

HUMANITARIAN LAW CENTER KOSOVO



# TOWARDS A NATIONAL TRANSITIONAL JUSTICE STRATEGY FOR KOSOVO



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# I. INTRODUCTION

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Twenty-two years after the end of the 1998–1999 conflict, Kosovo’s complex and disputed past continues to impact its social and economic development and prospects for reconciliation and lasting peace. With renewed determination to address Kosovo’s troubled past, in August 2021, Prime Minister Albin Kurti participated in the inauguration process to develop a National Transitional Justice Strategy (NTJS) that would “unite all initiatives and ... provide a platform for action and coordination between initiatives and ... a reference platform for all those dealing with the past.”<sup>1</sup> The prime minister publicly acknowledged deficiencies in earlier initiatives and committed to rectifying past errors and adopting a more inclusive approach stressing the “critical need” for civil society organizations, state institutions, researchers and citizens to join forces to support this renewed process. The prime minister further stressed that Kosovo did “not have the luxury” of repeating previous mistakes and that it was vital for state and non-state actors to “join forces” in support of the process.

Kosovo’s minister of justice, Albulena Haxhiu, established the working group to draft the strategy and highlighted the importance of including the voice of victims in the strategy’s drafting. She stated that she would be committed “to drafting a comprehensive victim-centered and gender-sensitive strategy and would ensure that its development is done in consultation with stakeholders to reflect the victims’ experiences, needs and rights.”<sup>2</sup>

**"This is the last moment for proper confrontation with the past. It's the last moment to address all that has happened. To measure the damages, to repair them, to fulfil the right to truth for victims of crimes, survivors and their families."**

**PRIME MINISTER OF KOSOVO, ALBIN KURTI**

Civil society and human rights activists in Kosovo also welcomed the renewed initiative by Kosovo’s authorities, recommending that a higher level of transparency and active communication with all actors are required to better inform the process and to gain the trust and support of beneficiaries, particularly victims’ groups and the silent majority in society who support reconciliation. In this context, civil society is understood as non-governmental organizations (NGOs), civil society organizations (CSOs), individual activists, prominent persons and groups, women’s and youth associations, victims’ groups, veterans’ groups, and the Kosovar and Serbian diaspora. Lessons learned from comparable programs demonstrate that these particular actors play a seminal and catalytic role in advancing transitional justice, human rights and the rule of law. Moreover, civil society organizations in Kosovo and the region have demonstrated the capacity and capability to effect change and promote an appropriate inclusive policy framework for a reconciliation agenda and sustainable peace.

In the drafting phase of the NTJS, civil society is also an essential partner in helping to facilitate and conduct outreach activities and provide guidance to victims and marginalized groups to ensure

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<sup>1</sup>Office of the Prime Minister, Prime Minister Kurti at the Working Group Meeting: The Strategy on Transitional Justice Should Unite All Initiatives to Address the Past (August 18, 2021): <https://kryeministri.rks-gov.net/en/prime-minister-kurti-at-the-working-group-meeting-the-strategy-on-transitional-justice-should-unite-all-initiatives-to-address-the-past/>

<sup>2</sup>IBID



that their needs and views are addressed in the strategy. Finally, civil society actors ensure that the project is sustained and that victims remain the priority in the implementation phase. In particular, ensuring that the gender dimension is mainstreamed throughout the process. Moreover, if implementing bodies fail in their responsibilities, civil society can take corrective actions to support the unhindered continuation of the process. In this regard, civil society in Kosovo and the region welcomes the Government of Kosovo's efforts to develop the NTJS.

To support the development of the strategy, the minister of justice appointed a working group with 26 members to conduct research and consultations with stakeholders and to ultimately draft a document for parliamentary procedure and implementation. This renewed commitment marks a new level of political maturity and opportunities for Kosovo society, effectively operationalizing Kosovo's long-term political objectives to end impunity, promote justice and reconciliation – a prerequisite to promote political stability and sustainable economic development.

Transitional justice has long been a part of the Kosovo peacebuilding architecture with instruments implemented or facilitated by international mandated bodies such as the United Nations Mission in Kosovo (UNMIK), the European Union Rule of Law Mission in Kosovo (EULEX), the International Criminal Tribunal for the former Yugoslavia (ICTY) and others mainly to address the rule of law and the processing of atrocity crimes.<sup>3</sup> The Comprehensive Proposal for the Kosovo Status Settlement, which concluded negotiations with Serbia for Kosovo's independence, obligated Kosovo's authorities to undertake transitional justice initiatives and measures to build peace and foster reconciliation.

Kosovo's first attempt to deliver a strategy was facilitated by the Inter-Ministerial Working Group on Dealing with the Past and Reconciliation in 2008. However, according to a civil society review,<sup>4</sup> the work was severely hampered by deficiencies in leadership and management, political ownership, representation and participation of Kosovo's minority communities and public engagement. Nevertheless, the study concluded that the sincere commitment of the Working Group was beyond any doubt and that its members deserved the gratitude of all of Kosovo's citizens. However, the failure of the initiative was due to specific design flaws and a severe lack of political will and coordination.

Transitional justice plays an essential role in public and political discourse from a societal perspective. Small-scale, internationally funded initiatives and projects focused on multiculturalism, tolerance and diversity in Kosovo have been notably successful in bridging gaps and raising awareness of the importance of dealing with the past. In addition, youth initiatives are particularly effective in promoting human rights, democratic values and transitional justice at local and regional levels by adopting a future-oriented perspective towards social and institutional development.

A recent study found that most citizens in Kosovo would support a government/civil society platform to address issues related to Kosovo's conflict and to create conditions for reconciliation.<sup>5</sup> The study suggests that any future effort must involve effective and impartial political engagement and recognize the needs voiced by victims and affected communities. Furthermore, the report found that many efforts to address Kosovo's troubled past were instrumentalized to benefit a particular political view and agenda and ethnic groups supportive of a particular political affiliation.

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<sup>3</sup>These include international tribunals (the ICTY and the International Residual Mechanism for Criminal Tribunals), hybrid tribunals (the Kosovo Specialist Chambers) and truth-seeking mechanisms (Truth and Reconciliation Commission and RECOM)

<sup>4</sup>Impunity Watch, Center for Peace and Tolerance, Integra and PAX (Nora Ahmetaj and Thomas Unger). Kosovo's Framework for Dealing With the Past at a Turning Point: Civil Society Review of Progress Toward a National Strategy on Transitional Justice (April 2017): <http://kosovomemory.org/wp-content/uploads/2018/10/Civil-society-review-of-progress-toward-a-National-Strategy-on-Transitional-Justice.p>

<sup>5</sup>New Social Initiative, Integra and PAX (Dr Gëzim Visoka & Besart Lumi). Citizens Perspective on a Future Strategy for Transitional Justice in Kosovo (December 2020): <https://paxforpeace.nl/media/download/Citizens%20Perspective%20on%20a%20Future%20Strategy%20for%20Transitional%20Justice%20in%20Kosovo%20PAX%202020.pdf>

## II. TRANSITIONAL JUSTICE

Transitional justice is a multidisciplinary field of theory and practice to counter impunity and restore dignity to victims of human rights violations through a mutually reinforcing set of “institutional mechanisms” designed and implemented to address the past in a constructive and future-oriented manner. In addition, transitional justice seeks to establish resilient social cohesion, restore civic trust, the rule of law and democratic order, and ultimately achieve reconciliation. These are critical elements necessary to provide recognition to victims, enhance the trust of individuals in the state, reinforce respect for human rights, promote the rule of law and enhance opportunities for reconciliation and sustainable peace.

In 2004, the UN secretary-general articulated transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, secure justice and achieve reconciliation.”<sup>6</sup> In this regard, transitional justice comprises four mechanisms; Justice, truth-seeking, reparations, institutional reform and guarantees of non-recurrence to be mutually reinforcing and applied holistically. The applied concepts and instruments are intended to be implemented as a public-civil society partnership linking judicial and non-judicial mechanisms, contingent that society is willing and prepared to face its common past and ready and willing to seek a shared future.

In this regard, the success of transitional justice is measured by the ability of the process to provide redress not only for individuals but through a broader societal transformation involving the establishment of resilient social cohesion, peaceful coexistence and reconciliation. Therefore, transitional justice measures must foster political, social and economic transformation and advance gender equality, with two distinct objectives: a) achieving justice for victims; and b) and creating just, inclusive and peaceful societies.<sup>7</sup>

Transitional Justice – the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

UNITED NATIONS 2004

From a conceptual and practical perspective, transitional justice measures must not function in isolation or parallel with other transformational or development activities. For example, without truth-seeking, institutional reforms or reparations for victims, punishing a limited number of perpetrators of war crimes can be interpreted as merely a form of retribution or political revenge. Truth-seeking, insulated from accountability and redress to victims, again fails to provide victims with justice or societal recognition. Reparations without direct links to the other transitional justice measures may be perceived as an attempt to buy victims’ silence or acquiescence. Therefore, the NTJS must seek a high level of complementarity to support victims and society and their legitimate expectations of justice, truth and reparation.

Transitional justice processes are inherently political as they often involve contentious decisions and actions based on power, interest and prudence.<sup>8</sup> Consequently, transitional justice processes are not neutral or purely technical but should be acknowledged as political, potentially producing positive and negative effects.<sup>9</sup> First, therefore, implementing transitional justice measures requires

<sup>6</sup>UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (August 23, 2004): <https://digitalibrary.un.org/record/527647?ln=en>

<sup>7</sup>Paige A, “How ‘Transitions’ Reshaped Human Rights.” Human Rights Quarterly, 31, no. 2 (2009), The Johns Hopkins University Press.

<sup>8</sup>Vinjamuri & Snyder (2015), cited in GSDRC, Transitional Justice: Topic Guide (August 2016): [https://gsdrc.org/wp-content/uploads/2016/08/TransitionalJustice\\_GSDRC.pdf](https://gsdrc.org/wp-content/uploads/2016/08/TransitionalJustice_GSDRC.pdf)

<sup>9</sup> Barsalou, 2005; Thoms et al., 2008; Sancho, 2014

effective structuring and sequencing to maximize complementarity and minimize contradiction and parallel initiatives. Second, interrelationships between measures should be clear and adaptable to promote broader public participation and support. Moreover, transitional justice measures should be sequenced to maintain and enhance the constituent elements of the transition process and ultimate goals of reconciliation, democracy and sustainable peace.

## III. GOALS OF A TRANSITIONAL JUSTICE STRATEGY

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The primary goal of a transitional justice strategy is to provide victims and survivors with redress for suffered human rights violations, establish trust in the state's legitimacy and the rule of law function, establish resilient social cohesion and seek reconciliation. By providing access to justice, social, ethnic and cultural tensions are resolved peacefully, and pathways for individuals to actively pursue material justice and reparations can be achieved through judicial and non-judicial processes. In this regard, transitional justice is also a vehicle for conflict prevention by establishing facts and combating disinformation, divisive narratives, historical revisionism and hate speech. This preventive and cathartic aspect is also vital in opening up opportunities for refugees to return to their homes in a more safe and secure environment.

The goals of transitional justice are articulated in national and international instruments and programs that broadly support the rule of law, peace, development and reconciliation. For example, 2010 guidance note by the UN secretary-general states that transitional justice "can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding and reconciliation."<sup>10</sup> Transitional justice, as a transformational process, includes mutually supportive judicial and non-judicial mechanisms, including truth-seeking, prosecution initiatives, reparations and measures to prevent the recurrence of violations, including legal and institutional reform, the strengthening of civil society, memorialization efforts, cultural initiatives, the preservation of archives and the reform of history education.<sup>11</sup>

## IV. TOWARDS A TRANSITIONAL JUSTICE STRATEGY

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The purpose of this guide, Towards A National Transitional Justice Strategy for Kosovo, is to provide a structured and comprehensive reference and approach to developing a strategy consistent with international norms, standards and best practices. The guide is Kosovo-specific, informed by contemporary research, best practice from past transitional justice initiatives and consultations with activists and stakeholders. The guide seeks to venture beyond the prevailing narratives and convey an inclusive, victim-centered approach capable of addressing the genuine and future-oriented

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<sup>10</sup>UN General Assembly, Report of the United Nations High Commissioner for Human Rights (January 12, 2022): [https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_49\\_39\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_49_39_E.pdf)

<sup>11</sup>OHCHR, Transitional Justice and Human Rights: <https://www.ohchr.org/en/transitional-justice>



needs of individuals and communities in Kosovo.

## GUIDING PRINCIPLES

A strategy is a general and inclusive plan to achieve one or more long-term or overall goals under conditions of prevailing uncertainty. For transitional justice, a supporting strategy is critically important as it involves setting goals and priorities, designing actions to achieve those goals and mobilizing resources to execute necessary activities or actions. In addition, a strategy describes and sequences how the individual processes and mechanisms will achieve their prescribed goals.

The timing and sequencing of launching and implementing transitional justice activities must be carefully planned to maximize impact and minimize risks. Political and conflict analysis can help to identify risks, changes in incentive structures and new opportunities to promote transitional justice.

This guidance supports conflict-affected communities in Kosovo to seek justice and reconciliation as a critical prerequisite for sustainable peace and prosperity.

The drafting of the NTJS should involve an inclusive consultation process with a wide array of stakeholders, including civil society organizations, victims' groups, women, youth and marginalized groups. This is essential to ensuring the integrity and public acceptance of the process.

Full compliance and integration of international principles, norms and standards are central in designing and implementing an NTJS. Accordingly, the following 10 principles are proposed to help guide the drafting of the NTJS to maximize impact and sustainability:

- 1** The NTJS must encompass all events from January 1998 to December 2000 in full recognition that Transitional Justice and reconciliation will only be achieved with the inclusion of all groups concerned.
- 2** Victim-centered approach – The overarching approach must be victim-centered, inclusive and consultative. In the Kosovo context, a victim-centered approach must prioritize the needs of the conflict-affected communities and individuals, avoid re-traumatization of victims, end divisive political narratives and re-focus efforts on the rights, safety, security and expressed needs of Kosovo's communities.
- 3** Situational awareness (do no harm principle) – As transitional justice deals with emotionally charged issues related to past traumatic events, there is an inherent risk of renewed tensions and even violence. Therefore, a conflict-sensitive approach is also vital in planning and implementing activities. This necessitates the careful analysis of societal and political vulnerabilities, the potential impact of transitional justice measures and the integration of risk-mitigating strategies and policies to control the process's adverse effects or political manipulation.
- 4** Comprehensive approach (or holistic) – Transitional justice measures must not be isolated from or in competition with other transformational or development processes but rather mutually reinforcing and supportive of cross-cutting issues and reforms. A comprehensive approach demands a coherent and timebound strategy in which each element works in tandem with and provides space for other initiatives.
- 5** Manage expectations – The processes must not falsely raise expectations or make unrealistic commitments to individuals or communities. It is vital to consider victims' expectations and views on the transitional justice process as victims' perceptions may also differ from the actual process.

The NTJS must ensure the highest degree of transparency and communication during all planning and decision-making stages. Transitional justice is a process, not a destination. Therefore, transparency and open communication will help to manage expectations and foster ownership and inclusion.

**6** Gender equality – Streamline gender equality and conflict-related gender issues as a cross-cutting and integral part of the NTJS. Gender inequality is often closely related to human rights violations and the consequences of those violations. Victims’ experiences of conflict include sexual violence but also a range of gendered human rights and socio- economic violations.

**7** Set realistic timelines – The drafter must take into account the particular context and propose an individual transitional justice measure. They must also account for developing an enabling environment (security, political, social and economic conditions, capacities of existing structures and the position of civil society) to deliver on the measure. This activity may require sequencing and a phased approach to link the various mechanisms and processes.

**8** Integrity and impartiality – All members should be screened to confirm personal and political integrity, including professional expertise regarding suitability to serve in the working group. In addition, the working group must adhere to specific conditions ensuring its independence, including controlling resources, conducting inquiries, building relationships and making substantive recommendations. These elements are critical as they demonstrate that the process is free from political manipulation, capable of impartial deliberations and open to public scrutiny.

**9** Civil society engagement – CSOs are an essential partner in supporting transitional justice, linking victims with information, resources and capacity building, educating stakeholders and providing active monitoring and evaluation of results to safeguard against backsliding or political interference. Youth actors and youth organizations will need to play an active role in the strategy as “agents of change.” The strategy should support youth engagement by fostering a process in which young people participate directly in designing and implementing transitional justice tools and mechanisms.

**10** Contribute to reconciliation – Transitional justice is a process, not a destination. As reconciliation seeks to transform relationships between individuals and enable society to move from a divided past to a shared future, transitional justice initiatives should target institutional and personal dimensions such as official apologies, commemorative events and memorials at all levels of society. In addition, tools to combat “obstacles to reconciliation” such as hate speech, glorification of war criminals and divisive, ethnocentric narratives should be integrated into the strategy to safeguard against historical revisionism and inter-ethnic conflict.

**11** Support the rule of law – The rule of law implies that Kosovo’s laws, law enforcement and the relationships among legal rules are themselves legally regulated so that no one – including the most highly placed official – is above the law. In the context of transitional justice, the pursuit of justice for victims of human rights violations must be fully supported and depoliticized in a manner that respects the presumption of innocence for the defendants and their rights to a fair trial while maintaining the rights and dignity of the victims and other participants in the judicial process.

# V. TRANSITIONAL JUSTICE – RIGHTS-BASED APPROACH

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For transitional justice to be effective, it must be “rights-based,” focusing on the rights and needs of victims and society as a whole. The guidance and recommendations adopt this (approach) as a compelling conceptual framework established in good-governance laws and practice. With this approach, the NTJS is anchored in a system of “rights” and corresponding legal and political obligations established by international law, including civil, cultural, economic, political and social rights and the right to development. Therefore, the NTJS must seek to incorporate a conceptual framework based on fundamental human rights principles (universality, indivisibility, equality and non-discrimination, participation, accountability) capable of guiding the “rights-holders” to claim their rights and the “duty-bearers” to meet their obligations.

The Joinet/Orentlicher Principles, or “principles against impunity,”<sup>12</sup> provide “rights-based” conceptual guidance for drafting the strategy to encompass: the right to know, the right to justice, the right to reparations and the right to guarantees of non-recurrence.

- Right to know – involves the rights of victims and their families to learn the truth about what happened to them or their loved ones. Furthermore, the right is based on the inalienable right of society to learn the circumstances that led to violations to prevent their recurrence in the future. In addition, it involves an obligation of the state to undertake measures, such as securing archives and other evidence, preserving collective memory from extinction and safeguarding against historical revisionism and denial.
- Right to justice – implies victims have the right to receive a fair and effective remedy, including the expectation that the person or persons responsible will be held accountable by judicial means and that reparations will be forthcoming. The right to justice also obligates states to investigate violations and prosecute persons responsible for human rights violations and to take punitive actions if guilt is established. National courts have the primary responsibility to exercise jurisdiction; however, international or hybrid criminal tribunals may exercise concurrent jurisdiction, as with the Kosovo Specialist Chambers & Specialist Prosecutor’s Office.
- Right to reparations – entails measures implemented by the state for victims, their families and communities to be restored to a state that existed before the conflict or violations. The rights may be satisfied in the form of compensation, for physical or mental injury and for lost opportunities concerning employment or education, or in the form of rehabilitation, i.e., medical care, restoration of dignity for crimes committed against moral and sexual integrity, and through recognition of responsibility in the form of public apologies and measures to build lasting peace and reconciliation.
- Right to guarantees of non-recurrence – The state must ensure good governance and the rule of law to guarantee non-recurrence. In a post-conflict setting, this entails the vetting and removal of political and other officials from offices – in compliance with due legal process and the principle of non-discrimination – who are directly implicated in human rights violations or may have, by omission or dereliction of duty, failed to protect or punish persons responsible for human rights violations.

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<sup>12</sup> In Annex

In addition, this activity foresees the reform of laws and state institutions following the norms of good governance and the rule of law and the full cooperation of governance structures with commissions of inquiry, national and hybrid judicial bodies and security sector institutions.

## VI. TRANSITIONAL JUSTICE – PROCESSES AND MECHANISMS

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The following processes and mechanisms represent the core mechanisms and activities associated with transitional justice.

### FACT-FINDING AND TRUTH-SEEKING MECHANISMS

Truth-seeking processes are based on the “right to truth,” prescribing that victims and communities have the right to know the fate of their family members or community. This includes the right to be informed of the circumstances of the violations and the identity of those most responsible. This right is closely associated with but distinct from the obligation of states to investigate and prosecute persons responsible for criminal acts. The International Center for Transitional Justice (ICTJ) states that: “Any person who has suffered atrocities has the unalienable right to know who is responsible; any family whose members have disappeared has the right to learn the fate and their whereabouts; every society where these crimes have taken place have the right to learn their history without lies or denial.”<sup>13</sup>

The right to truth is an inalienable right linked to the state’s duty to protect human rights, conduct effective investigations and guarantee effective remedies and reparations. It is enshrined in international instruments such as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>14</sup> From a transitional justice perspective, truth-seeking mechanisms represent a victim-centered, non-judicial approach designed to encourage societies to develop and agree upon a shared history or collective memory of a period of conflict or violence. This process also provides victims with a platform to be heard in official or unofficial forums that contribute to societal and individual healing.

Truth-seeking bodies such as truth commissions, commissions of inquiry and fact-finding and mapping inquiries help to establish what happened during a specific period of violence or conflict by conducting public hearings, taking statements from victims, witnesses and experts and carrying out independent research to provide publicly available facts and recommendations to address issues discovered in process and provide redress. In addition, truth-seeking via commissions or other bodies can provide a much-needed safe space for victims and survivors to speak out, report and make their perspectives on the conflict heard. Truth commissions often entail documentation and investigation of specific cases and situations in past conflicts to identify the critical drivers of events and the actions/practices that fueled crimes and the violation of human rights.

It is essential to recognize diverse and conflicting truths in the context of truth-seeking. Criminal

<sup>13</sup> ICTJ, Right to the Truth (March 14, 2012). Retrieved from: <https://www.ictj.org/>

<sup>14</sup>International Center for Transitional Justice, 14 March 2012, Right to the Truth&quot;. Marrë nga: <https://www.ictj.org/>

Criminal prosecutions, for instance, are focused on “truth” insofar as it relates to the criminal responsibility of the accused and the scope and nature of the evidence or circumstantial elements presented as arguments in judicial proceedings. Arguments and facts presented in a court of law often oppose one another and do not necessarily gather or present the maximum amount of information or historical account of a particular event.

States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know.

**UNITED NATIONS 2004**

The United Nations’ principles on impunity<sup>15</sup> inform the strategic application of transitional justice regarding a state’s obligation to combat impunity and the right to truth in which “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.”

Memory work or memorialization is cross-cutting, featuring in both truth-seeking and reparations mechanisms (or symbolic reparations) as it refers to a range of processes and forms of collective remembrance. Memorials, museums, monuments and other places of memory represent essential sites where the past can be confronted. Throughout the world, prior sites of atrocities, torture, genocide, mass graves and other similar locations have been turned into public memorials, drawing innovatively on the memorialization of the Holocaust.<sup>16</sup> In addition, these memory sites often aim to provide for education/learning and redress/reflection. In terms of education and social learning, the experience aims to create empathy for the victims as fellow human beings and provide information about the brutality of harm inflicted upon them.

Museums and documentation centers also play a role in fulfilling truth-seeking functions. Memorials and museums present an authoritative narrative about the past and serve as a repository of information and primary resources about a particular historical period. Like many transitional justice measures, memorials, museums and documentation centers can promote social healing in many other ways by honoring the lives of victims, recognizing the experiences of survivors of conflict and repairing past suffering.<sup>17</sup>

The “duty to preserve memory” – Knowledge of the history of the conflict is part of a people’s heritage and, as such, must be ensured by appropriate measures in fulfillment of the state’s duty to preserve archives and other evidence and information concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations.<sup>18</sup> Such measures must aim to preserve the collective memory from extinction and, in particular, safeguard documents and the testimonies of witnesses and victims against revisionist and denialist arguments. Documentary materials are not just paper or digital records generated by official or judicial bodies but also include audio and video recordings, media reports, the written history and personal effects of witnesses and victims, and evidence of crimes and acts of salvation post-conflict recovery.

Documenting human rights violations is vital to building peaceful and democratic societies and reconciliation. Documents can constitute legal evidence to support victims and their right to truth, justice and reparations, and they can form a basis for reconciliation and the means for determining the criminal responsibility of perpetrators of abuses.

<sup>15</sup> UN Commission on Human Rights, Updated Set of principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (February 8, 2005), Retrieved from: <http://derechos.org/nizkor/impu/principles.html> (See Annex I)

<sup>16</sup>Bickford, 2014

<sup>17</sup>United States Holocaust Memorial Museum, Transitional Justice Tools: Truth Seeking: <https://www.ushmm.org/genocide-prevention/simon-skjodt-center/work/ferencz-international-justice-initiative/transitional-justice/truth-seeking>

<sup>18</sup> International Council on Archives – Human Rights Working Group, Basic Principles on the Role of Archivists and Records Managers in Support of Human Rights: A Working Document of the International Council on Archives (September 2016).



Moreover, documentation is an integral component of human rights engagement and activism. It helps to foster responsibility for human rights enforcement and greater accountability for abuses while deterring future atrocities. In this regard, the establishment and maintenance of a “documentation center” mandated to collect and preserve Kosovo’s memory must follow the basic rule of “do no harm.” Therefore, it is imperative that “documentation initiatives” are established as bodies that are independent from state or political institutions, to maintain complete integrity and provide public access.

In 2008, a consortium of civil society organizations from the countries in the region established a regional truth commission known as RECOM (the regional commission for the establishment of facts

about war crimes and other serious violations of human rights committed in the former Yugoslavia) to consolidate the facts about the war crimes committed, the number of people killed and those who went missing or were held in prisons or detention camps during the region’s conflicts. In addition, RECOM launched several activities to include transitional justice in the EU integration process.

## THE DUTY TO PRESERVE MEMORY

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

UN COMMISSION ON HUMAN RIGHTS

## THE KOSOVO TRUTH AND RECONCILIATION COMMISSION

In 2017, then Kosovo President Hashim Thaçi initiated the establishment of a Truth and Reconciliation Commission. In 2018, a preparatory team was set up to prepare the legislation to establish the commission. However, by November 2020, Thaçi had resigned, and with that, the work on the commission also stagnated. Nevertheless, during the time the preparatory team operated, they drafted a comprehensive Draft Normative Act on the Truth and Reconciliation Commission,<sup>19</sup> which stated the commission would “document and establish facts on the human rights violations which occurred during the recent past, returning the dignity to the victims and survivors, to contribute to the social transformation to overcome the consequences of violations and abuses suffered and to prevent their recurrence.” The Draft Normative Act also stated that the commission would have “full acting independence, without any political or other influence,” and that it should “act freely, without direct influence or control of any local or international institution or mechanism, regardless of the support they may offer.”

The NSTJ should have in mind the possibility of establishing such a Truth and Reconciliation Commission and should take advantage of the work already done by the preparatory team, especially the draft normative act, which offers a good ground for establishing such a commission.

RECOM – The regional coalition for truth and reconciliation. The RECOM process was initiated in 2006 as the first and most successful regional coalition. Established as a truth-seeking body, it

<sup>19</sup> Preparatory Team for the Establishment of the Truth and Reconciliation Commission, Draft Normative Act No. Xx/2020 on the Truth and Reconciliation Commission: [https://president-ksgov.net/repository/docs/2020\\_01\\_28\\_103348\\_Normative\\_Act\\_eng\\_for\\_web\\_jan2020.pdf](https://president-ksgov.net/repository/docs/2020_01_28_103348_Normative_Act_eng_for_web_jan2020.pdf) ).

comprised 6,700 civil society representatives, including human rights organizations, victims, families of victims and the missing, refugees, veterans/defenders, former detainees, lawyers, artists, writers, journalists and other distinguished individuals from throughout former Yugoslavia. One hundred twenty-eight local and regional summits and eight international forums on transitional justice were held. The opinions presented were incorporated in a proposed RECOM Statute, which was adopted on March 26, 2011, by the Coalition for RECOM's Assembly.<sup>20</sup> In addition, over half a million citizens from the former Yugoslav signed petitions calling for a regional truth commission. Unfortunately, the process has since stalled due to a lack of endorsement by political elites. However, the RECOM initiative stands ready to resume activities and reinstate its mandate at participating states' requests.

## CHALLENGES AND CONSIDERATIONS

Right to know – encompasses the right to learn the truth about the fate of missing persons. In 2019, the United Nations' Committee on Enforced Disappearances issued the Guiding Principles for the Search for Disappeared Persons and Security Council Resolution 2474,<sup>21</sup> the first of its kind addressing missing persons. In the same year, the International Commission on Missing Persons (ICMP) presented its Paris Principles<sup>22</sup>, which “reflect and advance an emerging global consensus” on how to address the issue of missing persons. The International Committee of the Red Cross (ICRC) similarly draws attention to the families of the missing in its 2020 publication, *Accompanying the Families of Missing Persons: A Practical Handbook*.<sup>23</sup>

In this regard, the activities of the Humanitarian Law Center (HLC)-Serbia and HLC-Kosovo to research and document human losses, war crimes and human rights violations is an internationally renowned process represent an excellent example of a grass-roots initiative to support the “right to know.” HLC's ongoing “Kosovo Memory Book” project has recorded and established undisputable facts, listing the names of 13,500 victims and the circumstances related to their deaths.<sup>24</sup>

Therefore, the “right to know” empowers individuals and communities by allowing them to participate in decisions and processes that affect them while also holding governments and others accountable.<sup>25</sup> The NTJS should institutionalize procedures for citizens to access information related to the fate of missing persons and information on the activities of state authorities to obtain information from neighboring states. In this regard, all processes and timelines to address missing persons must be without statutory restrictions or limitations in terms of timeframes or the interpretation of laws or actions that may be perceived as discriminatory or limiting citizens' rights. Furthermore, authorities need to acknowledge the human loss regardless of ethnicity or circumstance of demise.

## MEMORIALS AND COMMEMORATIONS<sup>26</sup>

The memorialization process is directly related to the role of the state to ensure satisfaction for human rights violations and to protect historical remembrance, honor victims, prevent denial, revisionism and negation of the past, and prevent human rights violations from recurring.

<sup>20</sup>International Council on Archives – Human Rights Working Group, *Basic Principles on the Role of Archivists and Records Managers in Support of Human Rights: A Working Document of the International Council on Archives* (September 2016): [https://www.ica.org/sites/default/files/ICA%20HRWG%20Basic%20Principles\\_endorsed%20by%20PCOM\\_2016\\_Sept\\_English.pdf](https://www.ica.org/sites/default/files/ICA%20HRWG%20Basic%20Principles_endorsed%20by%20PCOM_2016_Sept_English.pdf)

<sup>21</sup> UN Security Council, Resolution 2474 on Protection of Civilians in Armed Conflict – Missing Persons in Armed Conflict (June 11, 2019): <http://unscr.com/en/resolutions/2474>

<sup>22</sup>ICMP, *Paris Principles* (May 13, 2019): ICMP The Paris Principles

<sup>23</sup> ICRC, *Accompanying the Families of Missing Persons: A Practical Handbook* (June 2020): <http://shop.icrc.org/accompanying-the-families-of-missing-persons-a-practical-handbook-pdf-en>

<sup>24</sup> As of May 2022.

<sup>25</sup> UNESCO, *Freedom of Information: The Right to Know*, p. 16 (2011): <https://uncaccoalition.org/resources/access-to-info/freedom-of-information-the-right-to-know-unesco.pdf>

<sup>26</sup> In transitional justice theory, memorials are often grouped under symbolic and collective reparations. However, the process of preserving historical memory is far more complex than its grouping into any of the transitional justice mechanisms precisely because memorialization contributes to other processes as well, such as truth-telling, protection of democratic values and respect for human rights, building confidence in government institutions, keeping peace, building new and restoring old social relations, reconciliation, etc.

Generally, memorials provoke emotional and cathartic reactions and provide information about a particular historical event. However, transitional justice also provides the opportunity for memorials to have a pedagogical function through education and widening social dialogue on the events or representations of the memorial or commemoration and the link to contemporary social and political developments.

In Kosovo, there is a tendency to establish monuments in memory of events and individuals related to the armed conflict. However, most are inadequately coordinated activities under ineffective legislation and public engagement. There is also limited understanding in Kosovo on the issue of memorials in the context of their potential adverse effects and polarization of affected populations. For example, most memorials are static physical representations of events, with an emphasized emotional function and often with sacral characteristics, while the pedagogical function of memorials remains imperceptible. In this regard, memorials continue to generate controversial debates in Kosovo society.

Fostering a bottom-up approach, the Coalition for RECOM has retooled to form a regional network of civil society actors to address the needs of local communities for truth-seeking and the documentation of facts related to the conflicts in the former Yugoslavia. The “Kosovo Memory Book” is one such initiative that is a monument to the victims of war crimes (civilians, the wounded and prisoners of war), persons killed in battle (soldiers) and those who were forcibly disappeared in Kosovo in the period January 1, 1998 – December 31, 2000 during the armed conflict between the Serbian police and the Yugoslav Army on one side and the Kosovo Liberation Army on the other. It urges people to remember the victims by providing indisputable facts as the most reliable witness to Kosovo’s past, replacing casualty figures with the names of those killed or missing.

Risks – It is essential to mitigate risks associated with truth-seeking efforts as they may reignite conflict by preventing people from moving forward from the past. Others have noted that autocratic regimes can co-opt truth-seeking efforts to fabricate history or establish self-serving versions of history. Like all transitional justice measures, truth-seeking measures must be designed with safeguards to ensure independence, legitimacy, inclusivity and credibility. Consulting and including diverse victim groups and affected communities throughout the truth-seeking process is therefore critical.

#### STRATEGIC OBJECTIVES:

- 1** To strengthen existing and support new civil society fact-finding and truth-telling initiatives by creating a platform for mutual dialogue and interaction at the national and regional levels to ensure their effective functioning and quality contribution to the process. This includes recognizing and assimilating “adjudicated facts” before international, regional, and national judicial bodies.
- 2** To establish institutional fact-finding and truth-telling mechanisms such as a “truth commission” to investigate human rights violations in the 1998-1999 conflict and its aftermath until the end of 2000, complementary to existing judicial and non-judicial mechanisms.
- 3** To establish strict guidelines and standards for memorials and commemorative activities through appropriate legislation and policies.
- 4** To strengthen political and technical capacities and initiatives in the search for missing persons, including a legally binding, harmonized and protected collection of data on all victims of

international human rights and humanitarian law violations.<sup>27</sup>

**5** To ensure the “right to the truth” through unhindered access to information about war crimes cases at the national and international levels, and those before the Kosovo Specialist Chambers.

Kosovo has failed to provide a comprehensive approach to fact-finding and truth-telling. As stated above, international and national judicial institutions have made significant contributions to establishing facts about human rights violations committed during the period 1998-2000. However, these contributions are restricted by the inherent focus of judicial proceedings to establish individual criminal responsibility. In this regard, the courts adjudicate facts focused upon the particular events in the indictment, while the events’ “root causes” (or why the events happened in the first place) remain outside the focus of criminal trials. For all these reasons, the NTJS should consider establishing an institutional, non-judicial mechanism focusing on victims and their needs (unlike judicial processes that focus on accountability) to prevent denial of committed war crimes, negation and historical revisionism.

## JUSTICE MECHANISMS

The right to justice – States are duty-bound to investigate, prosecute, and appropriately punish individuals who are responsible for legal and human rights violations. Criminal trials can support the rule of law, demonstrate that impunity for violation of human rights will not be tolerated and deter future injury by punishing those most responsible. In addition, the evidence presented and adjudicated in a court proceeding can help to establish an historical record of atrocities and to combat denials by victimizers and their political allies that such atrocities ever occurred. Finally, criminal proceedings also achieve a victim’s right to justice and help to restore dignity to victims and their families by publicly acknowledging the wrongs done to them.

The right to justice implies that victims can assert their rights and receive a fair and effective remedy, including the expectation that the person or persons responsible will be held accountable by judicial means and that reparation will be forthcoming.<sup>28</sup> The right to justice is the obligation on the part of the state toward the victims of crime to investigate violations, arrest and prosecute the perpetrators and, if guilt is established, issue sanctions for the crimes.

National courts have a primary responsibility to exercise jurisdiction, and international or hybrid criminal tribunals may exercise concurrent jurisdiction according to the terms of their statutes and agreement with the state with primary jurisdiction. However, despite their importance, criminal prosecutions alone are not sufficient to fully redress atrocities and restore the rule of law. Therefore, to form a holistic transitional justice strategy, criminal trials should complement other transitional justice mechanisms, such as reparations, truth-seeking and institutional reforms.

Most efforts to deal with the wartime past in Kosovo have focused on war crime prosecution without investing much in other transitional justice mechanisms to support society to move towards a more peaceful future. Previous international courts, and domestic courts in Kosovo and Serbia, only managed to prosecute a relatively small number of serious crimes. As a result, they did not live up to the

The Appeals Chamber held that adjudicated facts are “facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding chose to introduce, in the particular context of that proceeding.”

ICTY

<sup>27</sup> CSOs such as HLC-Kosovo should advise this process.

<sup>28</sup>Sisson, J., “A Conceptual Framework for Dealing with the Past,” *Politorbis*, Nr. 50 / 3 (2010), Swiss Federal Department of Foreign Affairs. See also the preamble of the Basic Principles and Guidelines on the Right to a Remedy and Reparation, cited above.

expectations of many victims and did not do much to restore trust in justice processes amongst citizens. Worse, in Kosovo and Serbia, acquitted suspects or convicted perpetrators are regarded as heroes, and many managed to stay in or return to positions of political power. On both sides, the political nationalist discourse is framed dramatically by this wartime past which defines exclusive victim and perpetrator narratives.

## CHALLENGES AND CONSIDERATIONS

Judicial processes must be independent and impartial regardless of political affiliation, position of authority or the ethnicity of the accused. In addition, the proceeding must include procedural safeguards for the integrity of the process, ensuring the rights of the accused to a fair trial and access to justice for victims. Five guiding considerations should be applied to all prosecutorial initiatives (whether domestic or with international assistance): The NTJS should seek to incorporate the following principles:

- Enhance victim/witness support and protection – Institute zero-tolerance and adequate penalties for intimidation or harm to victims, witnesses and other participants in judicial processes. Threats to victims and witnesses are exceptionally high in fragile transitional environments. Therefore, building institutional capacity to protect witnesses and victims in an adequate gender- and age-sensitive manner is critical to ensuring the independence and integrity of the judicial process and to safeguarding the rights of victims and other participants. Strengthening support to victims and witnesses in war crimes cases includes strengthening the capacities of social welfare centers, centers for mental health and CSOs. Therefore, the NTJS should add additional focus on rehabilitation as a form of reparations. Its strategic objective is to create a sustainable referral system to provide continuous and effective psychosocial services to victims and other persons in need in judicial processes. This system implies the networking of institutions that provide psychosocial services, such as university clinics, psychiatric wards of hospitals, centers for mental health, social welfare centers and CSOs in systems where referrals from law enforcement, judicial and other institutions or groups may request support services for persons in need of specialized care.
- Ensure independence and impartiality – Judicial processes must be independent and impartial regardless of political affiliation, the position of authority, or the ethnicity of the accused. The proceeding must include procedural safeguards for the integrity of the process, ensuring the rights to a fair trial and access to justice for victims. The adjudication of atrocity crimes can be particularly challenging in terms of collecting evidence, availability of the accused, costs and duration of the proceedings.
- Enhance capacities and capabilities – Investigating and prosecuting atrocity crimes is complex, requiring investigators, judges, prosecutors and defense lawyers with specialized knowledge and skills.
- Manage expectations and linking transitional justice processes – as criminal proceedings will process only a limited number of the crimes committed in Kosovo.<sup>29</sup> Therefore, judicial authorities and state actors must manage the expectations of victims, witnesses and the public through awareness-raising and outreach activities to ensure that the judicial processes and their outcomes are fully understood. In this regard, information related to the adjudication of war

<sup>29</sup> International Council on Archives – Human Rights Working Group. Basic Principles on the Role of Archivists and Records Managers in Support of Human Rights: A Working Document of the International Council on Archives (September 2016). [https://www.ica.org/sites/default/files/ICA%20HRWG%20Basic%20Principles\\_endorsed%20by%20PCOM\\_2016\\_Sept\\_English.pdf](https://www.ica.org/sites/default/files/ICA%20HRWG%20Basic%20Principles_endorsed%20by%20PCOM_2016_Sept_English.pdf)



cases, including transcripts and judicial findings, must be publicly available.

- Enhance regional cooperation – War crimes trials before national courts require a high level of inter-state cooperation due to the cross-border nature of the conflicts. Victims, witnesses, perpetrators and evidence are not available in a single national jurisdiction. Additionally, all Yugoslavia successor states have constitutional bans on the extradition of their nationals to face trials in other countries. In this regard, the adjudication of war crimes is impossible without effective regional cooperation.<sup>30</sup>
- Eliminate “trials in absentia” – A 2019 amendment to Kosovo’s Criminal Procedure Code allows trials in absentia in cases involving offenses against international humanitarian law and international criminal law committed between January 1998 and June 1999. However, Trials in absentia remain a matter of controversy in Kosovo due to alleged war crimes and the challenging relationship between Serbian and Kosovar authorities, hampering cooperation in general and criminal law cases. Notwithstanding supporting legislation and the impunity gap that exists in the processing of war crimes, civil society has argued against conducting trials in absentia in Kosovo, favoring closer cooperation with regional prosecution services in Serbia, Croatia and Bosnia and Herzegovina, and establishing a cooperation mechanism for cases to be processed in jurisdictions where the accused is resident. Opponents to trials in absentia further argue that they would further politicize judicial proceedings and cast doubt upon the credibility of the process itself. Trials in absentia, therefore, compromise the ability of the accused to exercise their right to a fair trial and the rights of the victims to justice and redress.
- Ensure the monitoring of judicial proceedings – and unhindered access to court records and documentation. The overarching goal of war crime trial monitoring is to strengthen the rule of law in war crimes proceedings by increasing efficiency, improving the legal framework for war crimes proceedings and improving the victim’s status in the proceeding. Therefore, it is imperative that the monitoring of judicial proceedings is viewed as an integral and supportive element in applying justice.

## REPARATIONS

Right to reparations – Victims have a right to a remedy and reparation. Established in international law and human rights conventions, this right refers to measures to redress human rights violations by providing material and symbolic benefits to victims, their families and affected communities. Reparation must be adequate, effective, prompt and proportional to the gravity of the violations and the harm suffered. State actors must ensure that individuals have accessible, effective and enforceable remedies and reparations as general guidance.

UN High Commissioner for Human Rights when introducing a debate on the Basic Principles on the Right to Remedy and Reparation emphasized the “catalytic power that genuine remedy and reparations can have on the future life of victims, families and entire societies,” reinforcing that reparations must seek to restore victims to their pre-conflict, pre-violation condition. The ICTJ further established that reparations “acknowledge the legal obligation of a state, or individual(s) or group, to repair the consequences of violations – either because it directly committed them or it failed to prevent them. They also express to victims and society more generally that the state is

<sup>30</sup> Given the importance of the fight against impunity for war crimes, regional cooperation is among the key commitments that Croatia, Serbia, Bosnia and Herzegovina and Montenegro undertook as part of their European Union accession processes.

committed to addressing the root causes of past violations and ensuring they do not happen again. With their material and symbolic benefits, reparations are important to victims because they are often seen as the most direct and meaningful way of receiving justice. Yet, they are often the last-implemented and least-funded measure of transitional justice.”<sup>31</sup>

A guiding principle is for the state to provide for a “living standard” equal to or comparable to those in society who did not suffer from the conflict. For instance, the provision of a secure income, housing, health care and education represent a threshold standard of care. In addition, it is important to complement financial compensation with other types of reparations such as the restoration of civil and political rights, reversing unfair criminal convictions, wrongful dismissals from employment or education, physical rehabilitation, and the restatement of property, health care and reputation following defamation. Finally, these measures are provided to victims’ family members, often children, in recognition that providing them with a better future is crucial to overcoming the enduring consequences of the violations and sending an important message affirming that victims are valued members of the community.

In these situations, reparations should be designed and implemented in ways that can transform previously unequal and unjust relations – linked with other transitional justice tools – and reparations can help to reveal the truth about the violations themselves and provide guarantees that they will not be repeated. Symbolic reparations<sup>32</sup> can be as beneficial, healing and meaningful as material reparations. Symbolic reparations may include official apologies, renaming public spaces, establishing days of commemoration and the creation of museums and public spaces such as parks dedicated to the memory of victims, among others. Naomi Roht-Arriaza<sup>33</sup> refers to these as moral reparations that include assistance in public reburials and appropriate rituals, prioritization of the search for human remains and converting repressive sites into sites of remembrance and tributes to victims.

## CHALLENGES AND CONSIDERATIONS

Reparations programs – States are obliged to provide material and non-material reparations that have individual and societal effects. They contribute to restoring victims’ dignity, acknowledging and accepting the harm suffered, overcoming the effects of human rights violations and improving their socio-economic status to achieve their social reintegration.

There are five basic forms of reparations programs<sup>34</sup> : 1) Compensation is implemented to cover any economically assessable physical or non-physical damage – awarded through administrative and judicial decisions; 2) Restitution is different activities to restore the rights of citizens. The overarching aim is to restore the victim to the original situation in which they were before human rights violations; 3) Rehabilitation includes medical and psychological care and access to justice and legal services; 4) Satisfaction includes symbolic forms, such as apologies, creating monuments and memorials and establishing facts about the past. 5) Guarantees of non-repetition – the reform of institutions, primarily of the judicial and law enforcement institutions, and a new legislative framework to prevent violations from recurring.

<sup>31</sup> ICTJ: <https://www.ictj.org/news/lebanese-judge-goes-after-top-officials-over-port-blast>

<sup>32</sup> Hamber, B. and Palmary, I., *Gender, Memorialization, and Symbolic Reparations* (2009): Gender, Memorialization, and Symbolic Reparations. – Ulster University

<sup>33</sup>Roht-Arriaza, N., “Reparations Decisions and Dilemmas,” *Hastings International and Comparative Law Review*, 27, no. 2 (2004), Google Scholar.

<sup>34</sup> Under international humanitarian law, a victim of gross violations of human rights law shall have equal access to an effective judicial remedy and reparations. Other remedies available to the victim include access to administrative and other bodies, mechanisms, modalities and proceedings conducted under domestic legislation.

**STRATEGIC OBJECTIVES:**

- 1** Support victims' rights to reparations, including acknowledgments of accountability, the time frame for eligibility, a clear definition and categorization of entitlements and types of reparations, the timeline for the administration of reparations, the sources and allocation of funding. The legislation should also indicate the institutions responsible for reparation and bodies responsible for providing oversight.
- 2** Ensure that reparation programs include different forms beyond compensation, such as measures of satisfaction, restitution and rehabilitation, and guarantees of non-recurrence – to the extent that measures are designed and capacitated to restore victims to their original situation before the violations occurred; that is the restoration of freedoms, employment, property and moral damages as defined in the guidance document.
- 3** Ensure reparations are implemented equitably and inclusively to all beneficiaries and that they are linked to longer-term development processes. To this end, it is essential to create a unified and categorized database of all beneficiaries, regardless of their rights or entitlements or type of compensation, and make this data accessible for public scrutiny under mandated data protection laws and procedures.
- 4** Ensure the acknowledgment of violations, support for truth-seeking, search for disappeared persons, recovery/reburial of human remains, issuing of public apologies and establishing of memorials and commemorations.
- 5** Raise awareness and disseminate information, through appropriate legal, diplomatic and consular facilities, and public and private mechanisms, about all available reparation programs and the rights of individuals and communities to those rights. Take appropriate measures to minimize administrative procedures and protect against unlawful interference with privacy and provide legal and other services to victims seeking access to reparations.

**RECONCILIATION**

In transitional justice, reconciliation is understood as a process and a goal involving mutual recognition of a common past and the transformation of harmful relationships and behavior to promote a shared future towards sustainable peace. Reconciliation, therefore, involves full recognition of past injustices proposed to establish a basis for rebuilding relationships between former enemies characterized by truth, mutual recognition and responsibility, "bringing together individuals, groups and societies burdened by past or present conflicts and negative representations and perceptions of 'the other.'" Truth and justice are needed to rebuild trust at both the interpersonal and societal levels. Reconciliation, therefore, does not mean forgetting or forsaking the past, nor does it necessitate forgiveness or clemency. Instead, at the individual and community level, reconciliation means learning from the past and changing attitudes and behaviors to ensure mutual respect and resilient social cohesion.

Reconciliation is one of the primary goals of transitional justice as it views reconciliation as a process that enables the restoration of social relations on the basis of fundamental values such as human dignity, respect, the right to life and the right to physical and psychological integrity.

## INSTITUTIONAL REFORMS

Institutional reform is the process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law and are accountable to their constituents.<sup>35</sup> Public institutions – such as the police, military and judiciary – are often instruments of repression and systemic violations of human rights in societies experiencing conflict or authoritarianism. When transitions toward peace and democratic governance occur, reform of such institutions is vital and traditionally considered central to transitional justice.

Over the years, however, experience has shown that a narrow focus on the institutions directly involved in physical abuse is not sufficient. Reforming entire branches of government and establishing appropriate oversight mechanisms to ensure their professional independence is frequently needed. This requires revising a large part of the applicable legal framework, starting with the constitutional charter. Furthermore, reforming justice and security institutions must be complemented with changes to political, economic, social and cultural institutions if a society can fully confront all the violations, including economic and social ones.<sup>36</sup>

## STRATEGIC OBJECTIVES

The NTJS should consider the following to enhance the professionalism and credibility of public institutions to respect human rights standards:

- 1** Establish a legal framework for the continuous screening and vetting of employees in public institutions and all levels of government, and ensure that the public institutions act in compliance with the principles of professionalism, transparency and full accountability to citizens.
- 2** Establish processes and capacities to raise awareness and knowledge among citizens and institutions about the importance of the transitional justice process and its potential impact on society and future generations.
- 3** Establish strict guidelines to combat historical revisionism and denial of war crimes, including the institution of substantive penalties for violations.

# VII. COMPLEMENTARITY - SUPPORTING ELEMENTS

The following are “supporting elements” to complement transitional justice processes by linking complementary processes and mechanisms.

- Access to justice – The provision of access to justice is a shared aim of transitional justice and is essential for achieving long-term development and peacebuilding objectives. In this regard, issues of gender inclusion and unique obstacles women face in accessing justice require special attention.

<sup>35</sup> ICTJ, Institutional Reform: <https://www.ictj.org/institutional-reform#:~:text=As%20a%20transitional%20justice%20process,to%20be%20reparative%20in%20nature>.

<sup>36</sup> *ibid.*

- Legal aid and legal awareness – Legal aid for victims has many forms, including legal counseling, strategic litigation, the filing of complaints and legal representation. Awareness-raising of fundamental rights and the legal remedies available to victims are needed to increase violation reporting and to provide legal aid to persons in need. Victims and their families belonging to the most disadvantaged parts of society face continued marginalization due to unaddressed systemic issues, such as reparations, economic empowerment and the fundamental rights to housing, education and employment.
- Communication and outreach – are essential for raising awareness and understanding of the aims and functioning of transitional justice processes and mechanisms. Careful communication and outreach strategies, including devising targeted messages to all relevant groups, will enhance public support for transitional justice efforts and state institutions.
- Youth focus – The conflict in Kosovo particularly impacts youth. Although the vast majority were not yet born, family histories and conflicting memories have left permanent traces, and youth are exposed to hatred toward other ethnic groups, nationalism and segregation. In addition, youth in Kosovo have limited opportunities to meet peers from other parts of the region or ethnic groups, resulting in increased xenophobic and ethnocentric views. Divisive narratives and conflicting histories of violent conflict/war, intergenerational trauma, political propaganda and manipulation and an absence of independent news media all impact the future generations in Kosovo. The NTJS should prioritize youth activities and peer-to-peer exchanges in the Western Balkans region to reverse this trend.
- Education – The social divide and ethnocentric perceptions of history are deeply aggravated by the segregation in the education systems in Kosovo, where the Albanian community is taught a curriculum managed by the Kosovo state and the Serb community is taught the Serbian curriculum in schools managed by the Serbian state. This means that children from the two communities have limited opportunities to have contact with each other and are taught fundamentally different and opposing views of history. Furthermore, neither community within their school system has the opportunity to learn the other's language, leaving a whole new generation without a common language except for English, French or German. Transitional justice should be introduced into the education curricula for primary and secondary schools. This could help foster a culture of dialogue, democratic values and respect for others.
- Combat stigmatization – Kosovo society is not sufficiently sensitized with respect to traumatized persons, particularly victims of conflict-related sexual violence leading to social exclusion. Out of fear of being stigmatized and social and family exclusion, traumatized persons and their families often refuse to face the problem of traumatization and hide it from society to preserve their social status. These circumstances are one of the critical limiting factors preventing successful psychosocial care for traumatized persons, their social reintegration and the spreading of knowledge about trauma. Stigmatization is extreme among victims of sexual abuse and rape (both women and men), primarily due to cultural reasons and family relationships.
- Monitoring – The NTJS must include the formation of an “Implementation Monitoring Body” as a permanent and independent body to monitor the development and implementation of the strategy and advise the public. In addition, as the process of drafting this strategy already



involves several CSOs and civil activists, A consortium of CSOs and activists should be mandated by the NTJS to provide periodic and special advisory reports to inform the drafting and implementation of the final strategy.

## VIII. CONCLUSION AND FINAL RECOMMENDATIONS

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Transitional justice – with its interconnected mechanisms of truth, justice, reparations and guarantees of non-recurrence – makes an essential contribution to navigating complex transitions marked by competing interests and societal and individual grievances, and where divisive narratives risk further polarization of society and political instrumentalization.

Transitional justice processes must be domestically owned and focused on the needs of victims to connect, empower and transform through dialogue and confrontation of the past. Truth-seeking initiatives can provide a platform for identifying commonalities in experience, acknowledging multiple narratives and establishing platforms for redress and reconciliation. Inclusive transitional justice processes that are participatory and seek broad societal ownership can be profoundly empowering for victims, particularly marginalized groups, giving them voice and agency to shape their future as rights-holders. Finally, through reparations and guarantees of non-recurrence, transitional justice can transform societies and set them on a new path for the future.<sup>37</sup>

The following elements and activities will inform the process and should serve as guiding principles for the drafting and implementation of a National Transitional Justice Strategy for Kosovo:

- 1** Review and incorporate a “full” mapping of transitional justice initiatives, lessons learned from those initiatives, and associated comments and recommendations.
- 2** Incorporate contemporary research, adopt best practices, and analyze and list internationally recognized norms and standards.
- 3** Identify leadership capacity for the drafting, promotion and effective implementation of the NTJS.
- 4** Propose the establishment of a truth commission or similar truth-seeking body as an integral part of the NTJS.
- 5** Incorporate lessons learned from the earlier Inter-Ministerial Working Group on Dealing with the Past and Reconciliation, including recommendations regarding procedural and substantive deficiencies in planning and design, leadership and management, as well as issues with the composition of the working group, lack of dedicated financial and human resources, irregularity of meetings, lack of objective outreach and communication, and lack of parliamentary oversight.<sup>38</sup>

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<sup>37</sup>OHCHR, Thematic Paper: Peacebuilding, Sustaining Peace and Transitional Justice: [https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/4\\_ohchr\\_thematic\\_paper\\_on\\_transitional\\_justice.pdf](https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/4_ohchr_thematic_paper_on_transitional_justice.pdf)

<sup>38</sup>Impunity Watch, Center for Peace and Tolerance, Integra and PAX (Nora Ahmetaj and Thomas Unger). Kosovo’s Framework for Dealing With the Past at a Turning Point: Civil Society Review of Progress Toward a National Strategy on Transitional Justice (April 2017): <http://kosovomemory.org/wp-content/uploads/2018/10/Civil-society-review-of-progress-toward-a-National-Strategy-on-Transitional-Justice.pdf>  
[https://www.impunitywatch.org/\\_files/ugd/f3f989\\_2f65205cacd94ee69b81ad17cc42e9e.pdf](https://www.impunitywatch.org/_files/ugd/f3f989_2f65205cacd94ee69b81ad17cc42e9e.pdf)

6 Incorporate awareness-raising and consensus-building to bolster the acceptance of the NTJS by stakeholders, affected individuals and communities, including educational programs on transitional justice in schools, the media and civil society groups.

7 Include transitional justice in the EU-facilitated Pristina-Belgrade dialogue and discussions with the EU about the Stabilization and Association Agreement (SAA) to support a victim-centered approach to peace consolidation and a negotiated normalization of relations.

## IX. ANNEXES

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### ANNEX I

#### PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

##### I. COMBATING IMPUNITY: GENERAL OBLIGATIONS

Principle 1. General obligations of States to take effective action to combat impunity

##### II. THE RIGHT TO KNOW

###### A. General principles

Principle 2. The inalienable right to the truth

Principle 3. The duty to preserve memory

Principle 4. The victims' right to know

Principle 5. Guarantees to give effect to the right to know

###### B. Commissions of inquiry

Principle 6. The establishment and role of truth commissions

Principle 7. Guarantees of independence, impartiality and competence

Principle 8. Definition of a commission's terms of reference

Principle 9. Guarantees for persons implicated

Principle 10. Guarantees for victims and witnesses testifying on their behalf

Principle 11. Adequate resources for commissions

Principle 12. Advisory functions of the commissions

Principle 13. Publicizing the commission's reports

###### C. Preservation of and access to archives bearing witness to violations

Principle 14. Measures for the preservation of archives

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<sup>39</sup>UN Commission on Human Right, Updated Set of principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (February 8, 2005). Retrieved from: <http://derechos.org/nizkor/impu/principles.html> (See Annex I)

Principle 15. Measures for facilitating access to archives

Principle 16. Cooperation between archive departments and the courts and non-judicial commissions of inquiry

Principle 17. Specific measures relating to archives containing names

Principle 18. Specific measures related to the restoration of or transition to democracy and/or peace

### III. THE RIGHT TO JUSTICE

#### A. General principles

Principle 19. Duties of States with regard to the administration of justice

#### B. Distribution of jurisdiction between national, foreign, international and internationalized courts

Principle 20. Jurisdiction of international and internationalized criminal tribunals

Principle 21. Measures for strengthening the effectiveness of international legal principles concerning universal and international jurisdiction

#### C. Restrictions on rules of law justified by action to combat impunity

Principle 22. Nature of restrictive measures

Principle 23. Restrictions on prescription

Principle 24. Restrictions and other measures relating to amnesty

Principle 25. Restrictions on the right of asylum

Principle 26. Restrictions on extradition/non bis in idem

Principle 27. Restrictions on justifications related to due obedience, superior responsibility, and official status

Principle 28. Restrictions on the effects of legislation on disclosure or repentance

Principle 29. Restrictions on the jurisdiction of military courts

Principle 30. Restrictions on the principle of the irremovability of judges

### IV. THE RIGHT TO REPARATION/GUARANTEES OF NON-RECURRENCE

#### A. The right to reparation

Principle 31. Rights and duties arising out of the obligation to make reparation

Principle 32. Reparation procedures

Principle 33. Publicizing reparation procedures

Principle 34. Scope of the right to reparation

#### B. Guarantees of non-recurrence of violations

Principle 35. General principles

Principle 36. Reform of State institutions

Principle 37. Disbandment of parastatal armed forces/demobilization and social reintegration of children

Principle 38. Reform of laws and institutions contributing to impunity

## ANNEX II

## GLOSSARY

**NON-JUDICIAL MECHANISMS OF TRANSITIONAL JUSTICE**

The transitional justice strategy aims to cover the following non-judicial mechanisms: fact-finding and truth-telling, reparations and memorials, and institutional reforms. These mechanisms are called “non-judicial” because their relevant activities are implemented outside the judicial system through various legal, policy and institutional arrangements. The non-judicial activities do not have the same mandates, nor do they have the same impact as judicial mechanisms. However, the non-judicial activities have, in a broader sense, a moral impact on individuals and society as a whole, while the judicial activities result in final and binding rulings, i.e., imposing sanctions in civil and criminal matters.

**UNOFFICIAL AND OFFICIAL TRANSITIONAL JUSTICE INITIATIVES**

“Unofficial initiatives” implies the activities initiated and implemented by the civil society (at the national and international levels). In contrast, “official initiatives” imply the activities initiated and implemented by the government and other public institutions (at the national and international levels). However, the transitional justice strategy is not supposed to use the terms “unofficial and official initiatives”; instead, “initiatives implemented by the civil society” or “initiatives of the civil society” to refer to the so-called “unofficial initiatives” and “initiatives implemented by government and other public institutions” to refer to the so-called “official initiatives,” focusing solely on national initiatives.

**INSTITUTIONAL NON-JUDICIAL FACT-FINDING AND TRUTH-TELLING MECHANISMS**

The institutional non-judicial fact-finding and truth-telling mechanisms are independent and ad hoc investigative bodies formed to investigate issues defined in their mandates and to inform the public about their findings. They are referred to as “non-judicial” because, unlike courts, they do not reach binding decisions, nor do they impose criminal and civil sanctions. In case of false statements, prevention of efficiency of the institutional non-judicial mechanism, destruction of documents, etc., the institutional non-judicial mechanism cannot punish these acts. There are no parties in the institutional non-judicial mechanism, unlike the judicial mechanism. The judicial mechanism is focused on individual human rights violators in criminal and civil proceedings, while the institutional non-judicial mechanism is focused on victims. However, the line between judicial and non-judicial mechanisms is not as strict. One of the examples is compensation as a form of reparation. Generally, reparations are a non-judicial mechanism. However, compensation can be provided through administrative procedures and the judiciary by filing physical injury and mental anguish damage claims. Also, criminal prosecution and punishment of those bearing responsibility for the war crimes – as a judicial mechanism – can deliver satisfaction to victims as a form of reparation, which is, *sui generis*, a non-judicial form.

**TRUTH-TELLING/TRUTH-SEEKING/FACT-FINDING**

The transitional justice strategy shall use the terms “truth-telling,” “truth-seeking” and “fact-finding.” One of the transitional justice mechanisms covered by this strategy is fact-finding and truth-telling

. In the theory and practice of transitional justice, the terms “truth-telling” and “fact-finding” are usually used interchangeably, although there are subtle differences between them. Specifically, “fact-finding” implies a permanent need for information, i.e., knowledge and inquiry, and facts about the past that need to be examined. The term “truth-telling” refers to the processes through which states and societies are telling stories about the past traumatic periods, such as armed conflicts, and implies the need for different voices to be heard and to share past experiences, which gives those most affected (victims) a feeling of empowerment and recognition. The term “fact-finding” indicates the need for the so-called “forensic truth,” the truth based on evidence, i.e., establishing such truth.

## VETTING

For the transitional justice strategy, vetting is defined as: a non-judicial activity that represents a procedure for background checks on public servants through screening their professional capacity and moral integrity to determine their suitability for public office. Professional capacity includes checking the qualifications required for a job, professional experience and continuous professional development. The institutional non-judicial fact-finding and truth-telling mechanisms are independent and ad hoc investigative bodies formed to investigate issues defined in their mandates and to inform the public about their findings. They are referred to as “non-judicial” because, unlike courts, they do not reach binding decisions, nor do they impose criminal and civil sanctions. In case of false statements, prevention of efficiency of the institutional non-judicial mechanism, destruction of documents, etc., the institutional non-judicial mechanism cannot punish these acts. There are no parties in the institutional non-judicial mechanism, unlike the judicial mechanism. The judicial mechanism is focused on individual human rights violators in criminal and civil proceedings, while the institutional non-judicial mechanism is focused on victims. However, the line between judicial and non-judicial mechanisms is not as strict. One of the examples is compensation as a form of reparation. Generally, reparations are a non-judicial mechanism. However, compensation can be provided through administrative procedures and the judiciary by filing physical injury and mental anguish damage claims. Also, criminal prosecution and punishment of those bearing responsibility for the war crimes – as a judicial mechanism – can deliver satisfaction to victims as a form of reparation, which is, *sui generis*, a non-judicial form.

## REAPPOINTMENT (Vetting)

Reappointment is a special form of vetting that implies substantial reforms within an institution in structure and human resources. In structural terms, a reappointment means abolition, reconstruction, or reorganization of an institution or even the formation of a new one. In terms of human resources, all institutions’ positions are declared vacant, and vacancies are announced publicly to select and recruit the most suitable persons for jobs. All persons who satisfy the job criteria can apply, including those already working in those institutions, if they want to continue to work. The reappointment procedure means that applicants should prove their suitability for the jobs they have applied for, as is the case with regular applications for other jobs. In case of reappointment, the burden of proof rests on applicants.



## LUSTRATION

Lustration is a specific form of vetting. It does not examine individual performance by checking professional capacity and moral integrity; instead, it establishes the link (affiliation), or the absence of a link, between an individual and a political organization, a military or police unit or institution, or a group in general, believed to be responsible for human rights abuse. Based on the finding of whether or not such a link exists, declaring whether or not somebody is suitable for public office. Just like vetting, lustration does not imply any criminal punishment. The consequences of establishing suitability for public administration are similar to those of the vetting process; however, they are based primarily on removal from public office.

## VICTIM

The term “victim” is derived from paragraph 8 of the Resolution 60/147 of the UN Security Council: The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law or serious violations of international humanitarian law. Where appropriate, the terms victims and survivors are interchangeable.

## CIVILIAN VICTIM OF WAR

In a time of war or immediate danger of war, a person sustained injury/injuries that caused bodily or mental harm or severe damage to health or death and was not regarded as a combatant or participated in military activities.

## VICTIM OF TORTURE

A person who suffered bodily harm due to torture, inhumane or degrading treatment, sexual violence, rape, unlawful punishment, unlawful deprivation of liberty at places of confinement, and forced labor during the war or immediate danger of war.

## PLACES OF CONFINEMENT

International documents, such as the Geneva Convention III (about prisoners of war) and the Geneva Convention (IV) (protection of civilians in an armed conflict), do not contain definitions of such notions as a concentration camp, places of confinement, collection centers. However, this notion covers individual and large-scale unlawful acts of confinement or lawful confinement of persons throughout Kosovo during the conflict and at which criminal activities, such as inhumane treatment, torture, and other cruel, inhuman, or humiliating treatment, were conducted.

## POST-TRAUMATIC STRESS DISORDER (PTSD)

Post-traumatic stress disorder is psychological harm caused by a traumatic experience, an event beyond any human experience, and which causes a feeling of shock. PTSD appears as a delayed or prolonged response to a stressful event and can show first signs many years later.

## WAR CRIME

A war crime is a generic term covering a range of criminal offenses punishable under international law, including crimes against humanity and genocide.

## PERPETRATOR

The term “perpetrator” covers the following categories: direct perpetrators of crimes, accomplices (instigators, aiders and abettors, and others). International humanitarian law applies only during an armed conflict, regardless of the character of the conflict (an international or internal conflict).

## SITES OF CONSCIENCE

Sites of conscience are public spaces and monuments to protect memory and interpretation of history by the encouragement of active involvement of citizens in an open, broad dialogue on legacies of the past.

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