup>

Deliberative transitional justice in this context entails reimagining and redesigning how the needs and concerns of affected communities are approached, prior to their translation into a policy document and development into an institutional mechanism. This includes direct public interactions with affected communities through community and local gatherings, citizen assemblies, emplaced commemoration, and victim-centred decision making processes rather than imposed by donors, state institutions or NGOs. As a civil society activist argued:

*“If we want to have a proper process and to be successful and have this local ownership from a bottom-up, it’s important to work with the people at the local level and engage them in the process. They have to be more transparent and to include more people, to be more grassroots and to go to remote areas, to meet more people, because this is what is all about.”<sup>149</sup>*

Deliberative transitional justice contributes to designing projects and interventions which are culturally appropriate and fit the context and needs of affected communities which may vary from one region to another. Deliberative and bottom-up approaches are seen as more appropriate for placing the affected communities at the very centre of the transitional justice process and recognise their right to be consulted. As a respondent stated:

*“Dealing with the past has to be an inclusive process, not just institutions, with meaningful participation from all stakeholders but especially the survivors. The process should be victim-centered, in this way we will also ensure ownership by the victims/survivors to the process.”<sup>150</sup>*

147 Colleen Murphy, ‘Deliberative Democracy and Agency’. In L. Keleher and S. J. Kosko (eds) *Agency and Democracy in Development Ethics*, Cambridge: Cambridge University Press, 2009, p. 359.

148 Office of the UN High Commissioner for Human Rights, ‘National consultations on transitional justice’, p. 2.

149 Interview B. 03 March 2020, Pristina, Kosovo.

150 Ibid.

In practice, meaningful participation of affected communities in DwP initiatives requires not only *instrumental participation* through testifying as witnesses in war crimes court trials and truth-seeking inquires; or *representative participation* through associations, networks, and organisations of affected communities who play a role in shaping policy and institutional aspects of DwP. Most importantly, it requires *transformative representation* through direct involvement of affected communities in local deliberations and national consultations on designing, implementing and evaluating DwP strategies and activities.<sup>151</sup> Thus, in order for a genuine bottom-up and participatory transitional justice to take place and be transformative, local affected communities - representing families of victims, survivors, war veterans and other categories – should be empowered to mould and drive all the stages of the process. A respondent stated that “key to a successful strategy is representation and inclusiveness”<sup>152</sup> Participation of affected communities in all these stages then “becomes a key element of empowerment that sees the marginalized challenge, access and shape institutions and structures from which they were previously excluded”<sup>153</sup> A careful consultation ensures that people who have been affected by the conflict are listened to, so that the transitional justice programs best reflect their actual experiences, needs and entitlements. As a respondent stated:

*“Public consultations could help ensure inclusiveness...People would know best what to do for themselves, that’s why I think it would be important to educate people at the local level.”<sup>154</sup>*

While deliberative approaches to designing transitional justice initiatives in Kosovo may enjoy wider legitimacy, they risk being cooped by national political dynamics. For example, among the Kosovo Serb community the importance of bottom-up and citizen-driven approaches to devising strategies on transitional justice is well recognised. As one respondent stated: “I think it would be fair to have a bottom-up approach for a national strategy, I think methodologically it wouldn’t be a problem, but the problem comes when this becomes political”<sup>155</sup> However, there are concerns that without proper political agency and representation at the political level, minority communities can be outnumbered and side-lined by the majoritarian concerns and their grievances about the past suffering and losses during the conflict.<sup>156</sup>

#### 4. Towards an institutional infrastructure for dealing with the past

Finally, if Kosovo manages to develop a national consensus on the guiding principles for transitional justice, develops a comprehensive repository of knowledge, and generates a strategy

151 For a broader and comparative discussion on the degrees of participation see: Kora Andrieu, et al., ‘To participate is to have hope: Victim participation in Tunisia’s transitional justice process’, *Tunis: Transitional Justice Barometer*, 2015.

152 Interview D. 05 March 2020, Pristina, Kosovo.

153 Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’, *The International Journal of Transitional Justice*, Vol. 8, No. 3, 2014, p. 358.

154 Interview C. 03 March 2020, Pristina, Kosovo.

155 Interview Q. 30 March 2020, Pristina, Kosovo.

156 See for example: Alternative Dispute Resolution Center, ‘Can we understand one another?’, Mitrovica, November 2018. Available at: <http://mediation-mitrovica.org/wp-content/uploads/2019/02/POR-Can-we-understand-one-another-ENG.pdf>.

through deliberative methods, it would have the necessary ingredients and properties for developing an umbrella institutional infrastructure for DwP which would be responsible for supporting existing and future initiatives for dealing with the past in Kosovo. The necessity for an infrastructure for transitional justice in Kosovo comes from the realisation that relying on dysfunctional mechanisms and on overlapping, ad-hoc, and project-based initiatives undermines the objectives of transitional justice and results in ineffective and uncertain outcomes. The concept of infrastructure for DwP denotes the development and coordination of institutional and non-governmental structures, initiatives and resources that promote transitional justice in Kosovo.<sup>157</sup> In other words, this entails engaging all levels of society and connecting all existing and future structures, mechanisms, initiatives, and resources in dealing with the past. A specially designated infrastructure for DwP would give people an address where they know where to seek justice on the past.

The design of future infrastructure for DwP should be first and foremost in service of implementing the strategic vision and framework on transitional justice and become a genuine body that works for the affected communities and ensures that their interests are advanced through seeking truth, justice, compensation, and guarantees for non-recurrence. The future infrastructure for DwP should adopt deliberative, inclusive, and transparent methods of decision-making that reflect the concerns and needs of affected communities belonging to all social and ethnic groups of Kosovo society. It should be open to transforming its mandate and scope of activities depending on how much progress Kosovo makes in uncovering the truth and promoting inclusive remembrance, bringing perpetrators to justice, protecting the victims and survivors, and undertaking institutional reforms. The infrastructure for DwP could have the following functions:

- ◆ Serve as a connection body for the existing transitional justice initiatives through information sharing and regular consultative meetings;
- ◆ Engage on interactive, cooperative, and deliberative problem-solving issues concerning DwP;
- ◆ Provide a space for affected communities to channel their needs and lobby for their rights and interests;
- ◆ Offer advisory services and consultation for all the affected communities and relevant stakeholders;
- ◆ Track the implementation of national strategy on transitional justice and the compliance of state institutions, non-governmental organisations, media and other bodies with the principles on transitional justice;
- ◆ Serve as a platform for the production, dissemination, and documentation of knowledge on transitional justice through analytical and empirical research, training workshops, and promotional activities;

<sup>157</sup> It draws on from an already well-established infrastructures for peace across different post-conflict settings around the world. See for example: Paul van Tongeren, et al. 'The Evolving Landscape of Infrastructures for Peace, *Journal of Peacebuilding & Development*, Vol. 7, No. 3, 2012, pp.1-7; Hans J. Giessmann, *Embedded peace: Infrastructures for Peace - Approaches and Lessons Learned*, Berlin: Berghof Foundation, 2016. Available at: <https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/conflict-prevention/infrastructures-for-peace--approaches-and-lessons-learned.html>.

- ◆ Connect transitional justice processes with other peacebuilding, and sustainable development activities to promote peace, justice, and a common future.

These functions would make the infrastructure for DwP a dynamic structure which ensures the adjustment to the national context, promotes the ownership of the process by all affected communities and relevant stakeholders and interconnects all elements of transitional justice.

The infrastructure for DwP should make space for diverse organisations and groups at the local, municipal, and national levels. In other words, the infrastructure for transitional justice should be founded at all societal levels: vertical integration between local, municipal, regional and national levels; as well as horizontal integration of all governmental and non-governmental mechanisms and initiatives.<sup>158</sup> In the future design of an infrastructure for transitional justice in Kosovo the international community needs to redefine its role.<sup>159</sup> While some respondents believe that the international community and donors are more genuine partners than the national authorities when dealing with the past, others see the involvement of external actors with a dose of scepticism, mostly due to limited success in the past two decades.<sup>160</sup> Thus, the donor community would benefit from allocating their assistance to those mechanisms and initiatives that address the needs and interests of affected communities in Kosovo and ensure sustainability rather than pursue externally-designed agendas that often encode geopolitical interests. In short, external support for transitional justice must be guided by the local needs and adjusted to the local context. International and national stakeholders in Kosovo preoccupied with short-term goals were unable to develop effective and long-term mechanisms for dealing with the past. However, the majority of respondents have pointed out that state institutions should have a primary responsibility for dealing with the past and pursuing transitional justice in Kosovo. In light of this, there are two realistic options for designing the infrastructure for transitional justice in Kosovo.

The first option could be the recently established Department for Transitional Justice and Support of Crime Victims within the Ministry of Justice, which could serve as an institutional infrastructure for transitional justice in Kosovo. This department has already has a legal mandate covering a wide range of transitional justice aspects, including the capacity to: 1) propose policies and normative acts related to the area of transitional justice; 2) provide support in collecting and documenting facts related to war crimes; 3) provide support in war damage identification, documentation, and assessment; 4) propose policies and normative acts on the status and treatment of victims of war; 5) support cooperation and coordination of institutions in the field of war crimes within the competence of the Ministry of Justice; and 6) examine the compensation requests of crime victims, among other functions.<sup>161</sup> This department could function as an umbrella institution that would aim for better coordination and cooperation among all relevant stakeholders. The department would need to ensure the harmonisation among different initiatives and avoid the overlap of donor assistance. If properly run, the department should represent the interests and needs of affected communities. Though, there is a risk that this department may become becoming politicised and unable to deliver on its mandate

<sup>158</sup> Interview G. 10 March 2020, Pristina, Kosovo.

<sup>159</sup> Interview L. 23 March 2020, Pristina, Kosovo.

<sup>160</sup> Interview E. 10 March 2020, Pristina, Kosovo. Consultation with civil society groups in Kosovo, 20 May 2020, Online.

<sup>161</sup> Government of Kosovo, 'Regulation GRK – No.12/2018 On Amending and Supplementing Regulation GRK-No. 31/2013 on the Internal Organization of the Ministry of Justice', Pristina, 2018. Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=17792>.

because it is a governmental institution, as we have seen in the past with the Institute for War Crimes Research and the IMWG-DwPR. The second option is to establish a fresh independent state-supported agency solely dedicated to the coordination, documentation, monitoring, and supporting of all existing and future initiatives for dealing with the past in Kosovo. It could be named as the 'Kosovo Agency on Dealing with the Past'. This new agency would have a similar set up and composition as other independent state agencies in Kosovo, such as the Institution of Ombudsperson, Agency for Gender Equality, Anti-Corruption Agency and various regulatory mechanisms. Some of the independent and semi-independent state agencies have been established by the Government and Assembly of Kosovo, and have a designated state budget and administrative support. The establishment of future infrastructure for DwP can lean in particular from the women's activism in Kosovo and their success in advancing gender equality at the political institutional and societal levels in Kosovo.<sup>162</sup> The advantage of the second option is to ensure greater independence from the government and other political institutions, which have so far dominated the scene of transitional justice but haven't managed to deliver as expected. It would also enable a greater role for the Assembly of Kosovo, which has been identified by the respondents as an essential actor for democratising transitional justice.<sup>163</sup> Moreover, this new agency could be more acceptable to the minority communities<sup>164</sup> as well as international donors. There would be greater scope to design this institution in accordance with the needs of affected communities and the community of organisations and associations working on transitional justice.

Regardless of which option would be more viable, there are legitimate concerns whether the infrastructure for dealing with the past would work best if it is run by state institutions, and in particular how to address the problem of state funding and dependence on the political will of key political leaders. Local initiatives and in particular those run by NGOs cannot succeed without the political commitment of national leaders. However, these dilemmas could be resolved if there is unity of purpose among the affected communities and solid advocacy by civil society groups and donors, as well as working with all political parties in Kosovo and their constituencies.

The recent experience of Tunisia offers insights which Kosovo could learn from. In Tunisia, following the 2011 revolution and regime change, the new government established the Ministry of Human Rights and Transitional Justice, which was tasked with undertaking a national consultation on transitional justice in order to set out a comprehensive transitional justice strategy for the country. A technical committee consisting of representatives from the government and civil society organisations undertook a broad national dialogue and regional consultations prior to drafting the law on transitional justice. Prior to interacting with different affected communities and surveying their views, a national awareness campaign was organised to improve understanding of the consultative process.<sup>165</sup> The consultative process resulted with the adaptation of the Organic Law on Transitional Justice and the establishment of the Commission of Truth and Dignity. However, the process of national consultation was flawed, which reflected on the final Organic law and subsequent transitional justice efforts. Embedding Tunisia's transitional

justice process in a government ministry led to some segments of civil society disengaging from this process, because they perceived it as a political project advanced by the new government rather than reflecting demands from below.<sup>166</sup>

Furthermore, the national dialogue was designed in line with international experiences and knowledge of transitional justice. The social justice and dignity demands of the revolution centred around access to jobs, unemployment and inequality. These local concerns were erased to the benefit of internationally established and pre-fixed categories focussing on violations of civil and political rights such as police abuses and violations of due process.<sup>167</sup> Moreover, beyond the national dialogue, the Tunisian transitional justice process has been condemned for being less participatory than it proclaims. Participation was obvious during the national dialogue and drafting of the law on transitional justice, but the organic law itself failed to include many demands of more marginalized and excluded populations, such as women in rural areas.<sup>168</sup> Beyond the problems undermining the bottom-up process, political disagreement among parties representing the old and new regime accompanied with allegations of corruption and mismanagement by the Commission of Truth and Dignity further undermined the operationalisation and implementation of the law on transitional justice.

<sup>162</sup> Consultation with civil society groups in Kosovo, 20 May 2020, Online.

<sup>163</sup> Interview A. 02 March 2020, Pristina, Kosovo.

<sup>164</sup> Consultation with civil society groups in Kosovo, 20 May 2020, Online.

<sup>165</sup> Christopher K. Lamont and H la Boujneh, 'Transitional Justice in Tunisia: Negotiating justice during transition', *Politi ka misao:  asopis za politologiju*, Vol. 49, No. 5, 2012, pp. 32-49.

<sup>166</sup> Lamont and Boujneh, 'Transitional justice in Tunisia: Negotiating justice during transition'.

<sup>167</sup> Ibid.

<sup>168</sup> Paul Gready, 'A transitional justice barometer: Measuring the needs for and impact of transitional justice processes in Tunisia, 2016', Netherlands Organisation for Scientific Research (NWO). Available at: <https://www.nwo.nl/en/research-and-results/research-projects/i/07/12607.html>.

# Conclusion: Reflections Beyond Kosovo

Every violent conflict is unique in its characteristics. And so are the transitional justice needs and dynamics. The legacies of Kosovo's violent conflict are only partially addressed so far. However, Kosovo's twenty-one year experience offers lessons that may be useful for other societies having to deal with war legacies.

Only a handful of war crimes trials have taken place through international, hybrid and national courts. A large number of alleged perpetrators are free at large, while victims and survivors continue longing for a measure of truth, justice, recognition, and closure. Governmental mechanisms for DwP in Kosovo have half-heartedly attempted to respond to the needs and rights of affected communities, but the lack of political will accompanied by weak institutional capacities and resources and politicisation of those initiatives has had little or no impact on advancing truth, justice, and reconciliation in Kosovo. Worse, this situation perpetuates enemy images and ethno-nationalist sentiments which could become breeding grounds for renewed conflicts. Other initiatives run by non-governmental bodies have tried to compensate these institutional weaknesses. Yet without a proper institutional infrastructure for DwP these project-based and scattered initiatives have had a limited impact. The only hope to remedy these shortcomings is to develop a strategic vision and national consensus on DwP accompanied by connecting knowledge and resources and guided by a deliberative strategic framework and implemented through an integrated and coordinating mechanism. While it remains to be seen if this proposed pathway could be realised in practice, Kosovo's experience offers at least four important lessons that may serve as reflection points to other conflict-affected societies and contexts.

## Lesson 1: No peace agreement without transitional justice provisions

The majority of peace agreements in the past twenty years have explicit provisions on transitional justice.<sup>169</sup> While this is an important indicator of the post-conflict transitional justice dynamics it does not signify concrete successes in dealing with the past. However, as the Kosovo case illustrates, post-conflict transitions without a peace settlement and explicit provisions on transitional justice can derail the long-term efforts for dealing with the past. The genesis of why Kosovo doesn't have a national strategy on transitional justice goes back to 1999 when the conflict ended without a mutually agreed peace settlement between Serbia and Kosovo. The UN Security Council Resolution which mandated the UNMIK to lead Kosovo's transition from war to its future political status was too broad and did not contain any specific provisions for transitional justice. Between 1999 and 2008, Kosovo was under UN administration, and the international community had full political and legal power on all matters in Kosovo, including transitional justice. However, pending Kosovo's political status and fearing the destabilising role it would have on inter-ethnic relations in Kosovo, the UN and other international actors focused on criminal prosecution of a handful number of war crimes cases, while ignoring other segments of transitional justice, such as truth-seeking, reparations, and guarantees of non-recurrence. International criminal justice ended up becoming more of a mechanism for controlling ethno-nationalist elites and governing geopolitical agendas than pursuing transitional justice and victims' interests.

After Kosovo's independence, the EU had the possibility to pressure the Kosovo government to deliver a national strategy on transitional justice. However, they feared such a strategy would undermine stability in Kosovo and ruin their efforts to resolve outstanding issues between Kosovo and Serbia. The case of Kosovo is therefore a good example of the dilemma of prioritising stability over justice, which in the long run not only undermines the legitimacy of the international community but also risks delaying the prospects for ethnic reconciliation and sets a bad example for national authorities. It also is a reminder of the importance to incorporate provisions on transitional justice into peace agreements while ensuring that short term concerns with stability do not overshadow the critical role of delivering justice to the affected communities for sustaining peace. Moreover, since Kosovo and Serbia did not sign a peace agreement any action taken by Kosovo authorities or the international missions for dealing with the past were mostly one-sided measures, focussing on the judiciary. More so, this undermined cross-border legal and judicial cooperation in prosecuting and trying war crimes suspects. It also undermined the willingness of each side to identify the bodies of missing persons and sharing documentation and evidence for past crimes. Finally, the absence of a peace agreement with TJ provisions undermined the willingness of each ethnic group to engage in activities for dealing with the past, fearing ingroup pressure and stigmatisation. This in turn reduced inter-ethnic dialogue and scope for reconciliation.

<sup>169</sup> See: PA-X (University of Edinburgh): Peace Agreements Database on transitional justice provisions. Available at: [https://www.peaceagreements.org/search?SearchForm%5Bregion%5D=&SearchForm%5Bcountry\\_entity%5D=&SearchForm%5Bname%5D=&SearchForm%5Bcategory\\_group%5D%5B%5D=10&SearchForm%5Bcategory\\_mode%5D=any&SearchForm%5Bagreement\\_text%5D=&s=Search+Database](https://www.peaceagreements.org/search?SearchForm%5Bregion%5D=&SearchForm%5Bcountry_entity%5D=&SearchForm%5Bname%5D=&SearchForm%5Bcategory_group%5D%5B%5D=10&SearchForm%5Bcategory_mode%5D=any&SearchForm%5Bagreement_text%5D=&s=Search+Database).

## Lesson 2: Timing and political will central to the success of transitional justice processes

The case of Kosovo also illustrates the determinant role of timing and political will when dealing with the past. The experience of Kosovo shows the importance of using suitable moments and timing for undertaking the national efforts for DwP. Looking back at events in Kosovo in the past two decades, we can now hindsight argue that, if UNMIK responsible for governing Kosovo in the aftermath of the conflict, would have undertaken sufficient strategic, legal and institutional measures to regulate DwP in Kosovo, perhaps the trajectory of developments would have been more positive towards addressing the legacies of the past. Yet, in the order of priorities, stability and short-term concerns seems to have played a more important role than the normative primacy of truth, justice, and recognition for all affected communities. Despite the fact that the international administration of Kosovo set a negative examples for dealing with the past, Kosovo's own institutions had multiple windows of opportunity to devise a national strategy on transitional justice. Kosovo's story shows that the lack of political will among national political and ethnic groups to uncover the truth and offer a measure of justice to all victims and survivors played a major role in failing to have a more coordinated, integrated and comprehensive approach to dealing with the past. The lack of political will sprang from a fear among national elites that dealing with the past would undermine their political power and legitimacy. Adding to this fear was the fact that transitional justice in Kosovo was mostly associated with criminal prosecution for war crimes. As the post-conflict political scene in Kosovo has been controlled mainly by parties and political groups who previously were leaders of the Kosovo Liberation Army (KLA), they have associated transitional justice with political hunting and thus have committed to partial truth-seeking which would enhance their political capital and popularity.<sup>170</sup> Pursuing an impartial and comprehensive agenda on transitional justice was seen as a risky strategy for their political survival and electoral support.<sup>171</sup> Under these conditions, the national elites in Kosovo have shown no commitment to tackle the legacies of the past only when it suited them to delegitimise their political opponents or generate popular legitimacy.

Kosovo is not a unique case. Examples from other conflict-affected societies also show that political willingness and the readiness of society to deal with the past play a far greater role in the success of transitional justice than often assumed. Despite the fact that Afghanistan devised an inclusive transitional justice strategy, the lack of political will and subsequent political and security changes resulted in jeopardising the quest for justice and reconciliation in the country.<sup>172</sup> In Bosnia and Herzegovina, the UNDP (United Nations Development Programme) supported in 2010 a joint government and civil society initiative to draft a national transitional justice strategy. Despite wide consultations with affected communities, the political disagreement among the parties representing the three constitutive ethnic communities, resulted in the failure of adoption of the strategy. Relying on civil society groups as the main means of disseminating the content of the draft strategy to a wider population did not result in wide public awareness and acceptance of the strategy. Subsequently, the strategy was never implemented.

<sup>170</sup> Visoka, 'Arrested Truth'.

<sup>171</sup> Visoka, 'Shaping Peace in Kosovo'.

<sup>172</sup> See: Tazreena Sajjad, 'These Spaces in Between: The Afghanistan Independent Human Rights Commission and Its Role in Transitional Justice.' *International Journal of Transitional Justice* Vol. 3, No. 3 (2009): 424-444.

## Lesson 3: Dealing with the past without strategy undermines transitional justice processes

The divergent agendas of international and national stakeholders and the absence of political support has led to the emergence of side-by-side initiatives for dealing with the past in Kosovo. The analysis in this study examined in detail the main initiatives for dealing with the past which have been characterised by a lack of consensus and capacity on how to design institutional responses; a lack of coordination and harmonisation among different overlapping and competing initiatives; and most importantly, a lack of representation of affected communities in the decision-making processes on transitional justice. The international, hybrid and national war crimes trials have been slow and inefficient. They have failed to deliver a measure of justice to the victims and survivors. Unintentionally, because they were not accompanied by broader transitional justice mechanisms, these trials have done more harm to the societal DwP than contributing to truth, justice, and reconciliation. In particular, as the national elites have perceived transitional justice processes as a geopolitical tool of international community to discipline and control them, there has been local resistance to comprehensively dealing with the legacies of the conflict in Kosovo. As a result, the institutional efforts of the Kosovo government were half-hearted and futile. Transitional justice initiatives have been associated with particular political leaders and have often been instrumentalized for narrow political interests.

Measures for dealing with the past were top-down and sporadic, with insufficient involvement of affected communities. To compensate for these flaws, a handful of NGOs with the support of international donors have undertaken projects to contribute to truth-telling and documentation of past sufferings, support the affected communities, and monitoring the work of governmental and judicial institutions on transitional justice matters. While NGO-based initiatives have partially compensated for the absence of serious state leadership on transitional justice, they have been criticised for lack of sufficient harmonisation and direct representation of needs and interests of affected communities. Moreover, they've all been implemented on a project-base, without sustainable follow-up. Next to state-led and NGO-led initiatives, affected communities have organised themselves around different victims associations which have often ended up becoming instrumentalized by different political parties for their own electoral and political agendas. These insights from Kosovo show that side-by-side initiatives for transitional justice without a proper strategic framework and cooperating and coordinating infrastructure certainly undermines and devalues the prospects for addressing properly the legacies of the past and building a better future for the affected communities. Having strategies and institutional mechanisms for dealing with the past is not a receipt for successful transitional justice, but judging by its absence in the case of Kosovo, their importance should not be underestimated.

## Lesson 4: Deliberative approaches to DwP key to overcoming blockages to truth and justice

Transitional justice initiatives in Kosovo have taken place with little or no meaningful involvement of affected communities. The initiatives reviewed in this study have mostly been top-down, designed by international and national experts in conjunction with a handful of NGOs and victim associations. The involvement of civil society and victim associations is seen as sufficient to sell those initiatives as locally-led, participatory, and representative of the needs of affected communities. In turn, the limited engagement of affected communities and the general population has resulted in wide contestation of and dissatisfaction with transitional justice processes.

The preceding discussion in this study highlighted the benefits of deliberative and participatory approaches to transitional justice. As Kosovo is yet to embark in a journey toward more deliberative approaches to transitional justice, it is difficult to evaluate the success and outcome of such an approach. The case for deliberative transitional justice is strong, because such an approach does not only seek to tackle unaddressed issues from the past within and between ethnic groups but also seeks to create an environment for non-domination, respect, recognition, and peace among different ethnic groups as well as generate legitimacy for the institutional infrastructure for dealing with the past.<sup>173</sup> Transitional justice through deliberative and participatory methods is more likely to generate political will for change from the bottom-up. When political leaders see wide popular consensus and involvement in pursuing different aspects of transitional justice, they are more likely to include it in the national political agenda. Bottom-up pressure and legitimacy can be an assurance that state institutions and other representative structures are accountable to the affected community and the citizens of the country. For example, the experience of Liberia is revealing of how important it is for the success of national strategies to involve the affected communities. In 2013, the Government of Liberia proposed the 'Strategic Roadmap for National Healing, Peacebuilding and Reconciliation', which was mostly devised by international consultants with a limited input from civil society representatives. This process overlooked both the affected communities more broadly as well as missed the opportunity to address their socio-economic concerns which then undermined public support for the process of dealing with the past, managing the present and planning for the future.<sup>174</sup>

Yet, it can be ascertained that the issue of designing and implementing a national strategy on transitional justice that responds inclusively to societal needs is not an easy task for any country and few have even attempted to meaningfully integrate citizens' needs and feedback into such strategy. While national civil society should play an important role in the design, implementation, monitoring and evaluation of transitional justice strategies, they should not be a replacement for a genuine bottom-up consultation process which should involve all affected communities from all ethnic, geographic, and socio-economic backgrounds. Outreach programs and national awareness campaigns on dealing with the past are important before consultations take place, but may not necessarily enhance the knowledge of affected communities. The politics of location and spaces of consultation also play a major role in the bottom-up transitional justice processes. Consultations

where the affected communities reside and work are more meaningful than those taking place within institutions and official spaces.

In addition to geographic issues, the socio-economic condition of certain categories of victims, such as women, may have an impact on the inclusiveness of local consultations. NGOs sometimes fail to understand or represent the victims and citizens' priorities, revealing that the inclusion of civil society groups may not always lead to greater representation of affected communities. Experience from Nepal shows that participatory action research conducted in affected communities revealed that not only elites but also NGOs failed to represent the victims priorities, thus highlighting that involvement of NGOs in the engineering of transitional justice processes may not always mean greater representation and inclusivity.<sup>175</sup> Thus, participation of affected communities in drafting transitional justice policies should not be window dressing. Participation should not only occur before the drafting process but throughout all phases of conception, creation and implementation of relevant measures. While using direct methods of consultation with affected communities is crucial, efforts must be made to comprehensively understand their needs, interests, and preferences rather than superficially consult them or impose externally defined mechanisms and approaches for dealing with the past. The international community and international NGOs in this regard should play a meaningful role in enabling, supporting and offering assistance to bottom-up processes. In particular, donors must ensure that the agenda, the process and the outcome of DwP initiatives are designed and owned by affected communities themselves.

Finally, this study has proposed a shift from fragmented initiatives for DwP to an integrated institutional infrastructure which would glue together existing and future efforts for DwP in Kosovo. The concept of an infrastructure for DwP would be a suitable arrangement for Kosovo to ensure a balance between the independence of different DwP initiatives and the importance for more coordination and cooperation among those initiatives and in congruence with a joint strategic vision and framework for action. Most importantly, the infrastructure for DwP would be an address where the affected communities would be involved directly in decision-making processes impacting their interests and needs. Yet, its success depends on the political will and commitment of all international and national stakeholders to pool together resources and enhance coordination to address the unresolved legacies of the conflict and support [truth finding and] trust-building among different ethnic groups, which eventually could result in reconciliation.

<sup>173</sup> James Bohman, 'Transnationalizing Peacebuilding: Transitional Justice as a Deliberative Process', in Larry May and Elizabeth Edenberg (eds.) *Jus Post Bellum and Transitional Justice*, Cambridge: Cambridge University Press, 2013, pp. 285-304.

<sup>174</sup> See: Priyal Singh and Lesley Connolly, 'The Road to Reconciliation: A Case Study of Liberia's Reconciliation Roadmap', Umhlanga Rocks: ACCORD, 2014. Available at: <https://www.files.ethz.ch/isn/182036/ACCORD-policy-practice-brief-30.pdf>.

<sup>175</sup> Simon Robins and Ram Kumar Bhandari, 'From Victims to Actors: Mobilising victims to drive transitional justice process - A participatory action research project with families of the disappeared in Nepal', NEFAD, 2012. Available at: [https://nefad.files.wordpress.com/2012/06/nefad\\_from-victims-to-actors-research-report1.pdf](https://nefad.files.wordpress.com/2012/06/nefad_from-victims-to-actors-research-report1.pdf).





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