

ARTICLE Hjortur Bragi Sverrisson, *Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?*

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## ARTICLE

# ***Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?***

***By Hjortur Bragi Sverrisson<sup>1</sup>***

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## **ABSTRACT**

The winter of 2005/2006 will be a defining time for the future of Kosovo; the talks on the future status of Kosovo will start. The author argues that a Truth and Reconciliation Commission (TRC) should be woven into such talks. Despite the well recognized fact that reconciliation is a vital component of any post-conflict transformation, the international presence in Kosovo has not made available the necessary resources and policy decision for such reconciliation to be effective and long lasting. The author argues that for returns of internally displaced people and refugees to be sustainable, for democratic institutions to be effective, and for peace to be lasting and credible, a sustained effort of reconciliation is needed. The existence of various ‘truths’ is currently fanning the flames of ethnic hatred, and such ‘truths’ will not be reconciled without a uncovering the events that led to the civil war in Kosovo and atrocities that took place before, during, and after that war. For that reason, a Truth and Reconciliation Commission is needed for Kosovo. The status talks provide a unique window of opportunity to put such a commission on the agenda

“Kosovo will not in the foreseeable future become a place where Kosovo Albanians and Kosovo Serbs are integrated. They probably never were. Nevertheless, the reconciliation process should start. It must come from inside Kosovo and be embraced by all communities. The international community must encourage reconciliation and provide active support.”

*Ambassador Kai Eide, UN Secretary General’s Special Envoy to Kosovo, 4 October 2005<sup>2</sup>*

## **INTRODUCTION**

The winter and spring of 2006 will be a defining time for Kosovo. The decision to start talks about the future status of the region has been taken. The question of status has haunted everyone

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<sup>2</sup> Ambassador Kai Eide, *A Comprehensive Review of the Situation in Kosovo*, (Report to the UN Secretary General, 4 October 2005), p. 15.

involved in the restoration of peace and justice in Kosovo and has been a major obstacle to any development, in particular economic development. The question of status has also been used by those who resent the involvement and influence of the international community as an excuse for not committing fully to the quest for a peaceful multiethnic Kosovo. The unclear status has also made the relation between the communities in Kosovo uneasy. Now this is about to change. How? That is too early to say.

It is necessary to provide a little background. In June 1999, after almost three months of North Atlantic Treaty Organization (NATO) air strikes, the government of the Federal Republic of Yugoslavia (now Serbia and Montenegro), left with few options, agreed to temporarily surrender Kosovo to the international community. Subsequently, the United Nations Security Council, after some turf struggle between international actors,<sup>3</sup> decided to establish an international presence in Kosovo, civilian as well as military, while “[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia”.<sup>4</sup> The United Nations Mission in Kosovo (UNMIK) has now been in operation for almost seven years. It is currently structured in four pillars, two operated by the UN itself, one by the European Union and one by the Organization for Security and Co-operation in Europe (OSCE). The military presence is operated by the Kosovo Force (KFOR) under the overall control of NATO. The main tasks of the civilian mission are to develop functioning governmental structures, promote interethnic tolerance, and create a favorable environment for economic development. In the seven years that have passed, significant achievements have been made. Nevertheless, numerous issues remain unresolved.

The promotion of inter-ethnic dialogue remains one of the important challenges for UNMIK and the government of Kosovo. Eruptions of violence in Kosovo since the end of the NATO bombing campaign, in particular in mid March 2004,<sup>5</sup> shows clearly that the road to a tolerant multi-ethnic society is like any other Balkan road, long, curvy, and full of potholes. In order to promote inter-ethnic relations, various tools have been employed and some measurable progress seemed to have

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<sup>3</sup> William G. O’Neill, *Kosovo: An Unfinished Peace*, (London: Lynne Publishers, 2002), p. 37.

<sup>4</sup> United Nations Security Council Resolution 1244(1999), 10 June 1999, UN Doc S/RES/1244 (1999).

<sup>5</sup> In March 2004 Kosovo suffered the most serious outbreak of violence since the end of the war in 1999. About 800 houses were burned, as well as several churches. Fortunately, only 19 people were killed but about 1,000 suffered injury, many of them serious. About 51,000 Kosovo-Albanians are thought to have participated in the violence.

been made prior to the March violence. The situation today suggests that these efforts have been insufficient.

The Ninth Assessment of the Situation of Ethnic Minorities in Kosovo, a report drafted by the OSCE in co-operation with United Nations High Commissioner for Refugees (UNHCR) back in 2002, recommended that the “prospect of a Truth and Reconciliation Commission should be openly discussed in the media, led by the PISG [the Provisional Institutions of Self-Government] and UNMIK.”<sup>6</sup> The purpose of this paper is to open up the question whether a TRC is a viable option in Kosovo as a method of establishing a credible historical account of the interethnic relations in Kosovo, as well to promote reconciliation and inter-ethnic dialogue. I argue that it is, and the window of opportunity is opening at this moment in relation to the status talks.

The paper builds on my experience as a member of the OSCE Mission in Kosovo for three years. It relies also on responses and reactions of many Kosovan individuals to the question if and how a TRC could work in Kosovo. Discussions with individuals involved in TRC processes in the region, mainly Serbia and Montenegro and Bosnia and Herzegovina, were particularly helpful. Informal advice and comments from several international experts, located within and out of Kosovo, was also obtained during the production of this paper. Finally, several UNMIK staff members, including OSCE colleagues, provided insight and shared their relevant experiences. I sincerely wish I could recognise the invaluable contribution of these individuals by mentioning their names. However, for many reasons, and based on a request from many of them, their names will not be disclosed.

## 1) **TRUTH AND RECONCILIATION COMMISSIONS**

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<sup>6</sup> *Ninth Assessment of the Situation of Ethnic Minorities in Kosovo*, (OSCE and UNHCR, May 2002), p. 7. PISG is an acronym for the Provisional Institutions of Self-Government. Also, a UNDP supported Early Warning Report issued in May 2002, lists six “[a]ctivities and courses of action “that could help mitigate the causes of instability.” One of them is the “[e]stablishment of a Truth and Reconciliation Commission in Kosovo with representatives of all Kosovan communities and the international community.” See *Early Warning Report*. Pristina: United Nations Development Programme and the United States Agency for International Development, 2002, p. 2.

**a) Reconciliation in post-conflict transition**

After conflicts, oppression, or ‘state crimes’, any new government that acquires power has the difficult task to reconcile the different factions of the community. This is imperative after a sudden collapse of the former political power structures, but also important where governments have departed because of shifts in the political winds, such as after democratic elections or “velvet” revolutions. Despite the importance of reconciliation for the transition to democracy, apart from some commendable efforts, this part of post-conflict democratic transition has until very recently not received its deserved attention by the international presence in Kosovo.<sup>7</sup>

There are a number of tools that can be useful for reconciliation in post-conflict transition, rebuilding confidence and the perception of justice in a society. Among them is an impartial investigation by an official TRC which publishes its findings. Another tool might be criminal investigation, leading to a punishment for human rights violations or war crimes. It cannot be overlooked that a number of other transition efforts, such as reconstructing the judiciary and the police as multi-ethnic institutions, promoting tolerance and the notion of non-discrimination in schools and in public service bodies, can have reconciliatory effects, although they are not considered as core reconciliation activities. Although not all of these tools are designed to face the past, they are an attempt to rebuild the perception of justice in the society and the hope for a secure and predictable future. These tools of reconciliation are certainly not mutually exclusive; on the contrary, they work only in a combination.

Reconstructing a society in a post-conflict transition is, however, in dire need for sustained, continuing, and co-ordinated efforts of reconciliation; the success of the work of democratic institutions depends on tolerance, understanding and respect for others. The main task of TRCs, such as the South African Truth and Reconciliation Commission, the Commission for Reception, Truth and Reconciliation in East Timor, the short lived Commission on Truth and Reconciliation in Yugoslavia,<sup>8</sup> the Commission on Historical Clarification in Guatemala, and the Chilean Truth

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<sup>7</sup> There are some commendable efforts that must be recognised. A number of NGOs have organised various types of reconciliation or tolerance building programmes, so have the OSCE Department of Democratization and Department of Human Rights and Rule of Law. Last but not least, a growing number of local groups have despite setbacks courageously crossed the inter-ethnic boundaries to discuss the future of Kosovo and the possibility for a peaceful co-existence of the various communities of Kosovo.

<sup>8</sup> Now Serbia and Montenegro.

and Reconciliation Commission, is or was to uncover the truth about past atrocities, record it and publish the findings. Priscilla B. Hayner<sup>9</sup> wrote:

‘Truth Commissions are difficult and controversial entities; they are given a mammoth, almost impossible task and usually insufficient time and resources to complete it; they must struggle with rampant lies, denials, and deceit and the painful, almost unspeakable memories of victims to uncover still-dangerous truths that many in power may well continue to resist. At the end of a commission’s work, a country may well find the past still unsettled and some key questions still unresolved. Yet despite the inherent limitations, both the process and the product of a truth commission can make a critical contribution in the midst of a difficult transition.’<sup>10</sup>

Not all TRCs have had reconciliation as their primary goal. However, all of them have at least seen reconciliation as a consequence of their work and one of the main justifications for the enterprise. Hayner distinguished between five roles of TRCs: “to discover, clarify, and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflicts over the past.”<sup>11</sup>

The fact-finding part of a TRC is imperative. One must remember, as a starting point, that a creation of any multi-ethnic society in a post-conflict environment will most likely be futile unless the perceptions and misperceptions which are causing the tension have been determined, the fact distinguished from the fiction, and credible versions of the truth, to a large extent acceptable to parties to the conflict, have been acknowledged. This would be the core contribution of a TRC in Kosovo to its post-conflict transformation.

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<sup>9</sup> Priscilla Hayner is the Director of Outreach and Analysis at the International Center for Transitional Justice in New York. She is a well know expert on truth commissions and transitional justice.

<sup>10</sup> Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, (New York and London: Routledge, 2001), p. 23.

<sup>11</sup> Hayner, p. 24.

Apart from the need of the society to understand the underlying political and societal reasons for the conflicts, and the need for disclosure of the abuses committed during the conflicts, the truth-telling can have positive therapeutic effects for the society. Revealing the truth and systematically recording testimony and evidence about past abuses is not to assign collective guilt, rather to avoid the collective innocence. The testimony of survivors is also an attempt to restore their human dignity by providing an ear for their stories and a forum to legitimise them, it is to overcome denial of responsibility. Nevertheless, the reconciliatory effect of such truth-telling can and has been questioned. Brandon Hamber pointed for example out that the purpose of victims' testimony before the South African TRC was unclear and that it left many victims dissatisfied with the process and the results, the concept of victims was defined too narrowly and that victims felt that they were not nearer to the truth than before.<sup>12</sup>

To evaluate the reconciliatory effects of a TRC, Hayner recommended it was necessary to distinguish between "individual reconciliation and national or political reconciliation" and that the "strength of a truth commission process is in advancing reconciliation on a national or political level."<sup>13</sup> Thus, individual reconciliation has to be handled simultaneously by grassroots reconciliation, psychological help for the victims, reparation programmes, etc. If a TRC is supposed to contribute substantially to individual reconciliation, it has to be able to deal directly with victims, the trauma resulting from their testimony or the disclosure of painful events. Individual victims also have to feel like justice is being done, perpetrators are being punished, removed from official post, forced to pay reparation, etc.

Some TRCs have had the authority to pay or order payment of reparation to victims or recommend compensation. Such compensations either come from the government or from perpetrators. Under UNTAET Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, reparation from the perpetrator can be used as a condition for amnesty.<sup>14</sup> Furthermore, the reports of some TRCs have been used as a basis for reparation programmes for the victims and survivors of an abusive government.<sup>15</sup> However, this

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<sup>12</sup> Brandon Hamber, *'Ere Their Story Die': Truth, Justice and Reconciliation in South Africa*, Race & Class, Vol. 44(1), 2002, p. 61, at 65 and 68-69.

<sup>13</sup> Hayner, p. 155.

<sup>14</sup> UNTAET Regulation 2001/10, section 27.7.

<sup>15</sup> Hayner, p. 173 and 175.

role of a TRC can be quite controversial as the hope for financial benefit might discredit the stories of the survivors. Therefore, it must be downplayed and not serve as an incentive or encouragement for persons to come forward and tell stories of their experience.

Although TRCs are not designed to gather evidence for criminal prosecution, the reports and conclusions of TRCs have in many instances led to prosecution of perpetrators. This was the case in Argentina and also in Chile to a certain extent.<sup>16</sup> TRCs could therefore directly support later prosecution while the local judicial institutions are still too weak or biased to function properly. Traditionally, the establishment of a TRC has required the weight of strong leaders who believe in non-violent movements and realise that breaking the cycle of revenge is pivotal for the road towards reconciliation. More recently, TRCs might be developing into the norm of post-conflict reconciliation, with the establishment of such commissions despite the absence of a striking leadership. Nevertheless, the lack of functioning civil society and credible leadership in Kosovo cannot be downplayed as an obstacle for the creation of an effective TRC in Kosovo. However, refreshing political winds have been gaining momentum, giving reasons for some optimism.

#### **b) TRC Contribution to Post conflict Reconciliation**

Reconciliation, be it political, national or individual, is a central component in any post-conflict transition. Most leaders who aim at building a just society have recognised the importance of such process and tailored it into their transition policies. However, the political message of forgiveness is not a package that is easy to sell under such conditions.

Post-conflict reconciliation is a process where the parties involved in conflicts attempt to break the cycle of violence by facing the past, learning from it, and attempting to construct a future of peaceful co-existence of former rivals. One must realise that reconciliation is not a single event; it is a process where one decides not to take revenge and to work on healing relationships between people as well as political and social entities.<sup>17</sup>

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<sup>16</sup> See Neil Kritz, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Coming to Terms with Atrocities: A Review of Accountability Mechanism for Mass Violations of Human Rights, Law and Contemporary Problems*, Vol. 59 (1996), p. 126, at 143, and Hayner, p. 34.

<sup>17</sup> Luc Huyse, *Theory and Practice*, in *Reconciliation: Rhetoric or Relevant*, edited by Gráinne Kelly and Brandon Hamber, (Belfast: Democratic Dialogue, 2005), p. 7, at 8.

The explanatory power of a general definition of post-conflict reconciliation will barely outweigh the controversy it can create.<sup>18</sup> Therefore, setting forth some general notes on the concept might be more appropriate. This paper will first discuss individual reconciliation and then national/political reconciliation. It is argued here that TRCs can contribute to both levels of reconciliation, although TRCs have traditionally not been adequately designed to deal with the former level.

### **c) Individual reconciliation**

Conducting individual reconciliation might not be the strongest component of TRCs. However, a TRC can contribute to the promotion of such reconciliation and, by including individual reconciliation in its structure or delegating this function to resourceful NGOs, contribute substantially to this level of reconciliation. It would be unrealistic to say that reconciliation is successful only if it results in a widespread recognition of victims, forgiveness by most of them and the creation of constructive remembrance for all. Such utopian thinking will only result in disappointment. Individual reconciliation must mean that the individual understands that there is a conscious choice to be made between vengeance and reconciliation, and by choosing the former one has chosen to be trapped in a cycle of violence which will subject its descendants to similar conditions or treatment that they are themselves unable to forgive. Unfortunately, such choice might often be seen as the most logical one by those who suffered, although such logic can be hard to grasp by outsiders.

The testimony of the survivors is probably the most important information gathering any TRC engages in. By allowing survivors to tell their story, the TRC becomes an official ear for their suffering. The testimony can change the status of the person from being the faceless and anonymous sufferer into a recognised survivor whose story now forms a part of a history that will be legitimised by the TRC. This process has the potential to change the perception of suffering and the balance of power between the silent survivor and the offender; the attention and the

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<sup>18</sup> See however an attempt in Brandon Hamber and Gráinne Kelly, *A Working Definition of Reconciliation*, paper published by Democratic Dialogue (2004), pp. 3-5, and some different perceptions of the term in the context of the South African TRC, Hamber (2002), at 66-67.

respect might be transferred from the offender to the survivor.<sup>19</sup> Such change of balance of recognition can then improve the environment for what is arguably an indispensable foundation for the next steps of individual reconciliation, the forgiveness and remembrance. Certainly this process rarely occurs smoothly; sometimes not at all.

Arguably, some level of forgiveness is an indispensable ingredient of reconciliation. One must however recognise that survivors are not always willing to forgive during the TRC process or perhaps not at all. Further, reconciliation is probably a multilateral process requiring participation by the wrongdoers, at least if they remain in any power positions. It is also necessary not to force an automatic forgiveness; the victims have to have control or at least participate in the reconciliation process. An author wrote, “[t]he victimized who survive must not be treated as objects without ability to participate,” and further “[t]he public staging of apologies must not silence those who do not accept them.”<sup>20</sup> It is vital that the survivors have a perception of power, that they now have the opportunity to strike back in one way or another, but because of their will to break the cycle of violence, they decide not to. This perception of power is often absent despite a TRC process. The common problem here is the same as with the recognition of victims; the main perpetrators may go unpunished, they sometimes maintain their position in the police or government, reducing not only the ability to forgive but also the trust in governmental institutions.

A photographic memory of atrocities can be a roadblock on the way to reconciliation. This does not mean that victims are forced to forget, on the contrary, “what is needed, then, is not memory but remembering, not retrieval of some intact picture but instead a dynamic process of both tying together and distinguishing fragments of past and present.”<sup>21</sup> Reinterpretation is the key word, enabling the survivor to “rehumanise” the perpetrators. It may be argued that offences are not necessarily objective; rather subjective interpretation of ones own experience, coupled with a context based on rumours and myths which are often rampant during times of tension and

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<sup>19</sup> See similar thoughts in a documentary by Margaret Lazarus and Renner Wunderlich, *Strong at the Broken Places: Turning Trauma Into Recovery*, 60 minutes, Cambridge Documentary Films, Cambridge, MA, 1998, and Eileen R. Borris, *Reconciliation in Post Conflict Peacebuilding: Lessons Learned from South Africa*, p. 12 in transcript.

<sup>20</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide or Mass Violence*, Beacon Press, Boston, 1998, p 122.

<sup>21</sup> Minow, p 120.

conflicts. The facts cannot be changed but the meaning given to them and the perceptions can be altered by gathering and introducing credible account of the events. This is a central issue for the road to reconciliation. Truths are not only an unchangeable collection of facts. By post-trauma reinterpretation the survivor can “rehumanise” the inhuman, change the balance of power between him or her and the perpetrator, and develop empathy which would be unthinkable if the events were remembered as they were perceived when the atrocities were committed.

TRCs can contribute to this process of remembrance by helping survivors, not relive the events as the faceless sufferer, but as recognised survivors whose stories have been accepted as a part of the past atrocities and thereby given legitimacy.<sup>22</sup> This is not an automatic result of a TRC and has to be given a special attention by the TRC or agencies tasked with addressing the individual trauma.

#### **d) Political and national reconciliation**

It is easily visible that UNMIK and the leaders of Kosovo society have established a largely functional basic structure of democratic institutions, judicial system, police, etc. It is also apparent that underlying ethnic tensions have made the operation of these institutions problematic to say the least. The tensions have hindered the operations of the Assembly, limited the credibility of judicial institutions, and preserved a pattern of discrimination against minorities. Members of minority communities expressed often their fears that the few positive developments are not deeply rooted and will fade away with the departure of the international community. Tensions between communities can easily negate the effective functioning of democratic institutions. If disputes in the Assembly are coloured by the underlying hate and distrust, a substantial part of its energy will be wasted in quarrels and unproductive anger. This has certainly been the case in Kosovo, where the operation of the Assembly has been marred by minority boycotts.

A disclosure of the truth through a community wide TRC is likely to ease this tension in the long run, thus making democratic institutions more effective. Hayner wrote, “[a]n official accounting

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<sup>22</sup> See Hamber (2002), at 64.

and conclusion about the facts can allow opposing parties to debate and govern together without latent conflicts and bitterness about past lies.”<sup>23</sup> National and political reconciliation is an attempt to avoid letting the past restrain the reconstruction of the future, or prevent disputes from being taken from the chambers of the Assembly into the streets or the battlefield. National/political reconciliation certainly does not mean that disputes will disappear but rather, as the Chilean director of the TRC follow up body said, that people are willing and able to respect “the rule of the democratic game”, that there “is a civilized dialogue between the government and opposition, and no sector wants to take over anti-democratically.”<sup>24</sup> Democratic structures are therefore in need of a political/national reconciliation to reduce tension between communities, which can at best restrict the function of the institutions but at worst lead to renewed conflicts.

The inability of judicial institutions to credibly deal with disputes within society is among causes of violent conflicts. No one will, however, suggest that the judicial system in Kosovo enjoys a widespread credibility among the minority communities. Trials against those who committed war crimes during the conflicts in Kosovo have not been particularly successful.<sup>25</sup> Additionally, these trials, as other criminal trials, have focused on the facts surrounding the particular offence at hand, but not the political context in which it was committed. A TRC might help to shed light on the political context, making trials more credible for all communities, including the Kosovo Albanian community. The ongoing resurrection of the judicial system as a method of solving disputes in the society will therefore benefit from the TRC process.

It may well be argued that Milosevic rose to political power by abusing myths or overblown “truths” about the ill treatment of Kosovo Serbs by Kosovo Albanians, the exaggerated and unqualified numbers on the relative growth of the Kosovo Albanian population, and the debated historical and cultural Serbian claim to the territory of Kosovo. The absence of free media and free exchange of information, coupled with nationalism in Serbia and the poor state of the economy, and faced with Kosovo Albanian claims for a Republic status in Kosovo or

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<sup>23</sup> Hayner, p. 155.

<sup>24</sup> Alejandro Gonzalez, Director of the follow-up body to the Chilean National Commission on Truth and Reconciliation, quoted in Hayner, p. 159.

<sup>25</sup> See two OSCE reports on this issue, *Kosovo’s War Crimes Trials: A Review*, (Pristina: OSCE, September 2002), and *The Response of the Justice System to the March 2005 Riots*, (Pristina: OSCE, December 2005).

independence, created a favourable environment for such abuse. The same distortion of truth is still present in Kosovo, on both sides of the barricades.

One must, however, remember that a society is not likely to subscribe to one truth and that survivors are not likely to forego its own perceptions of the truth simply because a TRC has defined it differently. “The truth, if it is to be believed, must be authored by those who have suffered its consequences.”<sup>26</sup>

Disclosure of the truth might not always reduce tensions and frustration in the short term, but an official record of the facts delivered by a TRC might prevent extremists from abusing the myths to gain or retain political power. The abuse of the myths will in the long run become highly difficult if the myths have been replaced by credible facts which have been properly disseminated among the population.<sup>27</sup>

#### e) **Success and failure contributors of TRCs**

There are many factors that can contribute to the success or failure of a TRC. The political will expressed by providing the necessary resources and funding is certainly a determining factor of success or failure of any TRC. Also, a sudden fall of the former regime creates a favourable environment for success of a TRC.<sup>28</sup> It can create the survivors’ perception of empowerment; that their status has been elevated from the powerless to the influential social group. It is at this stage where the conscious decision not to strike back is taken, and instead build a different kind of society. That brings us to another success factor, that is the aspirations for fundamental change in the society; the new government and actors of the civil society have to have genuine intentions to establish new methods of governance and resolution of social conflicts.

The best recipe for failure of a TRC is the lack of support from those holding political powers in the society, democratically elected as well as business and religious leaders, intellectuals and

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<sup>26</sup> Michael Ignatieff, *Articles of Faith*, Index on Censorship, Vol. 5 (1996), p. 110, at 114.

<sup>27</sup> Ignatieff, at 113.

<sup>28</sup> One of the reasons for the partial failures of the Chilean Truth and Reconciliation Commission to win support of the victims is that the commission was seen as a product of the regime that was responsible for the atrocities.

others from which political power derives.<sup>29</sup> Criminal organisations that benefit from disorder, politicians elected because of their covert or overt promise to seek revenge, will be the obstacles for any reconciliation process. Related to this, and also an important failure contributor, is the simple lack of will of the people to reconcile. Here, leaders play a pivotal role in influencing their constituency, by opening the door to accepting a different truth from the one that previously circulated in society. Nevertheless, without the fact-finding and disclosure of the truth of past events while reducing the power of the myths, reconciliation is not going to be a politically marketable idea. Reconciliation without a credible truth will therefore be problematic. This is precisely why a TRC is needed.

The answer to the question if a TRC in Kosovo is likely to be successful depends on the definition of “success”. A TRC can be a contributor to sustainable peace but not its creator. It can move a society closer towards co-existence of the different communities but not carry it all the way. Utopian expectations must be avoided.

## **2) IS THERE A NEED FOR A TRC IN KOSOVO?**

A poll in 2002 indicated that 65% of Kosovo Albanians and 57.5% of Kosovo Serbs do not believe that these two communities can live together.<sup>30</sup> After the violence of March 2004 there is a reason to believe that these numbers went up. Some critics of reconciliation might interpret these figures as indicating that reconciliation cannot work in Kosovo. They would, however, be mistaken. Reconciliation is not for people who love each other; it is for people who hate each other. These numbers indicate that firm, sustained, comprehensive and widespread reconciliation is imperative for the future of Kosovo and the success of the UNMIK mission. Without reconciliation, sustainable returns are highly problematic to say the least, the functioning of democratic institutions will suffer, judicial and administrative procedure will be stained by distrust, and a secure and predictable future of a multi-ethnic Kosovo is likely to remain a pipe dream.

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<sup>29</sup> See for example Paul Conway, *Truth and Reconciliation: The Road Not Taken in Namibia*, Online Journal of Peace and Conflict Resolution, Vol. 5(1) (2003), p. 66.

<sup>30</sup> Riinvest & Prims-Research, Opinion Poll, May 2002, quoted in *Early Warning Report (pilot project)*, United Nations Development Programme and the United States Agency for International Development, Pristina, 2002, p. 16. This question has not been repeated in later polls.

a) **“Reconciliation of truths”**

One of the most important features of a TRC is the fact-finding component and the establishment of a credible collection of facts, which in turn can create the foundations for the individually accepted “truths”. This is something that can only truly be achieved through a TRC (if at all) because of its official status. Hayner wrote “This official status gives a truth commission better access to official sources of information, increased security to undertake sensitive investigations, and a greater likelihood that its reports and recommendations will receive serious attention from authorities.”<sup>31</sup> It is nevertheless vital to fully include civil society in any reconciliation efforts; a TRC would be no exception.

The truth of what happened in Kosovo has not yet been established within the local community. A number of reports have been written by international organisations and NGOs but they have not received any significant distribution among the public in Kosovo. As an example, the OSCE report “Kosovo/Kosova: As Seen as Told,” published in 1999, has not when this is being written been translated into Albanian.<sup>32</sup> Furthermore, the international community does not influence public opinion anywhere as much as local leaders do. Instead, a mixture of truths and myths is fanning the flames of ethnic hatred. Without systematically addressing the events of the past, an environment favourable for violent expression of anger and distrust is likely to remain. This is where a TRC can be beneficial. A TRC is a local institution, composed mainly of local leaders from all communities, tasked with disclosing past events in a comprehensive manner. It is undeniable that the truth is a powerful weapon in the struggle for a long term political and social stability and should not be concealed.

The most challenging task of a TRC in Kosovo with regard to establishing what might be called an “official truth” or rather an acceptable account of the events, is the reconciliation of different “truths” and eliminating or reducing the credibility of the myths. One might say that fundamentally opposing views of events might not always be reconciled. For example, was the siege of Sarajevo an attempt to terrorise its inhabitants and the government or a “legitimate pre-

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<sup>31</sup> Hayner, p. 14.

<sup>32</sup> The report has, however, been translated into Serbian.

emptive defence by the Serbs”<sup>33</sup> Michael Ignatieff said the answer could not lie in between, and it could not be both.<sup>34</sup> This might not be that simple. First, different individuals have different reasons for performing the same act or waging the same war. And more importantly, the truth belongs to each individual; they each come from different backgrounds, have different identities, and use different methods to translate facts into truths. This individual context must be understood, and certainly that is a daunting task.

Kosovo Albanians and Kosovo Serbs largely believe that the guilt and responsibility for past abuses lies completely on the other side. This collective guilt assigned to other communities leads to the perception of collective innocence of ones own community. The sense of such collective innocence tends to perpetuate ones own victimhood and the hatred for others. Those of us who saw the hatred in the eyes of the youngsters who burned down Serbian villages in March of 2004 cannot doubt that this hatred was for real and in many cases deadly. This is despite that their hatred was not exactly in all cases based on accurate facts. The disclosure of facts related to past events by a credible institution, which takes into account the individual or societal context of the events, might open the eyes of many and reduce their justification for continuing strained relationship with other communities.

#### **b) Why punitive justice alone is not sufficient in Kosovo**

It is perfectly justifiable to ask why it is not enough to let the criminal justice system uncover the facts about past abuses. The answer lies in the inherent limitation of criminal justice and the endemic lack of the necessary conditions for criminal justice in a post-conflict society. It is inherent in the criminal judicial system to disassociate itself from political considerations; criminal trials do generally not address the political environment and the root causes of the conflicts. In addition, local laws and judicial traditions in Kosovo are not designed or equipped to deal with crimes of this magnitude and scope.<sup>35</sup> A TRC is not a tool to assign individual or collective guilt, rather to avoid the collective innocence resulting from scapegoating – and addresses the refusal to face the moral, social and political guilt.

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<sup>33</sup> Ignatieff, at 114.

<sup>34</sup> Ignatieff, at 114.

The effectiveness of punitive justice (criminal prosecution, criminal justice) as a tool of reconciliation and post-conflict rehabilitation rests on a number of factors. Two of them will be mentioned here. First, the group responsible for the alleged crimes has to be clearly identifiable.<sup>36</sup> Second, the institutional structure of the state has to be strong, credible, and effective. Generally, neither of these factors is present in a post-conflict society. Certainly, this does not mean that punitive justice should not play a role in post-conflict society. On the contrary, criminal prosecutions are an important component in re-establishing confidence in the rule of law. However, because of the lack of the two above mentioned conditions and because of the inherent limitation of punitive justice, criminal prosecutions have to be complemented by other reconciliation efforts.<sup>37</sup>

A person who commits a murder can be punished and that judicial process can largely reduce the need for revenge on behalf of the victim's family and reinstate their honour. In a post-conflict situation the question of who is to be punished can be hard to answer sufficiently without creating scapegoats. Massive human rights violations are seldom committed without the tacit assent of numerous people in the society who consequently share the responsibility, although they are not necessarily criminally responsible.<sup>38</sup> Irwin P. Stotzky<sup>39</sup> argued that it includes those who co-operated by lending material support or even through act of omission. He asked whom should we punish? Are we going to punish judges that fail to enforce the law, "journalists that fail to report the atrocities, diplomats who concealed or attempted to justify the position of their government, and everyday citizen who decided to turn a blind eye to what was happening, refrained from telling others of these atrocities, or even justified the deeds?"<sup>40</sup>

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<sup>35</sup> One might have to read between the lines of the OSCE report on *Kosovo's War Crimes Trials* (September 2002) but the report certainly supports this assertion.

<sup>36</sup> See for example Jaime Malamud-Goti, *Game Without End*, (Norman and London: University of Oklahoma Press, 1996), p. 8. Jaime Malamud-Goti, along with Carlos Nino, organised the trials of the generals after the "Dirty War" in Argentina in 1975 to 1983. He was one of the senior advisers to the Argentine President Alfonsín during his campaign in 1983 and after his elections.

<sup>37</sup> This suggestion should under no circumstances be interpreted as a suggestion that TRC can replace or reduce the need for vigorous prosecution of crimes committed in the course of the conflicts.

<sup>38</sup> Over 50,000 people participated in the March 2004 violence. Not all of them might be criminally liable, but most bear the guilt of the events.

<sup>39</sup> Irwin P. Stotzky was a legal adviser to Jean-Bertrand Aristide, former president of Haiti and to the René Preval administration in Haiti. He worked closely with Aristide in attempting to establishing democracy and the rule of law in Haiti after the United Nations and the United States reinstated Aristide as the President of Haiti.

<sup>40</sup> Irwin P. Stotzky, *Silencing the Guns in Haiti*, (Chicago and London: University of Chicago Press, 1997), p. 116.

The outer boundaries of criminal responsibility are not only blurred because criminal laws are too vague. Certainly, criminal liability for an act can be disputed and evidence might be unreliable or of limited supply. The consequence can be an acquittal of a perpetrator or a conviction based on questionable evidence. But even when criminal law assigns guilt relatively clearly, criminal liability is inherently limited and covers only a fraction of guilt in society. “Beyond individual criminal accountability, a society which has been sullied by the commission of genocide or other widespread atrocities in its midst must also explore and reckon with the problem of passivity when war crimes are committed in the name of one's people.”<sup>41</sup> Such society must deal with the commission of “countless little acts of negligence, of convenient adaptation of cheap vindication, and the imperceptible promotion of wrong; the participation in the creation of a public atmosphere that spreads confusion and thus makes evil possible.”<sup>42</sup> Also, criminal prosecution, in the absence of more comprehensive reconciliation, could lead to the creation of martyrs and further destabilisation. Thus, the concept of criminal liability, apart from its general shortcomings, does not deal with the comprehensive guilt that a post-conflict society has to face if it is to transcend the grief, the hatred, and the need for revenge; the roots of renewed conflicts. Another very important factor for the effectiveness of punitive justice for the purposes of reconciliation is the existence of strong democratic institutions, including judicial institution. Commonly, among the reasons for conflicts is the inability of the system (the court system as well as the administrative system) to resolve social conflicts. This may have been for structural reasons, constitutional reasons, cultural reasons, or simply because of traditional absence of the rule of law.

When the autonomy of Kosovo was withdrawn in 1989, the credibility of governmental institutions in Kosovo crumbled. The parallel system established by the Kosovo Albanians was never recognised by authorities in Belgrade and was therefore largely useless for inter-ethnic disputes. The war in 1997 to 1999 and its aftermath resulted in a total collapse of many governmental institutions, including the judiciary. Despite significant progress, it can hardly be

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<sup>41</sup> Neil J Kritz and Jakob Finci, *A Truth and Reconciliation Commission in Bosnia and Herzegovina: An Idea Whose Time has Come*, International Law Forum, Vol. 3, No. 1, 2001, p. 50, at 51. Neil J. Kritz is the Director of the Rule of Law Program at the United States Institute of Peace. Jakob Finci is the Chairman of the National Coordinating Committee for Establishment of the Truth and Reconciliation Commission in Bosnia and Herzegovina.

<sup>42</sup> Karl Jaspers, *The Question of German Guilt*, Dial Press Inc., 1948, p. 62, quoted in Kritz et al., p. 51.

claimed that these institutions are now functioning as a credible source of reconciliation. This is in particular clear in relation to criminal prosecution related to the conflicts but not limited to such cases.

Also, however efficient a judicial system is, the number of perpetrators in a post-conflict society “can be so overwhelming, so that even in those rare circumstances where the judicial system functions well enough to expect fair trials and there has not been a general grant of amnesty, only a very small number of the total are likely to be prosecuted.”<sup>43</sup> A report by the OSCE published in December 2005, painted a rather dark picture of the ability of the Kosovo criminal justice system to respond to the March 2004 violence. The report said that “investigative and judicial authorities did not pursue these cases as diligently as required”, that the “courts failed to send out a clear message of condemnation for such violent behaviour”, and that this “relatively weak response of the courts to the crimes committed during the March 2004 riots not only contributes to the impression of impunity among the population for such kinds of ethnically motivated crimes but may also be considered inadequate to prevent similar acts of public disorder in the future.”<sup>44</sup> Up to a certain extent, the International Criminal Tribunal for the former Yugoslavia (ICTY) might be seen to be the solution. However, almost seven years after the end of the war, ICTY has not become a significant contributor to the reconciliation process in Kosovo. Arrests of prominent leaders of the Albanian community, including Prime Minister Ramush Haradinaj in the spring of 2005, does not appear to have reduced the collective innocence but rather created martyrs and portrayed the ICTY as an anti-Albanian entity that shows no understanding of their war values. ICTY’s not guilty verdict in a case against two Kosovo-Albanians, Fatmir Limaj and Isak Musliu, might have further perpetuated this view.<sup>45</sup> Further, the arrest of Milosevic does not seem to be very relevant for Kosovo, apart from the earliest days of his trial when every other person in Kosovo watched their tormentor being questioned on life TV.

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<sup>43</sup> Hayner, p. 12. See also OSCE reports on this issue, *Kosovo’s War Crimes Trials: A Review*, OSCE, September 2002, *Review of the Criminal Justice System: Crime, Detention and Punishment*, OSCE, December 2004, in particular pp. 64-67.

<sup>44</sup> *The Response of the Justice System to the March 2005 Riots*, OSCE, December 2005, p. 34.

<sup>45</sup> International Criminal Tribunal for former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu*, Case No. IT-03-66-T, Judgment of 30 November 2005. Haradin Bala was sentenced to 13 years in prison.

ICTY will also suffer from the same limitation as criminal responsibility in general, as it only addresses a small portion of actual guilt in the society. An author wrote, “the repertoire of societal responses to collective violence must include prosecutions, but it must not be limited to them.”<sup>46</sup> Because of this apparent absence of favourable environment for punitive justice as a tool of reconciliation, any transformation of Kosovo society has to rely also on other means of reconciliation. As suggested before, prosecution and a TRC are not mutually exclusive; on the contrary, such processes compliment each other. Finally, it is worth mentioning that Carla Del Ponte, ICTY’s chief prosecutor, has recognized the importance of reconciliation and in a speech before the OSCE Permanent Council she suggested that the OSCE could take on a role in setting up TRCs in the Balkans.<sup>47</sup>

**c) Reconciliation and UNMIK’s mandate –  
UNSCR 1244 and OSCE PC Decision no 305**

Reconciliation certainly falls within the mandate of UNMIK. United Nations Security Council Resolution 1244 of 10 June 1999, (UNSCR 1244) provided for the establishment of an international interim administration for Kosovo, “overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.”<sup>48</sup> UNSCR 1244 does not directly assign the responsibility for reconciliation to any particular organization or branch of the civil administration. However, OSCE’s mandate for institution building, rule of law and democratisation is directly related to reconciliation, as reconciliation is of a fundamental importance for the transition to democracy, confidence building, and the legitimacy of institutions. The OSCE Permanent Council Decision no. 305 contemplates that the “OSCE Mission in Kosovo will, within this overall framework, take the lead role in matters relating to institution- and democracy-building and human rights.” Furthermore, Decision 305 states that the “OSCE Mission in Kosovo will in its work be guided by the importance of bringing about mutual respect and reconciliation among all ethnic groups in Kosovo and of establishing a viable multi-ethnic society where the rights of each citizen are fully

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<sup>46</sup> Minow, p. 89.

<sup>47</sup> Speech by Ms Carla Del Ponte before the OSCE Permanent Council on 4 November 2003, available at [http://www.osce.org/press\\_rel/2003/pdf\\_documents/11-3664-pc1.pdf](http://www.osce.org/press_rel/2003/pdf_documents/11-3664-pc1.pdf) (last visited 25 January 2006).

<sup>48</sup> United Nations Security Council Resolution 1244, 10 June 1999, para 10.

and equally respected.”<sup>49</sup> In line with what has been argued previously in this paper, reconciliation through a TRC is quite possibly a vital component of the work assigned to the OSCE mission in Decision 305.

It is clear that a TRC will not be established in Kosovo without solid, genuine and sustained assistance from the international community. The international community can therefore not decide to wait passively for a local initiative, rather it must take action to encourage such initiative and support it. The international community must, however, not lose sight of its role as a guest; it must work with the community, the grassroots and the leaders. In addition to the lack of capacity to initiate a TRC or other comprehensive methods of reconciliation and fact-finding, knowledge and understanding of the concept of TRC and reconciliation is not widespread in Kosovo.

### **3) THE NEVER-ENDING QUESTION OF AMNESTY AND OTHER QUESTIONS OF STRUCTURE AND FUNCTIONS**

It is premature at this point to suggest an outline of the structure, functions and powers of a TRC in Kosovo. The Kosovo TRC model must be designed through locally driven consultations within the civil society, between local and international NGOs, among local opinion makers and international experts, and in harmony with the political and social reality in Kosovo. These actors need to answer the questions on the establishment, the membership, powers and functions, etc., and translate those answers into policies and political decisions. Every part of the TRC will go through a difficult time of negotiation, consultation, and compromises. Even the name is likely to be a matter of significant debate. The time period will be a highly political issue; some will suggest 1997-1999, others 1912 to the current day. Same goes for the geographical question, i.e. whether the Presevo Valley in southern Serbia and the regions in Macedonia inhabited by Albanians should be included. Some would suggest that a TRC would have to be Balkan-wide; Kosovo cannot be viewed in an isolation. One of the larger questions might, however, be the question of amnesty.

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<sup>49</sup> OSCE Permanent Council Decision no. 305, 10 July 1999.

It is a common misperception that amnesty or pardon is an indispensable element of any TRC. This misperception is largely derived from the processes of the South African TRC, which offered amnesty to perpetrators of politically motivated criminal acts who were willing to testify before the Commission, provided that they made a full disclosure of all relevant facts.<sup>50</sup> The amnesty was offered as an incentive for perpetrators to testify and was considered a condition for the foundation of unity of the South African post-apartheid society, to help it move beyond the past. Other TRCs have either not resorted to amnesty or have used amnesty in a much more controlled and limited manner.

The East Timor TRC, established in July 2001, offers amnesty to persons but it is both limited and conditional. First, no amnesty is offered for serious crimes, such as war crimes, genocide, crimes against humanity, murder, sexual crimes, and torture.<sup>51</sup> Second, the perpetrator has to accept responsibility and apologise for the act.<sup>52</sup> Third, the perpetrator has to perform an act of reconciliation, which can consist of community service, reparation, public apology, or other act of contrition.<sup>53</sup> Only when the perpetrator has complied with these conditions will he be offered a permanent amnesty for his acts. By limiting the crimes for which amnesty will be offered, the TRC might have avoided conflicts of jurisdiction with possible criminal prosecution, whether jurisdiction for such prosecution will be based on domestic provisions for universal jurisdiction or provisions of an international criminal tribunal.

It could be argued that if amnesty is not offered, perpetrators will not testify before the TRC. However, experience shows that a number of perpetrators need to confess to release a burden of their conscience. An example from the Milosevic trial before ICTY illustrates this clearly. A soldier who participated in a massacre of Kosovo Albanians testified about his participation. He had received a warning from one of the judges that he was not obliged to incriminate himself. However, the soldier “insisted he had wanted to testify to unburden himself of things that had been troubling him for the past three years, to ‘feel easier in my soul.’ Addressing Milosevic

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<sup>50</sup> See Article 20 of the South African Promotion of National Unity and Reconciliation Act No 34 of 26 July 1995, available at <http://www.doj.gov.za/trc/legal/act9534.htm> (last visited 25 January 2006).

<sup>51</sup> UNTAET Regulation 2001/10, section 32.1.

<sup>52</sup> UNTAET Regulation 2001/10, section 27.8.

<sup>53</sup> UNTAET Regulation 2001/10, section 27.7.

directly was a major help, he said. 'When I tell all this truth to the person who's the most responsible, I already feel better,'" he said.<sup>54</sup>

There are also other testimonies than the one of perpetrators that is of interest. In preparation of a proposed TRC in Bosnia and Herzegovina an interesting innovation surfaced. In addition to documenting the stories of victims and survivors, the idea was that the TRC was to hear testimony of those who have been called the real war heroes, that is “those individuals of all ethnic groups who, despite grave risks, resisted ethnic cleansing and acted to protect victims of other ethnic groups.”<sup>55</sup> By including stories of people who risked their own lives by crossing the inter-ethnic boundaries the TRC could put the spotlight on co-operation in time of crisis instead of focusing only on gaps and the conflicts between the ethnic communities of Bosnia and Herzegovina. This approach might be appropriate in Kosovo. There are occasional instances of Serbs sheltering Albanians during the Milosevic campaign and also of Albanians sheltering Serbs in the post war rampage which was mainly directed against Serbs and Roma. Other minorities have similar stories to tell.

#### **4) A WINDOW OF OPPORTUNITY**

Developments in Kosovo are about to open up a window of opportunity for a TRC in Kosovo; the negotiations on the future status of Kosovo are have began. It might be a politically smart idea to include a debate on a TRC in those negotiations. Putting a TRC on the agenda could also reduce the opposition of some states against some sort of independence for Kosovo as a genuine commitment to the process of reconciliation through a TRC might ease concerns about interethnic relations and the protection of minorities.

A TRC needs a local initiative and a local drive but that will not be obtained without a political and financial support from the international actors. The Special Representative of the Secretary General, UNMIK's head, has the confidence of a larger part of the population than his predecessors in recent years. He went to the edge to hold Kosovo society together when the then

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<sup>54</sup> Abigail Levene, *Ex-Soldier Tells Milosevic Trial of Baby Shooting*, Reuters, 6 September 2002.

<sup>55</sup> Kritz et al., p. 53.

Prime Minister Ramush Haradinaj was arrested and transferred to The Hague. The actions of several politicians, both Serbs and Albanians, have indicated that Kosovo has reached the political maturity to be ready for a debate on a TRC. It still remains to be seen how the recent death of Ibrahim Rugova, the President of Kosovo, will affect the political development. During this status talks, the local government in Kosovo and in Serbia as well as the international community have the opportunity not to repeat the mistakes of Tito to put ethnic or national hatred on what Misha Glenny called a historical deepfreeze, hoping that the spring will never come. There is a decision to be taken, and such decision must take into account future generations, not just the immediate threat of destabilisation.

One has to remember that there are always social forces that desire disputes, such as criminal organisations and certain economical interests. It then rests on the efficiency of the institutional structure of the post-conflict society, if the many elements of conflicts can be constrained and the process of reconciliation and constructive inter-ethnic dialogue can proceed. It is probably true that a firm effort of reconciliation through a body such as a TRC is likely to strengthen the institutional structure, as well as to enable and encourage persons to cross the inter-ethnic boundaries and discuss how to establish and maintain a peaceful co-existence of all communities of Kosovo.

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