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Airing Crimes, Marginalizing Victims: Political Expectations and Transitional Justice in Kosovo

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In: Waters, Timothy William, (ed.) *The Milosevic Trial: an Autopsy*. Oxford University Press, New York, USA, pp. 249-259

Abstract

Sensitivity to the local political context is posited by scholars as key for enhancing effectiveness of transitional justice in post-conflict societies, whether it takes a judicial or non-judicial form. This chapter makes the case for a critical reading of local political constraints, warning that framing of culpability and suffering in collective terms leads to marginalization of very victims whose crimes are being aired. The chapter compares the inability of the *Milošević* trial to engage Kosovo Albanians, with the mixed reception in Kosovo received by the RECOM -- the regional civil society initiative aimed at documenting past crimes which emerged as a response to weaknesses of the retributive approach to past abuse. Both mechanisms falter in the encounter with the intricacies of the local context in Kosovo, where suffering is understood within a broader national struggle, both past and present. Hence, it is critical to understand from the victims' perspective how local political constraints can be overcome *by* the pursuit of justice, rather than how they can be imported *into* the pursuit of justice.

Why did the *Milošević* trial fail to engage the Albanian public in Kosovo? The reaction – really, the non-reaction – of Kosovar Albanians contradicts the usual explanation for the ICTY's ineffectiveness in bringing about post-conflict justice in the former Yugoslavia. According to that view, many Serbs, Croats, and Bosniaks – and Albanians – have been loath to see their own co-nationals in the dock answering for acts committed in their name. Consequently, they hailed accused war criminals going to The Hague as heroes, dismissed the ICTY as biased – even as an

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international conspiracy – while invoking exclusively their own suffering and victimhood.¹ By the same token, of course, they have generally been happy to see their former opponents tried and convicted. Following this logic, we might have expected the Albanian public in Kosovo to follow closely the trial of Milošević as it aired his crimes, acknowledged Kosovar Albanians as victims, and established his culpability as the chief mastermind of their suffering? Wouldn't his trial represent the long-awaited recognition of injustice? Wouldn't the Albanians feel at least a degree of political, national, even historical rehabilitation? This is the paradox Trix tackles in her chapter: Charting Albanians' reception and perception of Milošević's trial in the Kosovar Albanian press, she concludes that they did not, and that therefore the trial was not a success.

Plausible enough, perhaps, but why? For Trix, the answer appears in what is her most important observation about the *Milošević* trial: that the voices of the victims were not heard. The trial aired Milošević's crimes, but still managed to offend his victims, not least because of their unacceptable treatment in the courtroom by Milošević himself, as well as their marginalization in the trial process. However, interweaving evidence constituted by the expectations Albanians had for the *Milošević* trial – what they expected the trial to do – with arguments about the trial's procedural failings – what the trial did inadequately – Trix's account remains inconclusive about where the answer is to be found. Is it in the realm of politics, or is it in a procedural, legal remedy?

Such inconclusiveness has a paradoxical outcome. The political interpretation of the court proceedings – even if undertaken from the perspective of Albanian national narratives – marginalizes rather than redeems the actual victims. The individuals are lost in the accounts of collective suffering, for which the apparent redress lies in collective responsibility of the perpetrator through its proxy – here of Serbia through

¹ Victor Peskin and Mieczysław P. Boduszynski, *International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia*, 7 *EUROPE-ASIA STUDIES* 1117 (2003); Dan Saxon, *Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia*, 4 *JOURNAL OF HUMAN RIGHTS* 559, (2005); Laurel E. Fletcher and Harvey M. Weinstein, 'A World unto itself? The Application of International Justice in Former Yugoslavia', in *MY NEIGHBOUR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF ATROCITY* 29 ff (Eric Stover and Harvey M. Weinstein, eds, 2004); James Meernik and Kimi King, *The Determinants of ICTY Sentencing: An Empirical and Doctrinal Analysis* 16 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 717 (2003).

Milošević. It, therefore, follows that even if Milošević had lived to face his verdict, the victims' need for justice would not have been met. But, as we will see, this is a dead-end street for coming to terms with past wrongs and for prospects of reconciliation. The impact of the *Milošević* trial needs to be read in the context of local political constraints in Kosovo, as Trix recognizes, but the key question is how these can be overcome *by* the pursuit of justice, rather than how they can be imported, as she seems to desire, *into* the pursuit of justice.

I. The Limits of Retributive Justice

Trix's argument is an elaborate, if implicit, critique of retributive justice, in particular of the idea that criminal trials, at least as they are presently conducted, are effective mechanisms for reckoning with war crimes and gross human rights violations. This view has, potentially, broader applications, for although her particular critique of the *Milošević* trial is located against its reception among Albanians in Kosovo, it also needs to be read in the context of global trends in ICL. These trends have made impunity for crimes a non-option,² but also brought a number of challenges for the project of ensuring that the new default of criminal trial is also relevant and purposive. For example, the location of the Tribunal outside the post-conflict zone, with foreigners at the helm, has disempowered the local, target populations the justice project ostensibly serves. In the *Milošević* trial, the direct consequence of this has been a thin ear for local circumstances and sensitivities; even the built-in, linguistic structures of the trial – inevitable in international tribunals as they are currently designed³ – ensure that the personal experience³ of pain and suffering gets lost and distorted in multiple translations of witnesses' statements.

But, above all, Trix shows that trials as a transitional justice instrument are not primarily victim-focused. Trials center on the perpetrator, and represent a demand not only for accountability and acknowledgment of the harms done, but also for

² Ruti Teitel, *Transitional Justice Genealogy*, 16 HARVARD HUMAN RIGHTS JOURNAL 69 (2003).

³ Surroi also discusses the linguistic politics of the trial, at XXX.

unflinching punishment.⁴ Within this model, the suffering of victims becomes factive, instrumental of the real purpose, which is the determination of guilt. It is the kind of court that can conclude its forensic examination of a massacre to its own satisfaction with the only survivor, from the stand, declaring ““But you haven’t asked about what I went through. . . !””⁵

Trix perceives an alternative to this defective model, invoking Adem Demaçi’s call to Serbs to apologize for war crimes committed during Milošević’s regime.⁶ Although Trix, a linguist, does not use the same vocabulary, this is implicitly a call for a model of restorative justice, and so it is pertinent to ask: Could a restorative justice mechanism – such as an official apology or a truth commission – avoid some of the pitfalls of the *Milošević* trial?

II. The Promise of Restorative Justice?

Restorative justice in transitional and post-conflict contexts refers to a range of non-judicial tools including truth commissions, mass disqualifications, reparations, compensations, apologies as well as traditional informal practices. It is an approach to justice that focuses on the victims of atrocities and their needs, underpinned by a broader aspiration to restore social relations in the aftermath of past abuse.⁷ To begin answering the question of whether or not restorative justice offers a more appropriate framework for coming to terms with past wrongs, we can consider a prominent effort to create and operate a non-judicial, restorative justice mechanism – one whose structure, procedures and purposes might constitute a plausible test of the alternatives to formal ICL. The Regional Commission for Establishing the Facts about War Crimes and other Serious Human Rights Violations in former Yugoslavia, or RECOM, is a regional movement that has grown in direct response to the perceived weaknesses of attempts to seek redress for past wrongs through trials, especially at the ICTY.

⁴ MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 26 (1998).

⁵ Trix at XXX. Krasniqi, at XXX, notes Hannah Arendt’s similar comments on how trials systematically focus on the perpetrator as agent and personality.

⁶ There has not been any such gesture so far, although Serbian President Boris Tadić has apologized in Croatia and Bosnia in name of the Serbs for crimes committed there, and the Serbian National Assembly has approved a Declaration on Srebrenica. See *Skupština usvojila Deklaraciju o osudi zločina u Srebrenici*, BLIC, 30 March 2010, <http://www.blic.rs>.

⁷ HANDBOOK OF RESTORATIVE JUSTICE (Gerry Johnstone and Daniel W. Van Ness, eds, 2006)

Specifically, its founders saw it as a response to selectivity of retributive models.⁸ RECOM is also an intentionally local response to a complex post-conflict legacy in the former Yugoslavia that has been invoked as a reason for the ICTY's ineffectiveness: namely the tendency of populations to view trials as an opportunity to emphasize and exaggerate the war crimes committed by the other side, while minimizing or contextualizing one's own. RECOM is supposed to be an answer, in other words, to public resistance to reckoning with the past, and to glorification of one's own war criminals coupled, curiously, with the neglect of victims.

But here we encounter the same inconclusive paradox that appears in *Milošević* trial. For although Trix critiques the ICTY for being tone-deaf to context, even a locally driven initiative like RECOM confronts the political problem of context and perspective. Hence, for restorative justice, like for retributive justice, the biggest challenge is to cut through the tendency by local populations on both sides of the conflict to impose a collective interpretation of responsibility for crimes and gross human rights violations as well as for suffering.

Producing valid truths across contexts is hard, but not impossible. The local context has to be addressed – but critically so, because it itself can stand in the way of post-conflict justice, whether pursued by judicial or non-judicial means. The analysis of a restorative alternative to justice shows that the role of victims in overcoming the complex and ambiguous role played by the local context in transitional justice is critical. Their voice can be an effective answer to collective framing of culpability and suffering, which are conducive to perpetuating a sense of injustice and grievance. Placing the victims at a centre of a post-conflict justice seeking mechanism goes beyond counteracting their marginalization, itself a key characteristic in restorative attempts to achieve a sense of justice. Their authentic accounts of suffering offer a point of solidarity between the victims from different ethnic groups, and form a steppingstone for a direct dialogue on the past wrongs; thus defying presumptions that justice can be served only *via* a collective truth.

⁸ Dragana Erjavec, *BiH na konsultacijama Koalicije za REKOM*, BIRN, 6 December 2010, <http://www.bim.ba>

A. Creating a restorative alternative: Establishment and aims of the RECOM process

The founding of the Coalition for RECOM in October 2008 marked the beginning of a regional truth-seeking process in the Western Balkans.⁹ The aim of the Coalition is to promote the creation of an officially recognized regional commission that would produce an accurate, objective and official account of war crimes and other grave human rights violations during the Yugoslav wars; this, in turn, would lead to the recognition of victims and their suffering, as well as prevent repetition of the crimes.¹⁰ Since the launch of the initiative, the Coalition has grown into a grass-roots movement, and involves 1,818 NGOs, associations, and groups – representing victims and their representatives, as well as prominent individuals, veterans, lawyers, artists, journalists, academics, and youth – from all areas of the former Yugoslavia.¹¹ It has held hundreds of consultations at the regional, state, and local levels, and has begun an initiative to collect one million signatures across the region in support of an official commission.¹²

Along with its innovative regional focus, RECOM is oriented towards victims. The process' remit is deliberately narrow and factive, prioritizing facts that themselves speak about the context in which the crimes were committed. Not unlike the truth-telling commissions in Latin America – such as *Nunca Mas* in Brazil, or the Argentinian and Chilean commissions¹³ – the Coalition aims to contribute to justice by establishing truth painstakingly, building up a record, witness by witness and fact by fact. Individual victims are to be named, rather than remaining contested, faceless numbers, manipulated and obfuscated in competing ethnic narratives about the recent

⁹ Nataša Kandić, *The RECOM Initiative: From a Non-governmental Challenge to a State Project*, 2 FORUM FOR TRANSITIONAL JUSTICE 107, 108 (2009).

¹⁰ *Istorijat inicijative o osnivanju REKOM-a*. Koalicija za REKOM. Public release, March 2009.

¹¹ Of these, 461 are NGOs, associations and civic groups, and 1357 individuals. See *Coalition members*, <http://www.zarekom.org/documents/Coalition-members.en.html?page=1>

¹² The signature drive's slogan: "Sign. For your own sake. So that it is known. So that it is not forgotten. So that it is not repeated. So we can move forward. So we can live more easily." <http://www.zarekom.org/Potpis-organizacije.sr.html>. In the event, the Coalition managed to collect over a half of the planned signatures throughout former Yugoslavia, but plans to press on with its plans. Dejan Anastasijević, *Intervju sa Natašom Kandić, Direktorka Centra za humanitarno pravo: Bitka za činjenice*, VREME, 7 July 2011, <http://www.vreme.com/cms/view.php?id=999449>.

¹³ Priscilla B. Hayner, *Fifteen Truth Commissions- 1974 to 1994: A Comparative Study*, 16 HUMAN RIGHTS QUARTERLY 597 (1994).

conflict.¹⁴ According to Lush Krasniqi, representing the families of victims from Đakovica (Gjakova) in Kosovo, “RECOM must exist so that it can be proved that there is only one truth – a real truth and to root out Albanian truth, Croatian truth, Serbian, Montenegrin, Roma, Macedonian, Bosniak, Slovenian and other truths.”¹⁵ As this focus on “one truth” implies, the act of documenting also has broader aspirations that have become evident in the consultation process, such as overcoming communal and official denial of atrocity, creating an historical record, preventing violence and encouraging reconciliation, both between and within ethnic groups.

While the RECOM initiative is ultimately aimed at becoming a state-run project, the process of consultations has itself already become a forum for airing crimes and acknowledging the suffering of all affected by them. In Kosovo, the consultations have offered an opportunity for Albanians and Serbs to engage in a dialogue underpinned by a shared mission to establish the truth. For example, Snežana Zdravković, from Udruženje porodica kidnapovanih i ubijenih na Kosovu i Metohiji (the Association of Kidnapped and Killed Persons in Kosovo and Metohija), expressed support for the Coalition “because the families of the victims thus gain an opportunity to speak about the victims publicly and openly, but to talk about my victims I ought to comprehend and understand your victims. Only then can we discuss and see our problem objectively.”¹⁶ Establishing the truth about the missing was also equated with justice: as one Albanian put it, “justice could be achieved only by finding the last missing person and providing a proper funeral for the last body to be found, and only then we could be speaking of justice.”¹⁷

B. RECOM encounters the local context

¹⁴ The RECOM projects aims to be the first comprehensive record of crimes committed on the territory of former Yugoslavia, as no such records exist for the First and Second World Wars.

¹⁵ *Konsultime rajonale me shoqatat e viktimave dhe familjarët e viktimave mbi draft Statutin për KOMRA*, 17 Dec. 2010. <http://www.zarekom.org/Konsultime/Konsultime-me-shoqatat-e-viktimave-dhe-familjart-e-viktimave.sq.html>.

¹⁶ *Konsultime rajonale me shoqatat e viktimave dhe familjarët e viktimave mbi draft Statutin për KOMRA*, 17 Dec. 2010. <http://www.zarekom.org/Konsultime/Konsultime-me-shoqatat-e-viktimave-dhe-familjart-e-viktimave.sq.html>.

¹⁷ Ballsor Hoxha, *Vox Populi: What about Transitional Justice?*, 2 MADE IN KS...PAST, PRESENT, FUTURE 5, 6 (2010). There are still about 1,900 people missing, mostly Albanians but including about 500 Serbs, Egyptians, Ashkali, and Roma. Furthermore, there has been a stagnation in recovering the remains of the missing both on the territory in Serbia since 2002, as well as from clandestine graves in Kosovo. *ICMP Issues Report on Missing Persons from the Kosovo Conflict*, 3 March 2011. <http://www.ic-mp.org/press-releases/kosovo-stock-taking-report/>

Alongside these promising developments, however, the debate about the RECOM process, its aims, and, ultimately, its reception among Kosovar Albanians, reveal the challenges of meeting expectations of transitional justice in complex post-conflict settings. Much like the *Milošević* trial, the RECOM initiative's effectiveness and acceptability have been criticized. Although the process has supporters among ethnic Albanians, there are also sceptics and opponents among civil society groups in Kosovo. Valdete Idrizi, a member of RECOM's Coordination Council, pointed out the need to deal with Kosovo's context delicately because there had not been much headway in dealing with the past – in particular, a lack of dialogue between Albanian and Serbian victims' associations, as well as between these associations and Kosovo's government.¹⁸ Similarly, representatives of the international community in Kosovo actively discouraged efforts to establish responsibility and accountability, concerned that these might be seen by Belgrade as a provocative gesture, at a time when goodwill was needed ahead of the status negotiations in 2006 and 2007.¹⁹ At the Fourth Regional Forum for Transitional Justice in 2008, some Albanian victims' associations expressed reservations towards their participation in the Coalition for RECOM, raising concerns about cooperation with other states and the time period covered by the commission's mandate.²⁰

The issue of missing Kosovo Albanians has cast a long shadow over RECOM's work. Serbia's uncooperative stance in investigating cases of the missing has been taken by some Albanians as an argument against participation in the regional initiative – that the initiative is not only premature, but constitutes outright cooperation with the perpetrator and enemy. The intensity of this feeling that Kosovo should not cooperate with anyone, especially Serbia and its civil society, was unequivocally expressed by one Albanian NGO: “As before, the servants of Belgrade are manipulating the people, especially the families of the missing, falsely stating that the Serbian initiative is supported by most Kosovo Albanians, especially the families of victims of the recent

¹⁸ Valdete Idrizi, *The Kosovo Perspective: The Importance of Ownership*, 2 FORUM FOR TRANSITIONAL JUSTICE 116 (2009).

¹⁹ Nora V. Weller, ‘The Failure to Face the Past in Relation to Kosovo’, in *CONFLICT AND MEMORY: BRIDGING THE PAST AND FUTURE IN [SOUTH EAST] EUROPE* 265, 279 (Wolfgang Petritsch and Vedran Džihic, eds, 2010). (specifically mentioning the opposition of ‘principal international actors’ in Kosovo to the memory process).

²⁰ Nataša Kandić, *The RECOM Initiative: From a Non-governmental Challenge to a State Project*, 2 FORUM FOR TRANSITIONAL JUSTICE 107, 109 (2009).

conflict in Kosovo.”²¹ Instead of engaging in a regional dialogue, such groups have argued that Kosovo should first start a process of reckoning with the past at the state level, spearheaded by the Kosovo government. This call for distance from a regional initiative goes to the core of Kosovar Albanians’ quest to establish their political place as a nation, whose statehood continues to be denied by Serbia, and is consistent with the tendency, which Trix observes in Kosovar Albanians, to view the *Milošević* trial through the prism of their nascent state project.

Simultaneously, the time period to be covered by RECOM proved a sticking point. RECOM’s Statute focuses on the period between 1991 and 2001 – the period of open, violent conflict from Slovenia to Macedonia.²² Some Albanian representatives argued that at least it should begin in 1980, as the year of the death of Tito and the beginning of the unravelling of the former Yugoslavia. These calls were backed by references to repression in Kosovo during Communist rule, and, in particular, abuse of Albanian recruits in the JNA in the 1980s and 1990s. One discussant said, “Here in Kosovo we have cases when our youths went to serve the army, and returned as corpses.”²³ Others singled out the early 1990s, which although not a period of armed conflict in Kosovo, saw unrelenting state repression under Milošević’s rule, when many Albanians were murdered, tortured, or subjected to political and staged trials.²⁴ For many Albanians, this period was prologue to the armed conflict in 1998 and 1999, and essential to understanding it. Much as in the *Milošević* trial, the sense that context was stripped away has been a source of dissatisfaction with and a basis for resistance to the RECOM initiative. Indeed, the critics of RECOM throughout former Yugoslavia argue that the establishment of political responsibility for the war is a precondition for

²¹ *Familjet e të zhdukurve kundër fushatës “KOMRA”*, SOT, 29 April 2011, <http://www.kohaditore.com>.

²² *Statut Koalicije za REKOM*, <http://www.zarekom.org/documents/Statut-Koalicije-za-REKOM.sr.html>.

²³ *Konsultime rajonale me shoqatat e viktimave dhe familjarët e viktimave mbi draft Statutin për KOMRA*, 17 December 2010. <http://www.zarekom.org/Konsultime/Konsultime-me-shoqatat-e-viktimave-dhe-familjart-e-viktimave.sq.html>.

²⁴ *Forumi i Katërt Rajonal për vendosjen e drejtësisë në shoqëritë post-jugosllave: Komisioni Rajonal për vërtetimin e fakteve të krimeve të luftës dhe shkeljeve tjera të rënda të të drejtave të njeriut në ish Jugosllavi*, 28 and 29 October 2008. <http://www.zarekom.org/Konsultime/Komisioni-Rajonal-pr-vrretimin-e-fakteve-t-krimeve-t-lufts-dhe-shkeljeve-tjera-t-rnda-t-t-drejtave-t-njeriut-n-ish-Jugosllavi.sq.html>.

establishing the truth, in contrast to RECOM's approach of focusing on the facts of past abuse first.²⁵

At the same time – and unlike *Milošević* trial – the RECOM initiative's focus on the needs of the victims and their families for truth and justice has assured it a measure of grassroots support. It reverses the methodology of trials which, as Trix shows, bury the harrowing statements by survivors of atrocities and relatives of victims in the background – just as it challenges their sidelining in all post-Yugoslav states. This includes Kosovo, where victims have complained about the government's indifference to them, a sense of neglect by Kosovo's society and institutions that one Albanian woman expressed, saying “We have been stripped of our dignity; so far we do not feel part of Kosovo society”²⁶ Despite opposition by some Albanian associations and think tanks, the number of signatures that the RECOM has collected in Kosovo makes the initiative more successful there, in comparative terms given Kosovo's size – than in other parts of the former Yugoslavia.²⁷ Still, this evidence of partial popular support only makes the question of opposition to an initiative focused on the victims and spearheaded by local organisations even more pertinent.

III. Back to the Map: Beyond the Mechanisms of Transitional Justice

The experience of RECOM so far suggests that – quite apart from questions of its ultimate efficacy – the process has met a mixed reception in Kosovo. RECOM was deliberately designed in reaction to critiques of the ICTY – a paradigmatic example of international retributive justice whose unfolding is removed from the local setting – but even this bottom-up, restorative justice initiative, exclusively shaped by local actors driven by an imperative to respond to victims' needs, has met resistance predicated on very similar objections. How can we explain this?

²⁵ Anastasijević, op.cit.

²⁶ *Project: Dealing with the Past*, 16 November 2010. <http://crdp-ks.org/pdwp>.

²⁷ Thanks to Nora Ahmetaj for this observation. Also see *Në Kosovë 20 shtande për mbledhjen e nënshkrimeve*, 6 May 011. <http://www.zarekom.org/lajme/N-Kosov-20-shtande-pr-mbledhjen-e-nnshkrimeve.sq.html>. In fact, RECOM was most strongly endorsed in Kosovo, where 100,559 signatures were collected, as opposed to 254,539 in Serbia, 122,473 in Bosnia-Herzegovina, and 19,668 in Croatia. *Potpisalo 542.660*, DANAS, 8 July 2011, http://www.danas.rs/danasrs/drustvo/kandic_rekom_pocetkom_2013_.55.html?news_id=219120

The most important consideration in pursuing transitional justice is the context, with all its social, historical, cultural and political particularities.²⁸ The observation that transitional justice is “constituted by, and constitutive of, the transition”²⁹ reminds us to focus on the political environment that shapes the reception and perception of efforts aimed at coming to terms with past crimes. In Kosovo, the introduction of transitional justice processes – whether international or local – has taken place in an environment marked by the legacy of a totalitarian regime and conflict. In particular, three aspects of Kosovo’s complex transformation comprise a challenge to any transitional justice mechanism: They concern the complex history of crimes in relation to Kosovo’s political transformation, the continuing national struggle, and victims’ position in narratives of conflict.

The maps of crime are complex. The legacy of crimes passed on to the post-conflict authorities in Kosovo has historical, ethnic and ideological dimensions. Given the history of Albanian-Serb relations in Kosovo – which both sides see as a history of domination of one group over the other³⁰ – efforts to reckon with war crimes have an explicit inter-ethnic dimension. However, as Albanians’ response to Bakalli’s testimony in the *Milošević* trial demonstrates, reckoning also has intra-ethnic and ideological dimensions. Kosovo Albanians’ perception of their own former Communist leaders is closely intertwined with perceptions of their cooptation in the Serb project of domination. Communism waned swiftly in Kosovo in the late 1980s as Milošević began his ascent to power through a forceful abolition of Kosovo’s autonomy. Nonetheless, Albanian Communists’ alignment with the Albanian national movement in Kosovo did not dispel their ambiguous standing in the Albanian community: they were seen on the one hand, as modernizers who spearheaded Kosovo’s political, economic, and even national development, crowned by its provincial status in the 1974 constitution, but on the other hand, as Communist cronies who subscribed to the Serbian vision for Kosovo, especially after their participation in the violent suppression of the Albanians’ 1981 demonstrations that voiced the demand for republican status.

²⁸ RACHEL KERR AND EIRIN KNOEBEKK, *PEACE & JUSTICE: SEEKING ACCOUNTABILITY AFTER WAR* 10 (2007).

²⁹ RUTI TEITEL, *TRANSITIONAL JUSTICE* 6 (2000).

³⁰ Dušan Janjić, ‘National identity, movement and nationalism of Serbs and Albanians’, in *CONFLICT OR DIALOGUE: SERBIAN-ALBANIAN RELATIONS AND INTEGRATION OF THE BALKANS* 117 ff (Dušan Janjić and Shkëlzen Maliqi, eds, 1994).

Second, the temporal and political context in which a transitional justice instrument, whether retributive or restorative, is introduced may ultimately prove defining for its impact. Kosovo's political status has been contested during the entire period that the ICTY and RECOM have been operating. Kosovo's declaration of independence on 17 February 2008 – the fulfilment of its ethnic Albanians' historical striving for national sovereignty since Kosovo's incorporation into Serbia in 1912 – aimed to end the ambiguous position Kosovo had found itself in since the adoption of Resolution 1244. However, although Kosovar Albanians and the majority of West European states consider the question of the status of Kosovo settled, the European Union is unable to agree on a recognition policy, and a majority of UN members still do not recognize the new state, which is left outside most international institutions.³¹ Above all, Serbia's refusal to recognize Kosovo has prevented closure of the Serbian-Albanian dispute. Most notably, in the north, run by Serbs loyal to Belgrade, Pristina has been unable to impose "empirical sovereignty," understood as effective exercise of attributes of statehood.³²

This continued contestation means that all crimes are interpreted, and all victims perceived, within the context of this struggle; this is as true for the ongoing RECOM initiative as it was for the terminated *Milošević* trial. Rugova's statements following his testimony in the ICTY in 2002 show this linkage between Kosovo's victims – between the ostensible forensic purpose of the trial – and Kosovar Albanians' political quest for independence is explicit.³³ Three years after Kosovo's declaration of independence, an analogous linkage helps explain opposition to participation in the RECOM initiative, despite its notional focus on local concerns and its attention to victims. Victims are not simply people, but factors in a national project – sacrifices: Marking the Day of the Missing by a visit to a "Lëndinë e Pikëllimit" (Field of Grief), commemorating Albanian victims of Serb violence in the village of Meja, near Gjakova, in April 2011, the newly elected President of Kosovo, Atifete Jahjaga

³¹ Martin Waehlich and Behar Xharra, *Three Years After Independence Kosovo Struggles for Recognition*, RADIO FREE EUROPE/RADIO LIBERTY, 17 February 2011, http://www.rferl.org/content/commentary_kosovo_third_anniversary/2312109.html.

³² Robert H. Jackson and Carl G. Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood*, 35 *World Politics* 1 (1982); Michael Barnett, *The New United Nations Politics of Peace: From Juridical Sovereignty to Empirical Sovereignty*, 1 *GLOBAL GOVERNANCE* 79 (1995).

³³ See Trix at XXX.

declared that “[t]he freedom and independence of Kosovo is owed to these martyrs who have sacrificed themselves so that Kosovo is governed by its people, that Kosovo will have democratic institutions and that Kosovo will be an equal and dignified country in the European Union.”³⁴ In such a hotly-disputed political context, transitional justice becomes another site where national struggle unfolds, rather than first and foremost serving the victims.

Such place of victims in the national project has made it difficult to distinguish between acknowledging individual victims and their particular suffering, on the one hand, and, on the other, asserting victimhood as a collective appropriation which allows only one side – one’s own side – to be the victim, while the other is always and only a perpetrator, never a victim.³⁵ In this way, “denial of the victims is more ideologically rooted in historically interminable narratives of blaming the other.”³⁶ As a consequence, Kosovo’s victims – of all ethnicities, but especially Albanians and Serbs – are in a paradoxical situation: They are acknowledged by their own communities, but simultaneously are subsumed in an exclusive collective claim to suffering expressed as opposition to the ethnic other, and by accompanying narratives of conflict.

Logically, reckoning with the past at the inter-ethnic level ought to start with de-collectivization of blame, without denying the scope of complicity in crime. However, reckoning with the past also has a critical intra-ethnic side: “[I]ntra-group reconciliation implies ‘a group coming to terms with its own history and culture, which may have been based on enmity, war thinking or a fixation on its ‘victimization’ or inherent ‘superiority.’”³⁷ In Serbia’s case, this requires the re-evaluation of its “mythical history” centred on Kosovo, not just to come to terms with

³⁴ *President Jahjaga Visited the Families of the Missing in the Village Meja in Gjakova*, 27 April 2011, <http://www.president-ks.gov.net/?page=2,6,1749>.

³⁵ An examination of Albanian and Serbian history textbooks on the subject of Kosovo’s history, for example, reveals a mirror image template in accounting for the relationship with ethnic other: Each group has a monopoly on suffering and martyrdom, denying the other’s suffering, while the promotion of a historical sense of victimhood is compounded by airbrushing one’s own violence and repression. DENISA KOSTOVICOVA, *KOSOVO: THE POLITICS OF IDENTITY AND SPACE* 133-168 (2005).

³⁶ STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* 96 (2001).

³⁷ Laura Stovel, *When the Enemy Comes Home: Restoring Justice after Mass Atrocity*, RESTORATIVE JUSTICE CONFERENCE, Vancouver, 1-4 June 2003, <http://www.sfu.ca/cfrj/fulltext/stovel.pdf>.

the loss of Kosovo,³⁸ but to come to terms with the crimes committed in the name of the Serbian nation – the kind of reckoning Demaçi envisions. For Kosovo this requires the recognition of discordant voices that question a master narrative of a KLA-led struggle for the liberation of Kosovo built on incorporating individual victims in a mythic collective martyrdom.³⁹ By overlooking these complex histories – including their internal complexities – the pursuit of transitional justice may further entrench the sense of victimization steeped in the past, rather than delivering the recognition of victims as a way of overcoming the past.

In Kosovo, the complex political and historical context, including the unfolding double transition from Communism and from conflict, provides us some insight into why transitional justice initiatives – whether judicial or non-judicial, retributive or restorative – have left victims unsatisfied. The fear and trauma engendered during Kosovo’s protracted transition and conflict, compounded by the indifference of its governing institutions and their cooptation as a collective symbol within the national project of Kosovo, ultimately has made individuals feel doubtful, anxious and insecure about dealing with the past, while simultaneously leading them to take on an “only-victim-role[.]”⁴⁰ The effects of this patterns perceptions of any effort to reckon with the past.

Thus the *Milošević* trial played into the collective nationalism in which the issue of war crimes in Kosovo was framed by political elites, both in Kosovo and in Serbia.⁴¹ Consequently, it helped close off whatever possibility might have existed for a cross-ethnic debate on crimes and violations of human rights. This politicization of the trial was aided by the sidelining of victims and their testimonies in the legal process, contributing to its perceived failure in Kosovo, as well as further marginalizing victims and their suffering.

³⁸ Nora V. Weller, ‘The Failure to Face the Past in Relation to Kosovo’, in *CONFLICT AND MEMORY: BRIDGING THE PAST AND FUTURE IN [SOUTH EAST] EUROPE* 265, 283 (Wolfgang Petritsch and Vedran Džihčić, eds, 2010).

³⁹ Anna Di Lellio and Stephanie Schwandner-Sievers, *The Legendary Commander: The construction of an Albanian Master Narrative in Post-war Kosovo*, 12 *NATIONS AND NATIONALISM* 513, 520-524 (2006).

⁴⁰ Nora Ahmetaj, *Fears and Hopes of Victims Engaging in Transitional Justice*, 2 *MADE IN KS...PAST, PRESENT, FUTURE* 7, 9 (2010).

⁴¹ Lamont makes similar arguments concerning the cooptation of ICTY trials in Croatia.

Similar challenges confront the ongoing RECOM process in Kosovo. Although it is organized on radically different principles than the ICTY, and seeks to draw its legitimacy from explicitly local sources, the RECOM process has not thereby escaped the pitfalls of context and politics. These challenges do not doom the initiative, or similar efforts. Precisely because RECOM aims to afford victims and their families space to reclaim their individual stories of pain and suffering, it holds the promise of a nascent dialogue between the Kosovo's polarized Albanian and non-Albanian communities, essential for mutual solidarity and understanding⁴² and as a precursor to establishing truth and justice. But to be successful, RECOM – indeed any transitional justice initiative – will also need to confront and overcome the many incentives, born of politics and history, to treat victims as something else.

Victims above Politics: The Transformative Potential of Transitional Justice

This returns us to the paradox we noted at the outset, which has to do with whether the remedies for the flaws of the *Milošević* trial are legal and procedural, in nature, or political. We have seen that neither retributive nor restorative justice mechanisms deployed in response to the conflict in Kosovo have been immune to criticism from the very stakeholders those mechanisms were meant to serve, and that this criticism has a common source: For both types – the ICTY's *Milošević* trial and the RECOM process – the context in which transitional justice unfolds has been critical in explaining its reception. That context has been one of complex, highly varied experiences of suffering set against a transformation that cuts across ethnic cleavages. If a primary aim of transitional justice is to take account of the needs of the victims, in all their diversity and with their varied understandings of truth and interest in redress for past wrongs, the evidence mobilised to mount a critique ought to receive particular attention. It ought to take on board the fact that political expectations for transitional justice may not coincide with victims' needs for truth and justice.

This is why Trix's deployment – really, her conflation – of evidence derived from what Albanians' expectations of the trial were – given Kosovo's troubled history and its unsettled contemporary circumstances – and evidence derived from analysis of the

⁴² *Ibid*, 9.

trial proceedings to explain why Milošević's trial failed to interest Albanians in Kosovo, falls short of providing an answer to the question of how the victims of crime can be properly respected and accommodated.

For in fact, Trix's explanation comes very close to prescribing as a solution precisely what has been the key obstacle to establishing the truth, particularly concerning the role of Serbian society and its pathology in the trial: that solution is, implicitly, a collective one. This derives from Trix's account that Kosovo's Albanians were dissatisfied with the trial because it did not reflect a collective and historic nature of Serbian culpability. Ironically, such framing of ineffectiveness of the *Milošević* trial undermines her key finding concerning the value of oral testimonies of victims. The victims ought to be heard not to reinforce but precisely to challenge collective understanding of culpability and suffering. Above all, therein lies the transformative potential of transitional justice. Otherwise, As long as issues of responsibility and culpability are presented in collective terms, criminals, as named individuals, will effectively be able to hide in plain sight amid the conceptual and discursive obfuscation of categories such as nation and society. Indeed, as several other chapters show, Milošević himself, while sitting in the dock in The Hague wearing a tricolour tie to match the Serbian flag, was at pains to show that it is not only him, but the entire Serbian nation, on trial. He was fully aware that the only way for him to defend and legitimate his policies and their consequences was to reach out to and represent – again as he had effectively done during his rise to power – the nation..

Human suffering is not monolithic, and injustice visits us in many forms. For this reason, transitional justice, properly understood, is not monolithic either, but rather characterised by a search for effective and legitimate ways to account for the legacy of injustice. There are many possible avenues, and no single transitional justice instrument can give a full accounting of complex histories of crime – Kosovo is an illustrative example of this principle. Indeed, this aspect of transitional justice is indirectly indicated by the multiplication of transitional justice instruments.⁴³ Still, for all their complexity, one common, critical factor in designing and implementing

⁴³ *Transitional Justice in Kosovo*, KOSOVAR INSTITUTE FOR POLICY RESEARCH AND DEVELOPMENT POLICY RESEARCH SERIES, OCCASIONAL PAPER, July 2009, www.kipred.net. (providing an overview of a range of transitional justice mechanisms in Kosovo).

transitional justice mechanisms is an awareness of the context in which they are pursued. But awareness is not the same as acquiescence or advocacy, and arguably requires a critical examination of that local context. Responding to local politics – especially a politics that marginalizes the victims themselves – may not actually help the victims in their quest for truth and justice, as in Kosovo it appears not to have. Victims need to be the agents of their own, rather than some national truth. Giving more voice to victims, whether in trials or in truth commissions, must be integral to any strategy to post-conflict justice. Ironically, cutting out their voices in the *Milošević* trial actually (and perhaps incidentally) did register within Kosovo's local context – but with the wrong kind of local politics, one that sees victims as means rather than ends in a quest for justice, itself used instrumentally for political ends.

