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A Fundament for the Transformation of Society and Its Path
to Democracy?”

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1. Introduction

The collapse of the Soviet Union had major repercussions for countries in the Balkans. Yugoslavia, which, after Tito's death in 1980, had been held together under communist rule, came to witness separative tensions within its respective provinces. Slovenia and Croatia declared their independence from Yugoslavia in 1991, followed by the former Yugoslav Republic of Macedonia (FYR) and Bosnia-Herzegovina (BH) in 1992. (Center for European Studies, 2004, 6) The so-called Yugoslav wars started in 1991 and were mainly led by Serbia in cooperation with the Yugoslav people's army (JNA), trying to violently halt the dissolution of Yugoslavia. Years of violence, war crimes, massacres, mass deportation of civilians and ethnic cleansing followed, primarily claiming lives of Bosniaks, but also Serbs, Croats and others. (Aukic, 2007) The Dayton Peace agreement that was signed by Bosnia, Croatia and Serbia in 1995 ended the war in Bosnia but did not put a total stop to violent outbreaks.

Countries' unravelling after the brake-up of the Soviet Union have brought up multiple policy concerns. They have stirred debates about the transition from authoritarian rule to democracy and from a violent past to a peaceful future. The issue of how to deal with violence and war crimes while simultaneously laying the fundament for democracy and reconciliation within society was a pressing one. A key concern for policy makers as well as scholars therefore came to be societal reconciliation (Armakolas et al., 2008, 23), or the "(...) *process through which a society moves from a divided past to a shared future*" (Bloomfield et al., 2003,12).

Different experiences of violent conflicts have established various approaches of how to respond to past crimes. Effective measures for societies to transition from war to peace need to include matters of justice and reconciliation. Past experiences have contributed to the understanding that truth seeking mechanisms, responding to diverse demands for justice, public acknowledgement of responsibility and creating a community based dialogue are central elements of rebuilding a community. (Zupan, 2006, 327) The concept of bringing together these different approaches has become popular in the last decade (Bloomfield et al., 2003,12) and has recently been referred to as *Transitional Justice*: It is part of the field of international criminal justice, which is itself in its early stages of development. Transitional Justice involves a complex and time-consuming process that needs to ultimately include all levels and structures of society. (Zupan, 2006, 327)

The United Nations define Transitional Justice as “(...) *the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation* (...) *Transitional Justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof*” (United Nations Secretary General, 2010, 2-3).

The case of former Yugoslavia faces multiple challenges within its Transition Justice process, as not only peace within the respective societies had to be rebuilt: the political landscape needed to transform from authoritarianism into a democracy, too. Democratic transformations do not only entail changes on the political, but just as much on the societal level. This thesis will therefore argue that a democratic transformation is not possible without dealing with the violent past within the society and will therefore assess to what extent mechanisms addressing this past have laid a foundation for establishing a democracy.

In order to do so, the paper is divided into five separate sections. In the second chapter, the Yugoslav wars and their international response will be briefly outlined. The third part will conceptualise justice and reconciliation in order to define both terms and analyse different mechanisms of achieving reconciliation and serving justice. In the next chapter, the International Criminal Tribunal for the former Yugoslavia (ICTY) and other ways to address the past violence will be analysed in order to assess their impact on justice and reconciliation. The fifth chapter will focus on essential prerequisites for democratisation, which will entail the building of a democratic society based on an active civil society as well as the transformation of the relationship between state and its citizenry. Ongoing challenges to democratisation processes in former Yugoslav countries through their heritage of centuries of authoritarian rule and years of conflict will furthermore be shed light on. This analysis does not apply to Slovenia and Croatia, as both are positive examples for a successful democratic transition in the region. In the last chapter the democratisation process of the Former Yugoslav Republic of Macedonia (FYR) will be illuminated in further detail and the question whether or not democracy promotes peace will be discussed. In the course of this thesis it will be argued that the retributive justice-driven process that addressed the conflict in former Yugoslavia and its narrow understanding of justice poses several challenges, including the hampering of a successful democratic transition in the region.

Before proceeding to the next chapter the research question, hypothesis, method as well as the theoretical foundation this thesis is based on will be shortly elaborated.

1.1 Research Question

The research question of this paper poses as follows: Did Transitional Justice and its mechanisms to address the past violence lay the foundation for the transformation of former Yugoslavian societies and their path to democracy? In order to tackle the question, the paper will first proceed to analyse the mechanisms of Transitional Justice that were used in Ex-Yugoslavia for dealing with the past violence. The impact of these mechanisms will then be outlined, in order to reveal how far a transformation of affected communities has taken place. It will be unfolded to what extent the process of Transitional Justice in former Yugoslavia has formed the basis for societies to deal with the past, to overcome social frictions, to find peace, reconcile and transform into functioning democracy.

1.2 Hypothesis

When the international community saw the necessity of responding to the conflict in the territories of the former Yugoslavia in the beginning of the 1990s, the concept of justice was approached in a specifically narrow manner. The response to the conflict by only setting up the ICTY for the prosecution of war criminals excluded any alternative mechanisms of justice, which is a symptom for the field of Transitional Justice being in its early stages of development. Different mechanisms of justice were perceived as separate and incompatible rather than combining them into one structure of mechanisms that can be pursued at the same time. This restricted approach to justice had major repercussion on the development of the war torn region.

The ICTY was faced with too high expectations. There is a clear divide between instructions of the ICTY's mandate and the way the tribunal's institutions are designed. It was bound to not be able to live up to its expectations, as it does not lie in the capacity of a criminal tribunal to serve the diverse demands of justice within a post conflict community, to sustain peace and bring forth societal reconciliation. An International Criminal Tribunal is exclusively capable of bringing about legal justice and serving the rule of law by prosecuting and punishing criminals responsible for violations of international humanitarian

law. However, due to understanding justice purely as retribution, prosecution and punishment, the ICTY was established as a sole mechanism of bringing and maintaining peace, serving justice and facilitating reconciliation. As these demands overstepped the tribunal's capabilities the ICTY cannot have laid the foundation for democracy and the transformation of society within former Yugoslavian countries. The repercussions of solely establishing the international tribunal to address the conflict without supporting other mechanisms for coping with the past violence and of addressing undemocratic structures will be outlined.

1.3 Method

The theoretical part of this thesis will first concentrate on a theoretical analysis of concepts of both justice and reconciliation and their possible definitions, to then lead on to the practical and theoretical assessment of the research question. This thesis is based on a critical text analysis, assessing the theoretical background as well as the practical impact of methods dealing with the past conflict in post Yugoslavia and the political transformation into democracy. The analysis leans on the theoretical foundation of constructivism, which opens a more holistic analysis of conflict dynamics, its agents and structures. The method resulting from the research question is a descriptive literature review and an interpretive approach to the analysis of the two conducted qualitative interviews.

1.4 Interview

In order to back the descriptive literature review, two interviews have been conducted. The first person that was interviewed was Michael J. Warren, who worked for the UNDP as a programme specialist for justice and security in Kosovo from 2006-2009. After that two sisters were interviewed, Adisa Buchmayer and Alma Salibasic. Both fled from Bosnia-Herzegovina during the war and have been affected by the conflict and its aftermath. The interviews aimed at revealing the impact of the ICTY, people's perceptions of mechanisms to deal with the past conflict and their view on lacking fundamentals for a democratic transition in former Yugoslavian countries. The guided interviews were conducted in an opened fashion and oriented themselves on the experiences of the interviewees.

Both interviews were carried out in accord with an open guideline-based technique. Guided interviews serve the purpose of the researcher's restricted interest in the respondent's knowledge on the topic of research. In order to develop the interview guide, the researcher has to engage with the subject matter in detail. Due to the researchers familiarity with the subject matter he or she can guide the respondent in a casual and non-bureaucratic manner through the interview. (Meuser/Nagel, 1991, 448) What is most important is that the researcher manages to restrict and determine the interview to the topic of interest even if the interviewees get off the subject. (Flick, 2001, 217)

The guideline for both interviews resulted from a detailed analysis of mechanisms for addressing past violence and rebuilding communities. Consequential the Transitional Justice process is reflected upon, including problems that can arise and requirements for a society to transition into a democracy. The investigation started with the impact the establishment of the ICTY had on post-conflict communities in former Yugoslavia. Positive and negative consequences of measures to deal with the conflict in the region have been enquired while taking the opinion of the interviewees into consideration.

To draw a wider picture of obstacles posed to the democratisation process in former Yugoslavia, the interview needed to focus on the current political landscape of respective countries as well as the public handling of past crimes and ethnic divisions in society. The interview questions aimed at linking the measures of Transitional Justice to ongoing problems on levels of society, politics and justice. Towards the end the interview tried to reveal if measures that addressed the conflict have done more damage than good and whether other justice mechanisms could have reached further into society in order to support the democratisation process.

The interviews gave a valuable insight into the topic of research and complemented the understanding that had been acquired through the literature analysis.

1.5 Theoretical foundation: Constructivism

Constructivism is a social theory that has become one of the predominant schools of thought after the end of the cold war. There are several core observations, hypotheses and assertions the constructivist approach is building on.

Firstly, constructivism emphasises the social, cultural and relational construction of interests and social meaning and how it is attached to habits, objects or practices. (Hurd, 2008, 298-299) Constructivism, according to Alexander Wendt, builds on the idea of people acting towards objects and towards each other based on meanings they have attached to objects. (Wendt, 1992, 396-397) The first core observation of constructivism is therefore that people's reality is a social construct. Social facts such as money, sovereignty or conflict rely on the existence of human agreements, which condition structures and institutions. The nature of social facts reveals how inter-subjective realities are perceived. (Jackson, 2005, 175) This means that individuals and groups are responsible for recreating and maintaining structures, institutions and social facts that constitute their reality through their shared meaning, shared practices and interactions. (Checkel, 1998, 326)

The second assumption of constructivism, apart from reality as social construction, is that agents and structures are interdependent. (Jackson, 2005, 175) The theory of constructivism is therefore based upon structures – including institutions and shared meanings between actors – and agents – including any body operating as an actor within a specific context – mutually constituting each other. (Hurd, 2008, 304)

„(...) constructivists are concerned with the way agents and structures co-constitute each other, the socially constructed nature of actors and their identities and interests, and the importance of ideational, normative and discursive factors in the shaping of international political reality“ (Jackson, 2005, 172).

Thirdly, constructivism underlines that ideals, symbols and language constitute people's identities, opinions and interests, which in turn are the basis for the formation of influential normative structures. (ibid., 2005, 175) The meaning of structures, institutions, behaviour, actors and events, as stated above, are socially constructed. This meaning is based on institutionalised ideas, which are shared among people. Constructivism understands ideas the following way:

„Ideas are not so much mental as symbolic and organizational; they are embedded not only in human brains but also in the ,collective memories,' government procedures, educational systems, and the rhetoric of statecraft“ (Legro, 2005, 6).

Existing patterns, relationships and even states consist of a network of meaning, practices and ideas. Both meanings as well as practices are never permanent as they change over time. (Hurd, 2008, 300) The perception of structures as well as agents can modify and can

therefore undergo a process of redefinition. (ibid., 2008, 304) To give one example: The meaning of sovereignty and the autonomy of rulers has changed after the second world war. Since 1945 the idea of major human rights violations legitimising international interventions has gained ground. Before that any legal justification for violating another country's sovereignty through an international intervention was unthinkable. (ibid., 2008, 300)

The constructivist approach can be used to explain international relations, conflicts, power politics or any other concrete phenomena. It allows a more holistic and multi-dimensional understanding of complex matters such as wars, violence and conflict resolution. It includes several factors that are missing in rationalist or interpretative theories such as the historical condition and reciprocal constitution of structures and agents within conflicts; the use of language, norms, customs, culture, symbols and ideas at the onset and reproduction of conflicts; the social construction of identities, interests and structures as well as the manipulation of group identities by elites. In the study of international conflict and conflict resolution the constructivist approach needs to be given a more dominant role, as these fields are currently monopolised by rational choice and quantitative approaches. (Jackson, 2005, 172)

Constructivism, in contrary to approaches such as 'materialism', neo-realism and neo-liberalism, is concerned with the agency of actors within a conflict. It is the best suited international relations approach to understand conflict and conflict resolution, as it addresses „(...) *the beliefs, attitudes and perceptions of parties in conflict, the normative structures that regulate conflict behavior, the formation of regimes, (...), the role of language, memory and narratives in reconciliation and the actions that individuals and groups can take to shape their lives and resolve their conflicts*“ (ibid., 2005, 172-173). Political elites therefore utilise existing grievances constituted by current structural conditions – i.e. discrimination, poverty, corruption – for the manipulation of identities and of perceptions of menace and victimhood, while simultaneously building the fundament for legitimate violent retaliation. (Kapferer, 1988)

Constructivism does not disclose a particular way of analysing, resolving or responding to conflicts, wars and violence, as the mutual constitution of structures and agents is specific for every context. Anything that could be said concerning these topics needs to be concluded from research findings of specific constructivist studies. (Jackson, 2005, 173) However, what can however be stated from a constructivist perspective is that social, cultural, normative, economic and political conditions do not cause conflicts per se. Similar

conditions would otherwise have led to the same results. Agents themselves are required to initiate the transformation from hidden structures of conflict into manifestations of violence. (ibid., 2005, 179) To adduce a simple example: The collapse of the Soviet Union posed similar structural conditions to all former republics. However, it initiated civil wars in only six out of 15 republics. While the collapse of Czechoslovakia passed peacefully, the break up of former Yugoslavia was extremely violent. (Kaufman, 2001) Constructivism can explain why countries that show symptoms associated with the eruption of a conflict do not experience the outbreak of violence or why wars erupt in some situations and in others they do not. (Jackson, 2005, 179)

Making use of constructivism to analyse, explain and make sense of a conflict, means making room for understanding specific conditions of structures and agents constituting each other. This approach asks for a specific flexibility in approaching matters such as conflict resolution, serving justice, establishing peace and facilitating reconciliation. This paper will therefore set its goal in comprehending the aftermath of a specific conflict – the one in former Yugoslavian territory – within its own specific set of conditions, context, mutual constitutions of objects and actors as well as its own distinctive meanings attached to past violence, conflicting parties, identities and narratives.

2. Historical contextualisation of the conflict

2.1 Background

After signing the Declaration of Corfu in July 1917 that united Serbia, Croatia, Bosnia, Herzegovina and Slovenia, “The kingdom of Serbs, Croats and Slovenes” was officially founded in October 1918 after World War I. Ethnic rivalries however divided the kingdom from the very beginning. (Case Study Webpage, n.d.) Serbia, seeing their republic as the centre of the newly established nation, wanted to control the rest of the nation from the capital city of Belgrade. The majority of citizens from the republics of Croatia, Slovenia and Bosnia, the latter being mostly Muslim, favoured a looser federal government. Tension between Serbs wanting greater unity and Croats fighting for individual autonomy broke out at an early stage. (Center for European Studies, 2004, 3)

The onset of World War II in 1939 unleashed a wave of chaos over the newly founded country of Yugoslavia. It was soon to be torn apart from within, some groups aligning with the Germans, others fighting to bring back the new king or to establish a new government.

Civil war broke out, while different republics were siding with different factions – regions, villages and neighbours turned against each other. A communist-dominated partisan group led by Josip Broz, who later became known as Tito, helped to defeat the Germans and reunified the divided country (U.S. Department of State, 2013) by establishing a dominant power position over all the other groups fighting to control Yugoslavia. (Center for European Studies, 2004, 3)

Tito created a new Yugoslavia under his communist government, modelled after the Soviet Union. It was composed of six republics: Serbia, Croatia, Bosnia-Herzegovina, Slovenia, Macedonia and Montenegro, as well as the two autonomous regions Kosovo and Vojvodina. In 1948 Yugoslavia surprisingly broke away from the USSR. Contrary to other Eastern European communist countries, Yugoslavia set up a de-centralised and less repressive government under Tito's rule. (U.S. Department of State, 2013). The country surprised the international community in the following two decades by its seeming political independence, internal political unification and its growing economic prosperity and success. (Center for European Studies, 2004, 3) *“Between 1960 and 1980 it had one of the most vigorous growth rates: a decent standard of living, free medical care and education, a guaranteed right to a job, one-month vacation with pay, a literacy rate of over 90 percent, and a life expectancy of 72 years”* (Parenti, 1992-2008). Reality, however, proved to be very different: Tito exerted rigorous political control over all Yugoslav republics by repressing political opposition and intimidating its citizenry through secret police, while mismanaging economic crises and leading the country towards its downfall. (Center for European Studies, 2004, 3)

Ethnicity is often mentioned as the underlying issue of centuries of divisions and internal tensions ripping apart the region. These ethnic divisions are however a rather modern perception. The underlying similarities of people in the Balkans, being all 'Slavic', had provided a reason for Roman-Catholic Christians, Orthodox Christians and Muslims to find a common ground. This convergence of different religious groups was certainly often a cause for conflict in the region – it nevertheless created a melting pot for a culturally diverse society, where ways of coping with one another had often been found in the past. (ibid., 2004, 4)

The countries of the former Yugoslavia do not all have the same ethnic diversity. Bosnia-Herzegovina is the most ethnically diverse country with 48% Bosniaks, 37.1% Serbs and 14.3% Croats. Serbia and Montenegro are both composed of 62.6% Serbs, 16.5% Albanians

and 5% Montenegrins. Kosovo has an almost exclusively ethnic Albanian population, whereas Vojvodina is ethnically highly diverse. The Macedonian population consists of 66% ethnic Macedonians, with a large ethnic Albanian minority of 22.7%. Croatia has, after Slovenia, the ethnically most homogenous population with 78.1% Croats. The Serb population of 12.2% comprises the biggest minority group, while Hungarians, Albanians, Bosniaks, Czechs, Slovenians and other groups make up only a small percentage of the Croat population. Slovenia is with 83% Slovenes the ethnically least diverse country within former Yugoslavia. Serbs, Croats and Bosniaks make up 5% of the total Slovene population, while 12% are unspecified. (The World Factbook, n.d.) So, how did the issue of ethnic diversity become powerful enough to cause a full-blown genocide over several years that aimed at ethnically cleansing Bosnian territory, killing hundreds of thousands of Bosnian Muslims, known as Bosniaks?

Yugoslavia started to show obvious cracks in its system geared by the single-party communist rule with the elections that took place in 1990. The results of the election have to be put into context with a collapsing communist system in Eastern Europe in 1989. The external factors of a broken up Soviet Union and a unified Germany shifted the Western focus away from Yugoslavia, undermining the economic and financial support necessary for preventing Yugoslavia from its total collapse. (U.S. Department of State, 2013) Responding to these events, the population of each republic elected domestic governments that turned out to be mostly not communist. Slovenia was the first country that initiated steps towards separation from Yugoslavia. Its culturally homogenous and therefore widely unified population perceived its country to be wealthier and more developed than the rest of Yugoslavia and did not want to be held back by a country ruled by a stagnant, communist government. Croatia was the second in line to call for independence from federal Yugoslavia, after also having elected a non-communist government. (Center for European Studies, 2004, 5)

Bosnia-Herzegovina as well as Macedonia swept their communist governments from power during the election in 1990s but did not declare their wish for independence immediately. Both countries seemed willing to remain in a looser and more autonomous confederation within Yugoslavia. In BH the disagreement over independence reflected the election results, where all ethnic groups had voted for their political parties, which, accordingly, had left the government divided along ethnic lines. (ibid., 2004, 5)

2.2 A brief overview of the Yugoslav wars

Slobodan Milosevic was at that time president of the Socialist Republic of Serbia and would later on be responsible for committing the worst war crimes against Muslims (Bosniaks) during the Yugoslav wars after 1991. When Yugoslavia seemed to disintegrate Milosevic wanted to secure his power position at all costs and secure Serbia's influence. He used the power vacuum that an increasingly weaker central Yugoslav state left behind and forcefully made use of Serbian ultra-nationalism to foster his power position at home. He progressively transformed "(...) *into the stalwart symbol of Serbian nationalism*" (U.S. Department of State, 2013). Milosevic strategically stripped the two provinces of Kosovo and Vojvodina of their autonomy and made sure to reintegrate them into Serbia, while replacing the Montenegro leadership by his allies. (ibid., 2013) Unlike Slovenia, Croatia and Bosnia-Herzegovina, Serbia and Montenegro, already under the fierce rule of Milosevic, did re-elect their communist government. Several parts of the Serbian population furthermore supported Milosevic's patriotic visions and his idea of a 'Greater Serbia' that would increase Serbia's influence and territory in the region. The federal Yugoslav government found itself in a very difficult situation. While several republics had announced their intention of separating from Yugoslavia, the centralised government still had its own army, had to manage its own economy, needed to provide services for its people and to pay its bills. (Center for European Studies, 2004, 6)

2.2.1 The secession of Slovenia and Croatia from Yugoslavia

Slovenia and Croatia officially declared their independence from Yugoslavia on June 25 1991. The Prime Minister of Yugoslavia at that time, Ante Markovic, ordered the Yugoslav National Army (JNA) to intervene and take control of Slovenia and stop the secession from the centralised regime. Slovenia however had a well-trained and equipped national guard that was able to fight off the JNA. (Center for European Studies, 2004, 6) The war lasted about ten days, claiming only minimal casualties. Slovenia unquestionably secured control over its own territory and the JNA officially confirmed Slovenia's separation. (U.S. Department of State, 2013) This would be the only clear-cut result in the conflicts to follow the succession of Slovenia.

Even though the JNA was the federal force under the command of the Yugoslav government, the national army was mainly composed of Serbs. While the authority of the

federal government continuously weakened, the JNA transformed into a tool of Serb political leaders and Serb interests. The JNA therefore also intervened militarily in Croatia, after it had declared itself independent on June 25 1991. This military manoeuvre was undertaken by the JNA under the pretence of wanting to protect the mostly Serb populated region of Krijina, that did not want to secede from Yugoslavia fearing discrimination within a Croatian state. The underlying goal, however, was to gaining territory for a Greater Serbia to be established in the future. (Center for European Studies, 2004, 6)

The international community did not know how to respond to this military intervention in Croatia. By the end of 1991 the war in Croatia had claimed tens of thousands of lives and had internally displaced hundreds of thousands. (U.S. Department of State, 2013) The United Nations entrusted Cyrus Vance, a former U.S. secretary of state, with the task of establishing a truce between the conflicting parties, which was signed in January 1992. As a result, the United Nations dispatched UNPROFOR (UN Protection Force) troops in order to keep the peace and monitor the cease-fire. The peace deal had however admitted large sections of Croatia to the Croatian Serbs, leaving seeds for future conflict behind. (Center for European Studies, 2004, 6)

2.2.2 The war in Bosnia-Herzegovina

In January 1992, when the international community expected the worst to be over, the European Commission recognised Slovenia and Croatia as independent states. (ibid., 2004, 6) Bosnia-Herzegovina held a referendum in March 1992 and declared its independence a month later, in April 1992. The Serb minority in Bosnia disagreed with the separation of BH from Yugoslavia and consequently declared its own independent republic. (U.S. Department of State, 2013) With Slovenia and Croatia having separated from Yugoslavia, BH realised it would have to play a junior role under the superior ruling of Serbia if it remained in the federation of Yugoslavia. The country's independence was internationally recognised soon after its declaration. (Center for European Studies, 2004, 6)

Since Macedonia had already declared its independence following a referendum in September 1991, Bosnia-Herzegovina's declaration of independence and the subsequent disintegration from the federal government left Serbia and Montenegro to uphold the 'Federal Republic of Yugoslavia'. (U.S. Department of State, 2013)

The move into independence was the trigger for Bosnia-Herzegovina's descent into chaos. (Center for European Studies, 2004, 6) Its political history had been characterised by a precarious compromise between the three main groups: Bosniaks, Croats and Serbs. The previous political cooperation had only been possible within a federal Yugoslav government. This unity was unsustainable within the context of an independent BH government, as its institution was not strong enough to control and manage the tensions within the country. It did not take long and Bosnian Serbs as well as Bosnian Croats declared the autonomy of their own regions. The internal struggles within BH were fuelled by outside interference. A secret arrangement between the Croatian president F. Tudjman and the Serbian president S. Milosevic to split Bosnia-Herzegovina up would be uncovered later on: Following this agreement the territories and ethnic inhabitants each country desired were to be added to Serbia and Croatia, respectively. (ibid., 2004, 7)

The Bosnian war raged from April 1992 until October 1995. It was defined by shifting alliances and different phases as well as several efforts of the international community to establish peace in the region. During the initial phase of the conflict the main fighting took place between Bosnian Serbs and the Bosnian government forces that were established by an alliance between Croats and Bosniaks. On April 17, 1992 the JNA together with Bosnian Serb paramilitaries attacked the Croat-Bosniak alliance aiming for the independence of their region and succession from BH. Within the first few weeks the JNA and the paramilitary had taken over more than 50% of BH and established the independent state of Republika Srpska. (The Center for Justice & Accountability, 2014)

In early 1993 the opposing sides refused to sign a cease-fire agreement put together by C. Vance among others, as both sides believed they could either win more territory, or reclaim the territory they had lost. The war entered a worse phase when Croats broke their allegiance with the Bosniaks, leading to three different armies fighting each other. (Center for European Studies, 2004, 9) Several 'safe areas' established by the UN to protect civilians were overrun by Serb units. The war entered its worst phase with increasing mass atrocities and ethnic cleansing. After U.N. forces surrendered the 'safe area' Srebrenica to advancing Bosnian Serb forces in July 1995, the world witnessed the largest mass murder since WW II. Republika Srpska forces killed more than 8,000 Bosnian Muslim men and boys under the command of General Ratko Mladic. (The Center for Justice & Accountability, 2014) The conflict had become increasingly violent on both sides, with stories about mass killings, forced evacuations of whole villages and concentration camps, while "*each side accused the other of worse atrocities (...)*" (Center for European Studies, 2004, 9).

In November 1995 negotiations in Dayton, Ohio, finally led to the Bosnian Peace Agreement between the fighting parties. The Dayton Agreement obtained concessions from the political leaders of Croatia, Bosnia-Herzegovina, as well as the Federal Republic of Yugoslavia to “(...) recognize each other’s borders and sovereignty, withdraw their armed forces, and allow humanitarian aid to get to the inhabitants and displaced refugees of the region” (ibid., 2004, 10). BH was split into two republics, one mainly inhabited by Serbs, the other by Croats and Bosniaks. Right after the Bosnian Peace Agreement was signed, a NATO peacekeeping force called IFOR (the Implementation Force) was sent to the respective regions and was given the responsibility of implementing the agreement’s military aspects. Its duty was to end all hostilities, while closely monitoring the armies after separating them. (ibid., 2004, 10)

2.2.3 Eruption of violence in Kosovo

The peace agreement signed in Ohio floated above a tense situation in the former republics of Yugoslavia for several years. Tensions grew in the Serbian province of Kosovo between the Albanian paramilitary and the centralised government of the Federal Republic of Yugoslavia. Having been the historic centre of ancient Serbia, Kosovo had become almost exclusively populated by ethnic Albanians. Under Tito’s rule Kosovo had enjoyed certain autonomy, but Milosevic had exercised strict control. The fragile peace in the region finally broke in 1998, when the Kosovar Albanian paramilitary groups clashed violently with the Serb military. (ibid., 2004, 10)

Both sides accused each other of drug trafficking, terrorism and ethnic cleansing, while the violence flared up and threatened to destabilise the fragile situation within neighbouring countries. NATO leaders therefore decided to launch air strikes in Kosovo against Serb military forces. A 77-day long air campaign followed that decision and resulted in Milosevic agreeing to negotiations. (ibid., 2004, 10) The NATO air campaign remains controversial until today, as it caused major destruction of hundreds of villages, killed thousands of innocent people and displaced even more – all on grounds of a humanitarian concern for ethnic Albanians. (Parenti, 1992-2008)

2.3 International responses to the violence

The efforts of countries, organisations and bureaucrats trying to deal with the crisis in Yugoslavia can be generally evaluated as having worsened the situation at the time for two main reasons: the coordination of all helping parties was bad and political reactions to the conflict were too slow. Strategic interests and historic sympathies of the respective states – such as the historic alliance between Serbia and Russia, or the historic animosity between Serbia and Germany – complicated the process of developing a cohesive strategy by the international community for ending the conflict in former Yugoslavia. What therefore characterised the international response was a hesitation of intervening in the conflict and a lack of clarity how to react accurately to the violence. (Klemencic, 2015) The United Nations finally agreed upon three main measures for ending the violence:

The U.N. first of all agreed on an arms embargo that applied to the entire territory of former Yugoslavia in September 1991. (Stockholm International Peace Research Institute, 2012) From more than 30 U.N. Security Council resolutions on Bosnia- Herzegovina this resolution on establishing an arms embargo was the only one that was passed and implemented (Klemencic, 2015), which again outlines the inefficiency of the international community to take action.

Secondly, the International Criminal Tribunal for the former Yugoslavia (ICTY) for prosecuting people responsible for massive violations of international humanitarian law during the conflict was established in 1993. (Center for European Studies, 2004, 10)

The U.N.'s third measure was to send UNPROFOR units into the region in order to establish UN-designated 'safe areas' to secure the protection of the civilian population. The U.N. peacekeepers were however hindered to effectively intervene in the conflict due to "*(...) unclear rules of engagement and limited resources*" (The Center for Justice & Accountability, 2014). The U.N. Secretary General at that time, Boutros Boutros-Ghali, demanded the neutrality of the UNPROFOR, which ultimately hindered their intervention in relation to massacres of Bosniaks by Serbian military and eventually made their presence useless. The countries providing soldiers for UNPROFOR wanted to prevent any serious military intervention, as 'blue helmets' carrying exclusively light arms would be incapable of resisting a military attack, especially by Serb forces. (Klemencic, 2015)

One of the main points of critiques against the U.N. was that Boutros-Ghali's measures against the Serbian president Slobodan Milosevic were considered to be too soft. The U.N.

Secretary General recognised the existence of Yugoslavia for far too long, as he was blinded by ‘Yugo-nostalgia’. UNPROFOR commanders, witnessing the atrocities and war crimes being conducted on the ground, rejected his policy, but did not have the means or the authority to intervene in the conflict and stop the violence. (ibid., 2015)

It is often argued that the U.N. intervention caused more harm than eased tensions. What effects other measures could have achieved and whether they would have saved more people from getting killed cannot be estimated at this point. However, whether the long-term strategy of supporting former Yugoslavia within their process of Transitional Justice did have a positive impact on rebuilding the region and leading it into a democratic future will be assessed throughout this paper. Before getting into this analysis, concepts of justice, reconciliation, impunity and measures of address them will be assessed in the next chapter.

3. Putting concepts of addressing violence into perspective

Violence, atrocities and conflicts are a complex matter, as they have several layers and require a diligent response. The resolution of conflicts needs to not only focus on the persistence of peace but also on serving justice and the reconciliation of society. Different ways of responding to conflicts build on different understandings of justice. The mechanisms and perspectives of justice need to be clearly distinguished in order to identify suitable response mechanisms for a specific context and expected outcomes of different means for conflict resolution.

3.1 International Criminal Tribunals as a tool for addressing past conflicts

International Criminal Tribunals (ICTs) are a tool of international criminal justice and a way of the international community to respond to mass atrocity. (Brants, 2013) ICTs are based on the retributive justice driven process, which is a specific form of legal justice conducted through criminal trials and punishment. ICTs aim at implementing the rule of law in war-torn societies on the basis of an international legal standard, as countries having experienced longer periods of ongoing violence mostly lack the constitutional framework for a functioning legal system. (Shinoda, 2002, 41) The rule of law is usually specific to a country’s domestic jurisdiction, however, in the context of ICTs the rule of law means “(...) *the prosecution and punishment of war criminals under international rules*” (ibid., 2002,

42). The goal is to fight the ‘culture of impunity’ by replacing it with the rule of law and by imposing accountability. (ibid., 2002, 42) International criminal justice furthermore claims to be a legitimate force of establishing truth about victims, perpetrators and past crimes. ICTs therefore play a part in establishing justice and truth about past crimes and can support a society in the process of dealing with a history of atrocity. (Brants, 2013)

Criminal prosecutions have in the past often been favoured as a response to gross human rights violations in post-conflict societies. Tribunals build on the notion that punishment of the guilty provides retribution for victims. (Ku et al, 2006, 787-789) Retribution is often perceived as a way of reclaiming human dignity (Villa-Vincencio, 1999/2000, 171), of reducing bitterness, diminishing individual vengeance and stopping the continuing cycle of violence by enhancing the respect for the rule of law. (Opotow, 2001, 164) The proponents of criminal trials and retributive justice support punitive measures to address violent conflicts, as it “(...) constitutes a method of deterrence for future perpetrators, satisfies the need for judicial resolution of grievances and hence prevents acts of revenge” (Armakolas et al, 2008, 26). Trying people responsible for atrocities presents an alternative to violently coping with differences and deters future perpetrators by holding people accountable and punishing them for their crimes. (Rigby, 2001, 4) Deterrent justice thus seeks to discourage future perpetrators “by making an example of past ones” (Asmal, 2000, 11).

Supporters of retributive justice endorse their argument by stating that criminal prosecutions contribute to reconciliation through two mechanisms: Firstly by individualizing guilt and not collectively accusing a population but only those thought to be responsible and secondly by establishing truth about the past. (Clark et al, 2008, 332) Judicial interventions can create the fundament for restoring social relations within society by making people perceive each other as individuals and not as part of an ethnic, political, social or any other group. (Armakolas et al, 2008, 45) “*Holding individuals accountable for their acts prevents the collective stigmatization of groups*” (ibid., 2008, 45). Old cycles of retribution can therefore be broken, paving the way for ethnic reconciliation. (Teitel, 1999, 183) Criminal trials not only support this process of individualising guilt but also create a public acceptance for past atrocities and establish a legitimate platform of revealing past crimes. (Clark, 2012)

This approach is however limited within its capacity for establishing justice for several reasons, which will be critically analysed in the course of this paper.

3.2 Conceptualising justice

There are several ways of dealing with a violent past and rebuilding a society. What needs to be taken into account is that justice is not a straightforward concept, as it can mean different things to different people. Justice is not universal and therefore difficult to define. This is due to the fact that: *“different societies and their members have distinct notions of what is fair and right (...). The meaning ascribed to justice varies widely because the concept is inextricably contextual”* (Gustafson, 1998, 66). Building on the theory of constructivism, the meaning of justice is socially constructed; people’s reaction to violence and demands for justice within a post conflict context is therefore based on the meaning they attach to justice and is conditioned by their perception of reality after mass atrocities. (Jackson, 2005, 175) As justice is a social construct, the way it is perceived greatly depends on people’s culture and history but also on the nature and outcome of the conflict.

“(...) what people see of and in justice depends to a large extent on perceptions and images of what it can achieve and thus contribute to healing in the aftermath of conflict. At the same time, its legitimacy in the community concerned depends on perceptions of the conflict itself and the way it is remembered” (Brants, 2013).

At this point it is important to clarify that justice depends on the perspective it is approached from. The different sides of a conflict will have different perceptions on what is fair and just. What a person perceives as just depends very much on whether he or she was on the winning or losing side of a conflict. But these are not the only two perceptions dividing the view on justice.

The political conception of justice on the one hand, i.e. justice from the perspective of an international community or a local government, needs to be distinguished from the civil conception of justice on the other, i.e. justice from the perspective of a local community or an affected individual. In a political context, the conception of justice is developed specifically for social, economic and political institutions. The political conception neither represents nor builds on a comprehensive doctrine, but can rather be explained and justified by several specific concepts in the public political culture. (Garrett, 2005) This political conception of justice does not reflect the individual demand for justice as the way justice is perceived within a community is greatly influenced by cultural connotations. Differentiating between different perspectives of justice is of major importance: it creates flexibility in addressing past violence and demonstrates the limits of justice within the political context to address individual or social demands for justice, fairness and righteousness.

When considering means for addressing unjust conduct it is furthermore necessary to recognise the different layers of justice. *Collins English Dictionary* online (2015) defines justice the following: Justice is a legal concept, implying lawfulness. Justice in this sense entails the administration of legal proceedings, of punishment and reward and the restoration of damages. Justice can however also mean righteousness or moral rightness. It is therefore also a moral principle that determines just conduct, but it is also the conformity to this moral principle manifested in just conduct. The term ‘justice’ will be used within the scope of its moral and legal understanding throughout this paper.

The legal concept is based on the political conception of justice. Justice as a legal concept does not include the moral aspect of righteousness and can therefore not comprehensively respond to individual or societal demands for justice. In the aftermath of a conflict the implementation of the legal concept of justice depends on the country’s condition. A post-conflict society mostly finds itself having to rebuild an entire functioning legal system. National conditions therefore often hamper the effectiveness of mechanisms of Transitional Justice. (United Nations Secretary General, 2010, 4) The legal system and mechanisms to address past crimes therefore cannot live up to the same moral and legal standards of justice that apply in countries with a functioning and well-established legal system. One needs to bear in mind that the way justice is used and how legal proceedings are carried out in a post-conflict context very much depends on the political, social, historical and legal conditions of a country and must therefore be distinguished from a morally ideal understanding of justice. (Brants, 2013) Justice, and specifically Transitional Justice, is extremely dependent on the financial and structural capabilities as well as social and cultural conditions the respective country faces after the violence.

As justice as a legal concept depends on the post conflict context, it is mostly “*a matter of political negotiation and compromise*” (Pankhurst, 1999, 241). The challenge in a peace settlement is in agreeing on a minimal type of justice, for which a common understanding and truth about the past is necessary. (ibid., 1999, 241) Different sides of a conflict have different understandings of a just outcome, as perceptions of justice are shaped through different lenses and experiences, making a consensus on ‘justice being done’ impossible in a war torn country. (Clark et al, 2008, 333) The decision on how matters of reconciliation and justice get handled in a post-conflict context is therefore “*(...) determined less on the basis of discussions about moral issues surrounding justice and reconciliation and more on politics*” (Borer, 1999, 304). The nature of the transition that put an end to the conflict

therefore plays a major role in determining the future path of how matters of justice and reconciliation get handled. (ibid., 1999, 304)

3.3 Conceptualising Reconciliation

Reconciliation has many different meanings, ranging from people not killing each other to forgiveness and mutual trust of conflicting parties, to the equivalent of “*a national hug*” (Daly et al, 2010, 183). Reconciliation means different things to different people, which is why it needs to be understood within and adapted to its social, political, cultural and historical context before assessing its value to a post-conflict society. Varying meanings lead to different policies and practices, which is why reconciliation can be promoted through different mechanisms. (Little, 2011, 83-84)

Reconciliation is generally said to be the process of rebuilding damaged individual and communal relationships in a post-conflict context. (Clark, 2008, 194) It requires modifying mainstream traditions of international politics and its rigid understanding of ‘justice as punishment’ with innovative ideas. (Lederach, 2008, 27) The demand for reconciliation is determined by the range of damage inflicted through violence and by understanding that crimes against humanity and the subsequent persistence of criminals’ impunity do not only affect individual people but societies as a whole. This is why reconciliation mechanisms focus on the restoration and rebuilding of community relations and not only individual relationships. (McSherry et al, 1999, 3) Victims’ traumata cannot be reduced to physical injuries, as they reach deep into social relations and create emotional pain due to the body’s capacity for memorising past violence. (Humphrey, 2000, 7) This memory of violence, which is expressed through people’s damaged relationships and the persistence of conflict within a society, demands measures of reconciliation, of transforming relationships and mentalities. Reconciliation is thus foremost about the rebuilding and restoring of relationships between conflicting parties. Mechanisms for reconciling societies focus on preparing the ground for these parties to engage with each other as “*humans-in-relationship*” (Lederach, 2008, 26) – they are about encouraging meaningful cooperation and interaction between former enemies.

One way of facilitating reconciliation processes is through Truth and Reconciliation Commissions (TRCs). Dialogue and truth telling is a main reconciliation mechanism for repairing relationships, dealing with tensions within a society and rebuilding a community.

(Parent, 2010, 286) The process of truth telling and narration is about transcending the narrow dichotomy of ‘victims versus perpetrators’ that cuts through society and holds up tension from within. During conflicts, opposing groups construct rigid dichotomies of victims and perpetrators, often based on ethnicity, religion or other categories. These seemingly ‘objective’ categories live on after the conflict and hamper societies to reconcile. They ignore the complexity of roles and incidents in a post-conflict situation, while stigmatising and/or marginalising the people involved and reinforcing divisions within society. (ibid., 2010, 287) In reality, a conflict does not establish clearly distinguishable categories of victims on the one side and perpetrators on the other, but rather different roles and identities. Consequently, one objective truth people agree upon does not exist, but rather many different truths and perspectives. A first step towards not objectifying the truth is providing a platform for dialogue between conflicting parties, deconstructing prejudices and rebuilding relationships. (Clark et al, 2008, 201)

The goal of reconciliation through truth telling is furthermore to re-humanise survivors, victims and perpetrators and to re-establish a personal sense of humanity, as conflicts often result in the dehumanisation of people. (ibid., 2008, 201) The goal of facilitating dialogue and social interaction is to tackle the root causes of a conflict and to prevent the violence from reoccurring. (ibid., 2008, 194) “(...) ‘true reconciliation’ required eliminating the conditions that had given rise to the civil wars and political repression” (Loveman et al., 2006, 1). Reconciliation focuses therefore on giving people enough space to address their grievance while not objectifying the conflict and narrowing the focus of reconciliation too much on specific events of the past.

Central to this process of publicly revealing the past is public acceptance and acknowledgement, i.e. through public apologies. (Lederach, 2008, 27) Moral condemnation of violence and sharing the truth about past crimes aims at acknowledging collective responsibility and recreating a moral community. (Humphrey, 2000, 9) Future oriented processes like public acknowledgement, truth telling, community dialogue, social interaction, healing, reconciliation, material and symbolic compensation and other forms of reparation are all part of an alternative mechanism of justice called ‘restorative justice’ and are of utmost importance for restoring relationships within a post-conflict society.

Reconciliation processes are often perceived as an antidote to conflict. They are recognised to mediate a conflictual past with a desired, peaceful future, moving people from antagonism to coexistence, fostering compassion, mercy and forgiveness. (Opatow, 2001, 160)

Reconciliation mechanisms are however not universally beneficial, as they are dependent on specific, supportive conditions. (Dwyer, 1999, 82)

3.4 The abuse of reconciliation mechanisms: Impunity in the name of truth and reconciliation in Latin America

Reconciliation has increasingly been playing a more important role within the process of Transitional Justice and is perceived as a necessary tool for rebuilding a community. Nevertheless, reconciliation mechanisms need to be treated with care and are often criticised for failing to tackle impunity and serve justice. In order to be conscious about possible shortcomings of so called ‘reconciliation mechanisms’, the history of abuse of the term ‘reconciliation’ will be illustrated shortly.

During the 1980s, military regimes in Latin America initiated a political transition to hand over power to civilian governments, ending a long period of military ruling characterised by officially conducted acts of violence. The regime change was on the one hand accompanied by former military rulers demanding immunity from prosecution (McSherry et al, 1999, 2) and on the other by an increasing public demand for truth and justice, for punishment of perpetrators and reparations for those injured. (Loveman et al, 2006, 1) In order to respond to the demand for accountability different forms of Truth and Reconciliation Commissions (TRCs) to investigate past crimes were introduced to the public, while executive decrees and pardons in form of blanket amnesties to the entire former leadership were being issued at the same time; in the end, people responsible for past violence were saved from being held accountable. (Rojas, 1999, 23)

The price the public had to pay for peace and a successful transition to civilian rule was the impunity of criminals – all under the pretext of national reconciliation (McSherry et al, 1999, 4), leaving the burden of challenging impunity to civil society groups. (Rigby, 2001, 64) These groups demanded retributive justice, implying criminal prosecutions and punishment, and were subsequently portrayed as “*a threat to the national project of reconciliation and reconstruction*” (ibid., 2001, 70) by the government.

The key criticism of the TRCs in Latin America was their undermining of justice in pursuit of peace and stability, while disclosing an only partial truth that failed to hold the ones responsible for past crimes accountable. To take Chile as an example: Neither the names of perpetrators nor any evidence or testimonies were made public. (ibid., 2001, 87) The state

was exclusively blamed for deaths and disappearances, which gave perpetrators the opportunity to deny and justify their actions. (Rojas, 1999, 23-24) The real beneficiaries of this obstruction of justice were therefore the perpetrators of the old regime, i.e., the military. Today, aversion of reconciliation mechanisms is very common in the field of conflict resolution. The root of this scepticism is to be found in the history of political transitions in the 1980s, which is intimately associated with blanket amnesties and impunity of criminals in the name of reconciliation. Reconciliation was nothing more than a tool for sidelining justice (Mariner, Sept 2003) and “(...) *a rhetorical subterfuge intended to hide the grim reality of the state’s failure to carry out its ‘duty to prosecute’ perpetrators of human rights violations*” (VanAntwerpen, 2008, 37).

In Latin America impunity was institutionalised and systematised by the state. (Rojas, 1999, 16) The political transition in Chile, as in many other Latin American countries, entailed the actual persistence of military power, oppressors becoming democrats and general acceptance of arbitrariness as the new rule of law while the term reconciliation stood for nothing but impunity. (ibid., 1999, 25) Under the pretence of “*political expediency and national reconciliation*” (Villa-Vincencio, 1999/2000, 182-183) people’s demand for justice was overlooked. The past violence was engraved into their memory as an inexorable reality, while the public realm was characterised by the denial and absence of past atrocities and abuses. (Rojas, 1999, 17)

The purpose of this illustration of the use of blanket amnesties in reference to the Latin American experience was not to generally condemn amnesty processes as being unjust and useless; rather, it was to show that “(...) *they [amnesties] must not prevent the emergence of the truth and accountability before the law for individuals who may have been responsible for gross human rights abuses*” (Human Rights Watch, 2005, 3). It is often argued that measures of clemency should wait for after responsibility over past crimes has been established and perpetrators are being held accountable. (ibid., 2005, 2) However, what ‘holding somebody accountable’ or ‘bringing justice’ means to people, greatly varies.

3.5 The problem of impunity

The link between reconciliation and impunity is not evident but rather conditioned by the history of politicised reconciliation mechanisms. Impunity will here be defined as the “*exemption from punishment or freedom from the injurious consequences of an action*”

(Oxford Dictionaries, 2015), which consequently means the lack of accountability for abusing power and the absence of justice. (McSherry et al, 1999, 1)

What makes impunity especially difficult to tackle is its reliance on the cooperation with others – “(...) *impunity depends on the mutual silence and protection of collusion (...)*” (Opatow, 2001, 153). Impunity is therefore hardly ever a phenomenon affecting a few individuals but rather something enmeshed in society on several levels. Impunity is of greatest concern when it is institutionalised. The immunity from punishment, once it becomes part of political, societal and legislative spheres, creates a culture of impunity, implying the perpetuation of former power structures, inequalities, and violence – all of which are often entangled into state structures; government officials, military, police or ordinary citizens can perpetually break the law without having to fear punishment. (ibid., 2001, 150)

Impunity is central to debates about post-conflict societies as it aggravates people’s situations within a post-conflict context by destroying human beliefs, principles and values and altering norms and regulations. (Rojas, 1999, 16). This is due to the concepts’ inherent paradoxical combination of the human will to know and judge a matter on the one hand, with the demand of concealing and forgetting criminal behaviour on the other. “*This ambivalent phenomenon produces a distorted reality*” (ibid., 1999, 17). Granting amnesty, which is by the *Legal Dictionary* online (2015) defined as the official pardon of people who committed a criminal offence by guaranteeing them immunity from prosecution, often ends up enforcing this paradox. Former enemies are obliged to live side by side while victims are forced to conceal past crimes and forget about the violence they endured.

In the view of Paz Rojas impunity is sustained by two mechanisms: Firstly, through the lack of the truth about past crimes and the denial and concealment of facts and people responsible for crimes, and secondly, through the absence of justice. (Rojas, 1999, 20) Both these pillars will be examined throughout this paper, while linking them to justice and reconciliation mechanisms and assessing the relation between reconciliation and truth, as well as reconciliation and justice.

3.6 A choice between peace and justice?

After the Latin American experience of compromising punishment of criminals for the sake of a political settlement, reconciliation got gradually depicted as “*a choice to forfeit justice*

for the sake of peace and democratic pluralism, settling for truth and peace rather than justice and bloodshed” (Rigby, 2001, 9).

The debate about the relation of reconciliation and justice is usually narrowed down to the comparison between two camps: those favouring prosecutions and justice on the one side and those supporting amnesty, the restoration of peace and reconciliation on the other. The first camp advocating amnesty processes believes that amnesties are necessary for reconciliation to take place and to restore peace within society. (Borer, 1999, 303) This side argues that bringing immediate justice by prosecuting the people responsible for gross human rights violations may jeopardise the fragile peace within a post-conflict society. (Rigby, 2001, 184) The camp favouring retributive justice however states that the preconditions for reconciliation are criminal prosecutions and punishment. In their line of argument prosecutions and punishment are necessary to restore justice within society. (Pankhurst, 1999, 246) Several scholars, such as A. Rigby argue that there is a clear tension between justice and peace. (Rigby, 2001, 184) The question is whether the two concepts are mutually exclusive.

The distinction between peace and impunity on the one hand and justice, criminal prosecutions and punishment on the other is unnatural and artificial. The concepts of justice, punishment, peace and reconciliation overlap and affect each other in reality. The comparison is extremely narrow and can only be upheld by defining justice in a purely retributive manner, implying criminal prosecution and criminal punishment. This debate about peace versus justice demonstrates the necessity of broadening the horizon within which we define justice as a legal as well as a moral principle.

3.6.1 Different forms of justice

Retributive justice is often portrayed as having a monopoly on bringing justice and serving the law, as prosecution, conviction and punishment are commonly perceived as serving justice above any other justice mechanism. (Gilbert et al, 2007, 7) As mentioned above, retributive justice is perceived as deterring future perpetrators by punishing the guilty, unfolding the truth about the past and fostering the respect for the rule of law.

Central to this approach is the necessary punishment of people responsible for conducting and planning crimes. Punishment can generally be understood as the imposition of a *“penalty as retribution for an offence”* (Oxford Dictionaries, 2015). From the approach of

retributive justice, punishment needs to take place in the form of criminal prosecution and imprisonment. The punishment necessary to challenge impunity can however also include restitution and any other forms of restoration of damages. (Hershenov, n.d.) Granting amnesties therefore does not exclude the possibility of punishment, as it does not avert the use of restitution, reparation and restoration processes. Alternative forms of punishment that do not include prosecution and conviction have often proved to foster the reconciliation of societies more than criminal prosecutions.

Post-conflict societies can demand different responses to conflict, violence and injustice. Reconciliation mechanisms, as mentioned above, can include truth telling and fostering a dialogue between conflicting parties. Reparation programs are another central aspect of reconciliation mechanisms insofar as they aim at acknowledging and compensating people for their suffering during the past violence. (Truth & Reconciliation commission, n.d.) These reconciliation programs can entail material reparations in the form of cash payments, access to education, health care and other opportunities (Rigby, 2001, 10) as well as non-material reparations through the construction of memorials, reburials or providing of headstones. (Crocker, 1999, 17) Reparation programs can be directed at individuals as well as communities.

It is important to understand that retributive justice, including retaliation and punishment, neither constitutes the only existing form of justice, nor is it the only form of justice that people affected by violence long for. Conceptualising justice in a purely retributive sense is therefore extremely restrictive and narrow. In order to demonstrate the range of mechanisms for justice C. Villa-Vincencio (1999/2000) outlines six different forms of justice:

1. Retributive justice, drawing on prosecution and punishment of people responsible for gross human rights violations.
2. Deterrent justice, seeking to discourage future perpetrators “*by making an example of past ones*” (Asmal, 2000, 11).
3. Compensatory justice, assigning people who benefitted from the old order to take part in restitution measures for those who suffered injuries.
4. Rehabilitative justice, addressing both victim’s and perpetrator’s needs in order to remedy defected relationships, temperaments and/or personalities of people affected by the violent conflict.

5. Justice as an affirmation of human dignity, recognising the need to re-establish people's dignity.
6. Justice as exoneration, aiming at rectifying the records of people falsely accused of wrongdoing. (Villa-Vincencio, 1999/2000, 73)

This should not be understood as a comprehensive list of different forms of justice but rather as an outline of the existing range of different forms of justice. Reconciliation mechanisms, aiming at restoring communities as a whole, furthermore use distributive justice to targeting the re-distribution of social resources, such as “(...) *funding and donations, manpower, supplies and material, representation, decision-making authority, and knowledge*” (Opotow, 2001, 165). These mechanisms target the inclusion of people in the scope of justice, regardless of their role within society. (ibid., 2001, 165) Justice can therefore not be narrowed down to measures of retribution, criminal prosecution and criminal punishment, but needs to take other concepts, such as economic and social justice, just as much into consideration. (Zyberi, 2012, 13-14)

The reconciliation process led by the ICTY focuses solely on retributive justice and punishment of war criminals in order to fight impunity, serve justice and restore peace in former Yugoslavia. In order to later understand whether the foundations for a democratic transition were laid, it is of prior importance to critically analyse the mandate, the goals and the impact the ICTY had on the former Yugoslav society.

3.7 Résumé

The core message of this chapter is the need for a broader definition of the term ‘justice’. The tendency to primarily respond to violations of humanitarian law and violent conflicts with criminal prosecutions and retributive justice needs to be challenged. Justice as well as reconciliation are both context specific concepts and vary in their meaning.

There is more than one way to address past crimes. However, it is important to embrace the wide spectrum of justice and to not solely focus on criminal punishment. Justice does not have to mean retribution and conviction. Justice can be served in the form of restoration of damages, symbolic and public acknowledgement, truth telling and community dialogue.

Reconciliation processes have been misused for legitimising a culture of impunity. This does

not necessarily mean that they lead society towards corruption, intrinsic impunity of war criminals and the persistence of the status quo. Impunity needs to be tackled, but can also be fought with other measures than criminal justice. Therefore, one does not have to choose between peace and justice, as it is so often portrayed. The most important step for accurately addressing the issues faced by war torn societies is to broaden our narrow understanding of justice as criminal prosecution and punishment.

4. The ICTY and other mechanism of addressing the past violence

The ICTY (International Criminal Tribunal for the former Yugoslavia) was initiated on May 1993 as a response to the war crimes taking place in the 1990's during the Yugoslav wars, after the Security Council passed the Resolution 827. (Armakolas et al, 2008, 32) This Resolution stated that the United Nations decided to

“(...) establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace” (United Nations Security Council, 1993, 2).

The rule of law is usually considered to be the most important principle to guide peace-building activities. It is perceived as serving justice, establishing order as well as providing freedom and social stability. The ICTY was created to build a bridge between the resolution of conflict and the rule of law. It is therefore an intervention into the domestic jurisdiction of former Yugoslav countries in order to implement international humanitarian law. Peace should therefore be made, kept and build up through the implementation of an international legal standard. (Shinoda, 2002, 1-2) The ICTY, later followed by the International Criminal Court for Rwanda (ICTR), was the first attempt by the international community to conduct a *“(...) peace operation through the institution of law-enforcement”* (ibid., 2002, 1).

The ICTY therefore came into existence in order to deal with the past violence in former Yugoslavia and can be regarded as the most important international body for addressing questions of peace, justice and reconciliation in the region. As the ICTY has been the dominant mechanism established for supporting the Transitional Justice process in Ex-Yugoslavia (Armakolas et al, 2008, 22), its role will be discussed in further detail, in order to assess its real value to justice, reconciliation and peace.

4.1. The mandate of the ICTY

The ICTY was the main international response to the on-going war crimes and human rights abuses taking place in former Yugoslavia. It was established not as a humanitarian but rather a dictatorial intervention, which means an “(...) *intervention by outside actors in internal affairs of conflict-torn-areas*” (Shinoda, 2002, 7). Hence, its goal was not to save victims from violence but rather to relieve the respective countries of their specific responsibility of acting on behalf of the rule of law and prosecute war criminals. In other words, the ICTY took up the role of national courts in order to substitute the local judicial system. (ibid., 2002, 48) This kind of international intervention was based on the urgency of responding to human rights violations being given supremacy above respecting a country’s sovereignty. This specific example outlines the process of redefinition concepts of sovereignty, states and legal justifications of outside intervention have undertaken. According to constructivism the perception of such concepts, structures and agents changes over time and is legitimated by the meaning and ideas attributed to them. (Hurd, 2008, 300)

The ICTY had the right to prosecute individual people only and hence, no legal subjects such as political parties, army units, organisations or other administrative bodies. (United Nations International Criminal Tribunal for the former Yugoslavia, Mandate and Crimes, n.d.) The international tribunal was thus given the mandate to prosecute and try individuals who committed major violations of international humanitarian law within the borders of the former Yugoslavia after 1991. The four categories of offences, as written in the Statute of the ICTY issued by the United Nations, include:

1. Grave breaches of the Geneva Conventions of 1949. A violation of any provisions declared a crime in the Geneva Conventions of 12 August 1949 included matters such as “*wilful killing; torture or inhuman treatment (...); extensive destruction and appropriation of property (...); wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation (...); taking civilians as hostages*” (International Tribunal for the Prosecution, 2009, Art. 2).
2. Violations of the laws or customs of war. These violations included but were not limited to the following: “*employment of poisonous weapons (...), wanton destruction of cities, towns or villages, or devastation not justified by military necessity; attack (...) of undefended towns, villages, dwellings, or buildings; plunder of public or private property*” (ibid., 2009, Art. 3).

3. Genocide. The international tribunal has the power of punishing persons who committed genocide, who were part of the conspiracy, incitement and the attempt of committing genocide, as well as the ones complicit in genocide. Genocide is defined within the Statute as several operations conducted to aim at the destruction of a national, racial, ethnical or religious group. Genocide includes, amongst others *“killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”* (ibid., 2009, Art. 4).
4. Crimes against humanity. These violations apply to operations in the course of international or internal armed conflicts targeting any civilian population. These crimes include *“murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts”* (ibid., 2009, Art. 5).

In the interest of international justice the ICTY was given primacy in prosecuting war criminals. It therefore had the power of taking over national investigations or proceedings at all times if deemed necessary. The international tribunal could furthermore refer any case to adequate and qualified national authorities within former Yugoslavian countries. (United Nations International Criminal Tribunal for the former Yugoslavia, Mandate and Crimes, n.d.) This was possible due to the support of the Dayton Agreement, which came into effect on October 5, 1995. The agreement obliges all countries within the territory of the former Yugoslavia to cooperate fully *“(…) in the investigation and prosecution of war crimes and other violations of international humanitarian law”* (General Assembly Security Council, 1995, Art. 9). This cooperation included the cessation of hostilities, the extradition of war criminals, the release and exchange of civilians or other prisoners, the withdrawal of foreign forces, the monitoring and inspecting of forces and facilities, the access to relevant information and any other necessary steps the tribunal needed to take in order to successfully prosecute war criminals. (General Assembly Security Council, 1995) The ICTY has to therefore be understood as the supreme mechanism of acting on behalf of the rule of law within the former Yugoslavia.

When the tribunal was first established, the Security Council acted under Chapter VII of the U.N. Charter, which legitimises necessary measures for ending a situation constituting a threat to international peace and security. The widespread war crimes and violations of humanitarian law and human rights occurring in former Yugoslavia were thus considered as jeopardising not only national but also international peace. (Goldstone, 1995-1996, 487) It is

important to understand that the tribunal was “(...) *founded upon the recognition of a direct link between peace and justice*” (ibid., 1995-1996, 486). The mandate of the ICTY did therefore not only specify the offences that war criminals could be prosecuted and tried for, but furthermore emphasised the connection between justice and peace: The mandate of the ICTY was „ (...) *to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and thus contribute to the restoration and maintenance of peace in the region*“ (United Nations International Criminal Tribunal for the former Yugoslavia, Mandate and Crimes, n.d.).

The tribunal was therefore given a multi faceted mandate: Its goals are not restricted to render justice to victims and to deter further crimes but to simultaneously put a stop to violence, contribute to restoring peace and promote reconciliation within society. (Zupan, 2006, 328) Transitional Justice has thus been included into the ICTY’s legal responsibilities and outreach. (Kulasic, 2012, 3)

4.2 The ICTY’s impact on justice and reconciliation

As demonstrated in the previous chapter, justice and reconciliation are both not universal concepts but rather context specific. The ICTY’s mandate was established as a tool of international criminal justice and thereby given the power to prosecute persons violating international humanitarian law. The goal was specified: serve justice, establish and maintain peace as well as contribute to societal reconciliation in a historically and socially specific context. It must be kept in mind though that the ICTY’s jurisdiction was limited to prosecuting and convicting war criminals.

4.2.1 Justice in the sense of international law

The ICTY has spurred many developments in the field of international law: It has put the rules formulated in Article 3 within the 1949 Geneva Conventions into practice, which has been specifically developed for the context of internal warfare; furthermore, it recognised rape as a crime of genocide. (Shinoda, 2002, 44)

Until today the ICTY has indicted 161 people, mostly high ranking military officials, for various crimes during the Yugoslav wars. (United Nations International Criminal Tribunal for the former Yugoslavia, Achievements, n.d.) The former Bosnian Serb leader Radovan

Karadzic, who was accused of a systematic ethnic cleansing of Muslims and Croats as well as the Srebrenica genocide that left more than 8,000 Muslims murdered by Serbian forces, first appeared in front of the ICTY in July 2008. He was the highest-ranking politician of the former Yugoslavian government after Slobodan Milosevic had been held accountable for his war crimes after having been indicted in 1999. The West perceived this as a breakthrough event and a victory over the on-going impunity of people responsible for past atrocities. (Human Rights Watch, 2008 July) A sense of 'justice being done' was established through the prosecution and imprisonment of war criminals – at least within the international community. But did the ICTY have the same impact on local communities?

The ICTY was established to individualise guilt by targeting individual perpetrators, to hold them accountable and thereby break the pattern of collectively accusing entire groups for past war crimes. As in the case of former Yugoslavia, the ICTY is confronted with ethnic divisions within societies of the respective countries. During the Yugoslav wars, Bosnian Serbs did commit the highest number of atrocities and are accused of the most horrific crimes during the war but they should nevertheless not be considered as being collectively guilty. (Clark, 2008, 668) The question arises whether or not the ICTY managed to achieve an individualisation of guilt and a perception of justice or whether former Yugoslav societies keep on insisting on the collective guilt of the Serbs as an ethnic group. In order to answer this question, the general achievements of the ICTY must be analysed.

4.2.2 The regional impact of the ICTY

What needs to be taken into account when assessing the ICTY's regional impact is the fact that its establishment was not a response to people's demand for justice, but rather a reflection of what the international community considered to be an adequate response to the ongoing violence.

Most people in Serbia, Bosnia, Croatia or Kosovo perceive the ICTY and its criminal trials as abstract and far from their reality. The lack of legitimacy, acceptance and impact of the ICTY throughout former Yugoslav countries is mostly a consequence of its location outside the actual domestic context. Locating the tribunal in a far off place like The Hague "*(...) had as an effect the absence of a feeling of ownership*" (Armakolas et al, 2008, 43).

Apart from the international tribunal prosecuting a few individuals, it has been of limited impact. (Zyberi, 2012, 8) The impact would have been hardly existent if not for the strong

support the tribunal has received from the European Union. When Serbian citizens were asked how familiar they were with the work of the ICTY in 2005, 72% of all Serbian citizens said they were not at all or just a little bit familiar with the work of the ICTY. In 2009 this shocking number decreased to 50% of the citizens that hardly knew something about the work of the International Tribunal. From these 50%, 65% of Muslims (Bosniaks), 48% of Serbs and 37% of Albanians said they knew nothing or just a little about the work of the ICTY. The Albanians considered themselves informed best. (Organisation for Security and Co-operation in Europe, 2009 Apr, 5-6)

Public opinion within former Yugoslavia is very little influenced by the actual work of the tribunal in The Hague and its prosecutions and convictions. The public is affected to a much greater extent by the opinions of local political, academic and cultural elites, as well as by depictions of the proceedings at The Hague by the local media. (Klarin, 2009, 90) Until the end of 2000, Serbian, Croatian and Bosnian governments were composed of members of political and military elites, which were mostly not supportive of the tribunal. These leaders were themselves suspected of their involvement in war crimes and did not want to risk a possible prosecution. It did not take them a great effort to keep the progress and achievements of the ICTY's work quiet and rather convince the public of the bias and hostility of the ICTY towards their states and ethnic groups. This manipulation of the public opinion was achieved through control of the local media. Editors and journalists were thus more loyal to their own regimes than to the truth. (ibid., 2009, 90)

It is therefore not only due to the lack of ownership, but also due to national politics that the ICTY has been limited in its impact and often perceived negatively.

4.2.3 Justice from a local perspective – perceptions of the ICTY

As mentioned before, the ICTY was established solely for prosecuting and punishing a number of individuals responsible for war crimes within the former Yugoslavian territories; however, no other forms of justice mechanisms were pursued. The war crimes tribunal therefore reflected a serious *“(...) gap between the international community's aspirations for justice and how this application was perceived by those most affected in the region”* (Armakolas et al, 2008, 31).

The 161 indictments of the ICTY have hardly satisfied people's demand for justice. Popular grievances concern the tribunal not having indicted enough people. Local courts have started

to conduct their own criminal trials to increase the feeling of ownership over the justice process and to work against collective accusations of guilt towards whole ethnic groups. The process of individualising guilt has nevertheless hardly taken place, as it is “(...) *not uncommon for people to make sweeping generalizations about entire ethnic groups and their collective culpability, habitually speaking in terms of Mi [Us] and Oni [Them]*” (Clark, 2012). These ongoing social divisions are partly due to common perceptions of too little justice having been done.

Undoubtedly, justice in a post conflict context can have diverse connotations but the high number of former Yugoslavian communities opposing the work of the Tribunal is alarming. A survey conducted in Serbia in 2009 revealed that 72% of the entire Serbian population view the international tribunal as very, or mostly, negative and perceive it to be unfair, subjective and as solely convicting Serbs. Only a small minority thinks the ICTY will have a positive impact on actual justice. (Organisation for Security and Co-operation in Europe, 2009 Apr, 7-8) Kosovars, too, have a mainly negative impression of the tribunal, as Kosovar Albanians believe it to be “(...) *focusing on crimes committed by Albanians and paying insufficient attention to Serbian war crimes*” (Warren, 2015). Serbs in Kosovo on the other hand accuse the tribunal as doing exactly the opposite.

But not only in Serbia and Kosovo, also in Croatia the general perception of the ICTY has become increasingly negative. This is due to the public figures and the media having adopted a hostile and growlingly contemptuous, degrading and unfavourable view towards Even in Bosnia-Herzegovina, where due to the Muslim majority the ICTY has traditionally been assessed more positive than in all other former Yugoslav countries, the initial enthusiasm is declining. People are frustrated with the small number of people tried, the long duration of trials and what they perceive as lenient verdicts. (Klarin, 2009, 90) The majority agrees that it is necessary to punish individuals that are responsible for past crimes. The ICTY's impact is nevertheless often evaluated as minimal, as the tribunal does not even get close to prosecuting everyone responsible for war crimes. (Buchmayer, 2015) Despite the disappointment with the tribunal's achievements the majority of people in BH nonetheless continues to advocate criminal prosecutions by the ICTY. People acknowledge that if it was not for the ICTY, hardly any trials and convictions would have taken place, which is why they accept “(...) *what little justice the Hague Tribunal has in fact delivered*” (Klarin, 2009, 90).

Victims of violence are frustrated the most with the work of the Tribunal due to its inability to address their psychological grievance and emotional suffering. Victims of the Yugoslav wars however suffer not only from trauma and psychological damage through the protracted conflicts, but have also experienced extensive material loss. For this reason most victims incorporate financial and material reparation into their understanding of 'justice being done'. (Armakolas et al, 2008, 44) Several judges and presidents of the ICTY have advised the UN Security Council to create a claims commission for victims harmed by the violent conflicts as a form of compensation. However, so far these suggestions have not been taken up, which is why there are no form of reparations, (Zyberi, 2012, 6) not even symbolic compensations. (ibid., 2012, 7)

This is all the more remarkable since the rules of procedure and evidence for the crimes committed within former Yugoslavia clearly state that victims of past crimes are to receive compensation and claim restitution of property. (International Tribunal for the Prosecution of Persons, 2009 Dec, 103-104) Various legal and practical problems on the domestic as well as the international level hamper the process of supporting victims through material reparations. (Zyberi, 2012, 6) Several lawsuits have been unsuccessful due to courts unilaterally interpreting "(...) *the provisions on statutory limitation of damage claims*" (ibid., 2012 8) and thereby denying victims their right to financial compensation. (Humanitarian Law Centre, 2012, 46) This is why, among other reasons, the majority of victims who survived the violence argue that the ICTY has not gone far enough in serving justice. (Armakolas et al, 2008, 44)

Nevertheless, it appears that the tribunal has reached a certain degree of public support over the years, but only by the minority of the respective countries. (Klarin, 2004, 553) This has indeed more to do with the nationalist drive of trying to defend one's own narrative of the conflict and less with "*fair trial standards*" (Zyberi, 2012, 9). Building on previous surveys, the OSCE conducted a survey in Serbia in 2009 that yielded the following results: While 76% of Albanians and 73% of Muslims (Bosniaks) living in Serbia view the ICTY as positive or mostly positive, only 8% of the majority population share this view. (Organisation for Security and Co-operation in Europe, 2009 Apr, 7-8)

International criminal justice does not only claim to support the individualisation of guilt, but also to provide of the truth about past crimes. Only 8% of the Serbian population believes that the ICTY is contributing to finding out the truth about war crimes and 54% think that the real truth will never reach the general public. (ibid., 2009 Apr, 31) Since its

establishment, expert reports presented in the ICTY have made a wide range of data public that capture the loss of human life during the armed conflicts. Despite its occasional negative perception, findings in reports of the ICTY have paved the way for the legitimisation of revealing past crimes. (Zyberi, 2012, 5) Over the years, the ICTY has had a positive effect insofar as it has raised awareness of the crimes against humanity that happened during the war; it has therefore effectively combated the general denial of these crimes in former Yugoslavian societies. The tribunal has managed to establish a narrative of the past violence and a certain public acceptance of revealing crimes and convicting perpetrators; (Nettelfield, 2010, 101) this will be discussed in further detail in the fourth chapter. But the findings of the ICTY have not produced a holistic picture of the past violence as they capture numbers of human lives lost, but fail to reflect the psychological suffering experienced by victims. (Zyberi, 2012, 5)

However, when comparing the public opinion of the ICTY in Serbia with attitudes towards domestic war crime courts, a different picture emerges. This difference between public perceptions of international and local courts relates to justice on the one hand and truth established by the courts on the other. Concerning the first matter, nearly half of the population has stated that war crime trials before domestic courts evoke a feeling of justice having been done. 57% of the entire Serbian population believes that the domestic courts reach just verdicts based solely on evidence; their outcomes are therefore generally accepted. In contrast, 39% do not believe the judgements of the domestic courts to be just and do not accept their verdicts. A third of the Serbian population feels that criminal trials have not created justice, as those criminals at whose hands they had suffered have not been tried. They furthermore reject criminal trials because they perceive the process of adjudications as too slow and verdicts too lenient. (Organisation for Security and Co-operation in Europe, 2009 Apr, 68-70) According to this study, people in Serbia trust domestic courts more to reach just verdicts than the international tribunal.

As to establishing the truth, 57% of the Serbian population believe that the whole or at least parts of the truth has been established through domestic war crimes courts. However, 36% of the total Serbian population believes that the real truth will never reach the general public. (ibid., 2009 Apr, 68-70) 72% of the total Serbian population thinks that war criminals should be tried within their own country or at least in the countries where the crime was committed – as opposed to The Hague. (ibid., 2009 Apr, 74) These statistics highlight the importance of ownership with regards to justice. The international tribunal in the Hague might be objective and comply with international standards of humanitarian law but is too far away from

people's reality to fulfil their demand for justice.

All in all, the ICTY, no matter how disputed, has had a certain, although limited, impact on public perceptions of past war crimes, on justice being done and on establishing the truth about past atrocities.

4.2.4 Reconciliation left behind?

Regardless of the fact that the general public in Serbia has a much better opinion of domestic war crimes courts than of the ICTY, the majority of the Serbian population still believes that reconciliation processes are not promoted through criminal prosecutions by domestic courts; only 33% believe that prosecutions do contribute to reconciliation. (ibid., 2009 Apr, 71)

In the course of this paper, it will be shown that the lack of societal reconciliation has hampered the individualisation of guilt, the feeling of justice being done as well as the establishment of a collective history and a shared narrative about the past. The ICTY did take first steps towards holding individuals accountable for their crimes; nonetheless, this was not enough to pave the way for ethnic reconciliation. In Serbia, only 14% of the population believes that the trials have contributed to the reconciliation process within the region, whereas 71% are convinced the ICTY has not supported societal reconciliation. (ibid., 2009 Apr, 32) The convictions of several individuals by the ICTY have not restored social relations.

The lack of societal reconciliation is manifested in the polarising narratives that dominate the public sphere and divide societies along ethnic lines. Narratives provide explanations particularly when people are torn in a “(...) *struggle for identity and power*” (Kamminga, 2010, 57). According to constructivist approaches, the account of history and the use of specific language, symbols and ideals constitute identities. Constructivism claims that the social construction of narratives is rooted in institutionalised ideas, which in turn are embedded in collective memories and educational systems. (Legro, 2005, 6) Indeed, the societal division on the basis of ethnicity in regions of the former Yugoslavia mirrors this approach: Different narratives are constantly being manipulated in order to attribute a specific meaning to past crimes. (Kamminga, 2010, 56-58) These narratives reflect the existing ethnic segregation and collective accusation of whole ethnic groups, which interferes with the process of reconciliation. (Zyber, 2012, 10) The importance of

reconciliation of ethnically divided communities has been neglected while trying to serve justice through criminal prosecutions alone.

The work of the ICTY may have disregarded societal reconciliation but it has had a certain impact on public acceptance of past crimes: The ICTY has influenced existing popular narratives, which is illustrated by the Serbian government assuming partial *“responsibility for the genocide committed in Srebrenica”* (Zyberi, 2012, 9) in March 2010. Moreover, the presidents of Montenegro, Croatia and Bosnia-Herzegovina have also accepted responsibility and displayed remorse, thereby contributing to a public narrative of war crimes and accounting for the past. (Zupan, 2006, 335) These are continuous steps towards facing the truth about the past, fighting public denial about war crimes and building the ground for a gradual rapprochement of conflicting parties. However, the public has accepted these official apologies with mixed feelings, as reconciliation would be a necessary precondition for a positive acknowledgement. (Dzidic, 2013)

Nevertheless, the sincerity and value of public acceptance needs to be questioned since politicians and large parts of society in Serbia refuse to assume responsibility for crimes committed during the wars. The possibility of a Serbian minister of the Kosovo government denying war crimes having occurred in Yakova (Kosovo) in 1998/1999 under Milosevic *“(...) is an extraordinary testament to the extent to which there is (...) no common ground in terms of remembering and accounting for what happened”* (Warren, 2015). The ICTY may have had an affect on some popular narratives in parts of the former Yugoslavia, but its impact has come nowhere near to establishing a notion of collective history throughout the region.

The discussed issues of insufficient societal reconciliation and missing collective narratives of the past can be directly linked to shortcomings of the retributive justice processes of the ICTY, as will be analysed in the following chapter.

4.3. Shortcomings of the ICTY

The ICTY had to meet extraordinarily high expectations. As described in the next chapter, the disappointments and shortcomings of the tribunal mainly arose from wrong assumptions of the ICTY’s capacity and its capability. Ignorance of practical obstacles, limits of the tribunal’s jurisdiction and its legal discourse as well as inherent limits of a retributive justice driven process resulted in a neglect of reconciliation processes. The gap between the

tribunal's mandate, which was expected to serve justice, bring peace and facilitate reconciliation, and the ICTY's capabilities as a tool of international criminal justice will be exposed. The analysis of practical obstacles for the ICTY, problems of retributive justice and limits of criminal tribunals in general will illustrate that the problems associated with lacking social reconciliation and persisting ethnic divisions could have been foreseen.

4.3.1 Practical obstacles faced by the international tribunal

There is a common consensus that the ICTY did not succeed in completely fulfilling its mandate. The dissatisfaction with the ICTY's proceedings is therefore not limited to a few individuals. (Armakolas et al, 2008, 38) This is mostly due to an existing imbalance between the instructions of the ICTY's mandate and the way the tribunal's institutions are designed. (ibid., 2008, 38)

As the ICTY is an international tribunal, it has no executive force to carry out arrest warrants. Although it has the power to issue arrest warrants it has neither the authority nor the capacity to apprehend those accused. (International IDEA, 2003, 15) The biggest handicap for carrying out its mandate, though, is the lack of an own police force. The ICTY is therefore not able to ensure the execution of arrest warrants and other orders but rather has to rely on international organisations or the former Yugoslav states. While the enforcement of its mandate is dependent on the assistance of states and international bodies, the tribunal "*(...) does not have the direct power to compel this cooperation*" (McDonald, 2004, 559). The greatest obstacle to the mission of the ICTY is however the unsatisfactory cooperation of the respective governments with the ICTY. (Oellers-Frahm, 2005, 213)

The lack of appropriate enforcement mechanisms is not a dilemma unique to the ICTY, but applies to any international tribunal and could therefore have been foreseen as to impede the ICTY's work. The consequent inefficiency of the ICTY resulted in Yugoslav societies questioning the tribunal overall and shaking public confidence in its work. (International IDEA, 2003, 15) Ad hoc tribunals such as the ICTY have proven furthermore to be expensive, time consuming and distant from people's realities. Its impact has therefore been limited and the lack of ownership has made it easy for political elites to manipulate public perceptions of the tribunal. Dovetailing international with local justice mechanisms could solve some of these problems. (ibid., 2003, 15)

The above-mentioned obstacles and resulting problems do not imply that the ICTY is particularly faulty but instead are common symptoms of the field of international criminal justice in general, which still is in its initial phase of development. (Armakos, 2008, 39) The failure of the ICTY to fulfil its mandate should therefore not be accepted uncritically; rather the focus should lie on the mistake of combining the responsibility of serving justice, bringing peace and reconciling traumatised communities into one institution – an International Criminal Tribunal – which is, just as international criminal law itself, still in its early stages of development.

4.3.2 Problems of the retributive justice driven process

Several obstacles to the reconciliation process in former Yugoslavia are the results of general shortcomings of the process of retributive justice.

Establishing an international tribunal involves the danger of over-emphasising retributive justice as a mechanism for coping with war crimes and “(...) *of imposing retributive justice as the universal response to human rights crimes*” (International IDEA, 2003, 15). This approach bears the risk of neglecting alternative mechanisms for addressing a violent past and of ignoring the growing demand of more informal, inclusive and mediation-oriented instruments of restorative justice. International Criminal Tribunals (ICTs) are based on the idea that the punishment of perpetrators prevents future crimes and outbreaks of violence, fights impunity and helps provide retribution to the victims. (Ku et al, 2006, 787-789) After the foundation of the ICTY, the international community therefore did not bother to provide other opportunities for addressing the past violence. The massacre of Srebrenica in July 1995 and the outbreak of the Kosovo war in February 1998 however seemed to indicate that the ICTY failed to serve its purpose of deterring future violence and satisfying grievances. (Armakolas et al, 2008, 38)

According to the mandate the tribunal was not only created to inhibit future outbreaks of violence and insure the continuation of peace, but also to build the fundamentals for reconciliation. Nonetheless, International Criminal Tribunals are a tool of international criminal justice for applying the rule of law and not for reconciling societies. ICTs can in fact have the opposite effect and exacerbate atrocities by hampering reconciliation within a society. (Ku et al, 2006, 832) A reason for this is that retributive justice sets very narrow priorities: a criminal trial’s highest priority is to prosecute a few individuals responsible for violence, thereby establish respect for the rule of law and serve legal justice. However, the

implementation of criminal justice through tribunals can be of secondary importance to a post conflict society that urgently needs to address hostile ethnic divisions. As a result of the narrow focus on prosecuting a few individuals, criminal trials often fail to empathically address reconciliation processes, the exchange of truths and the support of dialogue and social interaction. (International IDEA, 2003, 14) Criminal prosecutions can fuel tensions between perpetrators and victims, as criminal trials establish a narrow form of the truth that excludes diverse experiences of conflict. Hence, the process of criminal prosecutions can result in increased animosities towards the perpetrators rather than contribute to the healing of victims. (McGregor, 2001, 36)

The process of criminal prosecutions hardly ever endorses reconciliation between offenders and victims, as retributive justice is first and foremost a *“transaction between the state and the offender”* (Parent, 2010, 282). The needs of victims are of minor importance, which is reflected in the hostile atmosphere of cross-examinations; this tends to further traumatise survivors rather than show respect for their grievance. (ibid., 2010, 282) The retributive model views crimes purely as a violation of the law and justice as retaliation and punishment of the guilty. (Gilbert et al, 2007, 7) Criminal trials reduce human suffering and violent experiences exclusively to a legal matter and can therefore *“(...) never fully address the multitude and complexity of issues involved in justice”* (Brants, 2013). On the other hand, alternative justice mechanisms such as restorative justice dismisses justice as an abstract mechanism of the law, reaches further into society and creates the basis for reconciliation: a crime is not merely perceived as a violation of the law but as violating people and relationships. (Clark, 2008, 340)

The previous chapter explained the first claim of proponents of retributive justice, namely, that criminal trials contribute to reconciliation through the individualisation of guilt and establishment of truth about the past. Nonetheless, the former argument does not take into account that it is impossible to prosecute everyone responsible in a post-conflict-context, given the extremely high number of people involved in war crimes. It follows that comparatively few people get targeted for prosecution, while the real extent of guilty individuals within a society remains unknown and the majority of perpetrators go unpunished. *“[W]hat is billed as individual justice actually becomes a de facto way of exonerating many of the guilty”* (Bass, 2000, 300). While a few people get victimised and scapegoated for crimes committed by the government and/or the bigger part of society, past divisions are perpetuated in the future; this makes the justice system appear arbitrary and impedes healing processes. (Rigby, 2001, 5)

The ICTY, like any other criminal tribunal, acknowledges guilt in a legal context but ignores political or moral responsibility. Therefore, criminal tribunals can reveal an only partial picture of past crimes and are not able to establish a collective narrative of conflicts. Given that the ICTY could not reveal the numerous causes and practices of violence, it has fuelled the animosity between collective groups in many cases – especially in ethnically divided countries such as Bosnia-Herzegovina or Serbia. (International IDEA, 2003, 14) This, in combination with the above-mentioned factors, is reason enough for most Serbs to reject the ICTY's work. They hold Croats and Albanians responsible for most of the war crimes and accuse the tribunal of prosecuting ethnic Serbs only. In their eyes, the tribunal fails to punish any other war criminals. According to a survey, 42% of the majority population in Serbia believe that Croats, 32% believe that Albanians and only 8% believe that Serbs conducted the worst war crimes; on the other hand, 96% of Albanians and 84% of Muslims (Bosniaks) living in Serbia consider Serbs as primarily responsible for the atrocities and past violence. (Organisation for Security and Co-operation in Europe, 2009 Apr, 85) Different ethnic groups continue to perceive each other as collectively guilty and therefore fail to clearly distinguish between different groups or individuals and their responsibilities for different crimes. These undifferentiated generalisations of guilt could arise because those groups were not compelled to enter into a dialogue with each other. Hence, no common ground for a shared history could be established. This lack of communication and interaction between the different parties can easily result in a perception of collective guilt of entire groups, which often precedes mass atrocities. (Clark, 2008, 336)

The usefulness of criminal trials and the process of retributive justice should not be questioned in general, but its limits must be clearly analysed: it is necessary to outline such limits as well as possible negative repercussions to investigate whether there are better suited mechanisms to deal with war crimes and to meet the needs of post conflict societies.

4.3.3 Limits of International Criminal Tribunals such as the ICTY

Any criticism of the ICTY needs be considered in the context of the limits of retributive justice and should be analysed “(...) *under the lens of its real potential*” (Armakolas et al, 2008, 31). ICTs need to be viewed with regard to their restricted capacity and as a form of addressing past violence within the restrictions of legal discourse. Truth and justice can only be established in a narrow procedural sense. (Brants, 2013) These critiques should not put the effectiveness of criminal trials in general into question but should rather outline the

limits of criminal prosecutions to bring about peace, to satisfy people's demands for justice and foster societal reconciliation.

The International Institute for Democracy and Electoral Assistance (International IDEA) analysed the tribunal's impact and concluded that the ICTY faced one main obstacle: it has proven to be incapable of ending a conflict that is in progress. (International IDEA, 2003, 15) Tribunals have turned out to be poor peacebuilding tools. (Warren, 2015) This became apparent when the ICTY proved itself unable to stop the massacre in Srebrenica in 1995 and the outbreak of violence in Kosovo in 1999, even though it had been established in 1993. To conclude, the tribunal can serve legal or criminals justice by prosecuting and imprisoning war criminals; however, it has neither the capacity nor the outreach to end an ongoing conflict.

Concerning the claim of criminal trials establishing the truth about past crimes, it needs to be taken into account that the narratives established by the ICTY only paint a partial picture of past crimes. Given that the tribunal is "(...) *constrained by its strict legal procedure*" (Zyberi, 2012, 11) it stands in the way of forming a collective narrative, as the narrow truth revealed by criminal trials is only accepted by specific groups of society. The claim that criminal trials establish the only truth about past crimes neglects the dispute about the truth after violent conflicts: rather, many different perspectives on past crimes coexist in a post-conflict society than one single truth. (Clark, 2008, 336) A survey conducted in Serbia in 2009 revealed this diversity: 83% of the majority population, i.e., ethnic Serbs, believed that Serbs had sustained the most casualties during the wars from 1991 to 1999. In contrast, 89% of Muslims (Bosniaks) and 88% of Albanians considered Bosniaks (Muslims) to have been affected the worst. (Organisation for Security and Co-operation in Europe, 2009 Apr, 84) Opinions concerning the responsibility for past crimes diverge just as much: most Muslims (Bosniaks) and Albanians believe Serbs to have committed most crimes during the wars; the majority of ethnic Serbs on the other hand hold Croats and Albanians responsible. (ibid., 2009 Apr, 85) This outlines the clear divide within the Serbian population and the obvious dispute over the truth.

The aim of establishing the truth about past human rights abuses by the means of war crime tribunals fails to acknowledge the importance of providing a platform for exchanging different truths. Criminal trials and prosecutions focus solely on establishing one sort of truth that aims at revealing the 'facts' about the past, i.e. factual or forensic truth. This approach leaves no room for the establishment of healing truths, which are indispensable for

reconciling a community and are only generated in the course of alternative mechanisms of reconciliation. The truth and facts provided by criminal prosecutions divide a society even further. Factual truths established by criminal trials should not be questioned per se but what can be criticised is criminal trial's claimed monopoly on establishing the one and only truth about past atrocities. (Clark, 2008, 336)

Transitional Justice is a very sensitive process, which has to combine different methods and react to the diverse needs of people affected by the past violence. Victims and perpetrators of a conflict hardly ever agree upon the necessary measures to achieve justice in their particular situations. Measures of retributive justice such as the establishment of an ICT can however be particularly critical. While victims often feel that justice is being served through punitive measures such as a criminal court, groups of society accused of being responsible for crimes often feels scapegoated. (Klarin, 2004, 553) These effects are not unique to ICTY but rather a consequence of only using punitive measures to address past violence. In addition, every society has its own understanding and demand for justice and its own contextual circumstance, which makes the development of a single blueprint for a justice mechanism impossible. (Opatow, 2001, 162) No one method can serve as a panacea for conflict – not criminal prosecution or Truth Commissions or measures of compensation. Martha Minow captures it in a nutshell: “(...) *there are no tidy endings following mass atrocity*” (Minow, 1998, 102). However, judicial approaches in the form of International Criminal Tribunals to address and overcome past crimes will always fail to deliver justice to the majority of people or build a shared historical narrative. (Warren, 2015)

There are alternatives to retributive justice and punitive measures for addressing mass atrocities and war crimes; these often have better chances to foster societal reconciliation and secure peace.

4.4 Alternative mechanisms to address past violence

It has been shown that a criminal justice process such as the one pursued by the ICTY does not contribute to the reconciliation of former enemies. However, this can be achieved by Truth seeking commissions. (Zyberi, 2012, 14) They would not supersede the ICTY insofar as measures such as reparations for victims or the establishment of a Regional Truth and Reconciliation Commission would complement rather than replace the ICTY's work. (ibid., 2012, 6)

Several attempts at setting up Truth and Reconciliation Commissions (TRC) – in Bosnia-Herzegovina in 2000 and in Serbia in 2002 – have failed. (Zupan, 2006, 333) Most people in the former Yugoslavia have a positive attitude towards confronting the past and even deem it necessary. 64% of the majority population in Serbia think it is important to face the past, albeit for different reasons. 79% of Muslims within Serbia believe it is important to face up to the truth to accept responsibility for past atrocities. (Organisation for Security and Co-operation in Europe, 2009 Apr, 118)

The creation of a Regional Truth and Reconciliation Commission (RECOM) has been widely discussed and is supported by a considerable proportion of civil society. (Zyberi, 2012, 10)

“A non-political regional coalition of civil society organisations and individuals has been campaigning for years for the creation of a commission tasked with establishing the facts about war crimes and human rights violations committed in former Yugoslavia from 1991 to 2001” (Milekic, 2014).

In Serbia, only 41% of the total population but 66% of Muslims (Bosniaks) – considerably less than in other countries – believe that a regional Truth and Reconciliation commission would be able to determine further facts about crimes during the war. (Organisation for Security and Co-operation in Europe, 2009 Apr, 120) A regional TRC could establish more in-depth facts about crimes and human rights violations. Moreover, the regional civil society involved in the RECOM would have the possibility to create acceptable narratives for different ethnicities, *“(…) furthering the reconciliation efforts and helping to provide closure to the victims”* (Zyberi, 2012, 11). To help prevent future escalations of violence and the recurrence of human rights abuses (ibid., 2012, 12) the RECOM would be assigned the following tasks: Taking statements of affected people, collecting relevant documents, conducting field inquiries and visiting crime scenes, performing public hearings and thematic sessions as well as ensuring that victims receive material and symbolic reparations. (Coalition for RECOM, 2011, Art. 17-21, 45)

A preliminary statute was set up in March 2011 and is still under examination; (Zyberi, 2012, 11) however, it has been amended during these four years. (RECOM Initiative, 2014, 3-4) After its 17th assembly in Belgrade in November 2014, the coalition of civil society groups and NGOs called “For RECOM” amended the statute one last time. The lacking support by political leaders of respective countries has been deterring the establishment of

RECOM. (Dzidic, 2013) However, there are still high hopes that RECOM will be formed in 2015.

Future-oriented processes like truth telling, community dialogue, healing, reconciliation, material and symbolic compensation are all part of the alternative mechanism of 'restorative justice'; they can be of utmost importance for restoring relationships within a post-conflict society. (Amstutz, 2010, 152-153) This chapter has attempted to outline the insufficiency of the ICTY having been given the main role of bringing about peace, justice and reconciliation. As a consequence, several other mechanisms of Transitional Justice that could have supported the reconstruction of societies were neglected: *"(...) what was needed in the former Yugoslavia was a well aimed and targeted strategy of transitional justice within which the ICTY could have played a strategic role as one component of a holistic approach"* (Armakolas et al, 2008, 42).

Despite the shortcomings of a retributive justice driven process, the ICTY assisted in forming a narrative of the conflict and past crimes, and above all it laid the foundation for a transformation of the political system. The democratic transition was only possible because high-ranking politicians and military leaders have been prosecuted – the latest example of which is the ongoing trial of Ratko Mladic. This in turn has benefitted the emergence of more moderate leaders from within society. (Zyberi, 2012, 10) A transition however does not only take place on the political but just as much on the societal level. Whether at all and if so, to what extent a social transformation has taken place in former Yugoslav countries, will be discussed in the next chapter.

4.5 Rebuilding a community

Reconciling a society is not only an important milestone in preventing future violence and guaranteeing peace but also a necessary fundament for the transformation of a former authoritarian societal structure into a democracy.

In order to prevent future violence, overcome mere coexistence and ethnic tensions, it is as important for individuals to transform and reconcile as it is for communities. Violent conflicts traumatise not only individuals but also societies as a whole by inducing psychological changes and influencing social interactions and cohesion. This results in communities losing their trust and faith in their society. (Gutlove et al, 2005, 141) If the psychological impact of violence is not appropriately addressed on a community level, the

damages within society can be passed down generations through ‘transgenerational transmission’. (ibid., 2005, 141)

As victims of trauma often feel unable to cope with traumatic events on their own and healing societal traumata requires the connection to other people, it is all the more important to address this issue on a broader community level. (ibid., 2005, 140) This process of societal healing involves three stages: safety, acknowledgement and reconnection. A community needs to pass through all stages to be able to move “(...) *from a feeling of unpredictable danger to one of reliable safety and security; from a sense of dissociated trauma to acknowledged memory; and from feeling isolated and stigmatised to restoring meaningful social connections*” (Herman, 1997, 155).

4.5.1 Stage one – Re-establishing safety

Concerning the first stage of societal healing, the ICTY has been establishing a certain sense of safety by prosecuting war criminals that have previously appeared to be untouchable. However, this is not enough to create a secure environment for former victims of violence. Another important step involves the transformation from a repressive to a democratic system by making government structures transparent and fighting against corruption and clientelism. (Zupan, 2006, 332) A way of supporting this process is the expulsion of the former leadership: the process of ‘lustration’ describes the targeted punishment of individuals responsible for violence, repression and conflict. This non-judicial disciplinary measure can involve disenfranchisement or the exclusion from the political arena or public services such as the police, the military or state administration. Softer forms of lustration can include early retirement or relocation to unprofitable or unfavourable positions. (International IDEA, 2003, 15)

Processes of lustration as well as opening confidential police and army files to the public can help create a sense of safety within the community. (Zupan, 2006, 332) Serbia passed a lustration law in 2003. Nonetheless, the government failed to provide the means to put the law into practice and it expired in June 2013 without ever having been implemented. Apart from Serbia, Macedonia (FYR), that passed its first lustration law in 2008, was the only former Yugoslav country to have passed a law on lustration. (Ristic, 2013) It seems however that lustration in Macedonia (FYR) is mainly used by political elites as a tool for dealing with political opponents, rather than as a mechanism for confronting the totalitarian past. (Krtolica, 2013) Macedonia and Serbia have furthermore signed an agreement in February

2014 to exchange and hand over classified information that was gathered by the former Yugoslav secret service to the respective lustration commissions. (Independent. Mk, 2014) Overall, the implementation of a transparent lustration process in the former Yugoslavia has been very limited.

Safety is furthermore established through a functioning legal system. The ICTY has considerably promoted and strengthened the rule of law at the domestic and international level in former Yugoslav states. The tribunal has assisted in the training of legal professionals and handling of war crimes by transferring cases to domestic authorities to promote accountability. (Zyberi, 2012, 3ff) The tribunal has furthermore been supporting the enforcement of international legal standards and the transfer of „(...) *legal expertise to legal professionals*“ (ibid., 2012, 3). The underdeveloped rule of law and rudimentary judiciary of domestic courts poses nevertheless a constant challenge to the emerging democracies in the region and has not succeeded in building up people’s trust in their countries’ judiciary. (Merkel, 2007, 425) As outlined in a previous chapter, judicial rulings by regional courts have a broader impact than criminals’ prosecutions in The Hague. Prosecutions on a local level establish a sense of ownership over the process of justice and accounting for the past. The regions’ judiciary must nonetheless take further steps to develop the efficiency, transparency and ability to process cases fairly. (King et al, 2011, 42)

4.5.2 Stage two – Acknowledgement

Referring to the second stage of healing, the presidents of Serbia, Montenegro, Croatia and Bosnia-Herzegovina, as mentioned before, have made symbolic acts of acknowledgment by admitting responsibility and showing remorse for past crimes. (Zupan, 2006, 335) Furthermore, the ICTY’s extensive use of witness statements led to the global acknowledgement and recognition of victims’ sufferings, made victims’ voices become heard and contributed to social healing. (Armakolas et al, 2008, 44-45) In this respect, storytelling can play an important role in acknowledging past crimes and in integrating social trauma into public memory. (Herman, 1997, 175) The most noticeable acts of public recognition of past atrocities have involved the construction of memorials as a “(...) *source of collective memory (depicting heroism and victimhood for one nationality) for one nationality*” (Zupan, 2006, 336). According to constructivism, the most important aspect of conflicts is the realisation of the agency of actors. People can solve or reproduce conflicts and social tension by means of language, memory and narratives. The manner in which

political elites handle a conflict can foster reconciliation through measures of public acknowledgement of the violent past but it can just as much perpetuate a conflict by utilising existing grievances. (Jackson, 2005, 172-173)

Until today, public acknowledgement of past crimes has not progressed far enough yet for several reasons: Firstly, neither material reparation nor symbolic compensation have taken place; secondly, countries' governments are still hesitant to assume full responsibility for past crimes; and lastly, public apologies have not gone hand in hand with societal reconciliation and therefore have not been well received. To account for these shortcomings, amongst others, the establishment of a Regional Truth and Reconciliation Commission is of major importance.

4.5.3 Stage three – Moving towards social reconnection

Social reconnection is the last crucial step not only towards healing of a community but also towards transforming the social and political system into a democracy. In most regions of former Yugoslavia community-based reconciliation mechanisms, initiatives for social reintegration and processes of healing on the community level are largely absent. This owes to the over-emphasis on retributive justice mechanisms as well as the internationally driven led reconstruction process, which rather focused on rebuilding the infrastructure than the social sphere of shattered societies within former Yugoslavia. (Zupan, 2006, 336-337) The absence of any significant societal dialogue about the past has resulted in people feeling “(...) *very little empathy and solidarity for the victims from other ethnic groups*” (Council of Europe, 2010, 11). RECOM would be one way of facilitating this kind of inter-ethnic communication and of giving victims a platform where their voices could be heard. (ibid., 2010, 11)

Continuing ethnic divisions within former Yugoslav countries furthermore illustrate the absence of community-based reconciliation. (Zupan, 2006, 327) Especially in Bosnia-Herzegovina, exchanges between the different ethnic groups take place on a very minimalistic level. Even in places where different groups coexist more or less peacefully, there are constant tensions below the surface. These are easily inflammable and will calm down only until the next incident. (Buchmayer, 2015) Since the break-up of former Yugoslavia and the establishment of separate states, no efforts have been made on the political level to create a cohesive national identity and unity within ethnically divided societies. (Dzihic et al, 2008, 4) Especially nowadays, ethnic segregation is on the rise while

the level of tolerance between different ethnicities is continuously decreasing. Existing divisions between ethnicities are reinforced in everyday and occupational life. This is most of all the case in Bosnia-Herzegovina and Kosovo, but also in Serbia and Macedonia (FYR). (Piller, 2007, 3)

As past grievances, crimes and atrocities have not been processed within societies, mutually excluding ‘truths’ and viewpoints of past crimes shape national identities and “(...) *reinforce the fragmentation of post-war societies*” (Zupan, 2006, 327). According to constructivist approaches, this reproduction of conflicts and social tensions takes place because identities, interests as well as societal and state structures are socially constructed and often get manipulated by elites. (Jackson, 2005, 173) In order to work against reproduced divisions within a society it is of utmost importance to gradually change public attitudes by educating people and increasing public awareness. (Zyberi, 2012, 1) However, divisions within educational systems along national lines demonstrate that these social fragmentations are not tackled but rather politically reinforced. (Zupan, 2006, 336)

The failure to develop appropriate mechanisms for addressing past violence and crimes within former Yugoslavia have most of all resulted in the evolution of a defect society, separated on grounds of ethnicity and characterised by an endemically traumatised community. Symbolic measures to build a collective memory have been undertaken to a certain extent but the lack of reconciliation on the community level has been standing in the way of reconnecting different parts of society and of creating a national unity as a basis for a functional democracy. If, according to D. Rustow’s theory (1970, 350-351), a ‘stable national entity’ is the single most important building stone for a possible democratisation, the non-existence of a national unity in former Yugoslav countries is a serious obstacle to a democratic transition. (Dzihic et al, 2008, 4)

4.6 Résumé

The cause of several issues for a large part of former Yugoslav society is the clear gap between the ICTY’s mandate and the composition/structure of its institutions. On the one hand, the tribunal had to accomplish a mission, i.e., establish and maintain peace, serve justice and act on behalf of the law, deter future criminals, counteract intentions of personal retaliation and therefore lay the basis for communities’ reconnection and reconciliation. On the other hand, the ICTY was limited to enforcing only retributive justice. The ICTY was

judged as something different than a judicial organ delivering justice in the first instance; its purpose was misunderstood. While the enforcement of legal justice is the main objective of a criminal tribunal, the establishment and maintenance of peace, including social reconciliation and the transformation of society, exceeds its legal and institutional capabilities. (Shinoda, 2002, 44) (International) Criminal tribunals have neither the legal nor the institutional means to address the needs of victims, to facilitate the exchange of truths, dialogue and of social interaction, to recognise political and moral responsibility, to establish a collective narrative and to create and maintain durable peace within a community. Tribunals such as the ICTY are tools of criminal justice and therefore can only serve legal justice and the rule of law.

The ICTY has been at the forefront of international law: it has indicted 161 people, has created a legitimate platform for revealing past crimes and has to a certain extent managed to combat people's denial of crimes against humanity by establishing a narrative of the past violence and convicting its perpetrators. The Tribunal has therefore mainly gained the support of minorities within former Yugoslav countries.

The ICTY has nevertheless only had limited impact: The Tribunal has not been able to appropriately address the diverse local demands for justice, to reveal different truths about past crimes, to overcome ethnic divisions and, hence, tackle the collectivisation of guilt. These shortcomings in reconciling societies and rebuilding functional relationships within communities cannot be attributed to the ICTY alone, but rather pose an inherent problem of over-emphasising the retributive justice driven process. Therefore, the deficiency can be attributed to a lack of alternative measures for coping with the past, such as symbolic and material restorations, Truth and Reconciliation Commissions, community dialogue and other measures for building collective memories and establishing a national unity.

As a result, most of the former Yugoslav societies have not had the chance to heal. Even though the ICTY has created a certain form of legal safety, the respective countries' governments have failed to fight corruption and impunity by not passing national laws against lustration. This poses further obstacles for establishing social and legal safety within societies. To overcome ethnic divisions, further steps towards public acknowledgement of past crimes and facilitating social re-connection are necessary.

5. The path to democracy

It is a common perception that democracy offers the most effective way to overcome internal and inter-regional divisions within the former Yugoslavia. This approach is the driving force of EU policies for the region. (Balfour et al, 2011, 3) This chapter will analyse whether the democratic transition has helped to overcome social divisions or whether the lack of societal reconciliation has had negative repercussions on the democratisation process in former Yugoslav societies. It will be discussed whether or not the process of Transitional Justice has laid the foundation of a successful democratic transition. Also, the mandatory components of building a functioning democratic system as well as the necessary prerequisites for a transition from authoritarian rule and years of violence to a democracy will be outlined.

Throughout this analysis, a general picture of the democratisation process in former Yugoslavia will be drawn, as not every country can be discussed in detail. However, two countries do not fit into this generalisation: Slovenia and Croatia. From the outset, these two countries were less affected by the wars and managed to remain on the sidelines of the violence that erupted after 1991. They were spared from the chaos following the collapse of Yugoslavian state mainly because the populations in both respective countries consisted of one major ethnic group. Slovenia and Croatia were furthermore able to build their political and social transformation upon a more or less cohesive national unity. Both countries had the common goal of wanting to transform their political systems into democracies and become members of the EU. Their successful paths to democracy were fuelled by the obligatory (legal) implementations in order to join the EU and NATO and by the active support of European countries. (Hacek et al, 2013, 5) Slovenia joined the EU on May 4, 2004, followed by Croatia on July 1, 2013. (Communication department of the European Commission, 2015) Both countries are consolidated democracies even though issues such as corruption remain especially in Croatia and will take some time to eradicate from societal and state structures. The Bertelsmann Transformation Index demonstrates the successful democratisation of both countries: Slovenia is rated at 9.11 and Croatia at 8.17 on a scale from 1 (worst) to 10 (best). (Bertelsmann Stiftung, 2015)

Keeping these two success stories in mind, a general analysis of the rest of the region and its democratic processes will be undertaken in the following chapters. The democratisation process of the ‘former Yugoslavian countries’ will therefore refer to the entire region, with the exception of Slovenia and Croatia.

5.1 The specific case of former Yugoslavia – The dilemma of simultaneities

The topic of democratisation with a focus on the transformation of authoritarian structures has been thoroughly analysed within the field of political science. Drawn from the US and European experiences a western-liberal model of democracy was established for the region of the former Yugoslavia. The goal was to apply it to different countries facing the transition from an authoritarian to a democratic form of government. (Potreba, n.d.)

However, the break-up of former Yugoslavia has engulfed this field of political science in a crisis. The established ‘transitions-to-democracy’ paradigm could not be applied to the region of former Yugoslavia, as the conditions for democratisation differed remarkably from any other previous experience. Therefore, the context specific complexities of the democratic consolidation in the former Yugoslav territories needed to be adequately addressed. (ibid., n.d.)

The transformation to democracy in former Yugoslav was characterised by the so-called ‘dilemma of simultaneities’, i.e., the simultaneous transition on the societal, economic, political and the state level. (ibid., n.d.) These concurrent changes posed a particular challenge to the democratisation processes in countries of the former Yugoslavia, especially because former Yugoslav societies had to transit from war to peace while facing deep social divisions. Thus, not only did a state with its structures and institutions have to be built but also a nation, i.e., a political community accepting the government. (Gromes, 2009, 2-3) *“Simultaneous negotiations of institutional, economic, and attitudinal transition has often proven extraordinary difficult, especially in the presence of ethnic conflicts and controversies over borders and boundaries”* (Dryzek et al, 2002, 3). The transformation of institutions entails changes on the social, educational, legal and governmental level. The transition of attitudes refers to the establishment of new institutions and laws on the one hand, but even more importantly to the alteration of identities, class structures and political mindsets. (ibid., 2002, 4)

Even though all abovementioned changes are important, other factors weigh heavier than the consolidation of democracy: maintaining the countries’ stabilities, fostering their security and resolving the dilemma of statehood. (Balfour et al, 2011, 1) *“If there are any necessary preconditions for successful democratization at all, scholars of democracy see them in the existence of a state”* (Munch, 2004, 72 – In: Gromes, 2009, 1). Unresolved status and border issues of countries such as Kosovo or the Former Yugoslav Republic of Macedonia (FYR) jeopardise the progress made elsewhere, such as increased regional cooperation, successful

elections and peaceful inter-regional relations. (Balfour et al, 2011, 4) States in former Yugoslavia still rest on an unsound footing, which poses a great challenge not only with regards to nation building and implementing democratic reforms, but also relating to social transformation and fostering civil society. (ibid., 2011, 1)

The countries of the former Yugoslavia cannot be regarded as effective and well functioning democracies, as several obstacles remain: to enforce the rule of law and channels for accountability, i.e., organised civil society and the media, which still do not meet western standards. (ibid., 2011, VII) The Bertelsmann Transformation Index described all former Yugoslav countries, apart from Croatia and Slovenia, as ‘defect democracies’ in 2010. (ibid., 2011, 4)

Analysing all levels of transition would exceed this paper’s limits, which is why only a detailed analysis of the democratic transition of society will be undertaken. However, it is important to understand that the transformation of society is only one component of functioning democracies.

5.2. Requirements for a democratic transition

5.2.1 Defining ‘democracy’

According to the Inter-Parliamentary Union, democracy is a universal ideal and a form of government that can be applied irrespective of the cultural, social, political or economic context. (Inter-Parliamentary Union, 1998, IV) This is a widely held view in today’s world; it does however disregard that ‘democracy’ is a controversial concept, most of all in societies transitioning from authoritarian rule. (Dryzek et al, 2002, 4) Thus, democratic principles, as described below, are based on a Western understanding of democracy.

The definition of democracy on the basis of regular elections and votes originated from western experiences of democracy. This perception reduces democracy to a matter of procedure and can therefore only be considered as minimal definition: It disregards social realities and political conditions, which reflect the recognition of basic human and civil rights as well as the extent of participation within a society. It is important to shift the focus from transformation and democratisation studies towards people’s perceptions of their political (democratic) community and their respective problems arising in the course of democratisation. (Potreba, n.d.) This approach must take local realities and people’s

personal experience into account and must simultaneously disregard any ideals of democratic transition. (Krastev, 2003, 40) Democracy is “*less a matter of institutional settings than of the relations between government and citizens*” (ibid., 2003, 45).

After a brief outline of the underlying principles of democracy, the relationship between the state and society will be discussed in further detail.

5.2.2 Principles of democracy

Talking about democracy, it is more important to discuss basic principles and ‘regulative ideals’ than political institutions that we label ‘democratic’. Institutions should only be considered democratic if they facilitate the implementation of their underlying principles. However, institutions represent only the outer shell of a democracy, which is animated only if the institutions act according to democratic principles. (Inter-Parliamentary Union, 1998, 21) So, what are the underlying principles and ideals of a democratic system?

Democracies are based on certain prerequisites, such as equality, freedom, transparency and responsibility as well as the respect for the diversity of opinions. A democracy furthermore strives to uphold the right of the individual, attain social justice, facilitate the cohesion of society, strengthen the communities’ social and economic development and thereby contribute to international peace. (ibid., 1998, IV) A democracy does not only need peace and development to flourish, but also promotes and facilitates peace where it can; it also fosters social, economic and cultural development. (ibid., 1998, V)

Democracy as a form of government has the unique capacity for self-correction. It insures free political competition and the participation of citizens on the basis of non-discrimination. (ibid., 1998, IV) A democratic government must therefore safeguard diversity, pluralism as well as the development of a climate of tolerance. (ibid., 1998, VII) To do so, a democratic state must provide well-functioning institutions, which especially applies to those institutions representing all levels of society. This gives democratic institutions the capacity as well as the responsibility of mediating tensions and maintaining a social balance between competing parties within society. (ibid., 1998, V)

In a democracy, all citizens are equal before the law and no individual is above the law; this principle does not exclude any political parties or social elites. Therefore, the democratic government needs to guarantee openness and transparency, free and fair elections and the

respect for civil and political rights (ibid., 1998, V); also, it can be held accountable for its actions. (ibid., 1998, VI)

Accountability is often promoted through an active civil society; the latter in turn is the core of a democratic system. However, an active civil society is dependent on a well-established and educated political community. Building a political community is equivalent to building a nation, which is the basis for a functioning democracy. (Gromes, 2009, 2) Civil society is an essential requirement for insuring accountability and transparency of the democratic government and equality of all citizens before the law. The freedom of opinion and expression is one of the most crucial preconditions for guaranteeing a nurturing environment for civil society. (Inter-Parliamentary Union, 1998, VII)

Democratic governments receive their authority and accountability from their citizens. The public and political participation of the citizenry as well as their rights are of primary importance. (ibid., 1998, 21) However, the understanding and interpretation of democracy greatly varies within post-communist societies. (Dryzek et al, 2002, 5) It is for those reasons that one needs to base the analysis of a democracy on the citizens and not on governmental institutions. (Inter-Parliamentary Union, 1998, 21) “(...) *to understand if or how democracy works, we must attend to what people make of it (...)*” (Dryzek et al, 2002, 4) The next chapter will therefore focus on the perspectives of citizens, on civil society and the impact that years of dictatorial rule had on the Yugoslav citizenry.

5.3. Transforming the relationship between state and society

At the end of the Yugoslav wars, former Yugoslav societies had to transform their political landscape. They entered the transitional stage of democratisation, which includes the transformation of a non-democratic regime into diverse new forms of governance, public accountability and power sharing. (Inter-Parliamentary Union, 1998, 6) Dictatorial regimes, such as the one under Tito, are characterised by their destruction or undermining of civil society, thereby allowing the ruling power to act without being held accountable. As a result, intolerant ideologies can be established and marginalised parts of society can be victimised. For this reason, it is of major importance to bring post-war or post-dictatorial regimes to justice, to prevent similar occurrences in the future. (ibid., 1998, 11) This form of accountability is established by an active civil society.

5.3.1 The importance of civil society

First and foremost, civil society has an important role in safeguarding democratic ideals, democratic processes and justice by holding democratic governments and political elites accountable. The bureaucratic mechanisms employed by public institutions can be an obstacle to a democracy, given that bureaucracies represent an ideal way for those in power to maintain their position and thereby suppress democracy. (Inter-Parliamentary Union, 1998, 10) In this sense, such so-called democratic institutions are not enough to constitute a functioning democracy. Without an active civil society governmental institutions are able to act without being held to account.

An active and robust civil society is a major building stone for a democratic community and is indispensable for transforming the political landscape from authoritarian rule into a democracy. (Balfour et al, 2011, 42) A functioning civil society gives rise to citizens' political power, as it creates equality and also enables people to “(...) *exercise ultimate political power as a collective body*” (Garrett, 2005). Through its capacity to monitor governments' actions and to bring forth political change, it can support the initiation of transitions, the resistance against reversion, the consolidation of democracy and the completion of transitions. (Linz et al, 1996, 18) Furthermore, an active civil society “(...) *fortifies civil liberties and human rights, promotes economic prosperity, dislodges corrupt and incompetent governments, and stabilises the young democracies of the region*” (Balfour et al, 2011, 41).

In order for people to take up this role of bringing about democracy, preserving the democratic process and ensuring the efficiency and integrity of these processes, citizens need to have the necessary information, knowledge and capacity to utilise their individual and collective rights. (Inter-Parliamentary Union, 1998, 12) A functioning and active civil society needs to be cultivated and should not be assumed nor taken granted for. A democratic regime is responsible for developing “(...) *conditions conducive to the genuine exercise of participatory rights, while also eliminating obstacles that prevent, hinder or inhibit this exercise*” (ibid., 1998, VI). Governments need to eliminate obstacles that stand in the way of establishing an active civil society, such as intolerance, ignorance, indifference and the absence of choices. At the same time a climate of constant education and a culture of information is required for supporting the establishment of a civil society – particularly important is civil education and building of a responsible citizenry. (ibid., 1998, VI-VII) Education gives a citizenry the possibility of and capacity for developing a civil society and

thereby teaches a community how to stand up for its values. (ibid., 1998, 12) “*Democracy cannot exist without civil society, and civil society cannot exist without a population that has the will and capacity to act in defence of its values and institutions*” (ibid., 1998, 11). It is therefore necessary to ensure the continuous improvement of education, equality of all citizens and social cohesion.

Education is the single most important building stone in fostering democracy and facilitating civil society. The absence of education is dangerous as it causes indifference in a society. Apathy and indifference are key factors that the political elite use to misgovern, to exploit their fellow citizens and to misuse their power as well as to manipulate individual and collective rights. A genuine democracy cannot survive with an indifferent or apathetic citizenry that refuses to engage and participate in public life. (ibid., 1998, 12)

5.3.2 The heritage of centuries of dictatorship and years of conflict

After Tito came to power in 1945, the previous existence of all cultural, humanitarian and educational organisations was restricted to several amateur associations that were predominantly under the control of the central government. The communist system of self-management in Yugoslavia bound all regions to a one-party representation. This system of state control hindered the emergence of independent civic institutions. (Sterland, 2006, 11) Civil society was run down by the aggressive populist nationalism, which fiercely dominated the republic and relentlessly drove the country into a civil conflict in the beginning of the 1990s. (ibid., 2006, 12)

The communist legacy, followed by ethnic nationalism had far-reaching and destructive consequences on post-communist civil society in former Yugoslavia, impeding its development and thereby hampering the democratic transition. (Balfour et al, 2011, 41) Shortcomings in civil society’s function with regards to social accountability in the Balkans are illustrated by people’s dissatisfaction with the government, resulting not in their active rebellion against the system but rather in their growing mistrust in state structures and the democratic transition. Communities’ inactivity persists despite a “(...) *widespread perception of high-level corruption, acute popular dissatisfaction with government performance and the prevalent impression that the elites’ agenda does not reflect that of the population in the Balkans (...)*” (ibid., 2011, 42). This is however significantly more problematic, as people are not willing to fight for their rights and values. As described above, this attitude of indifference is a fatal blow to the further consolidation of democracy.

In Bosnia-Herzegovina the growing dissatisfaction, indifference, as well as disillusioned and hopeless attitude towards politics and the status quo primarily stems from the lack of education amongst the population. The well-educated sector of society left during or after the war and this subsequently resulted in a generation that bought themselves prestigious positions in universities and school. It is these individuals who are now responsible for educating the next generation. The low standards of education are not being resolved, as they are continuously reinforced through a corrupt system, where anything can be bought with money and connections. Ethnic divisions are thereby passed on from one poorly educated generation to the next. “(...) *die neue Generation ist vergiftet mit alten Geschichten (The new generation is poisoned by old tales)*” (Salibasic, 2015). As the war is no longer part of the new generation’s lived history, the young population in former Yugoslavia is educated and informed by their families and in schools, where textbooks are biased on the basis of ethnicity – within Kosovo, Serbian children are taught from Serbian history textbooks and Albanian children from Albanian textbooks. (Warren, 2015) This not only occurs in Kosovo however, but also in Serbia and Bosnia-Herzegovina. The low standards of education, which passes on selective, non-objective and often false facts about the past reinforce social divisions and mistrust. It additionally interferes with the forming of a publicly shared history and with societies being able to organise themselves collectively to hold politicians accountable.

These limitations of civil society in the former Yugoslavia can be traced back to a lack of social capital in the region. (Balfour et al, 2011, 43) Shortcomings in social capital and consequently the existence of a weak civil society is not only a result of inadequate resources and institutions, but most importantly a consequence of an endemic culture of distrust, obedience and prejudice within communities of the former Yugoslavia. A day-to-day preoccupation focused on materialistic survival still stands in the way of people expressing their values, as well as articulating their demands and endeavours. Indeed self-expression of values has a major impact on strengthening democratic institutions. This prevalent culture, which is predominantly struggling for existence and ensuring daily survival has been formed by decades of communist rule, followed by years of violence. It is reflected in people prioritising safety and welfare before emancipative actions and values of self-expression. (ibid., 2011, 47)

The question that arises is if people in former Yugoslav societies do not rebel against their dissatisfaction with the government (a topic that will be discussed in more detail later on),

whether this will result in a death sentence for the upcoming democracies of the former Yugoslavia.

Two matters are significant in this context: It is firstly of utmost importance to eliminate the potential for conflict. The ICTY's achievements of prosecuting several war criminals is only a start and needs to be further build upon through measures of dialogue, social interaction, political accountability and reconciliation on the community level. This could counterbalance the intrinsic culture of prioritising security and economic well being over and above values of dialogue, self-expression and reconciliation. Secondly, it is necessary to promote civil dialogue and civil society development in order to change the relation of state and society. (Balfour et al, 2011, 48) A priority should be the reform of the cooperation and dialogue between the government and civil society organisations, which includes the resolving of any pending issues that hinder civil society from contributing to policymaking. (ibid., 2011, 48)

To ensure that the issue of an underdeveloped civil society regarding all ex-Yugoslav countries is comprehensively explored and not generalised, the situation in Bosnia-Herzegovina, Kosovo and Serbia will now be studied in more detail.

5.3.3 The current civil society landscape in Bosnia-Herzegovina

In Bosnia-Herzegovina the number of NGOs (Non-Governmental-Organisations) and NPOs (Non-Profit-Organisations) registered is estimated to be around 8.000; the number of active and functioning organisations however lies between only 500 and 1.500. (Barnes et al, 2004, 25) The majority of these organisations are put together by a small number of voluntary community-oriented associations that work at the canton or municipal level and depend on the work of a few committed and passionate semi-professionals. (Sterland, 2006, 21)

The biggest weakness of NGO and NPO sectors lies in their underdevelopment and poor quality of public advocacy. Most of their successful advocacy efforts take place at municipal level. The number of organisations regularly carrying out effective work in order to influence government policy or amend legislation is limited. The efforts of undertaking public advocacy aimed at influencing higher levels of governmental institutions are even less existent. There is no government-civil society cooperation at either the state or at entity level that is backed by a country strategy. (ibid., 2006, 22) An institutional mechanism set up for the mediation of state-civil society relations, for the definition of respective tasks and

responsibilities as well as for the provision of transparency and accountability, is also inexistent. The public generally perceives relations with the government as poor, regarding the state as not being politically interested in civil society and generally considers state cooperation as being irrelevant. (Barnes et al, 2004, 34 ff)

The majority of improvements in facilitating NGO-government cooperation in recent years has been driven and financed by foreign actors. (Sterland, 2006, 23) Since 1999 international funds provided to civil society organisations in Bosnia-Herzegovina have however been gradually decreasing. The NGO sector is nevertheless highly dependent on international donors, as 70 – 100 % of all funds are provided by foreign sources. (Barnes et al, 2004, 31) (Sterland, 2006, 24-25) To involve civil society in social policy, formal mechanisms have been developed in two key areas: Gender and Youth. Both initiatives are being driven by legal standards, as well as policy, established by the Council of Europe and the EU, which is required in order for Bosnia-Herzegovina to be considered for EU membership. These mechanisms, especially for creating youth policy, are gradually on the rise. (Sterland, 2006, 23) Grants or premises provided by the state to NGOs have increased, but the lack of systematic planning, coordination and a cohesive concept from the government has created not only confusion, but also inequality in funding and supporting NGOs across the country. (ibid., 2006, 25)

What remains problematic however, is not only the lack of state-civil society cooperation but also the poor coordination within the NGO and NPO sector itself. The lack of coordination leads to a high number of organisations working in isolation and activities often being duplicated. In order to tackle this issue a significant initiative was launched in 2001, led by the Centre for the Promotion for Civil Society, to establish a grand coalition (KRUZ – ‘To Work and Succeed Together’) of more than 300 NGOs. The KRUZ initiative aims to establish a future oriented strategy for developing civil society in Bosnia-Herzegovina. Thus far, it has been successful in establishing standards for the provision of services between the state and NGOs by developing “(...) *a formal agreement on cooperation between the state government and the NGO sector*” (ibid., 2006, 24). This initiative constitutes an important step towards facilitating an effective civil society network.

5.3.3.1 Tendencies of change in Bosnia-Herzegovina

The narrative of the communist legacy and the war extensively destroying the civil society in Bosnia-Herzegovina does however ignore certain consequences resulting from the

ICTY's work. After the Tribunal addressed the genocide in Srebrenica in only a limited number of cases, survivors were left disappointed and unsatisfied by the tribunal's inadequate actions. The ICTY's failure in its intended goal to transform the post-war state triggered the establishment of a social movement.

The ICTY established legitimacy for investigating crimes and calling for accountability. This formed strategies for collective action, in conjunction with the tribunal providing an empirical basis for broadening the criterion of accountability and therefore helping civil society to expand discussions of who ought to be held liable. (Nettelfield, 2010, 101) The ICTY's work also supported survivors and family associations through its findings, judgments and failings. *"The ICTY helped foster a social movement (...) by acting as a resource that the survivors utilized in their mobilization"* (ibid., 2010, 101). The importance of this development lies less in the possibility of accessing information and of victims to engage in political and legal matters, but rather in *"(...) the impact on the role of citizens in fostering a legal consciousness"* (ibid., 2010, 102). Above all, the ICTY's work consequently helped Bosnian citizens to claim their rights through collective action.

Initiated by developments surrounding the Srebrenica massacre, the ICTY indirectly fostered a social movement comprised of Srebrenica's family associations located primarily in Bosnia. (ibid., 2010, 101, 143) The court's work unintentionally set the grounding for political participation by creating a space for pursuing accountability. (ibid., 2010, 143) Activists and family associations were thereby given legitimacy, which was lacking before the tribunal's establishment and following the war, a time when a climate of denial was persistent. The ICTY, or more broadly speaking mechanisms of Transitional Justice have initiated positive developments with regards to developing a more active civil society and their involvement in account for the past in Bosnia-Herzegovina. Despite a few positive signs of change there are nevertheless significant obstacles obstructing the establishment of effective state-society relations, as well as inner civil society cooperation.

5.3.4 The current civil society landscape in Kosovo

The situation with regards to civil society in Kosovo paints an even darker picture than the one in Bosnia-Herzegovina. NGOs lack basic capacities, such a common purpose and social vision, well defined organisational identities, cooperation with primary stakeholders, as well as basic administration and management skills. Civil society faces difficulty in establishing

itself in a society having to fight ongoing economic difficulty, political uncertainty and social division on the basis of ethnicity. A realistic estimation of active organisations in Kosovo is no more than 500. Most of these organisations are small, consist of one project and are funded by a single donor. (Sterland, 2006, 25) A quarter of all organisations are located in the capital Pristina, while nearly half of all NGOs constitute youth and women's groups. Thus far, NGOs in Kosovo have been primarily concerned with ensuring people's means of existence. Distribution of humanitarian aid and the provision of basic needs have been a large part of civil society activity up until today. (ibid., 2006, 26)

Civil society organisations in Kosovo, just as in Bosnia-Herzegovina, are highly dependent on international funding. Strong support from several international donors and international organisations has given rise to an identifiable elite of sophisticated and professional NGOs. These organisations are involved in discussions on development policy, the goal of establishing a democratic system and market-oriented legislative framework. (ibid., 2006, 26) Since 2002 however international assistance has decreased significantly and with it the financial support for civil society organisations. The government has not had the capacity to compensate for the shortfall in financial assistance. (ibid., 2006, 28)

The collaboration of the local central government with NGOs and other civic organisations barely exists. Cooperation of state and society is especially difficult due to the government mistrusting NGOs on the one hand and NGOs being suspicious of state structures on the other. The government in Kosovo, as in Bosnia-Herzegovina, perceives NGOs as service providers and therefore does not see the necessity of including them into any form of the political process. This is one of the reasons for civil society advocacy being weak, particularly at the local level. NGOs' lack of identification with a common goal, future oriented planning as well as community mobilisation further hamper their efforts of building up public advocacy. (Sterland, 2006, 27)

The coordination of civil society organisations in Kosovo is even worse than in Bosnia-Herzegovina. In Kosovo it is characterised by a high fragmentation and a lack of coordination and leadership, on the central as well as the municipal level. As Kosovo is socially and spatially divided based on ethnicity, Kosovan NGOs are also in most cases ethnically exclusive. However the majority of ethnically exclusive organisations do not cooperate with each other. A more extensive form of NGO coordination is therefore lacking. (ibid., 2006, 26-28) Up until today, Kosovo has been more concerned with existential threats

such as an ongoing economic crisis, territorial uncertainty, profound social divisions and other factors, with low priority therefore being given to fostering civil society.

5.3.5 The current civil society landscape in Serbia

Civil society organisations in Serbia are generally on the rise, especially since government support has increased following the regime change in 2000. Their development is however still restrained due to a failure in developing a resource and future oriented investment strategy. (Stuppert, 2010, 7) The civil society organisations (CSO) sector often struggles with insufficient financial, material and human resources. (ibid., 2010, 31) Their capacities have nevertheless been continuously building up in recent years. (ibid., 2010, 8)

The international community has largely funded and developed Serbia's sector of civil society organisations (CSOs). The European Commission is one of the major sources in financially supporting civil activists. Contrary to experiences in Kosovo and Bosnia-Herzegovina, the state in Serbia has made substantial resources available for developing Serbian CSOs. (Stuppert, 2010, 7) The government has recently passed a resolution for co-funding CSO projects, which are financed by the EU. (USAid, 2010, 2) Nevertheless the CSO sector has up until today been dependant on international donors and will have to gradually transition to relying on domestic resources. (Stuppert, 2010, 8)

Especially after the regime change in 2000, the government has made major efforts to encourage the cooperation between state and civil society organisations in Serbia. (ibid., 2010, 7) In recent years there has been a noticeable increase in governmental cooperation with and support of the CSOs sector. (USAid, 2012, 2) In 2010 a governmental Office for Cooperation with Civil Society was set up to coordinate communication between CSOs and national authorities. This office facilitates the exchange of concerns, recommendations as well as formal and informal communication between government and civil society organisations. (ibid., 2010, 4) Public advocacy has been increasingly successful on local level since the early 2000s, as the parliament “(...) is dedicated to promoting the accountability and transparency of the Serbian National Assembly” (ibid., 2012, 5). In this process of increasing transparency the Assembly launched the initiative of publishing transcripts and voting records in 2012. State-civil society cooperation is increasingly successful, illustrated, *inter alia*, by the government having adopted a law on co-financing CSO projects. (ibid., 2012, 5)

Furthermore the public image of CSOs is now seen in a more positive light. As civil society organisations are increasingly present in the media and the public is increasingly informed about CSOs' work, public perceptions have improved. (ibid., 2012, 7) This has broadened the range of public influence exerted by CSOs, bringing the society one step closer to a functioning democracy. However, just as in Bosnia-Herzegovina, the civil society landscape in Serbia needs further steps of improvement and is far from being a functioning body able to hold the government accountable.

Issues of a deficient civil society and a lack of social capital is however not the only obstacle posed to former Yugoslav societies' democratisation processes. A democratic transition not only takes place on the social level, but also on the political and institutional level. As described in the following chapter, another major obstacle to the development of civil society is an ethno-nationalism that has developed into dominating the political and institutional sphere. Nationalism however, as David L. Lovell puts it, "*(...) is the enemy of civil society, because its model of social solidarity challenges the nuanced relationships and abstract interdependences of civil society*" (Lovell, 1999, 74). The consequences of this domination of nationalism on the basis of ethnicity will be further analysed in the next chapter.

5.4. Obstacles to democratic transitions in former Yugoslavia

There are several challenges former Yugoslav countries are facing within their democratisation process that are not necessarily linked to difficulties within civil society. The increasing mistrust in government institutions, external influence on the democratisation process in former Yugoslavia, social reconciliation hampering the bridging of ethnic divisions, the persistence of clientelism, and the misuse of the label of democracy pose several other obstacles that impede former Yugoslav countries from transforming into functioning democracies.

5.4.1 The domination of a politicised ethno-nationalism and its effect on society

Up until today politics have been split along ethnic lines, particularly in Bosnia The old political elite that was indicted by the ICTY has been replaced with a new generation of nationalist politicians who took control over the political arena. (Armakolas et al, 2008, 46).

This new form of ethnic nationalism shapes not only formal state institutions, but also mentalities, habits and social interactions. Past conflicts are therefore a continuous part of today's ethnically divided, nationalistic politics and live on in public opinions, predominantly in Bosnia but also in other regions of former Yugoslavia. (Kisic, 2013, 56) This process of ethnicity dominating the political, social and cultural landscape has survived the establishment of democracy until today and is hampering its consolidation. (Dzihic et al, 2008, 4-5) “(...) *the persistence of ethno-nationalism in formal and institutional arrangements results in the continuing challenge to democratisation*” (ibid., 2008, 4).

While national unity and territorial sovereignty were built upon the logic of ethnicity after the collapse of Yugoslavia, a network of clientelism and corruption started to replace individual liberties, thereby creating an increasingly authoritarian regime. (ibid., 2008, 4) Clientelism is a major obstacle to the democratisation process, especially in Bosnia-Herzegovina, as the political elite is not interested in finding solutions for issues of social divisions as well as non-transparent and corrupt political processes within the country. Politicians are mostly concerned with securing their power positions, supporting their family, their friends and their surrounding clan. (Buchmayer, 2015) Furthermore in Serbia, Kosovo and Macedonia political and economic elites ensure their power positions by basing them on an ideology of ethnicity, while individual rights and security have become subordinated and engulfed by collective dominance of the ethnic nation state. (Dzihic et al, 2008, 4) This particular process, which favours a specific elite while excluding people from the process of nation building on the basis of ethnicity, led to an “(...) *estrangement between political elites and citizens*” (ibid., 2008, 6).

This estrangement has been further deepened through a growing social-economic divide. Frustration with the political system has resulted particularly in Bosnia-Herzegovina and Serbia, where specific groups of society dominate the formal economy and others are constantly excluded. (ibid., 2008, 7) Job recruitments continuously take place on the basis of political affiliation. The change of government is frequently followed by replacement of personnel. (Balfour et al, 2011, 11) In Bosnia-Herzegovina the political elite is unwilling to change the institutional status quo and to overcome ethnic divisions and ineffective administrative structures. National elites have thereby been obstructing economic, social and political developments, while supporting the institutionalisation of the exclusive ethno-nationalist logic. (Dzihic et al, 2008, 9) In Serbia, corrupt elites are securing their power positions by fostering clientelistic structures and excluding large parts of the population from various state sectors. This ethno-nationalist discourse is continuously illustrated by the

Serbian struggle to extradite war criminals. (ibid., 2008, 10) The arrests of R. Karadzic in 2008 as well as R. Mladic and G. Hadzic in 2011 under the presidency of B. Tadic raised hopes that Serbian political elites were breaking with former discourses of corruption, clientelism and nationalism based on the ideology of ethnicity. (BBC News, 2011 Jul)

The significant number of politicians not having to be accountable for their actions due to politicians in general turning growingly authoritarian gave rise to a public perception of them being above the law. This popular perception is not far from reality: Public offices are primarily used for private gain. Corruption in the former Yugoslavia is the norm rather than an occasional occurrence and results in effectively disabling democratic control over the states' finances and personnel recruitment. (Balfour et al, 2011, 19) Corrupt conduct of state officials undercuts liberal democracy and causes people's mistrust in their leaders and institutions. (ibid., 2011, 23) While Croatia and Serbia are leading the way in making progress to tackle corruption, Bosnia-Herzegovina and Kosovo are still worryingly far behind. (ibid., 2011, 22)

Due to governments' ongoing corruption and the political arena being controlled by ethno-nationalism, a persisting mistrust towards governmental institutions, the media and any other organisation regarded as working for the government is dominating the public image of governments in former Yugoslavia. Trust is not only an important building stone in rebuilding a community as described earlier, but is also a necessary basis for transforming the relationship between the state and its citizens. One way this mistrust is expressed is by not trusting the government with information. A 2009 survey in Serbia indicates that 54% of the total Serbian population neither trusts government officials, political parties, the media nor the officials of the ICTY to inform them correctly in respect to war crimes proceedings taking place before the Hague tribunal. At the same time, 53% of the Serbian population do not believe the media, domestic judicial officials or politicians concerning information on criminal trials before domestic courts. (Organisation for Security and Co-operation in Europe, 2009 Apr, 100-101)

As much as people lack trust in their state officials, they also mistrust the media. The role of the media should not be underestimated in the building of democracy, transforming of the state as well as educating and informing society. The media being perceived as a puppet of government officials during war is still widespread today. 57% of the Serbian population hold that the media during the wars was not objective in informing citizens. A third believes that the media spread lies and therefore fuelled hate. Only 18% of the Serbian population

believes that the media assumed an objective role regardless of nationality during the wars after 1991. (ibid., 2009 Apr, 105) The media is still not perceived as a trustworthy body to inform the public accurately about matters such as war crime trials or past atrocities. (ibid., 2009 Apr, 101) Until today the media has been less concerned with informing the public and more about entertainment and distraction, especially in Bosnia-Herzegovina. The media cannot be regarded as means of educating and information people, but rather as a tool of supporting the status quo by failing to raise critical questions. (Buchmayer, 2015)

The way political elites have dealt with the democratisation process has further fed people's distrust in national institutions. Former Yugoslav countries are dependent on loans and financial support from the international community, especially the EU. This financial assistance goes hand in hand with specific conditions and rules, irrespective of the governments' promises during elections. International demands might be justified, but are often perceived by the public as illegitimate impositions, as it is impossible for citizens to distinguish between international impositions and actions of ethno-nationalist politicians. Measures of reform introduced by local governments due to foreign conditions lose legitimacy by being enforced by corrupt, clientelistic and ethnically divided political elites. While being unable to comprehend activities by governments that impact people's day-to-day lives, the public mostly reacts by being growingly apathetic towards party politics. As ruling parties use Europe as a scapegoat to conceal their own failures, mistakes and unpopular decisions, societies have become increasingly cynical not only towards their own governments, but also towards Europe and its conditions for democracy. (Balfour et al, 2011, 16)

5.4.2. External influence on the regional democratisation processes

A factor complicating the democratisation process in former Yugoslavia is its exposure to a strong external control, which is partly due to the region transitioning to democracy at such a late point in time. (Potreba, n.d.) This external influence is dominated by a European pattern of democracy, which led to regional processes of democratisation in the region adapting to European mechanisms. In this process of 'Europeanisation' "*(...) ideas, values, norms, rules, and procedures developed in the EU policy process become incorporated in the domestic identities, institutions, and policies*" (Dzihic et al, 2008, 5). This external promotion of democracy deeply changed the region and decisively influenced their process of democratisation. (Potreba, n.d.)

This democracy promotion in the form of ‘Europeanisation’ strove to implement a European model of democracy. The implementation of this model was not adapted to the context of post-dictatorial and war torn societies in former Yugoslavia. The version of democracy applied to the region therefore first and foremost emphasised establishing a formal system of institutions, without considering social conditions. (ibid., n.d.) Legislative output, i.e. matters such as elections or the formal adoption of laws, was given greater attention than democratic processes per se, namely roles and interactions of political parties or civil society organisations. Substantive aspects were in this sense given less focus than formal, institutional and procedural criteria of democracy. (Balfour et al, 2011, VII) This bias towards formal institutionalism is especially problematic as it distracts from the far greater problem of national elites fortifying their power positions in former Yugoslavia. (Potreba, n.d.) The exposure of outside influence is therefore not the only challenge the region faces. What makes this context especially complex is its combination with local struggles for power.

5.4.3. The battle for political power and its impact on people’s perception of democracy

The EU-led democratisation process became a politicised battlefield of political elites. Europe and the democratisation process are specifically used as a political tool for parties to distinguish themselves from their political opponents and to secure their positions within the ethno-nationalist system. While officially supporting the democratisation process, its formal institutionalism and the integration into the EU, national elites are drawing attention away from processes that help them fortify their power positions. (Dzihic et al, 2008, 5) The idea of democratisation and Europeanisation are used as tools by political elites to gain greater support and secure their political influence.

Democratisation is however not the only tool used by political parties to undermine their opponents. Investigation committees, motions for debate and other instruments overseeing the work of governments, if used at all, “(...) *serve the purpose of fighting political adversaries*” (Balfour et al, 2011, 11). The monitoring role of parliaments in the former Yugoslavia is often inexistent or inefficient, as it often gets misused for political purposes by ruling elites. (ibid., 2011, 11)

The democratisation process, which has been dominated by a European pattern of democracy, has formed people’s perception and expectation of the democratic transition.

This is especially problematic, given that the manner in which the concept of democratisation is politically illustrated is inconsistent with reality at ground level. As a consequence this broadens the rift between norm and reality of democracy in the region. This has resulted in a major gap between people's expectations of the democratic process on the one hand and the actual implemented democracy on the other. (Dzihic et al, 2008, 6) The misuse of labels such as democracy, European integration, prosperity and freedom by political elites and the simultaneous persistency of the status quo makes people associate the failure of government with these exact labels. People's disappointment with states institutions and ethno-nationalist elites thereby become indirectly linked to politicised notions of European values and the democratic transition. (ibid., 2008, 5) This particular context "*(...) leaves the citizens disappointed behind, decreasing trust in democratic structures and political participation*" (ibid., 2008, 7).

The preservation of power positions occupied by political elites is only possible due to an informalisation of political decision-making. The lack of accountability and transparency within former Yugoslav governments is due to the growing influence of cliques and clans. These informal networks have an extensive influence on formal decision-making, as interactions between formal and informal institutions reach far into society. (Potreba, n.d) This dominance of a clientelistic, non-transparent and ethno-nationalistic ruling elite has been hampering the process of consolidation of a nation state in the region.

The biggest obstacles for Bosnia-Herzegovina, Kosovo and Serbia in successfully transforming into democratic systems initially lie in their incomplete processes of building a nation-state and in not breaking with the dominant patterns of ethno-nationalism in thought, action and practices. (ibid., n.d)

5.4.4. Institutional challenges to democratisation

The ethno-nationalist system following communism and its strong socio-economic stratification, as well as the exposure to external influences are not the only factors complicating the democratic transformation in former Yugoslavia. The late onset of the democratisation, the past violence, the formation of authoritarian regimes in the 1990s and its legacy of corruption all pose a major challenge to the political transition while undermining democratic institutions. (Dzihic et al, 2008, 6)

One of the greatest institutional challenges in the region is a deficient judiciary. As the rule of law is one of the major building stones for a functioning democracy, its deficiency poses a considerable obstacle to the democratic transition. (Rosenfeld, 2001, 1307) Domestic courts are generally perceived as suffering from low capacity and as being unwilling to prosecute war criminals. (Armakolas et al, 2008, 42) Over the course of the so-called 'completion strategy' of the ICTY, lower level cases were transferred to national courts. (United Nations International Criminal Tribunal for the former Yugoslavia, Completion Strategy, n.d.) The dysfunction of regional legislature was quickly demonstrated by political elites being unwilling to try war criminals. Due to problems of ethnic bias by the judiciary and in prosecutions, war crime trials led by national courts mostly failed to “(...) *establish impartial and unbiased sentences*” (Zupan, 2006, 329). Restricted capacity of the judiciary, inadequate police cooperation, lacking protection for witnesses and insufficient cooperation concerning legal processes between former Yugoslav states is severely hampering the prosecution of war criminals. (ibid., 2006, 329) (HRW, 2004, 9-20)

Inadequate protection of witnesses is especially problematic, as it has also stood in the way of effective prosecutions by the ICTY. The insufficient safety of witnesses testifying in front of the tribunal has led to a vast number of them recanting, dying mysteriously, having unfortunate car accidents and disappearing. (Warren, 2015) This insufficient protection has discouraged future witnesses from stepping forward, limiting local courts in their ability to convict war criminals. While Bosnia brought 54 cases to trial, Serbia merely held nine war crimes trials at domestic courts and even then only trying low-level perpetrators. In Croatia “(...) *ethically biased prosecutions and convictions in absentia are prevalent*” (Zupan, 2006, 330), while in Macedonia (FYR) an amnesty law adopted in 2002 led to no war crimes trial being held on the domestic court level at all.

In some cases the adoption of adequate and progressive legislation did take place. Its implementation and enforcement was however heavily dependent on actual capacity. The prerequisites of well functioning state apparatus, economic advancements and general institutionalisation were and to a certain degree remain absent. Key institutions that are established to guarantee the governments' integrity and accountability, whilst being existent, are hindered in fulfilling their responsibility of ensuring the well functioning of a democracy due to problems of corruption. (Balfour et al, 2011, 22) A majority of former Yugoslav societies accuse public institutions of corrupt conduct. People often perceive the bodies responsible for fighting corruption – the judiciary and the policy – as also being involved in corrupt networks. This raises serious doubt with regards to the effectiveness of measures to

tackle corruption and the governments' ability to safeguard the rule of law as well as fundamental democratic rights of citizens. (ibid., 2011, 23)

“Certainly, most Balkan states are still weak (...), separated by soft and porous borders, haunted by the legacy of war, soaked in the communist culture of political connections, and composed of dysfunctional institutions (especially judiciaries), inexperienced administrations, feeble civil societies and a high degree of external dependency” (ibid., 2011, 22).

The differentiation between formal (procedural) and effective (substantive) democracies is especially important in the case of former Yugoslav countries. The difference lies in the rule of law and its most basic appearance – a society's right to freedom. (ibid., 2011, 5) Countries within the region may have implemented elections, democratic institutions, granted freedom rights, while some countries even passed laws on lustration and established other measures that constitute a formal democracy. Formal rules and procedures have been all to a greater or lesser extent implemented. However, several of these formal, procedural and institutional aspects have not actually been enforced in the respective democracies; *“(...) apart from Croatia, all of the countries in the region exhibit a clear gap between formal and effective democracy”* (ibid., 2011, 6). A lot of changes have only happened at surface level and have not been implemented into practice. Rights however lose their meaning if they are not enforced by the rule of law. (ibid., 2011, 5) It has become the norm rather than the exception that legal frameworks and rules of procedures are ignored. This, in combination with weak administrative capacities, continuously jeopardises the quality of legislation and hinders parliaments to take up their supervisory role and guide former Yugoslav societies through the process of democratisation. (Balfour et al, 2011, 10)

5.5. Résumé

The former Yugoslav countries had a difficult starting point for consolidating their democracies. Not only did they face the challenge of transforming their political, institutional and national landscape, but they simultaneously had to transform their social structure and move from a war torn context to a peaceful, democratic future. Former Yugoslav countries did not only have to build a state, they also needed to build a nation. The formal transition requires the establishment of institutions, elections, formal rules and procedures. These measures of building a state and its basic structures have taken place to a certain degree. But even more important is the implementation of these superficial rules and

regulations, the building of a political community and thereby the building of a nation, which enables countries to be effective democracies. The implementation and enforcement of an effective democracy is however hindered by the persistence of corruption, clientelism and ethno-nationalism in most countries of the former Yugoslavia. The building of states has therefore taken place in several instances; the building of nations is however lagging behind.

The extensive destruction of social capital and thereby the basis of civil society is the result of years of war and centuries of dictatorship. The civil society landscape of the former Yugoslavia paints a grim picture. Apart from Montenegro and Macedonia (FYR), there have been no major positive developments in the relationship between state and civil society. (Balfour et al, 2011, 11) People's increasing mistrust in and disappointment of ruling elites and government institutions however has not resulted in their active protest but rather in cynicism and apathy towards party politics as well as disillusionment of democracy as a system. This gap between the state and its citizens is further increased by political elites being growingly corrupt and fostering their power positions on the basis of ethno-nationalisms and clientelistic networks.

The external influence of the democratisation process is another difficulty that the region has to face. Democracies built upon the basis of a European experience results in the focus being put on a formal institutionalism; greater issues such as failures of local governments, growing corruption, informalisation of political decision making and an increasing socio-economic divide are instead disregarded. Deficient judiciaries and other institutional challenges are further obstacles that the region's democratisation process has yet to overcome.

6. The case of Macedonia (FYR)

The Former Yugoslav Republic (FYR) of Macedonia is often used as a positive example for progressive development in the region. Croatia and Slovenia should not be used as representative for the region, as they were more stable, independent and were in a better off position prior to their separation from the Republic of Yugoslavia. Therefore they cannot be compared with circumstances in Bosnia-Herzegovina, Serbia, Kosovo, Montenegro or Macedonia (FYR). The latter is however a particularly interesting case study for several reasons. Not only is Macedonia (FYR) mentioned as the only country having passed and implemented a national legislation on lustration and taking up initiatives to shed light on past crimes, but the cooperation between its civil society and the state is also said to be

successfully developing, contrary to other countries in the region. After Croatia, it has the highest Effective Democracy Index of nearly 40%. (Balfour et al, 2011, 6.) In 2014, Transparency International stated the score of their Corruption Perception Index at 45 within a range of 0, being highly corrupt, and 100, being very clean. This score is nearly the same as in Croatia, leaving all other former Yugoslav countries with considerably lower scores. (Transparency International, 2015)

Macedonia (FYR) is often used as a positive example of the region as it was the only one that managed to secede from Yugoslavia without the exertion of force. The country seemed to be a model, with Macedonian parties historically always integrating an Albanian party into the government and thereby paving the way for peacefully settling problems in an ethnically divided society. As power sharing between the two ethnic groups, with ethnic Albanians constituting the largest ethnic minority of Macedonia (FYR), already existed before the country, the international community assumed that only a remodelling of common institutions was needed to ease tensions, instead of establishing new ones. (Gromes, 2009, I)

The country has also been praised for the successful handling of the conflict that erupted in 2001. Macedonia (FYR) is moreover an interesting example as it is the only country in the region having passed an amnesty law during their Transition Justice process. (Vankovska, n.d., 1) The implementation of amnesty laws to settle a conflict and its possibly negative impact was discussed at the beginning of this paper. Macedonia's (FYR) experience will be used as a basis to continue this discussion and to draw a general conclusion with regards to the extent of the Transitional Justice process impacting the Macedonian society in coping with the past and whether it has facilitated the democratic transition.

6.1 The Ohrid Framework Agreement (OFA) and the amnesty law

While wars, atrocities and ethnic cleansing were taking place in the rest of Yugoslavia, Macedonia (FYR) remained peaceful until 2001. The ICTY therefore had no presence within Macedonia (FYR) for the first eight years following its establishment. (Lamont, 2010, 99) After 2001 the ICTY extended its jurisdiction to Macedonia and its conflict, proceeding with in-country investigation. (Kulasic, 2011, 2) This extension of the ICTY's jurisdiction subsequently obliged the Macedonian government to investigate all cases involving violations of international humanitarian law that the ICTY referred back to Macedonian authorities. (ibid., 2011, 4)

The conflict in Macedonia (FYR) was the shortest and least violent of all conflicts in former Yugoslavia. It started in February 2001 and lasted for half a year between the Albanian National Liberation Army (NLA) and Macedonian government security forces. (Vankovska, n.d., 9) The Ohrid Framework Agreement (OFA) was adopted by the parliament on 16 November 2001 and marked the end of the armed violence. (Pearson, 2002, 6) The Deputy Prime Minister of Macedonia (FYR) referred to the Agreement as the most important political document in building a democratic future in Macedonia (FYR). (Canada: Immigration and Refugee Board of Canada, 2003)

The Agreement opposes the use of violence for political goals and rejects the possibility of territorial division based on ethnicity, preserving Macedonia's unity. It emphasises Macedonia (FYR) being a multi-ethnic state and supports the promotion of respecting the identity of ethnic communities. (National Legislative Bodies / National Authorities, 2001, Art. 1.1-1.5) The OFA essentially provides “(...) *the architectural framework for equitable representation of minorities in public administration, language rights, the strengthening of local government, reintegration of territory held or captured by the NLA, return of refugees, and the conduct of an internationally supervised census*” (Pearson, 2002, 6). The Framework Agreement was mainly designed to respond to ethnic Albanian demands for being granted equal rights and representation. (Canada: Immigration and Refugee Board of Canada, 2003)

A key element of the Agreement was the amnesty law passed on 7 March 2002. The law aimed to protect former ethnic Albanian paramilitary combatants from being prosecuted for crimes committed during the conflict in 2001. The initial amnesty law complied with the ICTY and international law, as it was restricted to Albanian fighters who were accused of conspiracy against Macedonia, armed rebellion and treason. (ibid., 2003) The law however excluded people who committed war crimes from being pardoned, which fell under the jurisdiction of the Tribunal and for which it would initiate proceedings. This restriction of granting amnesty was however bypassed in 2011, when the Macedonian parliament extended the amnesty law on 19 July to all cases that were returned for prosecution to Macedonia from the Tribunal in The Hague. This decision resulted in the termination of investigating and prosecuting four war crime cases. The amendment of the amnesty law in 2011 has subsequently barred national courts from hearing cases involving violations of international humanitarian law that occurred in the 2001 violence; “*Macedonia's Amnesty Law explicitly exempts crimes under the jurisdiction of the ICTY*” (Kulasic, 2012, 5). Macedonia thereby defies its obligation to investigate all cases transferred from the ICTY.

The amnesty law does not only release the Macedonian government from prosecuting alleged war criminals, but also from investigating the truth with regards to past crimes, as well as compensating victims and their families. (ibid., 2011, 4)

6.2 The persistence of structural violence: Galtung's concept of different forms of peace

International and domestic leaders often describe the Ohrid Framework Agreement as a massive achievement of the Macedonian process of transition. It is said to have stopped the violence and prevented a civil war. (Vankovsa, n.d., 16) The direct, physical violence concerning military action has indeed come to an end through the Agreement. What is mostly disregarded in this matter however is the mutation that the military violence has undergone. Military hostilities have assumed different shapes such as „(...) *criminal activities, lawlessness in certain parts of the state territory, the parading of various paramilitary groups (...), the proliferation of illegal small arms and light weapons (estimated quantity of which reaches over 200,000 pieces in free circulation), or even dramatically increased levels of domestic violence*“ (ibid., n.d., 17). This culture of violence has been embedded in societal and political institutions. It has become structural violence that reinforces social divisions along ethnic lines. (ibid., n.d., 17)

This embedded structural violence is part of a so-called negative form of peace and was further reinforced by the manner in which societal tensions and the outbreak of violence were responded to. Measures to address the conflict led to further social divisions with dividing lines being drawn between the two ethnic groups, instead of the facilitation of social reconnection. Long-term solutions for tackling the causes of the conflict and social tensions were therefore not found. A sort of peace was established, albeit with tension lingering below the surface and with ethnic divisions being institutionalised.

Peace is often wrongly used as a synonym for reconciliation. What solutions for conflict resolution appear to overlook is the existence of different forms of peace, some forms being supported and aimed for by reconciliation processes, others being a mere subterfuge for the persistence of the unjust status quo that hampers reconciliation.

Johann Galtung draws a distinction between positive and negative peace. Positive forms of peace tackle the sources of violence, insecurity, hatred and potential causes of future conflicts within society. They aim at reconciling people, political equality and

socioeconomic justice. (Rigby, 2001, 11) Elin Skaar defines this as ‘thick reconciliation’, which goes beyond a simple coexistence of former enemies. Negative forms of peace on the other hand, which Skaar defines as thin reconciliation (Skaar, 2013, 65), are merely the absence of organised violent conflict and the perpetuation of the unjust status quo. (Pankhurst, 1999, 255) Galtung distinguishes between direct and structural violence as major characteristics of positive and negative peace. Direct violence means an actor directly commits violence, as a concrete, visible act upon a particular person. Structural or indirect violence on the other hand takes place, where there is no concrete actor, but where “*the violence is built into the structure and shows up as unequal power and consequently as unequal life chances*” (Galtung, 1969, 171). Galtung refers to structural violence as social injustice. (ibid., 1969, 171) Positive peace is characterised by the absence of structural violence, negative peace on the other hand by its persistence within state and societal structures.

When analysing reconciliation and justice, the distinction between positive and negative peace is crucial, as the persistence of negative peace hampers reconciliation as well as justice. Reconciliation mechanisms, if taken seriously, lead to the establishment of positive peace within a community. The general association of reconciliation with the term ‘peace’ makes it possible to uphold the claim of pursuing reconciliation, while actually maintaining negative peace. This is one of the reasons why reconciliation mechanisms are regularly criticised as compromising justice. Mechanisms to address conflict in Macedonia (FYR) failed to tackle the real causes of social tension. This led the way for structural violence and institutionalised ethnic divisions within society, which was thereby further engrained into state and societal structures.

6.3 The Ohrid Framework Agreement – a peaceful solution to social tensions?

The war in Macedonia was the only one in the region that did not aim to divide Macedonia (FYR) and capture territory, but rather to ensure the equality of citizens and their rights. (Reka, 2011, 12) The goal of the Agreement was to place ethnic Albanians, who constitute more than 20% of the entire population, on equal terms with the rest of Macedonian citizens. The aim was to ensure equal rights for all citizens and to open the political landscape equally to all ethnic groups. As written in the OFA, the Albanian language should therefore be recognised as an official language in the municipalities where more than 20% of the

population is Albanian. Furthermore, appropriate representation of Albanians in political institutions should be ensured. (Goga, 2013, 16)

With the implementation of the Framework Agreement a political agreement was reached that arranged political power sharing between Albanian and Macedonian elites in a way that resulted in a peaceful solution to the conflict. The signing of the Agreement promoted the belief that a new arrangement of sharing political power would automatically solve the underlying issues of the conflict. (Vankovska, n.d., 25) This new agreement was however doomed to fail in its task of ensuring sustainable peace, as the power-sharing system has failed to tackle the real causes of conflict. Inter ethnic tensions have worsened in recent years, confirmed by 70% of the Macedonian population who believe tensions have increased. (Goga, 2013, 19-20) Furthermore, the Agreement failed to establish peaceful structures that would safeguard a future oriented and peaceful development of Macedonia (FYR). (Vankovska, n.d., 21) This is partly due to ethnic elites, who are dictating the current political landscape and contributing to the conflict escalation just as they did in the past, and who are more concerned with securing their political position than with addressing causes of conflict. (ibid., n.d., 22)

Facts at ground level demonstrate that the goals of the OFA to achieve durable peace and tackle ethnic division within society have not been achieved. A survey conducted in 2011 outlined a major difference between perceptions of Macedonians and Albanians concerning the effects of the Framework Agreement and the possibility of a peaceful shared life with equal rights for both ethnic groups. When asked whether institutions ensure protection against discrimination, 52% of Macedonians answered positively, whilst 78% of Albanians believed that institutions barely guarantee any or no protection at all against discrimination. The gap between perceptions is even greater with regards to whether there has been an improvement in non-majority communities being represented in public and state institutions. Up to 94.3% of Macedonians believed improvements have taken place; only 33.7% of Albanians shared this view. (Sulejmani, 2011, 63)

The Agreement was supposed to build a new basis for a functioning multi-ethnic state. It was expected to eliminate all forms of mono-ethnic monopolism and a mono-ethnic ownership over the state. (Reka, 2011, 13) The OFA succeeded in guaranteeing the sovereignty and integrity of Macedonian territory. (ibid., 2011, 12) It also successfully implemented the power sharing agreement, seeing as four national elections and subsequent government formations have taken place with minimum levels of violence. Albanians were therefore effectively granted a share of power. (Warren, 2015) The Framework Agreement

however failed to “(...) *preserve the national integrity of citizens who did not belong to the majority*” (Reka, 2011, 12), as it failed to solve the status of Albanians. (Zejneli et al, 2011, 155) Issues such as the institutionalisation of the Albanian language and the Albanian symbol have not been appropriately dealt with (Reka, 2011, 155), as the Albanian language has still not been formalised as a state language. (ibid., 2011, 14)

Persisting ethnic divisions reveal that the way in which the conflict was dealt with in 2001 did not eradicate the sources of the social tensions. (ibid., 2011, 12) The United States Institute of Peace (USIP) stated in late 2002 that issues, which set off the conflict between ethnic Albanian insurgency groups and Macedonian forces in 2001 are still unresolved and can arise at anytime. (Pearson, 2002, 1) Ten years on, this assessment has become even clearer. The OFA may have ended the conflict, but it failed to tackle the root cause of this conflict, as a single ethnic group has ruled Macedonia up until today; “(...) *Macedonia still even after a decade of the inauguration of this peace Agreement, functions as a mono-ethnic state. Despite the proclaimed property of all citizens, the majority in this country claims to have absolute ownership over the state*” (Reka, 2011,13). The ruling majority still decides on the level of rights given to non-majority communities. (ibid., 2011,13) The Agreement has thereby not facilitated a durable and future oriented peace that addresses causes of violence, insecurity and social tension. Rather, it has created an illusion of peace, where political inequality and socioeconomic injustice has been embedded into state structures, as will be outlined in the next chapters.

6.4 Politics along ethnic lines and its impact on society

When the internal conflict broke out in 2001, the international community jumped to the conclusion that ethnic tensions caused the violence. However several scholars, such as Biljana Vankovska, a professor at the philosophy faculty in Skopje, have disputed that Macedonia experienced an ethnic conflict. Whether it was an ethnic conflict that broke out in 2001 or whether it was only portrayed as such will not be elaborated upon. What is nevertheless important when considering the handling of the conflict, was it being *treated* as an ethnic conflict, based on ancient hatred between ethnic Albanians and ethnic Macedonians. The measures that were therefore seen as adequate for resolving the conflict were the constitutionalisation and institutionalisation of ethnic divisions. (Vankovsa, 2005) The solution seemed to be separating the ,hostile' ethnic groups and imposing a sharing of political power based on ethnic lines. (ibid., n.d., 1)

Through implementing the Framework Agreement and dividing political power on the basis of ethnicity, ethnic differences have been institutionalised and embedded in state and societal structures. This ethnocentric political landscape resulted in political parties being biased towards their own ethnic groups and the ruling elites not being supportive of a transparent and effective Transitional Justice process. (Kulasic, 2012, 3) These factors have led to ethnic divisions becoming engrained into the Macedonian society, where separate communities live in isolation from each other in a joint state. (Vankovska, n.d., 22) Both ethnic groups almost always vote for political parties that represent their ethnic group; generally marry within their own ethnicity as well as their own religion; and live in areas that are mostly inhabited by the same ethnic group. Macedonians and Albanians coexist rather than mix in their country. Even the involvement of civil society organisations is divided into ethnic categories. This kind of segregation does not give communities the opportunity to reduce prejudices and stereotypes, but instead reinforces them. (Gromes, 2009, 25) Two parallel societies living in the same country have essentially been created but operating in two diverse worlds, with ethnic Macedonians on the one side and ethnic Albanians on the other; (Goga, 2013, 17) *“Multi-ethnicity has been sacrificed and replaced by bi-nationality”* (Vankovska, n.d., 2). These two parallel worlds are neither given a way nor incentives to communicate or interact with one another. (Goga, 2013, 17)

The public-political discourse is dictated by ethnic and political aims of nationalist and ethno-centric elites whose goal lies far from resolving pending problems of social divisions within the Macedonian society. (Kulasic, 2012, 5) This process of ethnic elites dominating politics is aggravated by the politicisation of state institutions. The ‘fair’ representation of communities functions as a façade for political parties controlling the state administration. Party affiliation weighs far more than affinity to a community. (Vankovska, n.d., 24) Parties have become mechanisms to articulate group interests, while ceasing to mediate between citizens and powerful elites.

Thus far, the equality of political representation of all minority groups that was called for in the OFA has therefore not been achieved. Although the Albanian minority is to a certain extent politically represented, this is not within a democratic atmosphere that would bring about peaceful interaction. What has effectively been established is a semi protectorate of the Macedonian majority that is shaped by ethno-political bargaining of ethnic groups and elites. (ibid., n.d., 20) The political process of decision-making follows the rules of unprincipled trade-offs and blackmail. It does not resemble a consensual process of finding solutions for pending issues related to the equal inclusion of different ethnic groups into the

political landscape and addressing ongoing tensions between Macedonia's two major ethnic groups. (ibid., n.d., 25)

Due to politics being dominated by reciprocal bargaining and blackmail between the Albanian and Macedonian political fractions, there is no room available for public involvement of citizens and a participatory democracy. (ibid., n.d., 22) This results not only in political elites being able to ensure their power positions, but also in people becoming indifferent to political processes, such as elections. (ibid., n.d., 25) This process of purely focusing on the implementation of the Agreement has not only disregarded the inexistent state-society relationship, but other crucial building stones for a democracy have also been left behind, such as implementing the Constitution and safeguarding the rule of law. Up until today, the Framework Agreement has not been ratified by the Macedonian parliament and is thereby not part of the legal system. (ibid., n.d., 21)

The Ohrid Framework Agreement has failed in its objective to achieve a multi-ethnic society and establish fair political representation. The last 13 years have led to the segregation of communities based on ethnicity, a wide gap between politicised state institutions and Macedonian citizens, as well as the bargaining of ethnically divided political parties that are more concerned with exploiting their political position to push group interests through, instead of resolving the country's pending issues.

6.5 A choice between peace and democracy

The Inter-Parliamentary Council adopted the Universal Declaration on Democracy in 1997 at its 161st session. It states that the Inter-Parliamentary Union is committed to peace and development and that the support of democratic processes is a great contribution to achieve these goals. (Inter-Parliamentary Union, 1998, III) The Union created the link between fostering peace and development by strengthening the democratisation process and thereby declared the promotion of the democratic process to be "*a strategy for peace*" (Gromes, 2009, 1).

The measure adopted to respond to the conflict in Macedonia, namely by establishing a power sharing agreement between the two major ethnic groups, sought to further support the country in the democratisation process. The ethnicisation of politics however resulted in deepening social divisions and led the way to a 'ghettoisation' of citizens while the Macedonian majority further dominated the public-political sphere. These conditions

guaranteed the establishment of negative peace and structural violence as well as the reinforcement of unjust and unequal living standards. (Vankovska, n.d., 1)

This relative peace, or according to J. Galtung negative peace, undermines rather than supports the democratic process in Macedonia, as it is not a long term solution for facilitating peaceful communal life. It can only be sustained by political elites paying each other off and thereby suppressing the underlying ethnic divisions, social tensions and outbreak of direct military violence. Democracy cannot in this context be effectively established, as the state is too weak to provide a peaceful alternative to the political bargaining of ethnic groups. A transparent democratic process would question the power positions of ethno-political elites and is therefore boycotted until today. Democracy is compromised for the sake of securing the persistence of a negative peace. Thus, in Macedonia we are unable to speak of both peace *and* democracy having been established but rather a choice having been made between peace on the one hand *or* democracy on the other. (ibid., n.d., 20) The efficiency and existence of democratic procedures and institutions are being sacrificed for the sake of choosing peace above democracy. Extending the amnesty law to violations of war crimes in 2011 also reflected this choice; “*The legal rationale for applying the Amnesty Law is to accentuate peace over justice*” (Kulasic, 2012, 5). In doing so local interests of citizens are disregarded so that ethnic elites have the possibility of fostering their local governance, making the system further authoritarian. (Vankovska, n.d., 23)

When speaking about negative peace being chosen over democracy and the country becoming increasingly authoritarian and ethnically divided, a further crucial factor needs to be kept in mind: The development of Macedonia has been severely hampered as a result of the dispute with Greece in relation to Macedonia’s name. Since 2008, the Greek government has blocked Macedonia’s progress with regards to being integrated into NATO and the European Union. This has now led to the stalling of Macedonia’s accession into NATO and the EU. (Phillips, 2011, 44) Over the past few years, Macedonia has therefore become increasingly authoritarian and nationalistic, as it has lost the incentive to being granted membership in the EU and NATO. The two ethnically divided political camps have therefore lost their one common goal. (Warren, 2015)

Effective political negotiations and a culture of dialogue are widely absent in the political sphere. However, these obstacles to democracy cannot be purely linked to issues with Greece and the blocking of Macedonia’s (FYR) accession to the EU and NATO. The OFA

has never considered the importance of societal peace- and nation-building and the elimination of the roots of conflict. Failing to address matters such as reconciliation and confronting social tensions, past conflicts and corrupt state institutions, has left the country lingering in an atmosphere of negative peace, while perpetuating an unresolved conflict. (Vankovska, n.d., 24-25)

These conditions are very much a result of insufficient nation building. Up until today, the Macedonian society and especially its elite has refused to accept the common state and its structures. (Gromes, 2009, 20) Macedonia (FYR) lacks basic principles of democracy, with corruption, the insufficient independency of courts, elites' influence over public institutions and the weakness of state institutions remaining a major problem. (ibid., 2009, 15) This deficiency mainly stems from a legacy of authoritarian rule and is a reflection of the political elite refusing to commit to democratic values. (ibid., 2009, 20)

6.6 Résumé

The 2001 conflict in Macedonia came to an end with the signing of the Ohrid Framework Agreement (OFA) in 2001, which aimed to improve the living conditions of the Albanian minority. The Framework Agreement included the adoption of a restricted amnesty law, which was extended in 2011 to perpetrators of war crimes. The Macedonian government thereby disregarded their obligation of investigating all crimes transferred to them by the ICTY

The power sharing agreement between the two major ethnic groups that was established by the OFA led to the institutionalisation and constitutionalisation of ethnic divisions. Not only was politics split in accordance to ethnic lines but this resulting segregation was present at all levels of society. The implementation of the Agreement failed to build a multi-ethnic state, but has rather led to Macedonia (FYR) having become a bi-national country, with communities coexisting and living in different worlds, while sharing one state.

The equal representation of different ethnic groups has not been achieved. Even though Albanians are to a certain extent politically represented, they must live under the constant domination of the Macedonian majority. The political landscape has developed into an arena of political bargaining and blackmailing. Political elites are more concerned about fostering their power position than serving as mediators between citizens and political elites, which

leaves citizens of Macedonia (FYR) disillusioned and indifferent towards politics and elections.

The conditions in Macedonia (FYR) have inevitably led to the establishment of a negative form of peace, with structural violence and the perpetuation of the unjust status quo being embedded in state apparatus. Social tensions and causes of the conflict are not addressed, hampering the consolidation of democracy. Macedonia (FYR) should not be seen as a positive example of the region for successfully merging democracy with peace, as it is so often portrayed, but rather as a place where a choice has been made *between* democracy and peace. Democracy is continuously undermined for the sake of maintaining negative peace, thereby prolonging the conflict that lingers underneath the surface. The decision to extend the amnesty law in 2011 to war criminals portrayed the Macedonian government's continuous decision to choose peace instead of a transparent democratic process. Further steps towards political accountability, public acknowledgement of the past and facilitating social re-connection to overcome ethnic divisions are still needed as a basis for a democratic transition of society.

7. Conclusion

An entire region was damaged on multiple levels as a result of the Yugoslav wars between 1991 and 2001. The very destruction of functioning communities, institutional and state structures as well as national identities has created a complicated point of departure for the region to transform into functioning democratic systems. To support the region in this process of Transitional Justice and democratisation, an International Criminal Tribunal was set up by the international community in the early 1990s.

The ICTY was established on false expectations that it would be a remedy for ongoing violence, ethnic divisions, the absence of the rule of law and the lack of a democratic grounding in the region. Based on these expectations the mandate is comprised of multiple facets: The tribunal was not only supposed to serve criminal justice and help establish a functioning legal system, but to also deter future perpetrators by fostering respect for the rule of law and thereby putting an end to the conflict; it was given the responsibility to maintain peace by providing an alternative to violent responses; to induce reconciliation within ethnically divided societies and to thereby establish the basis for a democratic

transition. The international community did not consider it necessary to establish other mechanisms in relation to addressing the past violence in former Yugoslavia.

The mandate assigned the tribunal a set of responsibilities that overstepped its capabilities and capacities as a tool of international criminal justice. The ICTY was misunderstood as being something other than a mechanism to serve legal justice and establish the rule of law. The expectation that the tribunal would end an ongoing conflict, respond to people's demand for justice and foster reconciliation in order to achieve durable peace is a fundamental misjudgement in relation to the purpose and the capability of an International Criminal Tribunal such as the ICTY. The so-called shortcomings of the Transitional Justice process in the former Yugoslavian regions were not a failure of the ICTY per se, but rather the result of a clear gap between the Tribunal's mandate and its actual institutional and jurisdictional capacity. The insufficient transformation of state and society, the inadequate handling of the past conflict and the absence of a durable solution with regards to ethnic divisions can be traced back to inadequate action being taken by the international community: Their sole response in implementing retributive measures to address the violence in former Yugoslavia, by way of ICTY-led legal prosecutions and criminal punishment, did not meet the multiple demands of a post conflict society to restore a functioning community and transform their system into a democracy.

The ICTY took initial steps in legitimising the investigation of the truth concerning past crimes and helped foster public acceptance for the violent past. The ICTY has however proved incapable in meeting people's expectations and was not successful in bringing about social reconciliation. Most importantly, it did not establish the basis for building democracy; it only had a limited impact on fostering civil society and reconciling societies; it was inefficient and time consuming due to its required reliance on countries' cooperation; and it was not able to fight corruption within the respective countries' legal system or enhance efficiency within local courts. However these are not failures of an inadequate criminal justice process per se. The restricted impact of the ICTY needs to be understood within the restricted capabilities and limits of a purely retributive justice driven process.

This thesis has shed light on the complexity of Transition Justice in the post-conflict society of Yugoslavia. It has revealed the retributive justice driven process of the ICTY succeeding in the prosecution of a number of major war criminals responsible for massacres, atrocities and human rights violations during the Yugoslav wars. The ICTY therefore served (legal) justice in the eyes of some minority groups by rebuilding a consciousness for the rule of law

and by holding 161 perpetrators responsible for their actions. It has on the other hand proven incapable of reconciling ethnically divided societies and building a common ground for a shared, collective history. Tribunals such as the ICTY only create one narrative with regards to the past by not facilitating the exchanges of truths, dialogue, societal healing and interaction as well as symbolic and material compensation. The establishment of a Regional Truth and Reconciliation Commission is supported by a major part of civil society and would be a necessary accompaniment to the tribunal's mechanisms. It has been shown that the ICTY has not reached far enough into society and that the RECOM could help to induce social reconciliation in a way that the punitive measures of the ICTY have been unable to do.

Some parties would argue that criminal trials and punishment of offenders is the only legitimate mechanism to restore the respect for the rule of law and serve justice within a post conflict society. In 1994, the Preamble of the UN Security Council Resolution 995, which was followed by the establishment of the International Criminal Tribunal for Rwanda (ICTR), stated that criminal prosecutions would bring peace and reconciliation and would simultaneously serve justice. (Kamatali, 2003, 116) Perceiving prosecution and punishment as the main tools of serving justice results from believing that revenge brings relief to the pain and suffering of victims. If one however agrees upon the ultimate goal of justice as being the healing of a community and not merely revenge, then justice through retribution needs to be extended as a concept. (Villa-Vincencio, 1999/2000, 184-186) In a post-conflict context the number of successful criminal prosecutions often measures 'justice'. (Asmal, 2000, 14) However when moving beyond this immediate assumption, the incorporation of concepts of restorative justice and reconciliation become essential bases for repairing societies. Restorative justice views crimes as a violation of individuals, human relationships and effectively whole communities. (Clark, 2008, 340) Criminal tribunals on the other hand use the abstract mechanism of retributive justice, viewing crimes purely as a violation of the law and justice as retribution and punishment of the guilty. (Gilbert et al, 2007, 7)

What complicates discussions about justice and reconciliation is the absence of a general agreement on how to "*assess the strength of either justice or reconciliation*" (Pankhurst, 1999, 239), or the context in which it is more useful to promote legal justice while restraining social reconciliation or vice versa. What will however bring the discussion forward and help facilitate an appropriate response to post conflict contexts in the future is widening the concept of justice. The failure to accurately address the conflict in the regions of former Yugoslavia lies in an overly restricted approach to justice. This narrow

understanding of justice being synonymous to criminal punishment, which the ICTY was built upon, is the main reason for ethnic divisions still being prevalent in most former Yugoslav societies. The ignorance of alternative forms of justice – such as restorative justice, compensatory justice, rehabilitative justice, justice as an affirmation of human dignity or justice as exoneration (Villa-Vincencio, 1999/2000, 73) – has resulted in the absence of societal reconciliation, leaving behind a damaged community.

Establishing the ICTY as the sole mechanism to address the past violence has not only failed to rebuild a functioning community but also an active civil society – both indispensable building stones for a democracy. Macedonia provides the example for a corrupt, clientelistic and ethno-national political system hampering the democratic transition, as politics stand in the way of facilitating the information given to and the education of the Macedonian society. The additional socio-economic divide, estrangement between political parties and their citizens as well as politics being dominated by clear ethnic divisions has created an apathetic and indifferent citizenry not only in Macedonia. Upcoming democracies within former Yugoslavia are still facing several challenges: There is a clear gap between formal (procedural) and effective (substantive) democracies; there is a need to rebuild peoples trust in political leadership, to foster civil society, to create a collective memory of the past as well as a cohesive national unity, to break down ethnic divisions, to rebuild the deficient judiciary, to tackle the corrupt, authoritarian and clientelistic political networks and to adapt the democratic model to regional realities and demands. This analysis applies to the whole region of former Yugoslavia, with the exception of Slovenia and now also Croatia, which are considered to be democratic success stories.

Furthermore the experience in Macedonia has shown that peace does not necessarily promote democracy and vice versa. In a context where preconditions for a successful democratic transition are not given, democracy and peace can constitute two incompatible concepts. A negative form of peace, characterised by institutionalised structural violence, hampers the consolidation of democracy. It keeps a society from collectively organising to hold governments to account and from building a cohesive national identity. Negative peace stands in the way of citizens being well informed and educated as well as different parts of society getting equal political representation.

The upcoming years will demonstrate whether the establishment of the RECOM was one of the missing cornerstones for the defect former Yugoslav societies to rebuild a community, to reconcile society, to overcome divisions, to foster civil society and to hold the political elite

accountable. All these will be crucial steps to enable the effective consolidation of democracies in the region. If the respective countries fail to take these steps, their path towards democracy will end as quickly as it began.

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Interviews:

I. Buchmayer, Adisa & Salibasic, Alma (2015, 5 March) “Situation of Bosnia-Herzegovina, consequences of the war and current political mismanagement”. Personal interview. Vienna, 05.03.2015, conducted by Maica Wurmboeck.

II. Warren, Michael J. (2015, 4 March) “The political situation in Kosovo and the impact of mechanisms to address past violence”. Personal interview. Vienna, 04.03.2015, conducted by Maica Wurmboeck.

9. Appendix

Interview I:

“The situation of Bosnia-Herzegovina, consequences of the war and the current political mismanagement” (Buchmayer, Adisa & Salibasic, Alma), 5 March 2015.

Résumé:

Adisa Buchmayer and Alma Salibasic are two sisters, who grew up in Bosnia-Herzegovina, in the multi-cultural city Tuzla and came to Austria ten years ago. They witnessed the war in Bosnia and moved to Vienna in their 20ies to study. Basing the interview on their experiences before and during the war in Bosnia, the interview aimed at illustrating a local perspective of mechanisms to address the past violence as well as drawing a picture of prospects for their country.

Both interviewees painted a rather grim picture of the situation in Bosnia-Herzegovina. They outlined the importance of firstly employment and secondly education, two matters that get continuously sidelined by politicians. They perceived the impact of the ICTY as limited and reacted towards the assumption of an International Tribunal outside the country solving any issues in the country rather cynically. They did not perceive the Tribunal having brought any kind of change or any sort of meaning for the Bosnian society, but rather having been a major financial and time consuming effort. A few individuals may have been prosecuted, but specific elites still control politics and people’s daily lives. Both interviewees described the political landscape as corrupt and not transparent. The main problems in their eyes were therefore less the lack of bringing justice to their war torn society, but rather the corruption of politicians, clientelism and the domination of party politics, that fail to address the two main issues that push the society into an inescapable impasse: the lack of education and the striking rate of unemployment.

Transcript:

“Das politische System hat ja gar kein Interesse daran zu einer Lösung zu kommen (...) sie [die Politiker] sind eigentlich Beschwörer dieses Zustandes” (Buchmayer, 2015, Min 2-3).

“Das Problem ist, dass wir eigentlich in Ex-Jugoslawien früher diese Unterschiede nicht gekannt haben (...) wir haben damals nicht gewusst wer ein Serbe oder wer ein Kroat [war]” (Buchmayer, 2015, Min 7.30-9.00)

“Die Trennung findet statt, die findet überall statt (...) das größte Problem ist, dass es dem Land nicht besser geht. Weil wenn du den Leuten Arbeit gibst, dann sind sie beschäftigt, dann fängt es [sozial Differenzen] an eine Nebensache zu werden (...) es ist wichtig dass ich etwas zu tun haben (...) es [soziale Anspannungen und Differenzen] wird immer intensiver, desto weniger Beschäftigung du hast. Das ist, finde ich, der Schlüssel dieser Lösung” (Buchmayer, 2015, Min 18.50 – 19.30) “Das Zusammenleben in den Städten findet statt (...) was wichtig ist, ist was sie [die Bevölkerung] in dem Fernsehen sehen, was reden diese Politiker” (Buchmayer, 2015, Min 36.50-37.30) “Natürlich ist es wichtig, dass jemand bestraft wird und vor Gericht kommt (...) aber es gibt so viele Leute, die mitgemacht haben [im Krieg]” (Buchmayer, 2015, Min 37.30-38.15).

“In dieser Welt passiert nichts zufällig. Es sind Leute, die Macht haben, die diese Welt bewegen. Wenn sie wollen, können sie so viele Sachen lösen. Sie können einen Krieg stoppen, sie können einen Krieg verursachen” (Buchmayer, 2015, Min 32.30-33.20).

“Es geht überhaupt nicht um diese Leute [die verantwortlich sind für den krieg], irgendwer wird schon hängen” (Buchmayer, 2015, Min 43.25-43.45)

“Wofür ist das Ganze passiert? Was hat es wem gebracht. (...) Vielleicht ist es so schwer zu beseitigen, weil es so schwer zu verstehen ist” (Buchmayer, 2015, Min 33.40-34.30).

“Ich lege nicht Wert auf künstliche [Versöhnungs-] Versuche” (Buchmayer, 2015, Min 36.30)

“(...) ich glaube, da [in den Medien] steht gar nichts mehr drinnen. Das sind keine seriöse Zeitungen (...) es ist sehr primitiv geworden, (...) sehr gefährliche Richtungen, die dich gar nicht zum Nachdenken bringne, sondern einfach nur schnell konsumieren, kurz, unwichtig (...) das Niveau ist sehr niedrig (...) da gibts so viel Spielraum nach oben und niemand will das aufbauen” (Buchmayer, 2015, Min 46.45-48.30).

“Das Problem ist immer wieder diese Korruption, ich kann mir wirklich alles kaufen, auf jeder Uni, sogar auf der Medizinischen Uni (...) Das sind die Folgen von jahrelangen mühelosen Richtung in die wir gegangen sind, (...) man musste sich nicht an Gesetze halten,

man konnte machen was man will, Hauptsache man kennt jemanden” (Salibasic, 2015, Min 49.45 – 50.05).

“Die gut ausgebildeten Leute sind ausgewandert und es sind irgendwelche Leute gekommen, im Krieg haben sie einfach etwas bezahlt um auf die Professoren Stellen zu kommen. Das sind jetzt die Leute, die die nächste Generation ausbildet” (Salibasic, 2015, Min 1.01.00-1.01.45).

“Deswegen gibt es keine Zukunft meiner Meinung nach, weil die nächste Generation wieder schlecht ausgebildet ist und es geht nur nach unten (...) sie lernen schon seit sie klein sind, es funktioniert nur wenn du wen kennst, wenn du viel Geld hast ” (Salibasic, 2015, Min 1.02.30-1.03.10)

“Die Demokratie hat eine Chance [in Bosnien-Herzegowina], ist quasi dort jetzt, aber in einem kleinen Prozent (...) du brauchst gewisse Personen, die Eu zum Beispiel, die unbegrenzte Macht hat und Leuten sagt was sie tun sollen (...) man bräuchte eine höhere Autorität, als die Leute, die dort sind (...) Wir müssen selbstständiger werden, aber die Frage ist, wer lernt und so zu funktionieren, selbst kommen wir da nicht hin” (Salibasic & Buchmayer, 2015, Min 1.05.45-1.07.45)

“Wir brauchen erst Bildung und dann können wir über bessere Zeit reden (...) die neue Generation ist vergiftet mit alten Geschichten” (Salibasic, 2015, Min 1.08.00-1.09.00).

“Die Menschen vertrauen einander nicht mehr (...) es funktioniert nicht und es wird auch nie funktionieren, die Verträge, wie das Dayton Agreement, müssen geändert werden” (Salibasic, 2015, Min 1.09.20-1.10.50)

Interview II:

“The political situation in Kosovo and the impact of mechanisms to address past violence”
(Warren, Michael), 4 March 2015.

Résumé:

Michael J. Warren worked for the UNDP (United Nations Development Programme) as a programme specialist for Justice & Security from 2006 until 2009 and was positioned in Pristina throughout his time of working in Kosovo.

The interviewee perceived the ICTY a useless tool for delivering justice to a broader majority of people and for building a collective memory of the past, where war crimes become part of a shared history. He stated, that if in 2015 a large majority of the Serbian population as well as senior politicians, such as Serb government ministers in Kosovo and Serbia can publically deny war crimes committed in the past, no common ground has been established of past crimes in the region. The Tribunal has from his perspective been unable to create and maintaining peace and has generally been of limited impact. The ICTY has furthermore failed to strengthen the justice system in Kosovo and to guarantee witness protection.

Ethnic divisions are in M. Warrens eyes more present than ever in Kosovo, which is demonstrated by most Albanians never having met a Serb. Education is split along ethnic lines, while Albanians study history from Albanians/Kosovar textbooks and Serbs, who are under great influence of the Serb government, use Serb history textbooks. A process of social reconciliation of the Kosovar society has largely been absent over the last century, leaving the society further and further divided.

The interviewee furthermore gave a short overview over the democratisation process of Macedonia, which has from his perspective above all been hampered by Greece blocking the accession of Macedonia into the EU and NATO. Since the door of becoming an EU member state has effectively closed, the ethnically divided political parties have lost their common goals. Conditions in Macedonia have therefore throughout the last 6 years been deteriorating, giving rise to an increasingly clientelistic, authoritarian and corrupt regime.

Transcript:

“The international community is not confident that the judicial institutions in Kosovo have the independency or the capability to investigate crimes that were committed by the Kosovo Liberation Army during the Liberation war 1999 or immediately after the war in 2000/2001 (...) the Kosovo government was kind of bullied into agreeing that the European Union could established a new special tribunal based in The Hague that would have an independent prosecutor who would be empowered to file charges effectively against senior KLA commanders, many of whom are now senior politicians in Kosovo and try them for war crimes – it’s a disaster (...) its absolutely the worst possible outcome, its going to be massively disruptive and controversial and air all sorts of skeletons in closets that nobody wants to dig up, its going to enrage Kosovars and going to not deliver very much justice to anybody” (Warren, 2015, 0.10-2.35)

“The international community did not do anywhere near enough to strengthen the justice system in Kosovo, to insure effective witness protection – I mean the witness protection with the ICTY has been a joke. The ICTY put Ramush Haradinaj who at one point served as prime minister of Kosovo and was a commander of the KLA during the war 1999, they put him on trial twice. And the number of witnesses who recanted, died mysteriously, had unfortunate car crashes, disappeared is astronomic. (...) The bottom line for me in the former Yugoslavia is that the purpose of ICTY was two fold, the purpose was both two create a sense of justice being served, so people who had perpetrated gross violations of human rights, war crimes, to see them publicly brought to justice (...). The second part was to establish a shared understanding of what actually happened during the war, so a shared history” (Warren, 2015, 3.45-5.20).

“There is a large majority of the population of Serbia who simply denies the basic history of what happened during the war (...) it really leads you to question what the value of that entire exercise [the ICTY] was, the value of it as a peacebuilding tool was very limited” (Warren, 2015, 5.45-6.20).

“The general failure of a collective narrative of what happened in the 1990s in Yugoslavia to emerge and to be accepted by all of the countries that emerged from the Yugoslavia has resulted in these incredibly absurd situations, like there was a scandal in Kosovo two months ago where a Serbian minister of the Kosovo government, so this is a senior politician who sits in the cabinet of Kosovo, a government minister of Kosovo, publicly denied that there had been war crimes committed in Yakova, which is a part of Kosovo that suffered the most

egregiously under Milosevic in 1998 to 1999. The fact that in 2015 it is possible for anybody to still do that is an extraordinary testament to the extent to which there is just no common ground in terms of remembering and accounting for what happened” (Warren, 2015, 7.40-8.45).

“This is now becoming for a whole generation of people in Kosovo this is no longer lived history, its things that they hear about from their parents. So Serbian kids read Serbian history textbooks and Albanian kids read Kosovar, or Albanian textbooks (...) the bigger issue is that most Albanians have never met a Serb. (...) There is no interaction like that [before the war] any more” (Warren, 2015, 10.30-11.50).

“If you look at the outcome of Ohrid strictly in terms of powers sharing it has been hugely successful, they have had 4 national elections, that have gone down with an absolute minimum of violence, government formation has happened after each election, Albanian parties have a share of power, that aspect of Ohrid has been really effective. But Ohrid has not created a sustainable model for a multi-ethnic Macedonia that’s the bottom line. One of the reasons for it is that Macedonia has slid back from being the top democratic reforming country in the former Yugoslavia, which it really was in 2005/2006/2007; its becoming increasingly authoritarian, the system is very clientelist, very oriented towards the division of spoils. So if you talk to young Slavic Macedonians and young ethnic Albanian Macedonians they will have all the same complaints – power is focused in the hands of too few people, jobs are handed out on the basis of political party affiliation” (Warren, 2015, 18.45-20.10).

“The biggest reason why Macedonia started going backwards is because of Greece. The Greek objection to Macedonian integration into NATO and into Europe has created massive disruption in Macedonia. Basically after Ohrid, the European Union held out a European identity to Macedonia, (...) it doesn’t really matter how things go in Macedonia per se, because you are going to be part of the European Union, it will be a European identity, it will be European rule of law, it will be European governance that you will be enjoying. Do your best, here is the reform agenda, meet these targets and then you will all get into Europe anyway (...) – that was the carrot that was held out to Macedonia. And Macedonia responded probably better than any other country in the Balkans to that carrot. It was a real reform success story in 2005-2007. When it started to go backwards was when it became clear that Greece was not going to allow Macedonia to join NATO, it was not going to allow Macedonia to advance on its EU accession path and as a result the Macedonian government started looking around and saying, how do we justify ourselves now? If our purpose is not to

get into Europe, how to we legitimate our governance in this country? For Nikola Gruevski, the prime minister, what he is trying to do is nationalism. (...) He is basically trying to create a semi-authoritarian regime, because the door to Europe is closed. And the only reason for this is Greece. (...) Macedonia has been seriously damaged by this dispute, possibly irreparable” (23.05-25.15).

“Everybody in Macedonia was willing to accept an amnesty (...) because of that carrot or European integration, the idea was lets all put our grievances aside and march forward together towards Europe and the one thing that the Albanian political elite and the big Slavic Macedonian parties could agree upon was that they all wanted to be in Europe. It enable everybody to find common ground in policy, in politics (...) they had a common vision and a common goal. That has now been undermined by the fact that their path to European accession seems to be blocked by Greece” (Warren, 2015, 26.15-27.05).

“In Kosovo, the ICTY had a mainly negative image, because for Albanians it seems to be focusing on crimes committed by Albanians and paying insufficient attention to Serbian war crimes. And for Serbs in Kosovo exactly the opposite” (Warren, 2015, 29.40-30.15).

“You are never going to have a perfect outcome when you are taking a judicial approach to dealing with the past (...) But I think the ICTY neither delivered justice nor delivered a shared historical narrative and to that extend it was not a success” (Warren, 2015, 30.30-31.05).

“I think that the political environment between about 1992 and today (...) was not conducive to having a broader formal truth and reconciliation process that would have included all of the countries and that is still impossible. But at some point in time there is going to have to be a concerted effort (...) the core of that process is going to have to be in Serbia” (Warren, 2015, 31.25-32.30).

ABSTRACT (E)

The Yugoslav Wars lasting from 1991-2001, with intermissions, have forced the countries in the former Yugoslavia to find mechanisms to address past violence. The ICTY (International Criminal Tribunal for the former Yugoslavia) was established in 1993 as the primary international body to respond to war crimes and human rights abuses. It was set up as the main instrument for establishing peace, reconciling societies and serving justice in the region. This thesis will outline the inability of the ICTY alone to achieve these goals: While only focusing on punishment and retribution, other aspects of reconciliation such as community-based dialogue, societal healing, exchanging of truths as well as symbolic and materialistic compensation have been neglected. Its narrow understanding of justice as prosecution and punishment restricted the tribunal. The ICTY has proven incapable of bringing about social reconciliation, resolving ethnic tensions, building a cohesive national identity, forming a collective narrative, transforming mentalities and rebuilding a community. It lacked the capability and capacity to fulfil the mandate given because it is designed as an organ whose institutions and jurisdiction merely serve legal justice. This has resulted in deepened ethnic divisions, which dominate most of former Yugoslav societies, with the political scene being controlled by corrupt and clientelistic elites. These developments have hampered the democratic transition within most countries of the former Yugoslavia. This thesis reveals the lack of a foundation for a functioning democracy, which is directly linked to the violent history not having been dealt with on a broader societal level. Major building stones for a democracy such as a reconnected community, equality of ethnic groups, an active civil society and a functioning relation between the state and its citizenry are missing in former Yugoslav societies. This leaves room for a persisting ethno-nationalism, which dominates the political landscape. The transition from authoritarian rule to a democracy has been unsuccessful in former Yugoslavia, with the exception of Slovenia and Croatia. All other countries in the region still have a long way ahead in implementing not only a formal but also an effective and well functioning democratic system.

Keywords: Transitional Justice; Reconciliation; International Criminal Tribunal for the former Yugoslavia; Ethnic Divisions; Democratisation; Civil Society; Macedonia (FYR)

ABSTRACT (D)

Nach den Jugoslawienkriegen, die, mit Unterbrechungen, von 1991-2001 andauerten, mussten Mechanismen gefunden werden, um auf die frühere Gewalt zu reagieren. Der Internationale Strafgerichtshof für das frühere Jugoslawien (ICTY) wurde 1993 als wichtigster internationaler Apparat gegründet, um mit Kriegsverbrechen und Menschenrechtsverletzungen umzugehen. Er war alleinig dafür verantwortlich in der Region Frieden zu schaffen, Gesellschaften wieder zusammen zu führen und Gerechtigkeit Genüge zu tun. Diese Masterarbeit wird das Unvermögen des ICTYs aufzeigen all diese Ziele zu erreichen: Während der Fokus rein auf Bestrafungs- und Vergeltungsmaßnahmen lag, wurden andere Schlichtungsaspekte in Form von gemeinschaftsbasiertem Dialog, gesellschaftlicher Heilung und Versöhnung, Austausch von Wahrheiten und Erfahrungen, sowie symbolischer und materieller Entschädigungen vernachlässigt. Der Strafgerichtshof war von seinem engen Verständnis von Recht und Gerechtigkeit als Strafverfolgung und Bestrafung eingeschränkt. Es hat sich erwiesen, dass er nicht im Stande war einen Prozess gesellschaftlicher Versöhnung einzuleiten, ethnische Spannungen zu lösen, nationalen Zusammenhalt zu schaffen, ein kollektives Narrativ zu bilden, Mentalitäten zu verändern und Gemeinschaften wiederaufzubauen. Der Strafgerichtshof hatte weder die Fähigkeit noch die Kapazität sein Mandat zu erfüllen, da es ein Organ ist, dessen Institutionen, Gerichtsbarkeit und Zuständigkeitsbereich ausschließlich der Gesetzesgerechtigkeit dienen. Dies hat zur Verschlimmerung ethnischer Spannung geführt, die den Großteil ehemaliger jugoslawischer Gesellschaften durchziehen, während die Politik von korrupten und klientelistischen Eliten kontrolliert wird. Diese Entwicklungen stehen einer erfolgreichen Demokratisierung des Großteils der Region im Wege. Diese Arbeit legt den Mangel an demokratischen Fundamenten offen, der direkt damit zusammen hängt, dass die gewaltvolle Vergangenheit nicht auf einer breiteren, gesellschaftlichen Ebene behandelt wurde. Zentrale Bausteine für eine funktionierende Demokratie, wie unter anderem gesellschaftlicher Zusammenhalt, die Gleichstellung von ethnischen Gruppen, eine aktive Zivilgesellschaft und eine funktionierende Beziehung zwischen Staate und Bürgertum, fehlen im früheren Jugoslawien. Dies ließ der Etablierung eines beharrlichen Ethno-Nationalismus Raum, der die politische Landschaft dominiert. Der Übergang von autoritären zu demokratischen Systemen ist – außer in Slowenien und Kroatien – gescheitert. Alle anderen Länder der Region haben noch einen weiten Weg vor sich, um nicht nur ein formelles, sondern auch ein funktionsfähiges demokratischen System zu etablieren.

Schlagwörter: Übergangsjustiz; Internationaler Strafgerichtshof für das frühere Jugoslawien; gesellschaftliche Versöhnung; ethnische Spaltungen; Demokratisierung; Zivilgesellschaft; Mazedonien (EJR)

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