



TRANSITION, JUSTICE AND TRUTH: ESTABLISHING A TRUTH AND RECONCILIATION COMMISSION

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HUMAN RIGHTS THESIS
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EXECUTIVE SUMMARY

The present thesis focuses on truth and reconciliation commissions, more specifically a process of their establishment through observation of relationships between the State authorities/institutions and civil society organization. The question this thesis addresses is the question on a nature of relationships between the State and civil society organization in the establishment process.

Building on examples of the truth and reconciliation commission's establishment process in South Africa, Brazil and the RECOM Initiative, the thesis presents three relationships models between the State and civil society organizations. The case of South African Truth and Reconciliation Commission is a model of a State led establishment process which is characterized with the strong and genuine will of the State to establish a truth and reconciliation commission. The civil society organizations are participating in the process with know-how and expertise from the practice in dealing with the human rights abuses. This knowledge is used to build a mandate of a commission.

The case of Brazilian National Truth Commission is a collaboration model where a State is reluctant to establish a truth and reconciliation commission and therefore the whole process is highly politicized. The civil society organization are not included to the process in genuine way, thus the result is a commission without strong support of the civil society and dubious strength of its mandate. The RECOM case is a model characterized by the ignorance and hostility for the State/s, while the whole process is designed and led by the civil society organizations. The civil society organizations do not have a partner in State institutions in order to build a mandate of a future commission.

The three models are different from the perspective of conducting a cooperation process between a State and civil society organizations. However, they share a common feature suggesting that the role of civil society organizations is limited with a level of interests and will a State has for establishing a truth commission, or on a more general level, on a degree on which a society is willing to deal with the past violations of human rights.

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1 INTRODUCTION

The South Africa, Brazil and the countries of the former Socialist Federative Republic of Yugoslavia all have in common the experience of torture, killings, enforced disappearances and gross human rights violations committed in recent past. They all had a violent past that affected many of their citizens and caused significant damage to their societies. South Africa and Brazil both experienced long rule of nondemocratic regimes that were implementing policies of repression and gross human rights violations as tools for maintaining the power. The countries of the former Socialist Yugoslavia began their transition from communism to democracy with the set of bloody wars that left thousands of dead and millions of refugees.

Once the oppressive regimes and wars were ended and peace and stability were gained, those countries faced a challenge: what (if anything) to do about the massive human rights violations, how to serve justice and maintain social order at the same time, how to reconcile different and opposed sides of the society, or national groups? All of those questions are important issues each society must address alongside their transition to democracy. There are various means for addressing past human rights violations and violent past. The set of those means and instruments are grouped together under the name: *transitional justice*.

The present work is going to explore how the above-mentioned countries dealt and are still dealing with the past abuses and violent past by using means and instruments of transitional justice, more specifically this work is going to focus on one particular instrument: *a truth and reconciliation commission*.

A truth and reconciliation commission is an instrument of transitional justice whose popularity is growing since the second half of 20th century. They are a fairly novel instrument, although thinkers as influential as Karl Jaspers were advocating for such approach to mass

human rights violations from 1960s: “Now I have this foolishly simplistic idea: It would be wonderful to do without the trial altogether and make it instead into a process of examination and clarification. The goal would be the best possible objectification of historical facts.”¹ Until today the world saw the work of around 40 truth and reconciliations commission.²

Truth and reconciliation commissions are temporary and official collective bodies established by the State in order to examine the past human rights violations, established facts about it, and sometime are even empowered to contribute to reconciliation. Their work is concluded with publishing the report on their findings and recommendations to the State institutions on how to conduct future processes of transitional justice.³

In my personal capacity I had a chance to be part of an establishing process in case of RECOM. That experience gave me an excellent chance to observe the process of establishment from inside and to see all the virtues and weakness of conducting the establishment of a commission without the support of a State. Being aware of our failure, or at the best our very limited and relative success, I could not divert myself from wondering whether different outcomes would be possible if the nature of relationship between the States and civil society organizations was based a bit more on partnership. This personal and professional experience was the main reason for choosing a subject and focus of my thesis.

This work is going to focus on truth and reconciliation commissions as one of the transitional justice’s instruments. More specifically, it is going to focus on the establishment process of a truth and reconciliation commission by observing the relationship between a State and civil society organizations. Thus the main issue this work tackles is the question of

¹ Douglas, Lawrence. *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*. Yale University Press, 2001: 175.

² Hayner, Priscilla B. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge, 2011: xi-xii.

³ See subchapter 4.3.2 below for more detailed definition of truth and reconciliation commissions.

what is the nature of relationship between a State and civil society organizations in the establishment process.

The South Africa, Brazil and the case of RECOM of former SFRY were chosen for a comparison because of their comparative potential, as all three commissions had (or still have) a strong involvement of the civil society in the process of its establishment. However, the interplay between governmental and nongovernmental factors played out differently in these cases, leading to differing outcomes.

For the purpose of presenting the three models of the collaboration on the establishing a truth and reconciliation commissions this work is divided into three parts. The first part is going to focus on defining transitional justice and examining its main components: justice and transition. Subsequently it will go through examination of the work done by the international governmental organizations, and international and national NGOs in the field of transitional justice. From transitional justice at large the focus will be diverted to the truth and reconciliation commissions, its definition and objectives.

The second part of this work is going to focus on the historical background of the gross human rights violations in the South Africa, Brazil and on the territory of the former Socialist Federative Republic of Yugoslavia, by examination of political history of periods when atrocities were committed, nature and types of oppression and human rights violations, history of transition and nature of political change of each respective case.

The third and final part is going to present three models of a truth and reconciliation commission's establishment by presenting and analyzing the establishment process of the *Truth and Reconciliation Commission of South Africa*, the *National Truth Commission of Brazil* and the *Regional Commission for Establishing the Facts about War Crimes and Other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia*.

2 TRANSITIONAL JUSTICE AND TRUTH AND RECONCILIATION COMMISSIONS

2.1 Introduction

Transitional justice become unavoidable segment when discussing transition to democracy, not only as a conceptual instrument used by the social scientist and researchers to understand and describe the process of dismantling the authoritarian legacy, but also as a tool with growing usage in the work of international organizations, both governmental and nongovernmental. Thus, it is necessary to explore what are the key concepts of transitional justice and who are its key proponents.

This chapter is going to deal with key terms and concepts relevant to transitional justice: from defining the terms of *transition* and *justice*, as its constitutional elements, to exploring the concepts of *truth* and *reconciliation*. Further on, focus is going to be put on origins and historical developments of truth and reconciliation commissions, as probably the most known mechanism of transitional justice.

2.2 Transitional Justice

2.2.1 Defining Justice and Transition

As evident, transitional justice is a coin-term fused from words *transition* and *justice*. Before defining transitional justice, it is necessary to individually explore the meaning of both constitutive terms. Afterwards, focus will be put on their mutual interaction and correlation.

In the Academic Edition of Encyclopedia Britannica *justice* is defined as "...the concept of a proper proportion between a person's deserts (what is merited) and the good and bad things that befall or are allotted to him or her."⁴ As a concept, justice is of interest for scholars

⁴Encyclopædia Britannica Online, s. v. "justice," accessed February 27, 2013, www.britannica.com/EBchecked/topic/308729/justice.

and researchers of many social sciences, e.g. theology, sociology, political science, philosophy etc. In the context of our subject, a legal definition of justice is required. The Webster's New World Law Dictionary defines justice as "the balanced and equitable administration of law."⁵

In the Merriam Webster Dictionary *transition* is defined as a "passage from one state, stage, subject, or place to another: CHANGE."⁶ It goes without further explanations that both terms stand independently and not necessary in correlation with each other. *Transition*, in the context of our subject has been primarily used by authors, who were writing about political transition, most notably by authors writing about the transition to democracy. Thomas Carothers defines transition as a process in which "...any country moving away from dictatorial rule can be considered a country in transition toward democracy."⁷

The merger of two separate terms, emerged somewhere around efforts of social scholars to explain transition to democracy happening in South America in 1980's and in East Europe in aftermath of the Cold War.⁸ The term itself "...has been coined as recently as 1991"⁹ Transitional justice becomes useful explanatory instrument in the work of social scientists on democratic transition from authoritarian rule. Eventually, whole new discipline emerged with the focus on newly emerged democracies' answer to the past human rights violations committed by authoritarian regimes. The coin *transitional justice* become widely accepted by scholars researching in field of human rights violations, primarily by legal

⁵ Wild, Susan Ellis, ed. *Webster's New World Legal Dictionary*. Hoboken: Wiley Publishing, 2006: 166.

⁶ Encyclopædia Britannica Online, s. v. "transition," accessed February 27, www.britannica.com/bsp/dictionary/query=transition.

⁷ Carothers, Thomas. "THE END OF THE TRANSITION PARADIGM ." *Journal of Democracy* 13, no. 1 (January 2002) : 6.

⁸ "Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence." Edited by Alexander Laban Hinton. New York: Rutgers University Press, 2011: 2.

⁹ Ibid: 2.

scholars, sociologists and political scientists. Before proceeding to the analysis of different transitional justice definitions made by various scholars, critiques regarding the merger of the terms *transition* and *justice* should be examined.

In their work on transitional justice, Olsen, Payne and Reiter made an important observation regarding the correlation between *transition* and *justice*. They analyzed criticism of scholars regarding the usage of *transitional justice*. Main critiques were referring to the term as “...unhelpful, misleading or simply wrong”.¹⁰ According to the advocates of the *unhelpful* critique, *justice* without *transitional* is “...perfectly adequate and special terminology is neither required nor useful”.¹¹ The second group of scholars, states that the usage of transitional justice is misleading because of a modification potential that *transition* has over *justice*. Those modifiers can suggest that *transitional justice* is some kind of altered justice, less valuable justice.¹² The *Simply wrong* group of scholars argues that transitional justice is beneficial neither to justice nor to transition. “Instead, some mechanism may actually undermine both justice and transition by replacing justice with mechanisms of unaccountability, hiding impunity and the continuity of authoritarian regime control behind a thin veil of political transition.”¹³

As presented, there is a certain dissonance between scholars about how useful is transitional justice; more particular how useful are mechanisms of transitional justice in reaching separate goals of transition and justice. Those two goals can be diametrically opposite.

¹⁰ Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter. *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. Washington DC: United States Institute of Peace, 2010: 10.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

2.2.2 Defining Transitional Justice

“Transitional justice can be defined as the concept of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”¹⁴ This narrowly tailored definition of transitional justice by Ruti G. Teitel is focused on “...legal responses to confront [past] wrongdoings...”¹⁵ At the beginning, transitional justice only embodied legal responses to redress past violations of human rights, but with time the concept overgrown its legal nucleus and become more multidisciplinary:

“Transitional justice is often defined as the process or redressing past wrongs committed in states shifting from a violent, authoritarian past toward a more liberal, democratic future – though more recently the term has been defined in a broader manner (for example, a more general response to systematic or widespread violations of human rights) and extended to encompass a larger set of outcomes, such as advancing development and social justice.”¹⁶

This expansion in the scope to which Alexander Laban Hinton is referring in his Introduction to *Transitional Justice: Global Mechanism and Local Realities after Genocide and Mass Violence*, is a consequence of global political and social changes that happened since the end of Cold War. He underlines the progress that transitional justice made in practice by focusing not only on legal redress as achieving the ultimate transitional justice goal (from the legal perspective), but pursuing other forms of addressing past human rights violations (e.g. memorialization, symbolic reparations, communal reparations, etc.).¹⁷

¹⁴ Teitel, Ruti G. "Transitional Justice Genealogy." *Harvard Human Rights Journal* Vol. 16 (2003): 69.

¹⁵ Ibid.

¹⁶ ‘Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence.’ Edited by Alexander Laban Hinton. New York: Rutgers University Press, 2011: 2.

¹⁷ Ibid: 2-6.

Awareness that the scope of transitional justice must be expanded came gradually with time. To understand how this shift occurred, it is essential to consult work of Ruti G. Teitel. In her article *Transitional Justice Genealogy*; Teitel summarized historical development of transitional justice, from conceptual beginning after World War I. to the present comprehensive understanding of its mechanisms and applicability in practice.

“The origins of modern transitional justice can be traced to World War I. However, transitional justice becomes understood as both extraordinary and international in the postwar period after 1945. The Cold War ends the internationalism of this first, or postwar, phase of transitional justice. The second or post-Cold War, phase is associated with the wave of democratic transition and modernization that began in 1989. Toward the end of the twentieth century, global politics was characterized by acceleration in conflict resolution and a persistent discourse of justice throughout law and society. The third, or steady-state, phase of transitional justice is associated with contemporary conditions of persistent conflict which lay the foundation for normalized law violence.”¹⁸

Involvement of the civil society, mainly human rights organizations and victims associations made an impact on transitional justice to start broadening its scope away from tribunals of law only. Truth commissions started emerging with the fall of military junta regimes and dictators in South America. The civil society made a huge success in the mobilization of general public to make pressure on down-going military regimes, and later on newly elected democratic governments to adopt transitional justice mechanisms that will reveal wrongdoings committed in the past and offer a redress for victims.

¹⁸ Teitel, Ruti G. "Transitional Justice Genealogy." *Harvard Human Rights Journal* Vol. 16 (2003): 70.

The scholars followed shift in practice as well. The “...*International Journal of Transitional Justice* (...) notes that the field, if initially the concerned primarily of legal and human rights scholars/practitioners, is now interdisciplinary and the concern of a combination of scholars, practitioners, and activists. (...) This range is manifest in the first issue, which includes essays from all three perspectives and fields as diverse as anthropology, law, political science, education, geography, and sociology.”¹⁹

Along with the spread of transitional justice around the world and with the development of more interdisciplinary mechanisms to address past wrongdoings, scholars noticed friction: the notion of universality becomes challenged by the notion of locality. “Recently, transitional justice has itself undergone a shift toward the local. Customary law and other forms of local justice currently receive unprecedented attention as complements to tribunals and truth commissions. And increasingly, transitional justice policymakers conduct surveys to consult people in areas of conflict and post-conflict about their priorities for transitional justice.”²⁰

2.2.3 Transitional Justice in Practice: International Governmental Organizations and International and National NGOs

At the end of twentieth century, transitional justice theory and practice became widespread, not only among scholars but also among international governmental organizations, and international and national NGOs.

“[Transitional justice] is linked to a set of practices (prosecutions, truth commissions, memorialization, lustration and vetting, reparations, amnesties, and pardons) and

¹⁹ ‘Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence.’ Edited by Alexander Laban Hinton. New York: Rutgers University Press, 2011: 4-5.

²⁰ Shaw, Rosalind, Lars Waldorf, and Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*. Stanford, California: Stanford University Press, 2010: 4.

institutional structures such as international humanitarian law, international tribunals and courts, the United Nations Development Program (UNDP), and nongovernmental organizations, including International Center for Transitional Justice that, since its establishment in 2001, has grown to a staff of more than 100 people working all around the world.”²¹

The United Nations (UN) bodies and agencies have been not only supportive for transitional justice efforts around the world; they were also directly involved in some of them as actors. The Office of the United Nations High Commissioner for Human Rights (OHCHR) “...has actively supported transitional justice programmes in more than 20 countries around the world. OHCHR support includes ensuring that human rights and transitional justice considerations are reflected in peace agreements: engaging in the design and implementation of inclusive national consultations on transitional justice mechanisms; supporting the establishment of truth-seeking processes, judicial accountability mechanisms and reparations programmes; and enhancing institutional reform.”²²

Beside the OHCHR, other agencies and bodies of the United Nations are involved in transitional justice efforts around the world as well. “Though no single [United Nations’] entity can or should have exclusivity in the transitional justice area, it will be important that departments, agencies, programmes and funds work together to capitalize upon their respective strengths. The challenge is to ensure that there is coherence, consistency, effectiveness and coordination in political, policy, and programmatic work in a way that

²¹“Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence.” Edited by Alexander Laban Hinton. New York: Rutgers University Press, 2011: 4.

²² Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: ‘Analytical study on human rights and transitional justice; A/HRC/12/18, par. 4, accessed March 4, 2013, http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-18_E.pdf.

builds on what the United Nations has learned so far, maximizing efforts and effectively strengthening the capacities of national stakeholders.”²³

The United Nations faced a problem in attempt to coordinate transitional justice activities. Beside the fact that various bodies and agencies were implementing different projects and activities, the United Nations were using only one and coherent understanding of what transitional justice is. In the 2004 report to the Security Council, the Secretary-General of the United Nations underlined what transitional justice represents for the UN.²⁴ Following that statement, in 2010 Secretary-General issued guidance on transitional justice for the UN.

“For the United Nations system, transitional justice is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law.”²⁵

The *Guidance* is offering overview of the transitional justice mechanisms and goals as to be sought by the UN.

“Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes,

²³ United Nations Economic and Social Council: ‘Promotion and Protection of Human Rights: Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system’; E/CN.4/2006/93, par. 6, accessed March 4, 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/106/49/PDF/G0610649.pdf?OpenElement>.

²⁴ Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: ‘Analytical study on human rights and transitional justice’; A/HRC/12/18, par. 4, accessed March 4, 2013, http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-18_E.pdf.

²⁵ Guidance Note of the Secretary-General: ‘United Nations Approach to Transitional Justice’, March 2010, pp. 3, accessed March 4, 2013, http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf.

institutional reform or an appropriate combination thereof. Whatever combination is chosen must be in conformity with international legal standards and obligations. Transitional justice should further seek to take account of the root cause of conflict and the related violations of all rights, including civil, political, economic, social and cultural rights. By striving to address the spectrum of violations in an integrated and interdependent manner, transitional justice can contribute to achieving the broader objectives of prevention of future conflicts, peace building and reconciliation.”²⁶

The United Nations understanding of transitional justice is expanding and clarifying the definition of transitional justice by scholars. The UN links transitional justice with the existing international legal order and obligations arising from it. By including *non-judicial* mechanisms and processes, the United Nations expanded the scope of transitional justice mechanisms. It is also important to underline the fact that transitional justice mechanisms and processes are seen in a broader concept of promoting the rule of law and good governance. The prevention of future conflicts is another important emphasizes presented in *Guidance* that follows the provisions of the Charter of the United Nations. Therefore it can be concluded that by supporting transitional justice efforts worldwide, the United Nations are fulfilling their purpose: “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace...”²⁷

Along with the United Nations’ increased role in the past decade, various nongovernmental organizations are dealing with transitional justice issues as well. The most prominent of transitional justice NGO’s is the International Center for Transitional Justice (ICTJ). Its mission is to “...assist societies confronting massive human rights abuses to

²⁶ Ibid.

²⁷ Charter of the United Nations and Statute of the International Court of Justice, San Francisco 194, chapter 1, art. 1(1), accessed March 4, 2013, <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>.

promote accountability, pursue truth, provide reparations, and build trustworthy institutions.”²⁸ As it was mentioned before, the ICTJ has been offering its services to the societies in transition since 2001, when it was established. The definition of transitional justice the ICTJ uses in its work emphasizes the notion of multidisciplinary: beside judicial and non-judicial mechanisms and processes of transitional justice a truth-telling component must be presented and strengthen. In a way, a *truth telling* can be seen as an outreach activity of transitional justice. The ICTJ advocates for a holistic approach to transitional justice.

“Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.

(...)

Without any truth-telling or reparation efforts, for example, punishing a small number of perpetrators can be viewed as a form of political revenge. Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as “blood money”—an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims’ legitimate expectations of justice, truth and reparation is not only

²⁸ International Centre for Transitional Justice: Mission and Vision, accessed March 5, 2013, <http://ictj.org/about/vision-and-mission>.

ineffective from the standpoint of accountability, but unlikely to succeed in its own terms.”²⁹

The holistic approach includes mechanisms and processes such as: criminal prosecution, truth commissions, reparations programs, gender justice, security system reform, and memorialization efforts.³⁰ Along with it, the ICTJ strongly advocates for other mechanisms and processes, e.g. truth-telling should be implemented as well. Only the holistic approach can offer stronger guarantee that transitional justice efforts will have long lasting results.

Despite the development of transitional justice mechanisms in the past twenty years, and their worldwide implementation, a success is not always guaranteed.

“(Ultimately,) there is no single formula for dealing with a past marked by large-scale human rights abuse. All transitional justice approaches are based on a fundamental belief in universal human rights. But in the end, each society should—indeed must choose its own path.”³¹

2.2.4 Right to Truth

The Academic Edition of Encyclopedia Britannica defines the *truth* as “...assertions, beliefs, thoughts, or propositions that are said, in ordinary discourse, to agree with the facts or to state what is the case.”³² Defining truth has been a preoccupation of many woman and man through centuries. Philosophers, theologians, poets, writers and many others were writing and discussing what is truth, and what is the value of truth. Truth is considered as the ultimate

²⁹ International Center for Transitional Justice: Global Transitional Justice, accessed March 5, 2013: 1, <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>.

³⁰ Ibid.

³¹ Ibid.

³² Encyclopædia Britannica Online, s. v. "truth," accessed March 05, 2013, <http://www.britannica.com/EBchecked/topic/607381/truth>.

value that should govern the morality of human relations. Relations between the truth and human morality and ethics are probably old as *Homo sapiens* itself. But, this relation will not be of our concern here; however, defining a right to truth will be.

“[T]he idea of truth took on a particular significance during the human rights movement in Latin America’s Southern Cone in 1970s and 1980s.”³³ From historical perspective, right to truth as legal concept emerged within international humanitarian law “...in regard to the right of families to know the fate of their relatives, together with the obligation of parties to armed conflict to search for missing persons”.³⁴ The International Committee of the Red Cross later expanded this right to all missing persons regardless to the nature of the conflict, covering families of the missing persons in an internal armed conflict as well.³⁵ Intergovernmental human rights mechanisms have expanded the scope of a right to truth: “...each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”³⁶ Important contribution to future development of a right to truth came from “...the establishment of truth commissions or other similar mechanisms in the aftermath of conflict or authoritarian rule resulting in massive violations of human rights.”³⁷ Development of a right to truth has been influenced by decisions of regional human rights bodies. Both the Parliamentary Assembly of Council of Europe and the General Assembly of

³³ Bickford, Louis. "Truth and Reconciliation" *Sistema Penal & Violencia* Vol. 2, no. 2 (July/December 2010): 15-21.

³⁴ Report of the Office of the United Nations High Commissioner for Human Rights: “Promotion and Protection of Human Rights: Study on the right to truth”, E/CV.4/2006/91, par. 4, accessed March 4, 2013, par. 5, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf?OpenElement>.

³⁵ Ibid, par. 7.

³⁶ E/CN.4/2005/WG.22/WP.1/Rev.4, art. 24, para. 2 in Report of the Office of the United Nations High Commissioner for Human Rights: “Promotion and Protection of Human Rights: Study on the right to truth”, E/CV.4/2006/91, par. 9, accessed March 4, 2013, par. 5, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf?OpenElement>.

³⁷ Ibid, par. 13.

the Organization of American States has passed resolutions emphasizing and confirming the right to truth.³⁸ “The European Union has also reaffirmed the right to the truth in its resolutions on missing persons and in reference to the process of disarming and demobilizing paramilitary groups and in the context of peace talks.”³⁹

Having in mind the historical development of a right to truth as legal concept, it is clear that scope of this right has grown. The empowerment of victims’ families to seek the truth regarding what happened to their family members expended “...the material scope of the right to truth (...):

“These may be summarized as the entitlement to seek and obtain information on: the causes leading to the person’s victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators.”⁴⁰

2.2.5 Reconciliation

To reconcile for the *Cambridge Online Dictionary* is “to find a way in which two situations or beliefs that are opposed to each other can agree and exist together”.⁴¹ Priscilla B.

³⁸ Ibid, par. 19-20.

³⁹ Ibid, par. 19.

⁴⁰ Ibid, par. 38.

⁴¹ Cambridge Online Dictionary, s. v. "reconcile," accessed March 05, 2013
<http://dictionary.cambridge.org/dictionary/british/reconcile?q=reconcile>.

Hayner gives more suitable definition of reconciliation in the context of the occurred political violence.

“In the context of political conflict or violence, reconciliation has been described as developing a mutual conciliatory accommodation between antagonistic or formerly antagonistic persons or groups.”⁴²

Reconciliation has become more discussed alongside the spread of transitional justice. Implementing various mechanism of transitional justice all around the world raised the question of whether transitional justice is truly successful. Naturally, reconciliation becomes one of the indicators of success. Hayner is asserting importance of differencing “...between individual and national or political reconciliation”.⁴³ National reconciliation must be seen as primarily political process that can start by setting up one of transitional justice mechanisms and it is continued by combating impunity, and through a process of truth telling.

“On an individual level, however, reconciliation is much more complex and much more difficult to achieve by means on national commission [or by any other transitional justice’s mechanism].

(...)

Forgiveness, healing, and reconciliation are deeply personal processes, and each person’s needs and reactions to peacemaking and truth-telling may be different.”⁴⁴

What is the purpose of reconciliation and what should be expected from it? Alidu, Webb and Fairbairn are offering possible answer to this question:

⁴² Hayner, Priscilla B. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge, 2011: 182.

⁴³ Ibid: 183.

⁴⁴ Ibid.

“Some victims of abuse may define reconciliation as a form of empowerment that involves recompense or compensation through financial rewards. Others may equate reconciliation to justice where perpetrators who are guilty of involvement in abuse are made to face the law. Equally, some victims assume reconciliation to mean the total disclosure of the total truth surrounding their victimhood.”⁴⁵

2.3 Truth and Reconciliation Commissions

2.3.1 Introduction

Arguably the most prominent and well-known mechanism of transitional justice (not taking into account traditional criminal proceeding) is a truth and reconciliation commission. Priscilla B. Hayner in her book *Unspeakable Truths* counted 40 truth commissions that had been created since 1974 (Uganda 1) until 2009 (Canada).⁴⁶ This number increased ever since Brazil formed The National Truth Commission in 2011. The reasons why there was 40 truth and reconciliation commissions so far, which represents a significant number, was the best summarized by Mark Freeman in his book *Truth Commissions and Procedural Fairness*:

“The majority of truth commissions have done important work in their respective contexts. They have often rebutted the misinterpretations of the old order through investigations, public hearings, and detailed reports. Some have spurred significant national debates and helped push governments to take corrective and preventive actions in the area of justice, reparation, and institutional reform. Many truth commissions have

⁴⁵ Alidu, Seidu, David Webb, and Gavin J. Fairbairn. "Truth" and "Re-Imaging" in the Reconciliation Process." *Journal of Social Justice* Vol. 21 (Summer 2009): 139.

⁴⁶ Hayner, Priscilla B. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge, 2011: xi-xii.

also contributed to a sense of ‘historical justice’ on the part of victims and society when criminal justice was no a viable option.”⁴⁷

Since the truth and reconciliation commission are not empowered with the judicial prerogatives, they cannot pass judgments and sentences, which is another reason for their usage by the governments to reveal the past human rights abuses.

2.3.2 Definition

In 1994 Hayner suggested a definition of truth commission: “(1) focused on the past; (2) set up to investigate a pattern of abuses over a period of time, rather than a specific event; (3) a temporary body, with the intention to conclude with a public report; and (4) officially authorized or empowered by the state.”⁴⁸ Here definition was criticized by Mark Freeman who offered revised definition based on the omission Hayner did in here definition.

Freeman’s definition emphasizes a difference between a truth and reconciliation commission and the criminal proceedings regarding the focus on victims:

“A truth commission is an *ad hoc*, autonomous, and victim-centered commission of inquiry set up un and authorized by a state for the primary purpose of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.”⁴⁹

⁴⁷ Freeman, Mark. *Truth Commissions and Procedural Fairness*. New York: Cambridge University Press, 2006: 11.

⁴⁸ Hayner, Priscilla B. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge, 2011: 11.

⁴⁹ Freeman, Mark. *Truth Commissions and Procedural Fairness*. New York: Cambridge University Press, 2006: 18.

While agreeing with the most of the points made by Freeman, Hayner suggested that his definition omitted to incorporate "...what is special about truth commissions is their intention of affecting the social understanding and acceptance of the country's past, not just to resolve specific facts."⁵⁰ Based on Freeman's points and her original definition, Hayner brought revised, holistic definition of a truth commission, based on the revision of her previous work on commissions:

"A truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review."⁵¹

2.3.3 Objectives of Truth and Reconciliation Commissions

Truth and reconciliation commission can have many objectives sought to achieve. Freeman recognizes two main goals of a truth and reconciliation commissions. "Two invariable and interrelated objectives are the investigation or clarification of serious past violations, and the preservation of similar violations in the future."⁵² The investigation of the past human rights violations is a crucial task of a truth and reconciliation commission in order to establish an official track record about it. Other tasks are mandated to commissions as well.

"Truth commissions are typically tasked with some or all of the following goals: to discover, clarify, and formally acknowledge past abuses; to address the needs of victims; to "counter impunity" and advance individual accountability; to outline institutional

⁵⁰ Hayner, Priscilla B. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge, 2011: 11.

⁵¹ Ibid: 11-12.

⁵² Freeman, Mark. *Truth Commissions and Procedural Fairness*. New York: Cambridge University Press, 2006: 33.

responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past.”⁵³

An investigation into the past abuses aims to establish an accurate track record of the violations and crimes committed by the past regimes. The commissions are conducting interviews with victims and survivors in order to determine patterns of human rights violations. “The detail and breadth of information collected by a truth commission is usually of a kind and quality far better than what is available in any previous historical account, resulting in a well-documented report on oft-disputed events.”⁵⁴ The establishment of an accurate catalogue of violations with the list of victims provides victims’ families with the public recognition of their sufferings, and victims with symbolic acknowledgment of their status and respect. Hayner brings statements of the South African rights activists who stated that “...commission’s most important contribution was simply to remove the possibility of continued denial.”⁵⁵

Truth and reconciliation commissions are victim-centered; hence they put the victim in the center of their work. Their aim is to listen the victim’s story about the past, about what happened to it. The truth telling serves as both a healing process for victims as well as it is important for the society to get confronted with the past. The truth and reconciliation commission should satisfy victims’ needs to speak publicly about the past abuses and violations occurred to them.

“A fundamental difference between trials and truth commissions is the nature and extent of their attention to victims. The function of the judicial system, first and foremost, is to investigate the specific acts of accused perpetrators. During a trial, victims are invited to

⁵³ Hayner, Priscilla B. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge, 2011: 20.

⁵⁴ Ibid.

⁵⁵ Ibid: 20-21.

testify to back up the specific claims of a case, usually comprising a very narrow set of events that constitutes the crime charged. Usually, very few victims are called to testify, and their testimony is likely to be directly and perhaps aggressively challenged by the defense attorneys in court.”⁵⁶

Combating impunity is a widespread problem in most of the post-authoritarian or post-war countries. Due to many problems, the authorities lack in conducting effective investigations of the crimes committed in the past. Lack of political will and obstructions coming from the old power structures are preventing investigations and prosecutions of those accountable for the crimes. Truth and reconciliation commissions can have a positive effect on prosecutorial authorities to start effectively with combating impunity by prosecuting the past regime’s officials. “Many commissions pass their files on to the prosecuting authorities, and where there is a functioning judicial system, sufficient evidence, and sufficient political will, trials may result. A number of commissions have named names of perpetrators, thus providing at least some sense of accounting.”⁵⁷

At the conclusion of their work, commissions should provide a set of recommendations on the reform of the security sector, i.e. police, military and other security services that have the highest responsibility for the human rights violations. After investigations conducted, a commission would have the best insight into the types of violations and possible perpetrators. It is best suited to address reforms and to give recommendations to the government to that end.

The final task of the commissions is to promote reconciliation. This task represents the biggest challenge for the commissions regarding the how to design and implement a process dependent on so many factors. The initial position for reconciliation is arising from the

⁵⁶ Ibid: 22.

⁵⁷ Ibid: 22-23.

premise that the future depends on the past, and if violations are reviled that creates a healthy foundation for the future development of a society.⁵⁸ However, reconciliation depends on many factors, i.e. ultimately it is an individual process between a victim and perpetrator.

“The goal of reconciliation has been so closely associated with some past truth commissions that many casual observers assume that reconciliation is an integral, or even primary, purpose of creating a truth commission, which is not always true. Whether and how national, political, or even individual reconciliation might result from clarifying the truth, and what other factors are likely to affect this elusive goal, remain questions for much further consideration.”⁵⁹

The reason why some truth commissions are not tasked with reconciliation is behind the fact that the truth does not necessary leads to reconciliation. It contributes to it, but it does not instantly leads to it. These two goals, seeking the truth and reconciliation might also end up in collision. Discovery of the truth and making it public can even enhance or prolong the tensions and distrust between the former belligerents. As the world saw in the aftermath of the South African TRC, the process of reconciliation is much longer and outlives the work of the commissions until the society is ready to reconcile.⁶⁰

Truth and reconciliation commissions, when set-up well and with noble motives of discovering the past abuses, and to contribute to the reconciliation and peace can actually achieve those goals. However there are some dangers that could jeopardize the noble cause of the commissions. Firstly, the transitional Governments might see an opportunity in establishing a commission as a mean to get rid of their political enemies by limiting the scope of commission’s investigations to exclude themselves from investigations. Commissions

⁵⁸ Ibid: 23.

⁵⁹ Ibid.

⁶⁰ Freeman, Mark. *Truth Commissions and Procedural Fairness*. New York: Cambridge University Press, 2006: 11.

could be highly politicized and deliberately used to hide past atrocities by establishing them only pro-form, as a smokescreen. Governments can use them to improve their human rights track records by claiming they are promoting accountability for past crimes and taking care of victims. Even the strongest and the best truth and reconciliation commissions were criticized regarding their treatment of perpetrators and granting the amnesties; if they are empowered to do that.⁶¹ The other line of criticism is grounded in the old political cynicism saying that if you do not want something solved, form a commission. In the light of such skepticism, it comes clear that commissions work under severe political constraints. Their relative success or failure depends of many factors, not the least the nature of human rights abuses of the regime they are supposed to address, and of the nature of demise of that regime.

⁶¹ Ibid: 37-40.

3 HISTORICAL BACKGROUND OF THE GROSS VIOLATIONS OF HUMAN RIGHTS IN SOUTH AFRICA, BRAZIL AND ON THE TERRITORY OF THE FORMER SFRY

3.1 Introduction

The present chapter is going to deal with the history of gross violations of human rights in the South Africa, Brazil and on the territory of the former Socialist Federative Republic of Yugoslavia. A historical context is of crucial importance for understanding the reasons how and why a particular society started and conducted its transition to democracy. More importantly, those factors are determinant for a set-up of transitional justice mechanisms. Interactions between various players and stakeholders, a magnitude of oppression, nature of transition, and a scale of human rights violations are important variables when setting-up a truth and reconciliation commission.

Therefore, the present chapter is going to examine how the transition occurred and how was conducted, what were the main attributes of oppressing regimes and scale of human rights violations.

3.2 Brazil

3.2.1 A Political History of Dictatorship

Brazil was under the rule of military dictatorship for more than twenty years. The beginning of the military rule was marked with the coup d'état on March 31, 1964 when democratically elected president João Goulart was overthrown. The reasons why the military coup occurred are summarized in the work of David Pion-Berlin on the military dictatorship in Brazil and Southern Cone:

“Militaries are often driven to intervene in politics by what they perceive as threats around them. The generals who seized power in Brazil (...) were preoccupied with social, political, and ideological threats of one kind or another. This was the Cold War

era, when the United States was locked in a global struggle for domination with the Soviet Union. Not surprisingly, the fight against leftist movements was a huge motivator. Washington, wishing to enlist these regimes as allies against the Soviet Union, actively coaxed these militaries into seizing power and thereafter propped them up so as to establish separate theaters of operation within the larger war between East and West.”⁶²

The nature of the military rule was oppressive. The military turned against civil and political liberties aiming at establishing the central government and suppressing all the opposition: democratic institutions were suspended and public gatherings were strictly limited, even banned. The military dictatorship ruled via the Institutional Acts, decrees issued primarily with the purpose to limit political life, especially oppositional political life. The Constitution of 1946 was suspended and the military government enacted a new one. That was the basis for excluding and exiling opposition members that were regularly subjected to torture, enforced disappearances and killings. All the leftist organizations were banned, and the Government interfered to other civic institutions, e.g. universities and unions. The repression turned opposition members to go underground in order to continue their work. The military dictatorship orchestrated a democratic parliament by creating and allowing the participation for only two parties: the National Renewal Alliance and the Brazilian Democratic Movement, the first being pro-regime and the latest being oppositional. Besides those two, no other political parties existed.⁶³

Along with the political oppression and limiting civil liberties and freedoms, the military Governments introduced a new economic model. The new economic model aimed to

⁶² Pion-Berlin, David. "Military Dictatorships of Brazil and the Southern Cone ." *World Scholar: Latin America & the Caribbean*. 2011: 2.

⁶³ Crocitti, John J. *Brazil Today: An Encyclopedia of Life in the Republic*. ABC-CLIO, 2012: 394.

reconstruct the economy and labor in the country by imposing the state controlled liberal economic development model, designed to trigger the economic growth. As a consequence, the minimum wage was reduced and the new economic policy targeted work and middle class with negative measures.

“Another priority of the military dictatorship was implementation of a conservative modernization model. Although authorities spoke of liberal economic policy and a restricted role for the state, in fact the military dictatorship pursued economic protectionism, amplified the state’s power, and actively intervened in economic development. (...) At the same time, however, the military dictatorship encouraged foreign investment in Brazil through measures such as the elimination of restrictions on profit remittances by transnational corporations to their home countries. To finance the state’s modernization project, the military dictatorship resorted to forced savings through more intensive exploitation of labor, denying increase in the minimum wage (...), reducing the availability of credit for working-class families, and raising tax burden levied on Brazil’s lowest income groups.”⁶⁴

The force of the Brazilian military rule was derived from the strength of the economy. The economy’s fundamental pillar was the economic growth based on the low production expenditures at home and lucrative export. As a consequence to the export orientated economy and due to the 1973 oil shock that crippled international markets, Brazil faced huge economic instability. That was the beginning of the problems for the military dictatorship that continued all the way through the end of the regime. The opposition movement exploited difficulties in the economic life and in 1979 managed to get amnesty for all those who were exiled or their political was banned due their association with leftist organizations. That led to renewal of the political life in the country. Many oppositional political leaders returned from

⁶⁴ Ibid: 395.

the exile and started organizing new groups, like the Unified Confederation of Workers, which together with already existing nongovernmental organizations, the progressive parts of the Catholic Church and others started openly opposing the military dictatorship. The financial difficulties and crippled economy turned the Brazilian elites, until then the supporters of the regime, against the military. With introduction of the policy of opening, or Abertura in Portuguese, the last general-president Joao Figueredo, initiated democratic changes that inevitably led to dismantle of the military regime.⁶⁵

3.2.2 Oppression and Human Rights Abuses

The Brazilian military dictatorship, after the coup d'état, faced opposition coming from the leftist groups and students, in general from a portion of the population that supported overthrown democratically elected president in 1964. As a response to growing dissatisfaction and public demonstrations the military Government instituted the Institutional Act (IA) No. 5. "Decreed in December 1968, it restated the powers set forth in earlier IAs but without any time limits. It marked the beginning of a new, more ominous phase of the dictatorship, eliminating habeas corpus, allowing for arbitrary arrests, disbanding the congress and setting the stage for an extensive purge of political figures followed by massive assaults on the human rights of ordinary citizens."⁶⁶

The cancelation of the political freedoms and substantial limitations of the civic liberties were just the first step of the military dictatorship to control the population. Steps that followed institutionalized the state's organized repression, coercion and violence as tools of fear against any kind of disobedience. The military dictatorship heavily used the paramilitary groups and was substantially relaying on the secret police. The National Intelligence Service

⁶⁵ Ibid: 396-397.

⁶⁶ Pion-Berlin, David. "Military Dictatorships of Brazil and the Southern Cone ." *World Scholar: Latin America & the Caribbean*. 2011: 9.

gained the power equals to military's power. The structure of the secret police was based on placement of the officer within the every ministry and other public departments in order to get the information necessary for exercising total control over the public services, preparing dossiers on the public servants etc. The Archdiocese of Sao Paulo designated the Center for Internal Defense Operations, a section of the National Intelligence Service as the most responsible for the grave human rights violations, e.g. torture, killings and enforced disappearances.⁶⁷

The national intelligence apparatus played an important role in the structure of the military government as an instrument of the control. All the undesirable opponents of the regime were targeted by the intelligence services. By removing the system of checks and balances and therefore the judicial control of habeas corpus and democratic oversight of the intelligence work, the service was free to conduct the administration and enforcement of law in absolutely arbitrary manner.

'It was these operators [the National Intelligence Service] who abducted people from their homes or plucked them off the streets, carting them away to SNI interrogation centers where they were preventively detained for weeks without court appearances or the benefit of defense counsel. It is there that detainees were tortured with the assistance of doctors (...) who advised the abusers how to conduct such sessions without leaving marks or traces, and how to revive victims so they could be tortured again. It is estimated that some 50,000 Brazilians were imprisoned during the dictatorship; 20,000 of those were tortured and 10,000 exiled. (...) According to the Archdiocese, some 125 people were thought to be disappeared and a total of 500

⁶⁷ Ibid.

killed.”⁶⁸

In the comparison with other South American military dictatorships, the death count of the Brazilian military Government was relatively small. “Part of the reason for the lower death figures is that the Brazilian regime was of two minds and two factions. Most military presidents maintained some balance between hardline and softline factions within their administrations, in an effort to accommodate both.”⁶⁹

3.2.3 Transition

The strong fist of the Brazilian military rule started fading away with the oil shock in 1973, and continued facing problems of maintain the high economic growth. Absence of economic results created additional problems, i.e. due to low performance in international trade the regime was unable to maintain its structure required to implement the policy of modernization and development. As a result of the economic trembling in 1973, the military dictatorship introduced a new policy direction.

“The Geisel government (1974-1979) proposed détente (i.e. a relaxing) in the political controls held over society. Previously implemented censorship was partially suspended, and electoral results, after a certain amount of manipulation of the rules, were admitted, entrepreneurs’ protest against the “ economic model” were regarded with tolerance, albeit reserve, and the unexpected workers’ mobilization that began in 1978 were an unexpected effect of the liberalizing actions. This project was maintained, with controversial actions and under opposition from the extreme right, throughout the

⁶⁸ Ibid: 9-10.

⁶⁹ Ibid: 10.

Figueiredo (1979-1985) government, under the name of a “politics of opening”.⁷⁰

The politics of opening brought civic liberties and political freedoms back to life in Brazil. The military government initiated this shift, as a concession to the opposition hoping it will divert the ongoing criticism regarding the poor economic performance of the regime. The Geisel's administration was not using torture on a regular basis like previous administrations. That decision was disputed by the regime's hardliners. However, despite the resistance coming from its own ranks, Geisel abolished the Institutional Act number 5 and brought back the civic liberties. It also introduced the amnesty for exiled opposition leaders. Since the opposition was heavily criticizing the imposed two-party system from 1965, the administration announced its reform. However, the reform was done with the aim to divide the opposition rather than foster the true democratic process.⁷¹

Despite the intentions of the generals to manipulate the liberalization and democratization of the Government and the society, the *opening* made an irreversible shift in the politics. The opposition got enthusiastic and determined to continue pushing for the true reforms. Although the opposition was naturally dispersed due to different ideological and value stances of their respective programs, there was a unifying element in their agenda for democratization and liberalization. That element was human rights and their violations. The issue of human rights, more precisely their violations became a hot political issue and subject of many debates. Due to the nature of the oppression and dictatorial political system the only language suitable for use in political discourse became the language of human rights. It was hard to exclude the human rights language from debates, and it became the unifying thread for the opposition in

⁷⁰ Codato, Adriano Nervo. "A political history of the Brazilian transition from military dictatorship to democracy." *Rev. Sociol. Polit.* vol. 2 (2006): 15-16.

⁷¹ Mainwaring, Scott. "The Transition to Democracy in Brazil." *Journal of Interamerican Studies and World Affairs* (Center for Latin American Studies at the University of Miami) 28, no. No. 1 (Spring 1986): 155.

their pursuit of democracy being reinstated in Brazil.⁷²

“Demands for human rights constituted a focal point for both traditional and new political actors of different ideological complexion. Many other non-governmental organizations (NGOs) were constituted under the umbrella of the defence of human rights. The Catholic Church played a prominent role (...), denouncing human rights violations and defending their victims. Among the traditional political actors, mainstream politicians used the question of human rights to vindicate a past political order in which human rights were formally guaranteed in the constitution. The left, which previously had regarded human rights as an issue of bourgeois ideology and suffered the blunt of repression under the military, found in the defence of human rights a vital lifeline for political survival as well as for the physical survival of its militants.”⁷³

The *opening* showed the regime’s resilience towards variety of challenges: economic crisis, torture allegations, human rights abuses and lack of political pluralism etc. However, that changed in late 1983 when the regime “...lost its ability to control the presidential succession, paving the way to an earlier transition than most observers expected.”⁷⁴ The transition finally occurred when “(o)n January 15, 1985, Brazil elected a new president, 74 year old Tancredo Neves, a moderate career politician who had been one of the important leaders of the opposition to the military regime (...) Tancredo died before assuming the office, but the elected Vice-president elect, Jose Sarney, took over the Executive Office on March 15, 1985, bringing to an end 21 years of military rule.”⁷⁵

⁷² Panizza, Francisco. "Human Rights in the Processes of Transition and Consolidation of Democracy in Latin America." *Political Studies* XLIII (1995): 169.

⁷³ Ibid.

⁷⁴ Mainwaring, Scott. "The Transition to Democracy in Brazil." *Journal of Interamerican Studies and World Affairs* (Center for Latin American Studies at the University of Miami) 28, no. No. 1 (Spring 1986): 158.

⁷⁵ Ibid: 149.

3.3 South Africa

3.3.1 A Political History of the Apartheid

The apartheid was a political and social system in South Africa from 1948 until 1994. The Encyclopedia Britannica Online defines apartheid as “(Afrikaans: “apartness”) policy that governed relations between South Africa’s white minority and nonwhite majority and sanctioned racial segregation and political and economic discrimination against nonwhites.”⁷⁶ The system of apartheid was introduced through set of parliamentary enacted acts following the general elections in 1948, when the National Party seized the control over the parliament and Daniel Malan became the Prime Minister on the promise to protect the white hegemony over the society.⁷⁷

Although the apartheid was introduced as a coherent set of policies in 1948, its roots can be traced back to the beginning of the European colonization of the southern parts of Africa. After the World War II the South Africa was heavily influenced by the global trend of nationalism. The National Party that came to power in 1948 was enforcing its policy of racial discrimination by consolidating the Afrikaners with the promise of ending the British protectionism and their policy that was leading towards racial equality.⁷⁸

A combination of colonialism, racial and white supremacy theories and growing decolonization and nationalism paved the way for apartheid systems to be institutionalized. The main difference of apartheid system in contrast to previously existed policies of racial subordination of non-whites was in the fact of its complexity and the political and social institutionalization. The apartheid was a complex and comprehensive policy that was systemically implemented for more than 50 years.

⁷⁶ *Encyclopædia Britannica Online*, s. v. "apartheid", accessed April 27, 2015, <http://www.britannica.com/EBchecked/topic/29332/apartheid>.

⁷⁷ Cottrell, Robert C. *South Africa: A State of Apartheid*. Chelsea House Publishers, 2005: 85.

⁷⁸ UNESCO. *Racism and apartheid in southern Africa: South Africa and Namibia*. Paris: UNESCO Press, 1974: 44.

“The NP’s apartheid edifice, drawing on segregationist precedents, can be conceived as resting on seven pillars: starker definition of races; exclusive white participation and control in central political institutions (and repression of those who challenged this); separate institutions or territories for blacks; spatial segregation in town and countryside; control of African movement to cities; tighter division in the labour market; and segregation of amenities and facilities of all kinds from universities to park benches. Politicians insisted that there were only two alternatives: integration and the submersion of whites; or the increasingly elaborate system of apartheid.”⁷⁹

Introduction of the apartheid policy and the enactment of laws implementing it did not go without the reaction from non-white residents of South Africa. The African National Congress was one of the most prominent opponents of the apartheid regime. Prior its formation, the torch of resistance against the regime was led by the Communist Party, which was banned at the beginning of 1950s. The African National Congress was a movement that emerged out from several groups in 1950s. The Congress based its actions on Gandhi’s principals of nonviolent resistance and coordinated disobedience. With the membership of over then 100.000 members, the Congress laid grounds to become a mass movement fighting on the basis of the anti-colonialism and for freedom. In 1955, in Johannesburg, the Congresses’ Assembly adopted the Freedom Charter, which added a fight for equality and against racial discrimination at the center of its work.⁸⁰

The resistance did not come only from the African National Congress but was rather combined of the various actors, both internal and international. The first stronger international reaction on the oppression in the South Africa happened after the Sharpeville shootings in 1961. Immediately after that event, the National Party held the referendum and as a result the

⁷⁹ Beinart, William. *Twentieth-Century South Africa*. Oxford University Press, 2001: 148.

⁸⁰ Ibid: 154-155.

South African Republic was created, thus breaking ties with the British Commonwealth.⁸¹ However, stronger reactions from the international community were absent, due to at least two reasons: economic interests of the Western countries and the Cold War bastion against Communism.

“(…) British and other Western countries with extensive interests in the country deflected early attempts at isolating South Africa internationally. For all the unease about Afrikaner power, South African was a significant centre for investment and commerce; critically, it represented a regional bastion against communism as the cold war intensified.

(…)

South Africa was very much part of the post-Second World War globalization of multinational investment. Its efficient communications and financial sector, the lively Johannesburg stock exchange, a well-educated local white management and professional class, as well as relatively cheap labour, all made it attractive.”⁸²

Despite the support the South African apartheid Government received from the Western countries, the United Nations managed to keep the focus over the countries problematic racial policy. In its Resolution 1761 the United Nations General Assembly condemned the policy of apartheid and call the South African Government to abandon it. Many other actions followed from that Resolution of 1962, but without major success. However, the most significant step the United Nations General Assembly did was the adoption of the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973. The Convention defines apartheid as a crime against humanity. All the

⁸¹ Ibid: 169.

⁸² Ibid: 168-173.

acts brought under the policy of apartheid resulting in inequality are considered to be an international crime. The definition of crime of apartheid was shaped based on the acts of the South African authorities, and are described as measures and acts whose aim is to create a system of dominance of one racial group over others.⁸³

Despite the struggle of the African National Congress and other national opposition groups, and efforts of the international community to condemn and criminalize the apartheid policy of the South African regime, situation did not change until 1994, which was the result of the process of the weakening of the regime from 1984 until its end in 1994.

“If the renaissance of black opposition in the 1970s paved the way for political change, the insurrection of 1984-6 made the process very difficult to reverse. Although white authority partially collapsed during the 1980s and early 1990s, Afrikaners were reluctant to sacrifice power and whites in general protective of their wealth. The Nationalists actively pursued a settlement that might secure the position of whites and satisfy their conception of black aspirations but that would fall short of democratic government in a unitary state. While Botha intensified repression, the state also pursued reformist initiatives that laid the ground for some post-apartheid developments.”⁸⁴

The last part of this chapter is going to examine the conditions that led to democratic transition in South Africa, but prior to it the following part will take a look over the nature of the regime regarding the oppression and gross and grave violations of human rights violations committed by the apartheid regime.

⁸³ Dugard, John. "Convention on the Suppression and Punishment of the Crime of Apartheid." *United Nations Audiovisual Library of International Law*. 2008.
http://legal.un.org/avl/pdf/ha/cspca/cspca_e.pdf.

⁸⁴ Beinart, William. *Twentieth-Century South Africa*. Oxford University Press, 2001: 254.

3.3.2 Oppression and Human Rights Abuses

The apartheid system of government was in its nature oppressive. Based on white supremacy and racist theories, its aim was to suppress and economically exploit the non-white majority of the South African population.

“The apartheid system was maintained through repressive means, depriving the majority of South Africans of the most basic human rights, including civil, political, social and economic rights. Its legacy is a society in which vast numbers of people suffer from pervasive poverty and lack of opportunities.

(...)

It must also be remembered that human rights violations affect many more people than simply their direct victims. Family members, communities and societies themselves were all adversely affected. Moreover, the South African conflict had effects far beyond those who were activists or agents of the state; many victims who approached the Commission were simply going about their daily business when they were caught in the crossfire.”⁸⁵

The following passages are going to depict some of the human rights violations in South Africa by grouping them in four categories: civil, politician, social and economic rights. Apartheid system had a holistic approach in its design and implementation. Thus policies and measures used by the Government were designed to reach all leaves of social, political and private living of the non-white population. Categories presented above are tentative and not

⁸⁵ O'Malley, Padraig. *The Heart of Hope: South Africa's Transition from Apartheid to Democracy*. 1985-2005. Chapter 4: Consequences of Gross Violations of Human Rights: §1 and 4.

<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02398/08lv02402.htm> (accessed April 29, 2015).

fully fixed, i.e. torture as a human rights violation can be categorized as both a violation of civil and political rights. Therefore, the proposed categorization does merely serve to depict the holistic and far-reaching effect of the apartheid regime on daily lives of non-white South Africans.

Regarding the violations of civil rights in South Africa the most notorious are crimes of arbitrary killings and arrests, enforced disappearances and torture among others. All the mentioned could happen to any non-white resident of South Africa. However, the most targeted population were members of the opposition groups.

“Perhaps 10,000 people were arrested in the early 1960s. Opposition movements still had relatively open recruitment policies and security police were able to find spies, black and white, or extract information from those arrested. Increasingly ruthless methods were used, including torture, which had not been so significant a part of the police repertoire before. The long and sorry saga began of deaths in detention, of prisoners alleged to have thrown themselves out of windows or hanged themselves in their cells. Legislatively sanctioned imprisonment without trial and house arrests were accompanied by an increasingly uncontrolled cop-culture—smashed windcreens and windows, dead cats on gate posts, threatening phone calls, and eventually political killings.”⁸⁶

Regarding the access to political rights, the non-white communities were either banned from direct participation in the Parliament, or were represented by the small number of deputies disproportioned to the percentage of non-whites in population at large. The limited political participation acts were inherited by the apartheid regime from the pervious period. However, the apartheid regime made them even more restrictive and far-reaching. There was some representation for Indians and colored people but the blacks were left out from the

⁸⁶ Beinart, William. *Twentieth-Century South Africa*. Oxford University Press, 2001: 229.

Parliament. The Government enacted legislation in 1968 that prohibited political parties of mixed races. Finally, with the enactment of the new Constitution in 1983 the Parliament was formed of three houses that represented whites, colored and Indian people while blacks remained unrepresented until 1993 and adoption of the post-apartheid Constitution.

“Apartheid denied blacks any representation since they were supposed to be given independence through the creation of homelands. In the case of other groups such as Asians and Coloureds they did not have a homeland and thus were given representation in a tricameral parliament with the constitution of 1983 (...). The reasoning behind this arrangement was that homelands were being organized so that blacks could rejoin their traditional ethnic groups and regain independence.”⁸⁷

Regarding the social rights, it is important to emphasize that the apartheid regime had a far reaching consequences in creating separate and divided communities. All the laws and policies implemented by the Government were designed for that purpose. At the beginning of the apartheid regime, the Government started to deconstruct communities by removing blacks and colored people out from urban areas. That led to construction of new racial and linguistically normative communities. Thus, the social division was made on whites, blacks, coloured and Indians.⁸⁸

The economic conditions for non-white inhabitants of South Africa were hard. Restrictive labor laws heavily impacted families as basic units of society. Due to migrant labor policies families were separated due to the fact a place of work was usually not the same as a place of

⁸⁷ Feigenblatt, Otto von. "The South African Transition: A Holistic Approach to the Analysis of the Struggle Leading to the 1994 Elections." *Journal of Alternative Perspectives in the Social Sciences* 1, no. 1 (2008): 52.

⁸⁸ O'Malley, Pádraig. *The Heart of Hope: South Africa's Transition from Apartheid to Democracy, 1985-2005*. Chapter 4: Consequences of Gross Violations of Human Rights: § 135. <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02398/08lv02402.htm> (accessed April 29, 2015).

living. That affected families' capability of having children. Low income resulted with poor living conditions and bad diet.⁸⁹ Additionally, economic conditions were heavily influenced by other human rights violations as well. The imprisonment for a long time and trauma caused by a physical or mental torture affected person's abilities to find a job afterwards.⁹⁰

Centuries of racial oppression boosted by the decades of apartheid brutality and exclusion shaped modern day South Africa as a deeply divided society despite the formal equality. The role that human rights oppression had on current stage is more than evident. Social and economic deprivation of non-whites is direct consequence of apartheid regime and its policy of white supremacy.

“The consequences of repression and resistance include the physical toll taken by torture and other forms of severe ill treatment. The psychological effects are multiple and are amplified by the other stresses of living in a deprived society. Hence, lingering physical, psychological, economic and social effects are felt in all corners of South African society. The implications of this extend beyond the individual - to the family, the community and the nation.”⁹¹

The following part of this chapter is going to examine the conditions that led to the South African transition and explore how it was conducted.

3.3.3 Transition

The South African Transition to democracy started with the series of negotiations in 1990 that lasted until 1994, when the free elections were held and non-whites had an equal vote. “Though peaceful, the constitutional negotiations were far from harmonious. It took over four years from the date of Nelson Mandela's release from Robben Island on February 11, 1990

⁸⁹ Ibid: §75.

⁹⁰ Ibid: § 122 and 126.

⁹¹ Ibid: § 2.

until April, 1994 before even an outline of a democratic constitution was accepted by the three relevant parties to the negotiations, the National Party (NP) representing the once ruling whites, the African National Congress (ANC) representing the majority of blacks and Asian South Africans, and Inkatha Freedom Party (Inkatha) representing the rural blacks of the historic Zulu nation.”⁹²

The beginning of democratic transition in South Africa can be traced much earlier in 1980s, although it is not possible to talk about it before De Klerk’s presidency in 1990s. However, those years between 1980 and 1990 were crucial for both the liberation movement and for the apartheid regime’s pivotal National Party. With the failing of communism in 1980 the apartheid regime faced economical challenges due to the fact that a liberal *liaises-fair* economic model was prevailing over a state-led economic development. The fall of Communism reduced the support from Western countries, thus making critiques of apartheid more frequent. From the economical point of view, the National Party started understanding that the end of apartheid will bring the economic development to brighter perspective since the sanctions would be removed and the labor market will be free of apartheid rigidity.⁹³

The economical reality forced the apartheid regime to start the talks with the opposition and thus trying to convince the international community to remove the economic sanctions imposed during the 1960s and 1970s.⁹⁴ The international pressure was intensifying over the apartheid regime, primarily through the United Nations forums. The Western states, which were turning the blind eye in the past, were now changing their attitudes due to the

⁹² Inman, Robert P., and Daniel L. Rubinfeld. "Understanding the Democratic Transition in South Africa." *The National Bureau of Economic Research*. February 2012: 1. <http://www.nber.org/papers/w17799.pdf> (accessed April 29, 2015).

⁹³ Feigenblatt, Otto von. "The South African Transition: A Holistic Approach to the Analysis of the Struggle Leading to the 1994 Elections." *Journal of Alternative Perspectives in the Social Sciences* 1, no. 1 (2008): 62.

⁹⁴ Ibid.

transformed geopolitical circumstances of falling communism. The geopolitical change affected the liberation movement as well, which started with a small number of supporters at the beginning of the 20th century without any significant support from abroad. This situation changed during 1960s and 1970s when the liberation movement was both getting the support for the West and the East. The West was giving its support in order to enhance the respect for human rights and the East was supporting the South African Communist Party.⁹⁵

The geopolitical change was crucial for paving a road to transition in 1990s, but it was not a single contributing factor to the opening of the political process. The liberation movement was growing from the small opposition voice at the beginning of the apartheid regime in the late 1940s to a mass movement that brought together all the levels of the society and various groups to fight for the same cause. “The liberation movement used four main tactics: mass mobilization (mass action), armed struggle, international pressure (shaming), and ultimately negotiation. Numbers were the strength of the liberation movement and due to the disenfranchisement of the black population, it made widespread use of mass mobilization. Affiliated unions organized massive walk-outs in order to pressure the government to change, major political rallies were organized (...) The goal of the liberation movement was to make the country ungovernable to bring about change.”⁹⁶

In 1990, Nelson Mandela was released and assumed the leadership of the liberation movement. Now with him leading the opposition and De Klerk being a leader of the National Party, the negotiations could take place. The crucial factor for the success of the negotiations was that the both sides “...had a sufficient common interest in compromise. (...) They were pushed into discussions by fear of the alternatives and by increasingly adverse socio-economic conditions. South Africa’s political elite (...) to some extent ... shared a view of the

⁹⁵ Ibid: 63-64.

⁹⁶ Ibid: 59.

virtues of modernity and progress, which served to underpin discussions.”⁹⁷ In that spirit, the De Klerk’s Government ended most of the apartheid policies and amended criminal laws, censorship laws etc. The process continued by the Convention for a Democratic South Africa that had a task to design a new constitution and was followed with the referendum where the white voters confirmed reformist policy of De Klerk’s Government.⁹⁸

Under the provisions of the new Interim Constitution, first free elections were scheduled resulting with the clear victory of African National Congress and Nelson Mandela becoming the President of South Africa. With this act the South African transition finished its first lap, but was far from being completed. Mandela then announced the creation of South African Truth and Reconciliation Commission, marking the beginning of second step in the South African transition. He was a strong supporter of the idea to establish a commission due to importance of addressing the past human rights violations as a cornerstone for future progression of the nation.⁹⁹

3.4 The Former Socialist Federative Republic of Yugoslavia

3.4.1 A Political History of the Failing State

The following part of the present chapter is going to depict conditions that lead to the fall of the Socialist Federative Republic of Yugoslavia (SFRY) and the emergence of wars. The period this part covers is approximately 10 years, from the beginning of 1980 until early 1990s.

The SFRY was a federal socialist state with one party system led by the League of Communists. It emerged as a socialist state after the World War II when National Liberation

⁹⁷ Beinart, William. *Twentieth-Century South Africa*. Oxford University Press, 2001: 271.

⁹⁸ Cottrell, Robert C. *South Africa: A State of Apartheid*. Chelsea House Publishers, 2005: 113.

⁹⁹ Ibid: 115.

Movement led by Josip Broz Tito's partisans liberated the country from Axis powers, and Ustaše's proclaimed Independent State of Croatia. The SFRY replaced demolished Kingdom of Yugoslavia. After 1948, and departure from the Stalin's influence, SFRY started developing closer relationships with the Western countries and nurtured Nonaligned Movement, both of which were crucial elements for country's economic and social prosperity. For all that time, the SFRY was led by Josip Broz Tito who was an unifying person responsible for keeping the federation together internally and managing to secure successes internationally.

Tito died in 1980 and all the problems that were on the horizon suddenly started to shake the Yugoslav State. There were two external factors influencing the dynamics of internal relationships in SFRY. The first was the oil shock of 1973 and the global recession that shacked Yugoslav economy initiating the austerity measures being implemented across the Federation.¹⁰⁰ The second reason is the global decline of communism led by weakening of the Soviet Union's economy in 1980. Those external circumstances heavily influenced the internal relations in SFRY and exploited the weakness in political system and economic model, and distribution of wealth among the regions.

The 1974 Constitution of the SFRY empowered every constitutive Republic with the veto power over the legislation that might affect respective republic negatively. That meant a high degree of consensus should be reached, which was proven impossible in practice. Additional, in order to change a Constitution all the constitutive parts would have to approve the change to become valid. The Constitutional set-up affected the efficiency of policy making and implementation, and weaken the effectiveness of the Federal Government. In

¹⁰⁰ Gibbs, David N. *First Do No Harm : Humanitarian Intervention and the Destruction of Yugoslavia* . Nashville: Vanderbilt University Press , 2009: 54.

addition to the political structure problems, the SFRY faced diverse levels of regional development. Croatia and Slovenia were the most developed parts of the Federation while other parts were noticeably poorer and undeveloped. To depict the situation, in late 1980s the gross domestic product per capita of Slovenia was eight times higher than Kosovo's.¹⁰¹

The economic and political problems were fertile soil for spring of hidden nationalism that never disappeared from the constitutive ethnic groups of the Yugoslav Federation. "The first major political upheaval in the new era of economic austerity was in Kosovo. In 1981, an upsurge of tension led to major riots. (...) This was the first in a series of violent upheavals in the province, which gradually accelerated over the next decade. Ethnic tension in Kosovo would become a major destabilizing force for the whole federation. In other areas of the federation, intellectual and literary circles began to promote a renewed nationalism, especially in Slovenia, Croatia, and Serbia, that was often exclusionary and separatist in character."¹⁰²

The strength and unity of the League of Communist was fading away and the Party did not have the control over the political and social process any more. The emergence of nationalism was connected with the demand for free and democratic elections. Eventually, the Communist Parties at the national level allowed the elections.

"...in 1990, multi-party elections were held in each of the Yugoslav republics.⁷⁴ In retrospect, however, these elections magnified the intensity of the conflict and accelerated national disintegration. The voting was conducted *only* at the republic level; no election took place at the federal level. These circumstances were bound to strengthen the individual republics, since they were now endowed with democratic legitimacy, while they concomitantly weakened the central government."

¹⁰¹ Ibid: 51-52.

¹⁰² Ibid: 59.

With the new leadership in the Republics, the role of the Federal Government was dismissed irretrievably. That cemented the road for dissolution of the SFYR. The proposed plan for the reorganization of the federation into the confederacy was not successful and failed in 1990. Ultimately, the political failure to preserve the Federation was amplified with the growing nationalism and ethnic violence, which was the prelude to the war. With tensions between the Republics reaching the boiling point, Slovenia and Croatia seceded from SFRY in June 1991. Macedonia followed them later same year, while Bosnia and Herzegovina seceded in 1992. Following the secession of the former Republics, the Yugoslav National Army intervened, first in Slovenia. The Slovenian intervention lasted only for few days and ended with the withdrawal of the Yugoslav National Army due the fact that the ethnic Serbs did not densely settle Slovenian territory and because the Army encountered resistance. After Slovenia, Yugoslav National Army under the control of Serbian president Slobodan Milošević then turned to Croatia. The goal was to take the control over the portions of Croatian territory mainly settled by ethnic Serbs who had 12.5 percent in the total number of the population. Milošević and his regime manipulated with the Croatian Serbs, which in August 1990 rebelled against the new democratically elected Croatian Government and managed to take control over the parts of Croatian territory.¹⁰³

The following part is going to explore nature and circumstances of the gross human rights violations committed on the territory of the former SFRY from the period from 1991 to 1999.

¹⁰³ Human Rights Watch. "Playing the "Communal Card" : Communal Violence and Human Rights." *Human Rights Watch*. Edited by Cynthia Brown and Farhad Karim. April 1995: The Former Yugoslavia Chapter. <http://www.hrw.org/legacy/reports/1995/communal/> (accessed April 28, 2015).

3.4.2 The Nature of the Conflict and War Crimes and Other Gross Human Rights

Violations

The conflict in Yugoslavia was not a single conflict, but rather there were four conflicts that happened from 1990 to 1999: Slovenia, Croatia, Bosnia and Herzegovina and Kosovo. Following the first free elections in the Yugoslav Republics, ethno-nationalistic parties constituted new democratically elected Governments. Even in Serbia and Montenegro, the former Communist now being transformed only by the name to Socialists, were in fact nationalist. That being put in place, along with the political struggle and debate over the fate of the Federation and having in mind that most of the Republics were also multiethnic as the whole Federation was, the events that followed were calling for war and conflict to come.

The rebelled Serbs in Croatia were armed by the Milošević's regime and by the August 1990 grabbed Knin and continued rebelling in other parts of Krajina and East Slavonia, both being parts of the Croatian territory. The war erupted in June 1991 between the Croatian armed forces and forces of rebelled Serbs.¹⁰⁴

“By the time a tenuous peace pact was signed in January 1992, Serbs had occupied approximately 30 percent of Croatia's territory and had assumed control over large parts of Bosnia, eventually assuming control of approximately 70 percent of that republic by late 1992.”¹⁰⁵

The conflicts were initiated and held along the ethnic lines supported by the strong nationalistic propaganda. “The Serbian, Croatian and Bosnian governments have all manipulated the state-owned media to foment ethnic hatred.”¹⁰⁶ Serbian national television would spread national haltered by broadcasting films about the treatment of Serbs under

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

Ustaše regime during the Second World War, the Croatian National Television was reporting only about the crimes committed against Croats in Bosnia but omitted the reports about Croatian crimes as well.¹⁰⁷ There are numerous examples of how the state propaganda executed by the public media contributed to the war effort and to the human rights violations.

The Slovenian, Croatian and Bosnian conflicts finally ended by the mid 1990s after the set of peace accords were signed under the sponsorship of the international community led by the United States of America. The Kosovo conflict however was a delayed conflict that emerged only in 1998 and lasted until the following year. It is not that tensions and sporadic fights did not happened until then, but the full scale war and the heaviest human rights violations occurred only after the end of belligerency in above mentioned countries. The Kosovo conflict was in part different to other conflict due to the fact that Kosovo was not a Republic in the former SFRY but rather an autonomous province, whose autonomy was scattered under the Milošević's rule. The Serbs considered this province a creedal of the Serbian State and a vital part of their national identity. Kosovo was in majority inhabited by ethnic Albanians, which do not share same South Slavic origins like other former Yugoslav nations.¹⁰⁸ Suffering heavily during the 1980s from social and economical deprivation imposed to the by Serbian Government under Milošević, they strived to fight back and rebel, ultimately claiming the right to self-determination. The conflict was led along that line, with of course being intensified by the nationalist ideas as well, thus sharing the same feature with other conflicts.

Regarding the mass and gross violations of human rights, and war crimes and crimes against humanity committed during the wars it should be noted that all the sides in all the

¹⁰⁷ Ibid.

¹⁰⁸ FREEDMAN, LAWRENCE. "Victims and victors: reflections on the Kosovo War." *Review of International Studies* 26, no. 3 (July 2000): 345.

wars committed similar kinds of atrocities with the similar patterns. "In almost all cases in which fighting took place, a pattern involving JNA troops or forces from Serbia proper emerged. In many large-scale field operations in Croatia and Bosnia, heavy weaponry, grid coordinates and other logistical support was provided to the rebel Serb forces by the JNA. The siege of a village, town or city was then conducted with those weapons, either by indigenous Serbs or in conjunction with JNA and paramilitary forces from Serbia proper."¹⁰⁹ The ethnic cleansing operations were conducted by the military and paramilitary groups in order to make the territory ethnically clean for one group. That practice was especially present in Bosnia and Herzegovina.¹¹⁰

The gross human rights violations committed during the wars are still not fully investigated and classified. However, the International Center for Transitional Justice states that "(t)he abuses included widespread attacks against civilians, population expulsions, systematic rape, and the use of concentration camps. Between 1991 and 2000, more than 140,000 people were killed, and almost four million others were displaced."¹¹¹ The mass graves are witnessing about the executions and ethnic cleansing, even the genocide (Srebrenica).¹¹²

The international community reacted to committed war crimes and crimes against

¹⁰⁹ Human Rights Watch. "Playing the "Communal Card" : Communal Violence and Human Rights." *Human Rights Watch*. Edited by Cynthia Brown and Farhad Karim. April 1995: The Former Yugoslavia Chapter. <http://www.hrw.org/legacy/reports/1995/communal/> (accessed April 28, 2015).

¹¹⁰ Akhavan, Payam. "Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order." *Human Rights Quarterly* 15, no. 2 (May 1993): 267.

¹¹¹ The International Center for Transitional Justice. *The Former Yugoslavia*. <https://www.ictj.org/our-work/regions-and-countries/former-yugoslavia> (accessed April 29, 2015).

¹¹² FREEDMAN, LAWRENCE. "Victims and victors: reflections on the Kosovo War." *Review of International Studies* 26, no. 3 (July 2000): 349.

humanity by establishing the International Criminal Tribunal for former Yugoslavia in 1993 under the auspice of the United Nations. The Court dealt with high profile perpetrators' individual criminal responsibility, thus did not go into questioning the role of the nations and states regarding the conflict. Despite the work of the Court and the pressures of the international community to the post-Yugoslav states to instigate domestic criminal proceedings, that effort did not have wider significance. Many of the crimes and human rights violations remain unresolved and impunity for it is a huge burden to region's apparent strives for reconciliation.

Section of the transition of post-Yugoslav countries is bound to remain incomplete. The transition to democracy in former Yugoslav countries nominally happened with the first democratic and free elections in 1990. However, due to the war it was not completed, especially from addressing violent past point of view. Since it would not be possible to address each country by itself regarding its transition path, it is necessary to make a broad generalization and state that second democratic transition that had elements of transitional justice occurred only in 2000s with the regime changes in Croatia and Serbia as pivotal actors of the conflict. Now, that statement is no entirely accurate, because Slovenia had different path as well as Bosnia and Herzegovina and other former Republics or autonomous provinces. The focus of this work is on how the past human rights violations are addressed by the new democratic regimes, not merely on describing how the political transition occurred and finished in relation to transformation of institutional power, redistribution of wealth etc. More particularly, the topic of this work is to focus on the debate regarding the formation of the truth and reconciliation commission, its institutional set-up and role of key stakeholder. This is the subject of a following chapter.

4 ESTABLISHING A TRUTH AND RECONCILIATION COMMISSIONS: AN INTERPLAY BETWEEN STATES AND CIVIL SOCIETY ORGANISATIONS

4.1 Introduction

The present chapter is going to explore an establishment process of a truth and reconciliation commissions. The main aim of this section is to understand the process leading to formal constitution of a truth and reconciliation commission and evaluate the quality of it based on two criteria: the public support for the establishment of a truth and reconciliation commission as an instrument of transitional justice, and definition of a mandate regarding the scope of investigations into gross human rights violations. For the purpose of this work, three models of the processes are distinguished based on the roles and interplay of two groups of stakeholders. Those two groups are States and civil society organizations, namely human rights organizations, victims and veteran associations among others.

The three models are defined based on the role of stakeholders in initiating and carrying out a truth and reconciliation commission's establishment process. The first model is based on the central role of the State authorities in initiating and leading the process. The second model is based on divided involvement of both the State authorities and civil society organizations, and the third model is based on the central role of the civil society organizations in the process.

The three models are going to be discussed latter in this chapter based on three cases of the truth and reconciliation commissions' establishment process: the South Africa being the

example for the first case, the Brazil for the second and the RECOM Initiative¹¹³ for the third one.

This chapter is limited on exploring how the three establishment models corresponded with the public support/expectations, and how the proposed mandate of the commissions respondent with the demands and requests of the victims and other civil society stakeholders. The public support for the establishment of the truth and reconciliation commission as well as the scope of its mandate regarding the investigations of the gross human rights violations are chosen among other criteria's for the assessment of the commission's success due to their explanatory potential on a degree depicting society's treatment of the past human rights violations through usage of the transitional justice mechanisms, e.g. truth and reconciliation commissions.

The present chapter is going to be divided into three parts, each part devoted to explore one of the three proposed models.

4.2 Case of South Africa: A State Led Establishment Process

A state led establishment process shall be defined for the purposes of this work as a process of establishing a truth and reconciliation commission where a State has a genuine intention to confront the past human rights violations and injustices by establishing a truth and reconciliation commission, thus a State designs a policy instrument of transitional justice. The genuine State led establishment process means that the official holders of the political power are determinant in their intention to establish a truth and reconciliation by putting it at the top of their political agenda. The South African case fits to this definition.

¹¹³ Initiative for the establishment of the Regional Commission for the Establishing the Facts about War Crimes and Other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia in the period from 1991-2001.

The South African Commission of Truth and Reconciliation (TRC) was established by the *Promotion of National Unity and Reconciliation Act, No. 34 of 1995* and was operational from December 1995 until 2002. The TRC had 17 commissioners, persons of high morals and strong public recognition. The work of the commissioners was carried out with the help of around 300 staff-members and it was organized in three committees dealing with human rights violations, amnesties, and reparations and rehabilitations.¹¹⁴

The establishment of the TRC was a product of political transition done by major political parties, namely a descending National Party and ascending African National Congress. The idea to establish a truth and reconciliation commission was vaguely present in the South African public from 1992, when the African National Congress's member, Kader Asmal spoke about the importance to have a truth commission at the University of Western Cape.¹¹⁵ The idea to have a truth and reconciliation commission coincided with the finalizations of the Interim Constitution negotiations when the question of amnesty for past wrongdoings was reopened.

“(...) the deciding factors in the establishment of the TRC were the debates and finalisation of the Interim Constitution. At the last minute, when all else had been settled, the question of amnesty remained unresolved. The National Party was not prepared to sign an agreement that did not provide for amnesty. Purportedly in the interests of maintaining the peace and securing the transfer to democracy, a compromise was reached. It was agreed and written into the Interim Constitution that amnesty would

¹¹⁴ United States Institute of Peace. *Truth Commission: South Africa*.

<http://www.usip.org/publications/truth-commission-south-africa> (accessed May 8, 2015).

¹¹⁵ Hayner, Priscilla B. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge, 2011: 301, note 1.

be granted to those who had committed abuses. However, the mechanisms for implementing this amnesty were left undecided.”¹¹⁶

That Interim Constitution opened the road for establishment of the TRC by committing the new Government to establish a mechanism for granting the amnesties; hence the mechanism would have to be empowered with investigative prerogatives in order to establish grounds for granting a amnesty for committed human rights abuses. The African National Congress and the National Party both had experiences with amnesties in recent past: the National Party granted amnesties to the members of the Congress for their unlawful acts.¹¹⁷ The African National Congress was exploring the question of amnesty during the negotiation process. The difference between the National Party and the African National Congress was in the fact that latest wanted to connect the amnesty with the broader investigations into the gross human rights violations and saw the need for addressing those violations through investigations.

“(...) the ANC had been examining experiences in other countries who had had to face problems of gross violations of human rights perpetrated in the course of long and bitter conflicts. It began to develop ideas about creating a truth and reconciliation process to deal with the harsh and brutal legacy of the past. These ideas began to incorporate the possibilities of amnesty into such mechanism. The question of a Truth and Reconciliation Commission (TRC), however was not made part of the negotiations.”¹¹⁸

The TRC was not the only mechanism of transitional justice that was discussed as a

¹¹⁶ Van der Merwe, Hugo, Polly Dewhirst, and Brandon Hamber. "Non-governmental organisations and the Truth and Reconciliation Commission: an impact assessment." *Politikon: South African Journal of Political Studies* 26, no. 1 (1999): 56.

¹¹⁷ Ibid.

¹¹⁸ Dudouet, Veronique, and David Bloomfield, . "The ANC and South Africa's Negotiated Transition to Democracy and Peace." *Berghof Transitions Series: Resistance/Liberation Movements and Transition to Politics*, 2008: 27.

possible tool for addressing past human rights violations. However the idea to pursue criminal trails was abandoned at the very beginning of a discussion. The first reason was the inability of the legal system to prosecute large amount of human rights violations cases via criminal proceedings, thus the second problem followed regarding difficulties in collection of evidence due to long time period of apartheid regime. The third issue was the amnesty granted by the Interim Constitution.¹¹⁹

“As Desmond Tutu has recently argued, “many of those calling for justice through criminal trials supported the negotiated settlement at Kempton Park, and seem to forget that amnesty was a crucial ingredient of the compromise which reversed the country’s inevitable descent into a bloodbath.”¹²⁰

After the ANC and the National Party passed the Interim Constitution in accordance with the deal made, the Government of National Unity was created, and started with drafting the legislation necessary for the establishment of the TRC. However, the drafting was not done by the Government directly, it was rather outsourced to the informal committee made of experts and civil society representatives. The Minister of Justice, Dullah Omar did not want to jeopardize the work of the newly established Government and undermine the partnership between the National Party and the ANC with inevitable quarrels that would for sure emerge at some point during the drafting process.¹²¹ The first round of drafting the TRC legislation was largely done by the civil society organizations.

“Input on the underlying principles that shaped these drafts came largely from

¹¹⁹ Norval, Aletta J. "Memory, Identity and the (Im)possibility of Reconciliation: The work of the Truth and Reconciliation Commission in South Africa." *Constellations* (Blackwell Publishers) 5, no. 2 (1998): 253.

¹²⁰ Ibid.

¹²¹ Van der Merwe, Hugo, Polly Dewhirst, and Brandon Hamber. "Non-governmental organisations and the Truth and Reconciliation Commission: an impact assessment." *Politikon: South African Journal of Political Studies* 26, no. 1 (1999): 57.

conferences and workshops held by Justice in Transition¹²². These were forums where selected NGOs were formally invited to make input into the policy process. A wide range of political and civil society organisations were involved in these discussions. Twenty-six organisations were on the invitation list compiled by Justice in Transition. National Party, military and police representatives declined invitations to participate in the workshops.”¹²³

With the process unfolding, the draft produced by the informal committee of the civil society organizations was delivered to the Government, which referred it to the Parliament. Then in the Parliament the draft became a subject of “political negotiations, and the political 'horse-trading' played a central role in shaping the final legislation.”¹²⁴ The civil society organizations had the opportunity to influence the draft while it was still being negotiated in the Parliament, but that effort was rather minimalistic then substantive. The Parliament would rather have an individual expert consulting then a representative of an NGO advocating on behalf of a certain group. Once in the parliamentary procedure, the draft legislation was out of reach for the NGOs. The TRC legislation was debated and passed by the Government of National Unity, and the ANC’s goal was to gain the widest possible support for the legislation, thus compromise and political pragmatism were inevitable.¹²⁵ Thus a little space for the civil society’s suggestions was available.

The political negotiations around the TRC legislation can be understood through observing the public opinion on addressing the past oppression and human rights violations, and reconciliation. The survey conducted in 1992 at the beginning of discussions about what

¹²² Justice in Transition was an NGO established by the Dr Alex Boraine who had a strong connection with the Minister of Justice, Dullah Omar.

¹²³ Van der Merwe, Hugo, Polly Dewhirst, and Brandon Hamber. "Non-governmental organisations and the Truth and Reconciliation Commission: an impact assessment." *Politikon: South African Journal of Political Studies* 26, no. 1 (1999): 57.

¹²⁴ Ibid: 57-58.

¹²⁵ Ibid: 58.

to do with the past human rights violations and how to address the violent past of the apartheid regime, showed that the "...public opinion was split along historical cleavages. Resistance against attempts to punish perpetrators of past injustices was especially strong among white South Africans, while African respondents expected justice to be done from a new government (...) fifty-nine percent of all African respondents demanded that 'whites who harmed blacks during apartheid [should] be charged in court', but 48 percent of white respondents strongly opposed this idea."¹²⁶ The split was expected due to historical reasons, racism and as an outcome of apartheid. This split explains the background of negotiations in the Parliament between the ANC and the National Party.

Later surveys got similar results as well. In 1994, when the proposed TRC legislation was out in public, the 65 percent of South African population supported establishment of the Commission, while support to investigate crimes of the past governments got support from only 39 percent of white population. Just before the TRC commenced with the work, another survey indicated that 63 percent of whites is not convinced about the TRC's success in addressing the past wrongdoings.¹²⁷

4.3 Case of Brazil: A State's Reluctance in Establishment Process

The Brazilian case represents a process of establishing a truth and reconciliation commission where neither a State nor civil society organizations have a leading role in initiating and carrying out the establishment process. The main characteristic of this process is the State's reluctance in pursuing a policy development of transitional justice, most notably, truth and reconciliation commission. Main incentives are coming from the civil society

¹²⁶ Theissen, Gunnar. "Common Past, Divided Truth: The Truth and Reconciliation Commission in South African Public Opinion." *Legal Institutions and Collective Memories*. Onati, Spain: International Institute for the Sociology of Law, 1999: 30.

¹²⁷ Ibid: 30-31.

organizations, and state's role is not proactive, but rather responding in non-genuine manner.

The Brazilian National Truth Commission (NTC) was constituted in November 2011 by the Law 12.528 and was operational until December 2014. The NTC was mandated "...to shed light on facts and circumstances of grave human rights violations; to identify the structures and institutions that have a connection to these rights abuses; to collect information; to help locate the bodies of the disappeared; to cooperate with public institutions to provide education concerning human rights violations; to recommend measures to prevent such violations; to foster national reconciliation and reconstruct the history of these violations, as well as to assist the victims."¹²⁸

Brazil was the last country in Latin America that experienced the military dictatorship in the second half of the 20th century to establish a truth and reconciliation commission. The NTC was not the first try of the Brazilian authorities to address past human rights violations committed by the military dictatorship. "In 1996, the special commission, *Comissão de Familiares de Mortos e Desaparecidos Políticos* (Commission for the Family Members of the Persons Killed or Disappeared for Political Reasons) was created to investigate the crimes committed during the dictatorship and to grant reparations for families who could prove to have been victims of violence."¹²⁹ However, the abovementioned special Commission should not be understood as a truth and reconciliation commission since it did not have the mandated neither to establish the facts regarding the whole number of human rights violations nor it had the full access into the State's and military archives.¹³⁰

¹²⁸ Ghione, Leonard. *Addressing Past Violence: The New Brazilian Truth Commission*. March 30, 2012. http://www.monitor.upeace.org/innerpg.cfm?id_article=887 (accessed May 8, 2015).

¹²⁹ Filho, Paulo Coelho. "Truth Commission in Brazil: Individualizing Amnesty, Revealing the Truth." *The Yale Review of International Studies* 2, no. 1 (2011-2012): 50.

¹³⁰ Ibid.

The reason why Brazil waited for a long time to establish the NTC was in the fact that all administrations before the Luiz Inacio Lula da Silva became the President were reluctant to address the past human rights violations because of the resistance coming from the military and the old power structures. Another problem for effective confrontation with the past abuses was the Amnesty Law of 1979 that granted amnesty for the perpetrators of the human rights violations.

The civil society organizations that were strong opponents of the military regime and advocates for the respect of human rights and democratizations from 1960s were not successful in pressuring the civilian Governments after 1985 to revoke the Amnesty Law which was the institutional barrier for the establishment of the truth and reconciliation commission.

“Paradoxically, given the strength of NGOs devoted to human rights in Brazil as well as a much publicized campaign against torture by the Catholic Church, unlike neighboring Argentina and Uruguay, Brazil’s amnesty law enacted by the military before leaving office was not overturned by the new civilian government after 1985. Nor did the new government move to organize a truth commission like those of Argentina, Chile and Uruguay to document human rights abuses by the military.”¹³¹

The political will to put the past abuses on the political agenda was for the first time expressed by the President Lula in 2009, when proposing the National Human Rights Plan he called for the revision of the amnesty provision and the establishment of the NTC. The Lula’s plan was under heavy attack from the military. Both the Joint Chiefs and his own cabinet member, the Minister of Defense were publicly against the commission. The main criticism

¹³¹ Encarnación, Omar G. *The Myth of Civil Society: Social Capital and Democratic Consolidation in Spain and Brazil*. New York: Palgrave Macmillan, 2003: 120.

coming from the military was regarding the absence of the provision from the Plan for the establishment of the TRC that would deal with the crimes of the leftist guerilla organizations. The issue of already granted amnesties was also problematic. Both problems were eventually resolved, when Lula and later President Dilma Rousseff agreed with the military regarding the inclusion of leftist guerilla in the mandate of the NTC. Finally, the amnesty issue was resolved by the judgment of the Inter-American Couth of Human Rights from December 2010, which de facto quashed down the amnesty.¹³²

Those two developments pawed the road for the NTC to be established and diverted the focus of the public at this issue. However, the process was developing in the shadow of old, but still strong power relations between the civilian-leftist Government and the military and conservative parliamentary opposition. That was the political constellation of negotiations that was limiting the access and influence of the civil society organizations to the drafting process of the NTC legislation.

The position of the civil society organizations was to establish a truth and reconciliation commission that would have a strong mandate regarding the investigations into the fate of disappeared persons, torture and other gross human rights violations. Ever “(s)ince the democratic transition, the relatives of the missing and former victims of the dictatorship have demanded truth and justice with respect to the state violence committed in the recent past.”¹³³ However, much of the proposals coming from the civil society organizations were not taken under consideration. “Many victims and human rights organizations are dissatisfied with the weak mandate of the truth commission. In particular, they demand the possibility to

¹³² Filho, Paulo Coelho. "Truth Commission in Brazil: Individualizing Amnesty, Revealing the Truth." *The Yale Review of International Studies* 2, no. 1 (2011-2012): 51.

¹³³ Quinalha, Renan Honorius. *50 Years Later, Still in Search of Truth: Challenges Facing Truth Commissions in Brazil*. April 2014. <http://ohrh.law.ox.ac.uk/50-years-later-still-in-search-of-truth-challenges-facing-truth-commissions-in-brazil/> (accessed May 8, 2015).

convene and to punish perpetrators.”¹³⁴ This particular request was not possible to include as a part of the NTC’s mandate due to the strong opposition from the military and associations close to it.

Other proposals of the civil society organizations were not taken as well. “Victims and human rights groups suggested amendments to ensure the commission would have the capacity to publicize its activities in advance of a final report. They also requested a period of public consultation to select members of the commission. Although these amendments were not included in the final project, they represent legitimate demands and the commission’s work should be conducted with the utmost regard for public involvement.”¹³⁵ The Chamber of Deputies rejected the proposals that were submitted as amendments to the NTC bill.

Another issue that speaks about Brazil’s reluctance in dealing with the past abuses was the issue of the NTC’s staff. In total to seven commissioners, only fourteen staff members were assigned to the NTC. That was a small number in comparison to other truth and reconciliation commissions. “The limited staffing of the Brazilian commission is counter to the worldwide trend to employ a larger staff. The commissions in Argentina and Chile, for example, employed around 60 staff and covered a significantly shorter period of time. The truth commission of the Democratic Republic of Congo, a more recent model covering human rights abuses during a time period similar to that of the Brazilian commission, is set out to cover 46 years.”¹³⁶

¹³⁴ Schneider, Nina. *Too Little Too Late? The National Truth Commission in Brazil*. June 2012. <http://transitionaljusticeinbrazil.com/2012/06/01/too-little-too-late-the-national-truth-commission-in-brazil/> (accessed May 8, 2015).

¹³⁵ International Center for Transitional Justice. *Brazil: Truth Commission Bill Important Step against Impunity*. October 2011. <https://www.ictj.org/news/brazil-truth-commission-bill-important-step-against-impunity> (accessed May 8, 2015).

¹³⁶ Ghione, Leonard. *Addressing Past Violence: The New Brazilian Truth Commission*. March 30, 2012. http://www.monitor.upeace.org/innerpg.cfm?id_article=887 (accessed May 8, 2015).

Since the establishment of the NTC was part of the President Rousseff's election agenda based on which she was elected to the office, there was a popular support for the establishment of the NTC. She won the 2010 presidential elections with the 55 percent of all votes.¹³⁷ The election victory gave the final push for the establishment of the commission, however that did not save the NTC establishment from a resistance and criticism. The civil society organizations, namely the human rights NGO's and victims associations were supportive, and participated in the process, however without the overwhelming success as we saw before. The main opponents for the establishment of the NTC were military and organizations of former military officers that joined ranks with the parliamentary opposition. The whole public argument against the NTC was developing around the amnesty issue. "Even with public opinion moving against the amnesty law, many conservative politicians in Brazil remain resolutely in favor of the amnesty. A special session in the lower house of congress (...) meant to commemorate the 50th anniversary of the coup that led to the 1964-85 dictatorship was briefly suspended due to a scuffle between legislators for and against the legacy of the military regime. As *Estado* reports, the turmoil appeared to be triggered by an inflammatory banner unveiled by conservative lawmaker, which read: 'Congratulations military personnel - March 31, 1964. Thanks to you Brazil is not Cuba.'"¹³⁸

4.4 Case of RECOM: A State Declaratory Support for the Establishment

Process

The present case of the truth and reconciliation commission establishment process is

¹³⁷ Phillips, Tom. *Dilma Rousseff wins Brazil's presidential election*. November 1, 2010. <http://www.theguardian.com/world/2010/nov/01/dilma-rousseff-wins-brazil-president> (accessed May 8, 2015).

¹³⁸ The Pan-American Post. *Impunity for Human Rights Abuses in Brazil Starts to Crack*. April 2, 2014. <http://www.thepanamericanpost.com/2014/04/impunity-for-human-rights-abuses-in.html> (accessed May 8, 2015).

characterized with the strong initiative from civil society organizations while the State is declaratory supporting it, while in practice is not interested and sometimes even hostile towards the idea to have a truth and reconciliation commission. The whole business of conducting the process is at the shoulders of civil society organizations, with states mainly just observing the development but not indicating any initiative to join the process.

The response to war crimes and other gross human rights violations on the territory of former SFRY happened while hostilities were still ongoing. In 1993, the United Nations Security Council established the International Criminal Tribunal for former Yugoslavia. The task of the tribunal was to prosecute those individuals that had the highest responsibility for committed atrocities. Following the work of the International Tribunal, national courts also started with prosecution of perpetrators from lower ranks. The whole transitional justice process laid down on justice being pursued via criminal persecution, relying heavily on the international mechanisms and norms.¹³⁹

Despite the ongoing trials, their reach was limited. The International Court dealt with only small number of cases while domestic courts were responsible for conducting the trials brought before them by the national prosecutors, as a result of their own investigations or on the behalf of the International Tribunal's Prosecutor.¹⁴⁰ Driven with the thought that court proceedings cannot possibly reach all the war crimes and other gross human rights violations and thus justice would not be served, the civil society organizations working in the field of the international humanitarian law, transitional justice and human rights enhanced their regional cooperation regarding transitional justice issues.

¹³⁹ Kurze, Arnaud. "DEMOCRATIZING JUSTICE IN THE POST-CONFLICT BALKANS: THE DILEMMA OF DOMESTIC HUMAN RIGHTS ACTIVISTS." *CEU Political Science Journal* 7, no. 3 (2012): 243.

¹⁴⁰ Zyberi, Gentian. "THE TRANSITIONAL JUSTICE PROCESS IN THE FORMER YUGOSLAVIA: LONG TRANSITION, YET NOT ENOUGH JUSTICE." *Oxford Transitional Justice Research Working Paper Series*, March 2012: 3-4.

“The Documenta Center (Zagreb), the Research and Documentation Centre (Sarajevo) and Humanitarian Law Center (Belgrade) established cross-border cooperation on dealing with the past in 2004. In 2006, they initiated a campaign to establish a regional fact-finding mechanism for the countries of the former Yugoslavia. After a two-year consultation process (with regional forums held in Sarajevo, Zagreb, Belgrade and Prishtina), 108 local CSOs and 77 individuals from various countries signed an agreement in October 2008.”¹⁴¹

The Initiative for RECOM is led by the Coalition of civil society organizations: NGOs, victim associations, cultural associations, media etc., and individuals. In total, the Coalitions count around 1800 members.¹⁴² The large membership of the Coalition speaks about the public debate conducted around the needs of the victims as well as addressing the past abuses. At the beginning, the RECOM process aimed to examine whether there is a need for additional mechanisms of transitional justice to be established as a complementary instrument to the war crime trials. That was later followed with the consultation process on establishing RECOM and defining its mandate and other essential parts of the commission. “Since 2004, RECOM has held dozens of conferences, multiple workshops and hearings around the region...”¹⁴³ with the goal to foster a public debate on past abuses and to get opinions from the various stakeholders on how to shape the mandate of the future Commission.

As a final product of the consultations and other meetings, the Coalition drafted a proposal of the Statute of the Regional Commission for Establishing the Facts about War Crimes and Other Gross Violations of Human Rights Committed on the Territory of the

¹⁴¹ Fischer, Martina, and Ljubinka Petrić-Ziemer. *Dealing with the Past in the Western Balkans: Initiatives for Peacebuilding and Transitional Justice in Bosnia-Herzegovina, Serbia and Croatia*. Berghof Report No. 18, Berghof Foundation, 2013: 14.

¹⁴² Subotic, Jelena. "Remembrance, Public Narratives, and Obstacles to Justice in the Western Balkans." *Studies in Social Justice* 7, no. 2 (2013): 276.

¹⁴³ Ibid: 277.

Former Yugoslavia.¹⁴⁴ The Coalition's Assembly of Members finally adopted the proposed draft in 2011, and the plan was to give it to the Governments of all successor states of the SFRY for review and subsequently for adoption. The whole RECOM process was designed to be conducted by the civil society organizations. Once the mandate is drafted, the whole process would be transferred to the States for the formal establishment of the RECOM as an international governmental organization. The Statute of RECOM as an international treaty with Bosnia and Herzegovina, Serbia, Croatia, Kosovo, Montenegro, Macedonia and Slovenia as treaty parties would establish that organization.

“The proposed Statute for the Commission promises to deliver the truth of past violence, create a culture of compassion and solidarity with victims from all communities, and produce a shared historical knowledge, with the implicit hope of leading to a new consensus in the highly divisive successor states of Yugoslavia.”¹⁴⁵

The State's authorities from the countries of former Yugoslavia were not substantially involved in the RECOM process while it was being conducted by the civil society organizations. The official politics' of countries were declaratory supportive regarding enhancing the process of search for missing persons but remained skeptical about establishing a regional commission. Once the proposed Statute was adopted, the Coalition started with advocacy efforts to put the RECOM on the agenda of the political parties. Since it was not realistic to expect that to happen immediately, the Coalition approached the Presidents of the post-SFRY States, asking them to establish an expert group for assessing the proposed Statute

¹⁴⁴ Coalition for RECOM. "Proposed RECOM Statute." *RECOM Initiative*. March 26, 2011. http://www.zarekom.org/uploads/documents/2011/04/i_836/f_28/f_1865_en.pdf (accessed May 8, 2015).

¹⁴⁵ Lellio, Anna Di. "Engineering Grassroots Transitional Justice in the Balkans: The Case of Kosovo." *East European Politics and Societies and Cultures* 27, no. 1 (February 2013).

with the legal systems of respective States. The Presidents agreed with the Coalition's request, but remained very skeptical about the prospect of establishing the RECOM because the main objection was that the RECOM assumes judicial powers.¹⁴⁶

The establishment of a working group of experts represents limited success for the Coalition, since the Presidents of post-SFRY States are not empowered with the executive and legislative powers, thus the Governments would have to agree of putting the RECOM Statute on the legislative agendas. However, that did not happen. The major political parties, hence the Governments as well, were not supportive towards the RECOM Initiative. There were two main lines of objections. The first line was that the RECOM Statute violates the State's sovereignty, primarily by assuming some of the judicial powers, e.g. the proposed Statute envisioned the possibility of issuing subpoena for a person called to deliver a testimony which would be issued by a competent court at the request of the RECOM. The second line of arguments were originating from nationalistic matrix, e.g. the RECOM was simultaneously being accused for being anti-Croat, anti-Serb, anti-Bosniaks, anti-Slovenian, anti-Macedonian, anti-Montenegrin and anti-Albanian.¹⁴⁷

The public support for RECOM was not equal in all the countries of the former SFRY: "(...) based on the results of the poll carried out by *IPSOS* agency in April 2011. According to the poll, the Initiative for RECOM had a significantly greater support in Kosovo, Montenegro, Serbia, and the Federation of BiH, than in Croatia, and the Republic of Srpska - BiH."¹⁴⁸ In

¹⁴⁶ RECOM Initiative. "RECOM Initiative Advocacy - progress report." *RECOM*. June 2012. http://www.zarekom.org/uploads/documents/2012/06/i_2283/f_2/f_3041_en.pdf (accessed May 8, 2015).

¹⁴⁷ Mekina, Igor. "Analysis of Public Criticism and Support of the Initiative for RECOM." *Coalition for RECOM*. August 2011. http://www.documenta.hr/assets/files/REKOM/ENG/08_f_2826_en.pdf (accessed May 8, 2015): 9-15.

¹⁴⁸ "Report by Youth Initiative for Human Rights in Serbia and Youth Initiative for Human Rights in Croatia on 1,000,000 Signatures for RECOM Campaign." *Coalition for RECOM*.

order to gain the public support for the establishment of RECOM, the Coalition conducted a signature collecting campaign *1,000,000 Signatures for RECOM* in 2011. The campaign was an extensive endeavor, and the biggest campaign done so far by the civil society organizations in the countries of former SFRY. “The number of volunteers who participated in the campaign was 1,301 and they were activists of youth organizations and members of several political parties’ youth wings. They collected signatures at 219 stands in capital cities and other major cities, as well as in a door-to-door action.”¹⁴⁹ The lump sum result of the signature collection was 542,660 signatures supporting the establishment of RECOM.

However, the support was not equally distributed among the countries: the highest support was in Serbia with 254,539, Bosnia and Herzegovina with 122,473 and Kosovo with 100,599 signatures, while the lowest support was in Montenegro with 30,057, Croatia with 19,668, Macedonia with 10,022 and Slovenia with 5,342 signature. The Coalition did not manage to gain expected support of 1.000,000 signatures. The wide public support for RECOM was absent. Despite the amount of the war crimes and gross human rights committed, the public as well as politics were not supportive to establish the RECOM as a mechanism that would address those issues. The public was heavily influenced by the nationalist arguments against RECOM. This point is probably the best articulated in the following quotation:

“Association of Family Members of Detained and Missing Croat Soldiers publicly opposed the organization of the *Million Signatures Campaign* in Croatia with explanation ‘that by demanding their signatures for the truth about victims, their [Croat citizens] current sensitivity regarding everything related to the Homeland war will be

2011. http://www.documenta.hr/assets/files/REKOM/ENG/11_f_2184_en.pdf (accessed May 8, 2015): 1.

¹⁴⁹ Ibid.

manipulated, and that they would give their signature in support of objectives they do not even agree with.”¹⁵⁰

So far, the RECOM Initiative stays just what it is, the initiative of civil society organizations. The prospect of having the RECOM established in the near future remains unclear and uncertain, as declarative support of governmental factor could easily in practice amount to implicit obstruction.

¹⁵⁰ Ibid: 2.

5 COUNCLUSION

The present work started with the question on the nature of the relationship between the State and civil society organizations in the process of establishing a truth and reconciliation commission. For the purpose of examining that relationships, the three models of collaboration were designed and later described trough examination and analysis of the Truth and Reconciliation Commission of South Africa, the National Truth Commission of Brazil and the Regional Commission for Establishing the Facts about War Crimes and Other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia. The three models are descriptive, i.e. they derived out from the analysis of the formative process of three commissions.

The South African Truth and Reconciliation Commission is an example of a State led establishment process that is characterized by the State's strong and genuine intention is setting up a truth and reconciliation commission. The State is a key player in the establishment process and undertakes committed actions in order address past human rights abbesses. As we saw from the analysis of the South African TRC, the role of the civil society organization in the establishment process was generally limited in their influence on defining the scope of the TRC's mandate. Their role and therefore the influence were fading away with the process of establishment progress towards the institutional adoption. However, the South Africa did use the knowledge of the civil society organizations at the beginning of the TRC legislation's drafting process to get the broadest mandate and the best structure for the future commission, but later the entry to the process for the civil society organizations was blocked.

The Brazilian National Truth Commission is an example of a collaboration model where a State is reluctant regarding the establishment a truth and reconciliation commission. A State in this model is ambivalent regarding the implementation of transitional justice mechanisms

and therefore the process of establishment is highly politicized thus leaving a limited entry for the influence of the civil society organizations. An establishment process, once initiated is led and conducted by the State with the minimum imputes from the civil society organizations regarding the scope of a mandate and the structure of a commission. The commission is at the end established without the strong support of the civil society and with the questionable mandate.

The RECOM case is an example of a model of collaboration where a State is ignorant regarding the establishment of a truth and reconciliation commission as a consequence of poor commitment towards resolving past human rights violations. In this model, the civil society organizations are in different position then in the first two models. The process of establishment under this model is led and conducted by the civil society organizations. The result of this process is a broad mandate of investigations into the violations and generally good commission's legislation drafting product that is a result of the best practices from other jurisdictions adjusted with local needs. However, this model suggests the support of a State for the establishment is hard to acquire.

Deriving from those models, the role of civil society organizations in the establishment process of a truth and reconciliation commission is depending on a degree of States' interest to establish a commission. The impact of their role on the scope of a mandate is the highest when a state has a genuine intention to establish a commission as well as they is leading the process with the State being declaratory for the establishment of a commission. However, the latest is not achievable due to lack of a State support.

The most promising model of an establishment process is thus the first one due the reasons that the State is leading the process and has a genuine interest in having a truth and reconciliation mission. For those reasons a State is using the knowledge and experiences of

the civil society organizations to draft the best possible legislation for the commission's establishment. Two remaining models are lacking the State's support or genuine interest, therefore the influence of the civil society organizations are limited and results are either a poor mandated and badly structured commission or no commission whatsoever. Therefore, the role of the civil society organizations is entirely limited and dependent on the States willingness and interest to take serious effort to address the past human rights abuses.

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E/CN.4/2005/WG.22/WP.1/Rev.4, art. 24, para. 2 in Report of the Office of the United Nations High Commissioner for Human Rights: "Promotion and Protection of Human Rights: Study on the right to truth", E/CV.4/2006/91, par. 9, accessed March 4, 2013, par. 5,
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