

THE IMPACT OF TRANSITIONAL JUSTICE ON THE RULE OF LAW IN POST-CONFLICT AND POST-REPRESSIVE SOCIETIES

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The violation of human rights, the rise of dictators, and the escalation of war conflicts often come in the period when the rule of law will fade out. And, when the conflict will end or the repressive regime will be defeated, the following questions arise: how to rebuild the society and how to prevent the repetition of the injustices from the past. One of the answers to that question is by re-establishing the rule of law. However, the establishment of the rule of law in societies hit by a war conflict or repressive regime is not an easy task at all. There are a number of dilemmas and challenges in that process. What to do with the problematic past is one of the most important and at the same time one of the most bitter questions that are being posed after the war conflict finishes or after the fall of the repressive regime. In this context, the following question is posed: will dealing with the problematic past positively contribute to restoring the rule of law, or will the opening of the past push society into new conflicts and problems? The theoreticians' views are divided, but most theoreticians believe that dealing with the problematic past is one of the key moments in the process of democratic consolidation and restoring the rule of law. On the other hand, certain theoreticians emphasize that transitional justice is not in line with the rule of law because it relies on retroactive justice. Additionally, these theorists are stressing out that the application of transitional justice could lead to instability in society which will bring into question not only the rule of law but also peace in society. Still, the dominant position, in theory, is that peace without justice is doomed and that only the implementation of a comprehensive transitional-justice strategy could lead to the rule of law, but also to peace and democracy.

Keywords: *politics, political system, rule of law, transitional justice, post-conflict societies, post-repressive societies.*

I. INTRODUCTION

If we make a brief historical overview of human history we can easily notice that human history is more filled with wars, military conflicts, dictators, and tyrants rather than law, justice, democracy and human rights. On the wings of this overview, we can notice that even in the XX and XXI centuries humanity has witnessed brutal violations of human rights, as a result of military conflicts or repressive regimes, dictators, and tyrants. This brutal conclusion that human history is

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more filled with wars, military conflicts, tyrants, and dictators rather than with justice, law, human rights and democracy could be mitigated with Immanuel Kant's sentence which states that the entire human history is a struggle for more freedom. It is this kind of struggle for more freedom that has led, and in the future will lead to a great number of victories over tyrants, dictators, and military conflicts and the search for justice, peace, human rights, and democracy. However, when military conflicts cease, and tyrants and dictators are overthrown, what follows is a phase in which post-conflict and post-repressive societies should re-establish the rule of law and democracy hoping that wars and violations of human rights from the past will not be repeated. Moreover, re-establishing the rule of law in post-conflict and post-repressive societies is not a simple task. Such societies always have problematic past that negatively affects the re-establishment of the rule of law, but also affects stability, peace, and democracy in general. Therefore, the question that always arises in post-conflict and post-repressive societies is of what to do with systematic and serious violations of human rights, which were committed during such military conflicts or during the rule of repressive dictators, tyrants, and authorities.

Until the second half of the XX century, humanity responded to the problematic past filled with violations of human rights and freedoms by ignoring and forgetting. Under the bosom of *ex post facto* and *nulla poena sine lege* the problematic past, from a military conflict or, from a repressive regime, filled with violations of human rights remained a part of the past completely not confronted. Such a situation was a consequence of the reality that many of the acts that needed to be punished were not crimes when they were committed under the former regimes.¹ Thus, situations in which societies did not confront their problematic past eventually resulted in its repetition, or, on the other hand, in individuals taking justice into their own hands and carrying out violent revenge for the crimes suffered.²

II. CONCEPT AND DEFINITION OF THE TERM TRANSITIONAL JUSTICE

The dilemmas related to ignoring and forgetting the problematic past filled with violations of human rights led to the maturation of the idea that one society has the responsibility to face the systematic and massive violations of human rights from the past immediately after the end of the Second World War. This idea was translated and developed into the concept of transitional justice immediately after the end of the Second World War. While, certain authors argue that transitional justice can be dated back to the birth (in classic Athens) of democracy itself, modern conceptions of transitional justice emerge with the concerted efforts to enshrine international law at the heart of inter-state relations in the wake of the Second World War.³ That is why the Nuremberg and Tokyo trials, after the Second World War, are considered as starting point of the transitional justice concept. The fall of the regimes in South America, Spain, Portugal, Central, Eastern, and Southeastern Europe, the conflicts in Africa, and of course, the fall of Yugoslavia and the conflicts which were a result of its disintegration, opened enough space for this concept to develop drastically in the last 60 years and today to be one of the most interesting topics in the field of legal and political science. However, despite the big rise of ideas for transitional justice in the last 60

¹ Neil J. Kritz, "The Dilemmas of Transitional Justice," in *Transitional Justice Volume 1 General Consideration*, ed. Neil J. Kritz (Washington: United States Institute of Peace), xxii

² Noel Calhoun, *Dilemmas of Justice in Eastern Europe's Democratic Transitions* (New York: Palgrave Macmillan, 2004), 2.

³ Patrcija Lundy and Mark McGovern, "Whose Justice? Rethinking Transitional Justice From the Bottom Up," *Journal of Law and Society* Vol. 35 No.2 (2008): 268.

years, theory still has a problem to create a generally accepted definition for the concept of transitional justice. In most cases, theoreticians accept the definition of the International Center for Transitional Justice, which states that transitional justice refers to a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights.⁴ Recently, the definition that has been increasingly used is the one that define transitional justice as the array of processes designed to address past human rights violations following periods of political turmoil, state repression or armed conflict.⁵ Regardless of which definition will be used for analysis, the concept of transitional justice has one goal – a contribution to the establishment of the rule of law, democracy, and stability. However, in science, there is a division over the impact of transitional justice. Most theoreticians indeed believe that transitional justice has a positive impact on the establishment and functioning of the rule of law, democracy, and peace in post-conflict and post-repressive societies. On the other hand, other theoreticians believe that transitional justice does not contribute to the re-establishment of the rule of law, and in addition, it can represent a danger to the peace, stability and democracy in post-conflict and post-repressive societies.

III. POSITIVE IMPACT OF TRANSITIONAL JUSTICE OVER THE RULE OF LAW

Theoreticians who believe that transitional justice has a positive effect on the re-establishment of the rule of law in post-conflict and post-repressive societies defend this position by analyzing the effects of the application of various mechanisms of transitional justice. In that direction, these theoreticians emphasize that the different mechanisms of transitional justice have different effects in confronting the problematic past in post-conflict and post-repressive, but that they all jointly contribute to the improvement of the rule of law in these societies. This contribution is evident especially when the application of the different mechanisms is combined and when such application is analyzed over a long term. The positive influences on the establishment and functioning of the rule of law are especially linked to criminal trials as a mechanism of transitional justice, but truth commissions and lustration processes have their influence as well. That is why we are going to take a closer look at these mechanisms.

i. The impact of truth commissions in re-establishing the rule of law in post-conflict and post-repressive societies

Since 1974, when the first Truth Commission was established in Uganda, Truth commissions have become important mechanisms of transitional justice and conflict resolution.⁶ It can be noted that the first experiences with the truth commissions are negative. The truth commissions in Uganda, Bolivia, and the Philippines failed to complete their work and publish a final report. However, after the bad experiences with the commissions in Uganda and Bolivia, positive examples follow from Argentina, Chile, Chad, El Salvador, Haiti, and South Africa, which have restored hope that

⁴ Maria Avello, *European Efforts in Transitional Justice* (Madrid: Fride, 2007), 1.

⁵ Tricia D. Olsen et. Al., *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington: United States Institute of Peace, 2010), 11.

⁶ Rebekka Clara Friedman, “Hybrid TRCs and National Reconciliation in Sierra Leone and Peru” (PhD diss., The London School of Economics and Political Science, 2012), 13.

truth commissions could be implemented in the process of confronting the problematic past and represent a mechanism that will contribute to democratic consolidation in one society. Such an attitude arises within the theory due to the following reasons.

First, it should be emphasized, that the truth commissions are most often implemented when the balance of power is such that the criminal prosecutions of abusers look unlikely, as the previous regime still maintains the economic, political, social, or forceful upper hand.⁷ The alternative to truth commission is often not conducting trials, but doing nothing at all.⁸ Therefore, it is common for the truth commissions to be the first mechanism that political elites undertake in the process of confronting the problematic past after the fall of the repressive regime or after the end of the violent conflict. In that direction, the decision to establish a truth commission can have a major impact on the social and political situation of a country. That may be a message to society that there should be no impunity for the violation of human rights.⁹ Also, the establishment of the truth commission is an opportunity for the new political elites to be morally, politically, and legally disassociation from the crimes of the previous regime.¹⁰ Such distancing can contribute to (re)establishing accountability to political institutions, help to build a human rights culture, and ultimately restore trust to a shattered society.¹¹ A small step that will lead to big changes. Changes that will open the door for implementation of other mechanisms of transitional justice (criminal trials, lustration, reparations, etc.).

Second, the name of this transitional justice mechanism contains the word truth. This means that the primary task of these commissions is to investigate, determine and officially acknowledge the truth. The main purpose of the investigation, the acknowledgment and official recognition of the truth is consisted of the premise that exposure and condemnation of certain past events will prevent their repetition.¹² Therefore, the truth commissions, through the final report, have the task of acquainting the wider public with the general picture of what was happening during the repressive regime or the violent conflict, hoping that society will learn from it.

Third, although the truth commissions do not have the power to establish criminal liability and impose sanctions on individuals, still, they do contribute to the accountability of perpetrators of human rights violations. The process of research, establishing and acknowledging the truth, itself, is putting pressure on the judiciary to start prosecuting the perpetrators.¹³ When the truth will be revealed, under the influence of the wider public, the prosecutors and judiciary will find it difficult to remain silent about human rights violations. In addition, the truth commissions may reach a broader group of both perpetrators and victims.¹⁴ Therefore, by interrogating the victims and perpetrators, the truth commissions come up with very important and detailed information, statements, and evidence. In this regard, the commission's investigations may lead to the disclosure

⁷ Elizabeth Stanley, "Truth commissions and the recognition of state crime", *British Journal of Criminology*, Oxford: Oxford University Press, 2005, 587.

⁸ Eric Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact," *International Studies Perspectives* Vol. 8 No. 1 (2007): 21.

⁹ Mary Albon, "Truth and Justice: The Delicate Balance – Documentation of Prior Regimes and Individual Rights", *Transitional justice: Volume 1, General consideration*, Washington: United States Institute of Peace Press, 1995, 290

¹⁰ Nenad Dimitrijevic, "Justice beyond Blame: Moral Justification of (The Idea of) a Truth Commission", *Journal of Conflict resolution Volume 50 No3*, Online: Sage Publication, 2006, 369.

¹¹ Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact," 20.

¹² Jazmin Acuna Cantero, *After Truth: The Truth and Reconciliation Commission, Media, and Race Relations in Post-Apartheid South Africa* (New London: Connecticut College, 2011), 25.

¹³ Priscilla B. Hayner, "Truth commissions: a schematic overview", *International Review of the Red Cross Volume 88 No 862*, Cambridge: Cambridge University Press, 2006, 296

¹⁴ Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact," 22.

of evidence that could further benefit the public prosecutor's office and thus contribute positively to the legal battle against the perpetrators of human rights violations. However, even if the commission's work does not lead to the prosecution of the perpetrators, by naming them in the final report, the truth commissions contribute to the perpetrators' accountability. This accountability indeed relies on moral condemnation, but in the absence of prosecution, the publication of the names of the perpetrators of human rights violations will cause their public embarrassment and pressure the public to withdraw from public functions (Chile, Rwanda, El Salvador, Argentina). The public embarrassment is a certain consolation for the victims, and their withdrawal from public functions will have a positive effect on the functioning of the rule of law, as well as, on the legitimacy and credibility of the new democratic institutions.

Fourth, the truth commissions, through a detailed investigation of the problematic past, among other things, seek to identify a pattern of abuses¹⁵ and find out the basic reasons why the human rights violations occurred and why the relevant institutions failed to prevent such violations. Detecting the root causes opens the door toward institutional and political reforms. Therefore, the truth commissions in their reports almost always contain recommendations for institutional and political reforms. Reforms in the area of police, judiciary, army, etc. Reforms that should strengthen the rule of law and prevent future human rights violations. Though these recommendations typically carry no legal obligation, they can serve as a catalyst for future reform and as goals that the people of the nation can point to in their quest for political reorganization.¹⁶ Due to the official status of the commission and its credibility, political elites will hardly be able to remain completely deaf to the recommendations of the final report.

Having said all of the above, we can conclude that the truth commissions should contribute to the societies' knowledge of committed crimes and violations of human rights and freedoms. In addition, truth commissions tend to delegitimize the forces that are not related to the values of the rule of law and public support for the implementation of the reforms which will lead to the rule of law.

ii. The impact of lustration in re-establishing the rule of law in post-conflict and post-repressive societies

By analyzing the mechanisms of the concept of transitional justice it can be concluded that the lustration process is one of the most frequently used mechanisms in the process of facing the problematic past arising from the former repressive regimes. The term lustration originates from the Latin words *lustratio* and *lustratum*, which means purification. In legal and political science theory, lustration is defined as a legal process that authorizes government actions ranging from soliciting information, investigation, and disqualifying from public office those who have been collaborators of the secret service during the previous undemocratic regimes.¹⁷ Thus, certain definitions claim that lustration (or vetting) refers to 'the procedures for screening persons seeking selected public positions for their involvement with the previous undemocratic regime.'¹⁸ The main

¹⁵ Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact," 21.

¹⁶ Mark Vasallo, "Truth and Reconciliation Commissions: General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador," *The University of Miami Inter – American Law Review* Vol 33 No 1 (2002): 159.

¹⁷ Cynthia Horne and Margaret Levi, *Does Lustration Promote Trustworthy Governance? An Exploration of the Experience of Central and Eastern Europe*, Budapest: Budapest Collegium /Trust and Honesty Project, 2002, 2.

¹⁸ Paola Cesarina, "Transitional Justice," in *The SAGE Handbook of Comparative Politics* ed. Todd Landman and Neil Robinson (London: SAGE Publications, 2009), 506.

idea behind lustration is to reform institution's personnel by removing or excluding abusive, corrupt or unqualified employees.¹⁹ It can be said, freely, that lustration is a small, but perhaps the most significant and, at the same time, the most controversial step to face the totalitarian and repressive past in the process of creating democratic institutions, in order to establish institutions based on the foundations of democracy and the rule of law.²⁰ Such an impression is obtained due to the following arguments.

First, obviously, the people who had been collaborators to the secret services of the totalitarian regimes and thus progressed in the hierarchy of that system have developed values and competencies that do not correspond to the needs of the democratic society, and, therefore, are not competent to execute a public function in a democratic society. Accordingly, the lustration represents a way to purify the public administration so that only competent and moral civil servants connected with rule of law stay and work in it; civil servants that respect the democratic values and have no mortgages from the previous regime. The lustration should assist in assessing the moral and professional standards of those who perform a public function.²¹ All this contributes to an increase in the efficiency, professionalism, and openness of public administration. At the same time, the intention of lustration is to demonstrate to the population that there is a real change in the personnel of post-repressive governments, as well as safeguard against those individuals undermining the democratic reform process.²² The lustration will represent a message that there is no place for bribery, corruption and nepotism in the new system.

Second, the public administration, as a mechanism that implements decisions taken by the political institutions, represents a powerful interest group that has the capacity to block the enforcement of reforms.²³ There is a great danger of serious problems in the enforcement of democratic reforms and rule of law when the civil servants who had been collaborators of the secret services of the former system stay inside the institutions even after the change of the regime. Such individuals would not wish for changes and they as part of the public administration would have the capacity to slow down and in some cases capacity to stop the reforms. An obvious direct danger to democratic transition is a possibility of undermining its attempts by the officials of former regime.²⁴ The lustration will enable the purified public administration to be loyal to the new democratic authorities. That would mean that democratic authorities have the whole administrative capacity and will to enforce the necessary reforms in order to promote rule of law and democracy. Third, the lustration deprives the attempts of street lustrations, which can be a big problem for the stability of the system. The enforcement of a formal lustration, precisely determines which individuals had been collaborators of the secret services of the former repressive regime. Institutionalized and well-regulated lustration could solve or, at least, lessen: the threat of blackmail.²⁵

¹⁹ United States Institute of Peace. "Transitional Justice: Information Handbook." 12 at https://www.usip.org/sites/default/files/ROL/Transitional_justice_final.pdf

²⁰ Adam Czarnota, "Lustration, Decommunisation and rule of law", *Hague Journal of Rule of Law*. Hague: Cambridge University Press, 2008, 310.

²¹ Ibid.

²² Cynthia Horne, "International Legal Ruling on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context", *Law and Social Inquiry Volume 34 No 3*, Chicago: American Bar Foundation, 2009, 714.

²³ Саво Климовски, Тања Каракамишева, *Политички партии и интересни групи*, Скопје: Правен факултет Јустинијан Први, 2006, 342.

²⁴ Dariusz Grzyzlo, *Lustration. The Case of Poland*, Krakow: Instytut Filozofii, 2007, 6.

²⁵ Ibid.

Fourth, lustration can play a major role in countries where, after the fall of the repressive regime, a process of privatization of social and state property should occur. Privatization processes in post-communist countries confirm this conclusion. Namely, in the countries where lustration was left out or came with delay, there was room left for the people who had strong political capital during the previous regime to take part in the transition and through the privatization process to transform that capital into economic capital.²⁶ Such a possibility had negative effects on the privatization process in those countries, and further over the development of their economies. On the other hand, it is often emphasized that timely and well-enforced lustration contributes to quick economic development and success.

Practically, the processes of lustration should contribute to the reformation of public administration through its purification from civil servants who violate the rule of law. Thus, post-conflict and post-repressive societies should receive public administration dedicated to the rule of law instead of corruption, nepotism, and unprofessionalism.

iii. The impact of criminal trials in re-establishing the rule of law in post-conflict and post-repressive societies

Out of all transitional justice mechanisms, the application of criminal trials has the biggest influence over the re-establishment of the rule of law in post-conflict and post-repressive societies. The importance of criminal trials remains unrivaled because no other mechanism is perceived to have a greater impact on deterrence, public confidence in the state's ability and willingness to enforce the law, and a victim's sense of justice.²⁷ Such influence is ensured because of the following reasons.

Initially, criminal trials as a mechanism of transitional justice are necessary in order to promote a society based upon the rule of law.²⁸ One of the main goals of the rule of law is to lead to the protection of human rights and freedoms. Its non-functioning in one society is one of the main reasons for human rights violations. The feeling that the laws do not apply to everyone and that certain individuals, who will violate the laws will not be held accountable before the judicial authorities, contributes to a greater degree of violations of human rights. In that direction, the implementation of criminal trials serves to break the cycle of impunity.²⁹ Additionally, conducting criminal trials will be a message that all citizens in the society are liable under the same law³⁰ which would practically mean that no one is above the law. Moreover, the punishment of the perpetrators of violations of human freedoms and rights is a signal that everyone who has violated human rights and freedoms will be brought to justice, but it also lays the foundations that in the future such crimes will not be tolerated and that will be prosecuted regardless of who they are for. With that, the criminal trials will restore the predictability and supremacy of the law and will

²⁶ Natalia Letki, „The Consequences of Lustration for Democratization: The Experience of East Central Europe“, *Past and Present: Consequences for Democratisation*, Thessaloniki: Center for Democracy and Reconciliation in Southeast Europe, 2004, 6.

²⁷ James D. Meernik, Angela Nichols and Kimi L. King, „The Impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War,“ *International Studies Perspectives* Vol. 11 (2010): 310.

²⁸ Diba Majzub, „Peace or Justice? Amnesties and the International Criminal Court,“ *Melbourne Journal of International Law* Vol. 3 (2002): 250.

²⁹ George Kasapas, „An Introduction to the Concept of Transitional Justice: Western Balkans and EU Conditionality,“ *UNISCI Discussion Papers* No. 18 (2008): 62.

³⁰ Brian Grodsky, „Re-Ordering Justice: Toward A New Methodological Approach to Studying Transitional Justice,“ *Journal of Peace Research* Vol. 46 No. 6 (2009): 820.

contribute to the establishment of a political culture based on the idea of respecting rule of law and human rights.

Secondly, criminal trials represent an institutionalized response to human rights violations. Criminal prosecution is theorized to contribute to deterrence by lessening the perceived need for one group to take revenge against another.³¹ The victims' feeling that justice has been served eliminates the need for the individuals to take justice into their own hands and perpetuate the circle of violence. History is replete with examples of wild and private justice in situations where the perpetrators of the violations of human rights are not held accountable. In a situation where individuals take justice into their own hands, it often happens that in the name of justice, huge injuries are inflicted on justice. In a civilized society, justice should be left to the courts, not to observers of wrongdoings or to victims of wrongdoings.³²

Thirdly, in terms of the previous argument, it should be noted that criminal trials also have a big impact on the building of the capacities of the judicial system of the transitional society.³³ There wouldn't be any human rights violations in the past if the state had had a quality judicial system. The conduct of criminal trials will lead to the creation of judges, prosecutors, lawyers and other judicial staff who will be dedicated to the basic principles of the rule of law and the protection of human rights. By conducting criminal trials states will invest in the professionalization of the judiciary.³⁴ Over time a new generation of legal practitioners will emerge that will shift away from the old authoritarian order and become independent from executive.³⁵ All this will lead to the restoration of trust in the judiciary, which in the future should be able to prevent violations of human rights. A credible judiciary will also close the search for wild justice.

Fourth, criminal trials contribute to establishing individual responsibility for committed human rights violations and remove collective guilt and stigmatization.³⁶ Thus, criminal trials are showing that the ones who are responsible for the committed violations of human rights are individuals, who will be held responsible for that, and not entire collectives and communities. Through that, the criminal trials contribute to reconciliation and coexistence between different collectives and communities.

Fifth, criminal trials enable progress in establishing and maintaining peace, stability, and rule of law because they contribute to the removal and exclusion of perpetrators of human rights violations from political and social life.³⁷ On the one hand, criminal trials will enable the perpetrators of human rights violations to be imprisoned and not have the opportunity to influence the social and political trends in the transitional society. And, on the other hand, through the legal procedure, the criminal trials will succeed in stigmatization, or delegitimizing extremist elements and removing

³¹ James D. Meernik, Angela Nichols and Kimi L. King, "The Impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War," *International Studies Perspectives* Vol. 11 (2010): 312.

³² Jon Elster, "Justice, Truth, Peace." *Nomos* Vol. 51 (2012): 83.

³³ Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *The International Journal of Transitional Justice* Vol.8 (2014): 345.

³⁴ Claire Greenstein and Cole J. Harvey, "Trials, lustration, and clean elections: the uneven effects of transitional justice mechanisms on electoral manipulation," *Democratization* (2017): 3.

³⁵ Francesca Lessa et. Al., "Overcoming Impunity: Pathways to Accountability in Latin America," *The International Journal of Transitional Justice* Vol. 8 (2014): 81

³⁶ Ioannis Armakolas and Eleni Vossou, "Transitional Justice in Practice: The International Criminal Tribunal for the Former Yugoslavia and Beyond," *UNISCI Discussion Papers* No. 18 (2008): 26.

³⁷ Janine Natalya Clark, "Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship," *International Criminal Law Review* Vol. 11 (2011): 243.

them from politics.³⁸ Stigmatizing and delegitimizing the perpetrators of human rights violations will reduce their popularity and support among the local population. With that, the transitional society will practically be protected from groups and individuals that previously could threaten peace, stability, and the rule of law. In addition, the criminal trials represent a necessary protection against sabotage from within.³⁹ If the perpetrators of human rights violations remain to be part of the state institutions, they will have the opportunity to threaten the democratic processes in society from within.

Having all the above mentioned reasons into consideration, it becomes clear why criminal trials of all mechanisms of transitional justice have the biggest impact on re-establishing the rule of law. The implementation of the criminal trials by breaking the circle of impunity restores the predictability and supremacy of the law and contributes to the establishment of a political culture based on the idea to respect the rule of law and human rights.

IV. NEGATIVE IMPACT OF TRANSITIONAL JUSTICE OVER THE RULE OF LAW

On the other hand, there are a large number of theoreticians who believe that transitional justice will harm the re-establishment of the rule of law. These theoreticians base such attitude on several arguments.

At the very beginning, these theoreticians emphasize that the mechanisms of transitional justice have to confront (or finesse) the principle of *nulla poene sine lege*.⁴⁰ Therefore, transitional justice usually imply application of the retroactive justice and thus contribute to the creation of new violations of human rights. Such theoreticians emphasize that in the concept of the rule of law, there is no space for retroactive effects of the laws, so these theoreticians believe that the implementation of transitional justice represents a violation of the rule of law in the name of the rule of law.

Second, when it comes to the implementation of criminal trials as a mechanism of transitional justice it should be taken into consideration that the capacity and credibility of the judiciary play a major role in their implementation. It is difficult to expect criminal trials to happen if the transitional society has a completely broken judicial system. Thus, on the one hand, military conflicts cause a large number of judges, prosecutors and lawyers to be killed, forced into exile, or survive through complicity with the regime.⁴¹ It is to be expected that this kind of judicial system will not have the capacity to implement criminal trials as a mechanism of transitional justice. The example of Rwanda and South Africa can be used in order to show that it will be difficult to conduct criminal trials in the case where there are no available human resources and supporting legal infrastructure.⁴² Additionally, it should be taken into consideration that in post-repressive society's judicial system is effectively inoperative because of strong institutional loyalty to the old

³⁸ Catherine Turner, "Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law," *The International Journal of Transitional Justice* Vol.2 (2008): 144.

³⁹ Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past," *Law and Social Inquiry* No. 51 (1995): 56.

⁴⁰ Jon Elster, *Closing the books: Transitional Justice in Historical Perspective* (Cambridge: University of Cambridge, 2004): 133.

⁴¹ Laura Arriaza and Naomi Roht-Arriaza, "Social Reconstruction as a Local Process," *The International Journal of Transitional Justice* Vol.2 (2008): 158.

⁴² Ranyta Yusran, "The Implementation of Transitional Justice in Post-Conflict Situations: Case Study of Aceh and Papua" (Master thesis.,Lund University, 2007), 39.

regime.⁴³ Usually in repressive regimes the judicial system is created and composed under the full influence of the repressive political authorities, and therefore even after the change of the regime the judiciary will remain loyal to the old political elites. In situations like this, even if criminal trials are undertaken, they will be more of a mask rather than a real search for justice. In such situation investigation usually lead nowhere, even if judicial proceedings start they fade away through inefficiency and pressures from other branches of government and in the end punishments are ludicrously mild.⁴⁴ With such results, doubt is cast on the whole idea of justice, accountability and truth.

However, even if there is indeed a will to prosecute human rights violations, the conduct of criminal trials by judicial system without capacity and credibility can easily be held back by a number of procedural errors. This will be the case because judicial system will be marred by poorly trained, corrupt or indifferent judges and staff.⁴⁵ Such procedural errors will throw a black mark on the trials, but also on the entire process of re-establishing the rule of law. The search for justice in Iraq and the trial of Saddam Hussein are excellent examples of why societies that do not have a proper judicial system should not rush into conducting criminal trials.

Thirdly, in countries where the fall of the repressive regime took place quickly and through revolution, or, where the military conflict ended with a clear picture of who in that conflict is the winner and who is the loser, there is a great possibility that the transitional justice is simply a mask for a political vendetta, an opportunity for revanchism and scapegoatism.⁴⁶ Thus, in the name of justice, new injustices and violations of human rights will be created. These theoreticians believe that in such circumstances there is a great possibility that transitional justice can be transformed into victor's justice.⁴⁷ By doing so, transitional justice will be misused with the aim to satisfy the desire for revenge, and the feeling that revenge rather than justice is being sought will cast a black mark on the rule of law in post-conflict and post-repressive society. To that, we can add the fact that in such situations transitional justice can be misused to suppress political opponents.

Fourth, on the other hand, if the repressive regime falls slowly, by using negotiations or even if the military conflict ends without a clear picture of who is the winner and who is the loser, it can easily happen that the justice is the price post-oppression societies have to pay for peace.⁴⁸ The transitions which are a result of agreements and negotiations say that the groups that committed violations of human rights still hold power in that society. It is their power that is the reason for negotiations because through it they still possess the capacity to return society to new clashes and conflicts. Herewith, we can point out Pinochet's example, where during the period of the Chilean transition he pointed out that a fierce response will follow from his side if even a single hair from his soldiers' heads was touched.⁴⁹ Simply, moving too far and too fast in attempts to hold

⁴³ Majzub, "Peace or Justice?," 259.

⁴⁴ Cohen, "State Crimes of Previous Regimes," 29.

⁴⁵ Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* Vol. 31 (2009): 191.

⁴⁶ Mihaela Mihai, "Transitional Justice and Quest for Democracy: Towards Political Theory of Democratic Transformations" (PhD diss., University of Toronto, 2010), 24.

⁴⁷ Charles T. Call, "Is Transitional Justice Really Just?," *The Brown Journal of World Affairs* Vol 11 No 1 (2004): 109.

⁴⁸ Mihai, "Transitional Justice and Quest for Democracy:" 24.

⁴⁹ "I'm not someone who usually sends out threats. I warn only once. The day they touch one of my men, the rule of law is over." — Augusto Pinochet

perpetrators accountable will jeopardize the democratic transition.⁵⁰ And so, in a state where their power is reduced, but still significant, the groups that have committed human rights violations will look for a way to obstruct transitional justice because they are aware that if it comes to that, they will have to answer for their crimes. It is logical that dictators and war criminals will not want to give up power if they will be hauled into court the next day.⁵¹ Hence, fighting for their heads, these forces will use every card in their hand and even initiate a new conflict in order to reach negotiations in which they will give up their power and creation of new conflicts, but on the condition not to be prosecuted in the transitional period. Thus, granting amnesties will become acceptable price to pay for ending war or removing authoritarian governments.⁵² Practically, exchange of justice for peace will become acceptable tradeoff.⁵³ Under the arms of these negotiations, certain concessions will be agreed upon, which will lead to selectivity and an incomplete confrontation with the problematic past. Such selectivity will have a negative impact on the re-establishment of the rule of law which will ultimately lead to a conclusion that although the regime has changed or the conflict has ended, the same people have moved into the functioning of the new system very skillfully.

V. TRANSITIONAL JUSTICE AND THE RULE OF LAW THROUGH STATISTICS

For a long time, these kinds of debates between the theoreticians who support the implementation of transitional justice and the theoreticians who are against its implementation were based only to theoretical debates. Recently, in the transitional-justice literature, more and more research is being developed which aims to evaluate the effects of the implementation of transitional justice through the prism of statistics. Although this field of transitional-justice theory is still at the very beginning of its development, still most of the research speaks that the transitional justice has either positive or no effects at all.⁵⁴

Primarily, the UN has stated that nearly half of all peace agreements collapse within 5 years and difficulties of implementing the rule of law are being seen as key to that failure.⁵⁵ In that regard, precisely the decision to ignore the confrontation with the problematic past, because of stability and peace, ultimately causes such fragile peace and stability to fail because the society has not confronted the demons of the past that disrupt the functioning of the rule of law. According to this data it seems that only when justice is done, a new civil war or repressive regime will be prevented.⁵⁶

⁵⁰ Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, "The Justice Balance: When Transitional Justice Improves Human Rights and Democracy," *Human Rights Quarterly* Vol.32, (2010): 985.

⁵¹ Andrea Kupfer Schneider, "The Intersection of dispute Systems Design and Transitional Justice," *Harvard Negotiation Law Review* Vol. 14 (2009): 289.

⁵² Elizabeth B. Ludwin King, "Amnesties in Time of Transition," *The George Washington International Law Review* Vol. 41 (2010): 577.

⁵³ Charles P. Trumbull IV, "Giving Amnesties a Second Chance," *Berkeley Journal of International Law* Vol. 25 No.2 (2007): 298.

⁵⁴ Oskar N.T Thoms, James Ron and Roland Paris, "State-Level Effects of Transitional Justice: What Do We Know?," *The International Journal of Transitional Justice* Vol.4 (2010): 346.

⁵⁵ Christine Bell, "The "New Law" of Transitional Justice," in *Studies on Transitional Justice, Peace and Development: The Nuremburg Declaration on Peace and Justice* ed. Kai Ambos (Berlin: Springer, 2009), 120.

⁵⁶ Christina Binder, "Introduction to the Concept of Transitional Justice," 24.

Furthermore, out of all research, we should emphasize the research from Tricia Olsen and others, in which through detailed statistical analysis of the mechanisms of transitional justice the authors of the research will conclude that the transitional justice in general appears to have a positive and significant influence on democracy, human rights and rule of law.⁵⁷ According to this research, the transitional societies that implement the mechanisms of transitional justice have far better results in the field of democratic parameters, the rule of law, and the protection of human rights than the transitional societies that have not implemented the concept of transitional justice. This kind of research also statistically confirms the claims that transitional justice should be seen as a long-term process because the results of its application begin to be felt even after 10 to 20 years from the beginning of its implementation.⁵⁸ According to this research, out of all mechanisms of transitional justice criminal trials have had the most positive impact. This data was confirmed by other research that emphasizes that criminal trials are associated with higher rule of law scores.⁵⁹ Additionally, the empirical analysis of Sikkink and Walling who compared human rights conditions before and after trials in Latin American countries with two or more trial years found that the majority of countries had improved their human rights ratings after trial.⁶⁰ Such studies complement with studies that find that transitional countries with trials are less repressive than those without trials.⁶¹ To all those research, we should also add the fact that through statistical research it has been confirmed that societies that fall shy of punitive sanctions are less successful at reintegrating victims.⁶² Obviously, the feeling that justice has been served contributes to the victims reintegration into society and continuing with their life. However, the research of Olsen and others will also reveal the fact that the concept of transitional justice produces the desired effects only when the implementation of its mechanisms is mutually combined. Thus, under the auspices of this research, a holistic approach to transitional justice will be created, according to which only an integrated approach can satisfy different needs in complex transition situations, thereby increasing the likelihood of efficient transitional justice.⁶³

To such data that speak of a strong connection between the implementation of the mechanisms of transitional justice and the democratic consolidation of one transitional society, we can also add the data of the statistical research on the relationship between the concept of transitional justice and the number of foreign direct investments. Thus, Appel and Lloyd's statistical research tells us that when a post-conflict state has implemented the concept of transitional justice, the amount of FDI inflow is approximately 358 % greater compared with post-conflict states that fail to implement transitional justice institutions.⁶⁴ When investing, foreign companies always seek peace, stability and a functional system of rule of law from the societies. The fact that transitional societies which applied the mechanisms of transitional justice consolidate their democratic order faster and more qualitatively is the answer to why such societies have far better economic results. Obviously, for foreign companies, the implementation of the mechanisms of transitional justice in

⁵⁷ Olsen et. Al., *Transitional Justice in Balance*, 146.

⁵⁸ Anja Mihr and Chandra Lekha Sriram, *Rule of law, security and transitional justice in fragile and conflict-affected societies* (Hague: The Hague Institute for Global Justice and the Stimson Center, 2015), 4.

⁵⁹ Thoms, Ron and Paris, "State-Level Effects of Transitional Justice," 344.

⁶⁰ Christina Binder, "Introduction to the Concept of Transitional Justice," 24.

⁶¹ Thoms, Ron and Paris, "State-Level Effects of Transitional Justice," 344.

⁶² Monika Nalepa, "Tolerating Mistakes: How Do Popular Perceptions of Procedural Fairness Affect Demand for Transitional Justice," *Journal of Conflict Resolution* Vol. 56 No.3 (2012): 495.

⁶³ Kai Ambos, "Assessing the Efficiency of Transitional Justice," *Yonsei Law Journal* Vol.6 No.1-2 (2015): 48-49.

⁶⁴ Benjamin J Appel and Cyanne E Loyle, "The economic benefits of justice: Post-conflict justice and foreign direct investments," *Journal of Peace Research* Vol.49 No. 5 (2012): 693.

transitional societies is a signal that the rule of law, human rights, and democracy in these societies will be placed on stable foundations and that such countries are worth investing in.

VI. CONCLUSION

In addition to a large number of events in the field of legal and political theory, the XX century was also marked by the emergence of the concept of transitional justice. The emergence and development of transitional justice for many theoreticians represents one of the most dramatic transformations of global politics in the last few decades.⁶⁵ The application of the concept of transitional justice contributes to the application of international law and human rights standards in global politics, as never before. On the other hand, precisely the development of international law and human rights is the main reason why, in recent years, the concept of transitional justice has grown from the exception to the norm, constituting a new paradigm of the rule of law.⁶⁶ Still, within the theory, there are a number of dilemmas and debates regarding the impact of transitional justice over the rule of law and democratic consolidation. Indeed, the number of theoreticians who believe that transitional justice is basically a retroactive justice is not that small and they additionally emphasize that in post-conflict and post-repressive societies, there are unrealistic expectations for the administration of justice. This is primarily because post-conflict and post-repressive societies mostly have a non-existent judicial system. A judicial system that has a problem with credibility and capacity. In addition to the problems with the judicial systems, theoreticians, who are against the implementation of transitional justice emphasize that often in transitional societies justice is not possible due to the power of individuals and groups, who have committed violations of human rights. Insisting on justice in such societies can endanger the peace and lead to new violence.

However, the majority of the theoreticians advocate the view that a transitional justice strategy that foresees the combined application of the mechanisms of transitional justice has a positive impact on the functioning of the rule of law in post-conflict and post-repressive societies. According to them, the implementation of the mechanisms of transitional justice (especially criminal trials) contributes to breaking the circle of impunity. Such violation of the circle of impunity is a signal that everyone who violated human rights and freedoms will be brought to justice, but at the same time, it lays the groundwork that such crimes will not be tolerated in the future and will be prosecuted regardless of who it is. Also, by conducting criminal trials, this concept contributes to the development of a new generation of judges, prosecutors, lawyers and judicial staff who will be connected to the idea of the rule of law and the protection of human rights. Thus, the concept of transitional justice will contribute to building the capacities of the judicial system of transitional societies. A contribution to building the capacities of the judiciary, but also to building the capacities of the public administration in general, is also the process of lustration which through purification of the public administration from the corrupt and unprofessional civil servants contributes to a public administration that is guided by the principles of the rule of law and democracy. An additional contribution to the promotion of these values in society is also made by the truth commissions which, by familiarizing the general public with the committed violations of human rights during the military conflict or repressive regime contribute to an educational impact on the citizens that what happened was bad and that it should not happen

⁶⁵ Charles T. Call, "Is Transitional Justice Really Just?," 101.

⁶⁶ Ruti Teitel, "The Law and Politics of Contemporary Transitional Justice," *Cornell International Law Journal* Vol. 38 (2005): 840.

ever again. Understanding and acknowledging the difference between appropriate and inappropriate ways to act in politics and manage conflict is necessary for bringing back lost sense of justice in society that was complicit in massive human rights abuses.⁶⁷ Such theoretical claims of the theoreticians, who support the concept of transitional justice in the last few years have also been confirmed with statistical research and data. Thus, today, the arguments coming from theory and practice as well, strengthen the position that transitional justice contributes to the reestablishing rule of law and democracy. George Santayana's sentence that "*Those who cannot remember the past are condemned to repeat it*" serves as an excellent reminder that societies that sacrifice justice for peace end up without both.

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