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# The Law, Politics and Practice of ‘Never Again’: Guarantees of Non-Recurrence in Transitional Justice

Maja Davidović

## ABSTRACT

Ensuring non-recurrence of mass human rights violations has been a central goal of transitional justice (TJ) since its foundations. Recent developments in international TJ policy have transformed the goal that violations should happen ‘Never Again’ into guarantees of non-recurrence (GNRs), a norm of legal origin. In TJ scholarship, GNRs have since emerged as both a pillar of TJ, comprised of distinct practices of predominantly institutional reform, and an overall objective that frames the pillars of TJ. As a result, GNRs remain ambiguous, normatively flexible, and generally unexplored in the burgeoning TJ scholarship. This thesis sets out to provide conceptual clarity to the content, characteristics and position of GNRs in transitional justice by empirically investigating conceptualisations and practices of GNRs in post-conflict Bosnia and Herzegovina (BiH). Underpinned by structuration theory, the thesis treats TJ as a primarily ideational structure, a global, discursive force that carries a set of well-established tenets prescribing how past violence and injustice should be dealt with and how non-recurrence should be achieved. The thesis examines two core questions. Firstly, how GNRs are understood and practiced by transitional justice actors in BiH and, secondly, how transitional justice as a structure influences these domestic conceptualisations and practices.

The overarching claim of the thesis is that GNRs should be understood as a complex cycle, a non-hierarchical web of connected and sequenced processes in continuous practitioners’ engagement with the ideas found within the structure of TJ as well as the effects of past implementations of these ideas. Three principal arguments support this claim. First, practitioners in BiH re-contextualise the content of the norm of non-recurrence and are only seldomly influenced by existing international legal and policy frameworks in how they conceptualise GNRs. Second, transitional justice maintains persuasive power to shape many ideas considered as GNRs by the practitioners and how they are put to practice. Third, the tension between TJ’s malleability and adherence to legalism creates practical obstacles for the practices of the contextualised GNRs due to which they remain largely under-realised in BiH.



# The Law, Politics and Practice of ‘Never Again’: Guarantees of Non-Recurrence in Transitional Justice

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## **LIST OF ABBREVIATIONS**

ARBiH – Army of the Republic of Bosnia and Herzegovina

ARSIWA – Articles on Responsibility of States for Internationally Wrongful Acts

BiH – Bosnia and Herzegovina

BIRN – Balkan Investigative Reporting Network

CNA – Centre for Non-Violent Action

CRPC – Commission for Real Property Claims of Displaced Persons and Refugees of BiH

CSO – Civil society organisation

DPA – General Framework Agreement for Peace in Bosnia and Herzegovina/Dayton Peace Agreement

FBiH – Federation of Bosnia and Herzegovina

GNRs – Guarantees of non-recurrence/non-repetition

HJPC – High Judicial and Prosecutorial Council of BiH

HVO – Croatian Defence Council

IACtHR – Inter-American Court of Human Rights

ICC – International Criminal Court

ICJ – International Court of Justice

ICMP – International Commission on Missing Persons

ICTJ – International Center for Transitional Justice

ICTY – International Criminal Tribunal for the former Yugoslavia

IHRL – International Human Rights Law

IJC – Independent Judicial Commission

ILC – International Law Commission

IPTF – International Police Task Force of the United Nations

IRMCT – International Residual Mechanism for Criminal Tribunals

MHRR – Ministry of Human Rights and Refugees of Bosnia and Herzegovina

OHR – Office of the High Representative of the United Nations in Bosnia and Herzegovina

PIL – Public International Law

RDC – Research and Documentation Centre

RS – Republika Srpska

TA – Thematic analysis

TJ – Transitional justice

TRC – Truth and Reconciliation Commission

UN – United Nations

USIP – United States Institute of Peace

VRS – Army of Republika Srpska

WCC – War Crimes Chamber of the Court of BiH

# STATEMENTS AND DECLARATIONS

## Declaration

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## Statement on Published Work

An edited version of the second chapter of this thesis has been published by the author in 2021 as a single-authored article in the *International Journal of Transitional Justice* under the title 'The Law of 'Never Again': Transitional Justice and the Transformation of the Norm of Non-Recurrence.'

Signature



Date

27 September 2021

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*To my grandfather, Velibor Dača Davidović*

## CHAPTER 1: INTRODUCTION

*On the 16<sup>th</sup> of March 2013, I found myself living through what one may call a historic moment. A 21-year-old student at an American college in Thessaloniki, Greece, I stood at the front line of the city's first Holocaust Memory Walk. This walk, gathering several thousands of people at the city's Liberty Square, commemorated the 70<sup>th</sup> anniversary of the first deportation of the Jews of Thessaloniki. The walk was historic, maybe not so much for the world, as it was for Thessaloniki and, coincidentally, for myself. It was monumental for Thessaloniki because it represented the reembracing of the role Jewish communities played in this city's history before they perished in the Holocaust. For the first time in 101 years, it was said, the sitting Prime Minister of Greece had set foot in a synagogue.<sup>1</sup> As for myself, I came there to honour the victims. Soon after my arrival, I was given a large white banner and asked to walk with it at the very front of the march, together with two of my classmates. Of all the people, I never learned why the banner was given to the three of us. Perhaps because we were 'the youth', 'the future.' The banner read, 'Ποτέ ξανά! Never Again!' The message was explicit: Never Again will we let the Holocaust happen!*



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<sup>1</sup> Gavin Rabinowitz, 'Greek Jews get sudden boost in neo-Nazi fight' (*The Times of Israel*, 29 March 2013) <https://www.timesofisrael.com/greek-jews-get-sudden-boost-in-neo-nazi-fight/> accessed 15 April 2021.

*Image 1: A photograph of myself (centre of the banner), carrying the message of 'Never Again' and leading the march of more than 2,500 people in Thessaloniki on the 16<sup>th</sup> of March 2013. Photo credit: Giannis Papanikos (via Shutterstock).*

*At the time, I did not question the meaning of the words 'Never Again', but the phrase reverberated in my head for years to come. In my later engagement as a master's student of human rights law, I researched the five types of reparations for human rights violations, but I did not quite understand what the fifth type, the so-called 'guarantees of non-recurrence' were. How were we to ensure 'Never Again' then? When the opportunity arose to write a PhD, I knew the project had to ask this question, and it had to ask them in my preferred field of inquiry, that of transitional justice, where fulfilling the promise of 'Never Again' was closest to home – in Bosnia and Herzegovina. This thesis is exactly that: a story of guarantees of non-recurrence, the 'Never Again' promise in transitional justice and the people who work to fulfil it in this country.*

## 1.1. Introduction

In 2011, with the establishment of the United Nations (UN) mandate of the Special Rapporteur for the promotion of truth, justice, reparation and guarantees of non-recurrence (hereafter Special Rapporteur), guarantees of non-recurrence (GNRs) were proclaimed a pillar of the rapidly burgeoning field of research, policy and practice known as transitional justice (TJ). Originally utilised to solve diplomatic disputes, guarantees of non-recurrence<sup>2</sup> have more recently been conceptualised as a consequence of state responsibility for internationally wrongful acts in public international law (PIL) and a form of reparations for international human rights law (IHRL) and humanitarian law violations states owe to their subjects. These developments have fortified their standing as an international norm. In transitional justice, the establishment of the mandate of the Special Rapporteur placed GNRs on an equal footing with other, more developed, areas of intervention such as truth recovery and criminal justice. Positioning GNRs as a so-called pillar of transitional justice implies that non-recurrence of violations can be ensured

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<sup>2</sup> The difference between assurances and guarantees of non-recurrence was explained by the International Law Commission in their commentary on the Articles on Responsibility of State for Internationally Wrongful Acts, para 12 to Article 30, p. 88. Assurances are given verbally, while guarantees include material actions. Further information about the Articles is given in Chapter 2. Throughout this thesis, guarantees of non-recurrence and guarantees of non-repetition are used interchangeably, as they typically are in the literature.

through a set of practices, and these practices tended to be largely understood as measures of institutional reform. As a pillar of transitional justice, GNRs are therefore conceptualised as a delineated set of measures of certain character (i.e., state institution-focused, reformative) that are potentially in conversation with other such ‘pillars’ but nevertheless with no predicted overlaps between two or more of pillars in terms of their content. However, non-recurrence itself has also been a defining objective of the totality of TJ practice, enshrined in the famous ‘Never Again’ promise, and instrumentalised in contexts of mass violations around the world. The dual positioning of GNRs as a pillar of transitional justice and ‘Never Again’ as a normative expectation of TJ practices thus appear in conceptual tension. While the transformative potential of GNRs to ensure non-repetition of mass violence and injustice is repeatedly asserted in this field, there has been limited scholarly inquiry into in the transformations and operations of the norm of non-recurrence in transitional justice settings. In this thesis, I fill in this major gap in transitional justice scholarship with empirical investigations of the conceptualisation and application of GNRs in the post-conflict context of Bosnia and Herzegovina (BiH) where the infrastructure of transitional justice is well-developed.

Here, I investigate domestic understandings and practices of guarantees of non-recurrence among transitional justice practitioners in Bosnia and Herzegovina. These domestic engagements with the international norm of non-recurrence occur in ‘a highly contested normative space’ with multiple competing norms and interests in force.<sup>3</sup> Although the positive legal obligation to introduce measures of non-recurrence rests with the state and its institutions, generally, my approach is that what subsequently happens to norms derived from the law once they are written down and whether they are ‘adopted, enforced, alternatively modified or marginalized’ is dependent on social and institutional factors<sup>4</sup> in ‘an open-ended and reflective process of interpretation.’<sup>5</sup> As Finnemore and Sikkink assert, ‘norms do not appear out of thin

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<sup>3</sup> Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887, 897.

<sup>4</sup> Reza Banakar, ‘Having One’s Cake and Eating It: The Paradox of Contextualisation in Socio-Legal Research’ (2011) 7 *International Journal of Law in Context* 487, 492.

<sup>5</sup> Reza Banakar, Ann Denis and Devorah Kalekin-Fishman, ‘Law Through Sociology’s Looking Glass: Conflict and Competition in Sociological Studies of Law’ in Ann Denis and Devorah Kalekin-Fishman (eds), *The ISA Handbook in Contemporary Sociology* (Sage Publications 2009) 60.

air; they are actively built by agents having strong notions about appropriate or desirable behaviour in their community.’<sup>6</sup>

Underpinned by structuration theory, the thesis examines the interplay that exists between practitioners’ agency to define and practice GNRs and transitional justice as a primarily *ideational structure*, a global and discursive force that carries with itself a set of values and characteristics and well-established tenets of how past violence and injustice should be ‘dealt’ with.<sup>7</sup> Through its tools and mechanisms, TJ promotes certain goals and contributes (or not) to the fulfilment of these goals. As a structure, transitional justice is a collection of norms and values, such as non-recurrence, and ideas about how they ought to be fulfilled or realised. As observed through the mandate of the Special Rapporteur, at the level of international policy, transitional justice has commonly been defined as a four to five pillar model consisting of (criminal) justice, truth recovery, reparations, institutional reform and, as of more recently, memorialisation.<sup>8</sup> Both the mechanisms and the values found within these pillars have traveled and been exported to a range of different countries and situations and have ultimately formed a recognizable TJ discourse and a sense of necessity and inevitability of transitional justice. I argue that TJ is not only bound by its mechanisms and values, nor can it solely be equated to five pillars and the situations it examines, but also by its defining characteristics.

As an ideational structure, transitional justice is both referential to and contingent on actors’ agency that shapes it and is shaped by it. This field research-informed project demonstrates the multiple ways in actors conceptually, and practically, engage with the norm of non-recurrence in Bosnia and Herzegovina and make it different from its legal form. Yet, I argue that, to a great extent, transitional justice, as a structure, shapes which ideas are considered in the context of GNRs in the first place and how these ideas are put to practice. Through its ideational power, transitional justice further detrimentally impacts the realisation of these contextualised GNRs due to the tensions between TJ key characteristics as being as simultaneously legalistic and malleable. In its totality, the thesis tells a much-needed story of GNRs in transitional justice

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<sup>6</sup> Finnemore and Sikkink (n 3) 896.

<sup>7</sup> Further elaboration on my theoretical underpinnings may be found in Chapter 3.

<sup>8</sup> See, for example, Alexander L Boraine, ‘Transitional Justice: A Holistic Interpretation’ (2006) 60 *Journal of International Affairs* 17; Pablo De Greiff, ‘Theorizing Transitional Justice’ (2012) 51 *Nomos* 31. Susanne Buckley-Zistel and others, ‘Transitional Justice Theories: An Introduction’ in Susanne Buckley-Zistel and others (eds), *Transitional Justice Theories* (Routledge, 2014) 1.

starting with its fluid and exceptional origins in international law, through normative expansions in transitional justice, to exploring how different conceptual tensions have reflected on GNRs in domestic practice.

This chapter proceeds with an introduction to the relationship between the ‘Never Again’ promise and transitional justice. This section sets out the context in which the research takes place, an environment of transitional justice which, I argue, can be defined by its competing characteristics. I provide a foundation for understanding TJ as an ideational structure – as opposed to a pillar-like model – further theoretical underpinnings for which will be discussed in Chapter 3. This section is followed by an elaboration on the significance of the study, and the importance and urgency of researching guarantees of non-recurrence in Bosnia and Herzegovina. I then outline the two central research questions, and the core aim and objectives that surround them. Finally, this chapter also highlights the key contributions to knowledge the thesis makes and presents a detailed summary of each of the forthcoming chapters.

## 1.2. Transitional justice and ‘Never Again’

As a slogan and a promise, ‘Never Again’ gained prominence after the horrors of the Holocaust, when global leaders vowed not to let mass atrocities ever happen again at such scale.<sup>9</sup> It has since symbolically represented different political actors’ commitment to non-repetition of gross human rights violations across the world. Fulfilling the ‘Never Again’ promise and having a core goal of ensuring non-repetition of mass violations are tightly linked to the early developments of transitional justice as a field. Different genealogical accounts of TJ-like processes start with different events,<sup>10</sup> but generally, the notable early developments of TJ, as we know it today, were shaped by political transitions from oppressive regimes across Latin

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<sup>9</sup> The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, for example, is a symbol of such global actions, seeing how the treaty was created as a direct response to the Holocaust and was aimed to signal the international community’s commitment not to let such atrocities happen again. See the United Nations Office on Genocide Prevention and the Responsibility to Protect, *Genocide Convention*, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> accessed 16 August 2021.

<sup>10</sup> Teitel begins her genealogy in 1945 and the immediate post WWII period. See Ruti Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Journal* 69; Elster, on the other hand, seeks the roots of the first “negotiated transition” in ancient Greece. See Jon Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge University Press 2004).

America.<sup>11</sup> In countries such as Argentina, Chile and Guatemala, ‘Never Again’ enjoyed a prominent position and was utilised by many activists as a slogan shaping their calls for action. It was also in these countries that some staple mechanisms in the five-pillar transitional justice, namely truth commissions and criminal trials, were trusted with the potential to contribute to the fulfilment of the ‘Never Again’ promise. The ideas of ‘Never Again’ being more than a promise and a mere moral obligation and becoming an action-requiring obligation states owed to individuals were first developed here.

In Argentina, during its transition from dictatorship, the National Commission on Disappeared People published a report in 1986 entitled ‘Nunca Más = Never Again.’ The name of the report was inspired by the activism and slogans used by groups of victims’ families such as the Mothers of the Plaza de Mayo in the 1980s and, later on, other human rights organisations and exiles groups.<sup>12</sup> This line of activism advocated for empathy with the victims and sought to highlight the connections between the dictatorship and the perpetrated crimes, contextualising the atrocities within the cycle of military interventions in Argentina.<sup>13</sup> The moral imperative of ‘Never Again’ became associated with the state and its institutions, as calls were made by the activists and victims’ families to investigate “state terrorism” in order to prevent recurrence.<sup>14</sup> In the final report, the president of the Commission declared that “only with democracy” can the society be certain that these atrocities will be repeated “never again.”<sup>15</sup> The ‘Nunca Más’ report gained further importance for the Argentine public once it was offered and accepted as court evidence in the trials of military juntas and eventually reached the status of a “bestseller,” with translations in several other languages.<sup>16</sup>

The truth commission model and the resulting report carried the ‘Never Again’ promise with them into the very fabric of transitional justice as they were subsequently exported to

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<sup>11</sup> Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Quarterly* 321.

<sup>12</sup> Emilio Crenzel, ‘Genesis, Uses, and Significations of the Nunca Más Report in Argentina’ (2015) 42 *Latin American Perspectives* 20.

<sup>13</sup> *ibid* 22–23.

<sup>14</sup> *ibid* 23.

<sup>15</sup> Marcos Zunino, *Justice Framed: A Genealogy of Transitional Justice* (Cambridge University Press 2019) 74.

<sup>16</sup> Crenzel (n 12) 20.

various countries in Latin America, such as Guatemala and Paraguay.<sup>17</sup> The ultimate goal of the emerging interventions of ‘justice in transition’ in Latin America, whichever mechanism is used, be it a truth commission or a criminal trial, was to never experience such grave violations again. Yet, while the subsequent developments in both research and practice fixated on both trials and truth commissions, scholars and policymakers were less interested in studying non-recurrence either qualitatively or quantitatively. In other words, the ‘Never Again’ promise was present as the backdrop of the most prominent mechanisms of transitional justice. This remained so until, most notably, the UN revamped the ‘Never Again’ promise into the umbrella of TJ’s tools as ‘guarantees of non-recurrence’, a tool of legal origins, whose application serves to fulfil the goal of ensuring non-repetition of violations. While the idea of ‘Never Again’, or ‘Nunca Más’ may have been with ‘justice in transition’ since its inception, the legal term of ‘guarantees of non-recurrence’ and a set of measures that come with it followed with the globalisation of transitional justice, suggesting that this promise can be fulfilled through law and its institutions. The upcoming chapters of this thesis are driven by the curiosity regarding how this ‘Never Again’ promise has been transformed into GNRs and further shaped as well as constituted by transitional justice.

What is meant by globalisation of transitional justice? Since the ‘justice in transition’ developments in Latin America, an increased understanding, if not a consensus, has emerged around the idea that past violence and injustice must be dealt with and be accounted for.<sup>18</sup> Transitional justice, as the field of research, policy and practice under whose umbrella this ‘dealing with the past’ is conducted, has become a global norm that transitioning societies are expected or even conditioned to engage with.<sup>19</sup> The values and goals of transitional justice were subsequently translated into some kind of “legal imperatives,”<sup>20</sup> leaving the transitioning state to choose not whether to do transitional justice but instead which TJ framework to adopt.<sup>21</sup> Such a

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<sup>17</sup> For Guatemala, see Rothenberg D (ed.) *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012). In Paraguay, see non-governmental fact-finding by Comité de Iglesia para Ayudas de Emergencia, ‘Paraguay Nunca Más (1990)’ in Fernando Cruz Artunduaga and Vera Podbornaya (eds), *Comisiones de la Memoria, Verdad y Reconciliación* (Centro de Investigación por la Paz IDEASUR 2012).

<sup>18</sup> Jelena Subotic, ‘The Transformation of International Transitional Justice Advocacy’ (2012) 6 *International Journal of Transitional Justice* 106.

<sup>19</sup> Teitel, ‘Transitional Justice Genealogy’ (n 10).

<sup>20</sup> Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (Routledge 2016).

<sup>21</sup> Jelena Subotic, ‘The Transformation of International Transitional Justice Advocacy’ (n 18).

development is representative of a wider normative shift in international politics towards civil and political human rights (as opposed to socioeconomic and cultural rights) and seeing mass atrocities as threats to international security.<sup>22</sup> Since the initial conferences on ‘justice in transition’ in the late 1980s,<sup>23</sup> the field has expanded vertically to include different kinds of actors other than the state, all of whom are seen as relevant and capable of practising TJ.<sup>24</sup> As a result, the professionalisation of the field, numerous specialist NGOs, projects and even university courses of TJ followed and transitional justice provisions have found a way into multiple peace agreements.<sup>25</sup> In addition, TJ has also stretched horizontally from originally being an area of research and practice in transitions from authoritarianism to democracy, to being applicable to a variety of different contexts around the world.<sup>26</sup> In its short lifespan, transitional justice has seemingly become ‘the only legitimate response to conflict.’<sup>27</sup> As I will demonstrate in Chapter 2, this phenomenon has had bearings on how ensuring non-repetition of mass human rights violations has come to be understood as not merely a moral but also a legal obligation of states towards their citizens.

The normalisation of transitional justice has occurred because TJ cannot be universalised as one and the same in different situations but can instead be instrumentalised in distinct contexts to achieve a set of goals and universalised *ideas* attached to them. In other words, through transitional justice as a global project endorsed by the UN, the ‘Never Again’ in Argentina or Guatemala becomes a ‘Never Again’ exportable and applicable in other contexts around the world, such as Bosnia and Herzegovina, as guarantees of non-recurrence. Despite this consensus that the past must be ‘dealt’ with, definitions and scope of transitional justice have differed in scholarly and policy circles, and I will argue that these differentiations are of utmost importance for the practice of GNRs. In one of the most comprehensive accounts of the genealogy of the field, Zunino holds that while the fieldhood of TJ is rarely debated nowadays, the field itself is

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<sup>22</sup> Jelena Subotic, ‘Truth, Justice, and Reconciliation on the Ground: Normative Divergence in the Western Balkans’ (2015) 18 *Journal of International Relations and Development* 361, 363.

<sup>23</sup> Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (n 11).

<sup>24</sup> Thomas Obel Hansen, ‘The Vertical and Horizontal Expansion of Transitional Justice’ in Susanne Buckley-Zistel and others (eds), *Transitional Justice Theories* (Routledge 2014).

<sup>25</sup> Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008).

<sup>26</sup> Hansen (n 24).

<sup>27</sup> Turner (n 20) 22.

yet to refine its epistemological, theoretical, and methodological boundaries.<sup>28</sup> In Zunino's account, TJ has three main objects that define it, namely, 'the situations it examines, the mechanisms applied to them and its self-referential engagement with transitional justice.'<sup>29</sup> More precisely, transitional justice is self-referential to its mechanisms and contexts, continuously reflecting on the field, reassessing where it stands and where it is heading.<sup>30</sup>

It follows from Zunino's argument that the most common way to conceptualise TJ has indeed been through a set of mechanisms countries in different types of transition (i.e., from conflict to peace, from authoritarianism to democracy, or both) and non-transitions (in situations where conflict is ongoing, or in post-colonial contexts) have embraced or been recommended to embrace to deal with their violent past. These mechanisms have developed over time. In 2003, Teitel defined transitional justice as 'the conception of justice associated with periods of political change, characterised by *legal* responses to confront the wrongdoings of repressive predecessor regimes' and both research and policy adopted this definition.<sup>31</sup> Legal responses result out of modern legal positivist thinking, whereby causal links between the text and the outcome are sought in the process of evaluation that serves to improve the legislation in question.<sup>32</sup> In many ways, the paradigmatic<sup>33</sup> stream of TJ knowledge production since Teitel's conceptualisation argued that TJ can be described as policy-oriented,<sup>34</sup> describing and prescribing solutions to observed problems.<sup>35</sup> The initial defining characteristics of globalised transitional justice was therefore one of legalism. To work within the context of transitional justice in the first two decades of the field's existence largely meant supporting a consensus about unifying TJ values such as state-centrism, liberalism and the rule of law and their achievement through a set of institutions and mechanisms such as trials, truth commissions, reparations and institutional

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<sup>28</sup> Zunino (n 15) 28.

<sup>29</sup> *ibid* 22.

<sup>30</sup> *ibid*.

<sup>31</sup> Ruti Teitel, 'Transitional Justice Genealogy' (n 10) (emphasis added).

<sup>32</sup> Geoff Dancy, 'Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice' (2010) 4 *International Journal of Transitional Justice* 355.

<sup>33</sup> I employ Dustin Sharp's term 'paradigmatic transitional justice' to describe the dominant stream of TJ that has prioritised civil and political rights and legal responses to justice. As Sharp argues, such priorities became 'the normalized "default"' for scholars and practitioners alike. Dustin N Sharp, 'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice' (2019) 13 *International Journal of Transitional Justice* 570, 571.

<sup>34</sup> *ibid*.

<sup>35</sup> Jamie Rebecca Rowen, "'We Don't Believe in Transitional Justice:': Peace and the Politics of Legal Ideas in Colombia' (2017) 42 *Law & Social Inquiry* 622.

reforms. The resulting findings draw causal links between every existing TJ mechanism and an unquantifiable social good or phenomenon, including non-recurrence, and seek to measure the effectiveness or impacts of individual mechanisms such as criminal trials or truth commissions.<sup>36</sup>

In line with the tendency to define TJ through its mechanisms and the situations it examines, through the work of the UN, transitional justice has been sculpted as a multi-pillar model. In 2004, the United Nations Secretary-General had published a report on the rule of law and transitional justice, inclusive of the UN's working definition of TJ. In the report, it was stated that TJ consists of:

the full range of process and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation.<sup>37</sup>

Following this definition, the report denoted TJ's set of tools as inclusive of 'judicial and non-judicial mechanisms', more precisely, 'individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof,'<sup>38</sup> creating a four-pillar model of transitional justice that is defined as a collection of (criminal) justice, truth recovery, reparation and institutional reform. All of these said mechanisms, or a combination of them, are expected to be integrated in a comprehensive, holistic TJ strategy, ensuring that the mechanisms do not clash with one another, with a special focus being placed on how other TJ mechanisms can complement criminal justice and help overcome some of the limitations of criminal justice.<sup>39</sup> Similar discourse was echoed in the Human Rights Council resolution 18/7 that established the mandate of the Special Rapporteur, structuring the mandate according to the four pillars of truth,

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<sup>36</sup> To illustrate, in an early study on the impact of the ICTY, Payam Akhavan claimed that the tribunal marginalised Serb ultranationalism, promoted more democratic leaders and, essentially, boosted peacebuilding in the region. Akhavan's argument rested on the premise that international criminal tribunals stigmatise "delinquent leaders" by means of indictment, apprehension, and prosecution, eventually costing them their status and influence at home. The impact of these institutions, Akhavan argued, expands beyond their geographical mandates and spreads a new culture against impunity among political leaders everywhere. See Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities' (2001) 95 *American Journal of International Law* 7.

<sup>37</sup> Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) UN Doc S/2004/616\*.

<sup>38</sup> *ibid* 4.

<sup>39</sup> *ibid*.

justice, reparations and ‘guarantees of non-recurrence’, seemingly synonymous for what was previously ‘institutional reform.’<sup>40</sup>

Zunino explains that the discourse surrounding this model was created through a conglomeration of the tools and practices used in transitions in Argentina and other Latin American countries (e.g., trials and teleological frameworks), Eastern European states post-Berlin wall (e.g., lustration, restitution of private property and institutional reform), South Africa (e.g., truth and reconciliation commissions) and in the UN ad-hoc tribunals for the former Yugoslavia and Rwanda, finally glued together by the UN’s developing mandate on TJ.<sup>41</sup> By the time Neil Kritz published the *Transitional Justice* volumes in 1995, trials, truth commissions, vetting and reparations were discussed as the main objects and concepts of the now autonomous TJ discourse, replicated at the UN as the organisation’s interest in TJ grew as a way of addressing threats to international peace and security.<sup>42</sup>

The burgeoning literature on transitional justice embraced this model of TJ as authoritative and started conceptualising TJ as a four-pillar.<sup>43</sup> In that way, despite the understanding that TJ expands beyond purely legal approaches, as per Teitel’s previous proposition, in both literature and practice, “the institutional bias” of TJ is reflected.<sup>44</sup> Aspiring to mitigate some of this institutional bias, as recently as in 2020, international TJ advocacy as well the UN’s work on transitional justice have tended to promote ‘the fifth’ pillar of TJ by adding memorialisation as an object of the field, particularly observing the links between truth, justice and memory.<sup>45</sup>

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<sup>40</sup> ‘*Emphasizing the importance* of a comprehensive approach incorporating the full range of judicial and non-judicial measures, including, among others, individual prosecutions, reparations, truth-seeking, institutional reform, vetting of public employees and officials, or an appropriately conceived combination thereof [...]’. See United Nations Human Rights Council, ‘Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence’ (2011) UN Doc A/HRC/RES/18/7, p. 2.

<sup>41</sup> Zunino (n 15).

<sup>42</sup> *ibid.*

<sup>43</sup> Boraine (n 8); Pablo De Greiff, ‘Theorizing Transitional Justice’ (n 8).

<sup>44</sup> Pablo De Greiff, ‘On Making the Invisible Visible: The Role of Cultural Interventions in Transitional Justice Processes’ in Clara Ramirez-Barat (ed), *Transitional Justice, Culture and Society: Beyond Outreach* (International Center for Transitional Justice) 13.

<sup>45</sup> See, Special Rapporteur on the promotion of truth, justice, and reparation and guarantees of non-recurrence, ‘Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice.’ (9 July 2020) UN Doc A/HRC/45/45, para 99.

Nevertheless, understanding transitional justice and its relationship with the norm of non-recurrence requires reconceptualising transitional justice as more than its pillars. As per Zunino's genealogy, transitional justice has also been defined through self-referencing<sup>46</sup> and is therefore not only bound by its mechanisms and situations but also by its own characteristics. In its early stages, that TJ is legalistic and technocratic have appeared as its core characteristics. Soon after, the legal and institutional biases in defining transitional justice have been challenged myriad times as limited and privileging legal aspects to addressing the past over, for example, social and cultural interventions. Already in 2006, Roht-Arriaza's intervention differentiated between broad and narrow definitions of TJ. If Teitel's definition is classified as narrow then, broadly defined, transitional justice includes 'anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations' incorporating mechanisms such as trials, institutions such as museums, and measures of reform in state institutions and schools.<sup>47</sup> More recent scholarship on *transformative* transitional justice calls for investigations of processes over outcomes, emphasises local ownership and bottom-up initiatives for change and prioritises agency as a means of altering structural issues such as inequality and structural violence.<sup>48</sup> The thin theory of such transformative transitional justice suggests that transitional justice must be expanded beyond paradigmatic outcome-oriented legal approaches to allow for more structural changes to take place and prevent violence from reoccurring in transitional societies.<sup>49</sup>

These developments with respect of the fieldhood of transitional justice have created new defining characteristics of transitional justice as an ideational structure. Essentially, while there is an agreement that transitional justice is necessary at the level of global policy, at the level of research, there is no consensus on how these four/five pillars of TJ as either outcome-oriented projects or long-term processes operate or should operate in practice. It has been claimed both that they ought to be parts of a whole and that this is politically impossible seeing how states face

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<sup>46</sup> Zunino (n 15).

<sup>47</sup> Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza (ed), *Transitional Justice in the Twenty-First Century. Beyond Truth and Justice* (Cambridge University Press 2006) 2.

<sup>48</sup> Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *International Journal of Transitional Justice* 339; Paul Gready and Simon Robins, 'Transitional Justice and Theories of Change: Towards Evaluation as Understanding' (2020) 14 *International Journal of Transitional Justice* 280.

<sup>49</sup> Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *International Journal of Transitional Justice* 339.

different policy choices and possibilities in which the mechanisms found within these pillars are traded against each other.<sup>50</sup> This lack of consensus defines transitional justice as a structure. Consequently, the defining characteristic of the transitional justice-specific context in which guarantees of non-recurrence are conceptualised and potentially practiced is that of *malleability*. Inspired by Jamie Rowen’s work on truth-seeking in transitional justice, I describe TJ as malleable,<sup>51</sup> both universal and context-specific, both flexible and precise, both outcome- and process-oriented, all the while being treated as an inevitable response to mass human rights violations. It is in this inherently contested and contradicting space where law dominates and is simultaneously rejected, that my thesis sets out to investigate practitioners’ understandings and practices of GNRs and the indisputable goal of ensuring ‘Never Again.’

As simultaneously a model of practice and a field,<sup>52</sup> transitional justice has certain progressive goals, such as non-recurrence, that both its mechanisms and more transformative processes are said to be capable of achieving. Rather than being a singular norm, transitional justice is thus a *collection of norms*, that is, standards of “appropriate behaviour” for actors in certain circumstances.<sup>53</sup> The norms found in such a collection are mainly prescriptive, as they prescribe or evaluate any resulting actions for their oughtness and appropriateness.<sup>54</sup> From the UN Secretary-General definition above, for instance, one can deduct that these progressive goals include ensuring accountability, serving justice and achieving reconciliation. De Greiff theorises that the mechanisms found within the initial four-pillar structure of TJ are not randomly selected, but they rather share four goals of TJ: providing recognition to victims and fostering civic trust as two mediate goals, and contributing to reconciliation and democratisation, as two final goals.<sup>55</sup> This tendency towards determinacy, predictability and set outcomes arises out of the field’s initial positioning as a subset of international law and an essentially legalistic enterprise. The

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<sup>50</sup> For details on these two positions, see De Greiff, ‘Theorizing Transitional Justice’ (n 8) 31–32.

<sup>51</sup> Jamie Rebecca Rowen, *Searching for Truth in the Transitional Justice Movement* (Cambridge University Press 2017); Rowen, “‘We Don’t Believe in Transitional Justice:’ Peace and the Politics of Legal Ideas in Colombia” (n 35).

<sup>52</sup> Miller conceptualises transitional justice as a ‘virtue field’ and further defines virtue fields ‘as enterprises organised explicitly around social justice and progress objectives achieved through specific practices, consolidated and professionalised in the name of humanity.’ See Zinaida Miller, ‘Embedded Ambivalence: Ungoverning Global Justice’ (2020) 11 *Transnational Legal Theory* 353, 355.

<sup>53</sup> Finnemore and Sikkink (n 3) 891.

<sup>54</sup> *ibid.*

<sup>55</sup> Pablo De Greiff, ‘Theorizing Transitional Justice’ (n 8).

attachment to legalism, as process where law “regulates behaviour” while also shaping ‘political relations, ... language [and] ...the way we think’<sup>56</sup> has brought certain values into TJ that have subsequently been transformed into its inherent characteristics. In particular, the core values stemming from the dominant narrow legalistic approach to transitional justice as an emerging field include ‘objectivity, certainty, uniformity, universality, rationality’ and state-centrism.<sup>57</sup>

These values of predictability, objectivity, and certainty, that stem from legalistic thinking, have been particularly valued in the context of turbulent political transitions across contexts where the rule of law and security have been prioritised. Having been transferred to courts and trials as the most representative institutions of law, as well as to other institutions of transitional justice such as truth commissions, these characteristics set transitional justice as an entity well suited to ensure accountability and legitimacy of the new state or regime.<sup>58</sup>

Consequently, despite widespread uncertainties about the usefulness and effects of TJ mechanisms and tools, scholars and practitioners alike remain certain about the objectives of this field, the most representative of which is ensuring non-recurrence. As Miller contends in a 2020 article, TJ is organised around specific social justice goals where practitioners understand the limits of what she calls the “enterprise” but continue to portray it as the only or at least necessary response to violence.<sup>59</sup> To further quote Miller,

[o]ne of the greatest successes of transitional justice as a governing enterprise was to manifest increasing uniformity, predictability, and expertise while at the same time maintaining the fundamental need for difference, contingency and participation.<sup>60</sup>

Accordingly, TJ scholars and proponents have conceived of TJ as both global and local, rule-based and flexible. The governance of the global enterprise of transitional justice, as per Miller, is therefore characterised by embedded ambivalence. This ambiguity of the enterprise accounts for its rapid success allowing different actors to interpret core ideas differently, while

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<sup>56</sup> Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34 *Journal of Law and Society* 411, 416.

<sup>57</sup> *ibid* 417.

<sup>58</sup> *ibid*.

<sup>59</sup> Miller (n 52) 355.

<sup>60</sup> *ibid* 371.

faithful to the progressive goals of TJ.<sup>61</sup> To be more precise, transitional justice being malleable has allowed different actors to utilise it in contradictory ways.<sup>62</sup> As Subotić posits, the impression from practice is that transitional justice is experienced and practised in different, “even unrecognisable” ways on the ground than it is assumed in academic and international policy circles.<sup>63</sup>

The malleability is not only a defining characteristic of transitional justice but also a strategy that allows actors to promote ideas differently to distinct beneficiaries.<sup>64</sup> For instance, Rowen argues that that the global transitional justice advocates such as the International Center for Transitional Justice (ICTJ) keep the individual pillars of TJ (in their terms grouped as prosecutions, truth recovery, reparations and institutional reform) broadly defined and malleable enough to be utilised across different contexts and settings.<sup>65</sup> In other words, international TJ policy retains the UN’s categorisation of TJ as a four/five-pillar model but keeps the content of some of these pillars vague, if necessary, amendable, while remaining certain about the objectives and thus normative expectations of the practices enshrined in these distinct pillars. Consequently, any domestic applications, rejections and amendments of GNRs, as per international law and policy ought to be observed in this competing climate with agents stood at the very centre, examining how such actors “appropriate” transitional justice with all its structural properties.<sup>66</sup> This is what re-conceptualising TJ as an ideational structure allows this thesis to do. I provide further theoretical underpinnings for this conceptualisation in Chapter 3, and further juxtapose my conceptualisation against other similar theorising on TJ as a ‘global project’ and ‘enterprise.’

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<sup>61</sup> Schmidt and Thatcher for example argue that the adaptability and mutability of neoliberalism are key reasons for its global success. See Vivien A. Schmidt and Mark Thatcher, *Resilient Liberalism in Europe’s Political Economy* (Cambridge University Press 2013).

<sup>62</sup> Rowen, “‘We Don’t Believe in Transitional Justice:’ Peace and the Politics of Legal Ideas in Colombia” (n 35) 640.

<sup>63</sup> Subotić, ‘Truth, Justice, and Reconciliation on the Ground’ (n 22) 362; Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Cornell University Press 2009).

<sup>64</sup> Rowen’s findings suggest that truth commissions are subject to malleable understandings and therefore often met with competing claims about their scope, operation, and utility. See Rowen, *Searching for Truth in the Transitional Justice Movement* (n 51).

<sup>65</sup> *ibid.*

<sup>66</sup> Rowen, “‘We Don’t Believe in Transitional Justice:’ Peace and the Politics of Legal Ideas in Colombia” (n 35) 623.

Overall, after several decades of burgeoning, often conflicting conceptualisation of the field of transitional justice, the ‘Never Again’ promise that drove the early ‘justice in transition’ activism continues to frame the malleable and global transitional justice. Ensuring non-recurrence of violations has generally not been disputed as an organising goal of transitional justice practices and possibly, it is said, remains ‘the most important aim of’ TJ.<sup>67</sup> As a consequence, even at the level of international policy there is an understanding that transitional justice – however it is defined – ‘can contribute to prevention’ of recurrence.<sup>68</sup> Unlike, for instance, reconciliation which has been a questionable goal of transitional justice,<sup>69</sup> ensuring non-recurrence is arguably more tangible. If an intervention aims to ensure non-repetition, it is quite clear where it is heading – to a society free from mass violations and injustice, and this is a state of affairs all transitional justice enthusiasts are on board with. What has been unknown and often contested in transitional justice is what the road that leads this state looks like. As I will demonstrate in Chapter 3, scholars of TJ have proposed that each of the pillars of TJ and the tools contained within them have the potential and capacity to fulfil the progressive goal of non-recurrence, without empirically investigating what states, or other potential duty bearers exercise (or not), why they do so and how transitional justice itself influences the contextualisation of the norm in domestic settings.

This lack of knowledge on guarantees of non-recurrence is surprising as the contestations that define the malleability of transitional justice inherently imply that the goals of TJ, such as ensuring non-recurrence are not necessarily understood and practiced in coherent manners. Such assertion is inseparable from the predictability and certainty of the field and positioning of transitional justice as an ideational structure that defines how the past should be dealt with and the objective of non-recurrence should be met. The two are in tension and transitional justice embodies a collusion of seemingly irreconcilable ways of understanding and methods of

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<sup>67</sup> Michelle D Bonner, ‘“Never Again”: Transitional Justice and Persistent Police Violence in Argentina’ (2014) 8 *International Journal of Transitional Justice* 235, 237.

<sup>68</sup> See, for example, a recent report by the ICTJ which outlines four potential contributions of transitional justice processes to prevention, based on five country case studies. Roger Duthie, *Transitional Justice and Prevention. Summary Findings from Five Country Case Studies* (International Center for Transitional Justice 2021) 1.

<sup>69</sup> See, for instance, Weinstein who holds that the ideas of reconciliation and ‘closure’ that should come with it are too ‘elusive’ with no clarity regarding how they are to be achieved and what they mean for different people. Harvey M Weinstein, ‘Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief’ (2011) 5 *International Journal of Transitional Justice* 1, 2.

practicing the tenets of TJ. When explaining the origin of the norm of non-recurrence in transitional justice and its treatment in the literature in Chapters 2 and 3, I will show that GNRs are too conceptually equated with the overall pillar of ‘institutional reform’, on the one hand, staying faithful to their legal origins, while, on the other hand, they are promoted as a flexible, ambiguous, yet potent and transformative tool for solving many of TJ’s existential problems. In this thesis, I do not seek to resolve the tension, but investigate and explain how it operates in practice. This malleable, flexible, fluid, unsettled, and easily appropriated yet universal, normative, predictable, objective, ideational transitional justice forms the context of the following conceptual and empirical elements of this thesis. While this malleability of transitional justice could be interpreted both as a strength and a weakness of transitional justice, both useful and problematic, depending on how it affects TJ goals,<sup>70</sup> such effects ought to be effectively examined through investigation of the practices of agents of transitional justice in a specific setting.

### 1.3. Research questions and objectives

This thesis develops around two interrelated research questions. I ask, first and foremost, *how are guarantees of non-recurrence understood and practised by transitional justice actors in Bosnia and Herzegovina?* In this thesis, I understand transitional justice as projects, practices, and processes done through or towards (criminal) justice, truth recovery, reparations, reform of institutions, and memorialisation.<sup>71</sup> Here, I am interested in applications, adjustments and operations of the international norm of non-recurrence that are specific for BiH and, in that sense, (re)contextualised. The investigated ‘understandings’ include conceptualisations of the content (what are these guarantees?) and characteristics (what are they for?) of GNRs in BiH. ‘Practices’ refer to any activity done by an actor for the purpose of transforming the *status quo* in order to, in their own view, contribute to the non-recurrence of mass violence in BiH. I call these understandings and practices ‘domestic’ in reference to where they are conducted (i.e., in Bosnia and Herzegovina, as opposed to internationally). As I uncover these domestic conceptualisations

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<sup>70</sup> Rowen, *Searching for Truth in the Transitional Justice Movement* (n 51) 58.

<sup>71</sup> Such a definition is offered by way of limiting the scope of this thesis, and not out of an aspiration to limit the scope of the field. In fact, TJ research keeps expanding its toolbox to include, e.g., artistic expressions. Such expansions have not been explicitly researched in this thesis although some of the researched actors run or otherwise support art projects.

and practices based on both desk and field research on 51 institutions, organisations and mechanisms of transitional justice, I also ask, *how does transitional justice as an ideational structure influence these domestic conceptualisations and practices in BiH?* My driving force behind this question is an exploration of how and when the ideas about the organisation and implementation of the core norms of TJ make certain domestic interpretations and practices possible and others silenced or obstructed.

By responding to these research questions, this thesis aims to contribute to the ongoing conceptualisation of guarantees of non-recurrence in transitional justice research and practice and provide new knowledge into how transitional justice practitioners construct, adjust, or reject norms and ideas enshrined into the structure of transitional justice. The first objective of the thesis is to examine the understandings of the norm of GNRs by a variety of institutions, organisations, and mechanisms working within transitional justice frameworks or in different areas treated as TJ pillars in the scholarship and policy. The second objective is to explore these practitioners' practices of GNRs in Bosnia and Herzegovina, and what they jointly tell us about GNRs in this country. The final objective is to position these collected manifestations of agency believed to contribute to non-recurrence *vis-à-vis* the broader ideational structure of transitional justice and discuss the conditions shaping their interactions and influencing these context-specific understandings and practices. The study is empirical and context-sensitive and therefore, it presents contextualised understandings and practice (and lack thereof) of guarantees of non-recurrence. Nevertheless, due to its design and theoretical foundations, once the objectives are fulfilled, the study will provide new insights into some of the existential questions about transitional justice and, hopefully, open new ones. In particular, by achieving the overall aim and objectives of the study, I aspire to address transitional justice's key characteristics, their relationships with the objective of ensuring non-recurrence, and how they operate and evolve in practice.

#### 1.4. Significance of the thesis

The concept 'guarantees of non-recurrence,' now used to describe actions contributing to non-repetition of violations in TJ contexts, derives from international law. At the level of international law, states and the institutions they mandate to regulate their relations, have created an exceptional obligation to ensure that a certain violation committed in the past will not be

repeated. In inter-state relations, the violations that trigger such obligation are of different severity and character. However, in the context where transitional justice operates, such violations are typically of ‘gross’ character, often committed by state organs toward the local population on a mass scale, including enforced disappearances, ethnic cleansing, and even genocide. These grave violations feed a sense of urgency and monumental importance into the obligation to ensure that they are not repeated. In international law, as it will be explored in detail in this thesis, the obligation rests on the state to implement a selection of suggested measures that are believed, according to the law, to alter the *status quo ante* existing prior to the violation(s) and therefore diminish the likelihood of the same conditions leading to the same kind of violations. To study guarantees of non-recurrence *legally* would thus mean to see how this obligation, where applicable, has been fulfilled and how the suggested measures have been implemented, and why they have not. In modern legal positivism, by far the most dominant approach to legal theory, law is autonomous in its own interpretations of the world, determining what the appropriate knowledge about, for example, GNRs, is for legal purposes.<sup>72</sup> Consequently, in much of legal research, such positivist thinking seeks to evaluate legislation through causal links between the text and the outcome with no consideration of the social, political and economic contexts in which legal norms exist and that shape it.

On the contrary, this thesis asserts that GNRs are a social as well as a legal norm. International law on non-recurrence, while an integral part of this study, does not exist only in texts and in isolation from morality and social productions and reproductions. To study guarantees of non-recurrence *sociologically* instead means to understand non-recurrence as socially produced and reproduced, and see law and society as mutually constituting, where the law shapes the social while at the same time receiving meaning and authority from it.<sup>73</sup> In its totality, such research examines ‘how law, legal phenomena and/or phenomena affected by law and legal system occur in the world, interact with each other and impact upon those who are

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<sup>72</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press 2005).

<sup>73</sup> Roger Cotterrell, ‘Law in Social Theory and Social Theory in the Study of Law’ in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishers 2004).

touched by them.<sup>74</sup> By way of example, international criminal tribunals, a known mechanism of TJ, have a social-communicative function *vis-à-vis* societies in transition as they transform local grievances of these societies into the internationally agreed-upon values of violence and justice.<sup>75</sup> They cannot avoid doing so as the nature of the crimes they adjudicate on, such as genocide, necessitates examination of “facts” of historical significance that will determine the context in which an act took place and further potentially qualify the act as genocide.<sup>76</sup> This research, therefore, seeks to explore how the international law on non-recurrence and transitional justice have potentially shaped social understandings of what actions lead to non-recurrence and influenced individual and institutional integration of the well-known promise of ‘Never Again.’ Above all, it seeks to understand and investigate the norm of non-recurrence as potentially having an existence completely separate, or only marginally linked to law and its institutions, while still mindful of the power of legal ideas ‘in controlling and shaping social life.’<sup>77</sup> By understanding law as an entirely social phenomenon, this thesis holds that GNRs are only important as long they exist in society,<sup>78</sup> or in this case, in Bosnia and Herzegovina. At this point in the thesis, I offer no concrete definition of guarantees of non-recurrence because such definition is debatable in both international law and transitional justice literature. In absence of a ready-made definition of GNRs, conceptualising GNRs is something the thesis grapples with in all forthcoming chapters.

Researching guarantees of non-recurrence, as a legal and social norm, in Bosnia and Herzegovina specifically, matters for at least two sets of reasons. First, although on the outside BiH might be considered an ‘over-researched’ context no longer of interest for the communities of donors or academics having celebrated 25 years of peace, clear assurances and guarantees of non-recurrence of inter-ethnic violence in BiH do not exist. Ever since the four-year-long

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<sup>74</sup> Lisa Webley, ‘The Why and How to of Conducting a Socio-Legal Empirical Research Project’ in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019) 59.

<sup>75</sup> Marina Aksenova, ‘The Role of International Criminal Tribunals in Shaping the Historical Accounts of Genocide’ in Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds), *Law and Memory. Towards Legal Governance of History* (Cambridge University Press 2017).

<sup>76</sup> *ibid* 55.

<sup>77</sup> Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Clarendon 1995) 69.

<sup>78</sup> Roger Cotterrell, ‘Why Must Legal Ideas Be Interpreted Sociologically?’ (1998) 25 *Journal of Law and Society* 171, 183.

conflict ended in 1995, as a federation, BiH is an ethnically divided society by design and the narratives of ethnonationalism persist.<sup>79</sup> Political elites' threats of separation of the federation are a commonplace, causing public fear about resurgence of conflict.<sup>80</sup> The narrative of 'Never Again' is a popular one; however, it seems to be always directed towards one specific ethnic group; in other words, political elites typically cry that never again should crimes happen to Bosniaks *or* Serbs *or* Croats, one of the three core ethnicities. Such a reality serves to worsen the inter-ethnic tensions in a country that is already considered fragile<sup>81</sup> with rather ineffective state-building processes.<sup>82</sup> Whilst scholars may have exhausted the pool of knowledge about the emergence of the conflict and the events that happened during it, due to the current social and political climate, there seems to be much more to learn about what is needed to ensure its non-recurrence and how these needs have changed over the years and in relation to the existing structure of TJ. As I will demonstrate in Chapter 4, BiH makes an instrumental case that facilitates my investigation of GNRs in transitional justice due to its 25-year-long experience in testing out distinct ideas about what TJ is and how it looks like and developing a variety of TJ mechanisms, projects, and institutions. The emphasis of my research, however, is primarily on GNRs and the ideational structure of TJ as opposed to the case of BiH itself. On a broader level, empirically researching guarantees of non-recurrence in transitional justice settings is significant for its potential to bring in new evidence that helps illuminate and theorise GNRs in future transitional justice interventions. Importantly, addressing the tension that exists between GNRs as a legal and social norm and further exploring domestic realities of non-recurrence produces new knowledge into the realities of 'Never Again' years after the conflict. In that sense, it can prevent precious policy resources from being wasted or misplaced, TJ projects and processes paused or rejected, and ultimately the objective of non-recurrence being elusive for not adequately reflecting the complexities of non-recurrence on the ground. Finally, the second set of reasons for investigating GNRs in BiH is personal. My Serbian upbringing, past work and

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<sup>79</sup> Johanna Mannergren Selimovic, 'Challenges of Postconflict Coexistence: Narrating Truth and Justice in a Bosnian Town' (2015) 36 *Political Psychology* 231.

<sup>80</sup> For a recent episode, see Mersiha Gadzo, 'Disputed memo on partitioning Bosnia sparks fears of violence' (*AlJazeera*, 22 April 2021) <https://www.aljazeera.com/news/2021/4/22/leaked-memo-on-partition-of-bosnia-could-spark-violence> accessed 16 August 2021.

<sup>81</sup> Heleen Touquet, 'Multi-Ethnic Parties in Bosnia-Herzegovina: Naša Stranka and the Paradoxes of Postethnic Politics: Multi-Ethnic Parties in Bosnia-Herzegovina' (2011) 11 *Studies in Ethnicity and Nationalism* 451.

<sup>82</sup> Dženeta Karabegović, 'Aiming for Transitional Justice? Diaspora Mobilisation for Youth and Education in Bosnia and Herzegovina' (2018) 44 *Journal of Ethnic and Migration Studies* 1374.

educational experience in BiH, and the interconnectedness of politics and conflict between these two former Yugoslav republics, now separate countries,<sup>83</sup> make fulfilling the ‘Never Again’ promise in this context matter most.

### 1.5. Contributions to knowledge

My thesis is a unique and original exploration of guarantees of non-recurrence in transitional justice practice, and the tensions that exist between GNRs as a set of tools and objective of research, policy and praxis, and as both a legal and a social norm of which transitional justice has so fervently claimed ownership. The knowledge contributions of this thesis are numerous. This thesis responds to the overwhelming under-theorisation of guarantees of non-recurrence in transitional justice and is the first English-language doctoral thesis of this design asking questions about domestic conceptualisations and applications beyond international law and in relation to the TJ structure. I offer detailed accounts of the content and characteristics given to this norm of non-recurrence in a domestic context by practitioners working in governmental, non-governmental, state and international sectors, positioning these findings in both international law and transitional justice scholarship. Consequently, I propose a new classification of guarantees of non-recurrence as *immediate* and *gradual*, distinct yet inseparable. I connect and visualise the content and characteristics given to GNRs domestically into what I call a ‘cycle of guarantees of non-recurrence’. I argue that GNRs require a variety of connected short- and long-term actions and processes that are linked, interdependent and complementing one another, and not a set of isolated activities. My thesis goes beyond merely discovering what content and characteristics are given to this norm to examine these contextualised understandings within the broader structure of transitional justice. I show multiple ways in which transitional justice as an ideational structure generates as well as constrains practitioners’ agency relating to putting the contextualised guarantees of non-recurrence to practice. Ultimately, I demonstrate that while the normative flexibility awarded to GNRs in and by transitional justice opens space for context-specific applications of GNRs by various practitioners in BiH, the tension between TJ’s malleability and its legalistic roots and strong preference given to criminal trials as truth-

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<sup>83</sup> See Section 4.3. on the involvement of former Yugoslavia (now Serbia and Montenegro, separately) in the conflict in BiH.

and not only justice-seeking mechanism creates numerous practical obstacles for practising guarantees of non-recurrence, as they are understood in Bosnia and Herzegovina. In doing so, I both expand on and complicate previous scarce theoretical prepositions about the place and role of guarantees of non-recurrence in transitional justice interventions, identifying two core conditions that shape the context-specific interplay between the structure of TJ and practitioners' agency producing guarantees of non-recurrence in Bosnia and Herzegovina.

## 1.6. Thesis outline

This thesis consists of seven chapters and a conclusion. The first three chapters form the conceptual foundation for the empirical elements of the thesis. The present chapter has served as an introduction to the research topic, key research questions and objectives, and the reasoning behind studying GNRs in transitional justice in Bosnia and Herzegovina. In this chapter, I have elaborated on the relationship between 'Never Again' and transitional justice and sought to present competing characteristics and scopes of transitional justice that have developed since its origins. To that end, I have defined the transitional justice-specific context in which GNRs are conceptualised and practiced as malleable, both outcome- and process-oriented, fixed and flexible, rooted in legalism and seeking to expand beyond it. Finally, I have also outlined the core contributions to knowledge that this thesis brings into the transitional justice literature.

Chapter 2 offers the origin story of guarantees of non-recurrence in transitional justice. Treating GNRs as both a legal and a social norm, I provide a review of the history of the norm in public international law and international human rights law as the two most relevant regimes for GNRs in transitional justice. The focus of such review is on the norm's exceptional character and ambiguous content in public international law, contrasted with an understanding in international human rights law that GNRs largely include measures of legal and institutional reform. I show that this specific content of GNRs in international human rights law has clear origins in 'justice in transitions' in Latin America and is particularly inspired by the work of the Chilean truth commission. In that regard, transitional justice is responsible for the transformation of an ambiguous, barely emergent norm of non-recurrence into the often decontextualised equation of GNRs with a set of measures of institutional reform states emerging out of conflict or authoritarianism may have the obligation to implement. In this chapter, however, I identify further normative expansions of GNRs conducted by the UN Special Rapporteur whereby GNRs

are perceived as qualitatively distinct in transitional justice than in international law. More precisely, GNRs are conceptualised as ‘a function’ inclusive of multiple measures at the level of state, civil society and cultural and personal dispositions, going beyond legal and institutional reform. I argue that this suggests there is space to re-contextualise the content of GNRs in domestic arenas. The review of GNRs in public international law, human rights law and TJ thus suggests that the content of GNRs remains flexible and could be utilised differently across TJ contexts.

In Chapter 3, I set out the theoretical underpinnings of the thesis and explain how the key premises of structuration theory inform my research. I discuss how transitional justice operates as an ideational structure, shaping which actions take place in domestic settings and how. Since transitional justice is referential to its objects, I proceed with a literature review that explains how each of the five pillars of TJ is underpinned by a set of ideas about how non-recurrence is to be achieved. The review will show that while certain TJ mechanisms are supposed to have strong links to non-recurrence, they are also all almost equally disputed for their potential to trigger divisive practices harmful to non-recurrence. I proceed with a review of the literature that treats GNRs as a pillar composed of a set of practices, frequently in compliance with the measures outlined in IHRL. The review shows a trend to theorise GNRs as a ‘bridge’ between either different mechanisms of TJ or the paradigmatic legalistic approaches and the more recent transformative approaches to TJ. Subsequently, two problems with the reviewed literature are identified: firstly, the literature reflects a conceptual tension between GNRs as a pillar and non-recurrence as the overall objective; and, secondly, the research is conducted from structure-oriented approaches, neglecting the role of agency and actors in co-constructing the structure and shaping the knowledge of social phenomena such as non-recurrence. To that end, I complete the chapter by reviewing selected scholarly works that adopt an actor-oriented approach to various TJ matters and analyses actors’ capacity to shape international norms to fit domestic realities. I conclude the chapter with a recap of the major gaps in the literature noted in the review and a claim supporting both the urgency and importance of the thesis and its original design.

Chapter 4 bridges the first part of the thesis with the subsequent empirical chapters by explaining how the set research questions were studied and detailing the processes of designing the research and collecting and analysing the data. In it, I elaborate on my methodological

approaches whereby I explain that the thesis adopts a single country case study as its research design. In order to provide the reader with sufficient information to comprehend the thesis' findings in the unique BiH context, I offer a brief discussion on the conflict in BiH, with all the caveats regarding the sensitive terminology I employ in this case. This discussion is followed by a rather detailed 'skeleton' of transitional justice in BiH between 1995 and 2021, which mirrors the same five-pillar outline as my literature review in Chapter 3. These distinct institutions, mechanisms, organisations and the actors who inhibit them or support their work form my 'field', the setting in which I study guarantees of non-recurrence. The remainder of the chapter explains the process of data collection through desk and field research, details the interview-led methodology and provides further insights into the chosen approach to thematic data analysis. Finally, to manifest the validity and reliability of this research, I elaborate on my reflexivity and both the strengths and limitations of the research design. This chapter is complemented by four appendices: a table outlining all desk-researched institutions and organisations and interviewed practitioners (Appendix 1); ethical approval received by Durham University (Appendix 2); a sample of core interview questions (Appendix 3); and, a list of major nodes created in the NVivo software towards my thematic analysis (Appendix 4).

The first of two findings chapters, Chapter 5, is concerned with domestic conceptualisations of guarantees of non-recurrence in Bosnia and Herzegovina. I investigate how the practitioners understand the flexible norm of non-recurrence, where they align with international law and how they depart from it and why. Essentially, the chapter presents the ideas practitioners have about the contextualised content and characteristics of GNRs in BiH. I suggest that 'texts' alone cannot adequately capture the understandings of GNRs *over time* and as a social as well as legal norm, and that, textually, practitioners experience greater pressures to align with the international legal norm of GNRs than in everyday practice. Using time as an interpretative device, I argue that the narrated practitioners' understandings show that GNRs can be both immediate and gradual. While immediate GNRs generally concern institutional reform and specifically transparent and stringent vetting, as per IHRL, gradual guarantees require long-term engagements, all of which are interlinked through the idea of 'the knowledge' of the conflict. This knowledge, consisting of figures, names, and events, needs to be authoritatively established by way of truth recovery, transferred to different spheres of the society through education, and furthermore protected through legislation as well as bottom-up and individual

processes of coming to terms with the past. The chapter also explores how the practitioners perceive the notion of ‘responsibility’ to ensure non-recurrence. I argue that practitioners assign responsibility to both the state and the international community to create the necessary conditions for the practices of gradual GNRs. Observing all the presented findings together, I argue that immediate and gradual guarantees GNRs, and distinct perceptions of responsibility for non-recurrence, are linked together in a ‘cycle of GNRs’ and are therefore contingent on one another and need to be understood as processes and not quantifiable, definite projects.

Chapter 6 follows up on the contextualised understandings of GNRs to investigate how the practitioners put such conceptualisations to practice and what happens when they do not. I argue that the case of BiH shows that transitional justice as an ideational structure both generates and constrains practitioners’ exercises of the contextualised cycle of GNRs. In exploring the manifested practices of contextualised GNRs, I suggest that practitioners largely undertake two kinds of practices: fact-finding, for the sake of producing the ‘knowledge’ that is at the centre of the cycle of GNRs, and educational activities, for the purposes of transferring such knowledge. These applications of the contextualised context of GNRs, however, tend to be referential to the objects of the criminal justice pillar and particularly the idea that courts in transition have history-making and didactic qualities. While most fact-finding and education practices incorporate judicially established records as the (or one of) authoritative sources of knowledge, very rarely, these facts are challenged, and parallel fact-finding is conducted. Simultaneously, practitioners tend to reject the idea that truth and reconciliation commissions are adequate fact-finding bodies that could effectively contribute to non-recurrence. I note that these practices of contextualised GNRs are usually driven by the civil society and the non-governmental sector and go on to explore the instances where there is no engagement with GNRs among civil servants, jurists and members of the international community. I argue that the malleability of transitional justice enables distinct, sometimes competing understandings of ‘transitional justice,’ inclusive of identifying TJ as ‘logically criminal justice.’ These understandings, operating in tension with TJ competing characteristic as legalistic, hamper the prospects of establishing a coordinated state-wide strategy that would support the cycle of GNRs.

Finally, Chapter 7 serves to discuss the two findings chapters together and in relation to the conceptual, theoretical and legal foundations established in the first three chapters. Having

introduced the context-specific content and characteristic of GNRs in BiH, manifestations of practice and instances where such practice is absent, I explore what the case of BiH tells us about domestic engagements with the norm of non-recurrence and the structure/agency interplay that affects how GNRs come to life in this context. This chapter is organised around three core arguments. Firstly, I assert that the practitioners possess and exercise the power to (re)contextualise the norm of non-recurrence and develop their own BiH-specific meanings of what actions are necessary for non-recurrence and how they should operate in the given context. This (re)contextualisation of meaning is sometimes guided by international legal frameworks and TJ policy but more frequently, tends to expand beyond the guidance given by existing frameworks and can influence the positioning of GNRs within TJ. Secondly, I argue that transitional justice in many ways shapes both the practices of contextualised GNRs as well as some of the ideas initially considered as GNRs by the practitioners. Such a situation arises mainly through the hierarchically superior status given to the anti-impunity norm in transitional justice internationally, and the ‘holy’ status of the ICTY, domestically. Lastly, I contend that this specific structure/agency interplay results in contextualised GNRs being poorly practiced in Bosnia and Herzegovina. While civil society actors continue to drive the necessary transformations of the *status quo*, state and international actors remain constrained by the policy choices made during the, what I call, transitional moment in BiH as well as by TJ’s overall desire to remain flexible as well as predictable. More holistic, multi-actor, multi-sector, interconnected and long-term approaches to transitional justice in BiH remain an impossibility due to which the cycle of GNRs remains conceptual and only exceptionally material.

## **CHAPTER 2: THE ORIGINS | THE DEVELOPMENT AND TRANSFORMATION OF THE NORM OF NON-RECURRENCE IN AND BY TRANSITIONAL JUSTICE<sup>84</sup>**

### **2.1. Introduction**

The recorded story of guarantees of non-recurrence began at least two centuries before that of transitional justice, with first recorded practices of GNRs dating as early as the 18<sup>th</sup> century. For much of this history, the international law's sole focus with regards to GNRs was on states' actions towards other states and assurances and guarantees of non-repetition were offered as a consequence of internationally wrongful acts that states had committed against one another. Before codification of state obligation to guarantee non-repetition of an offending act, numerous examples of state practice point to a wide acceptance of injured states' right to demand these guarantees. Extensive diplomatic practice between the 18<sup>th</sup> and the mid-20<sup>th</sup> century suggests that ensuring non-recurrence was demanded and delivered as an exceptional legal consequence of an internationally wrongful act by way of a customary norm.<sup>85</sup> This centuries-long practice, as I will show in this chapter, has been co-opted and subsequently transformed in international human rights law as well as in and by transitional justice.

This chapter introduces GNRs 'origin story' in transitional justice and provides a conceptual and legal foundation for the thesis. Throughout the chapter, I stress the competing understandings of GNRs across legal regimes and TJ and demonstrate that the UN agencies in particular have been progressive in affirming GNRs as a norm with differentiating non-exceptional and context-specific characteristics. I argue that it is transitional justice that inspired the content/contextual expansions of GNRs in international human rights law, substantially transforming the previously ambiguous and exceptional norm. The following core questions in

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<sup>84</sup> A shorter and edited version of this chapter has been published by the author in the *International Journal of Transitional Justice* in 2021 under the title 'The Law of 'Never Again': Transitional justice and transformation of the norm of non-recurrence.'

<sup>85</sup> Gaetano Arangio-Ruiz, 'Second Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (1989) UN Doc A/CN.4/425 and Add. 1 and Corr. 1.

relation to GNRs in international law and TJ are explored: what is, as Pablo de Greiff phrases, “the offer,”<sup>86</sup> what content do GNRs entail in international law and policy? In which contexts are GNRs applicable? Are GNRs the same in transitional justice as in international law? The answers are reached by way of doctrinal and historical reviews; in other words, this chapter explores what international law and its various institutions say about GNRs and how they come to say that. To track the development and transformation of the norm of non-recurrence, I reviewed the treatment of the norm in two different legal regimes and in transitional justice, which was complemented by a historical reading of some of the key developments of ‘justice in transition’ in Latin America and an interview – of oral history kind – with Professor Theo van Boven whose work is woven throughout this chapter.

Consequently, this chapter is dedicated to an overview of guarantees of non-recurrence across different normative regimes. It is underlined by discussions on coherence and diversity in international law as well as the ‘new law’ of transitional justice whereby different international legal regimes merge to seemingly resolve individual regime’s gaps and ambiguities.<sup>87</sup> In Section 2.2., I provide an analysis of GNRs in public international law, namely as conceptualised and applied by the International Court of Justice (ICJ) and the International Law Commission (ILC). In Section 2.3., GNRs will be examined in international human rights law, primarily the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles) as the key document codifying GNRs as a type of reparations. Next, GNRs are placed within transitional justice. In Section 2.4., I seek to understand the conceptual origins of GNRs in transitional justice as well as the impact the early TJ developments have had on the transformation of the norm of non-recurrence in human rights law. In Section 2.5., I then link these conceptual origins to the work of the UN, particularly the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence that both enshrines and shapes the normatively distinct content of GNRs in TJ than in international law. In each section, the chapter addresses some of the major critiques of how

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<sup>86</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff (7 Sept 2015) UN Doc A/HRC/30/42.

<sup>87</sup> Bell (n 25).

GNRs are defined in legal terms, mainly pointing to the ambiguities regarding the scope and definition of the norm.

## 2.2. Public International Law

While it is unclear when the term ‘guarantees of non-recurrence’ was used for the very first time in inter-state relations, documented state practice on GNRs dates to the early 18<sup>th</sup> century. In 1707, the Russian Ambassador to the UK, Andrey Matveyev was arrested by his creditors, mishandled and placed in prison in accordance with the English law that at the time did not offer protection to aliens from imprisonment for debt.<sup>88</sup> After Matveyev’s angry departure from England, an Act of Parliament, called the Diplomatic Privileges Act, was adopted in 1708 with the purpose of preventing a recurrence of such incidents in which foreign ambassadors could be physically injured.<sup>89</sup> Specifically, the wrongful act towards the Russian Ambassador triggered the action of passing a new Act of Parliament that would guarantee such harmful acts are prevented from happening again. This early case of the use of guarantees of non-recurrence is also a rare example where the offending state adopted or amended its legislative provisions. The Diplomatic Privileges Act is, in other words, a less common example of the injuring state practising its obligation of conduct through the adoption of *specific* measures or actions. Other such specific measures taken to solve inter-state disputes included apologies and instructing the injuring state’s agents to act in specific, improved ways.<sup>90</sup>

More commonly, states demanded assurances of non-repetition, that is, mere moral commitment to non-repetition and no specification of any particular measures. By way of example, in the 1904 Dogger Bank incident, the UK requested that Russia provide ‘security against the recurrence of such intolerable incidents.’<sup>91</sup> In instances where the internationally

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<sup>88</sup> See J. Dumas, ‘La responsabilité des États à raison des crimes et délits commis sur leur territoire au préjudice d’étrangers’, *Recueil des cours de l’Académie de droit international de La Haye 1931-II*, vol. 36 quoted in Arangio-Ruiz (n 89), para 159.

<sup>89</sup> Diplomatic Privileges Act of 1708, available through the Statutes Project at <http://statutes.org.uk/site/the-statutes/eighteenth-century/1708-7-anne-c-12-diplomatic-privileges-act/> accessed 17 July 2020.

<sup>90</sup> Arangio-Ruiz (n 89) para 158. Scott M Sullivan, ‘Changing the Premise of International Legal Remedies: The Unfounded Adoption of Assurances and Guarantees of Non-Repetition’ (2002) 7 *UCLA Journal of International Law and Foreign Affairs* 265.

<sup>91</sup> Felix Stoerk (ed.), *Nouveau Recueil Général de traités et autres actes relatifs aux rapports de droit international 1906: Continuation Du Grand Recueil De G. Fr. De Martens; Première Livraison* (Vol 33, Forgotten Books 2017)

wrongful acts impacted the injuring state's nationals, a GNR seeking better protection of the nationals and/or any property could be requested. When the arrest of Lazo Vracaric, a former Yugoslav resistance forces captain in Munich in 1961 caused a diplomatic row, the German Foreign Ministry issued a statement claiming that the necessary measures against repetition were being taken.<sup>92</sup> Considering that the arrest of Vracaric was based on the previous regime's order dating to 1941, the German Foreign Ministry promised to take steps that would "close the loopholes" in the law, implying a possible legislative reform.<sup>93</sup> In both examples, however, the legal obligation was that of result and a mere non-repetition of the same event against the same country would have sufficed.

Although practised since the 18<sup>th</sup> century, assurances and guarantees of non-recurrence started appearing more frequently in legal documents in the 20<sup>th</sup> century. The Draft Convention on International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners, submitted during the preparatory meetings for the Lausanne session of the Institute of International Law in 1927, stated that 'necessary guarantees against a repetition of the offending act' are a part of the injuring state's responsibility.<sup>94</sup> This idea is replicated in the two main sources that codify GNR in international public law today, namely, the International Court of Justice (ICJ) decision in the *LaGrand* case<sup>95</sup> and the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts<sup>96</sup> (hereinafter ARSIWA). Both of them were issued only in 2001, after the end of the 'Decade of International Law' at the United Nations, where the UN showed determination to encourage international law's progressive development and codification.<sup>97</sup>

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pp. 641-642.

<sup>92</sup> "YUGOSLAV FREED IN WEST GERMANY, Bonn Moves to Bar Future Arrests of Wartime Foes." (*The New York Times*, 8 Nov 1961) p. 2 <https://www.nytimes.com/1961/11/08/archives/yugoslav-freed-in-west-germany-bonn-moves-to-bar-future-arrests-of.html> accessed 17 July 2020.

<sup>93</sup> *ibid* p. 2.

<sup>94</sup> Article 13 of the draft submitted by L. Strisower, 'Rapport final' (1927) 33 *Annuaire de l'Institut de droit international* pp. 560-561.

<sup>95</sup> *LaGrand Case (Germany v United States of America)* (Judgment) [2001] 104 ICJ 466.

<sup>96</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' submitted to the General Assembly (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10.

<sup>97</sup> United Nations General Assembly Resolution 44/23, 'United Nations Decade of International Law' (17 November 1989) UN Doc A/RES/44/23.

### 2.2.1. The International Court of Justice

The *LaGrand* case concerned alleged breaches of Article 36 of the Vienna Convention on Consular Relations which the US committed by failing to inform two detainees, German nationals and brothers, of their rights before sentencing them to death and executing them. Germany requested a guarantee that the opposing party would not repeat these violations in the future and would ensure that both its domestic law and practices allowed for an effective exercise of the rights included in the Convention. In Germany's view, assurances and guarantees were necessary based on two criteria: the existence of a real risk of repetition and the seriousness of the injury. In response, the United States objected that the very concept of GNRs was different from reparations, had 'no precedent' in the ICJ's jurisprudence and, therefore, fell outside the Court's mandate.<sup>98</sup>

The ICJ recognised commitment by the US to remedy their wrongdoing through the dissemination of leaflets and an apology, seeing their efforts as a sufficient *general* guarantee of non-repetition. Yet, Germany's request signals that the party would not have been satisfied with the more common verbal assurance of non-repetition or a symbolic apology. For Germany, none of the traditionally accepted forms of reparations was deemed inadequate; satisfaction in the form of an apology was insufficient, restitution was impossible as both LaGrand brothers were dead, and compensation for material losses did not apply.<sup>99</sup> As a result, Germany thought that more was needed and this meant *specific* GNRs, concrete steps that would prevent automatic reproduction of one violation after another of the Vienna Convention.

The ICJ, too, held a belief that, for more severe cases,<sup>100</sup> a mere apology to Germany would not be deemed sufficient for a breach of diplomatic law, but instead, the US would have 'to allow the review and reconsideration of the conviction and sentence' that were affected by an Article 36 violation, however, only *vis-à-vis* German nationals.<sup>101</sup> Importantly, the ICJ also

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<sup>98</sup> *LaGrand Case (Germany v. United States of America)* (n 95) 509.

<sup>99</sup> Christian J Tams, 'Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility' (2002) 27 *Yale Journal of International Law* 441.

<sup>100</sup> In cases where the individuals concerned are subject to prolonged detention or sentenced to severe penalties, pp. 513-514 at *LaGrand* (n 95).

<sup>101</sup> *LaGrand Case (Germany v. United States of America)* (n 95) 514.

acknowledged the existence of these specific GNRs that would trigger amendments in laws or policies; nevertheless, it did not go further than that in explaining what particular steps the US would need to take to comply with such an order, leaving the whole concept arguably purposefully vague and ambiguous.<sup>102</sup>

In reaching this particular decision, the ICJ judges voted nearly unanimously with one dissenting opinion that did not elaborate on GNRs in their dissent. Consequently, there seemed to be an agreement that assurances and guarantees of non-repetition can be a consequence of committing an internationally wrongful act for the injuring state and that the injured state might be entitled to seek both general and specific guarantees that the breach will not be repeated. The case also leads us to believe that GNRs are qualitatively distinct from other traditional types of reparations that seek to restore the *status quo*; GNRs, on the contrary, are “forward-looking,” and invested in preventing future violations.<sup>103</sup>

Scholarly opinions on this decision vary. Some think that leaving the United States to choose their own means of complying with the judgment can simply be seen as deference to national authorities and the fact that they might be better apt to decide on remedies,<sup>104</sup> while others instead argue that the ICJ did so out of concern that non-compliance would be more plausible had the guarantee been specific.<sup>105</sup> Nevertheless, this judgment has held an important place in public international law precisely because of its stance on specific guarantees of non-repetition which, as the brief review of diplomatic disputes above suggests, had been less common. Tams argues that the judgment has had an impact on the legal rules around the consequences of different international wrongs and principles of state responsibility in international law in general, not merely in diplomatic disputes, possibly signalling ‘a broader approach to the law of state responsibility.’<sup>106</sup> Similarly, Sullivan called assurances and

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<sup>102</sup> Tams (n 99).

<sup>103</sup> *ibid* 443.

<sup>104</sup> Joan Fitzpatrick, ‘The Unreality of International Law in the United States and the *LaGrand* Case’ (2002) 27 *Yale Journal of International Law* 427.

<sup>105</sup> John Quigley, ‘*LaGrand*: A Challenge to the U.S. Judiciary’ (2002) 27 *Yale Journal of International Law* 435.

<sup>106</sup> Tams (n 99) 443.

guarantees of non-repetition 'the most revolutionary consequence of *LaGrand*' which has allowed international courts to directly shape domestic law.<sup>107</sup>

The fact that several states have sought GNRs from the ICJ in the next few years<sup>108</sup> does not offer tremendous help in trying to understand the content of the norm of GNRs. Observing the cases which came after *LaGrand*, it becomes clear that the ICJ was in a position to rule on several requests for specific guarantees of non-repetition; however, it seemed to be rather reluctant to order them as a consequence of an internationally wrongful act or to elaborate on their application. For example, the government of Mexico was very specific regarding the steps they thought the United States needed to take in order to offer sufficient guarantees of non-repetition in the *Avena and Other Mexican Nationals* case which had similar facts as the *LaGrand* case.<sup>109</sup> In response to the three specific measures of non-repetition Mexico requested,<sup>110</sup> the ICJ failed to see any patterns under which the United States continuously committed a breach of the Vienna Convention.<sup>111</sup> In return, the Court stated that the *LaGrand* judgement, and the efforts the US claimed to have been undertaking at the time, remain applicable and sufficient. These cases prevent us from having a clearer picture of the applicability and form of GNRs. In the most recent genocide case before the ICJ, *The Gambia v. Myanmar*, the injured party also holds that Myanmar 'must offer assurances and guarantees of non-repetition of violations of the Genocide Convention ...'<sup>112</sup> As of June 2021, the ICJ is yet to

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<sup>107</sup> Sullivan (n 90).

<sup>108</sup> See, for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, para 318; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 466; *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 50, para 150.

<sup>109</sup> *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12.

<sup>110</sup> *ibid.* Mexico requested that the US guarantee that its judicial authorities will cease applying and not resort to applying in the future:

any procedural penalty for a Mexican national's failure to timely raise a claim or defence based on the Vienna Convention where the US authorities have breached their obligation to advise the national of their rights; any doctrine or judicial holding that prevents a US court from providing a remedy to a Mexican national whose Article 36 rights have been violated any municipal law doctrine or holding that requires an individualized showing of prejudice as a prerequisite to relief for the violations of the Vienna convention; para 13(2)(c).

<sup>111</sup> *ibid.*, para 149.

<sup>112</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings and Request for Provisional Measures (11 November 2019).

rule on this case. These cases are particularly worthy developments since, in the decades before the *LaGrand* judgment, it was generally observed that state practice rarely included requests for specific guarantees.<sup>113</sup> In the last two decades, however, these specific guarantees are increasingly seen as a right of injured states.

### 2.2.2. The International Law Commission's ARSIWA

The International Law Commission undertook the task of codifying state responsibility<sup>114</sup> in accordance with the power given to it by the 1947 General Assembly Resolution 174 (II) in relation to Article 13(1)(a) of the UN Charter.<sup>115</sup> The idea of state responsibility to assure non-recurrence was present from the early stages of the drafting process of the ARSIWA. It was already in the 1950s that the independent expert hired by the Commission, F.V. Garcia-Amador, included measures to prevent the repetition of the injurious act in his draft Articles on state responsibility for injuries caused to aliens. In Article 27, Garcia-Amador stated that:

the State of nationality shall have the right, without prejudice to the reparation due in respect of the injury sustained by the alien, to demand that the respondent State take the necessary steps to prevent the repetition of events of the nature of those imputed to that State.<sup>116</sup>

With respect to non-repetition, all subsequent independent experts followed Garcia-Amador's ideas in their recommendations. Although nearly none of the states involved in the process objected to the inclusion of GNRs in the final product, James Crawford, who was one of the drafters, admits that GNRs were one of the most debated paragraphs before the adoption of ARSIWA.<sup>117</sup> Indeed, a reading of the Drafting Committee's meetings about the ARSIWA

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<sup>113</sup> Arangio-Ruiz (n 89) 163.

<sup>114</sup> Article 1 of the Statute of the International Law Commission (1947) states:

1. The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.

<sup>115</sup> Article 13(1)(a) of the United Nations Charter (1947) reads:

The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification.

<sup>116</sup> FV Garcia-Amador, 'International Responsibility. Third report by F.V. Garcia Amador, Special Rapporteur' (2 January 1958) UN Doc A/CN.4/111.

<sup>117</sup> James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2014) 470.

exhibits significant hesitations about guarantees of non-repetition and their foundation in law.<sup>118</sup> More precisely, in the few decades preceding the adoption of the articles, debates arose about whether assurances and guarantees of non-repetition should be treated as a form of satisfaction, a separate form of reparation, or not being related to reparation *stricto sensu*.<sup>119</sup>

In 1981, Special Rapporteur on state responsibility, Willem Riphagen saw GNRs as one of the two forms of satisfaction - the other one being apology - that can generally be demanded from the violating state when cessation and repairing the *status quo* is “materially impossible.”<sup>120</sup> In particular, he argued, apologies and declarations of guarantees against repetition are welcome when compensation is not satisfactory.<sup>121</sup> In Special Rapporteur Arangio-Ruiz’s second report in 1989, it was claimed that all measures of reparations could be useful in preventing repetition of a violation, yet, seeking specific GNRs implies that the injured state sees the mere repair and re-establishing of the pre-existing conditions as insufficient protection.<sup>122</sup> The Rapporteur nevertheless concluded, based on a careful reading of the doctrine and practice, that GNRs comprise a form of satisfaction with ‘a relatively distinct and autonomous remedial function.’<sup>123</sup>

In 1993, the discussion moved towards GNRs being ‘special’ and ‘exceptional’ with their forward-looking mission and a preventive function. For these reasons, it was argued, GNRs are not supposed to be automatically available to every injured state as a measure of reparation.<sup>124</sup> By 2000, in addition to being exceptional, GNRs also became ‘flexible.’<sup>125</sup> Unlike cessation, for instance, GNRs are open to taking various forms and to be applied *when appropriate*. Because of their unique character, Crawford argued in his Third Report, GNRs do not trigger the same degree of state responsibility as other forms of reparations. He held a view that a violating state

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<sup>118</sup> Sandrine Barbier, ‘Assurances and Guarantees of Non-Repetition’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010).

<sup>119</sup> Yann Kerbrat, ‘Interaction between the Forms of Reparation’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010).

<sup>120</sup> Willem Riphagen, ‘Second Report on the Content, Forms and Degrees of International Responsibility (Part Two of the Draft Articles)’ (1 May 1981) A/CN.4/344. Articles 4(1) and 4(3).

<sup>121</sup> *ibid*, para 85. Riphagen gives examples of murdering diplomatic representatives or destroying an embassy to support his claim that GNRs and apologies might need to complement compensation.

<sup>122</sup> Arangio-Ruiz (n 89) para 149.

<sup>123</sup> *ibid* para 163.

<sup>124</sup> ‘Yearbook of the International Law Commission’ (1993) II, UN Doc A/CN.4/SER.A/1993/Add.1 (Part 2) 81,82.

<sup>125</sup> James Crawford, ‘Third Report on State Responsibility’ (2000) UN Doc A/CN.4/507 and Add. 1-4\*, 88.

that complies with all other aspects such as compensation and reparation would not likely be held accountable only for failing to offer GNRs to the injured state.<sup>126</sup>

In the final version of the ARSIWA, the concept of state responsibility for international wrongs was proclaimed not to be confined to obligations that are bilateral in character, but also to obligations states have on the basis of international law as a whole, therefore including human rights obligations owed to individuals and groups.<sup>127</sup> Accordingly, the state responsible for an internationally wrongful act has an obligation to not only cease the act but, under Article 30(b) ‘offer appropriate assurances and guarantees of non-repetition, *if circumstances so require*.’ That the very last clause of that Article changed from “when appropriate”, indicates, as the minutes of the Drafting Committee show, that GNRs are not a necessary legal consequence of any breach of international law.<sup>128</sup> Hence, the provision on GNRs was drafted with flexibility to, according to the commentary, ‘prevent the kinds of abusive and excessive claims which characterised some of the demands for assurances and guarantees by States in the past.’<sup>129</sup> Whether assurances and GNRs will be awarded depends on the circumstances of the case, including the nature of the breach and the obligation.

Despite previous classifications of GNRs as a form of satisfaction, or a separate type of reparation, the final version of the ARSIWA defines them as neither. Namely, Article 34 delineates different forms of reparation as restitution, compensation, and satisfaction – to be applied individually or in combination – but does not include GNRs under satisfaction. Instead, as per Article 37(2), measures of satisfaction, applied when restitution and compensation are not feasible, can take a form of ‘an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.’<sup>130</sup> In the commentary, however, the ILC stated it did not attempt to make an exhaustive list of measures of satisfaction and that GNRs could take the form of satisfaction, giving the example of repealing the legislation which brought about the violation in question as both a GNR and measure of satisfaction. The overarching explanation for

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<sup>126</sup> *ibid*, para 58.

<sup>127</sup> International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (n 88) 32.

<sup>128</sup> *ibid*.

<sup>129</sup> *ibid* 91.

<sup>130</sup> *ibid*.

such a decision was that international practice had not been univocal when it comes to the content of GNRs. In other words, not giving guidance regarding specific GNRs was intentional. Nevertheless, placing GNRs within Article 30 implies that they are distinct from reparations, as they are future-looking focus on prevention.<sup>131</sup> The distinction between reparation and non-repetition made in the ARSIWA was also important as it stresses the distinct character of GNRs as a measure that could be sought even when there is no basis for a direct claim for reparation.<sup>132</sup>

The lack of clarification about the content of specific GNRs in both the ILC and the ICJ, and the appearance of GNRs as a norm without a clear source, other than sporadic and heterogenous state practice, has caused many scholars to question the legitimacy of GNRs in international law. More specifically, Barbier asks how the ICJ came to a conclusion that GNRs are both a right and an obligation of the injuring state, having previously been practised as a right of the injured state.<sup>133</sup> The ILC's work, she contends, suggests that GNRs are an obligation of the injuring state and not a right of the injured state, as per previous practice. Barbier has also questioned the autonomy of GNRs – as distinct from reparations – calling it 'fragile.'<sup>134</sup> Sullivan argues that the ICJ went against customary international law in *LaGrand* as GNRs are generally not one of the goals of international dispute resolution mechanisms which are instead focused on repairing the past and solving current problems.<sup>135</sup> Generally, the argument is that there had been a lack of evident state practice on GNRs to satisfy the criteria for creating customary international law norms.<sup>136</sup> Another serious critique is calling GNRs an act of 'bootstrapping' initially created by the ILC and supported by the ICJ.<sup>137</sup> It is argued that the ARSIWA in particular move GNRs from being a form of diplomatic practice to 'a proposed part of customary international law.'<sup>138</sup>

Some of these arguments can be refuted. In particular, the fact that *opinio juris* of states was not clearly established before the ARSIWA codified GNRs does not necessarily threaten the

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<sup>131</sup> *ibid* 90.

<sup>132</sup> *ibid*.

<sup>132</sup> *ibid*.

<sup>133</sup> Barbier (n 118).

<sup>134</sup> *ibid* 556.

<sup>135</sup> Sullivan (n 90).

<sup>136</sup> Namely the evidence of state practice and *opinio juris*.

<sup>137</sup> Sullivan (n 90) 271.

<sup>138</sup> *ibid* 274.

legitimacy of GNRs, seeing how the International Law Commission is mandated to draft conventions on subjects that have not been sufficiently developed ‘to encourage the progressive development of international law and its codification.’<sup>139</sup> Moreover, states must be in agreement with their novel position and willing to practice them for at least two reasons. Firstly, a significant number of states have sought assurances and guarantees of non-repetition from the ICJ in the more recent, post-*LaGrand* period, as seen in section 2.2.1. Secondly, none of them apart from the United States and, to a lesser degree, Germany, objected during the drafting of the ARSIWA.

What both the ICJ’s *LaGrand* judgment and subsequent case law and the ARSIWA establish is that GNRs are a norm, but an exceptional one, that is, GNRs are not a necessary consequence of a breach of international law, and that they are flexible in content. When the last clause of Article 30(b) was changed from “when appropriate” to ‘if the circumstances so require’, GNRs were confirmed to be a non-necessary legal consequence of any breach of international law.<sup>140</sup> In the ICJ’s terminology, the Court can order the injuring state to offer either general or specific guarantees of non-repetition only when “special circumstances” justify it, suggesting that these are assessed on a case-by-case basis.<sup>141</sup> Regardless of this exceptionality, it is clear that, in Barbier’s words, GNRs ‘are now part of the legal consequences of an internationally wrongful act.’<sup>142</sup> However, neither the ARSIWA nor the ICJ’s jurisprudence so far tells us much about the content of these specific guarantees. On the contrary, both suggest that the choice of means rests with the injuring state. Most importantly for the future developments of GNRs in transitional justice, in public international law, they are not only exceptional in their triggering of state obligation, but also exceptional in their nature; although frequently tied to reparations and/or measures of satisfaction, they are construed as qualitatively different, ‘forward-looking’, progressive, and preventive.

### 2.3. International Human Rights Law

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<sup>139</sup> Article 17(1) of Statute of the International Law Commission 1947.

<sup>140</sup> Crawford (n 125).

<sup>141</sup> *Jurisdictional Immunities of the State (Germany v. Italy)* (Judgment) [2012] ICJ Rep 99, 132.

<sup>142</sup> Barbier (n 118) 555.

Thus far, this chapter establishes the relevance of guarantees of non-recurrence for states should they breach an international obligation they have towards another state or international community. While the PIL origins of GNRs are important for understanding the overall characteristics of the norm, guaranteeing non-recurrence has, as a legal concept, gained much more prominence in regimes geared towards individuals. International human rights law is the primary candidate as a regime where guarantees of non-recurrence have been conceptualised as a victim's right. The following review will focus primarily on the UN-issued Basic Principles on remedy and reparations as the framework most relevant for the conceptualisation of GNRs in TJ.

### 2.3.1. The UN Basic Principles

The position GNRs occupy within the Basic Principles largely stems from the work done by Theo van Boven and M. Cherif Bassiouni. These two legal scholars were mandated by the UN to conduct studies on the right to remedy of those who suffered from gross violations of human rights. Although they concern violations of both human rights law and humanitarian law, for the purposes of this thesis, they are categorised under the former considering that GNRs have not yet developed in the latter. The principles have the goal of strengthening victims' and survivors' rights to reparation. In fact, in his drafts, van Boven was explicit in noting that the perspective of the victim is 'often overlooked' which is why there emerged a need to give more systemic attention to the right to reparation.<sup>143</sup> Such a narrative around non-recurrence is naturally very different from the one found in state-focused public international law, which is why the inclusion of GNRs in the Basic Principles comes as somewhat surprising.

Van Boven's first comprehensive set of principles was issued in 1993 and went through minor changes in the subsequent years, eventually differentiating among five forms of reparation: cessation; restitution; compensation; satisfaction; and, guarantees of non-repetition.<sup>144</sup> That victims of human rights violations were entitled to an effective remedy was already cemented in several human rights documents.<sup>145</sup> Needless to say, each of the regional human

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<sup>143</sup> See, Theo van Boven, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms' (1993) UN Doc E/CN.4/Sub.2/1993/8.

<sup>144</sup> *ibid.*

<sup>145</sup> Starting with Article 8 of the Universal Declaration of Human Rights, as well as Article 2(3)(a) of the International Covenant on Civil and Political Rights.

rights conventions has its own article protecting this right,<sup>146</sup> and van Boven used all of these sources to fortify his work. Still, none of these documents mentions guarantees of non-repetition in any form, which does not help explain why GNRs became a staple of the Basic Principles, per van Boven's suggestion. A possible explanation lies in van Boven's references to the work of the International Law Commission on the ARSIWA which was, at that point, only in its drafting stage. He found particularly useful the ILC's identification of different types of reparations nevertheless admitting that the ILC's draft articles are suited for inter-state disputes.<sup>147</sup>

According to van Boven's proposed Basic Principles from 1993, reparations are meant to relieve the suffering of victims 'by removing or redressing to the extent possible the consequences of the wrongful acts and by *preventing* and *detering* violations.'<sup>148</sup> For van Boven, and this is his departure from the ILC's ARSIWA, guarantees of non-repetition and satisfaction are one and the same, both put in the same Article 11. However, he listed several specific measures that could be applied to meet the goal of preventing the recurrence of violations. This was the first time GNRs were specified as concrete measures and state actions in a UN document.

They are as follows:

- (i) Ensuring effective civilian control of military and security forces;
- (ii) Restricting the jurisdiction of military tribunals;
- (iii) Strengthening the independence of the judiciary;
- (iv) Protecting the legal profession and human rights workers; and,
- (v) Providing human rights training to all sectors of society, in particular to military; and, security forces and to law enforcement officials.<sup>149</sup>

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<sup>146</sup> Article 7 of the African Charter on Human and Peoples' Rights, Article 25 of the American Convention on Human Rights, and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>147</sup> van Boven (n 143).

<sup>148</sup> Article 3 at *ibid* (emphasis added).

<sup>149</sup> Theo van Boven, 'Basic Principles and Guidelines on the Rights to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law' (1997) UN Doc E/CN.4/1997/104.

These proposed measures of non-recurrence largely concern measures of legal and institutional reform. Van Boven's successor, M. Cherif Bassiouni published two reports on the Basic Principles in 1999 and 2000, building on the foundations set by van Boven, while also taking into consideration Louis Joinet's work on impunity.<sup>150</sup> Notably, when Louis Joinet drafted the Principles on Combatting Impunity in 1997, he recommended a set of measures preventing victims from enduring new violations. Joinet included three broad categories of legal and institutional reform for non-recurrence, which were separate from the right to reparation: the disbandment of paramilitary groups, the repeal of emergency legislation and recognition of the inviolability and non-derogability of *habeas corpus*, and removal from office of senior state officials implicated in serious human rights violations.<sup>151</sup> Although these measures were nearly entirely different from van Boven's, they, too, mainly concerned legal and institutional reforms.

Before the next and final report in 2000, Bassiouni consulted several governments, international and non-governmental organisations and independent experts in order to better understand practices and concepts of reparation across the world.<sup>152</sup> In this new draft, it was acknowledged that the Basic Principles incorporate some emerging norms and standards and aspire to anticipate future developments in international law.<sup>153</sup> For these reasons, a linguistic distinction was made to reflect existing international obligations ('states shall') in contrast to emerging norms ('states should').<sup>154</sup> Guarantees of non-recurrence fall under the latter category, which suggests they were not a fully conceptualised international obligation at the time.

Bassiouni's draft articles on satisfaction and guarantees of non-repetition, faithful to van Boven's distinction, expand previous guidelines by adding two entirely new principles of GNRs:

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<sup>150</sup> Louis Joinet, 'The Administration of Justice and the Human Rights of Detainees. Revised Final Report Prepared by Mr. Joinet.' (2 Oct 1997) UN Doc E/CN.4/Sub.2/1997/20/Rev.1. Between van Boven's and Bassiouni's guidelines, Joinet drafted a separate set of measures of reparation to be taken towards the duty to remember. These include, among other, commemorative ceremonies and acknowledgements in history textbooks and are not considered to be guarantees of non-repetition. On the other hand, van Boven placed such measures under the broad umbrella of satisfaction and guarantees of non-repetition.

<sup>151</sup> *ibid*, principles 37-42.

<sup>152</sup> M Cherif Bassiouni, 'The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms. Final Report.' (2000) UN Doc E/CN.4/2000/62.

<sup>153</sup> para 9 at *ibid*.

<sup>154</sup> para 8 at *ibid*.

first, public servants' observance of ethical norms and codes of conduct and second, establishing mechanisms aimed at minor preventive interventions and conflict resolution efforts.

Importantly, these drafts stressed that the measures listed are not exhaustive and are to be applied in accordance with national laws. This leads to a belief that national governments in transition from conflict, in which these mass violations of humanitarian and human rights law could have happened, are under no obligation to provide guarantees non-repetition if their domestic laws and regulations do not recognise such concepts. It has been argued that this provision goes against the principles of international law that suggest that invoking domestic law does not justify an omission to comply with an international obligation.<sup>155</sup>

Some twelve years after van Boven's first draft, the United Nations Basic Principles were finalised. In this revised set of principles, guarantees of non-repetition, surprisingly and contrary to van Boven's and Bassiouni's draft, appeared as a self-standing measure of effective reparation, along with restitution, compensation, rehabilitation, and satisfaction. This runs contrary to the ARSIWA where GNRs are deliberately separate from reparations as they 'look to the protection or maintenance of the legal relationship' and are, in that sense, presupposing a risk of recurrence.<sup>156</sup> It does, however, somewhat align with the ICJ and ILC's stance according to which GNRs are exceptional.

More specifically, according to Article 23 of the Basic Principles, GNRs should include, 'where applicable, any or all of the following measures [...]:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

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<sup>155</sup> Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 *Netherlands Quarterly of Human Rights* 641.

<sup>156</sup> Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press 2005) 89.

- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular, international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; and,
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.<sup>157</sup>

As such, the final Basic Principles contained only minor departures from Bassiouni's 2000 guidelines in terms of the content of GNRs, despite three consultation meetings that took place in between the two publications.<sup>158</sup> They are the first significant document to provide guidance about the content of specific GNRs, largely positioning that content within measures focused on laws, institutions and state officials. The wording "where applicable" somewhat align with the ICJ and the ILC's work in saying that the measures are to be considered on a case-by-case basis; yet distinguishing GNRs as a form of reparation suggests that they are a necessary consequence of a breach of IHRL or international humanitarian law. In 2020, van Boven observed the "skilful" drafting by Bassiouni whereby the Preamble to the Principles explicitly states that the Principles do not entail any new legal obligations for states but reflect those

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<sup>157</sup> UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2005) UN Doc A/RES/60/147.

<sup>158</sup> *ibid.* Only one new principle was added. It suggests that any laws that contribute, or could allow for, (grave) violations of international human rights law and (serious) violations of international humanitarian law ought to be reformed. Furthermore, rather than restricting the jurisdiction of military tribunals to military offences committed by army officials, the final Principle recommends that both civilian and military judicial proceedings comply with the standards of due process, fairness, and impartiality. Finally, according to the Basic Principles, mechanisms for preventing and monitoring conflict resolution should be 'promoted' rather than 'created'.

already enshrined in human rights law.<sup>159</sup> Van Boven contended that this aspect of the Preamble proved critical in soothing some of the numerous critiques of the Basic Principles. This observation makes the content attached to specific guarantees of non-recurrence even more monumental, shaping how the now existing and no longer emerging norm of non-recurrence may be applied domestically. Indeed, when Diane Orentlicher was hired to update Joinet's principles on impunity 'to reflect recent developments in international law,' in her 2005 report, she regrouped reparation and GNRs together because 'human rights treaty bodies have often treated guarantees of non-recurrence as a component of reparations', including the then-most recent draft on the Basic Principles.<sup>160</sup>

The Basic Principles are a crucial development in the story of GNRs in TJ. The principles provide this previously purposefully ambiguous and flexible norm with a number of specific measures that a state found in breach of human rights and humanitarian law might have an obligation to provide. This document challenges and expands not only state obligation, but also the contents and contexts of GNRs. Reparations are usually meant to make amends to the victim(s); however, including GNRs suggests that they, through legal and institutional reforms, are meant to benefit the entire affected community. Although the thesis does not investigate how regional human rights courts treat GNRs,<sup>161</sup> it is worth noting that the Basic Principles have evidently shaped these courts' practices and requests for reparations from violating states. While the principle of non-repetition is not explicitly mentioned in any corresponding treaties such as the European Convention of Human Rights or the American Convention of Human Rights, it is occasionally read as a part of the right to remedy protected by such conventions. The Inter-American Court of Human Rights in particular has awarded a number of non-monetary measures that fall under the non-exhaustive list of GNRs as per the Basic Principles, affirming the status of

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<sup>159</sup> Telephone interview with Prof Theo van Boven, 6 Oct 2020. From the Preamble to the Basic Principles (n 157):

Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.

<sup>160</sup> Diane Orentlicher, Report of the independent expert to update the Set of Principles to combat impunity (18 February 2005), UN Doc. E/CN.4/2005/102, 4.

<sup>161</sup> The reason for this decision is that this chapter offers my interpretation of GNRs' "origin story" in transitional justice, rather than a comprehensive review of GNRs application in international law. As such, looking into specific cases before international human rights bodies where GNRs have been sought and/or received, as per IHRL, would distract from the core arguments made in this chapter.

GNRs as a fully developed (as opposed to emerging) norm.<sup>162</sup> Similarly, the Human Rights Committee holds that the purposes of the International Covenant on Civil and Political Rights would be defeated without the corresponding measures of non-recurrence, although the Covenant itself does not explicitly enshrine provisions of GNRs.<sup>163</sup> As a result, while it generally shies away from outlining specific measures to be implemented, the Human Rights Committee has generally asserted that measures of non-recurrence could include changes in state laws or practice, as per the Basic Principles' understanding of GNRs.<sup>164</sup>

The list of proposed measures of non-recurrence, albeit non-exhaustive, suggests that guaranteeing non-recurrence requires reform of the 'structures and systems that allowed, facilitated or promoted violations.'<sup>165</sup> In that sense, the GNRs enshrined in the Basic Principles and adjacent documents are concerned with strengthening the accountability of state institutions previously implicated or with the potential of committing grave human rights violations.<sup>166</sup> As far as contexts are concerned, GNRs previously applied in cases of typically individual breaches in interstate relations but have now become operational in the context of gross violations of international human rights (and humanitarian) law. The nature and gravity of such violations imply background circumstances of war, civil conflict, or state oppression. This implication has been reflected in practice. By way of example, in the Ugandan peace agreement between the Government and the Lord's Resistance Army, GNRs are referred to as a measure of reparations

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<sup>162</sup> The Inter-American Court of Human Rights has, *inter alia*, held that states generally have a positive obligation to ensure that violations never occur again in accordance with their duties to respect the Convention rights and add corresponding provisions to their national laws in accordance with Articles 1 and 2 of the Convention. See *Case of Suarez v Ecuador* [1999] Inter-American Court of Human Rights, Series C no 51. In a landmark case against Mexico, the IACtHR ordered the violating state 'to modify the status quo' in which endemic gender-based violence in the country is rooted by creating a new law, implementing a program on disappearances, and offering a gender-sensitive training to both state officials and the general public. All of these measures, aimed at systemic reform, are greatly in line with the Basic Principles. See *Case of González et al ("Cotton Field") v Mexico* (Preliminary Objection, Merits, Reparations, and Costs) [2009] Inter-American Court of Human Rights, Series C no 205.

<sup>163</sup> UN Human Rights Committee, 'General Comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 17.

<sup>164</sup> *ibid.*

<sup>165</sup> Alexander Mayer-Rieckh, 'Guarantees of Non-Recurrence: An Approximation' (2017) 39 Human Rights Quarterly 416, 428.

<sup>166</sup> *ibid.*

in accordance with the Basic Principles.<sup>167</sup> The Basic Principles, therefore, make GNRs in this form well-suited for the contexts of transitional justice.

## 2.4. Guarantees of Non-Recurrence and Transitional Justice

As seen in this chapter so far, GNRs are treated rather differently in PIL and IHRL. In public international law, GNRs operate as a right of the injured state and an obligation of the injuring party and are given special characteristics of being exceptional and forward-looking, which makes them distinct from reparations. In IHRL on the other hand, GNRs are conceptualised as a type of reparations offered to victims of serious violations by the violating state. Moreover, while specific guarantees are largely absent from recent events in PIL, international human rights law (non-exclusively) treats GNRs as measures of legal and institutional reform, structural changes conducted by and towards the state and its institutions. On this development trajectory, how did GNRs become a pillar of transitional justice? How has the legal norm of non-recurrence travelled into and through TJ scholarship and practice? Chapter 1 discussed how central legalism has been to the birth and development of transitional justice. The rapid expansion of transitional justice from being an exception to inevitability following regime change, Teitel argues, meant that TJ was understood as ‘a paradigm of the rule of law.’<sup>168</sup> This part of the chapter will signal that such dominance of legalism is inseparable from the origin and development of GNRs in transitional justice and the decontextualisation of the norm that was aided by transitional justice. It does so in three parts. In Section 2.4.1., I discuss the conceptual origins of the norm of non-recurrence in transitional justice and identify how the early ‘justice in transition’ has helped transform GNRs in international human rights law. Section 2.4.2. reviews the treatment of GNRs at the United Nations, while Section 2.4.3. provides background to the normative expansion of GNRs by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

### 2.4.1. ‘Never Again’, prevention of repetition, and justice in transition

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<sup>167</sup>Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (29 June 2007) UN Doc. S/2007/435.

<sup>168</sup> Teitel, ‘Transitional Justice Genealogy’ (n 10) 71.

As signalled in Chapter 1, the conceptual origins of the field of TJ are traced in the developments in Argentina and other mainly but not exclusively Latin American countries transitioning from authoritarian regimes to democracy in the 1980s.<sup>169</sup> Arthur's argument about the birth of TJ as a field distinct from human rights is crucial for understanding the travels and transformations of GNRs. Her study focuses on multiple actors who participated in the creation of TJ as a distinct and necessary response to transitions to democracy, providing an "intellectual framework" for it.<sup>170</sup> These were human rights activists, legal scholars, journalists, donors, and policy-makers, and their interactions took place at several different conferences starting from the late 1980s.<sup>171</sup> Already at one of these first conferences, Jose Zalaquett, a Chilean lawyer and later a commissioner at the Chilean National Commission on Truth and Reconciliation, began to advocate for concrete measures such the state security reform to be undertaken for the purposes of 'guaranteeing to victims that violations would not be repeated.'<sup>172</sup> This is the language that, at that time, had only been performed by the activists in Latin America ("Never Again") and the Human Rights Committee ("ensuring that violations are not repeated" is the language typically used in its recommendations). Until then, as shown in the previous sections, the language of guaranteeing non-repetition was reserved for inter-state disputes, by and large practised as a right of states, as opposed to state subjects. Relatedly, Arthur argues that the transfer of local-level advocacy against impunity to the international level was marked by a focus on the *political* change thereby prioritising legal and institutional reforms, including state security reform Zalaquett talked about, over, for example, social justice issues. Such a deliberate preference shaped 'the initial conceptual boundaries for the field.'<sup>173</sup>

While shaping the field's boundaries, the promoted measures also gave normative content to the principle of 'Never Again' that was conceptualised as an objective of 'justice in transition' in Latin America. In 1990, around the time the conferences were taking place, Zalaquett published a seminal piece on confronting human rights violations. This article was not only seminal for its influence on the setting of the intellectual framework for TJ, noted by Arthur, but

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<sup>169</sup> Paige Arthur, 'How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice' (n 11).

<sup>170</sup> *ibid*, 327.

<sup>171</sup> *ibid*.

<sup>172</sup> *ibid*, 358.

<sup>173</sup> *ibid*, 326.

also for feeding content into the norm of non-recurrence in both transitional justice and international human rights law, which has been omitted by TJ scholarship thus far. It might also help us understand why GNRs, a legal tool, rather than the promise of ‘Never Again’ today occupy a central role in transitional justice. In this article, Zalaquett outlines nearly *all of the measures* today perceived to be guarantees of non-recurrence before any of the human rights documents mentioned in previous sections were drafted.<sup>174</sup> He then saw ‘dealing with transitional political situations’ as ‘a new area of human rights practice.’<sup>175</sup> Up until that point, Zalaquett observed, human rights organisations had dealt with these complex questions in the same way they responded to human rights violations committed by governments currently in place. Due to the myriad of (at the time) unanswered questions such as what international legal responsibilities governments have in regard to past human rights violations if any at all, Zalaquett found such efforts “inadequate.” He, in turn, aspired to design a policy that would deal with past human rights violations in a more adequate way.

Such a policy would have two general objectives: ‘to prevent the recurrence of such abuses; and ... repair the damage they have caused.’<sup>176</sup> Here one can observe a clear separation between reparations and non-recurrence, a topic that caused a great deal of disagreement among the ARSIWA drafters in the subsequent decade. Furthermore, according to Zalaquett, such policies can only be legitimate if the truth is known, the people or their elected representatives have a final say and, lastly, it is not in conflict with international law relating to human rights. The proof of Zalaquett’s pioneering work lies in his discussion on the concrete contents of these policies. In support of his arguments, Zalaquett used examples from domestic practices in Guatemala, the Philippines, Spain, and Panama. Admitting that ‘there exists no single formula for how best to prevent human rights violations,’ Zalaquett outlines the following “new” measures of preventing recurrence:

- Reinforcement of the legal system’s protection of human rights (e.g., amending constitutions, signing human rights treaties); and,

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<sup>174</sup> Jose Zalaquett, ‘Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints’ (1990) 13 Hamline Law Review 623.

<sup>175</sup> The term ‘transitional justice’ did not yet exist. *ibid* 625.

<sup>176</sup> *ibid* 628.

- Reforming/strengthening institutions to reinforce the protection of human rights (judicial reform, dismantling of intelligence services or other units responsible for abuses, and human rights education).<sup>177</sup>

In the year after the article was published, Zalaquett sat on the Chilean National Commission on Truth and Reconciliation. The Commission's lengthy final report includes a set of recommendations regarding the prevention of human rights violations in this country, in line with its mandate.<sup>178</sup> In the introductory remarks written for the English language version of the report, Zalaquett repeated the two ultimate objectives of a 'justice in transition' policy from his 1990 article, preventing repetition of atrocities being one of them. In Zalaquett's words, the Commission's mission was to decide how such an objective could be achieved. The prevention recommendations stress the 'significant flaws and shortcomings' of the domestic legal system that disable it from effectively protecting human rights.<sup>179</sup> To that end, the Commission recommends a series of measures of institutional and legal reforms: aligning Chile's legal framework into line with international human rights law, reforming judicial branch (including legal training), ensuring that armed forces, security forces, and the police exercise their functions in complete accordance with the obligation to respect human rights, creating an institution to protect human rights, and making changes in the legal order in constitutional, criminal, and procedural matters to better protect human rights. These elaborate measures are an extension to the 1990 article by Zalaquett, although ideologically identical.

Zalaquett's interpretation of these various measures of institutional and legal reform as measures best preventing human rights violations, and the subsequent practices of 'justice in transition,' helped give content to the otherwise content ambiguous norm of non-recurrence in IHRL. An important yet insufficient argument would point to the stark textual resemblances between the measures recommended by the Chilean commission and those included in the Basic Principles, albeit stripped of context.<sup>180</sup> More notably, both the Chilean Commission and

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<sup>177</sup> *ibid* 635.

<sup>178</sup> Center for Civil and Human Rights, *Report of the Chilean National Commission on Truth and Reconciliation* (University of Notre Dame Press, 1993).

<sup>179</sup> *ibid* 1075.

<sup>180</sup> By way example, the Chilean TRC recommends creating 'a judicial branch that really plays its role of guaranteeing the essential rights of persons', while the Basic Principles, faithful to van Boven's 1993 principles, in Article 23 (c) recommend 'strengthening the independence of the judiciary.'

Zalaquett himself were cited in van Boven's appendix to the 1993 draft Basic Principles.<sup>181</sup> Nearly three decades later, in our telephone interview, Professor van Boven observed that the "certainly large" influence of the Latin American experience is manifested in not only the Basic Principles but its contemporary, the Joint/Orentlicher principles on impunity.<sup>182</sup> In her 2005 report, Dianne Orentlicher notes that '[s]ome aspects of' listed GNRs are characteristic of periods of restoration or transition to democracy and/or peace that prevailed in Latin America and other regions at the time the Principles were drafted,' of which Chile was a representative state.<sup>183</sup> Supporting this is the pivotal role Chile played in the creation of the Basic Principles, as the drafting consultations were chaired by Chilean ambassador Alejandro Salinas.<sup>184</sup> Finally, the overall political backing for the Basic Principles came from Latin American countries that previously emerged from oppressive political regimes.<sup>185</sup>

The promoted measures of non-recurrence in Latin America, well-placed within the global end-of-the-Cold-War context, gave normative content to the principle of 'Never Again' that was then formulated as an objective of the emerging field of transitional justice. The links between institutional reform and non-recurrence, emerging out of Chile and other Latin American countries were characteristic of the overarching post-Cold War focus of the international community on security and the rule of law. In Eastern Europe at that time, reforming and controlling the security sector by the new regimes became integral to the desired democratic and economic transformations of countries in transition. In broader international politics, 'good institutions' and 'good governance' emerged as most sought-after values in aid-receiving, developing states, defining how successes of state- and peacebuilding, and therefore sustainable peace and ultimately non-recurrence are measured.<sup>186</sup>

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<sup>181</sup> Theo van Boven, 'Appendix C: Review of further developments in fields with which the Sub-Commission has been concerned,' (2 July 1993) UN Doc. E/CN.4/SUB.2/1993/8.

<sup>182</sup> Telephone interview with Prof. van Boven (n 159).

<sup>183</sup> Orentlicher (n 150) para 64.

<sup>184</sup> See Alejandro Salinas 'Report of the consultative meeting on the draft Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law' (27 Dec 2002) UN Doc E/CN.4/2003/63.

<sup>185</sup> Kelly McCracken, 'Commentary on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,' (2005) 76 *Revue internationale de droit pénal* 77.

<sup>186</sup> Pdraig McAullife, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing 2017) 26-28.

In the initial formulation of the emerging field of TJ and the rule of law as “mutually reinforcing phenomena,”<sup>187</sup> institutional reform measures appear crucial for restarting the rule of law in the transitioning society. This is because the legitimacy of this revived rule of law depends both on the content of laws and the process of making them, which necessitated reformative processes such as vetting.<sup>188</sup> Teitel’s seminal book *Transitional Justice*, published in 2001, represents the transformations of local reactions to the transitions in Latin America as normative underpinnings of the field of TJ.<sup>189</sup> Although Teitel looked only into political transitions from an authoritarian to a democratic regime, her theorising became foundational in creating a constitutive role for legal responses in transitions of different kinds. In non-transitional times, law is generally an inflexible instrument that could clash with political goals or common understandings of meaningful justice.<sup>190</sup> Yet, in *Transitional Justice*, Teitel is concerned with the paradoxical function of law in extraordinary times. She asks, how come law simultaneously maintains order and enables transformations such as political upheaval?<sup>191</sup> In these transitional periods, the law itself becomes transformative, as Teitel claims the rule of law can transcend politics and international law moreover can transcend both national law and politics. While Teitel acknowledges that law is never autonomous of its context, she asserts that the law holds ‘an independent potential for effective transformative politics.’<sup>192</sup> By mediating the normative shift in values in transitional societies, the rule of law responds to the dilemma of being ‘as backward-looking and forward-looking, as settled versus dynamic.’<sup>193</sup> Turner later argues that this conceptualisation of law in transition as fluid, transcending, and transformative ‘laid the foundations for the domination of the field by law.’<sup>194</sup> She adds that perhaps not the sole, but the most obvious unifying element in transitional justice was the idea that justice is achievable through legal instruments, and this idea has been transferred onto the ‘Never Again’ promise.

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<sup>187</sup> Pdraig McAuliffe, ‘Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?’ (2010) 2 Hague Journal on the Rule of Law 127.

<sup>188</sup> Pablo de Greiff, *Transitional Justice, Security and Development: Security and Justice Thematic Paper* (World Bank 2011).

<sup>189</sup> Ruti Teitel, *Transitional Justice* (Oxford University Press 2000).

<sup>190</sup> Gary Jonathan Bass, ‘War Crimes and the Limits of Legalism’ (1999) 97 Michigan Law Review 2103.

<sup>191</sup> Teitel, *Transitional Justice* (n 189) 6.

<sup>192</sup> *ibid* 213.

<sup>193</sup> *ibid* 11.

<sup>194</sup> Turner (n 20) 17.

The key aspects of norm transformation in and by TJ in this stage are twofold. Firstly, GNRs undertook content and context expansion based on early TJ practices and scholarship from Latin America. Secondly, the ‘Never Again’ promise, inseparable from justice in transition, was increasingly becoming equated with a list of institutional and legal reform measures, originally desirable towards prevention of repetition in Chile and other Latin American contexts. Both aspects of transformation were contingent on the growth of TJ as a legalised field, a field where law and its institutions became the key tool for breaking and dealing with the violent past, blending in the post-Cold War politics of regime change and the overwhelming emphasis on good governance and the rule of law. In the following section, I elaborate further on how the specific legal term of ‘guarantees of non-recurrence’ became used and mobilised as an inseparable aspect of transitional justice.

#### 2.4.2. United Nations, transitional justice and guarantees of non-recurrence

Although ideas about preventing future violence and injustice have existed in TJ since its creation, they have been conceptualised as GNRs and explicitly equated to measures of institutional reform only through the work of the UN and its intervention in transitional justice. Since 2004, transitional justice has been well-present on the United Nations’ agenda, often presented hand-in-hand with the rule of law objectives of the organisation.<sup>195</sup> In the first major TJ report, the 2004 ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’, Secretary-General Kofi Annan wrote that it was the horrendous events of the 1990s that showed that there can be no immediate nor long-term peace without appropriate redress for grievances and fair administration of justice.<sup>196</sup> In this report, it was admitted that ‘[...] the root causes of conflict have often been left unaddressed.’<sup>197</sup> It was believed that using legitimate and just approaches to address the causes of conflict can indeed help societies avoid returning to conflict. The one-size-fits-all formula was rejected and, consequently, the Secretary-General held a view that peace and stability could be achieved only when the local population thinks that

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<sup>195</sup> In the 2004 report, Kofi Annan stated that transitional justice had in fact been on the agenda of the General Assembly since 1993 as a concept entitled ‘strengthening the rule of law’. See Report of the Secretary-General (n 37).

<sup>196</sup> *ibid.*

<sup>197</sup> para 4 at *ibid.*

issues such as: ethnic discrimination; unequal wealth distribution; and abuse of power - which typically leads to a conflict - can be tackled legitimately and fairly. The report acknowledged a preference for criminal trials as a mechanism of transitional justice but encouraged simultaneous and complementary application of various TJ mechanisms including truth commissions, reparations, and vetting. What stands out in this report and its accommodation of the principle of non-recurrence is the context in which such prevention is employed. Across the legal regimes I reviewed in this chapter, the obligation and right to GNRs have been tied to a specific violation of the law of that regime; however, here we begin to see advocacy for non-recurrence of the overall conflict. In this report, it was clear that the UN wanted to draw lessons from former Yugoslavia, Rwanda, and other then-recent cases, claiming that *prevention* is one of the United Nations' main objectives in its transitional justice involvements.

Around the same time, high importance was given to transitional justice and the rule of law by the High Commissioner for Human Rights, Louise Arbour. In 2005, the Commission on Human Rights requested Arbour's office to conduct a study on transitional justice and human rights activities that had been done by agencies of the United Nations, hoping to learn from the best practices and assisting countries in their transitional justice trajectories.<sup>198</sup> Very soon after, the Commission of Human Rights started to explore the content of guarantees of non-repetition in relation to impunity. At that time, the final draft of the Basic Principles and Guidelines had been prepared, listing GNRs as separate type of reparations. The Commission placed emphasis on “prevention” of further violations to which the totality of transitional justice processes and mechanisms contribute, stating that:

exposing the truth regarding violations of human rights and international humanitarian law [...]; holding the perpetrators [...] accountable; obtaining justice and an effective remedy [...]; as well as preserving historical records of such violations and restoring the dignity of victims through public

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<sup>198</sup> UN Commission on Human Rights, 'Human Rights and Transitional Justice. Human Rights Resolution 2005/70' (2005) UN Doc E/CN.4/2005/L.10/Add.17.

acknowledgment and commemoration of their suffering are integral to [...] the prevention of future violations.<sup>199</sup>

While preventing non-repetition is one of the general objectives, a global imperative, two concrete measures were proposed as ‘a guarantee of non-recurrence’, namely, ensuring that those responsible for violations do not remain in a position of power and authority and strengthening the capacities of police and other public servants in the areas of human rights and international humanitarian law through training.<sup>200</sup>

In 2009, an analytical study on human rights and TJ was submitted to the Human Rights Council within the annual report of the Office of the High Commissioner for Human Rights (OHCHR).<sup>201</sup> The study was important for addressing the imperative of determining the root causes of conflict and violations are and promoting an expanded transitional justice that encompasses breaches of economic, social and cultural rights. Guarantees of non-recurrence are presented as reparations, in line with the Basic Principles but contrary to the work of the International Law Commission. Preventing recurrence of human rights violations, in comparison to previous reports by other UN organs, was more generally attached to institutional reform, on the hypothesis that fair and efficient public institutions allow governments to ensure non-recurrence.<sup>202</sup>

In 2010, the Secretary-General published a guidance note on transitional justice in which the duty of prevention, from which guarantees of non-recurrence stem, was discussed.<sup>203</sup> This guidance note cited the above-discussed *LaGrand* case and Orentlicher’s set of Principles to Combat Impunity as relevant legal sources.<sup>204</sup> Importantly, this guidance note highlighted that transitional justice processes should ‘ensure the right of victims to reparations, the right of victims and societies to know the truth about violations, and guarantees of non-recurrence of

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<sup>199</sup> UN Commission on Human Rights, ‘Human Rights Resolution 2005/81: Impunity’ (21 April 2005) UN Doc E/CN.4/RES/2005/81.

<sup>200</sup> para 18 at *ibid.*

<sup>201</sup> UN Human Rights Council. ‘Analytical Study on Human Rights and Transitional Justice’ (2009) UN Doc A/HRC/12/18.

<sup>202</sup> *ibid.*

<sup>203</sup> UN Secretary General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (United Nations 2010).

<sup>204</sup> *ibid.*

violations, in accordance with international law.’<sup>205</sup> This statement signals that international legal frameworks are authoritative on the content and context of GNRs. As to the content of GNRs, this guidance note aligned with the measures listed in the Basic Principles. Here, although the content of GNRs is informed by the Basic Principles, the obligation to ensure specific guarantees of non-recurrence appeared separate from the obligation to provide reparations, portraying some of the characteristics given to GNRs in public international law.

At this point, we start to see GNRs underpinned by what Christine Bell has usefully framed as “the new law” of TJ.<sup>206</sup> Bell’s analysis concerns peace agreements and TJ’s mingling with international legal norms on accountability and amnesties. In what she calls “regime merge” the impact resulting from different legal regimes is consolidated in a “direction” towards accountability without necessitating ‘complete accountability for all’ atrocities.<sup>207</sup> This regime merge, characteristic of TJ, Bell asserts, meant that ‘[t]he gaps or ambiguities of one regime could be resolved by turning to another.’<sup>208</sup> The transfer of the knowledge about GNRs from one regime to another to fortify the position of GNRs in international law and later TJ is characteristic of the regime merge. However, the continuous conflation of GNRs as reparations or qualitatively different from reparations, and the further lack of coherent ‘direction’ on the norm’s content is, for now, perhaps more indicative of a regime *blur*. I look into the work of the Office of the Special Rapporteur to further support this claim.

#### 2.4.3. The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

The UN’s agenda on transitional justice culminated with the establishment of a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition in 2011 by the Human Rights Council.<sup>209</sup> The Special Rapporteur is widely regarded as the ‘transitional justice’ rapporteur and truth, justice, reparations and guarantees of non-repetition as

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<sup>205</sup> *ibid* 4.

<sup>206</sup> Bell (n 25).

<sup>207</sup> *ibid* 243.

<sup>208</sup> *ibid*.

<sup>209</sup> UN Human Rights Council, ‘Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence’ (n 40).

the four pillars of the field.<sup>210</sup> The mandate of the Rapporteur was inspired by the Basic Principles, and previously mentioned UN reports on transitional justice and impunity as well as the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>211</sup> However, without any explanations, guarantees of non-repetition – and not, for instance, prevention – are, firstly, made a pillar of transitional justice – and not an objective – and, secondly, separated from reparations, contrary to the Basic Principles.

The establishment of the Office of the Special Rapporteur is not only monumental because of the separation of reparations and guarantees of non-recurrence. but also because in fulfilment of their mandate, the first Special Rapporteur provided further normative expansions of GNRs as more than just *legal* and just *institutional* measures. The Special Rapporteur was given a lengthy set of tasks, including recommending how the elements of the mandate, such as guarantees of non-repetition, can be improved and strengthened, and building their normative framework. The first Special Rapporteur Pablo de Greiff prepared three separate reports dealing with non-recurrence. In the first and most elaborate one, de Greiff provided clarifications to certain conceptual ambiguities. He defined a guarantee of non-repetition as a *function* performed through a variety of measures to which previously victimised societies as a whole are entitled and where state institutions are duty bearers.<sup>212</sup> In that sense, guaranteeing non-repetition is no longer a mere moral promise but ‘an object of rational policymaking.’<sup>213</sup> The GNRs in transitional justice are, therefore, not exceptional but integral; always specific and not general guarantees, concrete interventions that oblige institutions of the state and jointly contribute to diminishing the likelihood of repeated violence.<sup>214</sup> As the legal foundations for GNRs, the report relied on the developments of GNRs in international human rights law, including the work of the

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<sup>210</sup> For a recent such conceptualisation at the United Nation, see Rebecca Brubaker, *The UN Security Council and Transitional Justice: A Preliminary Look* (United Nations University Centre for Policy Research 2021).

<sup>211</sup> This Convention remains the only core UN human rights treaty to specifically mention guarantees of non-repetition. Even before the Convention was passed, the Working Group on Enforced or Involuntary Disappearances elaborated on carrying out thorough investigations the public is informed about and combating impunity are the necessary precondition for lasting peace without recurrence. See, Report of the Working Group on Enforced or Involuntary Disappearances, ‘Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment. Question of Enforced or Involuntary Disappearances’ (12 January 1998) UN Doc E/CN.4/1998/43.

<sup>212</sup> ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence’ (n 86).

<sup>213</sup> *ibid* para 22.

<sup>214</sup> *ibid* para 25.

Human Rights Committee and regional human rights courts. Therefore, the contexts in which this kind of GNRs become applicable are, in line with the Basic Principles, gross violations of human rights and humanitarian law.<sup>215</sup>

It follows from these observations that the norm transformation undertaken by the Special Rapporteur is not one of context but of content. In de Greiff's theorisation, GNRs incorporate multiple measures that are feasible and could be achieved through TJ measures and that require overarching mobilisation and benefit the entire previously victimised society. In his view, once the basic preconditions for institutional interventions such as ensuring security and access to legal identity for all are met, there exist three fields of intervention through which policies relating to GNRs should be structured: at the level of official state institutions, civil society and cultural/personal dispositions. For each of the interventions, a series of measures were proposed, some of which never appeared in any legal documents on GNRs before. To date, this framework represents the most elaborate attempt to define guarantees of non-recurrence in transitional justice, which is why it is given substantive weight in this chapter. In de Greiff's view, the following measures of non-recurrence can be applied:

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<sup>215</sup> In a later joint report by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide, prevention and recurrence in transitional justice were discussed as relating to 'atrocious crimes', i.e., genocide, war crimes, ethnic cleansing and crimes against humanity. See, Joint study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence. See Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide (6 June 2018) UN Doc 8 A/HRC/37/65.

Ratification of treaties and legal reforms	<ul style="list-style-type: none"> <li>•typification of relevant crimes on the basis on international law;</li> <li>•statutes of limitation and retroactivity questions;</li> <li>•introduction of reforms leading to de-incentivising violations.</li> </ul>
Judicial reforms	<ul style="list-style-type: none"> <li>•screening judicial personnel;</li> <li>•strengthening judicial independence;</li> <li>•strengthening judicial competencies in areas specifically important for preventive purposes.</li> </ul>
Constitutional reforms	<ul style="list-style-type: none"> <li>•removing discriminatory provisions and introducing mechanisms of inclusion;</li> <li>•incorporating a bill of rights;</li> <li>•security sector reform;</li> <li>•separation of powers;</li> <li>•limiting the scope of military justice;</li> <li>•establishing a constitutional court;</li> <li>•adopting a new constitution.</li> </ul>
Civil society	<ul style="list-style-type: none"> <li>•ceasing attacks and threats and removing legal and practical obstacles imposed on the civil society;</li> <li>•establishing community-level programmes which focus on those who lacked legal rights before ;</li> <li>•creating enabling environments for not only NGOs but also trade unions and religious organisations.</li> </ul>
Cultural and personal disposition	<ul style="list-style-type: none"> <li>•educational reform;</li> <li>•arts and culture;</li> <li>•archives;</li> <li>•trauma counselling and psychosocial support.</li> </ul>

*Table 1. Visualisation of different measures of guarantees of non-recurrence as presented by Special Rapporteur Pablo de Greiff in 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 86).*

The key idea stemming from of this report is that Special Rapporteur conceptualises ensuring non-recurrence as a complex function cutting across sectors of the society, with multiple potential measures that could be achievable through transitional justice institutions, mechanisms, and processes, and that generally require the mobilisation of the entire society.

Admitting that institutional reforms alone are not enough, the Special Rapporteur substantially expands the content of GNRs. He states:

The core function of guarantees of non-recurrence is preventive in nature. It is one to which truth, justice and reparations are themselves supposed to contribute: criminal justice mainly through deterrence; truth commissions through disclosure, clarification and formulation of recommendations with a preventive intent; and reparations by strengthening the hand of victims to claim redress for the past and future violations and to enforce their rights more assertively.<sup>216</sup>

De Greiff gives some account of the sources of his recommendations. In terms of legal measures, very few of them were observed by the Rapporteur in countries such as Sierra Leone, Kenya, and Guatemala, and these mainly concerned constitutional reforms. The premise that civil society also has the potential to prevent recurrence, however, does not originate from any previous legal documents on GNRs. Finally, cultural and personal dispositions are seen as sources of stability and as a means to allow for continuing social relations. Some of the measures recommended in this regard respond to the views of the Inter-American Court on the reparations relating to satisfaction<sup>217</sup> and rehabilitation.<sup>218</sup>

Holding a strong belief that if parts of the abusive regime stay in power, there can be no guarantee that violations will not happen again, the Special Rapporteur dedicated his second report on GNRs to security sector reforms, particularly vetting.<sup>219</sup> In addition to discussing contributions and challenges of vetting as well as suggesting how to overcome them, de Greiff also elaborates on why vetting of the security sector can contribute to the prevention of recurrence. He argues that vetting can be an enabling condition for transitional justice, meaning

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<sup>216</sup> ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence’ (n 86) 24.

<sup>217</sup> For instance, in the “Juvenile Reeducation Institute” case, the IACtHR ordered Paraguay to provide a measure of satisfaction that consists of vocational assistance and special education program for former juvenile offenders. See “*Juvenile Reeducation Institute*” v. *Paraguay* (Judgment) [2004] Inter-American Court of Human Rights, Series C No. 112 para 321.

<sup>218</sup> See, for example, *Chitay Nech et al. v. Guatemala*, an enforced disappearance case, where the IACtHR requested the violating state to provide free medical and psychological treatment of the victims’ family, which correspond with de Greiff’s recommendations regarding trauma counselling and psychological support. *Chitay Nech et al. v. Guatemala* (Judgment), [2010] Inter-American Court of Human Rights, Series C, No. 212, para 256.

<sup>219</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, ‘Promotion of truth, justice, reparation and guarantees of non-recurrence’ (21 Oct 2015) UN Doc A/70/438.

that transitional justice institutions will work better if the institutions responsible for abuses are vetted. The report is therefore based on the well-established position of the UN in favour of vetting<sup>220</sup> and state practice of vetting in societies emerging from an oppressive regime or conflict.<sup>221</sup>

Finally, in 2017, the first Special Rapporteur examined regional approaches and advances to guarantees of non-recurrence.<sup>222</sup> The Rapporteur admitted that GNRs were rarely used outside the United Nations circle and that even within the organisation only few documents used the term. De Greiff is right in saying that only as long as we forget GNRs are operational public international law. His criticism is that transitional justice has not been especially good at taking advantage of this new knowledge of the norm, which is why guarantees of non-recurrence remain its least developed aspect.

De Greiff's successor, Fabian Salvioli has also addressed GNRs in his reports, mainly reiterating De Greiff's work.<sup>223</sup> In a later report on domestic reparations, Salvioli argues the right to reparation important as a GNR, but also references the Inter-American Court of Human Rights (IACtHR) case law which lists GNRs as a form of reparation.<sup>224</sup> In yet another joint study with the Special Adviser to the Secretary-General on the Prevention of Genocide, it was reiterated that GNRs are doctrinally the least developed pillar but that 'vast amount of knowledge and expertise on the topic, albeit fragmented' exist, citing the three reports on GNRs by De Greiff reviewed above, which, as explained, are not firmly empirically grounded.<sup>225</sup> Nonetheless, such phrasing implies that three interventions on GNRs by the UN Special Rapporteur have become 'the knowledge' about GNRs in transitional justice. Content-wise, this new 'knowledge' brings back

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<sup>220</sup> United Nations, *Rule-of-law tools for post-conflict states. Vetting: an operational framework* (United Nations 2006).

<sup>221</sup> Pablo De Greiff and Alexander Mayer-Rieckh (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (The Social Science Research Council 2007).

<sup>222</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice (7 August 2017) UN Doc A/HRC/36/50/Add.1.

<sup>223</sup> *ibid.*

<sup>224</sup> '... as it helps perpetrators to understand that what they did was wrong and that societies must undertake to dignify the victims.' Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 'Promotion of truth, justice, reparation and guarantees of non-recurrence' (11 July 2019) UN Doc A/HRC/42/45 para 29.

<sup>225</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide (n 219).

some of the flexibility to the norm and attempts to allow for re-contextualisation of the prescribed measures. It is thus in tension with the previously detected attempts to equate GNRs with broadly defined measures of legal and institutional reform, both in international human rights law and practice. Such knowledge is, thus far, the final and most expansive transformation of the norm of non-recurrence. Subsequent empirical chapters of this thesis build on the tension existing between this knowledge and international law.

## 2.5. Conclusion

Guarantees of non-recurrence are a norm with the most curious journey. This chapter has traced its international law origins and sought to tell the origin story of guarantees of non-recurrence in transitional justice. The origin story implies that GNRs have developed into an international norm and a TJ pillar by way of a remarkable norm transformation. The story of guarantees of non-recurrence is therefore one of decontextualisation of local understandings of the norm, transfers of the norm content into IHRL, and further attempts to maintain some of the content-flexibility for re-contextualisation of the same norm in international transitional justice policy.

I have set the legal and conceptual foundations for GNRs while noting the similarities and differences between the norm's contents, contexts, and duty bearers across different regimes, and the ultimate normative expansion proposed by the Special Rapporteur. Until the emergence of transitional justice as a distinct field, and the subsequent developments of IHRL with regards to victims' rights to reparation, assurances and guarantees of non-recurrence had been barely a norm. Assurances and guarantees of non-recurrence suffered from non-uniform state practice and were known for their exceptional character. Today, as shown in this chapter, the ICJ *LaGrand* decision, the ILC's ARSIWA, the United Nations Basic Principles, multiple decisions by the IACtHR and recommendations by the Human Rights Committee, as well as the establishment of the Special Rapporteur on the promotion of truth, justice, reparations and *guarantees of non-recurrence* all point to norm affirmation, i.e., to existence of a right and obligation to prevent repetitions of violence and violations.

In this chapter, I have shown how transitional justice has transformed both the contents and contexts of the principle of non-recurrence and has furthermore helped stretch the principle

of state responsibility in the human rights regime. The influence of the developments in Chile and other Latin American countries on the Basic Principles and the establishment of GNRs as a form of reparation which such violating states could be entitled to provide is, without a doubt, a welcome and most remarkable development. The ‘new law’ of transitional justice on GNRs is not settled and resembles a regime blur more than a regime merge. Yet, I have also provided examples that further complicate the conundrum about non-recurrence in TJ. On the one hand, I demonstrated that the norm of non-recurrence has been both equated to institutional reform measures and therein decontextualised from specific political transitions in Latin America. On the other hand, the norm has been simultaneously normatively expanded and maintained as sufficiently ambiguous to be applicable and necessary across varying contexts. While GNRs pertain the characteristics of being forward-looking, flexible, and purposefully altering *status quo* across the reviewed regimes and in TJ, the content and the application of GNRs continue to differ. These similarities and differences form the first part of the foundation for the empirical aspects of the thesis which seeks to investigate how these tensions operate in the local context in BiH by exploring practitioners’ engagements with the norm, conceptually and through action.

## **CHAPTER 3: GUARANTEES OF NON-RECURRENCE: A PILLAR, AN OBJECTIVE, OR A BRIDGE? IN SEARCH OF CONCEPTUAL CLARITY**

### 3.1. Introduction

Although they share some of characteristics, such as being preventative, forward-looking and flexible, guarantees of non-recurrence are understood and treated differently in distinct regimes of international law and at the United Nations. This chapter builds on these conceptual foundations – and confusions - established in Chapter 2 to show that transitional justice scholarship portrays little consistency in its analysis of GNRs, creating an ambiguous position of the field towards this norm. The purpose of this chapter is to set out the theoretical underpinnings for the rest of the thesis which, inspired by structuration theory, conceptualises structure (transitional justice) and agency (practitioners in BiH) as mutually constituting. In line with the theory, I proceed to review key scholarship on GNRs, with structure- as well as actor-oriented approaches framing the review.

Previously, I have suggested an overarching goal of ‘Never Again’, that is, ensuring non-repetition of mass violations was rebranded as ‘GNRs’, an institutionalised set of measures used to achieve this goal, and made integral to transitional justice as we know it today. Indeed, to date, non-recurrence retains a dual status in transitional justice as an objective all other objects of TJ support and a collection of practices known as GNRs. In the literature, there is little disagreement that ensuring non-repetition of violations is an overall objective of transitional justice practice. In the words of Lykes and van der Merwe:

(...) most (scholars) recognise transitional justice as a set of processes and mechanisms, including accountability, justice and reparations, operationalised by

those seeking to come to terms with the multiple legacies of large-scale past abuses and *to ensure non-recurrence*.<sup>226</sup>

To that end, the past three decades of paradigmatic transitional justice literature have tended to promote a range of ideas about why and how distinct mechanisms, tools and institutions of transitional justice, typically enshrined in one of the ‘pillars’ of TJ, enhance or diminish non-recurrence, drawing causal links between the object and the objective. While at times critical of transitional justice as an enterprise or project, this body of literature maintains certainty over non-recurrence as a core objective of transitional justice that different mechanisms of TJ influence. At the same time, considering the centrality of GNRs in TJ in the past decade, the literature that seeks to theorise GNRs as a *pillar* of TJ, an often non-exhaustive set of measures of certain characteristic, or examine context-specific content of GNRs remains scarce and insufficiently empirically grounded. Within this limited body of literature, I identify an emerging pattern whereby GNRs are theorised as a *bridge* between distinct TJ mechanisms and streams of research and policy. This literature exists in parallel with the abundant literature on non-recurrence as a normative expectation – and requirement even - other TJ pillars contribute to and the two are typically not connected in scholarly endeavours.

The gaps in the literature I establish in this chapter are twofold. First, I argue that there is a conceptual tension between treating GNRs as a pillar and non-recurrence as an objective of transitional justice. This leads to lack of coherent scholarly approach on the topic and subsequently lack of empirically based knowledge of non-recurrence in transitional justice. Second, I hold that the scholarly accounts on GNRs tend to take a structure-oriented approach. The questions asked therefore concern how different institutions, laws or governments aid or hamper non-recurrence and how to position GNRs, as international human rights law sees them, within transitional justice. Concrete actor-oriented approaches to non-recurrence that would observe the agency of a range of actors involved in TJ practices and their potential to shape GNRs are absent from the scholarship. After reviewing selected actor-oriented approaches to different areas of transitional justice, I argue that most TJ scholars tend to limit their inquiries to examinations of either only how the structure of transitional justice, with its various laws, norms

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<sup>226</sup> M Brinton Lykes and Hugo van der Merwe, ‘Exploring/Expanding the Reach of Transitional Justice’ (2017) 11 *International Journal of Transitional Justice* 371, 372 (emphasis added).

and institutions, treats of GNRs or, on the other end of the spectrum, how people mobilise around, practice and accomplish different TJ values but not non-recurrence. Chapters 5, 6 and 7 will address both identified gaps in the scholarship, and further tie structure- and actor-oriented approaches together to offer novel positioning of GNRs within TJ theory.

The chapter proceeds as follows. In Section 3.2., I outline my theoretical underpinnings as per structuration theory and elaborate further on how they apply to my study of transitional justice and its actors. The key takeaway from this overview is that structure and agency are in interplay, mutually constituting and having the power to shape one another. Sections 3.3.1. – 3.3.5. explore how each of the five pillars of TJ has been causally linked to the objective of non-recurrence in the literature, drawing out some of the major ideas attached to the applications of these pillars and their potential to aid non-recurrence. In Section 3.4., I provide a detailed review of identified key literature on GNRs in transitional justice and explore the distinct ways in which GNRs are theorised and positioned *vis-à-vis* their international law origins and the normative development undertaken by the Special Rapporteur. Since GNRs have not been studied through a structuration theory lens in transitional justice, in Section 3.5., I offer a review of other key readings on agency in TJ more broadly to draw out three most commonly explored themes in this regard: actors as producers of knowledge; structural impediments to TJ agency; and, the influence of legalism. Out of this literature review arises my argument that domestic actors have the power and capacity to shape international norms and ideas to fit their realities or political agendas, yet, as studies on specific sub-sets of actors show, numerous internal and external factors influence such agency, including donors' priorities, funding requirements and adherence to legalism.

### 3.2. Theoretical underpinnings: structuration theory

My research is theoretically underpinned by structuration theory. Key sociological theorising on structure and agency suggests that the two opposites are in interplay and that therefore the agents of transitional justice and their practices are shaped by the structure of TJ while simultaneously shaping it. In his renowned book *Central Problems in Social Theory*, Giddens rejects the subject/object dualism and conceptualises it as a duality instead, stressing the

inevitable interplay between structure and agency.<sup>227</sup> In this duality, structures become both *medium* and *outcome* of practices' reproduction and power relations are inevitably conceptualised as two-way. To quote Giddens, 'however subordinate an actor may be in a social relationship, the very fact of involvement in that relationship gives him or her a certain amount of power over the other.'<sup>228</sup>

In Giddens' view, therefore, it is not social systems that reason, think, or have a purpose but rather human agents who can do these things. Furthermore, it is not institutions that operate and conspire against agents but rather agents who produce them. In fact, in *The Constitution of Society*, Giddens argues that structures 'have no existence independent of the knowledge that agents have about what they do.'<sup>229</sup> Agency in this context means intervening in world affairs to produce some outcomes, whereby Giddens works under a presumption that all social actors possess knowledge about the society's reproduction, although this knowledge can come from "unconscious sources."<sup>230</sup> Giddens furthermore posits that temporality and time-space intersections more generally are essential for understanding any social practices. The resulting agency is therein defined as '*a continuous flow of conduct*' and not merely a series of acts, reasons and purposes 'somehow aggregated together.'<sup>231</sup> Similarly, "structure" is composed of '*patterning elements of interaction ... and the continuity of interaction in time,*' that is, rules and resources that "bind" time and space in social reproduction.<sup>232</sup> More precisely, structures refer to the structuring properties that enable 'discernibly similar social practices to exist across varying spans of time and space.'<sup>233</sup> The duality of structure and agency suggests that structures are both "enabling and constraining" for human agency, meaning that structure is ultimately involved in the production of action in some capacity.<sup>234</sup> Agents are equipped with different kinds and levels of power which shapes the capacity to act as well as the outcome of their actions. Although

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<sup>227</sup> Anthony Giddens, *Central Problems in Social Theory. Action, Structure and Contradiction in Social Analysis* (The Macmillan Press Ltd 1979).

<sup>228</sup> *ibid* 7.

<sup>229</sup> Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press 1984) 26.

<sup>230</sup> Consciousness, as Giddens develops it, can be practical or discursive. Giddens, *Central Problems in Social Theory. Action, Structure and Contradiction in Social Analysis* (n 227) 5.

<sup>231</sup> *ibid* 55.

<sup>232</sup> *ibid* 62–64.

<sup>233</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 17.

<sup>234</sup> Giddens, *Central Problems in Social Theory. Action, Structure and Contradiction in Social Analysis* (n 227) 69.

power is integral to the constitution of social practices and structures are powerful enough to enable or constrain, they are not sufficiently powerful to entirely block actions by wilful agents.<sup>235</sup>

Both structure and agency are “simultaneously involved” and have the power to shape ‘the production of social phenomena’ including norms such as guarantees of non-recurrence.<sup>236</sup> Actors, having the capacity to intervene in the world, possess ‘a range of causal powers’ such as influencing the powers deployed by others.<sup>237</sup> Making a difference in the world therefore means having some kind of power. Carstensen and Schmidt provide a useful avenue through which empirical findings of this thesis will be discussed by arguing that ideational structures can constrain which ideas matter while actors engage with ideas to (re)construct these same structures.<sup>238</sup> The two authors differentiate between three different types of ideational power. Firstly, they identify *power through ideas*, whereby actors have the capacity to persuade other actors to adopt their views. Secondly, ideational power can also be *power over ideas*, whereby ideas are imposed and can or cannot be resisted and supplemented by alternative ideas. Finally, there is *power in ideas*, whereby some sort of institutions or hegemony constrains what ideas are even considered in the first place. These three types of ideational power, the authors argue, can come in different guises, combinations and intersections which ought to be further examined empirically.

In her book *Structure, Agency and the Internal Conversation*, Archer investigates two different kinds of causal powers whereby structures influence agency and vice versa.<sup>239</sup> Like Giddens, she asserts that structures can affect or even condition agents’ actions in two ways – through constraint and enablement. What is being constrained or enabled is what Archer calls a “project,” a specific agential enterprise that ‘involves an end that is desired, however tentatively or nebulously, and also some notion, however imprecise, of the course of action through which

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<sup>235</sup> Kathleen E Hull and Robert L Nelson, ‘Gender Inequality in Law: Problems of Structure and Agency in Recent Studies of Gender in Anglo-American Legal Professions’ (1998) 23 *Law & Social Inquiry* 681, 695.

<sup>236</sup> Alexander E Wendt, ‘The Agent-Structure Problem in International Relations Theory’ (1987) 41 *International Organization* 335, 361.

<sup>237</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 14.

<sup>238</sup> Martin B Carstensen and Vivien A Schmidt, ‘Power through, over and in Ideas: Conceptualizing Ideational Power in Discursive Institutionalism’ (2016) 23 *Journal of European Public Policy* 318.

<sup>239</sup> Margaret S Archer, *Structure, Agency and the Internal Conversation* (Cambridge University Press 2003) 4.

to accomplish it.’<sup>240</sup> Furthermore, structures are enabling or constraining where there is ‘a relationship of congruence or incongruence’ with such projects. Yet, she also holds that the subjectivity of agents is very much present in these processes and sees people as “reflexive” agents with subjective powers to deliberate and decide what they do and understand how they got there.<sup>241</sup> Giddens similarly argues that “reflexivity” means for agents to be self-conscious as well as monitoring ‘the ongoing flow of social life.’<sup>242</sup> Archer further ties agency to the *status quo*, which is of utmost importance for this research. To quote Archer, ‘[v]ery few agents participate in the activities of promotive interest groups without the explicit *intent* of defending or transforming the *status quo*.’<sup>243</sup> The word ‘intent’ is stressed here because since, as Archer asserts, the intentions rarely determine the final outcome of the *status quo* but are crucial in understanding acts of agency. Archer notes that structures are believed to have not only a temporal priority but also ‘causal efficacy *vis-à-vis* members of society.’<sup>244</sup> This causal power is not guaranteed by the mere existence of a structure but is only triggered when agents actively advocate in a manner that implies causation. In other words, the causal power becomes ‘mediated through social agency.’<sup>245</sup>

How do these theoretical assertions regarding structures and agency in the social world reflect on this thesis? Guarantees of non-recurrence do not exist in a vacuum, separate from the rules and resources that bind the structure of transitional justice across space and time. I draw on structuration theory here to define the ‘structure’ of transitional justice as ‘a set of internally related elements’,<sup>246</sup> that is, objects of transitional justice to which the field is referential. The objects of TJ, as explained in Chapter 1, consists of its mechanisms, situations, and transitional justice itself.<sup>247</sup> The most common way to conceptualise transitional justice has been through a set of mechanisms (trials, truth commissions, vetting, etc.) enshrined in a four/five pillar model which countries in different types of transition adopt or have been advised to adopt to deal with the legacies of their violent pasts. Nevertheless, I argue that, as a structure, transitional justice is

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<sup>240</sup> *ibid* 6.

<sup>241</sup> *ibid* 8.

<sup>242</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 3.

<sup>243</sup> Archer (n 239) 356.

<sup>244</sup> *ibid* 4.

<sup>245</sup> *ibid* 342.

<sup>246</sup> ‘Internally related’ means that the elements are defined through their position to the structure. Wendt (n 236) 357.

<sup>247</sup> Zunino (n 15) 28.

not only bound by its mechanisms and the situations it examines, but also by its own characteristics. While the structure of transitional justice is surely material, it is above all one of interests and ideas,<sup>248</sup> a “discursive project.”<sup>249</sup> The structure of transitional justice is material because it brings into the picture new courts, commissions, laws, organisations, and even monuments and memorials; it is undoubtedly a material structure that carries with itself a package of mechanisms and institutions, a combination of which is concerned or applied to a range of different pre-, during- and post-transitional settings. Yet, I argue that more prominently, however, the structure of transitional justice is a collection of norms and values such as anti-impunity, accountability and prevention and ideas about how they ought to be organised and implemented on the ground. As Zunino explains, TJ discourse is formed out of the said mechanisms of transitional justice and has six defining characteristics: transitional justice is ‘comparative, technical ... teleological, liberal ... multilevel and state-centric.’<sup>250</sup> These characteristics are rooted in field-defining developments in specific contexts – namely Latin America, East Europe and South Africa – and are exclusive of many other Cold War-era transitions that were non-liberal, non-legalistic or otherwise did not fit into the emerging discourse.<sup>251</sup> Over time, the characteristics became its inherent values: legalism, state-centralism, and liberalism,<sup>252</sup> exported in numerous countries dealing with their violent past. It follows, for example, that liberal peace is necessary for ‘successful’ transitions and is to be achieved through justice, which in turn, requires observance of the rule of law.<sup>253</sup> In that sense, transitional justice can be interpreted as a set of “rules of the game” in which actions, i.e., practices of non-recurrence take place.<sup>254</sup> As established in Chapter 1, a defining characteristic of such a set of rules of the game is in fact one of malleability with much flexibility as well as preciseness around these rules, whereby TJ as an ideational structure has managed to contain itself as absolutely necessary yet somehow both global and local, both universal and context-specific.

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<sup>248</sup> Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press 1999) Chapter 4. Georg Sorensen, ‘The Case for Combining Material Forces and Ideas in the Study of IR’ (2008) 14 *European Journal of International Relations* 5.

<sup>249</sup> Bonner (n 67) 241.

<sup>250</sup> Zunino (n 15) 229.

<sup>251</sup> For example, Russell’s tribunal with respects to the atrocities committed in Vietnam. See Zunino (n 15).

<sup>252</sup> *ibid* 231.

<sup>253</sup> Turner (n 20) 17.

<sup>254</sup> Wendt (n 248) 338.

This theorisation is conversation with yet distinct from the theoretical work by scholars such as Nagy and Miller who previously referred to transitional justice as a ‘global project’ or ‘enterprise.’<sup>255</sup> Nagy defines TJ as a ‘global project’ based on it emerging ‘as a body of customary international law and normative standards’ around which there has been a ‘settled consensus’ and a growing sense of inevitability that some kind of TJ is necessary to deal with the past – the question only remains what.<sup>256</sup> I agree with Nagy that TJ is perceived as evidently necessary and inevitable in a growing range of situations of violence and injustice. Like Miller’s ‘enterprise,’ my conceptualisation of TJ as an ‘ideational structure’ is built on the premise that there is certainty around TJ’s objectives that Nagy discusses yet at the same time there is ‘uneasiness’ about its means, results, and efficacy.<sup>257</sup> This has in fact become a defining element of transitional justice, one that shapes its malleability, as I discussed in Chapter 1.

My conceptualisation therefore builds on Nagy’s ‘global project’ and Miller’s ‘enterprise’ by proposing that the fact that there has been no consensus over how to do transitional justice or what transitional justice is good for begs the questions of not only the scope of transitional justice and whether it is inclusive of and effective in addressing structural violence and gender inequality,<sup>258</sup> or violence against Indigenous people,<sup>259</sup> but also what transitional justice is and for whom. Conceptualising TJ as an ideational structure allows me to investigate how this continuous effort to maintain consistency in some of TJ’s core mechanisms across contexts while creating room for context-specificity can be studied not as an interesting anomaly but a part and parcel of the ‘project’ of transitional justice that can have both enabling and constraining effects of agency. The structure, with all its structural properties, thus shapes not only the limits of transitional justice as a ‘project’ or ‘enterprise’, as per these previous theorisations, but also how the *internal elements* of the structure, such as norms and mechanisms, are created and re-created at all levels where TJ exists – local, national, regional, global.

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<sup>255</sup> Rosemary Nagy, ‘Transitional Justice as Global Project: Critical Reflections’ (2008) 29 *Third World Quarterly* 275.; Miller (n 52).

<sup>256</sup> Nagy (n 255) 276.

<sup>257</sup> Miller (n 52) 1.

<sup>258</sup> Nagy (n 255) 287.

<sup>259</sup> Miller (n 52).

In this thesis, therefore, such an ideational structure is treated as referential and dependent on the agency that produces and conceptualises it<sup>260</sup> and the malleability of TJ allows the agents to receive and adopt the attached ideas differently in different situations and therefore maintain or potentially alter the structure itself. Just like guarantees of non-recurrence do not exist in a vacuum, separate from the laws, policies and institutions and progressive goals that constitute the structure of transitional justice and maintain its existence across time and space, they also do not develop in isolation from domestic actors. Rather than assuming that any of the pillars of transitional justice in isolation or combined count as sufficient and only applications of guarantees of non-recurrence, I conceptualise the structure of TJ as being bound by the mechanisms and tools found within these pillars, as well as its claimed values and characteristics. Underpinned by structuration theory, I hypothesise that GNRs are produced and reproduced by both such ideational structure of TJ and its agents. Therefore, I wish to explore how actors of transitional justice, the practitioners inhabiting various institutions, organisations and mechanisms characterised as working towards TJ goals and for TJ values, create their context-specific understandings of GNRs and put them to practice.<sup>261</sup> To understand how GNRs are perceived and practiced in domestic TJ settings, I explore how the actors of transitional justice contextualise them and create meanings and practices of GNRs that are specific to the context of Bosnia and Herzegovina. In the case of GNRs, the place of actors becomes particularly important considering the fragmentation of the norm across legal regimes and the more recent normative expansion making GNRs qualitatively different in TJ than in international law (as per Chapter 2) as well as TJ's characteristic of malleability. This thesis' emphasis on 'agency' emerges from this reasoning.

The agency I will explore in this thesis is defined as conducting an activity or a series of activities over time to alter some of the existing social/political situations out of an understanding that these situations presently contribute to renewed violence or increase the risk of renewed violence in the near or far future. Agency could also include attempts to defend and maintain the *status quo* when this is done under a presumption that the current *status quo* ensures non-recurrence. Both understandings and practices of GNRs are explored in this thesis under the

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<sup>260</sup> Wendt (n 236).

<sup>261</sup> See Chapter IV on my methodological choices regarding who constitutes 'TJ actors/practitioners'.

premise that the actors ought to define a phenomenon before choosing to pursue a course of action towards it.<sup>262</sup> While agency and structure are treated in interplay, the interplay of structure and agency does not mean only that TJ actors report causal relationships between, e.g. an institution of TJ and their agency relating to GNRs, but also that they report or imply that the structure constitutes their practices of understandings of GNRs.<sup>263</sup> More precisely, the thesis explores how ideational elements and properties of transitional justice structure make or help make GNRs what they are in domestic practices in BiH as well as how the practitioners change the ways in which the norm of non-recurrence is understood domestically.

My epistemological choices go hand-in-hand with my theoretical choices. Epistemological preferences define *how* we know, which means that they guide how a researcher theorises the meaning of their research.<sup>264</sup> Constructionism treats perceptions and experiences as products of active construction mediated by social factors such as culture, ideology and history.<sup>265</sup> More precisely, my epistemological approach to social analysis sees human interactions as shaped primarily by ideational factors such as “widely shared” beliefs that in turn shape ‘the interests and identities of purposive actors.’<sup>266</sup> Constructionist epistemology in the case of this research means staying informed by contexts and grounding any findings in local circumstances in which they are created, both those specific to transitional justice and Bosnia and Herzegovina.<sup>267</sup>

Having introduced the theoretical foundation for the thesis, I proceed with a review of the key scholarly work on non-recurrence. I do so for two reasons: firstly, to establish the state-of-the-art of the scholarship on the topic that this thesis is inspired by; and secondly, to identify the major gaps in knowledge on GNRs in TJ which the thesis addresses and builds on. In particular,

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<sup>262</sup> Wendt (n 248) 186.

<sup>263</sup> *ibid* 165.

<sup>264</sup> Donatella Della Porta and Michael Keating, ‘How many approaches in the social sciences? An epistemological introduction’ in Donatella Della Porta and Michael Keating (eds.), *Approaches and Methodologies in the Social Sciences* (Cambridge University Press 2008) 19, 39.

<sup>265</sup> Yan-Yan Chen, Daniel TL Shek and Fei-Fei Bu, ‘Applications of Interpretive and Constructionist Research Methods in Adolescent Research: Philosophy, Principles and Examples’ (2011) 23 *International Journal of Adolescent Medical Health* 129.

<sup>266</sup> Martha Finnemore and Kathryn Sikkink, ‘Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics’ (2001) 4 *Annual Review of Political Science* 391, 393.

<sup>267</sup> Chen, Shek and Bu (n 265).

I highlight the lack of conceptual clarity on the concept of GNRs and its position in TJ theory. I further demonstrate that the existent studies tend to take a structure-oriented approach to GNRs, omitting to take into considerations actors' agency to produce, shape and reject norms.

### 3.3. Structure-oriented approaches to non-recurrence

So far in this thesis, I made a case for treating transitional justice as a primarily ideational structure due to the inherent tenets of this global, discursive entity of how the past should be dealt with, a set of established values that the claimed mechanisms and tools do, or do not, effectively lead to. Paradigmatic transitional justice scholarship, as discussed in Chapter 1, is oriented towards legal and institutional elements and the pillar-like model of transitional justice, and as such has produced literature that treats non-recurrence as a normative expectation or even a requirement, an objective towards which the legal and institutional objects enshrined in these pillars contribute to. This objective frames individual transitional justice pillars and various (predominantly) legal and institutional practices within these pillars. Each pillar carries with itself a certain set of ideas about the progressive objectives it promotes and their impact on non-recurrence as a social phenomenon. In the following five sub-sections, I will review how each of the pillars, and the mechanisms found within in, are discussed to be contributing to the objective of non-recurrence of violations (or violence and conflict overall) in the literature, therein serving as a GNR of sorts. In doing so, I delineate the key ideas established regarding these relationships between the objects that bind the TJ structure and GNRs as a legal and social norm.

#### 3.3.1. Criminal justice (and its absence)

Criminal trials have become a central, most commonly researched and advocated for mechanism of transitional justice. This promotion of the criminal trial as a superior mechanism of transitional justice has often been done on the accounts of its potential to contribute to non-recurrence of mass violations. These circumstances partly stem from the very origins of the field. Teitel's genealogy of transitional justice traces the origins of TJ back to the Nuremberg trials, an event that also gave birth to contemporary international criminal law.<sup>268</sup> The Nuremberg

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<sup>268</sup> Teitel, 'Transitional Justice Genealogy' (n 10).

Tribunal was ‘the heyday of the belief ... in law as a tool for state modernization,’ Teitel writes.<sup>269</sup> The dominance of criminal trials in transitional justice is, thus, closely intertwined with the centrality of law and legal approaches in paradigmatic transitional justice. In the origin region for ‘justice in transition’, Latin America, human rights advocates and civil society organisations created a strong impetus for criminal accountability in the 1980s and 1990s. Sikkink has coined this ‘the justice cascade’, referring to a positive turn to criminal trials for human rights violations, starting in Latin America and spreading elsewhere.<sup>270</sup> Since then, international and domestic tribunals dealing with past regime’s violations have proliferated. In addition to the ICC<sup>271</sup> and the two UN tribunals for Rwanda and the former Yugoslavia, the so-called ‘hybrid’ tribunals<sup>272</sup> emerged in Sierra Leone, BiH, East Timor, Cambodia and, recently, Kosovo. Hundreds of other cases were brought before domestic courts in various places such as Argentina, Colombia, and Uganda. Furthermore, in academic discourse on transitional justice, criminal trials have been the most written about mechanism.<sup>273</sup>

The arguments made for retributive justice are numerous and commonly linked to the objective of ensuring non-recurrence of violations. International and national trials are often exercised on the premise of their forward-looking potential to achieve deterrence and guarantee non-repetition in that regard.<sup>274</sup> In ordinary times, typical attributes of a trial would be their potential to enforce general and specific deterrence and prevent recidivism as well as increased crime rates.<sup>275</sup> Yet, the alleged potential of criminal justice in transitional times exceeds its usual influences. According to Teitel, trials ‘play the leading foundational role in the transformation to a more liberal political order.’<sup>276</sup> Because past violations are often committed or sponsored by state officials, holding these high-ranking officials accountable is seen as the best way to promote a normative transformation to the new system that upholds the rule of law. Teitel even

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<sup>269</sup> *ibid* 74.

<sup>270</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (Norton 2011) 5.

<sup>271</sup> According to Teitel, the most recognised symbol of the steady-state of TJ is the operationalisation of the ICC. See Teitel, ‘Transitional Justice Genealogy’ (n 10) 90.

<sup>272</sup> Hybrid tribunals are typically national tribunals, located domestically but with the ability to adjudicate international crimes. They are also likely to have mixed international and national staff.

<sup>273</sup> Zunino (n 15).

<sup>274</sup> McAuliffe, ‘Transitional Justice and the Rule of Law’ (n 187).

<sup>275</sup> See, for instance, Jack P. Gibbs, *Crime, Punishment, and Deterrence* (Elsevier 1975).

<sup>276</sup> Teitel, *Transitional Justice* (n 189) 7.

goes so far as saying that criminal law is not solely ‘an instrument of stability but also one of social change.’<sup>277</sup> Others have argued that obliging the new regime to obey the international rules against impunity promotes the rule of law, offers incentives to rebuild the judiciary, and draws a final line between the old and the new regimes.<sup>278</sup> Osiel, for instance, asserts that criminal trials in transition are “moments of truth” in and out of themselves as they highlight state officials’ violence and complicity and, therefore, inspire people to ‘reassess their foundational beliefs.’<sup>279</sup> Osiel, therefore, suggests that trials’ purpose is to employ law and serve a pedagogical role, creating and teaching a particular version of the history of the conflict and by doing so help prevent recurrence of atrocities.<sup>280</sup> The opposing action of not prosecuting those responsible for grave violations of human rights and humanitarian law is seen as an omission to uphold a state’s legal obligation which is claimed to have a direct link to further renewed violence.<sup>281</sup>

The qualities of criminal trials due to which criminal law and its institutions are claimed to contribute to prevention of non-recurrence are not a matter of inevitability and natural operation of criminal law. Instead, the literature positions them as exceptional and in some way serving to justify the vast investment in the international criminal justice infrastructure that took place in since the 1990s. Consequently, all of these alleged deterrence and non-recurrence relating attributes of criminal justice in transitions have been questioned in TJ literature, mostly on the account that trials are inevitably political. When it was argued, based on the Nuremberg Tribunal, that it is international criminal law and not politics, that can prevent future conflict, this was seen as entirely novel.<sup>282</sup> Moreover, when the International Criminal Tribunal for the former Yugoslavia (ICTY) declared one of its aims to be advancing deterrence of prospective human rights tragedies, Teitel states, it equipped transitional justice with new, empirically unproven tools.<sup>283</sup> More recently, various authors have questioned the positioning of criminal trials as the most effective response to violations and argued that the preference for criminal justice might

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<sup>277</sup> *ibid* 67.

<sup>278</sup> See Oskar NT Thoms, James Ron and Roland Paris, ‘State-Level Effects of Transitional Justice: What Do We Know?’ (2010) 4 *International Journal of Transitional Justice* 329.

<sup>279</sup> Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Routledge 1999) 2.

<sup>280</sup> *ibid*.

<sup>281</sup> Mattia Pinto, ‘Historical Trends of Human Rights Gone Criminal’ (2020) 42 *Human Rights Quarterly* 729, 748.

<sup>282</sup> Ruti Teitel, ‘Humanity’s Law: Rule of Law for the New Global Politics’ (2002) 35 *Cornell International Law Journal* 355.

<sup>283</sup> *ibid* 386.

preclude other structural concerns in a transitional society.<sup>284</sup> Karen Engle, for example, has made a call for *anti* anti-impunity on the basis of criminal prosecutions reinforcement of ‘individualized and decontextualized understanding of the harms they aim to address.’<sup>285</sup> Writing about the ICTY, Payam Akhavan expresses concern with prosecutorial independence and discretion.<sup>286</sup> It is the prosecutor’s choice of investigation, Akhavan argues, that inevitably shapes the historical record of the conflict that the tribunal will produce. Such accounts could lead to distortions of the truth and further political wrangling.

Despite their apparent success, criminal trials have not been on a perfectly steep rise since the end of WWII. In some transitional contexts, trials have been almost entirely absent on the account that not only do they not inherently guarantee non-recurrence but also, they might as well directly harm it. As numerous countries transitioned from communist and authoritarian regimes to democracy, they faced dilemmas over the alleged appropriateness of the criminal trial.<sup>287</sup> First, the contexts of transitions in Latin America and Central and Eastern Europe were different from Germany and also very distinct from each other. Second, the complex political realities of criminally prosecuting individuals from the past regime became apparent.<sup>288</sup> Leaders of certain new regimes in these contexts began to question selective prosecutorial policies and whether they would diminish public trust in the new regime’s institutions. As a result, tensions between punishment and amnesty emerged. The debate unravelled as follows: on the one hand, amnesties can be seen as an abandonment of justice, therefore hampering democratic progress. On the other hand, refraining from the use of punishment could represent ‘the return of the rule of law’ that is merciful and therefore liberal.<sup>289</sup> Consequently, many countries transitioning in the immediate post-Cold War phase have applied some level of amnesty. Instead of punishment and responsibility, the advocated values in this phase came from disciplines other than law - e.g., theology and social psychology - and included reconciliation and forgiveness, a representative of

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<sup>284</sup> See in general Karen Engle, Zinaida Miller and D.M Davis, *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2017).

<sup>285</sup> Karen Engle, ‘A Genealogy of the Criminal Turn in Human Rights’ in Karen Engle, Zinaida Miller and DM Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2017) 16.

<sup>286</sup> Payam Akhavan, ‘Justice, Power, and the Realities of Interdependence: Lessons from the Milosevic and Hussein Trials’ (2005) 38 *Cornell International Law Journal* 973.

<sup>287</sup> Teitel, ‘Transitional Justice Genealogy’ (n 10).

<sup>288</sup> *ibid.*

<sup>289</sup> Teitel, *Transitional Justice* (n 189) 54–55.

which is South Africa. Yet, over time, and with the establishment of the ad-hoc tribunals for the former Yugoslavia and Rwanda, the perceptions of criminal trials as the obvious, indisputable solution and remedy to grave human rights violations gained prominence internationally. The state obligation to prosecute – as opposed to offer amnesty to – perpetrators of the most serious human rights violations became universal through some of the core documents that also codify GNRs in IHRL today, namely the Joinet/Orentlicher Impunity Principles and the Basic Principles. Amnesties, on the other hand, were rejected as a viable option for international crimes, and the UN policy is that amnesties for such crimes are impermissible under international law.<sup>290</sup> While amnesties for international crimes as seen as venturing into the dangerous waters of impunity for future crimes, criminal trials emerge as the most obvious policy choices in transitional settings for their justice and non-recurrence values.

This section has discussed criminal justice as the most prominent mechanism of transitional justice and shown the various links made between criminal trials and non-recurrence in the literature under the premise that trials uphold the rule of law, deter violence, ‘make’ truth, and establish historical records of past violence. I have also briefly elaborated on the alternatives to trials such as amnesties which raise a possibility that trials can in fact be harmful to non-recurrence of violations, but ultimately show that the anti-impunity norm prevails over amnesties and as such it carries stronger ties to the objective of non-recurrence.

### 3.3.2. Truth recovery

Institutionalised truth recovery initiatives marked the early stages of ‘justice in transition’ where criminal trials were impossible or seen as destabilising and have since developed strong normative links with non-recurrence as a key objective which they ought to support. Searching for ‘the truth’ emerged as important for different contextual reasons. In Latin America, the nature of the violence committed meant that thousands of people were disappeared and never found, and their families ostracised.<sup>291</sup> In Central and Eastern Europe, the old, oppressive regimes conducted their affairs in much secrecy and through surveillance, leading to a belief that opening

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<sup>290</sup> See, generally, UN Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States. Amnesties* (United Nations 2009).

<sup>291</sup> Naomi Roht-Arriaza, ‘The New Landscape of Transitional Justice’ (n 47).

up state archives would shed the light on these long-hidden and denied crimes.<sup>292</sup> Revealing the truth about the regime's collaborators was trusted to aid the vetting process and ensure that any future influence of these individuals is limited. In South Africa, knowing the truth was seen as an opportunity to focus on the victims, and not perpetrators, and their testimony, allowing them to forgive but not forget by affording them a 'closure.'<sup>293</sup>

The pinnacle of truth recovery efforts in transitional justice has been the non-judicial institution of truth commission. Ad-hoc and short-term, truth commissions are defined as bodies created 'to investigate, document, and report upon human rights abuses within a country over a specific period of time.'<sup>294</sup> Unlike criminal trials, which are focused on individual criminal responsibility, truth commissions are valued for their potential to include both victims and perpetrators and provide broader historical narratives, elaborating on the role of state institutions as well as non-state actors.<sup>295</sup> While dealing with the past, truth commissions have future-oriented aspirations linked to the prevention of non-recurrence. As explained in Chapter 1, the moral imperative of 'Never Again' became 'a central rallying cry of truth commissions,' showing commissions' dual preventive and restorative role.<sup>296</sup> In addition to entitling their reports 'Never Again', commissions around the world also took upon themselves to make the truth known *in order to* prevent repetition of future violations, as a part of their mandates.<sup>297</sup> The literature on truth commissions reflected this. In a renowned edited volume *Truth v. Justice*, Rotberg holds that the South African TRC was a prime example of 'the new standard-setting model' of truth commissions that turned 'Never Again' into "a societal reality."<sup>298</sup> The praise of the TRC was mainly based on its methods of inquiry, most notably, holding public (and private) victim testimonies and interrogations of accused perpetrators, with the presence of and

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<sup>292</sup> *ibid.*

<sup>293</sup> *ibid.* 4.

<sup>294</sup> Teitel, 'Transitional Justice Genealogy' (n 10) 78; Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011).

<sup>295</sup> Teitel, 'Transitional Justice Genealogy' (n 10).

<sup>296</sup> Robert I Rotberg, 'Truth Commissions and the Provision of Truth, Justice, and Reconciliation' in Robert I Rotberg and Dennis F Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press 2000) 3.

<sup>297</sup> In addition to the examples in Chapter 1, see, for example, the South African TRC stating that the hearings held before the commission would establish the truth about 'the motives and circumstances' in which violations happened and 'make the findings known in order to prevent a repetition of such acts in [the] future.' Promotion of National Unity and Reconciliation Act (Government Gazette, Act No. 34) enacted 26 July 1995.

<sup>298</sup> Rotberg (n 296) 4.

transmission by the media. Roht-Arriaza similarly argues truth commissions have the mandate to, “at a minimum” elaborate on a common narrative about past violence in order to recommend reparations and therein prevent repetition of the violence.<sup>299</sup> Urban Walker asserts that truth commissions’ findings are a necessary condition for effective prevention of recurrence.<sup>300</sup> Provided that the findings of truth commissions are disseminated and included in school curricula, media outputs, and public dialogues, this author holds, the work of a truth commission can decrease the public’s resistance to acknowledge human rights violations.<sup>301</sup>

Mainstream truth recovery efforts such as truth commissions have been challenged for their claimed attributes due to which the ideal model of truth recovery is believed to contribute to non-recurrence. Instead, critical scholars have proposed that the model encounters numerous limitations in practice. The *Truth v. Justice* volume, both in its title and content, reflects the prevalent dilemma of the 1990s and early 2000s about the combination and sequencing of key TJ mechanisms. Debates were had on whether truth commissions should be preferred over criminal prosecutions and if amnesties should be offered in exchange for ‘the truth’ like it was the case in South Africa, or whether such actions were acts of injustice and immorality that consequently weaken truth commissions’ role in preventing future abuses.<sup>302</sup> Further discussion followed about the morality and practicality of establishing, interpreting and enforcing a single narrative about the past onto people. Using the example of reunified Germany, Maier points to the existence of multiple different types of truth that are recovered in transitional and post-transitional periods, e.g., the truth about unacknowledged murders and torture or truth about secret informing by the Stasi on other citizens.<sup>303</sup> In this line of critique, the construction of any ‘truth’ narrative is seen as a political act, an exercise of control.<sup>304</sup> As Turner argues, the idea of truth recovery itself is a site of conflict which operates on ‘rigid binaries of right and wrong,’

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<sup>299</sup> Roht-Arriaza, ‘The New Landscape of Transitional Justice’ (n 47) 3.

<sup>300</sup> Margaret Urban Walker, ‘Nunca Más’ in Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2013).

<sup>301</sup> *ibid.*

<sup>302</sup> Rotberg (n 296); Kent Greenawalt, ‘Amnesty’s Justice’ in Robert I Rotberg and Dennis F Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press 2000).

<sup>303</sup> Charles S Maier, ‘Doing History, Doing Justice. The Narrative of the Historian and of the Truth Commission’ in Robert I Rotberg and Dennis F Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press 2000).

<sup>304</sup> *ibid* 272.

leaving out all those whose narratives do not fit and ignoring all the grey areas between objective and subjective truth in transition.<sup>305</sup> Looking at the case of the South African TRC, questions were asked about whether the uncovered truth could only be provisional and preliminary. According to Villa-Vicencio, the director of the TRC, and Verwoerd, one of the Commission's researchers, striking a balance between the aims of the TRC to build "a historic bridge" between the violent and unjust past and a brighter future and the need to tell all the "hard truths" was like "walking a tightrope."<sup>306</sup> Writing a report that offers a full picture of past violations was made impossible by a number of factors including the lack of resources, destruction of evidence, limited mandate and, importantly, conflicting and contested memories. The most prominent effects of the report, in the words of these two authors, were 'holding up a mirror on the past' and starting a widespread discussion about the contents of the report and the work of the TRC.<sup>307</sup> Jointly, these critiques complicate the assertion that institutionalised truth recovery directly supports the objective of non-recurrence and can therefore be constituted as a GNRs. They do so by raising crucial questions about power and authority and the tendency of truth commissions in particular to privilege certain actors – and therefore certain truths – over others, leaving unaddressed grievances that could potentially lead to recurrence. Overall, there is no consensus on whether and how institutional 'truth' recovery leads to or aids non-recurrence.

This brief review sheds light on the links made by the literature between truth recovery efforts and ensuring non-repetition of violations. In particular, the literature has tended to theorise around didactic and illuminating effects of the work of truth commissions, revealing and enforcing a single narrative about the past and helping eliminate those with questionable pasts from public positions of power. This review also identifies some of the underlying dilemmas about truth recovery initiatives, shifting the focus to the issues of sequencing and coexistence of multiple TJ mechanisms as well as multiple conflicting truths, all of which are said to potentially negatively affect the objective of non-recurrence.

### 3.3.3. Reparations

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<sup>305</sup> Turner (n 20) 36.

<sup>306</sup> Charles Villa-Vicencio and Wilhelm Verwoerd, 'Constructing a Report: Writing Up the "Truth"' in Robert I Rotberg and Dennis F Thompson (eds), *Truth v. Justice* (Princeton University Press 2000) 280.

<sup>307</sup> *ibid* 286.

Providing reparations to the victims of human rights violations is another staple mechanism of transitional justice. As per Chapter 2, in IHRL, the link between reparations and guarantees of non-recurrence is easily noticeable, seeing how GNRs form a standalone type of reparations in this regime. In transitional justice theory and practice, these links are somewhat blurred with the separation of reparations and GNRs as two distinct, but not unconnected pillars. According to Teitel, while ordinary reparatory justice tends to be backward-looking for remedying past injustice, transitional reparatory justice is also forward-looking.<sup>308</sup> While traditionally reparations are understood as responses to violations that seek to restore the post-violation conditions to those that existed prior to the violation, guarantees of non-recurrence, by their definition across legal regimes and in TJ seek to change this *status quo* preceding the violation. In light of this seeming normative incompatibility, reparations are also claimed to have a more general task of deterrence and advancing transformative goals such as reconciliation.<sup>309</sup> Whereas it is not claimed that reparations could single-handedly ensure non-repetition, their non-recurrence-relating potential rather concerns creating a social and political climate in which recurrence would be less likely. Such claims are made on the account of reparations' prioritisation of victims,<sup>310</sup> potential publicization of the structural conditions that led to violence,<sup>311</sup> and fortifying political transformation by publicly condemning past regime's actions.<sup>312</sup>

Apart from GNRs, other types of reparations enshrined in the Basic Principles have been well-studied in the literature. Transitional societies have resorted to reparations such as compensation (e.g. a monetary contribution to those who qualify as victims of conflict),<sup>313</sup>

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<sup>308</sup> Teitel, *Transitional Justice* (n 189).

<sup>309</sup> Shelton (n 156); Teitel, *Transitional Justice* (n 189).

<sup>310</sup> Jemima Garcia-Godos, 'Reparations' in Olivera Simić (ed), *An Introduction to Transitional Justice* (Routledge 2017); Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017); Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 *Netherlands Quarterly of Human Rights* 625.

<sup>311</sup> Moffett (n 310).

<sup>312</sup> Teitel, *Transitional Justice* (n 189).

<sup>313</sup> See more on the compensation provided to the victims of conflict in Nepal in Ruben Carranza, *Relief, Reparations and the Root Causes of Conflict in Nepal* (International Center for Transitional Justice 2012).

restitution (e.g. returning the property taken away during conflict),<sup>314</sup> rehabilitation (e.g. providing survivors of conflict with medical and psychological services free of charges),<sup>315</sup> and measures of satisfaction that include symbolic reparations such as apologies.<sup>316</sup> In the literature, these individual types of reparations are not typically expected or required to achieve the goal of non-recurrence due to the authors' following of the IHRL separation of GNRs as an individual type of reparations centred on institutional reform. However, there has been some discussion that symbolic reparations such as apologies, with their collective element, have strong links to 'Never Again' due to their potential to repair group harm, memorialise victims' suffering<sup>317</sup> and promote efforts to reform institutions.<sup>318</sup>

In practice, transitional societies can rarely afford to implement a combination of all types of reparations and any claimed contributions to non-recurrence are often weakened. Compensation schemes in particular are very costly, placing hard, political choices in front of transitional societies which must balance between monetary reparations and deeper socioeconomic inequalities, with or without external support and often at the expense of potential beneficiaries or the chosen benefits.<sup>319</sup> As a result, comprehensive reparations schemes are typically lacking in transitional societies and unrealised reparations claims continue to be made decades after the violations took place.<sup>320</sup> For this reason, scholars express concern about the exclusion of certain types of victims<sup>321</sup> and reparations laws' limited ability to do justice,<sup>322</sup> both of which weaken the already ambiguous links made between reparations and the objective of non-recurrence. Overall, due to the qualitative normative difference made between reparations and GNRs in transitional justice and enshrinement of GNRs as a separate type of reparations in

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<sup>314</sup> Nicole Summers, 'Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?' (2012) 25 *Harvard Human Rights Journal* 219.

<sup>315</sup> Clara Sandoval-Villalba, *Rehabilitation as a Form of Reparation Under International Law* (REDRESS 2009) [www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf](http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf) accessed 19 September 2019.

<sup>316</sup> Ruben Carranza, Cristian Corre, and Elena Naughton, *More than Words. Apologies as a Form of Reparation* (International Center for Transitional Justice 2015).

<sup>317</sup> Moffett (n 310).

<sup>318</sup> Carranza, Corre and Naughton (n 316).

<sup>319</sup> Uprimny Yepes (n 310).

<sup>320</sup> For a recent example of restitution for the property lost during WWII, see Maja Davidović, 'Rectification of Racial Discrimination during WWII: The Case of Restitution Laws in Serbia' (2017) 4 *Contemporary Southeastern Europe* 105.

<sup>321</sup> On how women tend to fall under the cracks of reparation schemes, see Ruth Rubio-Marin (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (Columbia/SSRC 2006).

<sup>322</sup> Moffett (n 310).

IHRL, non-recurrence as an objective that frames reparation schemes is less discussed by TJ scholars. Exceptionally, collective symbolic reparations are claimed to have the potential to trigger actions required for fulfilment of GNRs.

#### 3.3.4. Institutional reform

Public institutions such as the police, the army, the judiciary and the security sector are often seen as instruments of repression and violence and as such need to be reformed and cleansed during transition. Measures of institutional reform are interchangeably defined as ‘the fourth’ pillar of transitional justice together with guarantees of non-recurrence. In the 2015 European Union’s Policy Framework on support to TJ, the fourth pillar of TJ is listed as ‘guarantees of non-recurrence/institutional reform’ thereby making the two equal and inseparable.<sup>323</sup> As the origin story in Chapter 2 explains, such conflation is achieved due to the global influence of the Basic Principles and the initial de-contextualisation of the non-recurrence measures recommended by the likes of the Chilean TRC in international TJ practice and policy. For these reasons, in the brief review of the literature that follows, measures of institutional reform are almost by default given the quality of preventing future violations.

Unlike the other three pillars discussed above, institutional reform is seen as more long-term and affecting not only victims and perpetrators but also entire transitional societies.<sup>324</sup> Preventive measures tied to institutional reform are vast and range from individual measures such as banning perpetrators from reassuming power to those targeting broader reconstruction, e.g., building a justice system where violations claims can be adequately accommodated.<sup>325</sup> Certain widespread measures of institutional reform target specific individuals, most prominently vetting, which is more administrative than criminal in nature as it relies on more relaxed evidentiary and procedural rules.<sup>326</sup> Many practices in this regard, however, have to do with state

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<sup>323</sup> The Council of the European Union. 2015. “The EU’s Policy Framework on Support to Transitional Justice.” [https://eeas.europa.eu/archives/docs/top\\_stories/pdf/the\\_eus\\_policy\\_framework\\_on\\_support\\_to\\_transitional\\_justice.pdf](https://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf).

<sup>324</sup> Boraine (n 8).

<sup>325</sup> Ellen Lutz, ‘Transitional Justice: Lessons Learned and the Road Ahead’ in Naomi Roht-Arriaza, *Transitional Justice in the Twenty-First Century. Beyond Truth and Justice* (Cambridge University Press 2006).

<sup>326</sup> De Greiff, ‘Articulating the Links Between Transitional Justice and Development: Justice and Social Integration’ in Pablo De Greiff and Roger Duthie (eds), *Transitional Justice and Development* (Social Science Research Council 2009) 38.

accountability and a larger transformation of state structures, such as the police or armed forces.<sup>327</sup> In that respect, some but not all practices of institutional reform in transitional societies reflect the measures listed as ‘guarantees of non-recurrence’ in the Basic Principles.

Institutional reform in transitional societies is typically promoted by the international community, often drawing on UN documents and international legal sources to buttress their claims, with the work done in IHRL on GNRs being at the forefront. Limited scholarship has reflected this enthusiasm about institutional reform as measures of non-recurrence. The idea is that through institutional reform, the rule of law is reasserted and there is a blanket political confirmation that some constitutional and political elements of the past played a role in conflict and are therefore stripped of their power.<sup>328</sup> Practices of institutional reform therefore unequivocally seek to challenge and transform some of the structures of power that would otherwise help maintain the *status quo*, if kept in their original form. In that sense, public institutions such as the security sector and judiciary are reformed both to eliminate past abusers, but also to improve effectiveness and accountability of the sectors in future prosecutions or prevention of potential future atrocities. A notable study that researches non-recurrence quantitatively does so by examining potential contributions of different institutional measures.<sup>329</sup> In this study, Payne and colleagues suggest that a new constitution is the most significant institutional factor contributing to non-recurrence, with non-recurrence being defined as an absence of violence, i.e., negative peace. Other interventions targeting institutions can send a clear message that the former ideology is illegitimate or significantly weakened,<sup>330</sup> so institutional reform is seen as contributing to the increased levels of civic trust.<sup>331</sup> Vetting in

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<sup>327</sup> Laurel E Fletcher, ‘Editorial Note’ (2015) 9 *International Journal of Transitional Justice* 193.

<sup>328</sup> Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, ‘Justice Discourses in Transition’ (2004) 13 *Social & Legal Studies* 305.

<sup>329</sup> In their analysis, the authors include establishment of constitutions, national human rights institutions and ombuds offices, as well as mechanisms such as trials, amnesties, and truth commissions. Leigh A Payne and others, *Conflict Prevention and Guarantees of Non-Recurrence* (World Bank 2017).

<sup>330</sup> Clara Sandoval, ‘Transitional Justice and Social Change’ (2014) 20 *SUR - International Journal on Human Rights* 181.

<sup>331</sup> De Greiff, ‘Articulating the Links Between Transitional Justice and Development: Justice and Social Integration’ (n 326).

particular is praised for its power to break apart networks of criminal activities<sup>332</sup> and remove people with a suspicious past, and thus transform institutions and people's trust in them.<sup>333</sup> These effects of institutional reform, most notably changing the structures of power and improving civic trust, are repeatedly claimed in international TJ policy and practice to be either essential for the objective of non-recurrence or, in fact, applications of guarantees of non-recurrence, as per IHRL.<sup>334</sup> They are also claimed to enable other transitional justice measures, for instance, by removing parts of the structure obstructing criminal prosecutions or truth-seeking.<sup>335</sup> The promotion of measures of institutional reform signals a widespread faith of international actors in both law and state institutions and as having the capacity to meet the goals of transitional justice, including non-recurrence.<sup>336</sup>

While some criticism has emerged over institutional reform measures and their capacity to support the objective of non-recurrence, it has generally been the 'poor cousin' of other, much more researched TJ mechanisms.<sup>337</sup> Some authors with an interest in institutional reform have argued that because of the politics of transitional justice, measures of international reform are rarely exercised as planned, failing to achieve the envisaged goals of the international community.<sup>338</sup> Other criticism includes allegations of the failure of institutional reform to redistribute wealth and power, therefore reinforcing the *status quo*.<sup>339</sup> Therefore, while some empirical research has done to examine the causal links between institutional reform and the objective of non-recurrence in practice, by and large, conceptual and practical overlaps and departures between the two – and GNRs - remain unexplored. The underlying idea, nevertheless,

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<sup>332</sup> Pablo De Greiff, 'Vetting and Other Transitional Reforms' in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice as Prevention: Vetting Public Employees in Transitional Justice* (Social Science Research Council 2007) 522.

<sup>333</sup> Roger Duthie, 'Introduction' in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice as Prevention: Vetting Public Employees in Transitional Justice* (Social Science Research Council 2007) 16.

<sup>334</sup> See, for example, High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States. Vetting: An Operational Framework' (n 220) or Commissioner for Human Rights, *Post-war justice and durable peace in the former Yugoslavia* (Council of Europe 2012).

<sup>335</sup> Alexander Mayer-Rieckh, 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, Prosecutor's Offices in Bosnia and Herzegovina' in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice as Prevention: Vetting Public Employees in Transitional Justice* (Social Science Research Council 2007).

<sup>336</sup> Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (n 51).

<sup>337</sup> Naomi Roht-Arriaza, 'Measures of Non-Repitition in Transitional Justice: The Missing Link?' in Simon Robins and Paul Gready (eds), *From Transitional to Transformative Justice* (Cambridge University Press 2019) 120.

<sup>338</sup> Pdraig McAuliffe, 'Weighing Domestic and International Impediments to Transformative Justice in Transition' (2015) 3 *London Review of International Law* 169.

<sup>339</sup> See Sharp (n 33).

is that institutional reform is promoted for weakening violence-prone ideologies, improving civil trust, and serving as a political confirmation of the new, peaceful order.

### 3.3.5. Memorialisation

The burgeoning literature on memorialisation and transitional justice would be impossible to summarise in this brief review, which is why I will focus only on the key claims made in the literature regarding the potential of memorialisation processes to fulfil the objective of ensuring non-recurrence. The rhetoric of ‘Never Again’ itself gives a discussion framework about different aspects of memorialisation and their usefulness.<sup>340</sup> The general idea, as Janine Clark describes it, is that ‘[o]nly by remembering ... can we learn from the past.’<sup>341</sup> Thus, while discussing memorialisation, the scholarship inevitably also elaborates on the place of education and, to a lesser degree, art and archives in memorialising for non-recurrence. To illustrate, museums that depict the struggle of victims/survivors of oppression or violence are portrayed as educational sites where audiences can be introduced to the horrors of violence.<sup>342</sup> Such spaces are believed to help ensure that the new generations will not resort to the same forms of abuse in the future by exposing past abuses. Judicial institutions of transitional justice have also taken note of these scholarly assertions and put them into practice. Elander shows how the Extraordinary Chambers in the Courts of Cambodia, for instance, regularly organised educational study visits to the Tuol Sleng Genocide Museum to help local people, particularly the youth, understand the violence of the past regime.<sup>343</sup> By facilitating the transfer of knowledge, they hoped to help prevent the violations from recurring. Hamber and colleagues track the intersections between memorialisation and art for the purpose of non-recurrence seen, for example, in Bangladesh’s Liberation War Museum and their mobile museum that travels

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<sup>340</sup> Janine Natalya Clark, ‘Reconciliation through Remembrance? War Memorials and the Victims of Vukovar’ (2013) 7 *International Journal of Transitional Justice* 116.

<sup>341</sup> *ibid* 117.

<sup>342</sup> Nayanika Mookherjee, “‘Never Again’: Aesthetics of “Genocidal” Cosmopolitanism and the Bangladesh Liberation War Museum: “Never Again”” (2011) 17 *Journal of the Royal Anthropological Institute* 571.

<sup>343</sup> Maria Elander, ‘Education and Photography at Tuol Sleng Genocide Museum’ in Peter Rush and Olivera Simić, *Arts of Transitional Justice: Culture, Activism, and Memory after Atrocity* (Springer 2013).

around the country with a photo exhibition of the history of the liberation war.<sup>344</sup> This minibus museum visits rural areas where the youth are considered to be more susceptible to radicalisation and religious violence. Combining oral history and art, the museum engages with participants for effective, experiential learning and, ultimately, deterrence from resorting to violence. Similarly, numerous other initiatives organised by non-governmental sectors in transitional societies are discussed as showing that visiting and engaging with sites of memory impact young people in numerous ways, including changing their opinions and encouraging civic engagement.<sup>345</sup> In this way, memorials and commemorations done by the grassroots can also be seen as struggles against forgetting as well as against repetition.<sup>346</sup> This body of literature therefore offers examples of practices seemingly beneficial for non-recurrence that encompass a combination of institutionalised and non-institutionalised practices such as museum visits and art making, for instance. As such, this scholarship introduces venues and processes otherwise not ordinarily encompassed in the paradigmatic transitional justice such as art and informal education, both of which carry with themselves values that seemingly improve their impact on non-recurrence.

Yet these links between different aspects of memorialisation and ensuring non-recurrence are often contested in the literature as scholars have argued that different memorialisation aspects can in fact obstruct the fulfilment of this objective. In general, memorials are used for mourning as well as for “making politics.”<sup>347</sup> State-led commemorative practices in particular can produce new victims, perpetrators and ideologies and reinforce certain patterns of historical interpretation over others.<sup>348</sup> For example, Subotic conducted a study of official remembrance projects in public education and commemoration in three former Yugoslav republics (Serbia, Croatia, and BiH).<sup>349</sup> Her analysis shows that these projects present different versions of the shared past that

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<sup>344</sup> Brandon Hamber, Liz Sevcenko and Ereshnee Naidu, ‘Utopian Dreams or Practical Possibilities? The Challenges of Evaluating the Impact of Memorialization in Societies in Transition’ (2010) 4 *International Journal of Transitional Justice* 397.

<sup>345</sup> *ibid.*

<sup>346</sup> Lia Kent, ‘Local Memory Practices in East Timor: Disrupting Transitional Justice Narrative’ (2011) 5 *International Journal of Transitional Justice* 434.

<sup>347</sup> Johanna Mannergren Selimovic, ‘Making Peace, Making Memory: Peacebuilding and Politics of Remembrance at Memorials of Mass Atrocities’ (2013) 1 *Peacebuilding* 334, 334.

<sup>348</sup> Jelena Đureinović, *The Politics of Memory of the Second World War in Contemporary Serbia. Collaboration, Resistance and Retribution* (Routledge 2020).

<sup>349</sup> Jelena Subotic, ‘Remembrance, Public Narratives, and Obstacles to Justice in the Western Balkans’ (2013) 7 *Studies in Social Justice* 265.

are mutually incompatible and therefore aid the renewed cycles of injustice and mistrust. In a recent book entitled *The Past Can't Heal Us*, David questions whether “standardisation” of memorialisation is in fact useful for reconciliation.<sup>350</sup> She does so by analysing the “real-life” effects of these manifestations of moral remembrance in and post-ethnic conflict in former Yugoslavia, Israel and Palestine. Critical of the attempts to standardise and globalise “proper” ways of remembering in order to move to a peaceful future, David concludes that such attempts are ‘generally ineffective at best and counterproductive at worst,’ enforcing interethnic animosities and ethnonationalism.<sup>351</sup> Hence, while many aspects of the fifth pillar of memorialisation seemingly escape the dominance of law and its institutions that comes with paradigmatic transitional justice and offer alternative approaches to non-recurrence otherwise not found in international law, they still retain a shaky and controversial position in the debates on ‘Never Again’ in TJ scholarship.

This section has explored the scholarship’s treatment of the links between memorialisation as the fifth pillar of TJ and any claims that aspects of it contribute to non-recurrence. Although not a measure of GNRs in any of the legal documents reviewed in Chapter 2, memorialisation is promoted as promising in achieving the ‘Never Again’ promise due to its didactic qualities and ability to connect wider audiences emotionally and experientially with the horrors of the past. Nevertheless, memorialisation’s links to the objective of ensuring non-recurrence are as controversial as they are promising, and many authors have revealed social and political costs of certain types of memorialisation, potentially hampering the prospect or longevity of non-recurrence and in turn inciting new animosities.

In this five-partite section, I have delineated the major ideas emerging from TJ research regarding how non-recurrence can or should be exercised domestically in a structure-oriented approach. The review shows that criminal prosecutions, truth commissions and memorials in particular have strong links to non-recurrence as an objective due to a range of didactic, truth-making qualities and claimed abilities to uphold the rule of law and help eliminate perpetrators from positions of power. These ideas are largely in line with the more recent developments in

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<sup>350</sup> Lea David, *The Past Can't Heal Us: The Dangers of Mandating Memory in the Name of Human Rights* (Cambridge University Press 2020) 2–4.

<sup>351</sup> *ibid* 2.

international TJ policy whereby the ICTJ finds that transitional justice can contribute to prevention of recurrence by addressing grievances and exclusion at both individual and collective levels, enabling inclusive rule of law, and reforming institutions to be more inclusive and less abusive.<sup>352</sup> The review has also showed that all pillars are subject to certain tensions between the ideal, and the claim progressive qualities they carry, and the reality in practice and, as such, are almost equally disputed for their potential to trigger divisive practices harmful to the overall objective of non-repetition. In the following section, I argue that the literature on GNRs, although equally structure-oriented, provides different insights into the content and position of GNRs as an unexplored yet transformative pillar of transitional justice.

### 3.4. Guarantees of non-recurrence as a pillar of transitional justice

I continue this chapter by exploring the various ways in which guarantees of non-recurrence as a pillar of transitional justice, a set of measures of a certain character, have been received and treated by the scholarship since the transformations of the norm's content in and by TJ. In particular, I seek to understand what scholars have made of and since the establishment of the mandate of the Special Rapporteur and the transformation of GNRs (and not prevention of recurrence) into a pillar (and not objective), often equated with institutional reform. Numerous authors writing about TJ matters in the past decade acknowledge the central position guarantees of non-recurrence occupy in the field, a position that is often equated with the objective of preventing future repetition of violations.<sup>353</sup> Yet as a pillar, GNRs are in conceptual tension with non-recurrence as an objective on which, as the preceding sections have shown, all other pillars of TJ are claimed to have an impact. In particular, questions arise about the conceptual boundaries of GNRs as per international law and/or the Special Rapporteur's expansions (Chapter 2) and the overall role and position of GNRs *vis-à-vis* other, more established pillars of

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<sup>352</sup> Duthie, *Transitional Justice and Prevention. Summary Findings from Five Country Case Studies* (n 68) 13.

<sup>353</sup> René Urueña and María Angélica Prada-Urbe, 'Transitional Justice and Economic Policy' (2018) 14 *Annual Review of Law and Social Science* 397; Naomi Roht-Arriaza, 'Measures of Non-Repetition in Transitional Justice: The Missing Link?' (n 337); Mayer-Rieckh (n 159); Clara Sandoval-Villalba, 'Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change In Times of Transition' in Roger Duthie and Paul Seils (eds), *Justice mosaics: How Context Shapes Transitional Justice in Fractured Societies* (International Center for Transitional Justice 2017); Lars Waldorf, 'Between Transition and Transformation. Legal Empowerment as Collective Reparations' in Simon Robins and Paul Gready (eds), *From Transitional to Transformative Justice* (Cambridge University Press 2019).

transitional justice. Consequently, although there is a consensus on non-recurrence as a normative expectation of TJ pillars, the ambiguity and disagreements arise when transitional justice scholars undertake the task of defining GNRs as simultaneously a pillar of transitional justice and a norm borrowed from international law. I review the key readings on GNRs in transitional justice to make a point about the lack of conceptual clarity on this pillar of transitional justice.

Attempts to situate GNRs within transitional justice theory, or further empirically explore them, remain scarce. In fact, most scholars who write about GNRs do so by way of pointing to the lack of research on this aspect of transitional justice. In her introductory remarks at a 2013 conference, Naomi Roht-Arriaza mentions in passing that the frustration about transitional justice not achieving its results could be partly addressed by “rebranding” certain policies relating to economic, social and cultural rights (such as land reform) as “guarantees of non-repetition.”<sup>354</sup> Although none of the panellists picked up on this remark in their presentations, it suggested that much was left open and undefined upon the introduction of guarantees of non-recurrence into the sphere of transitional justice. Sandoval, for instance, observes that GNRs ‘remain the missing piece of the transitional justice puzzle’, seeing that, despite them being a widespread topic of discussion, there is very little implementation on the ground.<sup>355</sup> Garcia-Godos observes that guarantees of non-recurrence as measures of reparations remain largely understudied, both empirically and conceptually.<sup>356</sup> In his 2020 editorial note to the *International Journal of Transitional Justice*, Pablo de Greiff has declared GNRs to be ‘if not from the standpoint of practice, certainly from the standpoint of doctrine ... the least developed element of transitional justice.’<sup>357</sup>

In this limited body of literature, a key study was conducted by Mayer-Rieckh who theorises the place of GNRs in TJ theory.<sup>358</sup> Mayer-Rieckh asserts that transitional justice uses a different range of tools; corrective transitional justice employs tools such as truth commissions,

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<sup>354</sup> Naomi Roht-Arriaza, ‘Introductory Remarks by Naomi Roht-Arriaza’ (2013) 107 *Proceedings of the Annual Meeting (American Society of International Law)* 81.

<sup>355</sup> Sandoval-Villalba (n 353).

<sup>356</sup> Garcia-Godos (n 310).

<sup>357</sup> Pablo de Greiff, ‘The Future of the Past: Reflections on the Present State and Prospects of Transitional Justice’ (2020) 14 *International Journal of Transitional Justice* 251, 257.

<sup>358</sup> Mayer-Rieckh, ‘Guarantees of Non-Recurrence: An Approximation’ (n 165).

prosecutions, and reparations, while distributive transitional justice would include measures such as institutional reform. In this author's view, GNRs fall under neither corrective nor distributive justice.<sup>359</sup> Mayer-Rieckh continues by saying that prosecutions, truth-telling, and reparations are not enough to do justice. More is needed to halt the violations and prevent their repetition and '[t]his more is the terrain of guarantees of non-recurrence.'<sup>360</sup> In his line of argumentation, GNRs are both distinct from and complementary to other pillars of TJ. As measures of institutional reform, which is how Mayer-Rieckh defines them, GNRs link to all other TJ measures in instrumental ways, by creating the conditions for and enabling them 'to better perform transitional justice functions.'<sup>361</sup> Whether institutional reforms enable other TJ pillars to fulfil their full potential, Mayer Rieckh asserts, will depend on these other measures' timing and sequencing. While other pillars of TJ can also be preventative, GNRs embrace prevention as their core function. GNRs thus bridge the two grand tasks of transitional justice of repairing past violations and ensuring a peaceful future, rather than being solely a forward-looking element. This key scholarly endeavour towards theorisation of GNRs in transitional justice seems to be supportive of the Special Rapporteur's ideas that GNRs are not individual tools – such as a measure of judicial reform or a new constitution – but that instead of guaranteeing non-recurrence is an enabling function relating to a series of tools, mechanisms, and institutions. Nevertheless, Mayer-Reickh too notes that GNRs are “under-explored” in transitional justice literature.<sup>362</sup>

In a separate publication from the one mentioned above, Roht-Arriaza calls GNRs ‘something of a catch-all category’ considering their attachments to cessation, satisfaction, and reparations in different legal sources.<sup>363</sup> Roht-Arriaza conceptualises measures of non-recurrence as a bridge between the shortcomings of traditional legalist approaches to TJ and the calls for expansion and “overpromising” that comes with transformative transitional justice scholarship.<sup>364</sup> The author further praises the potential “far-reaching effects” of GNRs as forward-looking, collective measures that are not conceptually limited to measures of

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<sup>359</sup> *ibid.*

<sup>360</sup> *ibid* 430.

<sup>361</sup> *ibid* 431.

<sup>362</sup> *ibid* 17.

<sup>363</sup> Roht-Arriaza, ‘Measures of Non-Repetition in Transitional Justice: The Missing Link?’ (n 337) 123.

<sup>364</sup> *ibid* 108.

institutional reform.<sup>365</sup> The proposal for the application of GNRs is, according to Roht-Arriaza, for measures of non-repetition to be informed by systemic analyses of the root causes of violence and patterns of exclusion, otherwise not tackled by paradigmatic transitional justice. Once that is established, “a roadmap” of the process and practices needed for recurrence would need to be created, following mapping of relevant actors, both state and non-state.<sup>366</sup> Roht-Arriaza concludes by saying that “[n]ot everything would have to be done at once, or in conjunction with other efforts ... [b]ut ... would have to be connected.”<sup>367</sup> Although Roht-Arriaza similarly to Mayer-Rieckh conceptualises GNRs as ‘a bridge’ linking different streams of TJ research and praxis, she opens the possibility that this bridge consists of measures beyond those found in IHRL.

Several other authors write about GNRs in the context of how they could be achieved or what they could do for a transitional/post-conflict society. In a recent publication, Kinder analyses the potential of archives to facilitate guarantees of non-recurrence in Northern Ireland.<sup>368</sup> Kinder recognises the difficulties in conceptualising and implementing GNRs and holds that GNRs contain ‘a broad range of open-ended responses’ that ‘will *necessarily* vary’ across contexts.<sup>369</sup> In addition, Kinder rejects containing her analysis only to the level of state institutions implicated in past violence and suggest that applications of non-recurrence can be extended through archival work by incorporation of the concept of accountability that ‘supports the tenets of non-recurrence while extending its scope to archival spaces.’<sup>370</sup> However, although it is stated that non-recurrence is contextual, in the rest of the article, it is not explored what non-recurrence would mean in the context of Northern Ireland. Instead, the prevalent measure of application of GNRs seems to be the one of rebuilding civic trust in state institutions and, to a

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<sup>365</sup> *ibid* 124.

<sup>366</sup> *ibid* 130.

<sup>367</sup> *ibid*.

<sup>368</sup> Eliscia Kinder, ‘Non-Recurrence, Reconciliation, and Transitional Justice: Situating Accountability in Northern Ireland’s Oral History Archive’ (2021) 25 *The International Journal of Human Rights* 509.

<sup>369</sup> *ibid* 512.

<sup>370</sup> *ibid* 518.

lesser degree, supporting community participation, tying this conceptualisation back to ‘the UN’s working definition of non-recurrence.’<sup>371</sup>

In other examples, GNRs become one of, if not the most important aspect of TJ interventions in order to transform the society on its journey to lasting peace. In two notable articles, Sandoval argues that ‘[g]uarantees of non-repetition, a core aim of transitional justice (...) remain crucial to realizing the transformative potential of transitional justice.’<sup>372</sup> In her study of social change and transitional justice, Sandoval differentiates between three types of change: ordinary, structural and fundamental. She argues that certain measures of institutional reform, such as new constitutions, which she characterises as ‘an important guarantee of non-repetition’ might suffice for structural changes but not the fundamental ones.<sup>373</sup> Instead, fundamental changes in transitional societies necessitate a transformation of the old regime’s ideology which cannot only be done through the power of law. This author argues, to deliver such fundamental social change, transitional justice needs to work through the summation of all different mechanisms it possesses, including GNRs. To act on GNRs, states should devise strategies that seek to transform the ideology that supported or allowed the violence to be committed.<sup>374</sup> Without GNRs in place, this author concludes, the objectives of prevention and social change remain “elusive.”<sup>375</sup>

GNRs have been conceptualised by McGonigle Leyh as a new framework for transforming policing and facilitating lasting institutional changes.<sup>376</sup> The author identifies GNRs as a set of measures that remains “(under)-conceptualized” under all fields of intervention in TJ and that lie at the nexus of different frameworks linking security, development, human rights, and the rule of law.<sup>377</sup> Faithful to IHRL definitions of GNRs, McGonigle Leyh argues that if adopted, GNRs could lead to profound institutional and cultural changes. In her theorisation, the author promotes the language and programming of GNRs, such as the norm’s focus on human

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<sup>371</sup> Referring to Orentlicher’s conceptualisation of GNRs as per the Updated Set of Principles on combatting impunity. *ibid* 523.

<sup>372</sup> Sandoval-Villalba (n 353) 5.

<sup>373</sup> Sandoval (n 330) 184.

<sup>374</sup> Sandoval-Villalba (n 353) 29.

<sup>375</sup> *ibid* 32.

<sup>376</sup> Brianne McGonigle Leyh, ‘A New Frame? Transforming Policing through Guarantees of Non-Repetition’ (2020) 15 *Policing*, 362.

<sup>377</sup> *ibid* 2.

rights and state obligations, to be useful in police reforms in post-conflict societies. It follows that reformed police would then need to incorporate human rights concerns, such as vulnerable and discriminated groups and situations and how to respond to them or would generally be better able to analyse and understand the patterns of past and ongoing violence.<sup>378</sup> This article effectively draws out some of the values attached to GNRs in international law such as triggering more structural changes with widespread effects. The limitations of this study, however, is that it does not consider the possibility of guaranteeing non-recurrence beyond the state, its institutions, and what is already enshrined in the law, and is therefore not treating non-recurrence as a social as well as legal norm.

Three central observations emerge out of this review of transitional justice literature on guarantees of non-recurrence as a pillar. Firstly, the literature tends to discuss GNRs as still ‘under-researched’, both conceptually and empirically in transitional justice. The key questions of how GNRs are practised domestically, if at all, and what shapes these practices remain largely unexplored, and this speaks both to the urgency of this thesis and the importance of its design. Secondly, the scarce scholarship that has thus far theorised the place of GNRs in transitional justice, mainly the works of Mayer-Rieckh and Roht-Arriaza, position GNRs as ‘a bridge’ between not only different mechanisms of TJ but also between different streams of research-policy-practice, the more legalist and technocratic stream and the transformative one. Such positioning of GNRs in transitional justice asserts that practices of GNRs would involve interactions with the overarching structure of TJ and among its distinct elements and is therefore largely in line with the ideas presented by the Special Rapporteur as reviewed in Chapter 2. The resulting lack of conceptual clarity, I argue, goes hand-in-hand with malleability as a defining characteristic of transitional justice whereby TJ tends to keep its flexibility as well as its normative underpinnings rooted in international law. Making GNRs flexible, open for re-contextualisation and qualitatively different in transitional justice than in international law opens space for such action, both at the level of theory and practice. However, these theoretical prepositions are yet to be investigated empirically, over time and as linked to the characteristics that bind TJ as a structure. Lastly, scholarly treatment of GNRs is somewhat reflective of the regime blur discussed in Chapter 2. More precisely, this review demonstrates that there are

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<sup>378</sup> *ibid* 7.

competing understandings of GNRs as measures of legal and institutional reform or ‘something else’, a magical norm with transformative potential, but often they remain undefined.

These three observations are intertwined – they point to the urgency of studying GNRs in transitional justice practice, empirically informing the scarce theory on GNRs, and exploring the conceptualisations of GNRs *vis-à-vis* other TJ mechanisms and tools, including most prominently institutional reform – and this is precisely what this thesis is setting out to do. What must be noted is that most of these approaches to the study of GNRs I have reviewed predominantly focus on the structure of TJ and its treatment of GNRs as a legal and/or social norm. In other words, they ask how the objects of TJ, its mechanisms, laws and institutions, or the state as a duty bearer in international human rights law, can or cannot guarantee non-recurrence, independently or in concert. However, as argued previously in this chapter, it is not only these elements of the structure that shape and practice GNRs but the agents who engage with the norm and interacting with the structure. My thesis thus argues that these approaches obscure the lives of GNRs in domestic settings where agency and structure constitute one another to conceptualise and practice non-recurrence. As such, it takes an alternative approach supported by structuration theory and calls for a focus on agents of transitional justice as well as the structure. To that end, in this final section of this chapter, I investigate agency-oriented approaches to the matters of transitional justice.

### 3.5. Actor-oriented approaches in transitional justice literature

So far in this chapter, I have provided insights into the theoretical underpinnings of this thesis that stem from structuration theory and have discussed the implications of these underpinnings for transitional justice. I have then reviewed a range of scholarly works that take a structure-based approach to the study of non-recurrence as an overarching objective of TJ pillars as well as a pillar itself, emphasising some major points of contestation and lack of conceptual clarity. The remaining task of this chapter is to explore the literature that takes a more actor-oriented approach to the study of transitional justice, researching the agency of those involved in TJ practices. While agency in the context of GNRs remains entirely unexplored, TJ scholarship on agency alone or in interplay with the structure is limited but notable. Research on actors of and in transitional justice has been conducted both from social constructivist IR and socio-legal perspectives, while focused on TJ matters. Most such research concerns subsets of TJ actors such

as lawyers, judges or civil society organisations. Rather than separating this literature per field of study, I will review it thematically, delineating three common threads: actors and knowledge production, external influences on agency, and actors' interactions with legalism.

### 3.5.1. Producing knowledge for transitional justice

The first common thread across the literature on agency in transitional justice is that of actors' influence and involvement in knowledge production. In a recent sociological empirical study, Christansen looks at the category of 'elites' of punitive and non-punitive truth recovery initiatives, asking which actors have the normative power of defining what TJ mechanisms are employed and where.<sup>379</sup> This author's findings show that these selected elites are decisive for drawing social and professional boundaries that shape the field of TJ. Individual and groups of actors, this author concludes, play key roles in driving the circulation of knowledge in transitional justice. This research's findings are in line with the more ethnographic and sociolegal research on human rights whereby human rights actors such as NGO and social movement activists are perceived as potent knowledge brokers.<sup>380</sup> Although this line of research, most prominently pioneered by Sally Engle Merry, asks distinct questions concerning the process of norm translation, it is relevant for showing some of the tensions between human rights actors and other factors of influence. For instance, Merry shows that while norm translation is influenced by local activists and community leaders, these are not immune to manipulation by state actors and further influence by international and national politics as well as personal and social commitments.<sup>381</sup> In her other work, Merry emphasised that the reinterpretation of global ideas – an example of which would be GNRs – in ways coherent with local realities happens in processes not necessarily imposed from the outside but rather mobilised because they are “politically useful.”<sup>382</sup>

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<sup>379</sup> Mikkel Jarle Christansen, 'The Borderlands between Punitive and Non-punitive Transitional Justice: Distinct Elites and Diverging Patterns of Import/export' (2020) 14 *International Journal of Transitional Justice* 456, 457.

<sup>380</sup> See Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 *American Anthropologist* 38; Sally Engle Merry, *Human Rights and Gender Violence. Translating International Law into Local Justice* (The University of Chicago Press 2006).

<sup>381</sup> Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (n 380).

<sup>382</sup> Sally Engle Merry and Rachel E Stern, 'The Female Inheritance Movement in Hong Kong: Theorizing the Local/Global Interface' (2005) 46 *Current Anthropology* 387, 402.

In their research on domestic negotiations of the international accountability norm, Boesenecker and Vinjamuri claim that civil society actors tend to be those who seek alternative practices and understandings of justice.<sup>383</sup> These innovative processes can include adapting the international norm to local contexts or devising solutions that are seemingly more suitable for local politics and priorities. In their investigation of truth commission policy transfers in Ghana and Canada, Oduro and Nagy similarly stress the important role of domestic agents and their ideas.<sup>384</sup> These two authors reject the argument that the spread of truth commissions is a consequence of states being socialised into the one-size-fits-all international TJ model. Instead, they explore how the truth commission ideas are called for and adopted by domestic actors with the support of international actors. Arthur and Yakinthou's work on civil society in TJ also demonstrates that TJ initiatives become "hybridized" through negotiations between international and local norms, with support from external actors such as INGOs and donors.<sup>385</sup> This interdisciplinary body of literature, therefore, demonstrates numerous empirical examples of domestic actors' capacity to reshape international norms and ideas yet often on a selective basis and/or depending on a range of internal and external factors. The following section reviews a selection of the literature that deals precisely with such factors of influence.

### 3.5.2. Factors influencing agency

Further investigation into the research on victims' and civil society associations as subsets of TJ actors provides insight into the challenges that could possibly surround practitioners conceptualising and practicing GNRs. Rudling notably seeks to improve our understanding of victims' individual-level agency within victims' associations and account for their differences regarding TJ preferences.<sup>386</sup> Rudling reveals that victims' groups undergo internal negotiations about the associations' collective position which can result in intra-organisational conflicts. As a

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<sup>383</sup> Aaron P Boesenecker and Leslie Vinjamuri, 'Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms' (2011) 5 *International Journal of Transitional Justice* 345.

<sup>384</sup> Franklin Oduro and Rosemary Nagy, 'What's in an Idea?: Truth Commission Policy Transfer in Ghana and Canada' (2014) 13 *Journal of Human Rights* 85.

<sup>385</sup> Paige Arthur and Christalla Yakinthou, 'Changing Contexts of International Assistance to Transitional Justice' in Paige Arthur and Christalla Yakinthou (eds), *Transitional Justice, International Assistance, and Civil Society* (Cambridge University Press 2018).

<sup>386</sup> Adriana Rudling, 'What's Inside the Box? Mapping Agency and Conflict within Victims' Organizations' (2019) 13 *International Journal of Transitional Justice* 458.

result, victims' associations encounter situations where they must adjust their positions, including normative priorities and activities, based on individual pre-existing political and socioeconomic identities. Yet, some of these adjustments will also depend on the donors' and governments' actions and preferences. From this field research-informed study, we can begin to consider a combination of internal and external factors at play in the agency of this specific group of actors.

Such arguments have also been made regarding civil society organisations. In particular, Arthur has argued that international assistance to local TJ initiatives is shaped through four 'Is' – ideas, interests, institutions, and information while arguing against a single causal explanation of why donors fund TJ and advocating for a multifaceted understanding of the relationships between donors and civil society organisations.<sup>387</sup> This research raises questions about whether, and how, local actors might be “fitting” their discourse into the international standards for practical reasons such as financial support.<sup>388</sup> In particular, Arthur's research raises the idea that criminal justice, as the most powerful mechanism of TJ advocated for by influential legal practitioners, attracts most funding with no other TJ initiative being funded at such scale.<sup>389</sup> The consequences of this phenomenon are that TJ initiatives may not always be funded when needed and furthermore, that when they are funded, it may not be in the most relevant way. These selected studies tend to be written from a social constructivist perspective and, while deconstructing the politics of frameworks in transitional justice in light of actors' agency, they are rather silent about the interactions with broader legal infrastructure in creating, shaping, and rejecting ideas and practices and how agency might shape it.

### 3.5.3. What about legalism?

A limited body of sociolegal literature has examined legal professionalism in transitional justice and filled in some of the gaps identified in constructivist literature. More precisely, this body of literature has sought to examine the influence of legalism and legalist thinking on practices by different sub-sets of practitioners working in transitional justice settings. Most

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<sup>387</sup> Paige Arthur, 'Why Do Donors Choose to Fund Transitional Justice?' in Paige Arthur and Christalla Yakinthou (eds), *Transitional Justice, International Assistance, and Civil Society* (Cambridge University Press 2018).

<sup>388</sup> *ibid.*

<sup>389</sup> *ibid* 238–239.

notable studies have been conducted by McEvoy in collaboration with different colleagues. These studies are interested in placing actors' action and non-action within the wider socio-political context intertwined with their identity, ideology etc. In a study on cause lawyers, McEvoy shows that legal professionals stay faithful to the rule of law even in the most extraordinary of times such as conflict and mass violence.<sup>390</sup> Notwithstanding individual cause lawyers who act against legal regulations in support of their cause, these lawyers tend to stress their professional neutrality and see the role of a lawyer as 'a tool ... not a decision maker.'<sup>391</sup>

In another study on women cause lawyers in several transitional societies, Bryson and McEvoy analyse the practices of these lawyers on the structure/agency nexus.<sup>392</sup> Across transitional contexts, cause lawyers' work has been influenced by distinct social, political, cultural, legal and gendered realities. The authors raise the possibility that political, economic, and legal structure could "swallow" cause lawyers to the point where they end up perpetuating gendered processes and politics.<sup>393</sup> Treating structure and agency as intersecting, Bryson and McEvoy point to innovative approaches to activism through which these women cause lawyers assert their agency in circumstances of social and political struggle. Instead of treating structures as necessary constraints, the authors show how lawyers bring their own 'energetic and inventive approach to activism' which corrects some of the disempowering power coming from different structural variables.<sup>394</sup>

Finally, McEvoy and Schwartz research judges in Northern Ireland, identifying these judges' views of their own judicial roles.<sup>395</sup> In this article, the two authors argue that the role of legal professionals as actors in institutions that were important parts of conflict and transition need to be better understood by and integrated into TJ scholarship and practice to grasp the causes and consequences of the harms committed and ensure they are not repeated.<sup>396</sup> This causal link presupposes that understanding the role of legal professionals would make for a

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<sup>390</sup> Kieran McEvoy, 'Cause Lawyers, Political Violence, and Professionalism in Conflict' (2019) 46 *Journal of Law and Society* 529.

<sup>391</sup> *ibid* 543.

<sup>392</sup> Anna Bryson and Kieran McEvoy, 'Women Lawyers and the Struggle for Change in Conflict and Transition' (2016) 42 *Australian Feminist Law Journal* 51.

<sup>393</sup> *ibid* 72.

<sup>394</sup> *ibid* 58.

<sup>395</sup> Kieran McEvoy and Alex Schwartz, 'Judges, Conflict, and the Past' (2015) 42 *Journal of Law and Society* 528.

<sup>396</sup> *ibid*.

sensitive approach to institutional reform and therefore strengthen public confidence in the institutions they inhabit, leading to non-recurrence. The assorted socio-legal studies are underpinned by structuration theory and demonstrate the persuasive power of legalism to prioritise certain values and ideas over others, potentially limiting actors' agency to transform global ideas and norms.

In the preceding section, I have provided a review of the key scholarly endeavours that adopt more actor-oriented approaches to various matters of transitional justice and highlight the agency of different actors involved in TJ processes. These studies, typically conducted from a socio-legal or social constructivist point of view, provide an invaluable guidance for the empirical elements of this thesis, and demonstrate how some of the tenets of structuration theory operate in practice. More specifically, these reviewed studies point to international and domestic actors' inherent power and capacity to construct and shape knowledge, including conceptual applications and adoptions of international norms. In doing so, they do not treat norms as existing in vacuum from various actors operating on the ground, as some of the more structure-oriented approaches do but emphasise the existence of international norms in society. Importantly, this literature demonstrates that agency can shape structures as well as be shaped or even constrained by it through different external factors such as governments and donors' preferences. In particular, this body of literature highlights legalism as a major external constraining factors due to which actors conform to expected "legalist" codes of conduct. Overall, these studies remain the minority in transitional justice-specific literature and, as previously noted, none of the actor-oriented scholarship has undertaken the task of studying guarantees of non-recurrence. Nevertheless, this body of literature demonstrates that transitional justice can be studied through an alternative approach of the agency/structure nexus on which my thesis builds. Chapter 5, 6 and 7 explore the 'contextualisation' of the norm of non-recurrence by practitioners, that is the knowledge they create regarding GNRs, how such knowledge is put to practice and, in line with structuration theory, how it shapes and is shaped by transitional justice as an ideational structure. As such, the thesis contributes to this body of literature not only through its focus on GNRs but also through its expanded scope of analysis and examination of the interplay between a range of different objects of TJ and the agents who engage with them.

### 3.6. Conclusion

This chapter has pointed to conceptual tensions between distinct bodies of literature investigating GNRs, delineated major gaps in the knowledge about GNRs in transitional justice and advocated for the urgency and importance of this thesis' original approach to GNRs. It has included a literature review of major scholarly engagements with GNRs in transitional justice and of the scholarship that discusses the links, often causal, between distinct objects of TJ and the overall objective of ensuring non-repetition of violations or conflict. The literature review has demonstrated that structure-oriented approaches to GNRs remain dominant, investigating how TJ as a collection of norms, laws and institutions puts forwards ideas as well as guidance on how non-recurrence should be dealt with. In structure-oriented approaches to TJ, each of the five pillars of TJ is said to contribute to non-recurrence to different degrees. I delineated numerous ideas attached to these relationships whereby elements such as upholding the rule of law, creating a historical record, and drawing the line between the old and the new regime, all set as normative requirements of specific mechanisms, are claimed to be crucial for non-recurrence. This literature does not consider the structure of TJ and its different elements as shaped and shaping different actors but tends to be interested in the ideal environment the mechanisms could create. Nevertheless, critical scholarship has also raised questions about the achievement of the objective of non-recurrence in practice and, as I have showed, offer major arguments of contestation for each pillar. A selection of the actor-oriented literature to TJ matters has been reviewed to propose that the key matters of transitional justice can be studied through alternative approaches and delineate the key themes and arguments made towards a structure/agency approach in this field, with an overall conclusion that no scholarly work has addressed how different actors contextualise GNRs so far.

These distinct bodies of literature demonstrate clear gaps in knowledge about GNRs and point to the importance of this research. Firstly, there is evidence of continuous conflation, aided by the malleability of TJ, between institutional reform and guarantees of non-recurrence as measures practised in transitional societies in order to change the *status quo* and diminish the probability (the possibility always remains) of violations being repeated. The questions arising from the current state of the literature on GNRs are, therefore, conceptual, *whether* GNRs and measures of institutional reform one and the same as per international law and much

international TJ policy or if content-wise they are in fact something else and more transformative as per some scholarly assertions. Secondly, GNRs are currently theorised as ‘a function’ cutting across different TJ mechanisms and practices as well as a bridge bringing distinct ways of doing TJ together. Similarly, the most prominent pillars of TJ are all said to have some causal links with the objective of non-recurrence, yet all of them are debatable enough to justify the existence of GNRs as a separate pillar. Informed by the key tenets of structuration theory, I continue this thesis to uncover the roles TJ actors play in transferring, adjusting, and creating knowledge in and for transitional justice practice, suggesting that the domestic understandings and practices of GNRs ought not only to be contained to the mechanisms’ self-reported truths. The reviewed actor-oriented scholarship has also proven that such production of knowledge and subsequent practices are conditioned by both political and legal factors and cannot be analysed in a vacuum. In other words, domestically, GNRs cannot only be shaped by the ideas and guidance TJ as an ideational structure puts forward, but also by actors’ own context-specific conceptions. These are the two sets of gaps in the literature this thesis seeks to contribute to. This chapter completes the conceptual and theoretical foundation of the thesis. Before presenting my research findings, in the next chapter I discuss my methodological approach and introduce BiH as a case study.

## CHAPTER 4: METHODOLOGY AND INTRODUCTION TO BOSNIA AND HERZEGOVINA AS A CASE STUDY

### 4.1. Introduction

This thesis has, so far, offered the reader an introduction to the research problem, the origin story of GNRs in transitional justice, an elaboration on the theoretical underpinnings of the research, and identification of the major gaps, tensions, and ideas stemming from the literature on GNRs in transitional justice. This present chapter is positioned as a bridge between the first three chapters of the thesis that offer theoretical and conceptual foundations for GNRs, and the following three chapters which empirically respond to the key research questions. Before introducing my thesis findings, in this chapter, I provide an account of how I came about answering these questions and discuss my methodological approach to this empirical study.

This chapter is organised around the discussion of the research design I employ in this thesis. More precisely, I begin the chapter by discussing why a single country case design was chosen and further explain my choice of Bosnia and Herzegovina as an *instrumental* case, a case that is by no means representative of a common transitional justice experience or a ‘model’ across contexts. Instead, it is an instrumental case as it facilitates my exploration and understanding of GNRs and the influence of transitional justice as an ideational structure due to the country’s developed TJ infrastructure and a significant temporal span of its TJ experiences (Section 4.2.). The research design itself, whereby I investigate my research questions in the specific environment of BiH, necessitates further elaboration on transitional justice in this country. To that end, in Section 4.3., I describe the case of Bosnia and Herzegovina and provide a skeleton of TJ in this country, following the same five-pillar outline TJ as in Chapter 3, and explaining how the mechanisms and tools found within these pillars have or have not been realised in this country between 1995 and 2021. In this section, I assert that not all pillars have been equally developed, with criminal justice and institutional reform receiving most investment by the international community.

Data collection consisted of both desk and field research. I combined desk and field research in order to systematically explore GNRs as a social and legal norm and extend my

examination to how actors construct the social world of an otherwise legal norm and potentially re-interpret legal ideas. As my data analysis approach was primarily inductive, allowing theory to build up from the data, I used no authoritative definitions (e.g., as per IHRL or as per the UN Special Rapporteur's reports) of GNRs as my criterion for data selection and collection. Due to such approach, and in line with my research question, I sought to investigate understandings of GNRs that are specific to the case study and transitional justice in BiH. This allowed the thesis to engage with how potential new definitions, previously not captured by international law or transitional justice policy and scholarship, are constructed by the TJ actors, demonstrating how the flexibility of the norm of non-recurrence enables or otherwise conditions practitioners' agency.

The process of case description aided my identification and selection of different institutions, mechanisms, and organisations working or having worked towards criminal justice, truth recovery, reparations, institutional reform and memorialisation in BiH. All such identified bodies were selected for desk research. Representatives – or former employees where the organisation/mechanism ceased to exist – were then invited for interview and observation and, where they accepted the invitation, examined for their understandings and practices of GNRs through field research. They form 'the field.' Section 4.4., thus, specifically elaborates on the selection of these research units, the sources used in the desk and field stages of research, and the processes of data collection.

In Section 4.5., I offer an account of the process of data analysis, discussing the method of thematic analysis and employing a combination of inductive and deductive coding. Finally, Section 4.6. aims to make a case for the validity and reliability of this thesis. To do so, in line with the propositions made in qualitative methods literature, I incorporate a brief discussion on my reflexivity and the strengths and weaknesses of my overall design.

## 4.2. Case study research design

Two key research questions this thesis explores are:

*How are guarantees of non-recurrence understood and practised by transitional justice actors in Bosnia and Herzegovina?*

*How does the transitional justice structure in BiH influence these domestic conceptualisations and practices?*

The research design of this thesis is that of a single country case study. It is qualitative, contemporary, and exploratory.<sup>397</sup> In the words of Creswell, conducting case study research means exploring ‘a real-life contemporary bounded system (a case) or multiple bounded systems (cases) over time, through detailed, in-depth data collection involving multiple sources of information’ and reporting ‘a case description or case themes.’<sup>398</sup> Such research design is desirable due to the central ‘how’ research questions and the focus on GNRs, a complex contemporary phenomenon over which I as a researcher have no control.<sup>399</sup> In the literature, single case research design is valued for producing ‘context-dependent knowledge and experience’ which is in line with my sociological approach and my epistemological constructionist preferences (Sections 1.4. and 3.2.).<sup>400</sup> To research GNRs in this way means to depart from the positivist approach and refuse to only consider law's own truth, i.e., the findings stemming from legal texts (Chapter 2) as the truth about GNRs. Instead, the norm content found in international law is placed within broader contexts of transitional justice in BiH in which GNRs could be operational and where the premises stemming from the law can be created, recreated or completely rejected in the interplay of agency and wider structures.<sup>401</sup> My approach to GNRs does not ask ‘why is there a gap’<sup>402</sup> but instead assumes that there already is a gap between international law and TJ practice from the start, as an expected ‘outcome of the way legal system understands and reconstructs social relations internally.’<sup>403</sup> In the context of my research, it means to take the flexibility of the norm content of GNRs in IL and TJ as a starting point, and further examine how such flexibility allows or disallows practitioners to act innovatively. This is further matched by the objective of positioning the context-specific understandings and practices regarding GNRs in relation to the broader structure of transitional justice, examining why GNRs are the way they are in Bosnia and Herzegovina. Much in this

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<sup>397</sup> Robert K Yin, *Case Study Research and Application* (4th edn, SAGE 2009).

<sup>398</sup> John W Creswell, *Qualitative Inquiry and Research Design. Choosing Among Five Approaches* (3rd edn, SAGE 2013) 97.

<sup>399</sup> Yin, *Case Study Research and Application* (n 397).

<sup>400</sup> Bent Flyvbjerg, ‘Five Misunderstandings About Case-Study Research’ (2006) 12 *Qualitative Inquiry* 219, 223.

<sup>401</sup> Banakar, ‘Having One’s Cake and Eating It: The Paradox of Contextualisation in Socio-Legal Research’ (n 4).

<sup>402</sup> See, originally, Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review* 12, 36.

<sup>403</sup> Reza Banakar, ‘On Socio-Legal Design’ (2019) Lund University Working Paper Series 16.

research design, therefore, is contingent on specific conditions of conflict and transition found in BiH. The following section explains my choice of BiH as an instrumental case study.

#### 4.2.1. Bosnia and Herzegovina as an instrumental case

The country case chosen is Bosnia and Herzegovina, which can be interpreted as an ‘instrumental case’ since it is selected as illustrative for understanding a specific issue using a variety of sources and allowing for a more holistic understanding of otherwise complex social phenomena.<sup>404</sup> Within the single case of BiH, I investigate multiple ‘units’, that is, institutions, organisations and mechanisms of transitional justice and actors who participate in them (see Section 4.4.).<sup>405</sup> As per Creswell, a case is ‘instrumental’ when it is selected to ‘best understand’ the research problem or question, meaning that the focus of the researcher is more on the problem than it is on the country selected as the case.<sup>406</sup> This does not mean that the BiH experience with transitional justice is representative of a common TJ experience in other contexts. In many ways, BiH stands out as distinct when compared to other countries with developed transitional justice programmes and processes: the conflict in BiH is commonly characterised as ‘international’ as opposed to civil, it is only one of the two countries where the UNSC established an ad-hoc international criminal tribunal, the other one being Rwanda, and it is a country, as it will be explained in detail in this chapter, whose constitution is not only tied to but an integral part of the peace agreement that put an end to the conflict.<sup>407</sup> To choose BiH as an ‘instrumental’ case therefore means to make a claim about the usefulness of the case for investigating the complexities relating to both guarantees of non-recurrence and the structure of transitional justice.

To that end, Bosnia and Herzegovina was selected as an instrumental case country for two key reasons, both of which make BiH a ‘vehicle’ for understanding GNRs in domestic settings and vis-à-vis the structure of transitional justice.<sup>408</sup> Firstly, although BiH does not have a

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<sup>404</sup> Phoung Pham and Patrick Vinck, ‘Empirical Research and the Development and Assessment of Transitional Justice Mechanisms’ (2007) 1 *International Journal of Transitional Justice* 231; Yin, *Case Study Research and Application* (n 397); Creswell (n 398) 98.

<sup>405</sup> Creswell (n 398) 98.

<sup>406</sup> *ibid* 98.

<sup>407</sup> I would like to thank my examiners for highlighting these points during my viva.

<sup>408</sup> Creswell (n 398) 322.

coherent transitional justice policy, it has a very developed transitional justice infrastructure consisting of processes, projects and practices relating to all five pillars of transitional justice with long-lasting involvement of a range of international, regional and domestic actors. In fact, BiH is one of the countries with the most resource investment in transitional justice by the international community. Transitional justice practice in BiH has developed across sectors of the society and, as Campbell succinctly puts it, BiH became a country that ‘exemplifies contemporary transitional justice’ with its multiple projects, many of which have already completed their mandates.<sup>409</sup> Studying GNRs in BiH over other states where aspects such as institutional reform or criminal justice for instance may be entirely absent or yet to develop gives an opportunity to analyse what the mechanisms binding the structure of transitional justice and the ideas behind them make possible and impossible in terms of GNRs and how TJ actors interact with these distinct aspects of the structure in their construction of GNRs in practice.

Secondly, BiH was one of the first states to witness the newly developed field of research and policy called ‘transitional justice’ in the late 1990s/early 2000s and was since used to test many policy ideas initially proposed by TJ research, including those making causal links between different mechanisms such as criminal trials and the objective of non-recurrence. TJ projects and processes in BiH have been developing for over 25 years, which allows this thesis to observe how understandings and practices of GNRs have been revised over time, if at all, and whether present-day applications of GNRs are influenced by some of the earlier, well-developed responses to TJ in the country. The vast temporal span of TJ in BiH makes it possible to investigate the links between TJ processes and GNRs in the long-term, beyond expirations dates of some of the short-term projects of TJ.

Because Bosnia and Herzegovina facilitates my understanding of the research problem, it allows this thesis to draw more general conclusions about the characteristics of GNRs in such transitional justice that might be transferrable to or comparable with other countries. More precisely, it allows us to begin to understand how transitional justice interventions elsewhere, similarly or distinctly structured and bringing in these same ideas, can influence actors’ conceptualisation of the fluid norm of non-recurrence. What the case study of BiH does not

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<sup>409</sup> Kirsten Campbell, ‘Reassembling International Justice: The Making of “the Social” in International Criminal Law and Transitional Justice’ (2014) 8 *International Journal of Transitional Justice* 53, 66.

allow us to do is to export the content given to the norm of non-recurrence in BiH as a policy package, for such content is dependent on the specific political and socio-economic context of BiH as well as being contingent on the structural properties of transitional justice.

Description of the chosen case is essential for good case study research, as it underpins how research units were identified and selection for further desk and field research.<sup>410</sup> To compile this case description, I have used a range of primary and secondary sources in English and Bosnian/Croatian/Serbian, including academic articles and books, international and non-governmental organisations' reports on BiH and policy papers, as well as legal documents such as peace agreements, UN General Assembly and Security Council resolutions, statutes and constitutions. The 'facts' emerging out of these multiple sources were triangulated, that is, compared and contrasted against each other for reliability and validity of the information and enhancing the depth and richness of case description.<sup>411</sup> In the following section, I give an introduction to the politics of the BiH transition from conflict to peace and, simultaneously, socialism to democracy, and further provide a skeleton of the five-pillar TJ in BiH to portray the myriad of institutions, mechanisms, projects and processes (i.e. 'units' within this case study) operating under the umbrella of transitional justice between 1995 and 2021.

#### 4.3. Transitional justice in Bosnia and Herzegovina

Signs of the weakening of the unity of the multi-ethnic Socialist Federal Republic of Yugoslavia had become apparent after the death of the country's President-for-life Josip Broz Tito in 1980.<sup>412</sup> The federation consisted of six republics: Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Montenegro and Macedonia. The dissolution of the country was signalled by Slovenia and Croatia's declarations of independence in 1991.<sup>413</sup> While these declarations of independence were recognised by the international community, they triggered armed conflicts in

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<sup>410</sup> Creswell (n 398) 99.

<sup>411</sup> Louise Mallinder and Catherine O'Rourke, 'Databases of Transitional Justice Mechanisms and Contexts: Comparing Research Purposes and Design' (2016) 10 *International Journal of Transitional Justice* 492, 508.

<sup>412</sup> Andy Aitchison, *Making the Transition. International Intervention, State-Building and Criminal Justice Reform in Bosnia and Herzegovina* (Intersentia 2011) 40-42.

<sup>413</sup> For an overview of the academic work on the dissolution of Yugoslavia, see, for example, Sabrina P. Ramet, *Thinking about Yugoslavia. Scholarly Debates About the Yugoslav Breakup and the Wars in Bosnia and Kosovo* (Cambridge University Press 2005).

Croatia involving the Yugoslav National Army, controlled by Serbia, local Serb population and Croatian independent army. The bloodshed was most intensive in Bosnia and Herzegovina, an ethnically diverse republic. Here, the conflict<sup>414</sup> bled on for four years after BiH people had voted for independence in a 1992 referendum. During the conflict, BiH witnessed the longest modern-day siege of its capital city of Sarajevo, lasting 1425 days, and resulting in at least 10,000 deaths.<sup>415</sup> Elsewhere in BiH, numerous detention camps and centres were established for torture, rape, starvation and execution, where the majority of victims were civilians.<sup>416</sup> Overall, the conflict resulted in an estimated 100,000 deaths, an estimated 20,000 raped women and men, great displacement of the local population both within and outside the country, and vast destruction of property and social, cultural and economic life.<sup>417</sup> Three key armies were involved in the conflict: the army of Republika Srpska (VRS), the Army of the Republic of BiH (ARBIH), and the Croatian Defence Council (HVO). While the armies were ethnically organised and ethnically divided, some diversity existed, particularly in the ARBIH.<sup>418</sup> In addition, multiple paramilitaries, most prominently funded by different political parties in Yugoslavia (now Serbia and Montenegro, separately) were involved in the conflict and complicit in committing atrocities, while the involvement and support of the sovereign states of Yugoslavia and Croatia are debated to date. The paramilitaries from Yugoslavia were in particular led by an agenda of ethnic cleansing and ‘driving non-Serbs from Serb-controlled land.’<sup>419</sup> In 1993, the United Nations Security Council determined six ‘safe zones’ in BiH protected by the UN peacekeeping forces,

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<sup>414</sup> The qualification of the violent events committed between 1992 and 1995 in BiH is disputed. While some call the events ‘aggression’ on BiH, others prefer terms such as ‘civil war’, and yet others, including the ICTY treat this as an ‘international armed conflict.’ For the lack of political consensus on the qualification, I use the term ‘conflict’ throughout the thesis without any judgement as to what the correct legal, social, or political qualification should be.

<sup>415</sup> Marie E Berry, *War, Women, and Power. From Violence to Mobilization in Rwanda and Bosnia-Herzegovina* (Cambridge University Press 2018).

<sup>416</sup> According to the Centre for Democracy and Transitional Justice, a CSO that documents detention sites, around 1,350 camps and other detention facilities were established between 1992 and 1995. See Centre for Democracy and Transitional Justice ‘Dokumentovanje logora i drugih zatočeničkih objekata u BiH’ (CDTP, February 2014) <https://cdtp.org/dokumentovanje-logora-drugih-zatoceničkih-objekata-u-bih/> accessed 8 April 2021.

<sup>417</sup> Jessie Hronešová, ‘Might Makes Right: War-Related Payments in Bosnia and Herzegovina’ (2016) 10 *Journal of Intervention and Statebuilding* 339; Berry (n 415).

<sup>418</sup> See, for example, the story of ARBIH’s First ‘glorious’ brigade which, having consisted of 300 Bosnian Serbs, was called ‘first glorious-Orthodox’ brigade. Ibrahim Sofić, ‘Priča o Srbima u Armiji RBiH: Sahranite me kod Čede’ (*AlJazeera Balkans*, 08 January 2019) <https://balkans.aljazeera.net teme/2019/1/8/prica-o-srbima-u-armiji-rbih-sahranite-me-kod-cede> accessed 5 April 2021.

<sup>419</sup> Berry (n 415) 118.

the most notable of which was in a small town in eastern BiH called Srebrenica.<sup>420</sup> By 1995, when the VRS began their military action to capture the territory of the enclave, the Srebrenica enclave was protected by a single, lightly armed Dutch battalion (Dutchbat-3). The politics of ethnic cleansing by the VRS culminated with the genocide the Bosnian Serb forces committed in and around Srebrenica when they finally penetrated the ‘safe zone’ in July 1995, killing more than 8,000 Bosniak<sup>421</sup> men and boys.<sup>422</sup> Most executions were committed while the battalion was still present in the area, unable to prevent the atrocities from being committed. The UN personnel eventually retreated entirely from the Srebrenica area on 21 July, leaving for Zagreb in Croatia.<sup>423</sup> Besides the Srebrenica genocide, during the four-year conflict, civilian and military casualties were found among all ethnic groups, yet it is unequivocal that the majority were of Bosniak ethnicity.

The complex history of the conflict as well as any sociological analysis of the causes of the conflict are outside the scope of this thesis and I do not attempt to contribute to the knowledge of the character and history of the conflict. Instead, what is of importance for this thesis is an understanding of the end of the conflict and the beginning of transitional justice.<sup>424</sup> It follows that an understanding of the country’s intricate political system is also an essential background for the empirical chapters of this thesis.

The end of official armed hostilities was concluded with the signing of the General Framework Agreement for Peace, commonly referred to as the Dayton Peace Agreement (DPA) in December 1995.<sup>425</sup> The DPA, signed by representatives of Yugoslavia and newly independent states of Croatia and BiH, sought to establish a decentralised state of BiH and multilevel governance that would give voice to different ethnic groups across the country whose armies had

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<sup>420</sup> For an overview of the different UNSC resolutions establishing these ‘safe areas’, see United Nations, Report of the Secretary-General pursuant to General Assembly Resolution 53/55, ‘The fall of Srebrenica’ (15 November 1999) UN Doc A/54/549.

<sup>421</sup> The term ‘Bosniak’ is used throughout the thesis to refer to ethnic Bosnians of Muslim faith.

<sup>422</sup> ‘Genocide’ as per the ICTY’s jurisprudence, see *Prosecutor v. Krstić* (Judgment) ICTY-98-33-T (2 August 2001).

<sup>423</sup> Report of the Secretary-General (n 420).

<sup>424</sup> Although, of course, no straight line can be drawn between these two. Some transitional justice mechanisms, such as the ICTY, were formally established before the peace agreement was signed.

<sup>425</sup> Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina, 21 November 1995, signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, initiated in Dayton, Ohio, US.

been fighting for four years and would, over time, it was argued, overcome ethnic divisions.<sup>426</sup> To that end, the Constitution of BiH today recognises ‘Bosniaks, Croats, and Serbs as constituent peoples’, along with other minority ethnicities (e.g., the Romani) broadly grouped as ‘Others.’<sup>427</sup> However, the constitutional and institutional setup in the country, shaped by the DPA, has done much to fortify ethnic divisions and lead to ethnonational identity being preferred over civic identity.<sup>428</sup> As per the Constitution,<sup>429</sup> BiH has a federal political system whereby the federation is divided into two political entities; the Federation of BiH (FBiH), composed of majority Bosniak and Croat ethnicities, and Republika Srpska (RS), which, as its name suggests, is predominantly ethnically Serb. As a state, BiH is run by three presidents, one of each major ethnicity or, in constitutional terms, ‘constituent peoples’ who rotate every eight months. In addition, the state-level political system includes a House of Representatives and a House of People (with equal ethnic representation).

Internally, each entity, the Federation of BiH and Republika Srpska, has its own President, two Vice Presidents, and a government led by a Prime Minister, a National Assembly, and a House of Peoples. The Federation is further divided into ten different cantons, each of which has some self-governing competencies, such as their own sets of ministries. To illustrate, this means that in the FBiH alone, there are eleven ministries of health, one for each canton and one for the entity.<sup>430</sup> To complicate things further, in addition to the two entities, the district of Brčko has a special status according to which it does not belong to either entity and has its own government and district assembly. Map 1 below illustrates how the land has been divided administratively into entities and cantons, with Brčko having a special status. The map will also be a useful tool for envisaging my travels during field research as explained later in this chapter.

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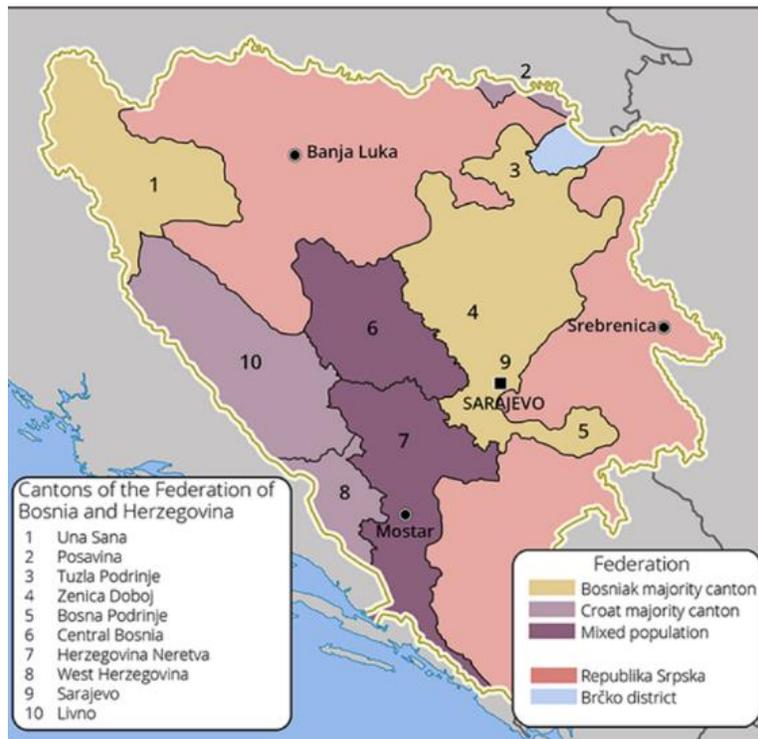
<sup>426</sup> Karabegović (n 82).

<sup>427</sup> See, the Preamble to the Constitution of Bosnia and Herzegovina, Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (n 425).

<sup>428</sup> Karabegović (n 82).

<sup>429</sup> See, Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina (n 425).

<sup>430</sup> World Bank Group, ‘Rebalancing Bosnia and Herzegovina. A Systematic Country Diagnostic’ (1 November 2015) <http://documents.worldbank.org/curated/en/910521467992511665/Rebalancing-Bosnia-and-Herzegovina-a-systematic-country-diagnostic> accessed 11 June 2021.



Map 1: Administrative map of Bosnia and Herzegovina, as illustrated by UK Parliament.<sup>431</sup>

Furthermore, Annex 10 of the DPA created the Office of the High Representative (OHR) as an *ad hoc* international institution that would oversee the implementation of civilian aspects of the Agreement until the country ‘is able to take full responsibility for its own affairs.’<sup>432</sup> Twenty-six years later, the OHR is still present in BiH and maintains its law-making powers, including its mandate to establish the rule of law as a necessary condition for other reforms. The High Representative was not actively been practising decision-making powers between 2014 and July of 2021, but their role in transitional justice practices has been monumental since the DPA entered into force, as will be referenced frequently throughout this thesis.

<sup>431</sup> House of Lords, Select Committee on International Relations, ‘The UK and the future of the Western Balkans’ 2017-19, HL Paper 53, (10 January 2018)

<https://publications.parliament.uk/pa/ld201719/ldselect/ldintrel/53/5302.htm> accessed 7 June 2021.

<sup>432</sup> The Office of the High Representative, ‘General information’ [http://www.ohr.int/?page\\_id=1139](http://www.ohr.int/?page_id=1139) accessed on 19 September 2019.

No overarching, state-level law or strategy on transitional justice exists to date, although a serious attempt to draft one was undertaken by the UNDP between 2008 and 2012, in cooperation with the BiH Ministry of Justice and Ministry of Human Rights and Refugees (MHRR).<sup>433</sup> The drafting body, called the ‘expert working group’ consisted of 15 members from the governmental and non-governmental sectors. Before the publishing of the draft document, the drafting body conducted two phases of regional consultations on transitional justice. Overall, the draft strategy emphasised a holistic approach consisting of judicial and non-judicial mechanisms and processes inclusive of truth recovery, reparations, memorials and institutional reform, running parallel to the strategy of war crimes prosecution already in existence<sup>434</sup> The draft strategy was eventually abandoned by the representatives of RS and it never re-gained sufficient political support. The following sections will provide an overview of the piecemeal transitional justice in BiH.

#### 4.3.1. Criminal justice

Judging by the involvement of the international community and overall expenditures, criminal justice has been the most developed pillar of transitional justice in the past 25 years in BiH, reflecting the overall dominance of this pillar in transitional justice research, policy, and practice, as established in Chapter 3. The ICTY, the first *ad hoc* international criminal tribunal of its kind, was established by the Security Council of the United Nations in 1993, while the conflict in BiH was still ongoing.<sup>435</sup> Over the course of its long 24 years of operation, the Tribunal charged 160 people, convicted 90 with, in their own words, the goal of deterring future crimes, providing justice to victims and therein aiding lasting peace in the region.<sup>436</sup> Although officially closed, the ICTY’s “essential functions” including retrials and appeals, and

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<sup>433</sup> Ministarstvo pravde Bosne i Hercegovina, ‘Ostale strategije: Informacija o procesu izrade Strategije tranzicijske pravde u BiH’ (MHRR, 6 Oct 2020)

<http://www.mpr.gov.ba/dokumenti/projekti/Default.aspx?id=3753&langTag=bs-BA> accessed 13 May 2021.

<sup>434</sup> BiH Ministry for Human Rights and Refugees and BiH Ministry of Justice, ‘Transitional Justice Strategy for Bosnia and Herzegovina 2012-2016 (Working Document)’ (March 2013)

[http://www.nuhanovicfoundation.org/user/file/2013\\_transitional\\_justice\\_strategy\\_bih\\_new.pdf](http://www.nuhanovicfoundation.org/user/file/2013_transitional_justice_strategy_bih_new.pdf) accessed 11 June 2021.

<sup>435</sup> UN Security Council Resolution 808 (22 February 1993) UN Doc S/RES/808.

<sup>436</sup> The International Criminal Tribunal for former Yugoslavia, *About the ICTY*, <http://www.icty.org/en/about> accessed 25 June 2021.

maintaining legacy<sup>437</sup> are kept in the International Residual Mechanism for Criminal Tribunals (IRMCT).<sup>438</sup> As of August 2021, there are still four open cases before the IRMCT, including the case of Ratko Mladić, who was indicted twenty-five years ago, which is still on appeal, and the retrials of Simatović and Stanišić.<sup>439</sup>

Since its inception, the ICTY has been subject to great criticism in both local and international academic circles. Scholars have criticised the ICTY on the accounts of discouraging national judicial development<sup>440</sup> and not producing a common, cross-ethnic truth.<sup>441</sup> Furthermore, a lot of the criticism stems from the Tribunal's apparent detachment from local realities, both in terms of physical distance (having been situated in The Hague) and people's perceptions of it. Justice by way of individual criminal responsibility of some, highest ranking individuals, which the ICTY was promoting, has been largely perceived as imposed by most if not all parties to the conflict, particularly the Serbs as the most frequently prosecuted ethnic group and can therefore be understood as injustice by certain groups.<sup>442</sup>

Much has changed since the ICTY first began operating and over time, courts and prosecutors' offices of BiH have undertaken a heavier workload than the Tribunal. In the first years of the transition, domestic prosecutions were left to the two entities, as the only central judicial institution was the Constitutional Court. The principle of territoriality on entity-level was abused to shelter suspected war criminals and, as a result, it was nearly impossible to see a Bosnian Serb suspect brought to court in Republika Srpska or a Bosniak or Croat in one of the Federation's courts.<sup>443</sup> This was improved with greater engagement of the OHR in the early

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<sup>437</sup> International Residual Mechanism for Criminal Tribunals, *About*, <https://www.irmct.org/en/about> accessed 8 July 2020.

<sup>438</sup> UN Security Council Resolution 1966 (22 Dec 2010) UN Doc S/RES/1966.

<sup>439</sup> International Criminal Tribunal for the former Yugoslavia, *Cases before IRMCT*, <https://www.icty.org/en/cases-before-irmct> accessed 18 August 2021.

<sup>440</sup> Julian G. Ku and Jide Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2006) 84 *Washington University Law Quarterly* 777.

<sup>441</sup> Janine Natalya Clark, 'Are There "Greener" Ways of Doing Transitional Justice? Some Reflections on Srebrenica, Nature and Memorialisation' (2016) 20 *The International Journal of Human Rights* 1199.

<sup>442</sup> Marlene Spoerri, 'Justice Imposed: How Policies of Conditionality Effect Transitional Justice in the Former Yugoslavia' (2011) 63 *Europe-Asia Studies* 1827.

<sup>443</sup> Janet Manuell and Aleksandar Kontić, 'Transitional Justice: The Prosecution of War Crimes in Bosnia and Herzegovina under the "Rules of the Road"' (2002) 5 *Yearbook of International Humanitarian Law* 331.

2000s.<sup>444</sup> To start with, the state Court of BiH was established by the OHR in November 2000,<sup>445</sup> and in 2002 and 2004, BiH saw amendments to the Law on the State Court of BiH according to which this Court was given primary jurisdiction regarding war crimes' prosecutions and a section on war crimes was created, Section I of the Court, also called the War Crimes Chamber (WCC).<sup>446</sup> Composed of international and national judges, the WCC follows international criminal law and is designed to hear top priority war crimes cases that do not go to the ICTY.<sup>447</sup> In academia and international practice, the WCC was welcomed as a demonstration of national ownership over crimes committed during the war and an institution that could potentially gain higher legitimacy by the local population.<sup>448</sup>

Due to a large number of unsolved war crimes cases in 2007, a working group was established to draft a national strategy for prosecuting war crimes cases.<sup>449</sup> In 2008, the National strategy for war crimes was adopted in an effort to better coordinate and speed up prosecutions. The strategy estimated that there were at least 10,000 individuals suspected to have committed atrocity crimes, only a tenth of whom were under active investigation at the time.<sup>450</sup> The strategy gave additional powers to local cantonal and municipal courts to hear less complex atrocity crimes cases, while the Court of BiH remained the central body adjudicating on the cases referred from the ICTY. The strategy envisaged that the complex and priority cases would be processed in seven years, and the rest, usually, but not always, left to lower-level municipal and canton courts, within 15 years. Since the most complex cases were nowhere near completion seven years later, a revised strategy was drafted, obliging state courts to process all war crimes

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<sup>444</sup> William W Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina' (2007) 46 *Columbia Journal of Transnational Law* 279.

<sup>445</sup> Manuell and Kontić (n 443).

<sup>446</sup> Law on State Court of Bosnia and Herzegovina (Official Gazette BiH no. 49/09, amend. 74/09, 97/09).

<sup>447</sup> Claire Garbett, 'Transitional Justice and "National Ownership": An Assessment of the Institutional Development of the War Crimes Chamber of Bosnia and Herzegovina' (2012) 13 *Human Rights Review* 65.

<sup>448</sup> *ibid.*

<sup>449</sup> Ministarstvo pravde BiH (n 433).

<sup>450</sup> Ministarstvo pravde Bosne i Hercegovine, *Državna strategija za rad na predmetima ratnih zločina*, (December 2008)

[http://www.mpr.gov.ba/web\\_dokumenti/drzavna%20strategije%20za%20rad%20na%20predmetima%20rz.pdf](http://www.mpr.gov.ba/web_dokumenti/drzavna%20strategije%20za%20rad%20na%20predmetima%20rz.pdf) accessed 11 June 2021.

by 2023.<sup>451</sup> This means that as of 2021, numerous prosecutions are still ongoing and many others are pending. According to the War Crimes Map, created by the OSCE, at least 519 cases have been completed before domestic courts in BiH by August 2021.<sup>452</sup> The Court of BiH has processed more cases than any other court and has adjudicated on the most complex of all domestic proceedings. Between 2004 and 2019, the Court ruled on 242 cases, finding 261 people guilty for genocide, crimes against humanity and/or war crimes.<sup>453</sup>

Due to the limitations of the initial criminal justice intervention, whereby the ICTY and the WCC could only accommodate a small number of relatively high-profile cases, thousands of victims sought redress elsewhere. The Human Rights Chamber, established in 1996 and envisaged as a European Court of Human Rights-like institution, was mandated by the DPA to hear human rights complaints.<sup>454</sup> The institution had the mandate to order both pecuniary and non-pecuniary damages with the goal of redressing past violations and preventing future ones.<sup>455</sup> Although it was empowered to only hear those claims relating to situations that happened or continued after the DPA became effective, the Chamber was very soon overwhelmed with cases beyond its capacity.<sup>456</sup> During its operation, the Chamber received thousands of applications, most of them relating to property and missing persons claims, as violations which consequences extended beyond the signing of the DPA. As a result, more victims have been involved in the cases heard before the Human Rights Chamber than the ICTY and WCC and the Chamber was able to accommodate some of the claims overlooked by the criminal justice institutions. The Chamber was eventually merged with the Constitutional Court of BiH as a Human Rights Commission.

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<sup>451</sup> Ministarstvo pravde Bosne i Hercegovine, *Revidirana državna strategija za rad na predmetima ratnih zločina*, [http://www.mpr.gov.ba/web\\_dokumenti/default.aspx?id=10809&langTag=bs-BA](http://www.mpr.gov.ba/web_dokumenti/default.aspx?id=10809&langTag=bs-BA) accessed 22 February 2021.

<sup>452</sup> Organization for Security and Cooperation in Europe, *Mapa procesuiranih ratnih zločina u BiH*, <https://maparz.pravosudje.ba/bhs>, accessed 2 September 2021.

<sup>453</sup> Sud Bosne i Hercegovina, *Statistika o presudama Suda BiH za period 2004. – 2019. godina*, <http://www.sudbih.gov.ba/stranica/102/pregled> accessed 8 July 2020.

<sup>454</sup> See, Annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina (n 425).

<sup>455</sup> J David Yeager, 'The Human Rights Chamber for Bosnia and Herzegovina - A Case Study for Transitional Justice' (2004) 14 *International Legal Perspectives* 44.

<sup>456</sup> *ibid.*

Finally, judicial redress was also sought at the inter-state level. The ICJ, while not a transitional institution, ruled on a monumental case between BiH and Serbia in 2007.<sup>457</sup> The case and its ultimate judgement became relevant in the efforts to deal with the past in two countries and had a further impact on the perceptions of peace in BiH and the wider region. In this case, the Court was posed with three substantive questions: whether the crimes committed during the conflict in BiH amounted to genocide; if yes, whether Serbia could be held responsible for it; and lastly, if yes, what reparations were owed to BiH by Serbia.<sup>458</sup> In reaching its decision, the ICJ relied on its own precedent, the *Nicaragua* case, in which it was established that states are only responsible for the conduct of non-state organs if they effectively control and direct them.<sup>459</sup> The application of the Nicaragua standard of effective control would in this case refer to Serbia's (then Yugoslavia) potential control over the Republika Srpska's army. In reaching a judgement, the court disagreed with the ICTY's previous widening of the standard in the *Tadić* case whereby the Appeals Chamber did not hold the Nicaragua test to be persuasive, finding that the VRS 'were to be regarded as acting under the *overall* control of and on behalf of' Yugoslavia.<sup>460</sup> Ultimately, in one of its longest ever judgements, the ICJ delivered that Serbia 'has not committed genocide ... has not conspired to commit genocide, nor incited the commission of genocide.'<sup>461</sup> Nevertheless, Serbia was found in breach of its duty to prevent genocide under the Genocide Convention as well as of its duty to punish perpetrators of genocide (most notably, by not surrendering Ratko Mladić at that time). Regarding reparations, the first breach was impossible to compensate for as it could not be established that Serbia could have prevented genocide, which is why the Court's judgement was declared to be an appropriate measure of satisfaction. In response to the second breach, Serbia was asked to hand over Mladić and other suspects sought by the ICTY. The day after the judgement was issued, thousands of survivors and families of the victims of the Srebrenica genocide took part in a mass demonstration in Sarajevo, upset about the ICJ's failure to hold Serbia responsible for committing genocide. The

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<sup>457</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 108).

<sup>458</sup> Martin Mennecke and Christian J Tams, 'The Genocide Case Before the International Court of Justice' (2007) 25 *Sicherheit & Frieden* 71.

<sup>459</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgements) [1986] ICJ Rep 14, para 115.

<sup>460</sup> *Prosecutor v. Tadić* (Appeal Judgement) ICTY -94-1-A (15 July 1999) para 162 (emphasis added).

<sup>461</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 108) para 471.

mass demonstration, some commentators have asserted, was an indication of the decision's 'far-reaching consequences regarding the stability of this ... region.'<sup>462</sup> Some commentators believed that the ICJ wanted to avoid worsening the resentment between Bosnian Serbs and Bosniaks, while others held that avoiding collective responsibility of Serbia further aided the instability in the country and the region.<sup>463</sup>

This scoping exercise demonstrates a rather developed criminal (and civil) justice infrastructure adjudicating the crimes committed in BiH, led by the ICTY for the most complex crimes, and further scaling down to Court of BiH and multiple other domestic courts and their numerous ongoing cases.

#### 4.3.2. Truth recovery

Unlike criminal justice, non-judicial truth recovery interventions have received significantly less attention in BiH's transitional justice circles. To date, no central state-wide and state-supported truth commission or inquiry have been established in Bosnia and Herzegovina. In the decade following the end of the conflict, there was a rather strong initiative to create a central TRC, initially promoted by Neil Kritz from the Rule of Law Program at the US Institute of Peace (USIP). Domestically, the TRC initiative was later most fervently supported by Jakob Finci, the executive director of the Open Society Foundation in BiH. In an article these two activists wrote together in 2001, it was claimed that a TRC-like non-judicial institution would help produce the ultimate, objective truth that is not tainted by ethnonationalism.<sup>464</sup> Kritz and Finci argued that BiH had already seen the suppression of the truth about past violence in its past (i.e. after WWII) and that this only led to the recurrence of violence.<sup>465</sup> In their view, the TRC would serve to avoid the repetition of that "mistake" and prevent future generations from fighting over which version of the ethnocentric truth is the correct one.<sup>466</sup> The TRC, Kritz and Finci wrote 'will then

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<sup>462</sup> Jernej Letnar Cernic, 'Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V Serbia and Montenegro), Judgment of 26 February 2007, General List No. 91 - Catching the Conscience of Judges' [2007] Australian International Law Journal 255, 255.

<sup>463</sup> *ibid.*

<sup>464</sup> Neil J Kritz and Jakob Finci, 'A Truth and Reconciliation Commission in Bosnia and Herzegovina: An Idea Whose Time Has Come' (2001) 3 International Law FORUM du droit international 50.

<sup>465</sup> *ibid.*

<sup>466</sup> *ibid.* 50.

be responsible for proposing specific steps which ought to be taken to restructure society, to deal with past abuses and to preclude their repetition.<sup>467</sup> Essentially, it was argued that transitional justice efforts, in order to not only ensure accountability for past abuses but also transform and therefore prevent future abuses, would be incomplete without more comprehensive truth-telling practices.

Nevertheless, this initiative was heavily contested by two perhaps least expected opposition groups – the ICTY and the victims’ families. The ICTY, having already been set up and ready to deal with the legacies of the conflict when the DPA was signed, feared that a truth commission would act as its alternative and therefore interfere with its work. Eventually, the tribunal came around and expressed approval of the idea under the provision that it would only deal with those matters not prioritised by the ICTY.<sup>468</sup> Fulfilling such a provision would essentially prevent the TRC from enquiring the truth about any of more ‘serious’ crimes such as genocide, otherwise accommodated by the Tribunal. Domestically, no political support was gained for the TRC at either entity or national level. Most contrary to the TJ literature, victims’ associations also rejected the idea of a TRC seemingly out of their dependence on local political parties who essentially opposed the initiative.<sup>469</sup> Some of the reasons offered by victims’ groups were rooted in their scepticism towards both the “truth” and “reconciliation” aspects of the TRC’s work, seeing both as individual, voluntarily given, and not something achieved through “compromise.”<sup>470</sup> Unable to gain enough political and public support, the TRC was never established and the initiative to found such a body on the state-level was entirely abandoned.

Another two, location-specific initiatives to establish truth commissions in BiH are worth discussing. The first one was the Commission for the Investigation of the Siege of Sarajevo which was established in 2006 and ceased to exist in 2007 without concrete results.<sup>471</sup> The other such initiative was more successful. Pressured by the High Representative, Republika Srpska authorities formed the Commission for the Investigation of the Events in and around Srebrenica

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<sup>467</sup> *ibid* 52.

<sup>468</sup> Jasna Dragovic-Soso, ‘History of a Failure: Attempts to Create a National Truth and Reconciliation Commission in Bosnia and Herzegovina, 1997–2006’ (2016) 10 *International Journal of Transitional Justice* 292.

<sup>469</sup> *ibid*.

<sup>470</sup> *ibid* 306–307.

<sup>471</sup> Commissioner for Human Rights (n 334).

between 10 and 19 July 1995 (Srebrenica Commission) in 2003.<sup>472</sup> The Srebrenica Commission, composed of five Bosnian Serb (one withdrew during the process), one Bosniak and one foreign commissioner, published its report in 2004, establishing that 7,779 Bosniaks perished in Srebrenica.<sup>473</sup> This was the first time that an official report settled on the number of those killed in Srebrenica in the hope that minimisation and trivialisation of the figures, most frequently coming from the RS officials, would decrease.<sup>474</sup> The report shied away from categorising the events of Srebrenica as ‘genocide’ but it did recommend that an apology is offered by RS authorities to the victims and their families. Following the publication of the report, the then-President of RS President Dragan Čavić issued a public apology for the ‘killings’ in Srebrenica.<sup>475</sup> At the time, this act was seen by some commentators as great progress in terms of symbolic reparations.<sup>476</sup>

Yet, as time went by, the information contained in the Srebrenica report was no longer seen as authoritative truth by political elites in Republika Srpska. The political climate changed significantly since early the 2000s, with overt secessionist aspirations by the ruling elite. As a result, in 2018, the National Assembly of Republika Srpska annulled the Srebrenica report, arguing that it manipulated the truth and changed the character of war in BiH.<sup>477</sup> Instead, Republika Srpska set up a new independent international commission on Srebrenica that is trusted to uncover the new truth, along with another separate commission that will investigate the suffering of the Serb population in the city of Sarajevo.<sup>478</sup> With the final report of the new Srebrenica commission pending as of August 2021, doubts have been raised about the

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<sup>472</sup> Daniela Mehler, ‘The Last “Never Again”?: Srebrenica and the Making of a Memory Imperative’ (2017) 24 *European Review of History: Revue européenne d’histoire* 606.

<sup>473</sup> Komisija za istraživanje događaja u i oko Srebrenice od 10. Do 19. Jula 1995, ‘Događaji u i oko Srebrenice od 10. do 19. Jula 1995. godine’ (*Radio Slobodna Evropa*, 19 June 2004) <https://www.slobodnaevropa.org/a/823047.html> accessed 4 October 2020.

<sup>474</sup> Commissioner for Human Rights (n 334).

<sup>475</sup> Stanko Smoljanović, ‘Čavić priznao masakr u Srebrenici’ (*Deutsche Welle* 23 June 2004) <https://www.dw.com/bs/%C4%8Davic-priznao-masakr-u-srebrenici/a-2485548> accessed 6 April 2021.

<sup>476</sup> Jessie Hronešová, ‘Bones and Recognition: Compensating Families of Missing Persons in Post-War Bosnia and Herzegovina’ (2018) 13 *Journal of Peacebuilding & Development* 47.

<sup>477</sup> Gojko Veselinović et al. ‘Skupština RS odbacila Izvještaj o Srebrenici’ (*Radio Slobodna Evropa*, 14 August 2018). <https://www.slobodnaevropa.org/a/skupstina-rs-srebrenica-opozicija/29432684.html> accessed 20 September 2019.

<sup>478</sup> Beta, ‘Vlada RS imenovala članove međunarodnih komisija za Srebrenicu i Sarajevo’ (*NI*, 7 Februar 2019). <http://rs.n1info.com/Region/a458523/Vlada-RS-imenovala-clanove-medjunarodnih-komisija-za-Srebrenicu-i-Sarajevo.html> accessed 10 October 2019.

trustworthiness of these commissions and the possibility of them being acts of propaganda aimed at denying or trivialising some of the existing court judgements.<sup>479</sup>

Ongoing debates about truth-telling initiatives in the country are greatly tied to the issue of missing persons in conflict. While the International Commission on Missing Persons (ICMP) mission in BiH has been greatly successful, having excavated and identified the remains of 70% of those initially declared missing, over 7,000 missing persons cases remain unresolved.<sup>480</sup> With such a large number of those still unaccounted for, the quest for the truth remains as important as ever. In efforts to localise the search for the missing, the BiH government passed a Law on Missing Persons in 2004.<sup>481</sup> This legislation remains the only state-level legal provision awarding rights and privileges to all victims of the BiH conflict. Following the enactment of the law, a central Missing Persons Institute (MPI) was co-founded by the Council of Minister of BiH and the ICMP.<sup>482</sup> As of 2021, the search for the missing continues to be led by the MPI in close cooperation with the ICMP.

Finally, another remaining large-scale truth recovery forum is RECOM, an initiative for a regional truth commission, originally started by Nataša Kandić of the Serbian Humanitarian Law Centre. RECOM is a regional coalition of 2,050 non-governmental organisations, associations, and individuals from the former Yugoslavia.<sup>483</sup> According to the initiative's draft statute, former Yugoslav states are asked to create an official, independent commission that will investigate the human rights abuses committed during Yugoslav wars. The main outputs envisaged would be a report with clear recommendations regarding reparations and measures of non-recurrence as well as creating a publicly accessible archive.<sup>484</sup> Several former Yugoslav governments showed official support for the commission so that 'the future generations would have an understanding

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<sup>479</sup> See, for example, Albina Sorguc, 'Bosnian Serbs' War Commissions: Fact-Seeking or Truth-Distorting?' (*BIRN*, 25 February 2019) <https://balkaninsight.com/2019/02/25/bosnian-serbs-war-commissions-fact-seeking-or-truth-distorting/> accessed 6 April 2021.

<sup>480</sup> Sarkin J et al., *Bosnia and Herzegovina. Missing persons from the armed conflict of the 1990s: A Stocktaking* (International Commission on Missing Persons 2014).

<sup>481</sup> Law on missing persons in Bosnia and Herzegovina (Official Gazette BiH, No. 50/04).

<sup>482</sup> As per Article 7 of the Law on missing persons, *ibid*.

<sup>483</sup> Koalicija za REKOM, *Šta je Koalicija za REKOM?*, <https://www.recom.link/sr/o-rekom-sr/sta-je-koalicija-za-rekom/> accessed 20 September 2019.

<sup>484</sup> Commissioner for Human Rights (n 334).

about the ugly part of our past and never repeat it’, but no concrete action as to its establishment has been taken yet.<sup>485</sup>

Since 1995, BiH has witnessed multiple truth recovery initiatives at the state level, most of which have never become operational. The key truth recovery work continues to be done in the context of missing persons, while the only central commission that has completed its mandate to date – the Srebrenica Commission – has been contested in Republika Srpska, and alternative truth recovery projects have been in the works.

#### 4.3.3. Reparations

Like truth recovery, reparations are an ongoing struggle for many survivors and victims’ families. By and large, the reparations process can be described as being held hostage by ethnonationalist politics.<sup>486</sup> When it comes to reparations to the families of the missing, the above-mentioned Law on Missing Persons envisages the creation of a compensation fund.<sup>487</sup> Nevertheless, this fund is yet to be realised due to the two entities’ inability to agree about its financing.<sup>488</sup> This remains the only state-level law that could compensate the victims, while other reparations schemes are organised at the entity level and separately in Brčko. More precisely, both entities have created separate legislation on the rights of veterans, disabled war veterans and fallen soldiers<sup>489</sup> and the rights of civilian victims of war.<sup>490</sup> These laws tend to discriminate between beneficiaries based on their ethnicity/residence. Republika Srpska’s laws in particular exclude any victim/veteran and their families who live in other parts of BiH or who live in RS but were in any way involved in the conflict supporting one of the ‘opposing’ sides.

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<sup>485</sup> Koalicija za REKOM, ‘Vlada Crne Gore podržala inicijativu za REKOM’ (*Koalicija za REKOM*, 28 June 2018). <https://www.recom.link/sr/timeline/vlada-crne-gore-podrzala-inicijativu-za-rekom/> accessed 20 September 2019.

<sup>486</sup> Jessie Hronešová, ‘Might Makes Right’ (n 417).

<sup>487</sup> Law on missing persons (n 481).

<sup>488</sup> Hronešová, ‘Bones and Recognition’ (n 476).

<sup>489</sup> Law on Rights of Demobilized Defenders and Members of Their Families in the Federation of Bosnia and Herzegovina (FBiH Official Gazette No. 61/06, 27/07, 32/08); In RS: Law on Rights of war veterans, disabled veterans, families of fallen soldiers in Republika Srpska (Official Gazette of RS No. 134/11 and 9/12).

<sup>490</sup> Law on Basics of Social Protection, Protection of Civilian Victims of War and Families with Children of the Federation of Bosnia and Herzegovina (FBiH Official Gazette No. 36/99, 54/04, 39/06 and 14/09); Law on Protection of Civilian War Victims of Republika Srpska (Official Gazette of RS No. 25/93, 32/94, 37/07, 60/07, 111/09, and 118/09).

Due to the piecemeal approach to reparations, many victims and survivors are left behind in seeking redress either due to eligibility criteria or the lack of funding. Among all reparation schemes, veterans, especially those who served any of the three armies for a long time, are singled out as the group most deserving of reparations. On the other hand, victims of sexual and gender-based violence in conflict are particularly unprotected. Republika Srpska, while it acknowledges the act of rape as a violation that deserves reparations in the above-mentioned law, offers monetary compensation only for the damages caused through rapes committed by ‘enemy forces’ and not its own army, therefore excluding a vast majority of victims.<sup>491</sup> In more recent legislation, redress is offered to all recognised victims of torture irrespective of their ethnicity but contingent on their place of residence during the conflict, which must be in Republika Srpska.<sup>492</sup>

For these reasons, victims of torture or civilian survivors and families of victims have generally resorted to litigation on domestic, regional and international levels to seek redress.<sup>493</sup> As a matter of last resort, victims of wartime sexual violence often attempt to obtain some monetary compensation through civil proceedings. However, such proceedings have been largely unsuccessful for two reasons. Firstly, where the alleged perpetrator is known and available to the court, they are often unable to pay the settlement, leaving the victim without compensation. Secondly, where the alleged perpetrator is not known or otherwise unavailable to the court, the compensation claims are rendered inadmissible due to the statute of limitations, as per a 2013 decision by the Constitutional Court.<sup>494</sup> As a result, civilian victims of physical or psychological violence are left with very little to no options for obtaining sustainable monetary compensation.

Finally, reparations have also been sought for more collective violations such as loss or damage to property during the conflict. On the former Yugoslav level, more than 3 million people were forced to flee their homes during the conflicts and migrate within or outside the

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<sup>491</sup> See, Article 2 of Law on Protection of Civilian War Victims at *ibid*.

<sup>492</sup> See, Article 5 of the Law on Protection of Victims of Wartime Torture of Republika Srpska (Official Gazette RS No. 90/2018).

<sup>493</sup> Hronešová, ‘*Might Makes Right*’ (n 417).

<sup>494</sup> TRIAL International, ‘Bosnia: Landmark decision for a Survivor of Sexual Violence’ (*TRIAL International*, 30 August 2019) <https://trialinternational.org/latest-post/bosnia-landmark-decision-for-a-survivor-of-sexual-violence/> accessed 6 April 2021. See a recent decision condemning this practice by the Committee against Torture, ‘Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 854/2015’ (22 August 2019) UN Doc CAT/C/67/D/854/2017.

territory.<sup>495</sup> In the concrete case of BiH, more than half of its population became internally displaced persons and refugees between 1992 and 1995.<sup>496</sup> This meant that half of all BiH people were outside their homes when the war ended, making violations of property rights one of the most common reparation claims.<sup>497</sup> Annex VII of the DPA acknowledged that all refugees and IDPs have the right to have their property restored or be compensated for what cannot be restored. The peace agreement also created the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) to deal with such property rights claims. The CRPC had an equal representation of the three main ethnic groups. To show its understanding of the chaotic circumstances of the war, the CRPC relaxed evidentiary requirements and allowed applications from claimants who had no written evidence that property was theirs to apply.<sup>498</sup> Although a compensation fund was never created, claimants could generally use CRPC's decisions to sell, lease or transfer property rights in accordance with the law.<sup>499</sup> The Commission ceased to exist in 2009 and since then, the Ministry of Human Rights and Refugees coordinates realisations of Annex VII of the DPA.<sup>500</sup>

This brief review of different reparations schemes in BiH demonstrates that, while inherently victim-oriented, reparations programs can also discriminate some categories of victims over others or separate them based on their ethnicity or the role they are believed to have played in the conflict. It also points to a lack of inter-entity cooperation on the matter due to which a sound state-level reparations scheme is still missing.

#### 4.3.4. Institutional reform

In the first decade after the conflict, the international community was heavily invested in reforming BiH state institutions at the level of the judiciary, the police, and armed forces. The court system of BiH has gone through a major restructuring phase. The reform of the judiciary

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<sup>495</sup> Commissioner for Human Rights (n 334).

<sup>496</sup> Hans Dans, 'Restoring Property Rights in the Aftermath of War' (2004) 53 *International and Comparative Law Quarterly* 429.

<sup>497</sup> *ibid.*

<sup>498</sup> *ibid.*

<sup>499</sup> *ibid.*

<sup>500</sup> Article 21 of the Law on Refugees from BiH and Displaced Persons in BiH (Official Gazette BiH No. 23/99, 21/03 and 33/03).

was led by the Independent Judicial Commission (IJC) established by the OHR in 2001.<sup>501</sup> The motive behind this restructuring project was first and foremost efficiency, as according to one commentator, post-conflict war Bosnia and Herzegovina found itself having ‘too many courts and too many judges’ which accrued costs the country could not sustain.<sup>502</sup> As a result, the overall numbers of courts and prosecutors’ offices were drastically decreased.<sup>503</sup> In addition, other non-financial reasons were given in support of the reform, mainly surrounding the issues of independence and impartiality, such as the perceived vulnerability of small courts to ethnic biases and compromises, new courts’ separation of ethnic communities, and institutions being tainted by judges formerly involved in the conflict.<sup>504</sup> Having these concerns in mind, the reform consisted of a process of vetting where all judges were asked to reapply and have their qualifications and any affiliations to conflict actors assessed. Many of the old judges were re-elected due to their outstanding qualifications, but the process also brought new and young professionals. It was considered to be a general and non-controversial success story; although perhaps only made possible due to the legislative powers the High Representative exercised at that time.<sup>505</sup> In efforts to localise the oversight of the judiciary, the IJC ceased to exist in 2003, and a new institution called the High Judicial and Prosecutorial Council (HJPC) was established in 2004 through a voluntary transfer agreement between the entities.<sup>506</sup> To date, this independent body has the mandate to appoint all judges and prosecutors in the country, propose judicial budgets, and determine appropriate training for judicial personnel.<sup>507</sup>

The reform of the security sector was conducted on an even larger scale. A joint communication issued by the European Commission and the OHR, two key actors in the reform, suggests that the security sector reform was believed to add to the EU objectives of fostering

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<sup>501</sup> Office of the High Representative, ‘Nezavisna pravosudna komisija preuzima zadatak izgradnje pravosudnog sistema u BiH’ (*OHR Sarajevo*, 30 November 2000) <http://www.ohr.int/?p=56452>, accessed 7 April 2021.

<sup>502</sup> David Pimentel, ‘Restructuring the Courts: In Search of Basic Principles for the Judiciary of Post-War Bosnia and Herzegovina’ (2008) 9 *Chicago Journal of International Law* 111, 124.

<sup>503</sup> Visoko sudsko i tužilačko vijeće BiH, *Desetljeće utemeljenja i rada Visokog sudskog i tužilačkog vijeća Bosne i Hercegovine Dostignuća pravosudne reforme* (2013) <https://advokat-prnjavorac.com/zakoni/Desetljece-utemeljenja-i-rada-VSTV-BiH.pdf> accessed 11 June 2021.

<sup>504</sup> Pimentel (n 502).

<sup>505</sup> *ibid.*

<sup>506</sup> Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (Official Gazette BiH No. 25/04).

<sup>507</sup> Adam Fagan, ‘Judicial Reform in Serbia and Bosnia-Herzegovina. Is EU Support and Assistance Augmenting Independence?’ (2016) 24 *Maxcap* 1.

‘peace and stability, inclusive and sustainable development, state-building and democracy, the rule of law, human rights and the principles of international law.’<sup>508</sup> Police reform had already been envisaged by the DPA Annex XI and the international community followed with a Security Council Decision on 21 December 1995 establishing the UN International Police Task Force (IPTF) with competencies to conduct police reform in BiH.<sup>509</sup> The IPTF, an *ad hoc* body, eventually became in charge of issuing certificates to all practising police officers after screening them for their involvement in the conflict as well as their qualifications and competencies to work for the police.<sup>510</sup> Police officers’ involvement in the conflict was investigated against the ICTY’s archive, checking if the police officer in question was mentioned in any collected documents. This process was considered a form of vetting in the police and was followed by continuous complaints by political elites who saw vetting as outside the IPTF’s mandate as per the DPA.<sup>511</sup> Out of the initial total of 40,000 police officers seeking certification, only 16,000 were successful by 2002.

While the police forces are still organised separately within each entity, armed forces were centralised during the reform. A new Ministry of Defence was created at the central level and a new Law on Defence was enacted in 2005, prescribing the role of all constitutive peoples and ‘Others’ in the united armed forces of BiH.<sup>512</sup> In addition, a new Intelligence-Security Agency was established in 2004 with competencies across the state.<sup>513</sup> Following the reform and centralisation of armed forces, more than 400,000 soldiers grouped in three armies at the end of the conflict were demobilised and a professional army of around 10,000 soldiers was formed.<sup>514</sup>

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<sup>508</sup> European Commission and High Representative for Foreign Affairs and Security Policy, ‘Elements for an EU-wide strategic framework to support security sector reform’ (July 2016) SWD(2016)221.

<sup>509</sup> UN Security Council Resolution 1035 (21 December 1995) UN Doc S/RES/1035.

<sup>510</sup> Dragan M. Popović, *Vodič kroz tranzicijsku pravdu u Bosni i Hercegovini* (UNDP n.d.).

<sup>511</sup> An additional Security Council resolution was passed in 1996 to give the IPTF responsibilities relating to the investigation of human rights violations by practicing police officers. See UN Security Council Resolution 1088 (12 December 1996) UN Doc S/RES/1088.

<sup>512</sup> See, Article 2(1) of Law on Defence of Bosnia and Herzegovina (Official Gazette BiH No. 88/05).

<sup>513</sup> Established by the Law on the Intelligence and Security Agency of Bosnia and Herzegovina (Official Gazette BiH No. 12/04, 20/04, 56/06 i 12/09).

<sup>514</sup> Marija Arnautović, ‘Oružane snage BiH: Deseta godišnjica rijetkog uspjeha’ (*Radio Free Europe*, 1 December 2015) <https://www.slobodnaevropa.org/a/oruzane-snage-bih-reforma-koja-je-imala-smisla/27400672.html> accessed 7 April 2021.

However, over time, mono-ethnic regiments and brigades were preserved, underlining ethnic divisions within the army.<sup>515</sup>

In sum, in addition to criminal justice, institutional reform has been the most heavily invested pillar of transitional justice in BiH. Three key sectors – the judiciary, the police and the military – underwent some form of vetting and were further restructured according to the set peace, justice and reconciliation goals by the involved members of the international community. In particular, the international community involved in these reforms aspired to bring stability to the country and reinforce the rule of law in a liberal, state-centric manner. Overtime, new domestic institutions such as the HJPC took over some of the vetting and monitoring from the international community in the effort to localise the process and demonstrate the stability of the country's reformed public sector.

#### 4.3.5. Memorialisation

Memorial practices in BiH are often shaped by political interests and ethnonationalism.<sup>516</sup> Memorialisation is not organised or regulated at the central level but instead, it is governed by numerous laws and regulations at the cantonal level in FBiH, entity level in RS, and separately in Brčko. As a result, monuments, statues, memorials, memorial plaques and such are plentiful across the country with little to no regulation about what or who they commemorate. In fact, it is estimated that, since the conflict, most monuments are built illegally without obtaining the necessary permits when such are required or after having the permit request rejected by the relevant authority.<sup>517</sup> According to the results of the project 'War of Memories' in which a CSO Centre for Non-Violent Action (CNA) documented sites memorialising the 1992-1995 conflict in BiH, at least 85 such sites had been established by 2015.<sup>518</sup>

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<sup>515</sup> Ana E Juncos, 'EU Security Sector Reform in Bosnia and Herzegovina: Reform or Resist?' (2018) 39 Contemporary Security Policy 95.

<sup>516</sup> Clark (n 441).

<sup>517</sup> Dzana Brkanic, 'Bosnian War Memorials Become Political Battleground' (*BIRN*, 8 August 2016) <https://balkaninsight.com/2016/08/08/bosnian-war-memorials-become-political-battleground-08-08-2016/> accessed 7 April 2021.

<sup>518</sup> Excluding commemorations, memorial events and street names. Centar za nenasilnu akciju, *RAT SJEĆANJA. Istraživanje o Mjestima Stradanja i Sjećanja Na Rat u BiH* (Centar za nenasilnu akciju 2018).

When it comes to official monuments established by whatever form of local authority, the majority of them honour fallen combatants of a singular army and not civilian victims.<sup>519</sup> The only city where monuments to soldiers of all three key armies, the VRS, ARBiH and HVO can be found in close proximity is Brčko, which as stated before is a separate non-entity district with its own Law on Monuments and Symbols.<sup>520</sup> In addition to the memorialisation efforts made by state officials, civil society organisations, veteran and victim groups conduct their own informal memorialisation, temporary and symbolic or otherwise physical and longer-lasting. Occasionally, such initiatives seek to memorialise opposing or contested memories not included in the official narrative led by political elites.<sup>521</sup> In a rare regulation that refers to memorialisation, the Law on Missing Persons grants the families of victims the right to mark exhumation or burial sites of their loved ones.<sup>522</sup> These sites of memory are not set in stone, and memorialisation sites are known to have been changed over the years to include, for example, a list of victims' names or an updated number of casualties according to any new truth recovery developments.

The site of memory most representative of the involvement of the international community memorialises the Srebrenica genocide. Possibly the most recognisable memorial in BiH in general is based in Potočari outside Srebrenica where genocide was committed in July 1995. Potočari, a site of mourning for Bosniaks, is located on the territory of what is today Republika Srpska. This made the process of establishing a memorial politically challenging, seeing how no official recognition that the killings in Srebrenica constitute a 'genocide' has come from the political top of RS.<sup>523</sup> In 2000, a committee of two Serbs and two Bosniaks was tasked to allocate appropriate sites for the memorial, which the committee could not agree on.<sup>524</sup> Eventually, it was the High Representative Ashdown who allocated a plot of land in the Srebrenica municipality, in his view, to ensure that the crimes are not forgotten and to keep 'the

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<sup>519</sup> Dzana Brkanic and Lamija Grebo, 'Bosnia Spends €2 Million on 'Divisive' War Memorials' (*BIRN*, 3 January 2020) <https://balkaninsight.com/2020/01/03/bosnia-spends-e2-million-on-divisive-war-memorials/> accessed 7 April 2021.

<sup>520</sup> Centar za nenasilnu akciju (n 518).

<sup>521</sup> *ibid.*

<sup>522</sup> Article 20 of Law on Missing Persons (n 481).

<sup>523</sup> In fact, while all other former Yugoslav states adopted some sort of resolution on Srebrenica, BiH was legally and politically unable to do so due to strong opposition from Republika Srpska. See Commissioner for Human Rights (n 334).

<sup>524</sup> Olivera Simić, 'Remembering, Visiting and Placing the Dead: Law, Authority and Genocide in Srebrenica' (2009) 13 *Law Text Culture* 279.

memory of the dead.’<sup>525</sup> To ensure the sustainability of the memorial, such a symbolic measure had to be codified in the form of a law, and the Law on the Centre of the Srebrenica-Potočari Memorial and Cemetery for the Victims of the 1995 Genocide was enacted in 2007, giving the State of BiH authority to manage the memorial, despite it being on the RS territory.<sup>526</sup> According to some commentators, the memorial law separates the people of Republika Srpska from the need to confront the atrocities committed, further problematising reconciliation in the country.<sup>527</sup>

An overview of memorialisation practices in BiH since 1995 shows the lack of coordination among competent authorities and, consequently, lack of regulation of the form of memorialisation practices and the message they send. While the Memorial Centre in Potočari has been the most visited site of memory in the country, numerous formal and informal statues, monuments, memorial plaques and such are found around the country, typically limited to one ethnic group and prioritising military over civilian victims.

Overall, this five-partite section demonstrates why Bosnia and Herzegovina is an illustrative, instrumental case for studying guarantees of non-recurrence in transitional justice. Since the DPA was signed in 1995, all five pillars of transitional justice have been developed in the country to varying degrees, with numerous international and local actors involved and new laws and institutions supporting the operations of various mechanisms of transitional justice, all of which, as Chapter 3 established, are claimed to have the potential to both aid and hamper non-recurrence.

#### 4.4. Mapping the field and data collection

So far in this chapter, I have elaborated on the chosen research design of this thesis and what makes BiH a relevant and important case country. Following these explanations was a review of the five pillars of transitional justice in BiH, outlining key institutions, organisations,

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<sup>525</sup> The Office of the High Representative, ‘Decision on the location of a cemetery and a monument for the victims of Srebrenica’ (25 October 2000) <http://www.ohr.int/decision-on-the-location-of-a-cemetery-and-a-monument-for-the-victims-of-srebrenica/> accessed 11 June 2021.

<sup>526</sup> The Office of the High Representative, ‘Decision Enacting the Law on the Center for the Srebrenica-Potocari Memorial and Cemetery for the Victims of the 1995 Genocide’ (25 June 2007) <http://www.ohr.int/decision-enacting-the-law-on-the-center-for-the-srebrenica-potocari-memorial-and-cemetery-for-the-victims-of-the-1995-genocide/> accessed 11 June 2021.

<sup>527</sup> Simić (n 524).

and mechanisms employed to date. In this section, I discuss the processes of selecting my empirical research ‘units’ – i.e., institutions, organisations and mechanisms of transitional justice and actors who participate in them, to be researched through both desk research and field research (Section 4.4.1.), selecting my sources for the desk and field stages of research (Section 4.4.2.) and describing the process of data collection (Section 4.4.3.).

#### 4.4.1. Mapping the field and selection of research ‘units’

Having done the review of TJ processes, enshrined in the five pillars, in BiH between 1995 and 2021, as per section 4.3., I identified 49 transitional justice institutions, organisations and mechanisms (‘TJ bodies’) that form the sample for the empirical portion of this study. They were selected based on whether the work they are doing could be classified as ‘transitional justice’, as it was conceptualised in Chapter 1. More specifically, while working on case description, as per section 4.3., I was able to identify a range of institutions, organisations and mechanisms that were involved in different processes of criminal justice, truth recovery, reparations and/or memorialisation in BiH between 1995 and 2021. This involvement included a range of activities and role, such as, for example, being a criminal justice institution with a mandate to adjudicate on atrocity crimes (e.g., the Court of BiH’s War Crimes Chamber) or being a partner or a lead organisation on memorialisation-related project (e.g., the Catholic Relief Service and their PRO-FUTURE project). Some of these bodies are not exclusively working towards TJ matters but have engaged in TJ-related activities through different projects or aspects of their mandate. For example, the Municipal Court in East Sarajevo hears a variety of criminal and civil cases but also has a special jurisdiction to adjudicate atrocity crimes cases. Others are exclusively TJ-oriented, such as, for example, the Srebrenica Commission was established with the sole purpose of conducting fact-finding into the violent events committed in July 1995. After publishing its final report, the commission ceased to exist.

This selection criteria inevitably excluded certain actors and organisations from the desk and field research stages. In particular, actors such as artists and activists who were not necessarily attached to any organisations or institutions – albeit it may be non-governmental – were excluded from the selection of research units. The same follows for actors who might be focusing on values not always captured by the five pillars, such as ‘reconciliation.’ While some

selected actors working on justice, truth or memorialisation definitely did make references to ‘reconciliation’, this research excluded actors who may have been working exclusively towards ‘reconciliation’ through, for example, inter-faith dialogue or psychosocial support. As discussed in Chapter 1, this was done in order to limit the scope of the thesis and not necessarily limit the scope of ‘transitional justice’ as an already contested and malleable concept. This thesis therefore does not claim to have included all actors and bodies conducting work that could be labelled as ‘transitional justice’ because there are multiple definitions of such; yet, it demonstrates that most, if not all, actors conducting ‘TJ’ work in BiH according to the set criteria have been included the desk research phase and, out of those, most have accepted to participate in the field research stage, as I will further detail below.<sup>528</sup>

All institutions, organisations and mechanisms that could be identified during the ‘case description’ stage, a total of 49 of them, were selected for desk and field research. The selection was done according to the above self-established criteria and regardless of whether representatives of these selected bodies would agree with the definition of TJ and whether or not their work constitutes ‘transitional justice’. In fact, as I will address in Section 6.3.2, representatives of a few of these selected bodies explicitly disagreed that their work should be labelled as ‘transitional justice’ work based on their competing and often limited understandings of what transitional justice is.

To demonstrate diversity among my sample, I differentiate between state, non-governmental, and international organisations. Some mechanisms were composed of representatives of both governmental and non-governmental bodies (e.g., the national TJ strategy) and were hence labelled as ‘mixed.’ For research purposes, these were further categorised based on the pillar they work on (e.g., criminal justice, institutional reform) where possible, but usually there were overlaps between pillars in their mandates.<sup>529</sup> While collected data were analysed within and across these categories to find any potential coherence or coordination, I had no expectations of seeing differences or similarities in the treatment of GNRs based on the mandated pillar of TJ the researched actor worked on. I treated each actor as

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<sup>528</sup> On inclusion/exclusion criteria, see Mallinder and O’Rourke (n 411).

<sup>529</sup> Neither the category of practitioners on its own nor any of the sub-groups within this category (e.g., criminal justice actors, NGO activists, civil servants, IO representatives) should be taken as homogenous or with uniform ideas about their own understandings of TJ values and responses.

valuable in their own rights while maintaining an interest in how they interact with other actors for the purposes of non-recurrence, if at all, and why they do so. This categorisation, along with the names of all selected institutions, organisations and mechanisms can be found in Appendix 1.

#### 4.4.2. Sources used during the desk and field research stages

The desk research phase of the research was completed prior to the start of the field research phase, and it included ‘texts’ as a data collection type.<sup>530</sup> These ‘texts’ consisted of the selected TJ bodies’ websites, official statements, interviews given in official capacity and any publications and documents issued and available online. All of these were downloaded, gathered, and examined for their references to the core themes of the thesis: ‘GNRs’, ‘Never Again’, ‘cooperation’, ‘transitional justice’, ‘relevance of international law’, etc. These sources were then coded in NVivo 12 according to these themes. This desk research was done to preliminary understand how these selected actors refer to GNRs and transitional justice in texts and to potentially examine any distinctions between textual narratives around GNRs as a legal norm and everyday experiences of this social (as well as legal) norm. As Section 4.5. will explain, data analysis was primarily inductive, which means that no ‘definition’ of GNRs was used in either selecting or analysing the sources. My inductive approach allowed me to investigate understandings and definitions of guarantees of non-recurrence that are specific to the case study and the conditions of transitional justice in BiH, therein creating space for new definitions of GNRs, previously unexplored or neglected in international law and TJ literature, to arise.

These selected and screened TJ bodies became my ‘field’ and once I arrived in BiH, I aspired to interview at least one representative of each of them as well as observe their work when possible. This is how the actors interviewed and observed at the field research stage were selected. At this field stage of research therefore, interviews and observations became my primary sources. They not only complemented the desk research but also challenged the view that both ‘GNRs’ and ‘transitional justice’ exist only externally and autonomously from the actors, and instead sought to explore how international and domestic actors interact with the

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<sup>530</sup> John W Creswell, *Research Design. Qualitative, Quantitative, and Mixed Methods Approaches* (4th edn, SAGE 2014) 190–191.

norm and the concept, beyond the constraints of the text.<sup>531</sup> I combined desk and field research in order to systematically, and not impressionistically, explore the social phenomenon that is GNRs.<sup>532</sup> Like in the desk research phase, there was no definition of GNRs used in selecting whom to interview or which interviews to analyse. Instead, my approach was primarily inductive, extending my examination to how the actors construct the social world of legal norms and potentially re-interpret legal ideas.<sup>533</sup>

Appendix 1 contains a table outlining all selected TJ bodies and person(s) interviewed, where applicable. It should be noted that certain interviewees worked for multiple relevant institutions and organisations and were therefore interviewed with regards to more than one TJ body.

#### 4.4.3. Data collection

Data collection, storage, and analysis were conducted in line with the 2018 Data Protection Act and Durham University's policies on data handling. The study received ethics approval from Durham University in July 2019 (see Appendix 2).

Having conducted desk research, I stayed in BiH between November 1, 2019, and February 14, 2020, with an additional 2 weeks spent in Belgrade where I interviewed organisations with a regional focus and outreach. In the field research stage, I resorted primarily to interviews, and secondarily to observations, as methods of data collection.<sup>534</sup> The sampling was purposeful, and I approached selected representatives of the 49 bodies selected in the desk research phase, as well as former employees in cases where the organisation/institution no longer operated. These representatives are generally referred to as practitioners/actors throughout the thesis. The participants occupied a range of jobs within these bodies and were employed as judges, prosecutors, civil servants, NGO activists (project managers, directors, researchers), international organisation representatives, consultants, curators, or academics. In line with the theoretical underpinnings of this research (Chapter 3), these actors, often categorised as 'experts'

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<sup>531</sup> Cotterrell, 'Law in Social Theory and Social Theory in the Study of Law' (n 73) 181.

<sup>532</sup> *ibid.*

<sup>533</sup> *ibid.* 190.

<sup>534</sup> Creswell, *Research Design. Qualitative, Quantitative, and Mixed Methods Approaches* (n 530) 191.

in the literature, are well-positioned to put their interpretations of GNRs to practice and have an influence on how GNRs further develop domestically. ‘Expert’ research is top-down<sup>535</sup> research as it does not directly involve ‘ordinary’ people. However, I would argue that this project is not necessary ‘top-down’ (as opposed to ‘bottom-up’) but rather a marriage of both as it includes a variety of practitioners, including NGO activists, academics, and curators who tend to be closer to the grassroots.<sup>536</sup> No similarities in responses within individual professions were assumed during the data collection stage.

During my stay in BiH, I remained open to the inclusion of new relevant actors by way of snowball sampling, in order to ensure that my selection criteria for researched TJ bodies is not biased and would not omit certain actors who did not come up during case description but nevertheless conduct work that fits my selection criteria. As it has been suggested in the literature, such flexibility and adaption proved to be crucial as fieldwork inevitably comes with surprises.<sup>537</sup> It was through this tactic that my sample of researched TJ bodies grew to 51 out of the initial 49. The two TJ bodies added through snowball sampling were subsequently ‘screened’ through desk research in the same way as the other 49 bodies (see Section 4.4.1.)

Overall, I interviewed 47 actors representing 42 of the screened TJ bodies. The interviews took place in Sarajevo (30), Banja Luka (3), Brčko (3), Bijeljina (2), Srebrenica (2), East Sarajevo (2), Belgrade (2), Durham (1), and online (2).<sup>538</sup> All interviews were semi-structured, except in two cases where the interviews were structured because interviewees preferred written correspondence. Unlike unstructured or focused interviews, I posed the same core set of questions to different types of actors (e.g., NGO members and civil servants) but made variations as the interview went on.<sup>539</sup> Among others, I asked about the mandate and goals

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<sup>535</sup> I differentiate between top-down and bottom-up actions based on the type of actors that are in focus. An activity or approach are classified as ‘top-down’ when they place state actors such as law- and policymakers at the centre, and ‘bottom-up’ when they give most relevance to non-state local actors and service deliverers that, among others include activists.

<sup>536</sup> See, Banakar who argues that the constraints of the ‘top-down’/‘bottom-up’ divide can be overcome by focusing on the key actors suitable for the specific context of one’s research. Reza Banakar, ‘On Socio-Legal Design’ (n 403).

<sup>537</sup> Suzanne E Scoggins, ‘Navigating Fieldwork as an Outsider: Observations from Interviewing Police Officers in China’ (2014) 47 PS: Political Science & Politics 394.

<sup>538</sup> Upon my return to the UK, I also interviewed Prof Theo van Boven (via telephone) for the purpose of writing Chapter 2 on the origins of GNRs in TJ.

<sup>539</sup> Nigel Fielding and Hilary Thomas, ‘Qualitative Interviewing’ in Nigel Gilbert (ed.) *Researching Social Life* (Sage Publications Ltd 2001) 123, 144.

of their institution/organisation, perceived impact on TJ goals, perceived impact on non-recurrence, perceptions and manifestations of GNRs, cooperation with other TJ bodies, and challenges to fulfilling their goals. A sample of the core interview questions can be found in Appendix 3.

Open-ended semi-structured interviews allowed the interviewees to provide their own frameworks for answers (to an extent) and increased the validity of the answers as they were not led in any specific direction by the researcher (e.g., towards understanding GNRs as per IHRL).<sup>540</sup> My field notes, also used as data, resulted from observations noted during events I attended where some of these selected TJ bodies were involved, or impressions based on informal conversations and chats with certain interviewed and other non-interviewed people (usually interviewees' colleagues) at these selected TJ bodies. Where I visited the TJ body itself and had a chance to observe and interact informally, I produced field notes. Where I met the interviewees outside their workplaces (in cafes or restaurants), I did not typically produce usable field notes. Any usage of field notes as 'data' is also noted in Appendix 1.

#### 4.5. Data analysis

Data collected through interviews, observations and desk research on the selected TJ bodies in BiH were analysed thematically, as defined in Clarke and Braun's body of work.<sup>541</sup> At this stage of research, thematic analysis (TA) was used as 'a method for identifying, analysing, and interpreting patterns of meaning ("themes")' among the data.<sup>542</sup> This method emphasises the active role of the researcher and, unlike traditional grounded theory, for instance, it does not believe that findings *emerge* from the data independently of the researcher.<sup>543</sup> TA is a flexible method. It allows research questions to evolve throughout coding and can be applied in a variety of different approaches to generating meaning.

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<sup>540</sup> Joel D Aberbach and Bert A Rockman, 'Conducting and Coding Elite Interviews' (2002) 35 PS: Political Science & Politics 673.

<sup>541</sup> Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77; Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE 2013); Victoria Clarke and Virginia Braun, 'Thematic Analysis' (2017) 12 The Journal of Positive Psychology 297; Virginia Braun and Victoria Clarke, 'Reflecting on Reflexive Thematic Analysis' (2019) 11 Qualitative Research in Sport, Exercise and Health 589.

<sup>542</sup> Clarke and Braun, 'Thematic Analysis' (n 541) 297.

<sup>543</sup> Cf. Melanie Birks and Jane Mills, *Grounded Theory. A Practical Guide* (2nd edn, SAGE 2015).

How meanings of collected data are theorised is dependent on one's research epistemology. Here, a choice is typically made between manifest and latent approaches to meaning. A *manifest* or semantic approach would mean not going beyond what the interviewee has said or written. On the contrary, a *latent* approach explores 'the underlying ideas, assumptions, and conceptualizations [and ideologies]' that shape the semantic content.<sup>544</sup> Considering my constructionist epistemological perspective, as explained in Chapter 3, in the following findings chapters, I do not merely describe what was narrated to me in the interview but instead explore and interpret latent meanings to the point of theorisation. As Clarke and Braun report, a focus on latent meanings is usually in line with a constructionist perspective whereby the perspectives, understandings, and experiences I investigated are not analysed for what they are as individual psychologies but how they are socially produced and reproduced.<sup>545</sup> The process of theorisation, in this case starts with observation and an establishment of 'a fact' from practice (e.g. Chapter 5 on how GNRs are understood) and then discussing what it is that enables the rise of this fact (e.g. Chapter 6 on how GNRs are practiced in relation to the structure of TJ).<sup>546</sup> Such theorising also undertakes the task of clarifying an existent concept – that of GNRs – and its evolution in TJ practice. Any doctrinal or institutional traits of GNRs are understood through their origins in the society as well as the effects they have on it. Through qualitative sociological methods such as interviews, this approach reveals complex social, political, and legal interactions, including relationships among different TJ bodies and their engagements with law and politics, and the effects they have on each other.<sup>547</sup> Similarly, when it comes to identifying areas of TJ actors' agency relating to non-recurrence, a mere verbal expression of one's aspiration to contribute to non-recurrence does not satisfy this thesis' understanding of agency.<sup>548</sup> Instead, some manifestation of *status quo*-transformational behaviour is necessary, either through an activity – or series of activities - with an already visible

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<sup>544</sup> Braun and Clarke, 'Using Thematic Analysis in Psychology' (n 541) 84.

<sup>545</sup> *ibid* 85.

<sup>546</sup> See, Richard Swedberg, 'Theorizing in Sociology and Social Science: Turning to the Context of Discovery' (2012) 41 *Theory and Society* 1.

<sup>547</sup> Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and Socio-Legal Methods of Research: Merits and Demerits' (2012) 2 *Educational Research Journal* 252.

<sup>548</sup> Interview questions asked included, *inter alia*, 'Does your organisation contribute to non-recurrence of mass violence in any way and if yes, how? In what ways do you engage with GNRs in your work? Are GNRs something that is relevant in your institution? Why yes, why not?' See Appendix 3.

outcome (e.g. legal amendments, interethnic dialogues, publications) or initiative(s) to create such an outcome (e.g. advocating for legal amendments, recruiting participants of interethnic dialogues, doing research for publication).

Thematic analysis is not theoretically bounded but is used in both inductive and deductive analysis. Choosing how to interpret data reflects a common debate about whether researchers should start their fieldwork with developed theoretical frameworks or allow the field experience to shape the way these frameworks develop.<sup>549</sup> Yet, combining inductive and deductive coding is common in social sciences.<sup>550</sup> My data analysis process was primarily *inductive*, allowing theory to build up from the data.<sup>551</sup> To code inductively means to closely read the collected data and derive concepts or themes from it. Like ethnographic research, qualitative research with a strong fieldwork component inevitably includes unforeseeable developments and events. This also means that it is near impossible to set a theoretical framework beforehand and assume what the outcomes will be.<sup>552</sup> As a result, the main conceptual categories presented in chapters 5, 6 and 7 developed independently of these basic, pre-fieldwork codes as I accumulated more data in my latent approach to the interpretation of meaning.<sup>553</sup>

On the other hand, data can also be coded *deductively* whereby the researcher examines whether data is consistent with a set of predetermined hypotheses or templates.<sup>554</sup> Having done a doctrinal review of the law on guarantees of non-recurrence as well as a literature review of non-recurrence in transitional justice, I entered the field having in mind some keywords I might expect to hear from the interviewees. These were merely preliminary basic codes that helped organise the data obtained via desk research. I had the law on GNRs to guide me, but as my

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<sup>549</sup> Stefanie Kappler, 'Coping with Research: Local Tactics of Resistance against (Mis-)Representation in Academia' (2013) 1 *Peacebuilding* 125, 129.

<sup>550</sup> See, Jennifer Fereday and Eimear Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5 *International Journal of Qualitative Methods* 80.

<sup>551</sup> Birks and Mills (n 543).

<sup>552</sup> John Flood, 'Socio-Legal Ethnography' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005).

<sup>553</sup> Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

<sup>554</sup> Fereday and Muir-Cochrane (n 550).

findings will show, this was not always relevant. While I did not have any hypothesis about what my findings would be, I did compare the data collected with the legal framework on GNRs established in Chapter 1 in Chapter 5 to see if international legal frameworks were relevant in shaping the context-specific content of GNRs. In that sense, I also took advantage of some deductive coding, searching for, for instance, references to international legislation or institutional reform as a measure of non-recurrence in my collected data.

Once the fieldwork started, the process of data analysis followed a more circular sequence with continuous assembling and reassembling of research findings.<sup>555</sup> It consisted of the following steps:

Step 1	Transcribing and familiarising with the data.
Step 2	Coding each transcript for preliminary nodes in NVivo 12.
Step 3	Establishing preliminary themes (with multiple nodes) near data collection completion.
Step 4	Writing preliminary findings.
Step 5	Rereading and recoding all collected data, keeping the research questions and some novel points from the preliminary reports in mind.
Step 6	Reorganising all nodes in themes and sub-themes.
Step 7	Writing empirical chapters.

*Table 2: Data analysis process.*

Lastly, I decided to use the software NVivo 12, primarily as a data management tool. More precisely, NVivo was used for the purposes of storing, sorting, and thematically coding qualitative data from interviews, desk research and field notes. It was particularly handy as the data collected through interviews and desk research resulted in several hundreds of pages. At the end of the recoding phase, I have produced 34 major nodes with multiple sub-nodes. These are listed in Appendix 4.

#### 4.6. Validity and reliability

Validity, in the words of Webley, ‘is a measure of the extent to which the researcher has captured an accurate reflection of a phenomenon.’<sup>556</sup> In the literature on qualitative research, the

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<sup>555</sup> Robert K Yin, *Qualitative Research from Start to Finish* (2nd edn, Guilford Publications 2015) Chapters 8 and 9.

key concepts addressing validity are trustworthiness, authenticity, and credibility.<sup>557</sup> The validity of my findings stems from the prolonged time I spent in the field and the variety of TJ bodies I have managed to include in my research to the point that I have nearly exhausted the field. The findings reflect a vast diversity of TJ institutions, organisations and mechanisms, drawing from a variety of collected sources. Upon transcription, all interview data was sent back to the interviewee for an additional check-up and an opportunity to amend the material as they wish. Data triangulation is further manifested in the use of multiple methods of data collection.

Reliable research means collecting data that captures a consistent and stable reflection of a phenomenon.<sup>558</sup> As Webley reports, for much qualitative research, the data collection and analysis tool is the researcher herself who employs methods such as interviews and interprets their meaning.<sup>559</sup> In such situations, the reliability depends on the researcher's training, experience, reflexivity, and ability to report on both the strengths and weaknesses of the research. To that end, as an exercise in validity and reliability of this research, I disclose my own biases in the following section on reflexivity (4.6.1.) and furthermore present some of the core strengths and limitations of my research design (Section 4.6.2.).

#### 4.6.1. Reflexivity

Constructionist epistemological choices require an attitude of reflexivity, seeing how research is a genuine shared, even co-produced process between the researcher and participants.<sup>560</sup> Designed to advance the credibility of the study, reflexivity allows for systematic reflections on one's research identities and how they impact the research process.<sup>561</sup> Therefore, reflexivity of the researcher, whereby she exposes her contribution to creating the meaning of research data, contributes to the reliability as well as validity of such research. Reflexivity does not mean being only reflective of my status *vis-à-vis* my research subjects but also on the

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<sup>556</sup> Webley (n 553) 935.

<sup>557</sup> Creswell, *Research Design. Qualitative, Quantitative, and Mixed Methods Approaches* (n 530) 201.

<sup>558</sup> Webley (n 553); Creswell, *Research Design. Qualitative, Quantitative, and Mixed Methods Approaches* (n 530).

<sup>559</sup> Webley (n 553).

<sup>560</sup> Chen, Shek and Bu (n 265).

<sup>561</sup> Ke Cui, 'The Insider–Outsider Role of a Chinese Researcher Doing Fieldwork in China: The Implications of Cultural Context' (2015) 14 *Qualitative Social Work: Research and Practice* 356.

influence of my discipline and my institution.<sup>562</sup> In that sense, I am also reflective of my positionality. I describe myself as a researcher with an ‘insider/outsider status.’<sup>563</sup> On the one hand, while in BiH, I had a strong advantage of speaking the local language(s), knowing the cityscape, and having already established acquaintances and contacts in the country. I had previously stayed, studied and worked in Sarajevo. However, even with these experiences, I was still not a local researcher by any standards. To my surprise, my ethnicity, which is easily noticeable due to my accent and name, showed that I was an ethnic Serb, from Serbia proper, the state involved in the conflict in BiH in the most troublesome ways. Regardless of whom I was interviewing, I felt I had to prove to them that I was there to listen to all stories without ethnic-based prejudice. My interest and expertise in BiH affairs were generally not openly doubted by my interviewees. Another reason I would describe myself as an ‘outsider’ is my institutional affiliation. The fact that I am a researcher from the UK, funded by Durham University and the Open Society Foundation was occasionally mentioned as ‘positive’ in some interviews, assuming that these affiliations made me more inclined to conduct what the interlocutors considered to be ‘objective’ research. I can only assume that it is also what gained me some of the many positive replies when I sent my invitations to prospective participants. Of course, the two positions – being Serbian and UK-affiliated – were often in an interplay when it came to how interviewees perceived me and responded to my questions. For example, in a single disastrous interview, the prospective interviewee (high-ranking judicial figure) accepted my invitation under the impression that I must have been sent there by “Serge Brammertz” (chief Prosecutor of the ICTY and now the IRMCT) or “someone like that.” When they met me in person and realised I was a 27-year-old Serbian woman not sent by the ICTY, they openly diminished my expertise based on my outsider status and age. ‘But we will still give you an interview in writing’, they said. ‘We can’t have you going around the UK saying we weren’t transparent!’ In the end, they never did. In all other cases, the scheduled interview was completed, and I was cautious not to appear superior to the interviewee in any way. Ideally, we would both position ourselves as equals, but of course, this is only my interpretation of how the interview went.

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<sup>562</sup> Kappler (n 549).

<sup>563</sup> Bahira Sherif, ‘The Ambiguity of Boundaries in the Fieldwork Experience: Establishing Rapport and Negotiating Insider/Outsider Status’ (2001) 7 *Qualitative Inquiry* 436; Cui (n 561).

Aware of any potential pre-existing biases stemming from of my past experiences in BiH and the region, I kept a journal throughout my PhD experience, and more intensively so during fieldwork. Writing down my thoughts and concerns as well as different achievements or challenges helped me keep track of the project's progress and single out any possible weaknesses that require more attention. This inevitably entailed posing questions such as '*What do I know? How do I know what I know?*'<sup>564</sup> *Am I assuming things based on what I already know?* While I was in BiH, this process made sure I was on track with my fieldwork plan, in line with my research questions, and not falling into the trap of wishing for data when they are not there. Yet, I acknowledge that my past experiences and specific positionality inherently play a role in how I interpret the collected data. In particular, due to my previous knowledge of daily political affairs in BiH, I suspect I was quicker to interpret the contexts in which specific interpretations of GNRs do or do not happen than a researcher with a full 'outsider' status would be.

In accordance with my theoretical underpinnings, I also treat the interviewed actors as 'reflexive agents' who deliberate and decide how they wish to present themselves and their responses to my question.<sup>565</sup> Some of the reflexivity has been made known to me, for instance, when an actor chooses to refer to provide reasoning for an answer, a concept, a practice, or generally reflect on the conditions and consequences of thereof. Other elements of reflexivity, that is the unacknowledged conditions such as personal concerns such as, e.g., how job insecurity influences certain practices or lack thereof, might remain unknown to the researcher.

#### 4.6.2. Limitations and strengths of the research design

Lastly, I offer a brief note on the limitations and strengths of the research design, seen in its totality, as I presented it over the past five sections. Some of the key limitations of my research design reflect the use of interviews as a method of data collections. Concerns have been raised in the literature that studied interviewees might adjust or alter their views because they know they are being studied.<sup>566</sup> It is true for all knowledge produced in social sciences that it was not found in a social vacuum but it is rather, in the words of Bogner and Menz, 'always a

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<sup>564</sup> Cui (n 561) 357.

<sup>565</sup> Archer (n 239) 8.

<sup>566</sup> Singhal and Malik (n 547).

situative statement made in the framework of a specific interaction situation.’<sup>567</sup> Participants in social science research can appropriate research findings.<sup>568</sup> To mitigate these potential alterations in interviewees’ responses, I employed semi-structured and open-ended questions and avoided asking direct questions about international law or the laws and institutions of transitional justice. Furthermore, interviews have been criticised as evidentiary material due to possible response bias or bias arising over poorly articulated questions.<sup>569</sup> In reality, even formalised and standardised interviews depend on the interaction between the participant and the interviewer.<sup>570</sup> It is commonly accepted in social legal research that any ”social significant data” cannot exist independently from the investigator.<sup>571</sup> For these reasons, I employed active interviewing as I “consciously and conscientiously” attended the interview in a way ‘sensitive to the social construction of knowledge’.<sup>572</sup>

While single case study research does improve our understanding of the social world from the position of the studied actors who construct that same world, it is not the most effective research design to be used for generalisation. Showing how the study’s findings can be generalised, also sometimes referred to as ‘external validity’, is more difficult to obtain in qualitative research.<sup>573</sup> The value of a project heavily relying on field research in one country, therefore, lies in acquiring new understandings of social structure or phenomenon ‘from the perspective of the individual social actors.’<sup>574</sup> Nevertheless, case study design can lead to knowledge that is useful across contexts. As Flyvbjerg states, the case study design ‘can certainly contribute to the cumulative development of knowledge’ and therefore, although it does not provide findings that apply to every other case, it can be rather central to scientific

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<sup>567</sup> Alexander Bogner and Wolfgang Menz, ‘The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction’ in Alexander Bogner, Beate Littig and Wolfgang Menz (eds), *Interviewing Experts* (Palgrave Macmillan 2009) 56.

<sup>568</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229).

<sup>569</sup> Yin, *Case Study Research and Application* (n 397).

<sup>570</sup> James A Holstein and Jaber F Gubrium, ‘Active Interviewing’ in Darin Weinberg (ed), *Qualitative Research Methods* (Blackwell Publishers 2002).

<sup>571</sup> Reza Banakar, ‘Reflections on the Methodological Issues of the Sociology of Law’ (2000) 27 *Journal of Law and Society* 273, 275.

<sup>572</sup> Holstein and Gubrium (n 570) 113.

<sup>573</sup> Yin, *Case Study Research and Application* (n 397).

<sup>574</sup> Chris Pole and Sam Hillyard, *Doing Fieldwork* (SAGE 2016) 17.

development.<sup>575</sup> Single country case studies produce or use concepts and ideas applicable or at least relevant in other countries and can present first steps for comparative studies of GNRs in practice.<sup>576</sup>

A major strength of this particular design is the potential to achieve high conceptual validity, having conducted a detailed and context-specific analysis of the data collected with the emphasis on depth rather than breadth of inquiry.<sup>577</sup> Because the key research question is interested in knowing *how* something takes place, insights from interviewees are encouraged for their potential to give in-depth responses and details otherwise not available only through document analysis or participant observation. Another major strength of this study is its interdisciplinarity. Writing about international criminal law and TJ scholarship, Nouwen explains how the centrality of law as existing externally and “to be found” rather than interpreted impacts the methodological choices researchers in these fields make.<sup>578</sup> In her engagement with Nouwen’s work, Jones argues that legal research wrongly disallows reflexivity and therefore aids the idea of TJ as ‘applicable, replicable, generalizable, and measurable’ solutions instead of TJ as ‘experienced, interpreted, or contested.’<sup>579</sup> The specific design I have utilised in this study has enabled me to include a large number of practitioners working across sectors and therefore to conceive of transitional justice not in isolated segments but as a whole. The design responds to the interdisciplinarity of the project and the questions asked that require looking to law, sociology and political science. Conducting a study that goes beyond what GNRs are in the law and TJ research, and employing methods such as in-depth, semi-structured interviews and observations, has allowed me to make sense of GNRs as unmeasurable, lived, changeable, and interpreted.

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<sup>575</sup> Flyvbjerg (n 400) 228, 241.

<sup>576</sup> Todd Landman, *Issues and methods in comparative politics: an introduction* (3rd edn., Routledge 2008).

<sup>577</sup> Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005); Flyvbjerg (n 400).

<sup>578</sup> Sarah MH Nouwen, ‘“As You Set out for Ithaka”: Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict’ (2014) 27 *Leiden Journal of International Law* 227.

<sup>579</sup> Briony Jones, ‘Qualitative Data and The Challenges of Interpretation in Transitional Justice Research’ in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019) 221.

#### 4.7. Conclusion

Choosing to conduct qualitative field research on transitional justice in Bosnia and Herzegovina presents a range of complexities and challenges. In the preceding sections, I have sought to introduce Bosnia and Herzegovina as an instrumental case and portray the multi-pillar, multi-actor infrastructure of transitional justice that has developed in BiH since 1995, while also providing an introduction, as brief as possible, to the conflict and this country's complicated, ethnically balanced political structure. I have argued that international engagements with TJ in BiH prioritised criminal prosecutions and reform in the sectors of police, judiciary, legislation and armed forces. Other pillars, particularly reparations, have been fragmented between entities and cantons with little to no coordinated action.

All these distinct, some fragmented, some central mechanisms, institutions and organisations form my 'field' in which I empirically studied GNRs in transitional justice. Throughout this chapter, I explained the significance of my single country case research design and provided insights into how the 51 screened TJ bodies were selected – or, in the case of two of them, recommended – and how they were studied through desk research and analysis of collected official documents. In the four months of field data collection, I managed to interview 47 representatives of 42 of those TJ bodies and, where applicable, observe their work. My discussion on reflexivity accounts for this extensive access to so many practitioners working or having worked for the selected organisations and institutions and also exposes my position(s) *vis-à-vis* the field. To improve the reliability and validity of the research, I exposed my insider/outsider status and revealed any biases. As explained in this chapter, the collected data have been analysed thematically in a combination of inductive and deductive approaches. The thematic categories developed during data analysis are incorporated directly into the findings and the presentation of research findings proceeds in the next two chapters. The chapters are organised based on the question they address. To that end, Chapter 5 explores the question of context-specific understandings of GNRs in Bosnia and Herzegovina, investigating domestic conceptualisations of the flexible norm. Chapter 6, on the other hand, asks how these contextualised understandings are put to practice and, as per the second key research question, how transitional justice as an ideational structure influences these practises.

## CHAPTER 5: FINDINGS I | CONCEPTUALISING GUARANTEES OF NON-RECURRENCE IN BOSNIA AND HERZEGOVINA

### 5.1. Introduction

Scholarly engagements with GNRs have thus far tended to focus on institutions over actors of transitional justice. As I explained in the previous chapters, the scholarship has explored how different mechanisms and institutions aid or hamper the objective of non-recurrence or investigated the transformative potential of GNRs as a set of practices in accordance (or not) with the Basic Principles which by and large conceptualise GNRs as measures of institutional reform. Such approaches have created a dual character of GNRs as an organising objective and a pillar, leading to little conceptual clarity and general under-theorisation of GNRs in transitional justice. They largely reflect legal ways of knowing that prioritise evaluation over exploration and prefer measurable outcomes over unquantifiable phenomena. This chapter takes a different, actor-oriented approach and explores how the concept of non-recurrence is socially reproduced and made context-specific in BiH by the selected actors, with potential influences of international law and policy. This actor-oriented approach on the question of GNRs' content is also welcome in light of the fluidity and flexibility of the norm (as per 'regime blur' discussed in Chapter 2) and the overall malleability of transitional justice (Chapter 1).

This chapter, the first of the two findings chapters, asks: *how guarantees of non-recurrence are understood by TJ actors in Bosnia and Herzegovina?* It investigates how the flexible norm of non-recurrence, qualitatively distinct in international law and transitional justice, has been conceptualised domestically by various practitioners working across the five identified TJ pillars. In essence, the chapter provides novel insights into the *ideas* TJ actors have about the content and the characteristics of guarantees of non-recurrence in Bosnia and Herzegovina and how these ideas reflect the creation of new *contextualised* knowledge about GNRs. The major point this chapter makes is that content-wise, there is a major discrepancy between the international and domestic interventions and that guarantees of non-recurrence in BiH include a variety of intertwined immediate and gradual measures that expand beyond GNRs

in international law. Although measures of institutional reform are relevant GNRs in the context of BiH, they form the foundation for the more long-term, gradual GNRs. The common thread connecting these gradual GNRs is ‘the knowledge’ of the conflict, which needs to be authoritatively established, transferred to different spheres of the society, and protected through law and more organic, personal processes of reckoning with the past. In that sense, the empirical findings presented in this chapter point to the limitations of international law in capturing the essence of GNRs which, in the case of BiH, I argue, differ in content, operate in a non-hierarchical cycle, and cannot be implemented in isolation.

The chapter proceeds as follows. In Section 5.2., I discuss references to ‘Never Again’ and GNRs found in the texts collected through desk research, which are treated as complementary and not authoritative presentations of domestic understandings of GNRs, as I account for the differences noted between these and the narrated and observed understandings of GNRs that stem from the field research phase. Section 5.3. discusses the narrated understandings of GNRs and analytically differentiates between *immediate* and *gradual* GNRs and any blurring of this binary demonstrated in practice. In Section 5.3.1. I call measures of institutional reform ‘immediate GNRs’ due to their urgency and discuss how such GNRs are perceived among the TJ actors who chose to discuss them. In Section 5.3.2., I discuss the four most commonly narrated and observed understandings of ‘gradual GNRs’: truth; education; prohibition of denial, trivialisation and minimisation of atrocity crimes; as well as less commonly proposed bottom-up approaches to non-recurrence. Although these are analytically separate, certain TJ actors interpreted GNRs as being more than one process. In Section 5.4., I complicate the notion that the responsibility for guaranteeing non-recurrence rests only on the state and discuss the multiple pools of responsibility assigned by TJ actors based on their understandings of the content of GNRs. Finally, in my concluding remarks in Section 5.5., I link both immediate and gradual GNRs as well as the perceptions of responsibility in what I call a ‘cycle of guarantees of non-recurrence’ in Bosnia and Herzegovina.

## 5.2. ‘Never Again’ and GNRs in the text

Conceptualisations of GNRs by practitioners in BiH warrant a distinction between the understandings interpreted based on the data collected through desk research and the understandings interpreted based on the data collected through interviews and observations. As

explained in Chapter 4, prior to starting fieldwork, I collected and investigated statements, publications, texts, judgments, reports, and selected news published on official websites of all identified TJ actors in BiH. Yet, instead of accepting these textual references to GNRs as the ‘reality’ about GNRs, I went on to interview the representatives of the selected TJ bodies and observe their work (where possible) to access further, ‘everyday’ interpretations of the norm of non-recurrence. This analytical distinction stems out of my attempt to go beyond the legal or law-like texts in the analysis to investigate more than law’s self-reported truths about how it generates practice and treat GNRs as a social, as well as legal norm, existing in the BiH society. In line with my theoretical underpinnings, both human agency and structure operate as a ‘durée’, in ‘continuous flow’ in time,<sup>580</sup> which is not something that can be easily or adequately captured by texts such as, for example, TJ bodies’ official websites that could be only occasionally updated to inform about day-to-day practices.

The two forthcoming sections therefore refer primarily to the treatments of GNRs as a legal norm and/or universal, yet ambiguous ‘Never Again’ promise. Section 5.2.1. discusses the commitments to the moral promise of ‘Never Again’ and the overall objective of preventing non-recurrence found in the analysed texts, while Section 5.2.2. elaborates on the references to GNRs more specifically in these texts.

#### 5.2.1. ‘Never Again’ and prevention of non-recurrence

The analysis of collected texts suggests a widespread moral commitment to ‘Never Again’ and the prevention of further conflict in BiH. In that sense, verbal expressions of such moral commitment represent assurances rather than guarantees of non-recurrence, seeing how they do not seem to explicitly necessitate any specific further action beyond the verbal promise that ‘Never Again’ will be fulfilled. Such verbal commitment was detected in collected texts of 20 out of 51 selected TJ actors, it is particularly prevalent among international actors and expressed in relation to the Srebrenica genocide. The ICTY is at the forefront of these commitments. Judges of the ICTY have repeatedly expressed the court’s observance of the

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<sup>580</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 3.

‘Never Again’ promise, including within the courtroom.<sup>581</sup> Various presidents of the ICTY have made repetitive and dramatic appeals to ‘Never Again’ at different events, typically those commemorating the Srebrenica genocide. Consider, for instance, the following statement by Judge Carmel Agius, President of the Residual Mechanism made on the 21<sup>st</sup> anniversary of the genocide.



In preparing this speech a few days ago, I closed my eyes and momentarily transported myself to the grounds of this Memorial Cemetery where, in the quiet of the night, under a sky covered with almost 8000 shining stars, I could hear the choral voice of the thousands of boys and men who 21 years ago had their lives torn away from them. They were telling me that they will only find peace when they know they have not been forgotten [...] that justice has been done; and that there is a commitment *never to have another Srebrenica again*.<sup>582</sup>

*Image 2: A monument at the Memorial Centre Potočari depicting the language of 'Never Again.' All images in Chapters 5, 6 and 7 were taken by the author unless stated otherwise.*

While Judge Agius represented the ICTY at this commemoration, the message also reads as if it was made on behalf of the entire international community that pledged not to allow genocide to be repeated in Srebrenica or elsewhere in the world. In addition to these pledges

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<sup>581</sup> For example, see *The Prosecutor v. Kvočka et al. (Hearing) ICTY-98-30/1 (12 July 2000)* (to the witness) Judge Rodrigues: [Interpretation] ‘Thank you, Mr. ..., for coming here to testify. We would like to wish you a pleasant journey back to your place of residence, and I hope that the thoughts that you have about the events that had taken place will help the world in a way and that the events -- such events will never happen again’ (emphasis added).

<sup>582</sup> United Nations International Criminal Tribunal for the former Yugoslavia. ‘Judge Carmel Agius, President, U.N. Tribunal for the Former Yugoslavia’ CS/PR1667e (11 July 2016, The Hague). [https://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/160711\\_president\\_agius\\_srebrenica\\_en.pdf](https://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/160711_president_agius_srebrenica_en.pdf) accessed 7 June 2021 (emphasis added).

given by judges within and outside courtrooms, the very existence of the ICTY and its work are seen as contributing to the prevention of recurrence of conflict. The Tribunal's latest legacy project, the ICTY Archives, for example, is claimed to have 'the potential to educate and inform in the interest of preventing the occurrence of future violations of international humanitarian law.'<sup>583</sup> In other words, when the ICTY acts to fulfil the 'Never Again' promise, it does so by existing.

The Memorial Centre Potočari, where Judge Agius made the pledge in the above example, similarly describes its existence and activities as bringing the central message of 'Srebrenica should never happen again' closer to its numerous visitors. The legislation that established the Memorial Centre and cemetery on the particular territory where it is today, passed by the OHR, also suggests that the Centre was built out of 'the necessity of a constant reminder that genocide should never be repeated to any people again in Bosnia and Herzegovina.'<sup>584</sup> The monument found on the centre's grounds, depicted in Image 2 below, illustrates this message in English (Bosnian inscription is available on the other side of the monument).

Occasionally, institutions and organisations of transitional justice add some content to their moral commitment to 'Never Again' in texts and explain what this promise would mean in the context of BiH. The attached content is typically one's already well-established mandate and operational objectives. For example, in a conference report, the ICMP argues that its central mandate – which is to resolve missing persons cases - contributes to 'ending cycles of violence and ensuring economic development, non-repetition and prevention.'<sup>585</sup> OSCE, which runs a large war crimes trial monitoring program in BiH, sees 'establishing the facts about [war] crimes ... and bringing perpetrators to justice' as helping prevent recurrence of violence.<sup>586</sup> Among some major non-governmental organisations, the Post-Conflict Research Centre, the

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<sup>583</sup> United Nations International Residual Mechanism for Criminal Tribunals, *ARCHIVES*, <https://irmct-dev.irmct.org/en/about/functions/archives> accessed 29 November 2020.

<sup>584</sup> The Office of the High Representative, 'Decision Enacting the Law on the Center for the Srebrenica-Potocari Memorial and Cemetery for the Victims of the 1995 Genocide' (n 533).

<sup>585</sup> International Commission on Missing Persons, 'The Missing: An Agenda for the Future' (Conference Report, The Hague, 29 October – 1 November 2013) 10.

<sup>586</sup> Fletcher M. Burton, 'Breaking the vicious circle' (*OSCE*, 22 May 2013) <https://www.osce.org/bih/106390> accessed 15 September 2020.

Humanitarian Law Centre, the Centre for Democracy and TJ, and the Nansen Dialogue Centre have the prevention of conflict/mass violations enshrined in their mandates, publicly accessible through their websites.

These vague commitments to ‘Never Again’ and preventing recurrence of violence demonstrate a lack of specific mandate on non-recurrence by these organisations and institutions. Instead, the analysis of the texts reveals efforts to link a TJ actor’s already existing mandate and activities to the global goal of *prevention*, which in the case of BiH becomes prevention of repetition, to boost their profiles in the sector. These commitments to the prevention of non-repetition in the text are in tune with TJ and human rights developments in the past decade and a shift away from ‘reconciliation’ narratives to non-recurrence. In addition to non-recurrence being made a staple of a TJ intervention as per the UN Special Rapporteur’s mandate, it is also the current UN stance that prevention is not *a* priority but ‘*the* priority.’<sup>587</sup> Data collected through semi-structured interviews helps understand this dynamic and see how the efforts to contextualise GNRs reflect more recent developments in international TJ policy. To illustrate, when I asked the current Deputy Chief of the Western Balkans mission of the ICMP about non-recurrence. she posited that the ICMP ‘would not be doing this job’ if they did not believe they could contribute to non-recurrence.<sup>588</sup> However, the former Chief of the mission who worked for the organisation in the early 2000s said, in response to the same question, that ‘Never Again’ was never ‘written as a part of [their] mandate’ and that he instead felt the work was helping the process of reconciliation.<sup>589</sup> These textual examples of the commitment to ensure non-repetition of violence and conflict do not tell much about the norm of non-recurrence as much as they do tell about international (and some domestic) actors’ attempts to align their most visible narrative, easily accessible on their official websites, to the goal of preventing recurrence as the new organising telos of transitional justice.

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<sup>587</sup> United Nations, ‘At Security Council, UN chief Guterres makes case for new efforts to build and sustain peace (*UN News*, 10 January 2017) <https://news.un.org/en/story/2017/01/549122-security-council-un-chief-guterres-makes-case-new-efforts-build-and-sustain> accessed 15 September 2019.

<sup>588</sup> Interview with Samira Krehić, International Commission on Missing Persons (Sarajevo, 6 December 2019).

<sup>589</sup> Interview with Gordon Bacon, Srebrenica Commission and the International Commission on Missing Persons (Durham, 3 October 2019).

### 5.2.2. Guarantees of non-recurrence in the text

When it comes to textual references to GNRs, the content and characteristics of GNRs are largely consistent with international law, particularly IHRL. In judicial circles, domestic and international, GNRs make one notable appearance. The first instance is in the landmark case at the ICJ between BiH and Serbia and Montenegro, summarised in Section 3.3.1. In this case, BiH requested the ICJ to adjudicate and declare ‘specific guarantees and assurances [Serbia and Montenegro] will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court.’<sup>590</sup> Interestingly, the injuring party, Serbia and Montenegro, also claimed that BiH has an obligation ‘to take necessary measures so that the said acts would not be repeated in the future.’ Nevertheless, like in previous cases reviewed in Chapter 2, the ICJ rejected the request for specific GNRs not seeing ‘that this is a case in which a direction for guarantees of non-repetition would be appropriate.’<sup>591</sup> Sakib Softić who was the lead legal counsel for BiH in this case later published an academic article that suggests reliance on the ARSIWA when making this request.<sup>592</sup> To reiterate, as per the ARSIWA, GNRs are not a necessary legal consequence of an international wrong but whether the violating state is obliged to provide GNRs will depend on the nature of the breach and obligation. The purposive distinction between reparation and GNRs in the ARSIWA also suggests that GNRs could be sought regardless of whether BiH had the basis for a reparation claim, but the claim for GNRs did not prove fruitful in these circumstances.

In another dozen examples where GNRs are explicitly mentioned in the text, they are typically phrased as per the Basic Principles definition. Among state institutions of BiH, the two ministries that have a mandate on TJ, namely the Ministry of Human Rights and Refugees and the Ministry of Justice, treat institutional reform as the fourth pillar of TJ, without necessarily calling it GNRs. However, the product of their joint initiative to create a state-wide TJ strategy and action plan does explicitly frame GNRs as ‘the reform of institutions, primarily of the judicial and law enforcement institutions, as well as a new legislative framework.’<sup>593</sup> It goes on

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<sup>590</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 108) para 66.

<sup>591</sup> *ibid* para 466.

<sup>592</sup> Sakib Softić, ‘Elimination of outcomes of genocide – key for preservation of peace in Bosnia and Herzegovina’ (2017) 6 *Monumenta Srebrenica* 13, 34.

<sup>593</sup> BiH Ministry for Human Rights and Refugees and BiH Ministry of Justice (n 434).

to expand on this definition of GNRs stemming from the Basic Principles to include the process of memorialisation as a means of ensuring human rights violations do not recur.<sup>594</sup> The strategy also sought to fortify the state obligation to guarantee non-recurrence to make it applicable under all circumstances. The drafters discussed an obligation of states ‘to take all measures necessary to prevent recurrence of human rights abuses.’<sup>595</sup> This obligation, according to the drafters, finds its roots in ‘the Constitution, laws and international law,’ yet an interpretation of how the Constitution or domestic law provide for this obligation is not further elaborated in the strategy.

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A few of the screened non-governmental organisations that do make references to GNRs specifically on their website, generally interpret GNRs as measures of institutional reform but expand on this concept depending on what they are advocating for. One of the most prominent NGOs working on TJ issues, the Humanitarian Law Centre has the mandate to document human rights violations in conflict. In their textual narrative, they frame GNRs as ‘complete and effective realization of the right to truth’ but also reference the UN Basic Principles as the document enshrining the obligation to apply specific GNRs.<sup>597</sup> Similarly, the Helsinki Committee for Human Rights in Republika Srpska, which had TJ-specific expertise among their cadre at the time of my research, references both the Basic Principles and Orentlicher’s guidelines to construct GNRs as measures of institutional and legal reform in their published work.<sup>598</sup> In the interview, however, the representatives of this NGO asserted that their organisation draws its working definition of GNRs out of international legal documents, most notably the Orentlicher Principles on Impunity but that such legal frameworks as ‘only a guideline’, a starting point to begin thinking about how to adjust GNRs to local realities.<sup>599</sup> Similarly to international organisations reviewed in the previous section, these examples also

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<sup>594</sup> *ibid* 17.

<sup>595</sup> *ibid* 14.

<sup>596</sup> *ibid* 18.

<sup>597</sup> Fond za humanitarno pravo, *Pristup dokumentima o zločinima protiv međunarodnog prava u posedu institucija Srbije: Državna tajna jača od prava na istinu* (Fond za humanitarno pravo 2016) 18.

<sup>598</sup> Galešić et al. *Obrazovanje za Mir – Peace Education on Location. Obrazovni paket. Priručnik za primjenu u formalnom i neformalnom obrazovanju mladih o ljudskim pravima, interkulturalnom dijalogu i suočavanju/sučeljavanju sa prošlošću* (Helsinski odbor za ljudska prava u Republici Srpskoj 2015); Interview with Aleksandra Letić, Helsinki Committee for Human Rights RS and Transitional Justice Strategy (Bijeljina, 12 November 2019).

<sup>599</sup> Interview with Letić *ibid*.

show a trend to both link one's mandate to the norm of non-recurrence and stay faithful to international legal frameworks establishing state obligation to guarantee non-recurrence, but further take advantage of the norm's flexibility on the ground.

Studying non-recurrence only textually suggests that some local actors link their existing mandates and activities to the language of non-recurrence and prevention for practical reasons. These identified cases correspond with the reviewed literature on TJ actors, in particular, Arthur and Yakinthou's work whereby it is argued that, among other reasons, local actors often adjust their discourse to fit international discourses for financial reasons, i.e. to improve their grant-winning chances.<sup>600</sup> It also suggests that when discrepancies between the content of GNRs in international law and the analysed texts do exist, the core international legal frameworks are still referenced to show alignment between the TJ actor's work and the global norm of non-recurrence. Such texts suggest that the Basic Principles in particular, which treat GNRs as a set of measures of legal and institutional reform, are capable of reflecting not only past conceptualisations of GNRs in Latin America, as shown in Chapter 2, but also those in BiH. As such, it can be argued that they prescribe current as well as future domestic practices of non-recurrence.

However, such suggestions are, as I will demonstrate in the subsequent sections, limited as they do not adequately capture how TJ actors in BiH construct, promote, and practice guarantees of non-recurrence in their everyday work. These discrepancies between the text and the lived experiences are not at all surprising but a starting premise of my research design whereby I understand them as manifestations of the power of international legal discourse and inherent outcomes of how IHRL structures human rights practice. The presentations of 'Never Again' and GNRs in texts also give another, more serious false message by allowing us to deduct that, if non-recurrence is truly ensured through a set of measures of legal and institutional reform and mere verbal assurances, then the promise of 'Never Again' already holds in BiH. Non-repetition of mass violations triggered by conflict, one could deduct from pure textual analysis, is ensured. Lived experiences in the country, nevertheless, show that the exact opposite is true. In the absence of GNRs other than those enshrined in the Basic Principles and repeated verbal

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<sup>600</sup> Paige Arthur and Christalla Yakinthou, *Transitional Justice, International Assistance, and Civil Society: Missed Connections* (Cambridge University Press 2018).

assurances, renewal of conflict within a couple of decades can be reasonably expected, many practitioners believe. To quote an interviewee who representatively voiced their concern about the risk of non-recurrence being very much alive:

[I]f we do not talk about these issues now, [repetition] will be the case in 30, 40, 50 years. It is not the only thing one could expect but it would be a very logical situation, a totally logical course of events that there will be a repetition [of conflict].<sup>601</sup>

In the subsequent sections of this chapter, I analyse these ‘expanded GNRs as a social norm.

### 5.3. Narrated understandings of GNRs

The next task in this chapter is to explore different understandings of GNRs as a legal as well as social norm existing in TJ bodies and among practitioners in BiH beyond any straightforward application of the Basic Principles or publicly accessible texts. Based on in-person semi-structured interviews and observations, I analyse how the basic premises about GNRs in the law and transitional justice, their content and characteristics and attributed responsibility, are absorbed (or not) domestically. The specific case study of BiH with 25 years of TJ experiences allows me to differentiate analytically between two types of GNRs, *immediate* and *gradual*, both of which are my own interpretive devices used to navigate among thesis findings. While the dominant equation of GNRs with measures of institutional reform is replicated to some extent in BiH, this equation only responds to a single type of GNRs, as they are understood by TJ practitioners: the short-term urgent GNR interventions in the immediate transitional period. The rest, which I coined as ‘gradual’ GNRs, are matters of longer-term processes and interventions, dependent on other institutional TJ mechanisms as well as more personal processes of coming to terms with the past. The analytical distinction between ‘immediate’ and ‘gradual’ GNRs is made on the premise that immediate GNRs reflect the idea that non-recurrence requires legal and institutional reform and as such form the foundation for the other practices of non-recurrence otherwise not captured by the law. Temporality was used as

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<sup>601</sup> Interview with Muhamed Tucaković, Youth Initiative for Human Rights BiH (Sarajevo, 11 December 2019).

a tool for data collection since all participants were asked how their mandates and activities have changed over the years and it was proven essential for capturing how the content of GNRs changes over time and in relation to what (see Appendix 3). Where possible, desk research screened the work of the selected TJ bodies through their history. For these reasons, my original categorisation of GNRs as ‘immediate’ and ‘gradual’ is introduced early on in this chapter to frame the forthcoming analysis.

### 5.3.1. Immediate guarantees of non-recurrence

In the literature and limited insights into international policy, measures of legal and institutional reform and most notably vetting, as highlighted in Chapters 2 and 3 are promoted as guarantees of non-recurrence on the premise that they reassert the rule of law and strip certain violent political ideologies of power, therein improving civic trust. In Chapter 4, when discussing the ‘skeleton’ of transitional justice in BiH, it was said that the country’s legal, judicial and security systems have gone through significant legal and institutional reforms in the first decade after the conflict, all of which were sponsored and monitored by different international actors. Packages of new laws have been passed, police officers and judges have been vetted, the army has been professionalised, centralised and downsized.

However, contrary to the expectations set by international law and community, out of the 47 interviewees, only three believed that these various completed reforms, particularly of armed forces, are (or were at the time) a sufficient and appropriate guarantee of non-recurrence. All such answers came from actors who are members of the international community and were formerly involved in some of the processes of institutional reform. The rare argument made for existing institutional reform to be understood as GNRs links to the issue of security, seeing how the reforms make new conflict extremely difficult, if not impossible to organise through the police and armed forces.<sup>602</sup> For example, Timothy Hughes, who worked in a legal capacity at the Independent Judicial Commission, was of the view that the reform of the judiciary helped guarantee non-recurrence because it enabled judges and prosecutors to work under a unified

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<sup>602</sup> Interview with Raffi Gregorian, Deputy High Representative in the Brčko District and Defence Reform Commission NATO Co-Chairman (Online, 27 December 2019); Interview with Richard Monk, UN International Police Task Force (Online, 25 November 2019); Interview with Timothy Hughes, Independent Judicial Commission (Online, 23 January 2020).

system, subject to the same ethical standards, overseen by the HJPC, thereby contributing to the independence and impartiality of this branch of government, which the interviewee saw as crucial for non-recurrence.<sup>603</sup>

The conversations I had with the interviewees about the need for more comprehensive institutional reforms mainly arose in the context of the incompleteness or inappropriateness of the existing reforms, due to which, the interviewees held, strong GNRs did not hold. In that sense, the reported interpretations of immediate GNRs are contingent on comparisons to the past processes of institutional reform conducted in the country and assessing their outcomes. Most notably, the vetting processes that took place in BiH are considered insufficient either because they were not transparent or overarching and stringent enough. On the account of transparency, the process of recertification in the police is particularly singled out as problematic. Several interviewees held that the criteria for non-recertification were not transparent to the public and the non-recertified police officers had no means of challenging the decisions as they were not granted an appeals procedure. Furthermore, even after the reform was conducted, there was suspicion among the public that certain officers who actively took part in the war were left in positions of power. Overall, a legal expert asserted, this ruined the public trust in the renewed institutions.<sup>604</sup> In judicial circles, one municipal judge adjudicating war crimes shared their belief that the specific criteria for the current vetting of judges and prosecutors, conducted by the HJPC, was insufficiently transparent and therefore, potentially biased.<sup>605</sup> The judge further held that the lack of transparency results in numerous ongoing disciplinary processes against judges and even occasional controversial appointments of individuals with criminal records. Those stories eventually find their way into the media, the judge explained to me, and citizens' trust in state institutions further deteriorates.

In another stream of critique, insights from interviews with several actors in both public and non-governmental sectors imply that vetting across sectors was short-sighted and not stringent enough. As it currently stands, domestic law prohibits suspected war criminals from running for a public office only if they are sought by the ICTY and allows convicted war

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<sup>603</sup> Interview with Hughes (n 602).

<sup>604</sup> Interview with Midhat Izmirlija, RECOM Coalition Working Group (Sarajevo, 14 November 2019).

<sup>605</sup> Interview with Judge, Municipal Court of East Sarajevo (East Sarajevo, 3 December 2019).

criminals to assume office after serving their sentence.<sup>606</sup> As a result, several interviewees observed how convicted war criminals can still be found in positions of power. These loopholes in vetting procedures, Saliha Đuderija from the MHRR explained, cause ordinary people to feel insecure because they see people directly responsible for certain crimes in decision-making, powerful posts.<sup>607</sup> The very foundation of transitional justice is ruined through incomplete and inadequate vetting, another interviewee asserted, seeing these as examples that disregard the respect for the rule of law, human rights and security.<sup>608</sup> One of the drafters of the national TJ strategy, Admir Operta, shared a personal story of the effects of the incomplete vetting in practice. He narrated a powerful story, reflecting on his arrival to the capital city of Sarajevo from a smaller Bosnian town some years ago.

My landlord was Enver, and I was very good friends with him. He was some sort of commander in the war, but I met him [because] he had a firm. I ordered some furniture, and his firm got the job via a tender, so he delivered this furniture to me ... I [then] lived in his flat [in Sarajevo] for 4-5 years and had good relations with Enver. Then, he was named the director of Toplane [public company] because he is in the SDP [political party] and ... Op! [local exclamation of surprise] Suddenly it was all over the news that Enver Zornić, my friend, was convicted for committing war crimes. War crimes!<sup>609</sup>

Eventually, Zornić lost his position at Toplane when his criminal past was revealed. While his example is illustrative, it is certainly not solitary in BiH. Other notable examples include Fikret Abdić, the mayor of Velika Kladuša, who assumed the post after completing his sentence for committing war crimes in Bosanska Krajina between 1993 and 1995, and Blagoje

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<sup>606</sup> Article IX (1) of the Constitution of Bosnia and Herzegovina (Annex 4 of The General Framework Agreement for Peace in BiH signed on 14 December 1995) states: ‘No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appeal before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina’ (n 425).

<sup>607</sup> Interview with Saliha Đuderija, Ministry of Human Rights and Refugees of Bosnia and Herzegovina (Sarajevo, 17 December 2019).

<sup>608</sup> Interview with Mirsad Tokača, Research and Documentation Center (Sarajevo, 21 January 2020).

<sup>609</sup> Interview with Admir Operta, Transitional Justice Strategy and Office of the Coordinator of Brčko District (Sarajevo, 13 December 2019).

Simić, who was named director of a local health centre after serving his 15-year-long sentence for war crimes.<sup>610</sup>

It follows that when talking about institutional reform with regards to GNRs, most TJ actors understand GNRs as measures that would be more comprehensive than the existing reforms. In most cases, such more comprehensive reforms include the same type of measures proposed in international law, most prominently vetting, but done ‘better’ than they were in BiH in the late 1990s and early 2000s. More precisely, vetting cannot be a sufficient GNR if done superficially and sloppily, but must instead be transparent, stringent and overarching within and across sectors. Very rarely, GNRs are conceptualised as reforms of *other* institutions not yet reformed in BiH. For example, for the Helsinki Committee on RS, GNRs are not only reforms of institutions such as the judiciary, the police, and the armed forces, but also reform of public schools and the media.<sup>611</sup>

From the perspective of the interviewed members of the international community leading some of these projects of institutional reform, the goals of such projects often do not match the mandates given to the actors involved. The former Commissioner of the UN IPTF, Richard Monk, stated that although he was under the impression that the goal of the IPTF was to ‘open accountable methods of professional policing and rebuilding their relationships with the citizens’, the practice proved that not to be the case.<sup>612</sup> He further claimed:

The major constraint was the notion of IPTF as a monitoring, advising, and training force *without any authority* to introduce or impose institution- and capacity-building initiatives. It was obvious that many police officers desperately needed to re-connect with their European counterparts but were constrained from doing so by their political masters fearful of progressive external influences. I

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<sup>610</sup> Eventually Simić was demoted to deputy director. See Nejra Džaferagić, 'Život nakon odsluženja kazne za ratni zločin: Između suočavanja s prošlošću i načelnickih fotelja' (*BIRN*, 20 April 2021) <https://detektor.ba/2021/04/20/zivot-nakon-odsluzenja-kazne-za-ratni-zlocin-izmedju-suocavanja-s-prosloscu-i-nacelnickih-fotelja/> accessed 21 April 2021.

<sup>611</sup> Interview with Letić (n 598).

<sup>612</sup> Interview with Monk (n 602).

arranged regular meetings ... but the imperative for both sides was establishing territorial control for the future.<sup>613</sup>

As a result, Monk added, it was nigh on impossible to enforce recognisable international standards of impartial police conduct on local police behaviour' and no political commanders were vetted for political ends. This example of police reform, told from the perspective of TJ actors critiquing the process, shows the urgency of finalising the matter for security and civic trust reasons. The intervention from Monk however contrasts this with an impossibility of overcoming certain political obstacles to widespread, transparent reform partly because of this urgency. Consequently, BiH was subject to quick but incomplete reform fixes.

In substance, the GNRs found in this category are by and large faithful to the GNRs enshrined in the Basic Principles, however, with certain attributes such as transparency and stringency being discussed with an added emphasis. To be able to conceptualise GNRs are more transparent and more overarching vetting processes, TJ actors must be able to look back and assess the completed measures of legal and institutional reform and their impacts after a passage of time. The case of BiH allows for such examination from a place of distance from both the events of the conflict and the existing measures of institutional reform. Yet, even though these GNRs are conceptualised from a place of distance, they are still understood as urgent, 'immediate' GNRs that should have been operational in the short period following the end of the conflict.

### 5.3.2. Gradual guarantees of non-recurrence

So far in this chapter, I have emphasised that TJ actors' understandings of GNRs as measures of institutional reform, namely vetting, are only one, less frequent view found among several interviewed actors. For most interviewed practitioners who engage with the norm, GNRs represent processes that are contingent on the passage of time and cannot be implemented in the immediate period after the end of the conflict. As a result, these understandings of GNRs are interpreted together as having the main characteristic of 'graduality'. Four different interventions are found in this category: truth recovery; education; prohibition of denial; trivialisation and

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<sup>613</sup> *ibid.*

minimisation of atrocity crimes, and less frequently, personal and bottom-up contributions to non-recurrence. I elaborate in more detail on each gradual GNR in the following four sections.

#### 5.3.2.1. *Truth recovery*

The most common understanding of guarantees of non-recurrence in Bosnia and Herzegovina concerns the process of fact-finding and recovery of the truth about the conflict as a guarantee that the conflict will not be repeated. Fifteen interviewees across sectors primarily understood GNRs as truth recovery. For them, the specific interpretation requires establishing a nationwide fact-finding body and subsequently creating and accepting a narrative about the events of the conflict known and acknowledged by all ethnic groups. The interpretation of truth recovery needed to guarantee non-recurrence is holistic, and overarching, done with the purpose of creating a common narrative about the conflict and with the message of peace.

It follows that these practitioners largely perceive truth recovery as GNRs as a political process. What is needed, it is argued, is an initiative that is state-led and has the purpose of creating history. Fact-finding that is supported by political agents should be created as a baseline and a guideline for normalising inter-group relations to the point of fulfilling ‘Never Again.’<sup>614</sup> Rather than advocating for quasi-judicial bodies or public testimonies in the form of a truth commission, the desired process of knowing and accepting the truth is very much a state-led, or at least state-supported, top-down process that with wide-reaching authoritative powers to change public opinion.<sup>615</sup> A desirable solution would be a national fact-finding commission which would create an obligation for the state to accept its report as facts, carving a way for them into education and other spheres of the society. Subsequently, an atmosphere is needed where talking about crimes that happened or publicly calling out those who deny or minimise them is not a political or social “suicide.”<sup>616</sup> This, after all, in the words of one interviewee, would be “hardcore politics.”<sup>617</sup>

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<sup>614</sup> Interview with Meldijana Arnaut Haseljić, Institute for research on crimes against humanity and international law (Sarajevo, 15 November 2019).

<sup>615</sup> Interview with Izmirlija (n 604).

<sup>616</sup> Interview with Đuderija (n 607).

<sup>617</sup> Interview with Letić (n 598).

Insisting on truth recovery as a GNR in BiH stems from two factors, both of which I was able to interpret through actors' acts of reflexivity on long-lasting transitional justice. First, truth recovery is promoted under the narrative of 'lessons learned from the past.' The idea behind truth recovery as one of the core GNRs is that without a public discussion about competing narratives between former conflict parties, and reconciliation thereof, repetition of conflict can be expected.<sup>618</sup> For many interviewees who adopt this understanding of GNRs, the conceptualisation does not necessarily stem from the legal 'right to truth' but instead from both lived and narrated experiences of conflict. More concretely, in elaborating on such conceptualisation of GNRs, interviewees observe that the conflict of the 1990s is already a repetition of conflicts that took place during WWII.<sup>619</sup> After WWII, former enemies lived together under the Yugoslav flag, and atrocities committed between these groups were not discussed for the sake of 'brotherhood' and 'unity', core values of socialist Yugoslavia. Forty-five years later, upon the dissolution of Yugoslavia, personal interpretations and distinct, conflicting perceptions of what had happened in WWII fuelled some unsolved inter-group tensions which re-emerged in political leaders' narratives and were used to mobilise soldiers.<sup>620</sup> As Tucaković from the Youth Initiative for Human Rights explained:

[...] crimes happened in the 1940s, but they were not talked about. They were pushed under the rug for the sake of the ideas of brotherhood and unity [...] Simply, they were neglected [...] And then it happened that you had ... a general

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<sup>618</sup> For example, Interview with Rasim Muratović, Institute for research on crimes against humanity and international law (Sarajevo, 7 November 2019); Interview with Tucaković (n 601); Interview with Letić (n 598).

<sup>619</sup> I am referring here to conflicts (plural) seeing how in the 1941-1945 period, in addition to being occupied by Nazi Germany, Yugoslavia was also experiencing internal conflicts between Partisans, who led the National Liberation Movement against the occupiers, and Nazi-collaborators, predominantly Chetniks, a radical Serb Royalist group who sought to maintain the monarchy and 'cleanse' the territory of non-Serbs. In Croatia, Nazi-collaborators Ustashe ran a puppet state with concentration camps for the extermination of Jews, Serbs, Roma and communists. With Partisans' eventual victory over the occupiers and their collaborators, Yugoslavia became a socialist country, and these former enemies continued to live under the same roof with no transitional justice processes as we know them today.

<sup>620</sup> To date, many crimes committed by ethnic Serb individuals in the conflict of the 1990s are presented as crimes committed by 'Chetniks' the above-mentioned Royalist group involved in the atrocities in WWII. This is particularly visible in memorialisation processes, see, for instance, Laništa, Brčko, Spomenik žrtvama četničkog masakra 08. svibnja 1992 (Monument to the victims of chetnik massacre 8 June 1992) at <https://kulturasjecanja.org/lanista-brcko/>.

enter a [Bosnian] town [in 1995] saying ‘this is revenge for 500 years of the Ottoman rule, revenge for this, revenge for that.’<sup>621</sup>

The second, related factor shaping the understanding of GNRs as truth recovery is the interviewees’ observation that, in BiH, truth recovery has been the least developed out of the five pillars of transitional justice. Without a “metanarrative” about the war, the concern is that when those who bore witness to the war are no longer alive, future generations might fall into the traps of ethnic-based, victimhood-oriented narratives and resort to fighting.<sup>622</sup> As I noted in Section 4.3.2., to date there have been no successful nationwide truth and reconciliation commissions or fact-finding inquiries that would investigate the causes, operations, and consequences of the conflict. The findings of the only commission that did complete its mandate, the Srebrenica Commission, are now rejected by Republika Srpska authorities, and instead, two new location-specific entity-run commissions were formed. The one major initiative to establish a regional fact-finding commission, RECOM, provokes very divisive reactions among BiH’s civil society. Some CSOs such as the Foundation Truth, Justice and Reconciliation in Tuzla and the Centre for Democracy and Transitional Justice in Banja Luka were still members of the RECOM coalition and were actively promoting its establishment at the time I was in BiH. Others were rather critical of the initiative, sharing with me critiques about the great amounts of funding captured by this still non-operational initiative and emphasising a regional over national approach. For example, Letić of the Helsinki Committee for Human Rights RS effectively explained, it is easier to connect Sarajevo and Belgrade than Sarajevo and Banja Luka (administrative centre of Republika Srpska), implying that a national fact-finding body is a more urgent task.<sup>623</sup>

These findings suggest that the links between truth recovery and guarantees of non-recurrence are made for context-specific reasons after a certain passage of time and are therefore distinct in BiH than they were in, for example, Latin America (Section 3.2.). Thus, while many actors perform their own fact-finding in order to guarantee non-recurrence, as will be explained

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<sup>621</sup> Alluding to Ratko Mladić’s speech upon entering Srebrenica on 11 July 1995 in which he said ‘Finally, after the rebellion against the Dahis [an Ottoman-era event], the time has come to take revenge on the Turks in this region’. Translation by the ICTY. See BBC News, ‘Footage of Mladic entering Srebrenica played at trial’ (*BBC News*, 17 May 2012) <https://www.bbc.co.uk/news/av/world-europe-18102216> accessed 20 April 2021.

<sup>622</sup> Interview with Letić (n 598).

<sup>623</sup> *ibid.*

in the next chapter, these same actors still understand the need to create a political consensus about ‘the truth.’ The underlying assumption, therefore, is that an authoritative body of ‘knowledge’ about the conflict can be produced through institutional fact-finding efforts. The discussion about truth recovery as GNRs reflects some of the questions raised in the literature review about the practicality as well as the morality of ‘objective’, ‘scientific’ single narratives about the conflict. In particular, such a political act may be an exercise of control over what is officially accepted as ‘the knowledge’ about the conflict;<sup>624</sup> yet it is nevertheless seen as a necessary act by many practitioners after more than 25 years of fragmented, multiple and incomplete ‘truths’ circulating in the society.

#### 5.3.2.2. *Education*

For a quarter of all respondents, education about the conflict is singled out as a key guarantee of non-recurrence. As a guarantee of non-recurrence, education is a multi-layered intervention, and these layers should not be treated in any hierarchical order – rather, they should be treated with equal importance. Three notable levels were discussed by the interviewees who adopt this conceptualisation of GNRs: the level of formal school education, which was most frequently discussed; the informal education of the public in general; and, the specific education of key political actors.

At the level of school education, my interviewees spoke about guarantees of non-recurrence as education reform that restructures the current public school system. The meaning of such restructuring would be twofold, according to the interviewees. First, it is asserted that the practice of dividing spaces of education and course curricula on ethnic bases must be abolished as a matter of priority. In over 50 schools in Federation BiH, students are segregated, sometimes even with fences made of barbed wire, into distinct physical spaces based on their ethnicity.<sup>625</sup> As a result, Bosniak and Croatian students are subject to different history curricula and are not given space to mingle inter-ethnically. On the other hand, in public schools in Republika Srpska,

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<sup>624</sup> Maier (n 303).

<sup>625</sup> The strategy of segregation is known as ‘Two schools under one roof’ and it was originally imposed by the OSCE under the premise of maintaining security. See, Organization for Security and Cooperation in Europe, “‘Two Schools Under One Roof.’” The Most Visible Example of Discrimination in Education in Bosnia and Herzegovina,’ (OSCE, 3 December 2019) <https://www.osce.org/mission-to-bosnia-and-herzegovina/404990> accessed 8 July 2020.

pupils of all ethnicities are obliged to learn the same ‘Serbian’ version of history. This layout is seen by several interviewees as creating and fortifying fundamental ethnic divides in the country.

Following that, the interviewees identified the content of history education in particular as divisive, dangerous, and actively contributing to the creation of new *mrzitelj*, new ‘haters’,<sup>626</sup> more extreme and radical than those who took part in the conflict in the 1990s.<sup>627</sup> History education, therefore, has the potential to make or break guarantees of non-recurrence. Current history classes, asserted Saliha Đuderija of the MHRR, teach students about “wrong” kinds of heroes who should, by all logic, be proclaimed war criminals.<sup>628</sup> Tatjana Milovanović of the Peace and Conflict Research Centre argued how the absence of systematic and coherent education about peace and conflict leaves young people, who have no personal memory of the conflict, with very subjective interpretations that come from their family members who had some personal involvement in past events.<sup>629</sup> Through these distorted interpretations and no alternative found in history education, young people are susceptible to new divisions, it is believed. Yet, such educational reform, for the interviewees discussing it, has been a most challenging task due to different political actors’ sensitivity to the topic. Đuderija claimed that the draft TJ strategy, although developed through a multi-ethnic, cross-sectoral effort, had not been passed partly because of the drafters’ demands that the educational system is reformed, making this one of the most controversial points of action.<sup>630</sup>

On another level, several interviewees spoke about systemic education of the public in general as a desirable but not yet realised guarantee of non-recurrence. Several interviewees identified the culture of public speaking, both on- and offline as “poisonous” and harmful for non-recurrence.<sup>631</sup> Part of this education means disseminating information about the events of the war. It is the case, one judge argued, that the public needs to be educated on how to interpret judicially established facts but also that the journalists reporting on these facts should know how

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<sup>626</sup> Interview with Goran Šimić, Transitional Justice Strategy and Federal Ministry of Justice (Sarajevo, 12 December 2019).

<sup>627</sup> Interview with Selma Džihanović, Ministry of Justice BiH (Sarajevo, 10 February 2020).

<sup>628</sup> Interview with Đuderija (n 607).

<sup>629</sup> Interview with Tatjana Milovanović, Post-Conflict Research Center’ (Sarajevo, 6 November 2019).

<sup>630</sup> Interview with Đuderija (n 607).

<sup>631</sup> *ibid*; Interview with Marko Jurišić, Missing Persons Institute (Sarajevo, 17 December 2019).

to report accurately without “sensationalist” tendencies.<sup>632</sup> Seemingly “simple” things such as understanding an acquittal as the matter of lack of exculpatory evidence and not a matter of denial that the crimes in question happened make a huge difference in how the public converses about the conflict.<sup>633</sup> Other aspects of educating the public, these interviewees posited, require encouraging public consciousness about “the other.”<sup>634</sup> Furthermore, education of the public would also mean nurturing the culture of memory and remembrance.<sup>635</sup> For instance, for the former Chief of Staff of the ICMP, an example that such education is successful is when ethnic labels are rejected and people come together in *transethnic spaces*.<sup>636</sup> Such wider education can be realised through venues such as museums, galleries, and sites of atrocities. In that sense, memorialisation is important to show people what happened and where it happened as well as to create these transethnic spaces where people of all ethnicities can come together to commemorate victims.<sup>637</sup>

Finally, for several interviewees, education for the purposes of non-recurrence means educating the key actors who influence public discourse, such as members of the parliament and the judiciary. The interviewees held that these influencers of public discourse should be educated about the events of the war as well as about how to communicate their knowledge to the public. This approach is more frequently promoted by international actors such as TRIAL International, UNDP, OSCE and USAID since their current TJ agendas, by and large, have to do with reform of the judiciary and working with political actors such as members of the Parliament. An illustrative example would be the political academy for young politicians organised by the PRO-FUTURE project at the Catholic Relief Services. The academy gathers young prominent members of all major political parties in BiH and offers them teaching on “universal human values” such as empathy, humanity and caring, nurturing their potential inter-party and inter-

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<sup>632</sup> Interview with Judge (n 605).

<sup>633</sup> Interview with Judge, Court of BiH, War Crimes Section (Sarajevo, 10 January 2020).

<sup>634</sup> Interview with Representative 1, PRO-FUTURE Project, Catholic Relief Services (Sarajevo, 18 November 2019).

<sup>635</sup> Interview with Representative, Republika Srpska Institute for research on war, war crimes and missing persons (Banja Luka, 27 November 2019).

<sup>636</sup> Interview with Bacon (n 589).

<sup>637</sup> Interview with Tamara Zrnović, Center for Non-violent Action (Sarajevo, 4 February 2020).

ethnic cooperation in the future.<sup>638</sup> The motivation behind the project, the two interviewed representatives asserted, is to show young politicians ‘another way of political thought and action’ that is not ethnonationalism.<sup>639</sup> Educating key political actors, it is argued, would also be beneficial in the long run as it could generate a shift in nationalist narratives currently promoted by the politicians in power. These narratives are replicated and echoed by teachers and parents across the country, leaving young people with no personal memory of the conflict exposed to harmful rhetoric that could lead to recurrence from at least three sides: political debates, formal education, and their own homes.

Understanding GNRs as education and education reform is in line with the expanded conceptualisation by the Special Rapporteur where it is argued that ‘education has the potential to act as a powerful tool for non-recurrence’ when it seeks to identify the patterns giving rise to conflict and particularly emphasises the teaching of history as a system of research.<sup>640</sup> Yet, these identified domestic understandings of GNRs as education are not shaped by theory; it is rather that the theory reflects, in this regard, the lived experiences. Education as a GNR is, like truth recovery, equally influenced by the period between 1945 and the 1992-1995 conflict where atrocities and suffering caused by different parties in WWII, including those who lived together in the same country, were pushed under the rug.<sup>641</sup> This understanding, from TJ actors’ perspective, then involves a careful examination of the aspects of history used to fuel conflict and present-day inter-ethnic divides and animosities which are seen as potentially able to trigger recurrence. On all three levels, education as a GNR is promoted for its knowledge transferring capacities and ability to trigger consensus around an authoritative body of knowledge. While it is necessarily linked to the first gradual GNRs, it is also a pillar that expands beyond the victim-perpetrator duality and necessitates incorporation of a variety of actors in the society. These actors include those participating in the public system of education, the so-called ‘future generations’ as well as the public in general, among whom key political actors, as shapers of public discourse, are singled out as important receivers of this education.

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<sup>638</sup> Interview with PRO-FUTURE Representative 1 (n 634); Interview with Representative 2, PRO-FUTURE Project, Catholic Relief Service (Sarajevo, 18 November 2019).

<sup>639</sup> *ibid.*

<sup>640</sup> Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (n 86) para 93.

<sup>641</sup> Interview with Tucaković (n 601).

### 5.3.2.3. *Prohibition of denial, trivialisation and minimisation of atrocity crimes*

In this section thus far, I have explained the two most commonly identified understandings of GNRs by transitional justice actors in Bosnia and Herzegovina as truth recovery and education. While truth recovery refers to the production of knowledge about the conflict, education is interlinked with it and is promoted on the grounds of transferring this knowledge across different sectors of society. The third gradual GNRs responds to the theme, and it serves to 'protect' the established and transferred knowledge. More precisely, practitioners in BiH also understand guarantees of non-recurrence to mean prohibiting denial, trivialisation, and minimisation of atrocity crimes. This understanding of GNRs is a current reaction to the ongoing, widespread denial of genocide and glorification of war criminals in BiH and the region as well as reflection on the consequences of some of the past TJ practices. This particular GNR spreads across the immediate/gradual binary. While it could form a part of the immediate institutional reform, it is also dependent on other processes, namely 'the knowledge' of the conflict being established and then 'endangered' which requires a passage of time.

Several patterns of action are included in this category: denying the validity of judgments by the ICTY and domestic courts,<sup>642</sup> glorifying convicted war criminals in public discourse,<sup>643</sup> and naming streets and public institutions after them.<sup>644</sup> These acts of denial, trivialisation and minimisation are not only seen as obstacles to (criminal) justice but also as direct threats to non-recurrence. As Letić pointed, these events suggest that despite different interventions in institutional reform, 'we still cannot be 100 per cent sure some "things" will not happen.'<sup>645</sup> One of the interviewed representatives of OSCE made a similar point saying that 'the whole narrative

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<sup>642</sup> For example, in 2019, the Serb member of the BiH Presidency, Milorad Dodik said that the Srebrenica genocide is a myth that never happened. See 'Dodik: U Srebrenici nije počinjen genocid, to je mit poput kosovskog' (*Radio Slobodna Evropa*, 12 July 2019) <https://www.slobodnaevropa.org/a/30052016.html> accessed 28 January 2020.

<sup>643</sup> Kolinda Grabar Kitarović, then President of Croatia, posted an 'in memoriam' photo of Slobodan Praljak, who was found guilty of war crimes by the ICTY, on her Facebook account in 2019. See N1info, 'Kolinda Grabar-Kitarović komentirala objavu fotografije Slobodana Praljka' (*NI*, 3 December 2019) <http://hr.n1info.com/Vijesti/a464854/Kolinda-Grabar-Kitarovic-komentirala-objavu-fotografije-Slobodana-Praljka.html> accessed 28 January 2020.

<sup>644</sup> Nejra Džaferović, 'Ulice i trgovi u BiH nose imena ratnih zločinaca' (*BIRN*, 19 May 2020) <https://balkaninsight.com/2020/05/19/ulice-i-trgovi-u-bih-nose-imena-ratnih-zlocinaca/?lang=sr> accessed 29 November 2020.

<sup>645</sup> Interview with Letić (n 598).

of denial and glorification relativises the peacebuilding process and puts ... ‘Never Again’ under a huge question mark.’<sup>646</sup>

These referenced acts of denial and rejection are not isolated incidents by individuals, which would not be justified but less problematic, but collective, strategic, and planned events sponsored and promoted by political elites. To illustrate, one of the three presidents of BiH, Serb representative Milorad Dodik, was the one who officially opened a student accommodation hall named ‘Radovan Karadžić’ after the former President of Republika Srpska convicted for genocide and war crimes by the ICTY.<sup>647</sup> Calling the Srebrenica events ‘genocide’ is frequently openly outright rejected as the proper classification of the crime by ethnic Serb public figures in BiH who would rather it be called ‘massacre’ or simply ‘a terrible crime.’ For example, one such public figure in Mladen Grujičić, the current mayor of the town of Srebrenica, who dismissed the ICTY’s classification of the crime in an interview and furthermore held that the list of Srebrenica victims ought to be “revised and changed.”<sup>648</sup>

Interviewed members of the criminal justice sector were particularly eager to identify atrocity crimes denial as problematic and hampering their work. To begin with, it was said to me in an interview that the ICTY established its Outreach program, the first of its kind for an international tribunal, as a direct reaction to revisionism and a culture of denial which had negatively impacted its work.<sup>649</sup> The subsequent outreach activities aimed to educate the public about the work of the court and raise awareness of the gravity of the crimes adjudicated by the Tribunal. Twenty-seven years after the Tribunal was established, the interviewed representative of the programme perceived the denial to be even only further aggravated, despite of the actions of the ICTY Outreach. Moreover, a prosecutor from East Sarajevo observed that the weakening of victims’ interest in participating in criminal justice processes was partly a consequence of the

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<sup>646</sup> Interview with Nedžad Smilagić, OSCE (Sarajevo, 21 November 2019).

<sup>647</sup> See TrebinjeLive, ‘PALE-Dodik otvorio studentski dom “dr Radovan Karadžić”’. (*TrebinjeLive*, 20 March 2016) <https://trebinjelive.info/2016/03/20/pale-dodik-otvorio-studentski-dom-dr-radovan-karadzic/> accessed 28 January 2020.

<sup>648</sup> Igor Spaić, “Srebrenica’s Serb Mayor Repeats Denial of Genocide” (*BIRN*, 13 April 2017) <https://balkaninsight.com/2017/04/13/srebrenica-s-serb-mayor-repeats-denial-of-genocide-04-13-2017/> 29 November 2020.

<sup>649</sup> Interview with Almir Alić, independent expert on transitional justice (Sarajevo, 5 December 2019).

widespread denial of the judicial truth determined by the ICTY and domestic courts.<sup>650</sup> His colleagues from Brčko also stressed how political elites build their campaigns on denials of crimes and glorification of people who should univocally be labelled as perpetrators.<sup>651</sup> Instead, perpetrators are declared as heroes and their victims are left to live in the same environment as their batterers, ‘bumping’ into each other on the street. ‘[T]his affects both these current and any future perpetrators’, the prosecutors from Brčko concluded.<sup>652</sup>

The application of this particular guarantee of non-recurrence, for most interviewees who discussed it, is by way of law as a direct force against what appears to be pervasive evil. At the time of my field research, there was no legislation at the central level that criminalised denial, trivialisation and minimisation of atrocity crimes, but such matters were handled either on the entity-level or not at all. Such legislation was absent from the package of measures passed or nudged by the High Representative in the first years after the conflict and the need for it did not arise until some years later when atrocity crimes denial, trivialisation and minimisation became new patterns of action for political elites to exploit towards political gains. A draft law that would make denial, minimisation, justification or approval of Holocaust, genocide and crimes against humanity criminal acts had been unsuccessfully circulating in the BiH Parliament since 2011.<sup>653</sup> The two most apparent reasons for the non-adoption of the draft law are connected to other forms of guarantees of non-recurrence discussed above. The first one is incomplete vetting processes which left certain figures with questionable wartime involvement in powerful political seats, as explained in Section 3.1. of this chapter. The second reason has much to do with the lack of safe public spaces where war crimes can be discussed and condemned and an environment where acknowledging the classification of a crime as ‘genocide’ does not mean putting a label on an entire ethnic group as genocidal. For this reason, my interpretation of this GNR is that they are rather ‘gradual’ although of course a *lex specialis* prohibiting atrocity crimes denial could have been adopted shortly after the DPA was ratified.

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<sup>650</sup> Interview with Tarik Crnkić, Prosecutor’s Office of East Sarajevo (East Sarajevo, 29 November 2019).

<sup>651</sup> Interview with Prosecutor 2, Prosecutor’s Office of the Brčko District (Brčko, 13 November 2019); Interview with Prosecutor 1, Prosecutor’s Office of the Brčko District (Brčko, 13 November 2019).

<sup>652</sup> Interview with Prosecutor 2 at *ibid.*

<sup>653</sup> Parlamentarna skupština Bosne i Hercegovine, 'Prijedlog zakona o zabrani negiranja, minimiziranja, opravdavanja ili odobravanja holokausta, zločina genocida i zločina protiv čovječnosti' (05 September 2011) <https://www.parlament.ba/law/LawDetails?lawId=733> accessed 11 June 2021.

Interpreting GNRs as acts of prohibition of atrocity crimes denial, trivialisation and minimisation could be a uniquely Bosnian-Herzegovinian phenomenon; after all, at the time of my field research, BiH was a rare European country without legislation that would prohibit these acts of denial.<sup>654</sup> However, how this particular conceptualisation fits into the bigger picture of GNRs, and consequently transitional justice, bears importance to other contexts. Prohibiting denial of atrocity crimes means protecting the knowledge emerging out of the truth recovery pillar and, in doing so, contributing to the maintenance of a common narrative deemed so essential for non-recurrence. It means creating and protecting the conditions in which the two other gradual GNRs can be realised. Ensuring that the knowledge is ‘protected’ and maintained in public discourses ought to be done through the power of law, at least the majority of interviewees engaging with these ideas thought so. Nevertheless, there is another way to create such enabling conditions, according to a few participants – through personal and bottom-up processes. I explore this further in the section below.

#### 5.3.2.4. *The bottom-up contributions to non-recurrence*

Not all understandings of GNRs among the researched TJ actors fall under the four above-listed categories. Exceptionally, guaranteeing non-recurrence was interpreted as a bottom-up action that aims to reform the system, not cosmetically but at its core. Two interviewees identified activism by a group of high school students in a small town of Jajce in central BiH as ‘a prime Never Again’ which reforms the system to its core. For six years, students from a Bosniak-Croat ethnically divided school in Jajce protested against the segregation demanding that they attend classes together.<sup>655</sup> Supported by an interviewed civil society organisation, the Nansen Dialogue Centre, they managed to win their claim and unite the school into a shared space for all. This act was the first step towards abolishing the ‘Two Schools Under One Roof’ policy. Since then, several schools among the 56 of those which remain divided on ethnic lines

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<sup>654</sup> Lejla Gačanica and Caroline Finkeldey, *Calling War Crimes By Their Right Name: Regulating a Ban on Denial, Trivialisation, Justification or Condonation of Genocide, the Holocaust, Crimes against Humanity or War Crimes* (forumZFD - TRIAL International 2019).

<sup>655</sup> Lidija Pisker. ‘Slučaj „dvije škole pod jednim krovom” u Jajcu.’ (*Osservatorio balcani e caucaso transeuropa*, 21 June 2017) <https://www.balcanicaucaso.org/bhs/zone/Bosna-i-Hercegovina/Slucaj-dvije-skole-pod-jednim-krovom-u-Jajcu-180584> accessed 6 February 2020.

have started similar initiatives demanding desegregation of their schools.<sup>656</sup> Nebojša Savija-Valha from the Nansen Dialogue Centre explained how the case of Jajce was directly impactful on non-recurrence:

... [the protests] were real political processes because the kids asked to be together in a society that is made to divide. So, this was a total shift in the system's matrix ... I am exaggerating a bit, but it was an act of destruction of the constitutional order because they [the students] took away the constitutional right of people to have classes in their mother tongue [as a basis for segregation] ... From the legal point of view, and human rights perspective, people asked not to be discriminated against [based on their linguistic preferences]. But then you have a group of students who say, 'alright, we are aware of the [linguistic] discrimination but that does not mean we have to be segregated' ... And they manage to win!<sup>657</sup>

The central message of the story of Jajce, in Savija-Valha's view, is that it creates transethnic spaces in a country where ethnic divisions are imposed by constitutional design. The very same design continues to benefit nationalist political elites who have no common vision for the future of the country as a whole. Enabling these transethnic spaces is something additional two interviewees spoke about, giving practical examples from their own work. Such examples include commemoration events attended by three mayors of three ethnicities jointly and publicly honouring victims<sup>658</sup> and cases of collaboration – business or otherwise – of different ethnic communities in cases where refugees and IDPs returned to their hometowns with drastically changed demographics.<sup>659</sup> The examples are seen as spaces where differences are met and understood and where people work towards building a mutually accepted narrative and a collective vision for the future.

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<sup>656</sup> Reporting on the initiative in Travnik, Guy Delauney. 'Bosnian children fight back against segregation in schools' (*BBC News Bosnia*, 3 July 2019). <https://www.bbc.com/news/world-europe-48760442> accessed 6 February 2020. Reporting on the initiative in Bugojno, AlJazeera Balkans. 'Borba srednjoškcolaca protiv segragacije u obrazovanju' (*AlJazeera Balkans*, 22 April 2018) <http://balkans.aljazeera.net/video/borba-srednjoskolaca-protiv-segregacije-u-obrazovanju-u-bih> accessed 6 February 2020.

<sup>657</sup> Interview with Nebojša Savija-Valha, Nansen Dialogue Centre (Sarajevo, 4 November 2019).

<sup>658</sup> Interview with PRO-FUTURE Representative 1 (n 634); Interview with Dragana Kovač, Ministry of Human Rights and Refugees (Sarajevo, 24 January 2020).

<sup>659</sup> Interview with Kovač at ibid.

The transethnic spaces these few interviewees spoke about are similar to the references to informal education as a vessel to creating such spaces (Section 3.2.2. in this chapter) but are all seen as bottom-up processes done by ordinary people for ordinary people. Other, mainly institutional approaches to the norm of non-recurrence are dismissed as not being able to trigger meaningful changes that alter public perceptions of either the events or actors of the conflict. This idea links closely to another small set of responses where the interviewees did not always engage with the concept of GNRs but more generally spoke about ‘Never Again’ as a primarily personal process, a personal journey to changing people’s consciousness. ‘Conflict is not over in our heads’, Đuderija from the MHRR reminded me, for instance.<sup>660</sup> She further explained:

We can always argue about things we disagree on in a cultured, nice way. But what is currently present in our culture of [public] speech... Look at our internet portals... It is horrible. People are scared when they read such comments... It doesn't matter if it is a Serb, Croat or Bosniak, there is so much hatred and animosity ... We are now in a situation that we are trying to finish the war in our heads. A small number of people managed to do that; they overcame. A significant number of people, unfortunately, still has a problem with it.<sup>661</sup>

These personal processes are influenced by all other material GNRs and the overall transitional justice work, both top-down and bottom-up. These desired changes are inspired most effectively through education, dissemination of 'objective' information, and provision of mental health services; although, holism is still the way forward. To quote Đuderija again:

[I]t is important to include our parliaments, our public lives, our televisions, our education [in the process of transitional justice]. We simply have to speak out, publicly and openly, testify about our problems, our troubles, about what we love and do not love, what we accept and do not accept ... and the listener should not see that as a personal attack.<sup>662</sup>

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<sup>660</sup> Interview with Đuderija (n 607).

<sup>661</sup> *ibid.*

<sup>662</sup> *ibid.*

Although the narratives surrounding these acts are often not coated in the language of GNRs per se, they are more broadly linked to the promise of ‘Never Again’ and making the outcomes of transitional justice intervention last long-term. More precisely, the legal norm of non-recurrence is not relevant for these actions; it does not inspire them either in discourse or practice. Nevertheless, these bottom-up processes of coming to terms with the past, creating and operating in transethnic spaces, and publicly speaking out are all relevant for my analysis here as they are linked to gradual GNRs and creating enabling conditions for more institutionalised truth recovery and education. In a way, although different in content, these kinds of GNRs correspond with the Special Rapporteur’s reasoning regarding the inclusion of cultural and personal dispositions into their assessment of GNRs (as per Section 2.4.3.). More precisely, like the cultural and personal measures proposed by the Special Rapporteur, the key characteristic of these processes would be to restart the trans- and inter-ethnic social relations that are perceived as a spine for a future without recurrence of violations. These actions escape grand-scale TJ projects and official TJ narratives created by the more influential actors, yet they point to the complexity of ‘Never Again’ in practice. The final destination for these processes could be the same as for a law preventing denial of atrocity crimes: protecting and maintaining the knowledge and paving the road for its acceptance. The most crucial difference, of course, is that these bottom-up and often individual acts of reckoning would get us there organically, and not because the law says so.

#### 5.4. The responsibility to guarantee non-recurrence

Before concluding this chapter by drawing links between these distinct understandings of GNRs, I wish to elaborate on the concept of state responsibility to realise non-recurrence, one that emerges out of international law. As explained in Chapter 2, prospective state obligation to apply specific GNRs remains at the centre of the debate. To recapitulate, the ARSIWA identify GNRs as a consequence – albeit an exceptional one – of a wrongful international act that triggers state responsibility both towards another state and the international community as a whole. The Basic Principles and the IHRL regime in general are focused on GNRs as reparations for acts or omissions of the state or, on rare occasions, state responsibility for the acts of non-governmental actors. In this regime, however, the language around GNRs and reparations is centred on victims and their rights, where GNRs emerge no longer as rights of injured state but, remarkably, rights

of individuals whose human rights had been violated. In transitional justice, what emerges from the Office of the UN Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence is that guaranteeing non-recurrence is an object of policymaking and the responsibility of the state and its institutions. Even interventions at the level of ‘cultural and individual’ spheres such as educational reforms, memorialisation, archives, and trauma counselling are positioned as part and parcel of *state* non-recurrence policies.

The case of BiH adds more complexity to the concerns about responsibility for GNRs other than merely establishing that a content gap exists between GNRs in international law and TJ practice and that therefore international law should catch up by further stretching state responsibility for guaranteeing non-recurrence. Instead, the case of BiH suggests that the responsibility for guaranteeing non-recurrence through specific actions rests primarily, but *not only* on the state and its institutions. In the sphere of TJ practice in this country, the issue of responsibility for guaranteeing non-recurrence is, in essence, a question of trusting the state and its actors to do the job. For nearly all TJ actors interviewed, the enforcement of GNRs includes some combination of efforts from state and international actors, largely embodying a ‘top-down’ approach. Most interviewees’ responses portray persistent trust in the state (although perhaps not the current government) to handle what is collectively required with regards to GNRs and, when the state is not trusted to do so on its own, it is believed it should be pressured by international actors.

In line with their international law origins then, GNRs in practice in BiH are first and foremost constructed as obligations of the state, that is, political elites populating state institutions. This is because the state is legally believed to be able and required to create an environment in which it is possible to practice the above-mentioned understandings of GNRs that require the engagement of other kinds of actors. State actors such as the judiciary and members of the Parliament are crucial stakeholders due to their power to influence discourse and decisions, both of which are currently used to exacerbate inter-ethnic animosities to the point where non-recurrence is threatened.<sup>663</sup> ‘[P]oliticians build their campaigns by turning criminals into heroes,’ a local prosecutor asserted.<sup>664</sup> A couple of actors observed that the current

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<sup>663</sup> Interview with Representative, TRIAL International (Sarajevo, 22 November 2019).

<sup>664</sup> Interview with Prosecutor 1 (n 651).

constitution is problematic because it legalises ethnonationalist politics, a root cause of the war, and perpetuates ethnic division.<sup>665</sup> In the eyes of the interviewed practitioners, the obligation is not so much on state actors to prevent themselves from being genocide deniers but rather to mature and be more willing to engage in TJ for the purposes of its progressive goals.<sup>666</sup> It is to proactively create ‘a society without divisions’, a society where all diversities would be respected and messages of togetherness would transfer to the youth.<sup>667</sup> It is to enforce the democratic foundation of the society that respects the rule of law, equality, human rights and freedoms, as one interviewee posited.<sup>668</sup> To get to the point of establishing a nationwide truth recovery program, educational reform, and eliminating strategic atrocity crimes denial, political elites, it is believed by many interviewees, need to create these adequate political conditions for such action.

For a smaller group of TJ actors, the responsibility is shifted to ‘the international community’, the term used colloquially to encompass Western international institutions and states who have had a presence and/or influence on TJ matters in the country (key contestants here being the UN, the OHR, the EU, and NATO). The allocation of responsibility to the international community is occasionally combined with the desirable efforts from, or pressures on local authorities as well. To give an illustrative example, Milovanović of the Post-Conflict Research Centre directed her focus on both the BiH government and the international community out of her observation that the little work that has been done on GNRs was done by civil society organisations. The international actors engaged in TJ matters in BiH did not go in the direction of GNRs in their work, she explained.

[T]heir approach was mainly ‘if there is a fire over there, we are going to put it down. If they [the people of BiH] are quiet and not shooting at each other, we are moving onto the next step on our agenda’<sup>669</sup>

According to this practitioner, the efforts pushed for by the international community with regards to transitional justice were superficial, “bare minimum.” For example, she claimed, the

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<sup>665</sup> Interview with Hughes (n 602); Interview with Gregorian (n 602).

<sup>666</sup> Interview with Krehić (n 588).

<sup>667</sup> Interview with Jurišić (n 631).

<sup>668</sup> Interview with Tokača (n 608).

<sup>669</sup> Interview with Milovanović (n 629).

EU's conditionality imposed on Croatia cooperation on TJ matters, which eventually trickled down to the cooperation with the ICTY and as soon as the EU membership was ensured, all progress regarding transitional justice halted. For a BiH-specific example, one could observe all legislative reforms done in the country which, like institutional reform, check out the responsibility box but do not do the job. While domestic legislation in BiH regarding TJ and human rights is commendable (e.g., the country passed a *lex specialis* on the missing persons), it is worth little due to the resulting poor implementation and adherence to the rule of law (e.g., the victims' compensation fund envisaged by this same law has not been established to date due to the relevant actors' inability to agree).

As a result, the state is distrusted, and the international community is seen as needing to assert more pressure on the state. Another interviewee explained how it is 'the legacy of foreign rule [Ottoman, Austro-Hungarian]' which led the people of BiH 'to feel like we need to delegate our responsibilities to someone else.'<sup>670</sup> These ideas link to the very start of TJ in BiH – the signing of the Dayton Peace Agreement in 1995 – which was brokered by international actors. The obligation to ensure non-repetition of conflict is on the same parties who helped cease the conflict, another participant posited.<sup>671</sup> 'If they had the capacity to stop the armed conflict then they surely have the capacity to prevent their repetition' through a variety of constitutional and legal amendment and institutional reforms, she explained.

However, for a member of the international community, Richard Monk of the IPTF, the direct obligation to guarantee non-recurrence for the international community, to his dismay, does not exist on the account of state sovereignty.

During my early contribution to the Brahimi Panel,<sup>672</sup> I mused that each member state should agree that if the Rule of Law broke down to such a degree within its territory such that it ceased to exist, then other states under the aegis of the UN

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<sup>670</sup> Interview with Alić (n 649).

<sup>671</sup> Interview with Arnaut Haseljić (n 614).

<sup>672</sup> Report of the Panel of United Nations Peace Operations, known as the Brahimi Report after Lakhdar Brahimi, results from the work done on the shortcomings of existing peace operations. Recommendations for improvement were issued by the expert panel of which Mr. Richard Monk was a member. This report constructs disarmament, demobilisation and reintegration of former combatants as a key to 'reduced likelihood of conflict recurrence.' Report of the Panel of United Nations Peace Operations (21 August 2000) UN Doc A/55/305-S/2000/809, para 41.

would be entitled to enter and establish the conditions necessary to re-establish it. No country would ever agree to this or the consequent surrender of a part of its sovereignty and so no obligation or assurance could ever be sought or imposed.<sup>673</sup>

Finally, according to a small number of interviewees, the responsibility for ensuring non-recurrence rests on both political elites and *the society as a whole*. One interviewee held that the institutional bias towards the state keeps BiH in a phrase of “permanent truce” and what is needed ‘is to work on the human level that is necessary to re-establish trust [among people] first of all.’<sup>674</sup> Few other TJ actors elaborated that will ‘Never Again’ is everyone’s right because all levels of the society were affected by the conflict, the obligation to ensure ‘Never Again’ rests on everyone who assumes the role of educators, in formal, informal and non-formal spaces of education; it rests on teachers, parents, mentors and role-models. Operta, one of the drafters of TJ strategy, gave an illustrative example of why he conceptualised the responsibility for guaranteeing non-recurrence as primarily resting on parents and home education. He held that the processes of coming to terms with the past within the family can hamper any positive developments in the formal state education. To that end, Operta illustrated with a personal story from his hometown of Brčko, known for its special administrative status, and ethnic diversity and representation in schools.

We were standing at the square one day ... my youngest son [three years old] was a very chatty and sociable child, joyful. Some kids were playing ball and he approached them. Those kids were older than him, maybe 10-12 years old, both boys and girls. They were playing with him, playing for a long time, especially the girls, they liked him. Then one kid asked him ‘what’s your name?’ He said [Muslim name]. Suddenly ... The group of boys and girls around him dispersed in a second and you could hear them whisper. Nobody around him, the child was left alone. Look, these were ten-year-old children we are talking about ... who are [brainwashed] from birth, I think. All three [ethnicities] do that. Ten-year-old children whispering [about my son] ‘he’s one of them, don’t play with him.’<sup>675</sup>

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<sup>673</sup> Interview with Monk (n 602).

<sup>674</sup> Interview with Zrnović (n 637).

<sup>675</sup> Interview with Operta (n 609).

To conclude, the responsibility to ensure non-recurrence is primarily trusted to the state and its institutions or, alternatively, the international community to assert pressure onto local institutions to create the conditions for creating all different elements of GNRs. The concern here is that in the game of shuffling the responsibility to the international community and back again, the notion of state obligation to undertake specific GNRs as per international human rights law could be lost. This could particularly be the case considering the politics of the international-national interactions in the immediate transitional period and the fact that, as Richard Monk explained, trusting the international community with an obligation to ensure non-recurrence of an intrastate conflict is not always realistic. Only exceptionally do TJ actors conceive of non-recurrence as primarily a bottom-up, individual, familial obligation, a process people must work on inter-personally within their small collectives. Lastly, no significant differentiation can be made regarding the types of actors and the kind of responsibility they attach to GNRs. The overwhelming responses around top-down interventions and the focus on the state and its institutions represent all levels of TJ action, domestic governmental and non-governmental, and international.

### 5.5. Conclusion: Connecting the dots

In this chapter, I have offered empirical responses to the question of how practitioners in BiH understand the norm of guarantees of non-recurrence, flexible in content. In doing so, I have presented an alternative approach to the study of guarantees of non-recurrence and sought to unearth the productions and reproductions of the international norm's meanings in context-specific manners. How do these distinct understandings of guarantees of non-recurrence relate to one another? What do immediate and gradual GNRs tell us about the conceptualisation of non-recurrence in BiH altogether? In this final section, I draw connections between and among TJ actors' understandings of GNRs and elaborate on the characteristics given to the norm.

Studying GNRs in Bosnia and Herzegovina, which has had more than 25 years of TJ experience at the time of my fieldwork, has allowed me to observe the relevance of the suggested measures of legal and institutional reform over time. If one studied GNRs in text only, they could have made two conclusions: firstly, that a variety of measures of institutional reform had been implemented in the country; and, secondly, that the overall local understandings of the content of the norm were more or less identical to those enshrined in the Basic Principles where GNRs are a

legal norm. Consequently, one could have deduced that transitional justice transformed the norm of non-recurrence in international human rights law (as per Chapter 2) and that this has furthermore shaped the understandings and practices of local actors regarding GNRs. These findings alone would lead to a portrayal of BiH as a country where the obligation of and need for non-recurrence are seen as more or less fulfilled.

What I have shown in this chapter, however, is that these would be misguided conclusions as they do not adequately capture the extent of the transformation of norm content by TJ actors in this country. Instead, my fieldwork in BiH and its years of transition shows that the said measures of institutional reform, as reviewed in detail in Section 4.3.4. are only the beginning of the work done on non-recurrence. Measures of institutional reform, what I called ‘immediate’ GNRs are in that sense only the tip of the iceberg; the tip that is thus far visible and acknowledged by international law. Immediate GNRs maintain some of the characteristics given by TJ scholarship, as they have to do with establishing and maintaining certain security standards and eliminating potential perpetrators of atrocity crimes from the positions of public power. In today’s BiH, however, the engagement with GNRs as measures of institutional reform is largely a reaction to the already implemented reforms. While the reforms of a handful of state institutions, in particular the armed forces, have ensured the absence of remerged fighting, they have also been considered to be genuinely flawed. Most prominently, critiques on the account of lack of transparency and incompleteness of these reforms are linked to the decreased civic trust in the reformed state institutions, therefore hampering the general perceptions of non-recurrence. Much more is needed to transform the ideologies that fuelled conflict and mass violence.<sup>676</sup>

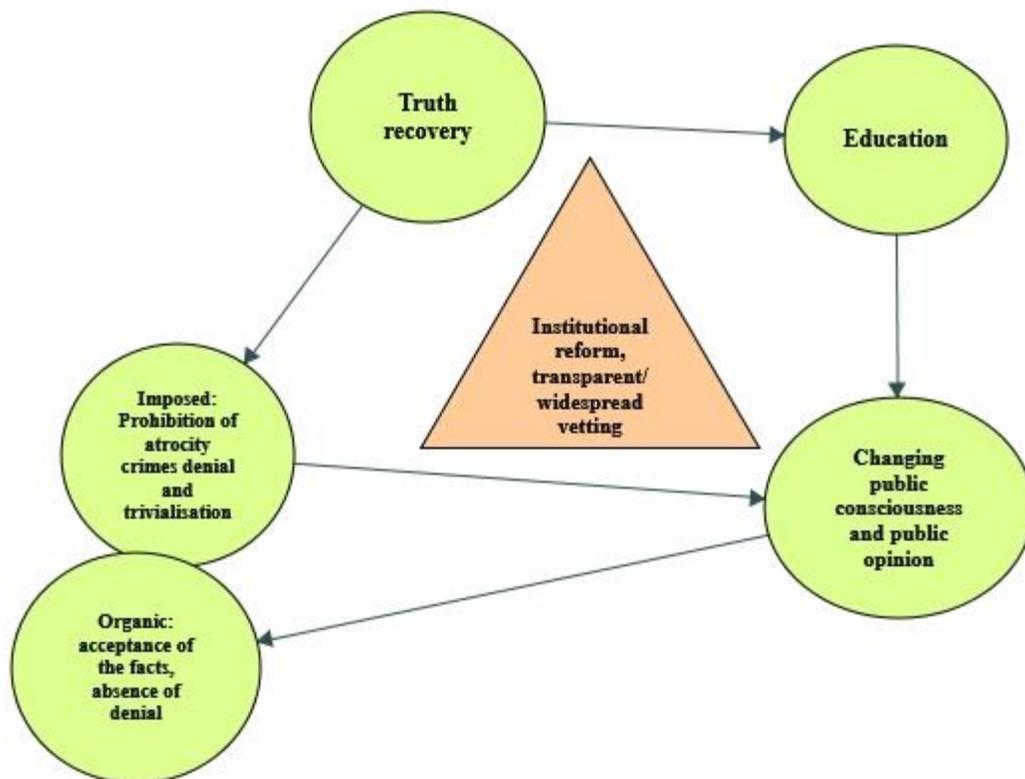
Yet, even once these more transparent and encompassing measures of institutional and legal reform, especially vetting, are performed as a necessary foundation for GNRs, they remain in the background of the more long-term, gradual measures of non-recurrence. When I say ‘background’, this does not mean that immediate guarantees are not linked to the gradual ones or that they are hierarchically inferior, but simply that they are ought to have been completed by the time other gradual GNRs start to take form. In many ways, the textbook measures of legal and institutional reform, as enshrined in the Basic Principles and picked up by numerous

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<sup>676</sup> Here building on Sandoval’s prepositions explored in Chapter 3. See Sandoval (n 330).

international actors in BiH, are pre-conditions, *a foundation* for the gradual GNRs. Establishing ‘the knowledge’, transferring it and protecting it are all processes that require transparent, unbiased, and trustworthy institutions as well as security guarantees to silently exist in the background.

Truth recovery, the first gradual GNR presented here, is at the centre of non-recurrence efforts. It is central not only because it is the most common conceptualisation but also because it is the one GNR that connects all the others. As explained in the preceding sections, truth recovery is about establishing and agreeing on ‘the knowledge’ – general knowledge about the nature of the conflict as well as concrete numbers, names and locations of those who lost their lives and those who perpetrated the crimes. It requires looking into the past omissions of ‘dealing with the past’ matters and treating the conflict of the 1990s as already a repetition of violence. This knowledge then, for the purposes of non-recurrence, needs to be transferred; it needs to spread its roots across all spheres of society. The way to do that and to ensure the *longue durée* of the knowledge and therein the likelihood of its relevance for non-recurrence is through education. While the knowledge transfer is happening via different streams of education – state-sponsored, informal education of the public and that of key stakeholders – the knowledge also needs to be protected, otherwise its importance and the impact on society will be minimised. Two roads can lead us there. One is most likely necessary in the initial phases of knowledge establishment and transfer: prohibiting denial, trivialisation, and minimisation of the knowledge regarding atrocity crimes by way of legislation. This is a rather imposing method that could alter public but not necessarily private denial, at least not in the short run. The second road is longer but more organic. The idea is that through education at all levels and in all spheres, nurturing a different culture of public speaking and shared transethnic spaces, public consciousness about the conflict and its parties will change, and people will bring TJ matters into their private spheres. Eventually, it is believed, this will lead to an organic acceptance of the facts and a general state of absence of denial and minimisation of atrocity crimes and victims’ grievances. At this stage, the prohibition of denial by law would be more symbolic and existing as a safety net against any outbreaks of extremism in the years to come. This is what I call *the cycle of guarantees of non-recurrence*, based on BiH, and visualised below.



*Visualisation 1: The cycle of GNRs, as understood by the practitioners in BiH.*

The cycle of GNRs is not one of normative hierarchy. All gradual GNRs are dependent on each other while also relying on legal and institutional reform to enable them to reach their full potential. Gradual GNRs need to be developed and practised in the long term and are referential to one another. More precisely, truth recovery may be connecting all other gradual GNRs, but this does not mean that truth recovery can and should be prioritised as normatively superior over, for example, education. This is because both truth recovery and education in isolation as seen as insufficient for non-recurrence. Without education, truth recovery initiatives face limitations in transferring the established knowledge onto the different spheres of the public and therefore influencing public consciousness and public opinion. Without systematic and comprehensive truth recovery, education efforts are bound to present incomplete stories, potentially marginalizing certain voices and groups, and therefore perpetuating dissatisfaction about and inter-group animosities over how the conflict is remembered and taught.

Gradual GNRs are generally not understood as projects but processes, not easily quantifiable and measurable, which puts them at risk of failing to receive sustainable engagement by international actors pursuing TJ agendas. In BiH, GNRs are not treated as exceptional but normative and necessary. Yet, the responsibility to trigger, implement, support, and maintain GNRs is of somewhat exceptional character and ultimately rests in all sectors of society. While it is predominantly trusted to multiple state and international actors, it is also partly a personal process that all members of a society in transition are invited to go through. Such a multi-layered scheme of responsibility corresponds with the content of GNRs, as visualised above. On the one hand, truth recovery, education and prohibition of denial can all be triggered by state actors, with or without pressure or support from the international community. These are also obligations that by and large already exist in international human rights law<sup>677</sup> with the exception of TJ education where any state obligation is more likely to be moral rather than legal or pressured by the international community. On the other hand, the individual and the personal aspects of non-recurrence step in at the stage of more organic and therefore potentially durable acceptance and anti-denial. The idea of taking bottom-up responsibility for the process therein remains an inseparable component of the cycle of GNRs. Contextualised GNRs in BiH are both backward and forward-looking and inclusive of both circularity and linearity of violence and conflict. At the conceptual level, they are normative, preventative, and transformative, aiming to tackle the post-conflict *status quo* and decrease the likelihood of renewed violence. While international law reflects the characteristics of GNRs in BiH, it largely misses out on their contents. The following chapter builds on these findings and explores how such contextualised understandings are put to practice, if at all.

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<sup>677</sup> For details regarding the right to truth, see, for instance Sam Szoke-Burke, 'Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies' (2015) 33 Berkeley Journal of International Law 526.

## **CHAPTER 6: FINDINGS II | TRANSITIONAL JUSTICE AND PRACTICES OF CONTEXTUALISED GNRs**

### 6.1. Introduction

Guarantees, unlike assurances of non-recurrence, are a norm that requires positive action; GNRs inherently include practices rather than mere promises of non-recurrence. In Chapter 5, I showed how TJ actors contextualise GNRs, that is, create meanings of the norm that are specific to BiH and hence more elaborate or altogether distinct from the international norm of non-recurrence, as it is enshrined in IHRL. Consequently, each aspect of this context-specific cycle of guarantees non-recurrence in Bosnia and Herzegovina requires implementation of measures and processes. These processes are interdependent. The cycle of GNRs rests on truth recovery at its centre, which is transferred into different spheres of the society through education and further protected by developing a respectful culture of public speaking and enabling transethnic spaces. In the previous chapter, I also demonstrated that the responsibility for GNRs is mainly trusted to the state and its institutions, with or without involvement by the international community, to first and foremost create conditions that would enable different aspects in the non-recurrence cycle. This chapter follows up on these findings, and asks – how do different actors put their understandings of GNRs to practice? If the cycle of non-recurrence rests on a consensus about ‘the knowledge’ of the conflict, how do practitioners (help) create, transfer, and protect this knowledge? What does TJ as an ideational structure, with its competing characteristics of legalism and malleability have to do with it if anything? Which of the many ideas linking objects of transitional justice with the objective of non-recurrence reviewed in Chapter 3, if any, has borne most influence on the practices of GNRs in Bosnia and Herzegovina?

The core takeaways from this chapter are, firstly, that numerous practitioners undertake fact-finding and/or educational practices through their organisations and institutions in attempts to realise the cycle of GNRs (or aspects of it) and that in undertaking such agency, they tend to be referential to the idea that courts in transition have both didactic and history-making properties. To that end, practitioners incorporate judicially established facts as the authoritative ‘knowledge’ of the conflict, treat it as a source of such knowledge, or otherwise reject it and directly challenge these ideas with their practices of fact-finding. In line with my theoretical underpinnings, I

understand these manifestations of practices of GNRs as *enabled* agency and provide further analysis into this enablement throughout the chapter. Secondly, in this chapter, I establish that the malleability of TJ creates distinct, competing conceptions of transitional justice and that these affect the non-existence of a coordinated strategy on TJ that would support the cycle of GNRs. As a result, the competing understandings of TJ as both defined through its key mechanisms and undefined play a role in the diminished engagement with the ideas and practices of GNRs among certain actors, primarily found state and international actors. I argue that these examples are manifestations of *constrained* agency.

Section 6.2. is framed around enabled agency and it explores how practitioners continuously engage in producing, transferring and/or protecting ‘the knowledge’ about the conflict with the intention of changing the transitional *status quo* towards non-recurrence. In the subsequent three sub-sections, I explore how the manifested agency is referential to the idea that court records are the authoritative knowledge of the conflict: most actors use it as such (6.2.1.); some accept that there are truths criminal justice institutions cannot tell and seek to unearth them (6.2.2.); and, very rarely, actors conduct parallel fact-finding directly challenging these judicially established ‘truth’ (6.2.3.). Finally, in Section 6.2.4., I suggest that some of the practices of contextualised GNRs are conducted out of an objection of the idea that truth and reconciliation commissions are useful and appropriate truth-making mechanisms. Manifestations of constrained agency and thus absence of GNRs practices are discussed in Section 6.3. In it, I show how the defining characteristics of TJ, as structural properties, impact practitioners’ practical engagement with GNRs. In Section 6.3.1., I explore the tension between the conceptual equation of TJ with criminal justice and the competing, confused definitions of TJ, seeing transitional justice as a mix of undefined ‘bottom-up’ and ‘top-down’ approaches. In Section 6.3.2., I show how this tension impacts the lack of a coordinated approach to transitional justice in BiH which in turn prevents certain actors from practising these contextualised GNRs.

## 6.2. Enabled agency: Producing, transferring and protecting ‘the knowledge’ as applications of contextualised GNRs

In their efforts to apply or contribute to the cycle of non-recurrence, certain – and not all – TJ actors seek to produce, transfer and/or protect this ‘knowledge’ of the conflict that GNRs in Bosnia and Herzegovina necessitate. These actors, therefore, undertake fact-finding and/or

educational practices and, exceptionally, initiatives to criminalise atrocity crimes denial, trivialisation and minimisation. Fact-finding seems to establish or help facilitate establishing an authoritative body of knowledge of the events, people and circumstances of the conflict around which a consensus could be reached, and the current discriminatory and abusive narratives of multiple, distorted truths could be diminished. Education for non-recurrence has two core aims: passing down information, or ‘the truth’, and by doing so, discrediting any dominant narratives that have been exclusive, discriminatory, or manipulative of this truth, whether in local communities or at the central level. Here, I show how TJ as a structure is involved in the production of the practices of contextualised GNRs by way of enablement. When acting towards such goals, TJ actors are mainly referential to the objects found within the criminal justice pillar and the ideas that courts in transition have both didactic and history-making qualities<sup>678</sup> and, in rare cases, engaging with the truth-making attributes given to TRCs.<sup>679</sup> These elements of the ideational structure of TJ therein serve as both factual and legitimating basis for practices of GNRs due to which the application of contextualised GNRs is in fact inseparable from the structure.

#### 6.2.1. Court records as ‘the knowledge’

In practising contextualised GNRs, most TJ actors treat court records as the authoritative ‘knowledge’ about the conflict that needs to be further transferred into the society for the sake of non-recurrence. While courts in general are seen as legitimate vessels of knowledge about the conflict, it is the ICTY in particular that is positioned as the hub of conflict-related knowledge in BiH and its judgements treated as historical records. For the vast majority of TJ actors in BiH, the ICTY and its legacy are holy. As one interviewee observed, ‘[w]hoever knows how the tribunal operated [can see that] there are no mistakes there.’<sup>680</sup> Linked to these statements is another participant’s qualification of court judgments are ‘the best thing that the human society could come up with’ in the context of mass-scale violence.<sup>681</sup> He further added that the BiH society has ‘a unique opportunity to be written down in the books of humanity and civilisation as

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<sup>678</sup> See, for example, Gerry J. Simpson, ‘Didactic and Dissident Histories in War Crimes Trials’ (1997) 60 Albany Law Review 801.

<sup>679</sup> See, for example, Hayner (n 294).

<sup>680</sup> Interview with Tokača (n 608).

<sup>681</sup> Interview with Representative, High Judicial and Prosecutorial Council (Sarajevo, 10 December 2019).

[a society] that solved the worst possible situation in the correct way’, this way being through court proceedings.<sup>682</sup> The validity of treating court records as the authoritative knowledge at the centre of the cycle of non-recurrence is not questioned by this group of actors. ‘Here the only truth is the adjudicated one’, said the representative of the Peace and Conflict Research Centre.<sup>683</sup> ‘If we do not take the findings of the ICTY as the truth of what happened, then we really won’t know what happened,’ she continued.

By putting their contextualised GNRs to practice, numerous actors undertake the role of ‘educators’, taking upon themselves the task of transmitting this court-produced knowledge and, in their view, teaching the history of the conflict to ensure non-recurrence. Quantitatively, the most successful manifestation of education for non-recurrence among the international actors came from the ICTY’s own Outreach office. Once the Tribunal realised how much the effects of its work were impeded in BiH by manipulative and distorted narratives presented in the media, it founded an outreach office in the late 1990s, first of its kind, in the centre of Sarajevo. The very existence of the ICTY was influential and politically important enough that the office was given permission by ministries of education across the country to teach their educational material about the ICTY to high school and university students. The office combined formal and non-formal education. The education was formal in the sense that it took part on public school premises with all students present, and non-formal as it was conducted by an institution about its own work. In a nutshell, the educational material used in the schools was not advertised as the history of the conflict but as the ICTY’s treatment – and therefore interpretation - of it. Regarding the impact of such education on the transitional *status quo*, several thousand students from all parts of the country participated in presentations and discussions about the tribunal and its work.<sup>684</sup> The Outreach office’s evaluations show that 70% of those students reported having learned something about the ICTY after only one workshop while 90% of them left believing that those indicted for war crimes should face a trial no matter what their social or ethnic status was. This indicates the success of the project in the climate that, as I explained in the previous chapter, systemically glorifies convicted war criminals. Nevertheless, such an inspiring project was short-

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<sup>682</sup> *ibid.*

<sup>683</sup> Interview with Milovanović (n 629).

<sup>684</sup> Tortora G (ed.). *Outreach. 15 godina Outreach-a na MKSJ-u.* (ICTY 2016).

lived; as of December 2019, the ICTY Outreach no longer had permission to go into all schools across the country with these activities.<sup>685</sup>

Another example of treating court records as ‘the authoritative knowledge’ is the Memorial Centre Potočari which heavily relies on the ICTY judgments to educate about the truth about the genocide in Srebrenica, teaching for ‘Never Again.’ The Memorial Centre channels its educational aspirations towards thousands of children, pupils in the final year of middle school or high school in FBiH, who visit the Centre on organised school visits to learn about the genocide. In addition to being a space for informal education for pupils, the Centre is also visited by thousands of tourists and activists around the world. Most foreign visitors, one of the curators told me, come from the Netherlands, the country whose peacekeeping battalion has been held accountable, both morally and legally, for failing to prevent the genocide on the territory it was protecting in 1995.<sup>686</sup> The space hosts numerous posters with photographs of perpetrators and the sentences issued by the ICTY (see Image 3 and note the additional curational level above, presenting some of the physical evidence used in court) and video projections of testimonies. When I visited the Memorial Centre in November 2019, I watched a short introductory film together with other visitors. The chronology of the events in Srebrenica in the film was reconstructed based on the ICTY findings. While taking a break outside trying to process the overwhelming emotions the film incited in me, I started chatting with a couple of curators of the Memorial Centre. One of their curators explained that it was best to stick with what was proven before a court because it was hard to be objective with history since everyone has their own inclinations towards one group of actors of conflict or another. The ICTY, therefore, was seen as inherently objective.

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<sup>685</sup> Interview with Alić (n 649).

<sup>686</sup> Much has been written about the Netherlands’ responsibility for the Srebrenica genocide, and some of the survivors have taken action before domestic courts in the Netherlands to legally pronounce the Dutch peacekeeping forces guilty and receive reparations from the Dutch government. See, for example, Jasna Hasanbasic, ‘Liability in peacekeeping missions: a civil cause of action for the Mothers of Srebrenica against the Dutch government and the United Nations’ (2014) 29 *Emory International Law Review* 415.



*Image 3: An example of the incorporation of the ICTY's judgments in the permanent exhibition at the Memorial Centre Potočari. The four photographs portray the faces of four perpetrators and large prints exclaiming 'GUILTY' as per the ICTY's rulings.*

Treating court records as a factual foundation for the cycle of non-recurrence occurs due to the *truth*- and not justice-related values attached to the anti-impunity norm and its institutions. This factual foundation is not built under a presumption that criminal justice is the only form of justice or for the appraisal of the resulting accountability. Instead, it is built on the basis of criminal justice institutions' qualifications to create 'the truth', the only truth that is not to be disputed. Some of this belief relates to the perception that court-established facts rely on science and are therefore as objective as any truth can be. Relying on expert witnesses and forensic evidence collected by the likes of the ICMP, courts are able to confirm – by way of acceptance – both who died and the circumstances in which they died during the conflict. Samira Krehić, Deputy Head of Western Balkans Program at the ICMP gave a detailed example of this forensic and seemingly objective truth recovery process.

There are victims buried in a small area and one party [of the conflict] says that they were civilian victims, while the other party says that there were soldiers who died in battle, which would make them legitimate targets. Then we [the ICMP]

dig out the mass grave and find remains of the people whose hands and feet were tied with a wire or who had blindfolds over their eyes which means that evidently, they were captured and brought [to the execution site]. ... Another thing, if you find one person in four mass graves tens of kilometres apart from one another, how could this man, if he died on the battlefield, end up in four different mass graves? This means that somebody, in the attempt to conceal the crime ... put the bodies in four different trucks and drove them within a radius of 120 km and buried them in four different graves.<sup>687</sup>

The work of the ICMP in BiH is generally considered to be one of the most successful TJ processes based on the fact that the organisation has helped exhume and identify 74% of those declared missing during the conflict.<sup>688</sup> The implication is that scientific approaches to truth yield results.

Other bases for criminal justice's qualification to produce 'the truth' rest on the premise that criminal justice is morally and inherently good. The understanding that guarantees of non-recurrence require prohibition of denial, trivialisation, and minimisation of atrocity crimes as a way of protecting the established knowledge about the conflict is of course highly referential to the anti-impunity norm and its institutions which both produce the definitions of these crimes and adjudicate when they are committed or not. It is only if one accepts all judgments of all courts adjudicating on atrocities committed in BiH as a pinnacle of 'good' that they can make a claim about criminalisation of any acts that contradict or minimise these judgments. As explained in the previous chapter, many interviewees see passing new legislation as effective means to diminishing atrocity crimes denial. Thus far, such legislation has not been successfully voted in the Parliament, but activism to do so pertains. A representative of TRIAL International said that their initiative to create and publish a policy paper on atrocity crimes denial comes out of the realisation that focusing narrowly on atrocity crimes prosecutions is insufficient to see core justice improvements in society.<sup>689</sup> In a way, such activism is a reaction to the inability of the facts produced by courts to be organically accepted by all groups in the society as the

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<sup>687</sup> Interview with Krehić (n 588).

<sup>688</sup> *ibid.*

<sup>689</sup> Interview with Representative, TRIAL International (n 663).

authoritative knowledge of the conflict. Several interviewees who discussed this issue in the context of GNRs alluded to its complexity. The problem is not only that the acts of denial, trivialisation and minimisation disrespect institutions of law, but also that such acts pollute the morality of the society. ‘Denying certain crimes is a universal definition of evil’, a representative of the Helsinki Committee for Human Rights in RS told me.<sup>690</sup> Adding to that, one of the drafters of the TJ strategy concluded that ‘not acknowledging genocide is what sets us apart from the civilised world.’<sup>691</sup> Thus, the knowledge produced by criminal justice institutions ought to be protected on the premise that it represents the absolute good in society, the good that needs to take root in all spheres of society for the sake of non-recurrence.

All in all, numerous TJ actors in Bosnia and Herzegovina self-report their application of contextualised GNRs where they seek to educate different spheres of the public about the conflict and further (legally) protect this body of knowledge. In doing so, these actors interact with the objects of the criminal justice pillar in two ways. The first is the material way where these actors use physical court archives to teach about the conflict, using them as a factual foundation for their agency. The second and intertwined way is more ideational. These actors work under a belief that courts can and do write history, represent the ultimate moral good in the society that needs to be further spread and that its continuity should be protected. The practices that seek to transfer the court-established knowledge of the conflict through education have been impactful. Perhaps not yet impactful enough to disturb the dominant political discourse beyond repair, but jointly, these actors have educated tens of thousands of young people in BiH in the hope that future generations will make different, better decisions when in positions of power and will reach a consensus on the history of the conflict, as it was written by the ICTY and domestic courts.

#### 6.2.2. What truths does criminal justice not tell?

In another stream of GNRs practices, TJ actors understand court records as a body of knowledge placed at the centre of the cycle of non-recurrence while also being cognisant that there is other knowledge yet to be produced about the truths criminal justice institutions do not

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<sup>690</sup> Interview with Letić (n 598).

<sup>691</sup> Interview with Operta (n 609).

tell. These actors acknowledge that the lived experiences of injustice and violence are not fully captured by courts and seek to act in ways that could compensate for the detected omissions. The actors therefore either produce or transfer the knowledge in ways that are more encompassing, wider-reaching or context-sensitive. Such expanded practice is then considered to be more contributing to non-recurrence than only employing the factual material generated by courts.

#### 6.2.2.1. *Fact finding*

Where the practitioners in this category resort to fact-finding as an application of GNRs, the objects of the criminal justice pillar are used as a legitimating foundation. The actors build upon the contexts and issues already dealt with by international and domestic courts while referring to court records to stress the severity, pervasiveness, complexity and/or roots of the conflict.<sup>692</sup> Non-governmental actors tend to be more represented as fact finders; however, among state actors, each entity has a state-funded research institution that undertakes fact-finding activities. In FBiH, such an institution is the Institute for Research on Crimes Against Humanity and International Law based in Sarajevo. Despite conducting their own research and producing their own publications about a range of topics relating to the conflict, as their name suggests, international law and the ICTY archive in particular remain the central, always integrated body of knowledge. Their former director explained the relationship between the Institute's fact-finding agency and the ICTY:

Of course, we use everything that the ICTY has produced so far. We do not believe that there is some absolute justice in the world, but we have exact numbers of how many sentences were issued, for Serbs, Croats, Bosniaks... It is still the most objective thing that could happen to us. What do you think would have happened if it had been up to national courts? Who would have brought Slobodan Milošević to court? ... Never.<sup>693</sup>

Among notable publications, the Federation Institute has done research on the crimes committed against children in Sarajevo under siege, the 'Greater Serbia' ideology, and 'truth

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<sup>692</sup> Maja Davidović, 'Reconciling Complexities of Time in Criminal Justice and Transitional Justice' (2021) 21 *International Criminal Law Review* 935.

<sup>693</sup> Interview with Muratović (n 618).

about genocide' in BiH,<sup>694</sup> buttressed, where applicable with ICTY's judgements. I use the phrase 'where applicable' because the Institute's body of work contains numerous summaries of ICTY judgments and completed cases but also publications that reclassify some of the crimes adjudicated by the ICTY. The reclassification is done to add to the gravity of the crimes, which results in the category 'genocide' being used to describe the crimes committed in places such as in Brčko,<sup>695</sup> Ahmići,<sup>696</sup> and all of Bosnia and Herzegovina.<sup>697</sup> The ICTY on the contrary contained their genocide classification only for the atrocities committed in the area in and around Srebrenica.

As far as the impact of this agency is concerned, the Institute has operated as an authoritative research institution since its creation in September 1992. It was among the first ones to survey the population in Sarajevo during the siege in 1993 and 1994. The members of the Institute publish their work widely and lecture on the topic at the University of Sarajevo and public events.<sup>698</sup> The Institute's work is influential in FBiH, and it is not uncommon in Bosniak public discourse to hear the word genocide used to describe crimes committed outside Srebrenica.

Members of the largest network of investigative journalists in former Yugoslavia, Balkan Investigative Reporting Network (BIRN), report and cover all transitional justice topics as comprehensively as possible from as many angles as possible, they state, as their only mechanism against the widespread denial of atrocity crimes. In our interview, their TJ program

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<sup>694</sup> Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava, *Publikacije* <http://www.institut-genocid.unsa.ba/bs/stranica.php?idstranica=8> accessed 4 October 2020.

<sup>695</sup> E.g., Rasim Muratović and Ermin Kuka, *Genocid u Brčkom 1992-1995* (Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava 2015). In the most high-profile case dealing with the crimes committed in the Brčko area, the ICTY found Goran Jelisić guilty of crimes against humanity at the gravest count. See *Prosecutor v. Jelisić* (Appeals Judgment) ICTY-95-10 (5 July 2001).

<sup>696</sup> Rasim Muratović, *Genocid u Ahmićima 1993* (Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava 2013). See the case of Miroslav Bralo who was convicted on eight counts including persecution in political, racial and religious grounds and torture or inhuman treatment and unlawful confinement for the crimes committed in Ahmići, *Prosecutor v. Bralo* *Prosecutor v. Bralo* (Judgment) ICTY-95-17 (2 April 2007).

<sup>697</sup> Smail Čekić, *Genocid i Istina o Genocidu u Bosni i Hercegovini* (Institut za istraživanje zločina protiv čovječnosti i međunarodnog prava 2012).

<sup>698</sup> Interview with Muratović (n 618); Interview with Arnaut Haseljić (n 614).

coordinator Jovana Prusina asserted that the ICTY archive is currently the biggest hub of “established facts.”<sup>699</sup> Consequently, she stated that:

[...] what we are really trying to do is stick to the court-established facts. We stick to court-established facts, and court materials are things we refer to. The editorial control is rather strict when it comes to this question and I think that is a very good thing.<sup>700</sup>

To that end, in their documentation database, BIRN ensures that all entries are linked to either direct court judgements or other databases where judgements are available and translated. Occasionally, these are complemented by non-judicial sources such as private documentation initiatives by victims’ families. ‘However,’ Prusina added, ‘sometimes it is simply necessary to find ways to report about matters that were never adjudicated before, where nobody was proclaimed criminally responsible.’ In that case, the reportage would not focus on individual criminal responsibility, but rather invite interpretations from the audience by presenting evidence. The outputs published by BIRN are republished by numerous media outlets across former Yugoslavia, making them the most cited sources of news on transitional justice matters. The contribution of their agency lies in both fact-finding and fact conservation through which they fight against the loss of information over time and against allowing ‘propaganda to become the truth’ with the passage of time.<sup>701</sup> Their agency is impactful in raising people’s awareness of the conflict and dealing with it, yet Prusina held that these efforts could become useless considering the current political climate of revisionism and denialism. The hope is that some of the information they collect and reveal will eventually find its way into history books and further contribute to non-recurrence.

The Research and Documentation Centre’s (RDC) is a local NGO whose largest fact-finding initiative called the Bosnian Atlas of War Crimes seeks to document *all* human losses and atrocity crimes committed on the territory of BiH between 1992 and 1995. The Atlas was borne out of the decade-long research conducted by the RDC and the need to make it available to the wider public ‘to help historical remembrance based on available and trustworthy facts,

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<sup>699</sup> Interview with Jovana Prusina, Balkan Investigative Research Network (Belgrade, 19 February 2020).

<sup>700</sup> *ibid.*

<sup>701</sup> *ibid.*

change the social climate in which argumentative social dialogue is absent, and the climate of ... politicisation of the recent past dominates' and is seen as potentially leading to new conflicts.<sup>702</sup> In the Atlas, court judgments are incorporated where applicable and the Atlas remains faithful to court qualification of wrongful acts. For example, the only atrocity classified as 'genocide' on the Atlas is the one in Srebrenica, as per the ICTY's jurisprudence (see Image 4 below). Yet, the events and violations included in the Atlas expand beyond those adjudicated by the ICTY and domestic courts to document the destruction of religious objects and hospitals, as well as forced displacement, among many others. The Atlas is therefore respectful of ICTY's legacy but fully aware of the limitations of such institutions. Mirsad Tokača, the director of the RDC, referred to the 'stereotypes built around the ICTY' suggesting it would reconcile and write history.<sup>703</sup> 'That is not its job,' he explained. 'A court is an instrument of criminal responsibility.'<sup>704</sup> The Atlas, which uses Google Earth for visual presentation of the findings, is a well-known and used tool by the researchers of the BiH conflict. In addition, many survivors and victims' families contribute to it by providing information, photographs of personal possessions of the victims etc., making the Atlas a platform that more closely reflects the lived experiences of violence and justice than criminal justice institutions can do in isolation. As a result, the Atlas has over 4,500 informative 'dots', i.e., markings on the map of BiH containing information about the violation committed and lives lost. In the first month since it went live, it was visited by 16,000 people.<sup>705</sup>

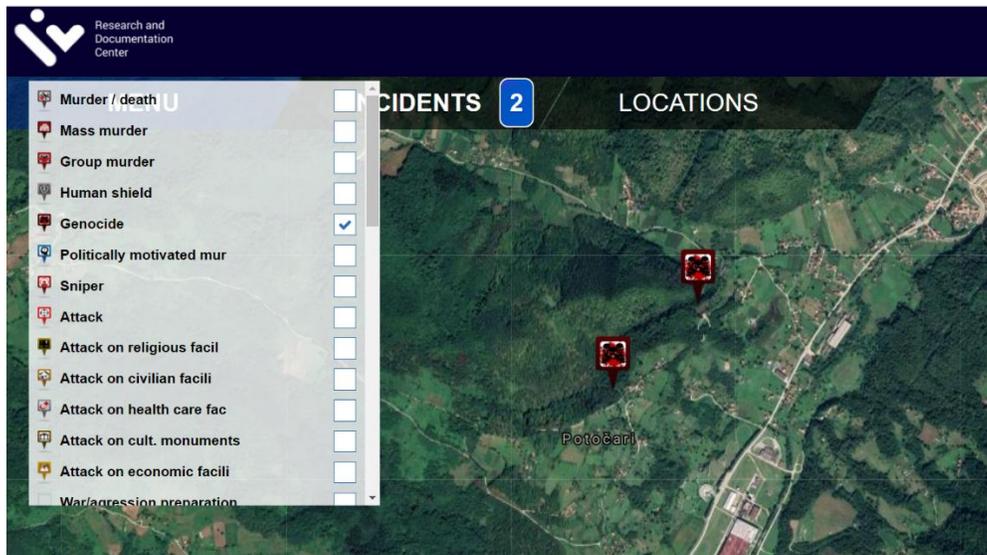
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<sup>702</sup> Research and Documentation Center, *Bosnian War Crimes Atlas 92-95*, <http://mnemos.ba/en/home/index> accessed 27 April 2021.

<sup>703</sup> Interview with Tokača (n 608).

<sup>704</sup> *ibid.*

<sup>705</sup> *ibid.*



*Image 4: An example of the Atlas' treatment of 'genocide' as a category of atrocity as per the ICTY jurisprudence, pointing to only two locations in the Srebrenica area. Photo credit: Research and Documentation Centre, <http://mmnemos.ba/en/home/Atlas#> accessed 14 June 2021.*

However, the reception of the RDC's fact-finding in the public has not been without resistance, and many reject it as an authoritative source of information. As Tokača reported in our interview, the resistance came primarily from his own ethnic group [Bosniak] for coming up with a lower number of victims than was originally estimated in public discourse straight after the conflict.<sup>706</sup> The product of these fact-finding practices has disturbed some of the commonly given figures about the causalities of the conflict, and therefore narratives that follow them, due to which its validity has been questioned in certain academic and NGO circles, particularly among other actors who also engage in fact-finding.

#### 6.2.2.2. Education

When it comes to practices which seek to transfer the knowledge of the conflict for the purposes of non-recurrence, this is done primarily in the sphere of informal education such as summer schools, seminars, and training, where participation is limited to a group of selected people and where education takes place in non-formal spaces. Accepting court records as a source of knowledge about the conflict, these programs by non-governmental organisations

<sup>706</sup> *ibid.*

utilise court records as educational materials. Nevertheless, the education does not consist of only presenting court-established facts but also of further expanding on the criminal justice foundations. To do so, these TJ actors tend to use more experiential tools to trigger empathetic feelings and emotional connections between those educated and those they need to be educated about. For the Youth Initiative for Human Rights, this kind of GNRs practice creates spaces for competing stories of conflict to be heard directly from actors who play different roles in the same conflict areas.<sup>707</sup> The participants of their summer school project, ‘School of Distinct Memories’, are not in dialogue with conflict actors; instead, the organisers allow the conflict actor to narrate their own interpretations of the conflict and then lead the participants into a discussion about these competing narratives. These narratives are then judged against each other and against any existing judgments on the case or the area by the participants to create a consensus among them about what happened. Most participants are motivated to keep learning about ‘the truth’ about what happened long after the school ends and, in that way, compensate for the lack of non-ethnically based history education in schools.

For the Centre of Non-Violent Action, education mainly happens in online spaces.<sup>708</sup> This group of activists marks unmarked sites of atrocities across the country in a physical manner by placing a commemorative plaque on-site with some basic information about what happened. Yet, the educational afterlives of such memorialisation are digital. The organisation uses photographs of the physical memorialisation and boosts them via platforms such as Facebook directly into local communities where the said atrocity happened. The photographs, followed by information about the atrocity, provide a means to challenge dominant discourses in the community which typically suppress and silence minority experiences. The markings of the unmarked sites of atrocity across BiH are usually but not always buttressed by court rulings establishing that the specific atrocity they plan to commemorate was committed. Nevertheless, because of the limited mandates of criminal justice institutions, their representative Tamara Zrnović told me, the activists occasionally encounter situations where no judgements have been issued.<sup>709</sup> In those instances, they rely on personal memories of survivors or war veterans to gather information about what had happened and where, before placing a commemorative plaque on location. The

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<sup>707</sup> Interview with Tucaković (n 601).

<sup>708</sup> Interview with Zrnović (n 637).

<sup>709</sup> *ibid.*

use of digital memorialisation for GNRs-relating education is a key to overcome the practical obstacles to physical memorialisation. Namely, Zrnović explained that most plaques they place are removed on the same day, sometimes within the first 30 minutes. When I asked why this could be the case, she asserted 'simply because a vow of silence is nurtured in certain communities. It is here as a person, as a phenomenon in everyone. So, they remove [the plaques] ... to forget, to not talk about it, to not threaten what is theirs... the “ethnic purity.”’<sup>710</sup> This vow of silence is seen as a core obstacle to guarantees of non-recurrence. Despite the pervasive challenges, the CNA's persistence and presence on the field have gained them politicians' support in certain communities that has led to permanent marking of a couple of sites of atrocity and organisation of inter-ethnic commemorative events, making small fractures in this vow of silence.

For a significantly large group of researched TJ actors, mainly non-governmental and some state actors, practising GNRs means producing or enabling the production of knowledge that expands beyond the truths established by courts and, in some cases, incorporating this knowledge into educational initiatives. Evaluation of such non-court established knowledge is outside the scope of this thesis. What I wish to stress is that these examples show how smaller scale, but nevertheless influential fact-finding and educational activities are two-way interactions between the objects of criminal justice and practitioners' agency. Court records are accepted and often used as a legitimating foundation, while some new facts are created, and inevitably in doing so, some of the judicially established facts are disturbed. It follows that such agency creates multiple avenues of knowledge, and while such work is respectful of the work of the courts, it is inherently impossible to align all of the newly produced 'facts' with judicial truths. This impossibility is particularly visible when it comes to certain reclassifications of crimes, where different propositions about what counts as genocide and for whom are produced. These kinds of practices thus add more possible sources of the knowledge that is at the centre of the cycle of non-recurrence by combining the work of criminal justice institutions with their intention to make known some of the previously left out stories.

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<sup>710</sup> *ibid.*

### 6.2.3. Fact-finding as a rejection of court records as unbiased and objective

So far in this chapter, I elaborated on practitioners' engagements with court records as 'the knowledge' that needs to be created and transferred into all spheres of society within the cycle of non-recurrence. In constructing such meaning of 'the knowledge' in practices of GNRs, these actors, by and large, maintain the presumption that (international) criminal law and its institutions are neutral, objective, and morally good. A very small fraction of researched practitioners conducts GNRs practices in ways that directly challenge these presumptions. In these engagements, which dominantly involve knowledge creation, criminal justice institutions are critiqued and questioned for being inherently political, and therefore biased towards certain agendas. The manifestations of agency I review here are often controversial as they seem to negate some aspects of criminal prosecutions and question the issued judgments as 'truths' and therefore disturb the elevated status of the anti-impunity norm and the official narrative of how TJ should be done. On a transitional justice scene that is so dominated by the ICTY and complementary courts, any rejection of the ICTY's work will be easily comprehended as anti-human rights and *anti* anti-impunity. Nevertheless, I assert that these activities must not slip away from academic inquiry firstly, because they are conducted using the language of non-recurrence and transitional justice, secondly, because they are influential and welcome in many public circles, and thirdly because they represent critiques to some key aspects of the TJ discourse.<sup>711</sup> In that sense, these applications of contextualised GNRs should be examined as having their own intrinsic values while also analysed as potential reactions to the ineffectiveness or insensitivity of the solutions initially implemented by the architects of TJ in BiH.<sup>712</sup>

A prime example of this kind of agency is the RS Institute for Research on War, War Crimes and Missing Persons from Banja Luka, which occupies a rather controversial position in the TJ sector and is frequently accused of being revisionist. Considering the officials of the Institute proudly call Radovan Karadžić, the former wartime President of Republika Srpska convicted of genocide, crimes against humanity and war crimes by the ICTY, "the first

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<sup>711</sup> On the third point, see Oliver P Richmond and Audra Mitchell, 'Peacebuilding and Critical Forms of Agency: From Resistance to Subsistence' (2011) 36 *Alternatives: Global, Local, Political* 326, 340.

<sup>712</sup> *ibid.*

President”<sup>713</sup> and openly refuse to label the crimes committed in Srebrenica “genocide,”<sup>714</sup> it is easy to see how this can be interpreted as denial of victims’ grievances. While the Federation Research Institute (Section 6.2.1.) has focused on studying, *inter alia*, the ‘Greater Serbia’ ideology, the RS Institute has published books regarding ‘the suffering of Serbian people’ in multiple areas in the region, the aggression of Croatia on Republika Srpska, and the role of Republika Srpska in what it terms “defensive-patriotic” war.<sup>715</sup> The RS Institute is therefore on the other side of the coin from the FBiH research institute; they seemingly have the same mandate but their research topics are mainly ethnically-organised and therefore separate.

What I am interested in for the purposes of this thesis is how the RS Institute conceives and forms its practices of ensuring non-recurrence and its practices of GNRs, as they conceptualise them. On the official website, this institution reports using all of their resources available ‘to find the truth’ because ‘court proceedings and judgments cannot write the truth.’<sup>716</sup> The idea that tribunals can have history-making capabilities and that court records are the authoritative knowledge about the conflict is thus straightforwardly rejected. In Banja Luka, I visited the offices of the RS Institute, located in a set of government buildings they share with the National Assembly of RS. The complex is located on a square symbolically entitled ‘the square of the victims of Jasenovac’ commemorating those (mainly Serb) victims who perished in this WWII concentration camp in Croatia. The meeting was off the record and my questions were instead answered in a written format. Still, the written correspondence did not prevent the representatives from openly discussing their disagreement with the major criminal justice institutions in the country. Instead, they presented me with numerous statistics aiming to prove ethnic biases of both the ICTY and the Court of BiH. By way of example, it was stated that:

[...] the ICTY has not fulfilled its task [to render justice], particularly if considering the fact that for the crimes committed against Serbs, the ICTY issued

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<sup>713</sup> Republički centar za istraživanje rata, ratnih zločina i traženje nestalih lica, *Kapamuh – procec*, <https://www.rcirz.org/kapamuh-procec> accessed 12 Oct 2020.

<sup>714</sup> Republički centar za istraživanje rata, ratnih zločina i traženje nestalih lica, 'Kojić: Uvredljivo saopštenje Memorijalnog centra Srebrenica' (*RS Institute*, 27 April 2020) <https://www.rcirz.org/kojic-uvredljivo-saopstenje-memorijalnog-centra-srebrenica/?script=lat> accessed 12 Oct 2020.

<sup>715</sup> Republički centar za istraživanje rata, ratnih zločina i traženje nestalih lica, *Publikacije*, <https://www.rcirz.org/publikacije/?script=lat> accessed 4 October 2020.

<sup>716</sup> Republički centar za istraživanje rata, ratnih zločina i traženje nestalih lica, *O nama*, <https://www.rcirz.org/onama/?script=lat> accessed 12 Oct 2020.

sentences amounting to a total of 64 years of imprisonment, for the whole of former Yugoslavia. At the same time, the ICTY sentenced Serb [defendants] to total sentences of 967.5 years and six life sentences.<sup>717</sup>

Similarly “defeating” statistics were offered for the practice of the Court of BiH which, as the RS Institute calculated, issued only 13% of all sentences for crimes committed towards Serbs. The overall interpretation of such court practice is that ‘35,000 Serbian victims of wars in Croatia and BiH’ are not accounted for and probably never will be considering the passage of time.<sup>718</sup>

As a state institution, the RS Institute is obliged by the DPA and subsequent domestic law to cooperate with the ICTY when necessary, yet the representatives see this legal obligation as imposed and problematic. Furthermore, they were also eager to express the centralised work by the ICMP and the MPI on missing persons issues as “manipulating science” and promoting distorted, subjective truths on the account that the number of identified missing persons of Serbian ethnicity has decreased since this centralisation.<sup>719</sup> Conducting their parallel (to criminal justice) fact-finding as a way to create the knowledge about the conflict necessary for non-recurrence is, in the case of the RS Institute, clearly ethnically conditioned. This institution is sponsored by the majority Serb entity where being of Serbian ethnicity and acting for the ‘good’ of Serbian people is seen as a default, at least in public discourse.<sup>720</sup> The challenging practices here are directed towards institutions that are seen not as biased against justice in general, but biased against justice for Serbian people, by prosecuting more ethnic Serbs, exhuming fewer Serbian disappeared people etc. While some technical points (e.g., exhumation techniques) are held against these challenged institutions, the objection, and therefore reason to be proactive, is made on political and not technical arguments. More precisely, the ICTY is not problematic because it made a procedural omission but because any omissions they made were done, these

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<sup>717</sup> Interview with Representative, Republika Srpska Institute for research on war, war crimes and missing persons (n 616).

<sup>718</sup> *ibid.*

<sup>719</sup> *ibid.*

<sup>720</sup> To illustrate, in January 2021, Bosnian Serb President Milorad Dodik publicly insulted two ethnic Serb members of the Central Electoral Commission BiH due to a particular vote they made against the validity of local elections in a part of Republika Srpska, calling them ‘bad Serbs.’ See AlJazeera Balkans, ‘Dodik vrijeđao članove CIK-a BiH: ‘Fukara of Srbina’ (AlJazeera, 21 Jan 2021) <https://balkans.aljazeera.net/news/balkan/2021/1/21/dodik-vrijedao-clanove-cik-a-bih-fukara-od-srbina> accessed 27 April 2021.

actors argue, against the Serbian population. The RS Institute’s publications focusing on ‘suffering of the Serbian people’ and Serbian victims exclusively seek to directly disturb the dominant narratives of, how the Institute interprets it, almost non-existence of Serbian victims and a blanket labelling of the Serbian people as aggressors. In addition to influencing public consciousness and discourse about the conflict through their publications, the RS Institute also establishes, suggests and coordinates memorialisation projects in this entity, seeking to both nurture and mould a culture of remembrance.<sup>721</sup> These efforts jointly have ‘the goal of realising the whole truth by the society, raising awareness about the horrors of war ... out of which emerges the goal of educating the entire society in order for something like this to never happen again.’<sup>722</sup>



*Image 5: one of the many commemorative plaques found in Sarajevo, warning of the acts of “Serbian criminals.”*

<sup>721</sup> Republički centar za istraživanje rata, ratnih zločina i traženje nestalih lica, *Djelatnosti*, <https://www.rcirz.org/djelatnosti/> accessed 30 April 2021.

<sup>722</sup> Interview with Representative, Republika Srpska Institute for research on war, war crimes and missing persons (n 728).

Needless to say, these practices ought to be examined for the content of the truth the RS Institute seeks to present, and any applications of revisionist and denialist techniques applied in constructing such content; yet this is outside the scope of this thesis. What I wish to argue here is that this kind of agency cannot be examined in isolation from the overall structure of transitional justice in BiH and the idea that (international) courts produce the authoritative truth of the conflict and therefore history. Such knowledge production is inevitably political despite the claimed properties of neutrality. The unequal party dynamics at the ICTY, which the RS Institute references in the statistics on imprisonment, reflects the unequal party dynamics during the conflict where the Bosnian Serbs forces quantitatively committed most atrocities. However, in the past 25 years, it must be noted that such unequal party dynamics have been mistranslated into the everyday language to label Serbian people – as opposed to the Army of Republika Srpska – as aggressors, a genocidal nation. By way of example, multiple commemorative plaques placed on sites of massacres around Sarajevo all come with the same message, as displayed on Image 5 to the left (in Bosnian): ‘At this place *Serbian criminals* on this date murdered [a number of] citizens of Sarajevo ... remember and warn.’<sup>723</sup> When I had an informal chat with a known TJ expert, otherwise fervently opposing “the propaganda” done by the RS Institute’s director and told him about these statistics narrated to me, he was swift to declare that this was true. ‘In this case, they are right, crimes against Serbs are only now started to be prosecuted at local courts’, he told me.

Thus, I note here that this kind of knowledge-producing practice with revisionist and/or denialist tendencies must be examined in the context of the politics of criminal justice in transitional justice and direct rejection of the idea that courts are neutral and can thus write history and teach about it for the sake of non-recurrence. This is why I understand the work of the RS Institute also as an example of practices of GNRs. While its current form is inseparable from the operations of criminal justice in BiH in the past 25 years, which the RS Institute

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<sup>723</sup> Similar text using the phrase 'Serbian criminals' is also found at the entrance to the restored City Hall. The text has been debated ever since it appeared and it most recently became the subject of a discussion between the new mayor of Sarajevo and the mayor of East Sarajevo, which is in the proximity of the city of Sarajevo but in the Republika Srpska territory. The mayor of Sarajevo refuses to edit the text on the account that would represent 'alteration of facts'. See Aida Đugum and Dragan Erjavec, 'Novi gradonačelnici dva Sarajeva u raspravi o spomen ploči' (*Radio Slobodna Evropa*, 13 April 2021) <https://www.slobodnaevropa.org/a/sarajevo-istocno-sarajevo-ploca-vijecnica-ferhadija/31199857.html> accessed 27 April 2021.

challenges, the values of transitional justice such as justice, truth recovery, reparations for past violations and, above all, working towards ‘Never Again’ are all incorporated into the discourse of this institution.

#### 6.2.4. The inappropriateness of ‘truth commissions’ as an idea

In this final section on practices of GNRs, I wish to present examples of practices that seek to produce knowledge for non-recurrence but have emerged as a reaction to and rejection of the idea, unique to transitional justice, that truth recovery ought to be done via truth (and reconciliation) commissions. More precisely, the conventional crown jewel of the truth recovery pillar in TJ with extensive conceptual links to the ‘Never Again’ promise, a truth and reconciliation commission, is overwhelmingly rejected by practitioners as an adequate exercise of truth recovery as a GNR. As noted in Chapter 4, a central state-wide TRC was never realised in Bosnia and Herzegovina. The most promising initiative to establish such a body was advocated by Neil Kritz and Jakob Finci, but it was initially opposed (although ultimately approved) by the ICTY and further ill-received by a variety of local actors. As one interviewee put it bluntly, people discard TRC initiatives because such an enterprise, often associated with faith-based ideas of interpersonal reconciliation, ‘could never be a part of their culture.’<sup>724</sup> Tokača, the director of the above-discussed RDC, explained to me that he was “the biggest opponent” of the USIP truth commission.<sup>725</sup> When asked why he was opposing the establishment of a truth commission, Tokača reflected on the short-term-ness of such institutions. ‘All commissions are *ad hoc* bodies,’ he added, explaining how the society is rather in need of permanent institutions to deal with truth-related issues and provide explanations about the conflict that would last ‘for all times.’

Similarly, he also departed from the initiative for RECOM, the regional truth recovery commission, on the basis of conceptual disagreements.

I had a feeling that they are not understanding why this [fact-finding] is done [but rather] that they simply wanted to get it done. You don’t do a census of victims only for the sake of the census. This census gives you an array of analytical

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<sup>724</sup> Interview with Anonymous source (Sarajevo, 7 February 2020).

<sup>725</sup> Interview with Tokača (n 608).

answers. They say, [we need] public hearing... Why public hearings? You will bring someone like the South African Commission and then what? I don't need a tribune for crying (...) the past does not exist if we do not have a relation to it. And what kind of relation towards the past can you have if you are uninterested and wish to simply list the victims?<sup>726</sup>

Further on in our conversation, Tokača rejected the supposed need to 'bring dozens of women and men to tell their stories and make the audience cry' as "the truth standard" established on an 'entirely wrong understanding of transitional justice.'<sup>727</sup> Informally, I was told by several interlocutors that they saw the RECOM initiative as established for financial gains, capturing millions of dollars of the available funding for NGOs in the region, as an initiative that looks attractive on the paper but has yielded no results.

Yet even the representatives of RECOM itself more recently do not present the initiative as a 'truth and reconciliation' one. When I interviewed one of the drafters of the statute of the regional commission, they warned me that RECOM was explicitly never going to be 'a truth and reconciliation' but a fact-finding commission.<sup>728</sup> The difference is, they asserted, that RECOM would "scientifically" and "objectively" establish facts such as statistics about the victims. With the idea of TRC becoming a synonym for the South African model of TRC in these TJ circles in BiH, the truth recovery needed for non-recurrence, for these TJ actors, is stripped of 'reconciliation' and 'forgiveness' as sought-after values and instead a move is made towards 'science' and 'objectivity', values otherwise attached to criminal justice.

When it comes to truth recovery practice that is different from the work of a TRC, Tokača remarked that problems are not solved with TJ theories – of which truth and reconciliation commissions are an inseparable aspect - but with TJ practice, which would involve more continuous, durable fact-finding. The Bosnian War Crimes Atlas offers an opportunity to analytically assess the deeper structures of conflict and their consequences. Showcasing the Atlas during our interview, Tokača explained that geographical reconstruction of the events of the conflict reveals much about the character of the conflict. 'Many people say it was a religious or

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<sup>726</sup> *ibid.*

<sup>727</sup> *ibid.*

<sup>728</sup> Interview with Izmirlija (n 604).

ethnic conflict. I say ‘no’, it was a classic fight for territorial expansion’, he continued. Showing how all bridges on the Neretva River<sup>729</sup> were destroyed, he explained that “strategically,” obtaining control over the river meant gains in the energy sector for the occupier. Contrary to the common belief, ethnic or religious hatred has nothing to do with that, it was implied. While respecting the ICTY legacy and treating judicially established facts as the ‘truth’, this kind of practice is conducted in direct opposition to the idea that truth and reconciliation commissions, with the public, often televised testimonies are necessary for truth recovery.

Another level of tension in fact-finding processes is detected between state-established bodies with comparable mandates, that is, the old Srebrenica Commission, which had completed its mandate in 2004, and the new one, established by the Republika Srpska authorities (as explained in Section 4.3.2.). The two commissions essentially have the same mission: investigating the truth about the events in Srebrenica independently and impartially. The only difference, however, is that the new establishment seeks to ‘prevent further manipulation of the fates of *true victims and their families*’, implying its focus on Serbian victims<sup>730</sup> and therefore, one could argue, a complete absence of impartiality. The latter commission was established not to complete the work of the former commission in any way but precisely to challenge and diminish its findings. In that sense, the new commission is a direct reaction to its predecessor. As of April 2021, the new commission’s final report is still awaiting publication.

Overall, in section 6.2., I discussed the manifestations of enabled knowledge-producing, transferring and protecting practices that engage with the ideas that, firstly, court records are an authoritative source of such knowledge, and secondly and less commonly, truth commissions are trustworthy and appropriate vessels of truth recovery. In the next section, I complicate the picture further by investigating what prevents certain researched actors from practising different elements of GNRs and how TJ possibly hampers such practices.

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<sup>729</sup> The river Neretva flows through the southern part of BiH into Croatia and the Adriatic Sea.

<sup>730</sup> Narodna skupština Republike Srpske, ‘Okončana 29. Posebna sjednica: Usvojeni Zaključci u vezi s Informacijom o Izveštaju komisije o događajima u i oko Srebrenice od 10. do 19. jula 1995.’ (*Narodna skupština RS*, 14 August 2018). <https://www.narodnaskupstinars.net/?q=la/vijesti/okon%C4%8Dana-29-posebna-sjednica-usvojeni-zaklju%C4%8Dci-u-vezi-s-informacijom-o-izvje%C5%A1taju-komisije-o-doga%C4%91ajima-u-i-oko-srebrenice-od-10-do-19-jula-1995> accessed 30 November 2020.

### 6.3. Constrained agency: What's transitional justice got to do with it?

Just as the structure of transitional justice and its different properties can enable practitioners' agency, they can also constrain it. In this chapter so far, I discussed the various ways in which actors practice the contextualised understandings of GNRs in Bosnia and Herzegovina. I demonstrated that such practices are primarily undertaken by civil society actors and tend to include fact finding and education activities. However, not all researched actors practice GNRs in their TJ-related work or engage with non-recurrence as an overall objective of such work. For the most part, most state and international actors lag behind the civil society sector in practising the cycle of GNRs and show lack of capacity to engage in GNRs even where there is a will to do so. In examining what prevents these actors from acting on different elements of guarantees of non-recurrence, I bring back the characteristics of TJ as an ideational structure and the notion of transitional justice as simultaneously legalistic and malleable. I show that there are two competing (mis)understandings of what transitional justice is and how it is done: one where transitional justice is equated with criminal justice and understood as only or primarily criminal prosecutions, and the other where recent normative expansions of the field caused the actors to see the field as a bit of everything and a total of nothing much tangible. In general, structural constraints procure from the character of the structure's properties in relation to actors in a particular context.<sup>731</sup> These competing characters of the TJ structure are able to exert constraints upon prospective practices of contextualised GNRs as they are compatible with the objective of ensuring non-repetition of mass human rights violations which, as argued previously, transitional justice frames.<sup>732</sup> The intention of this section is to show how these competing understandings of transitional justice and its reliance on legalism as well as malleability have practical implications that can be interpreted as constraints. While legalistic TJ limits the range of options available to wilful actors, malleable TJ confuses it, therein hampering the establishment of a coordinated strategy on TJ in which the cycle of GNRs could be realised. I establish three key findings: state actors are least likely to conduct any practices of GNRs due to the influence of legalism and legalistic thinking; transitional justice is understood differently by different actors; and, the

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<sup>731</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 176–177.

<sup>732</sup> See Archer (n 243).

malleability of TJ negatively impacts the exercise of a coordinated approach to TJ that would support practices of the cycle of GNRs.

### 6.3.1. ‘Not a matter of choice but faithful following of the regulations’

For some actors, contextualised GNRs, that is the context-specific understandings of the content of GNRs as per Chapter 5, fall outside their realm of practice. I argue that this is largely the case due to the persuasive influence of legalism and legalistic thinking due to which state actors interact with transitional justice in ways that prioritises certainty and predictability and therefore confirm to the codes of conduct that are in line with their set mandates and objectives. Representatives of state institutions tend not to manifest any practices of contextualised GNRs. These actors tend to operate under an outcome-oriented approach and prefer predictability and certainty otherwise offered by legalistic approaches to transitional justice and the actors’ strictly prescribed mandates. In other words, these actors are not likely to expand their roles beyond what is found in their legal mandate, considering themselves to be mere ‘implementors’ of a set of competencies. If such competencies do not specifically articulate a working definition of ‘transitional justice’, GNRs or any aspects of such, then any perceptions of agency on TJ matters and GNRs will be absent for this small group of actors. It can be argued, therefore, that normative flexibility of the norm of non-recurrence is therefore not desirable in these cases as it does not motivate context specific action.

Two stark examples are worth noting. The first one is a representative of the High Judicial and Prosecutorial Council. As I explained in Chapter 4, the HJPC is an institution created within the reform of the judiciary and is responsible for the vetting of judicial and prosecutorial staff. When asked about institutional reform as a measure of non-recurrence, the representative started laughing, later saying that this suggestion was “nonsense.”<sup>733</sup> ‘In accordance with its competences,’ he stated, ‘the HJPC does not have a direct touch ... with transitional justice, meaning that it never passed a document that could be called ‘transitional justice’ or would exclusively treat that question.’<sup>734</sup> Consider the following exchange:

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<sup>733</sup> Interview with Representative, High Judicial and Prosecutorial Council (n 681).

<sup>734</sup> *ibid.*

Interviewer: [...] are GNRs something that has ever been mentioned in your work at the HJPC? Do you consider the HJPC to in any way contribute to non-recurrence and, if yes, how?

Interviewee: We have to be very careful when it comes to the HJPC. The HJPC, according to the Law on the HJPC, has competencies ... of a systemic character. To simplify, the HJPC cannot intervene in individual cases, it cannot intervene in sanctioning politics, it cannot intervene in the actions of prosecutors and judges. ... In that sense, this question falls directly outside the mandate of the HJPC.

At the time when the HJCP was established by the international community, ensuring non-recurrence had not yet become the organising telos of transitional justice and was therefore omitted from the legal mandates of this and similar institutions. In the case of BiH, the causal links between measures of institutional reform and non-recurrence in the TJ theory were made *ex post facto*.

A similar example comes from the Institution of Human Rights Ombudsmen in BiH, a central body established to protect human rights standards and obligations in the country. The institution has normative limitations stemming from the Law of Ombudsman, meaning that the Ombudsmen cannot look into human rights violations that occurred before the Dayton Peace Agreement was signed in December 1995. Throughout the interview with their Assistant Ombudsman and Head of Department for Elimination of all forms of Discrimination, it was evident that it was the Law of Ombudsmen that prevented him from seeing any place for the institution in guaranteeing non-recurrence. He further stated that ‘...this [lack of agency] is not a matter of choice but a faithful following of the regulations.’<sup>735</sup> Due to the normative limitation stemming from the legal framework, the representative of the Ombudsmen office was unable to see the long-term consequences of the conflict, which expand beyond December 1995, as something that concerns the work of his office and transitional justice. The Assistant Ombudsman concluded that transitional justice as “a thematic unit” was not incorporated into the work of the institution, in the sense that the institution conducts activities relating to “fact-

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<sup>735</sup> Interview with Predrag Raosavljević, The Institution of Human Rights Ombudsman of Bosnia and Herzegovina (Banja Luka, 26 November 2019).

finding” about the events of the conflict or “war crimes trials.” Once again, transitional justice is defined through its best-known mechanisms, truth commissions and trials.

Paradoxically, while practices of contextualised GNRs tend to be referential to the institutions and values of criminal justice, criminal justice actors conduct little to no practices relating to non-recurrence, as they experience it. The interviewed judges and prosecutors understand their work as part of a ‘transitional justice’ strategy, yet they are most likely to report that their work is not a manifestation of GNRs. In other words, these judges and prosecutors do not treat themselves as fact finders producing ‘the knowledge’ placed at the centre of the cycle of non-recurrence. Such a situation would imbue them with responsibility for a mandate they do not have, they report. Instead, the responsibility for a complex issue such as ensuring non-recurrence of atrocity crimes, these actors asserted, rests on other participants in the society. By way of example, a district court judge working on war crimes saw that judges’ work contributes ‘very little to that transition, precisely because we are at the very end of this chain of responsibility’, being preceded on the chain by prosecutors, government officials, politicians.<sup>736</sup>

This overarching feeling of not acting or being able to act towards guarantees of non-recurrence comes from two self-reported structural constraints: limitations that are inseparable from criminal law and constraints of the job and the passage of time. Firstly, judges in particular tend to feel that their job is to apply the law as it is – and not interpret it – due to which their agency is quite limited. Comparably, judges and prosecutors feel like they have limited tools to actively contribute to the goals of transitional justice such as ensuring non-recurrence. In the words of one judge, courts only have judgments as a weapon, and these can do very little.<sup>737</sup> These findings are in line with the broader socio-legal research on the role of lawyers and judges in transitional justice, particularly McEvoy’s work which reports that conflict lawyers often stress neutrality and their roles as “tools” and not “decision-makers.”<sup>738</sup> The second reason for the lack of practices is the passage of time. This situation arises from the premise that the legal, procedural, and biological limitations imposed on criminal justice seem not to allow criminal justice to continue fulfilling its mandate after a certain time. Criminal justice is short term by

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<sup>736</sup> Interview with Nebojša Savić, Basic Court of the Brčko District’ (Brčko, 13 November 2019).

<sup>737</sup> Interview with Judge, Court of BiH (n 633).

<sup>738</sup> McEvoy (n 390) 543.

default, and traditionally not expected to concern itself with a long-term course of events that non-recurrence necessitates.<sup>739</sup> This section therefore predominantly links the characteristics of transitional justice as legalistic, technocratic, outcome- and predictability-oriented to the practices of various state actors and their potential incompatibility with the flexible norm of non-recurrence. The following sections begins to unpack the conceptual consequences of transitional justice as a malleable ideational structure.

### 6.3.2. Transitional justice: ‘logically’ criminal justice or ‘multiple sclerosis’?

As discussed in Chapter 1, the meaning and usefulness of transitional justice are not fixed but instead the malleability of transitional justice allows for diverse and competing positions. Only some weeks into my field research, I realised that the understandings of transitional justice are contested in BiH as well, and that my interlocutors and I did not necessarily have the same glossary starting the interview. For a small number of organisations profiling in specifically in ‘transitional justice,’ and not, for example, peace and/or conflict, broadly defined, their official websites usually follow textbook definitions of TJ, whether taken from how the ICTJ conceptualises it,<sup>740</sup> or inspired the four/five-pillar outline of transitional justice in the scholarship and international practice.<sup>741</sup> Sometimes, the definition is adaptable in practice based on the developments in TJ theory. For the Humanitarian Law Centre, for example, the former focus on documentation and criminal justice is today complemented by sectors working exclusively on education and memorialisation.<sup>742</sup> Other times, the four/five-pillar construction of TJ proves limiting in practice. To illustrate, in the case of BIRN, who generally comprehend transitional justice as per the ICTJ’s construction, reporting on everyday matters brings moments of doubt whether a story should be classified as ‘TJ’ or not and therefore included on BIRN’s TJ-specific news outlet. A story about a war crimes trial, their programme coordinator explained, is

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<sup>739</sup> Davidović, ‘Reconciling Complexities of Time in Criminal Justice and Transitional Justice’ (n 692).

<sup>740</sup> Balkan Investigative Reporting Network, *What is Transitional Justice?*, <https://balkaninsight.com/balkan-transitional-justice-home/balkan-transitional-justice-what-is-transitional-justice/> accessed 26 April 2021.

<sup>741</sup> Ministarstvo ljudskih prava i izbjeglica Bosne i Hercegovine, *Tranzicijska Pravda*, [http://www.mhrr.gov.ba/ljudska\\_prava/tran\\_pravda/default.aspx?id=1801&langTag=bs-BA](http://www.mhrr.gov.ba/ljudska_prava/tran_pravda/default.aspx?id=1801&langTag=bs-BA) accessed 26 April 2021.

<sup>742</sup> Interview with Jelena Đureinović, Humanitarian Law Fund (Belgrade, 26 February 2020).

‘logically transitional justice;’ yet the matters of, for examples, internally displaced people or refugees less so.<sup>743</sup>

That criminal justice is ‘logically transitional justice’ is something that perseveres among a small group of interviewed practitioners. As I entered their office, an interviewee who works on strengthening the integrity of the judiciary and improving public trust in these institutions told me that what they do ‘has nothing to do with transitional justice.’<sup>744</sup> Instead, transitional justice, as they saw it, was connected to criminal prosecutions. They agreed to the interview but overall did not see their work as part of larger whole scholars call ‘transitional justice.’ Another interviewee from the BiH civil society, Tamara Zrnović from the CNA shared her perception of TJ as tied to retributive justice. As such, it generally lacked “the human element” essential, in the eyes of this CSO, for peace and reconciliation. Admitting that even if only retributive, such TJ is needed and valuable, Zrnović added that ‘what should have come first, as a foundation ... is this human level ... so that there could be trust-building before anything else.’<sup>745</sup> Connecting on the human level to build civic trust was therefore seen as currently outside the scope of (retributive) transitional justice.

The equation of transitional justice with criminal justice is tied to the dominance of legalism and legalistic approaches in the early years of the field’s development and, relatedly, to TJ’s genesis in BiH. In these cases, TJ as legalistic is the prevailing characteristic of the structure. The fact that the ICTY had already been there when the conflict came to an end, meant that it created space for both international and domestic non-governmental organisations to develop their agency. As a representative of the Helsinki Committee for Human Rights reported during our interview, the NGO’s initial TJ activities in the late 1990s and early 2000s by and large meant engaging with the tribunal and supporting its operations. She further stated that ‘only later was the idea born to deal with TJ more structurally, to inform citizens about court-established facts, to get that information back into the communities where the crimes happened... to slowly start dealing with ‘the right to know.’<sup>746</sup>

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<sup>743</sup> Interview with Prusina (n 699).

<sup>744</sup> Interview with Anonymous source (n 724).

<sup>745</sup> Interview with Zrnović (n 637).

<sup>746</sup> Interview with Letić (n 598).

Yet the understandings of transitional justice have also changed over time as transitional justice branded itself as both universal and context-specific, specific and ambiguous. For instance, for a former Deputy High Commissioner working in BiH in the early 2000s, the concept of TJ introduced in BiH at first implied “not real justice,” meaning not justice in court, but rather more community based approached like in Rwanda or South Africa.<sup>747</sup> Nebojša Savija-Valha, whose organisation the Nansen Dialogue Centre supported the school desegregation in Jajce, rejected the title of 'a TJ actor' for his NGO and admitted that, as someone working in the humanities sector since 1991, he is ‘very, very confused with this term.’<sup>748</sup> He went even further to brilliantly compare transitional justice to multiple sclerosis. ‘Everything that doctors do not know what it is and has to do with motoric, they call multiple sclerosis.’ Transitional justice, too, for him appeared as an attempt to find a common term for many seemingly unrelated things.

Recently at a conference, [...] so, we have developed the bottom-up approach, and transitional justice should cover the top-down approach, right? However, now I see [at this conference] in some areas that the bottom-up approach is also included in transitional justice. This only creates confusion.<sup>749</sup>

The question that follows is – so what if practitioners have distinct understandings of transitional justice? My findings show that the conflicting understandings of TJ negatively impact the establishment of an overarching coordinated approach to TJ interventions, and this serves as a constraint to the agency of domestic actors. The link between malleability of transitional justice and coordination was best summarised by an academic and drafter of the RECOM statute, Midhat Izmirlija. He stated that the existing legal and institutional structures in the country do not purposefully limit any TJ actions such as practising guarantees of non-recurrence because for that to happen, there would need to be a common approach and an accepted understanding of the aims of transitional justice.<sup>750</sup> Yet, unintentionally and indirectly this lack of an accepted, common understanding of TJ has severe practical consequences. The idea is: you cannot coordinate something you cannot define. Overall, another local TJ expert concluded, the realities on the ground are manifested in:

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<sup>747</sup> Interview with Gregorian (n 602).

<sup>748</sup> Interview with Savija-Valha (n 657).

<sup>749</sup> *ibid.*

<sup>750</sup> Interview with Izmirlija (n 604).

a whole context in which there are detached, unrelated, under-financed activities by multiple actors, ... [including] NGOs, the rare ones who seriously and systematically work on TJ issues, those issues are the matter of the past already. Simply, there aren't any means left to enable their work.<sup>751</sup>

It was reported to me during field research that the lack of coordination on TJ matters also hurts the operations of this criminal justice actors, as courts and prosecutors' office struggle to obtain victims' and witnesses continued trust and satisfaction. As a municipal war crimes prosecutor illustrated:

You see, if you do not have one complete system that will not only consist of criminal justice processes but also reparations to victims and agreeing over some basic facts through transitional justice and reconciliation, then a question is posed about how much the very process of criminal justice can contribute to ... victims' satisfaction or the truth about what happened.<sup>752</sup>

This impossibility of coordination on TJ matters also concerns the international actors involved in implementing TJ in BiH in the past 25 years. In the Helsinki Committee for Human Rights RS, I was told straightforwardly that the coordination strategy by international actors is limited if not even non-existent. 'Too much work was invested in criminal justice,' their representatives told me, 'while other three pillars require much more strength, more people and a strategic approach to what needs to be done.'<sup>753</sup> Such work would be political, consisting of mobilizing greater societal forces, 'from the academic community to the media and civil society.' Among the interviewed international actors, many confirmed that an overarching transitional justice intervention has been lacking and that much coordination is absent even on single issues. A key issue is the discrepancy between legal texts setting a specific mandate and actual practical guidance as to what day-to-day activities are and how they fit into the broader picture, similarly to the tension I brought to attention in Sections 5.2.1. and 5.2.2. Richard Monk

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<sup>751</sup> Interview with Alić (n 649).

<sup>752</sup> Interview with Crnkić (n 650).

<sup>753</sup> Interview with Letić (n 598); Interview with Mirjana Cuskić, Helsinki Committee for Human Rights RS (Bijeljina, 12 November 2019).

effectively illustrated this tension in the context of his own work when asked about the mandate and goals of the IPTF:

The principal authority for implementing Annex 11 of the Dayton Agreement was UN Security Council Resolution 1074. However, *a mandate is not a strategy* and despite IPTF being the major component of the mission - and me being the third police commissioner to be appointed - at no time prior to, or after my arrival in-mission, was there clarity about what the aims and objectives of the IPTF were in any measurable sense, and therefore what I should be responsible for achieving.<sup>754</sup>

Consequently, certain international actors identify the need to act beyond treating transitional justice as ‘logically criminal justice’, yet they have spent more than two decades working solely on criminal justice. For the OSCE and TRIAL International, for example, criminal justice and the matters of (criminal) law have been the sole focus on their TJ agenda to date. In the case of the OSCE, their mandate stems from the Dayton Peace Agreement which nevertheless gives the organisation some leverage to mould their activities.<sup>755</sup> In the case of TRIAL, the representative asserted that GNRs are complex, and their organisation deals with one aspect (prohibition of atrocity crimes denial), admitting that other initiatives including education about the conflict and memorialisation are needed. When asked why TRIAL in BiH does not work on these other necessary aspects of GNRs, the representative remarked that they are limited by the central mandate of the headquarters in Geneva and the characteristic of the organisation as ‘a collection of lawyers wanting to work on cases concerning human rights violations, ... fight against impunity, war crimes prosecutions and eventually helping victims realise their rights.’<sup>756</sup> Representatives of both organisations reported realising that such narrow focus is “not enough” but are yet to develop more a comprehensive portfolio that would accommodate these wider interpretations of GNRs.<sup>757</sup> ‘There is no common approach of all actors in terms of transitional

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<sup>754</sup> Interview with Monk (n 602).

<sup>755</sup> The Dayton peace agreement establishes the OSCE’s Mission to BiH as one of the actors responsible for helping secure lasting peace and the competencies have included building ‘sustainable democratic institutions’ and ‘strengthening good governance and human rights principles.’ See OSCE Mission to Bosnia and Herzegovina, *Mandate*, <https://www.osce.org/mission-to-bosnia-and-herzegovina/mandate> accessed 4 June 2021.

<sup>756</sup> Interview with Representative TRIAL International (n 663).

<sup>757</sup> Interview with Smailagić (n 646); Interview with Representative, TRIAL International (n 663).

justice,’ a representative of the OSCE stated.<sup>758</sup> ‘There will always be some disputes but [it would be good to] at least know who does what.’ Another actor working for one of the other international organisations discussed this absence of clear coordination. They claimed that those international actors still operating in BiH tend to work on the same issues; at the time of our interview, a “popular” issue was corruption.<sup>759</sup> ‘For example, there are five big projects on corruption at the moment. There is work for all but no coordination’ which resulted in overlapping activities.

The lack of coordination should not be surprising. After all, in the OHCHR 2009 annual study on transitional justice and human rights, it was admitted that the international community had not yet developed a wide transitional justice approach.<sup>760</sup> More than a decade later, the malleability of transitional justice maintains such lack of coordination with severe ramifications. As a result, many actors work on the same issues with overlapping activities while other activities the actors themselves interpret as GNRs are left unaddressed due to the limitations relating to the actors’ mandate.

#### 6.4. Conclusion

In this chapter, actors’ practices of contextualised GNRs have been analysed in relation to the primarily ideational structure of ‘transitional justice.’ In line with my theoretical underpinnings, my findings in this chapter speak to how the structure of TJ both generates and constrains practitioners’ agency. Transitional justice institutions, organisations and mechanisms and the practitioners who work or have worked for them practice aspects of the contextualised cycle of GNRs primarily through fact-finding and education. I treat these numerous examples of practices as manifestations of *enabled* agency. In several cases, the practice-related agency on GNRs is entirely absent from the interviewees’ reflexive elaborations, which I interpret as examples of *constrained* agency. The structure of transitional justice influences both streams of practice and non-practice in distinct ways. Studying transitional justice in Bosnia and Herzegovina allows this thesis to note both how the understandings of GNRs have developed as well as how putting these

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<sup>758</sup> Interview with Smailagić (n 646).

<sup>759</sup> Interview with Anonymous source (n 724).

<sup>760</sup> UN Human Rights Council, ‘Analytical Study on Human Rights and Transitional Justice.’ (n 201).

contextualised understandings of the content of the norm to practice has been referential to TJ in distinct ways.

To that end, I have shown that the enabled practices mainly tend to be referential to the institutions and values of criminal justice, its didactic and history-making properties and qualities of neutrality and ‘inherent goodness.’ There are three ways in which fact-finding and education for GNRs make such engagements with the objects found within the criminal justice pillar: by utilising court records as authoritative knowledge of the conflict and by producing parallel fact-finding that either builds on the foundations established by courts or directly challenges the ‘truths’ claimed by the ICTY and domestic courts and the supposed claims of their neutrality. Engagements with specific elements of the TJ structure can be selective and, while criminal justice is overwhelmingly accepted as neutral, apolitical and ‘the best available’ source of the knowledge that lies at the centre of the cycle of non-recurrence, truth and reconciliation commissions have been rejected for their claimed truth recovery properties. Therefore, in practising contextualised GNRs, actors can reject some mechanisms of TJ and faithfully observe others. The overall takeaway from this set of research findings, however, is that elements of TJ as an ideational structure enable the practices that seek to establish, transfer or otherwise protect the knowledge of the conflict as GNRs by serving as a factual or legitimating foundation or, exceptionally, a platform that needs to be challenged in uncovering of the full, non-judicial truth.

The second part of this chapter has discussed the cases where practices of contextualised GNRs are lacking and appear constrained by different properties of transitional justice. I do not wish to argue that these properties of transitional justice alone suppress the agency of the otherwise wilful actors because the structure alone could never entirely prevent wilful actors from acting<sup>761</sup> nor do structural constraints function independently from actors’ own reasons and motivation,<sup>762</sup> but they play an unneglectable role. In particular, I have argued that the malleable character of transitional justice allows for the production of multiple, conflicting definitions of TJ in everyday practice. At least three such definitions are noted during my fieldwork: the four-pillar TJ; TJ as ‘logically criminal justice’; and, TJ as a confusing hodgepodge of bottom-up and top-down approaches. The malleability of transitional justice, therefore, works in direct tension

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<sup>761</sup> See Hull and Nelson (n 235).

<sup>762</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 181.

with the preoccupation with many state actors' preference for predictability and certainty as tenants of legalistic transitional justice, as they report that adherence to the goals and objectives set in their mandates leads them to prioritise certain activities over others, preventing them from practicing certain contextualized GNRs they would otherwise have the capacity to exercise. These competing understandings, I have sought to demonstrate in this chapter, are rather incompatible with the flexible norm of GNRs as they obstruct the prospects of running a coordinated action among multiple actors implicated in the cycle of guarantees of non-recurrence. This situation leads to constrained practices even where, as the cases of, for example, the OSCE and TRIAL International show, there is interest and need to do so. In that sense, transitional justice sabotages itself by constraining the exercise of its organising progressive goal of non-recurrence due to its conflicting characteristics. This section concludes the presentation of findings tackling the two key research questions of this thesis. In the following chapter, I bring Chapters 5 and 6 together to discuss what they tell us about domestic, conceptualised applications of flexible guarantees of non-recurrence in and within transitional justice as a structure.

## **CHAPTER 7: DISCUSSION | IDEATIONAL POWER AND THE CORE CONDITIONS OF GNRs**

### **7.1. Introduction**

Empirical findings presented in Chapters 5 and 6 provide responses to the two core research questions of this thesis. They demonstrate how practitioners in Bosnia and Herzegovina conceptualise, and thus contextualise, guarantees of non-recurrence; how they put these contextualised understandings of GNRs to practice; and, finally, how TJ as an ideational structure influences the practices of these contextualised GNRs. This final chapter discusses what these findings jointly tell us about GNRs, transitional justice as an ideational structure and practitioners' agency in this country and how they link to the key assertions established or hypothesised in the first three chapters. I make three principal arguments. Firstly, practitioners are able to re-contextualise the content of the norm of non-recurrence and are seldomly influenced by existing international legal and policy frameworks in how they understand GNRs. Practitioners create their context-specific meanings of GNRs and put some of the ideas to practice. In doing so, practitioners also have the potential to shape the structure of TJ in BiH, how GNRs are positioned within it, and what kinds of responsibility are attached to the exercise of GNRs. Secondly, transitional justice, despite its characteristic of malleability, maintains persuasive power to shape what ideas are even considered by practitioners as GNRs. In particular, the positioning of the 'anti-impunity' norm and its institutions as hierarchically superior influences the ways in which GNRs are contextualised in BiH and much of the practice relating to non-recurrence remains referential to the idea that courts produce 'the knowledge' of the conflict, albeit in distinct, sometimes clashing ways. Thirdly, these contextualised GNRs in BiH remain largely under-realised, particularly by state and international actors. I argue that this lack of applicability of GNRs stemming from the specific structure/agency interplay is conditioned by the policy choices made during the 'transitional moment' in BiH as well as TJ's desire to remain flexible as well as predictable which obstructs holistic approaches to transitional justice matters. The cycle of GNRs in BiH is, therefore, largely not realised in practice, and only some elements of the contextualised GNRs have been progressively developed.

The chapter proceeds as follows. Sections 7.2. and 7.3. provide an opportunity for understanding the structure/agency interplay and suggest that many practitioners have power through ideas while transitional justice rather exhibits power in ideas, employing Carstensen and Schmidt's work on ideational power<sup>763</sup> (Section 3.2.) as an avenue through which the findings can be understood. In these sections, I assert that both structural properties and practitioners exhibit certain forms of power. To that end, I discuss the extent to which practitioners contextualise the norm of non-recurrence content-wise and how transitional justice, and the particular set of ideas attached to the 'anti-impunity' norm shape or even restrict how GNRs are understood and practised domestically. Despite and alongside TJ's malleability, certain legal ideas persist, shaping the realm of 'possible' concepts and actions when it comes to GNRs. Actors create some new ideas about GNRs with the potential to change the understandings of the norm in broader TJ, while at the same time perpetuating the dominance of some of the structure's core ideas and norms. This is how TJ as a structure and practitioners' agency are mutually constitutive. Section 7.4. concern the realisation of these contextualised GNRs. It discusses the identified tension between TJ as legalistic and malleable and the conflictual tendency for flexibility and predictability and explains how this tension in fact influences the overall lack of implementation and realisation of GNRs, particularly by state and international actors. In sub-sections 7.4.1. and 7.4.2., I look for a bigger picture and claim that that the policy choices undertook during the 'transitional moment' in BiH and the impossibility of holistically tackling the progressive goals of transitional justice condition this non-realisation of GNRs in BiH.

## 7.2. Practitioners and their power through ideas

The preceding empirical chapters show that the researched TJ actors exhibit agency that could be described as having power *through* ideas, that is the capacity to influence the contextualisation of GNRs in BiH as different from international legal standards. In the previous two chapters, I have shown that practitioners in BiH by and large accepted GNRs as a norm applicable in their context and they subsequently contextualise both the content of the norm and its characteristics. Some of these ideas around truth recovery, education and prohibition of

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<sup>763</sup> Carstensen and Schmidt (n 238).

atrocities crimes denial as integral components of contextualised GNRs are also put to practice. In line with structuration theory, most researched TJ actors are thus able to go beyond international legal frameworks as well as TJ policy and “act otherwise” with an inspiration to “make a difference” and change a particular state of affairs seen as detrimental to non-recurrence.<sup>764</sup> The transformation of the norm of non-recurrence in and by transitional justice, which suggested GNRs are not exceptional but normative in TJ (Chapter 2), has been accepted by these practitioners. Guarantees of non-recurrence, as a norm requiring positive action, have been adopted over time in the sphere of TJ practice in BiH matching the developments in international human rights and TJ advocacy. As demonstrated in the case of the ICMP, those working on transitional justice issues in BiH in the late 1990s and early 2000s, were not necessarily actively using the language or characteristics of GNRs in their work, and the need to engage with the ideas of GNRs, as they are found in transitional justice, developed later on.

In this thesis, agency has been treated as intervening in world affairs to produce outcomes that could disturb the *status quo* for the sake of non-recurrence, and most, but not all researched practitioners have been able to do so with different levels of impact.<sup>765</sup> Many have been able to go beyond the thin theorising of GNRs in transitional justice to develop what they deem to be most appropriate actions for the purposes of non-recurrence and their ideas resonate with many others working in this sector. Conceptually, the content of GNRs is expanded beyond international legal frameworks and a mere equation of GNRs to measures of legal and institutional reform. Despite the majority of measures enshrined in the Basic Principles as GNRs being already implemented in BiH, practitioners detect further actions necessary for non-recurrence and only a handful of actors directly involved in the processes of institutional reform see the existing reforms as sufficient guarantees of non-recurrence. Throughout Chapter 5, I offered multiple examples showing that treating GNRs as measures of institutional reform does not reflect the realities of non-recurrence in BiH. Many practitioners, particularly among the non-governmental sector, utilise the ideas and the language of the Basic Principles but they do so to point to the flaws of the existing institutional reform that harm the values underpinning GNRs such as civic trust. In other instances, international legal frameworks as Orentlicher’s Principles

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<sup>764</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 14.

<sup>765</sup> Giddens, *Central Problems in Social Theory. Action, Structure and Contradiction in Social Analysis* (n 227).

on Combating Impunity are utilised as a guideline and the practitioners promote different forms of institutional reform or altogether different actions understood as GNRs.

These (re-)contextualised understandings and applications of the norm of non-recurrence are enabled by the normative flexibility of GNRs that transitional justice brings into the picture. Many interviewed practitioners, particularly among the non-governmental sector, are well-aware of the perception that GNRs are ‘under-theorised’ and generally unexplored in TJ practice. Unlike international law, transitional justice research and policy have kept GNRs malleable yet normative enough, somewhere between measures of institutional reform and an almost magical yet unexplored ‘bridge’ between different TJ mechanisms. As explored in Chapter 3, GNRs in TJ research and policy emerge as simultaneously an objective, a normative requirement if not even an expectation of TJ pillars, and a pillar. In my review of the scholarship on GNRs, I identified the seemingly irreconcilable conceptual tension over the characteristics of GNRs stemming from two sets of sources: IHRL that understands GNRs as measures of institutional reform and the Special Rapporteur who argues for normative expansion of GNRs to also include interventions at the level of civil society and personal dispositions. The previous two chapters demonstrate that the practitioners in BiH, through their everyday understandings and practices of GNRs, in fact support the expanded understanding of GNRs proposed by the Special Rapporteur.<sup>766</sup> More precisely, my empirical findings on contextualised GNRs generally show an understanding that GNRs are indeed a *function*, a process cutting across not only different mechanisms and practices of transitional justice but also across different areas of the society. Yet, the case is not that the Special Rapporteur’s reports influence domestic practice but rather that they reflect it. Consequently, my research builds on the Special Rapporteur’s proposition that GNRs ought to be understood as a function and suggests that GNRs do not operate linearly or even in a straightforward sequence but rather in a continuously re-constituted cycle that operates in the long-term and in engagement with all different types of GNRs as well as the elements of TJ structure, both its ideas and how they are materialised over time.

While immediate GNRs reflect the state-oriented conceptualisation of the guarantees in IHRL, gradual GNRs demonstrate the need to understand practices of non-recurrence as

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<sup>766</sup> ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence’ (n 86).

intertwined, cyclical and involving a range of state and non-state actors. Furthermore, such contextualised GNRs challenge the structure-oriented approaches in TJ research whereby non-recurrence is argued to be an objective of each individual pillar of transitional justice and the objects enshrined in them. As reviewed in Chapter 3, such structure-oriented approaches to the research on non-recurrence focus on the object (e.g., by asking how criminal trials contribute to non-recurrence) rather than on non-recurrence itself and, as such, they fail to connect different aspects of non-recurrence across and beyond TJ pillars in a sequenced and non-linear manner. What my structure *and* agency-oriented approach signals, however, is that GNRs not only cannot be contained in a singular pillar of transitional justice but also that they blur the boundaries between the five set pillars. To illustrate, prohibition of atrocity crimes denial, trivialisation and minimisation is a gradual guarantee of non-recurrence that simultaneously enshrines legal reform, education and truth recovery as equally necessary and intersected processes.

It follows that in contextualising GNRs, practitioners also shape the structure of transitional justice, the position of GNRs in it and the ideas attached to it. In particular, these contextualised understandings of the norm challenge the view that the ‘Never Again’ promise can be fulfilled solely through law and its institutions, as it came to be believed with the globalisation and normalisation of TJ. In that sense, GNRs in domestic contexts are not only shaped by the ideas transitional justice as a structure promotes but also by practitioners’ own comprehension of the reality and complexity of non-recurrence. Domestic contextualisation of GNRs in BiH goes against the drawing of causal links between individual mechanisms of TJ to the overall objective of non-recurrence (Chapter 3) and points the interdependence between different processes of TJ that constitute GNRs. It highlights the role not only of institutions, laws and governments in ensuring non-recurrence but also teachers, activists, families and ordinary citizens and all at intersections of these roles who construct TJ practices. By insisting on and advocating for processes of education as a guarantee of non-recurrence, the researched practitioners have the potential to change how transitional justice is done domestically and in the long run, seeing how education often escapes the structure-oriented narratives of non-recurrence.

This assertion leads me to a discussion of the responsibility for guaranteeing non-recurrence. In short, my research shows that domestically, GNRs continue their curious journey of stretching the notion of responsibility and obligation to ensure non-recurrence, building on the

foundations I established in Chapter 2. GNRs need the state to be fully realised but cannot be solely its responsibility. Here again, practitioners' understanding of GNRs builds upon both the IHRL and the work of the Special Rapporteur who perceives GNRs as a matter of policymaking that triggers state's responsibility to undertake action through its institutions. Indeed, the case of BiH suggests that political actors enshrining the state institutions (at all levels) have the obligation to ensure non-recurrence and that such obligation mainly requires the state to create adequate political conditions for other contextualised GNRs such as educational reform or a national truth recovery program. These ideas somewhat reflect the understanding of state responsibility to provide GNRs in IHRL whereby the core idea is that, where applicable, the state would undertake all or a combination of the measures found in Article 23 of the Basic Principles (see Section 2.3.1.). Domestic conceptualisations of GNRs in BiH take away the "where applicable" part of the clause and instead show advocacy directed towards the state as an inseparable stakeholder in the cycle of GNRs. Furthermore, such conceptualisations add two important sets of actors seen as responsible for GNRs: the international community and the society as a whole. The responsibility trusted in both sets of actors are of course moral and not legal. Quite a few of the practitioners stressed the role of the international community to promote GNRs better than and different from those enshrined in international law when such opportunities arise and support the expanded understanding of GNRs as it currently exists in BiH. Several others talked about the role of teachers, parents, and such role-models in helping integrate the elements of contextualised GNRs in all spheres of the society and provide future generations with tools necessary to resist the drivers of recurrent violence such as ethnonationalism. Thus, the long-term process of guaranteeing non-recurrence, the case of BiH shows, resists the structure by asserting that non-recurrence must be more than the implementation of a set of measures by the state and its institutions but reasserts the notion, coming from international law and the Special Rapporteur's intervention, that the primary and necessary responsibility to ensure non-recurrence must rest on the state. In doing so, practitioners also stress the importance of responsibility, legal or otherwise moral, of *actors* (state, international community, individuals) that is often absent from the scholarly discussions that conceptualise non-recurrence as merely a normative expectation of mechanisms of transitional justice (as per Sections 3.3.1. – 3.3.5.).

So far in this section, I have set out to argue that TJ actors in BiH contextualise the content and characteristics of and the responsibility for GNRs in ways that either challenge or complement the structure. While international law has not successfully managed to capture people's understandings of how ensuring non-recurrence of violations should be put to practice, it does demonstrate the persuasive power of law in TJ whereby practitioners express the need to align their work with these decontextualised international standards on GNRs. Such the need is particularly demonstrated on TJ bodies' official website where international legal frameworks are referenced for reasons such as funding and coordination. Yet, even in these cases, many actors, especially in the civil society sector, succeed at promoting their fact-finding or educational activities as contributing to non-recurrence, as it is overwhelmingly understood in BiH. The malleability of not only transitional justice but GNRs as well allows distinct actors to promote the idea of non-recurrence differently in their specific context.<sup>767</sup> I mentioned in Chapter 6 that certain actors tend to adhere to the ICTJ's working definitions of TJ, but later encounter certain dilemmas about what constitutes TJ in practice. However, GNRs are kept flexible enough even at the ICTJ, where they are not a standalone category, but it is rather that institutional reform is positioned as TJ's fourth pillar.<sup>768</sup> In a recent publication, I show that the ICTJ simultaneously refers to GNRs as measures of institutional reform and advocates for conceptualisations beyond institutional reform such as those presented by the Special Rapporteur.<sup>769</sup> In that sense, international transitional justice advocacy, while it rests on a set of key legal documents and frameworks on the matter, allows local practitioners to understand GNRs as they see fit and, in BiH, they seemingly succeed in doing so.

Why is 'the knowledge' about the conflict at the core of the cycle of GNRs in Bosnia and Herzegovina? Why do so many actors mobilise around the idea that finding, transferring and protecting this knowledge is the key? In the past two chapters, I posited that the practitioners tend to reflect on the lessons learned from the past and observe the transitional period after WWII (from war to peace, from monarchy to socialism) as a time where truth recovery

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<sup>767</sup> Rowen, *Searching for Truth in the Transitional Justice Movement* (n 51).

<sup>768</sup> International Center for Transitional Justice, *What is Transitional Justice?*, <https://www.ictj.org/about/transitional-justice> accessed 24 May 2021.

<sup>769</sup> Maja Davidovic, 'The Law of "Never Again": Transitional Justice and the Transformation of the Norm of Non-Recurrence' (2021) *International Journal of Transitional Justice* 15(2), 386.

initiatives were particularly lacking. In that regard, this specific understanding of GNRs is in many ways unprecedented in the limited literature on guarantees of non-recurrence. Yet, in the literature on truth recovery in TJ, the links between truth and ‘Never Again’ have been made repeatedly and the conceptualisation of GNRs in BiH rests on some of this pillar’s tenets. The literature review in Chapter 3 discussed a vast body of literature where ‘the truth’ is claimed to have a relationship to non-recurrence. At the time of the research, BiH society had witnessed over 25 years of multiple fragmented, ethnic-based truths, and the practitioners advocate for the creation of objective ‘knowledge’ over which the multiple groups in the society would be able to reach consensus. In doing so, many practitioners call for the creation of a single authoritative narrative that could be used in history books for all ethnic groups, a view that had previously been critiqued in TJ literature.<sup>770</sup>

However, while establishment of a common, seemingly objective truth has a glorified position in contextualised GNRs, most practitioners hold that such truth is not to be achieved through TJ’s most famous model – a truth and reconciliation commission. The idea of a TRC has been widely rejected by a variety of actors, some of whom conduct their own fact-finding efforts and/or otherwise advocate for the establishment of a national fact-finding body. While for some practitioners the truth causally leads to non-recurrence, it does not do so in a direct way but only asserts influence through education. To have an impact on non-recurrence, it is argued, the established truth must be transferred to all spheres of the society through formal and informal education and furthermore protected through legislation and/or gradual change in public consciousness about the factual circumstances of the conflict. Understanding GNRs as educational measures is found in the work of the Special Rapporteur (Section 2.4.3.) but is in this case formed out of the lived experiences of both divisive history education as well as education that is silent about past violence and injustice, and their root causes. Therefore, while this contextualised understanding of GNRs reflects much of the literature on truth recovery and non-recurrence and education and non-recurrence, the causal links established in such literature are often oversimplified. No single mechanism or even a single pillar of TJ could single-handedly be sufficient for non-recurrence. To quote Villa-Vicencio and Verwoerd, a former director of and a researcher at the South African TRC respectively argued in the context of South Africa, ‘[t]ruth

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<sup>770</sup> Maier (n 303).

is truth. It is not, in and of itself, social reform, institutional transformation, or political reconciliation. It all depends on what we do with “the truth.”<sup>771</sup>

Content-wise, the norm of non-recurrence is re-contextualised in the practitioners’ circles in Bosnia and Herzegovina, given context-specific measures again, similarly to how it was understood in Chile, for example, before the Basic Principles nearly equated GNRs with ‘institutional reform’ (Section 2.4.1.). Different aspects of GNRs, connected in a cycle of GNRs in BiH in this thesis, do not resemble any exportable, ready-made policy models or proposals by international actors, and are only occasionally explicitly influenced by international legal frameworks.<sup>772</sup> Instead, many actors have power through ideas to conceptualise GNRs based on the lived experiences, identified needs and the history of violence unique to the BiH society. The flexibility of the norm in TJ as well as TJ’s overall malleability create space for TJ actors to promote such contextualised understandings of what actions GNRs require and put some of them to practice, with the capacity to alter the structure of transitional justice in Bosnia and Herzegovina. However, this thesis’ story of guarantees of non-recurrence in Bosnia and Herzegovina does not end here. Contrary to Roht-Arriaza’s concern that the flexibility of the norm of non-recurrence and malleability of TJ could allow us to rebrand anything as “GNRs,”<sup>773</sup> domestic adaptations of GNRs in BiH show that practitioners’ agency is mighty but constrained. Just as TJ actors assert multiple forms of agency in order to contextualise GNRs and apply them in BiH, transitional justice structure also exerts influence on how GNRs are understood and practised. In this agency-structure interplay, actors resist some ideas attached to transitional justice, such as e.g., the validity of TRCs as a mechanism of truth recovery, yet overwhelmingly accept others, most notably the assertion that criminal trials can write history. In that sense, transitional justice preserves certain power in ideas that shapes what ideas are even considered as domestic applications of GNRs in the first place. I discuss this in detail in the following section.

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<sup>771</sup> Villa-Vicencio and Verwoerd (n 306) 291.

<sup>772</sup> See Rowen who argues domestic actors mobilise on truth commissions based on their own aspirations but, in doing so, they draw from and are inspired by foreign models and transnational actors. Rowen, *Searching for Truth in the Transitional Justice Movement* (n 51).

<sup>773</sup> Roht-Arriaza, ‘Introductory Remarks by Naomi Roht-Arriaza’ (n 354).

### 7.3. Transitional justice and its power in ideas

In this thesis, I have treated transitional justice as a set of prescriptive norms, a global force prescribing the appropriate course of action in ‘dealing’ with the past and evaluating any resulting actions for their appropriateness. In addition, as established throughout Chapters 1 and 3, transitional justice owes its success to the fact that it has been compressed into a global model of practice that carries a set of progressive goals and ideas attached to them from one context to another. As a structure, transitional justice exhibits power *in* ideas because it constitutes a system of knowledge, discursive practice and eventually specific institutions as a result of which court records in particular enjoy the authority of the knowledge of the conflict, often at the expense of other sources of knowledge.<sup>774</sup> As Carstensen and Schmidt explain, having power in ideas means that certain ideas, in this case, the notion that courts can write and teach history, become so integrated into the society that it is almost forgotten that they were once just that – emerging ideas.<sup>775</sup> When transitional justice helped transform guarantees of non-recurrence in IHRL (as per Chapter 2), it de-contextualised a set of measures relevant to specific transitional contexts such as Chile and aided the birth of a now global idea that legal and institutional reform equal guarantees of non-recurrence. When distinct measures of institutional reform were being implemented in BiH, this idea had not yet become a (human rights) norm. Still, even if any causal links between, for instance, re-certification of the police and non-recurrence are made after the fact, they continue to live in the perceptions of the interviewed international actors participating in those reforms as appropriate guarantees of non-recurrence. This suggests that the international policy level, TJ transformation intervention with regards to GNRs can lead to the identification of GNRs as ‘institutional reform’, broadly defined. Yet, even such an intervention as described in Chapter 2, was selective and it prioritised certain ideas over others. More precisely, in addition to the recommended measures of legal and institutional reform, the Chilean TRC also recommended that these are not sufficient on their own but must be included in formal education and further symbolic measures and attainment of truth and justice.<sup>776</sup> Yet, these other recommendations, while initially present in the tensions between ‘satisfaction’ and ‘non-

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<sup>774</sup> Carstensen and Schmidt (n 238) 329.

<sup>775</sup> *ibid.*

<sup>776</sup> Davidovic (n 769).

recurrence' that both van Boven and Bassiouni played with, were not replicated in the final Basic Principles nor fully included in the paradigmatic TJ research that preoccupied itself with state structures and laws. Now that these ideas of knowledge transfer and education, in particular history education, are showing to be of utmost relevance and importance in the re-contextualised GNRs, they continue to be subject to further ideational influence by transitional justice.

The manifestation of GNRs practice in BiH, past two chapters have shown, are reflective on 'anti-impunity' as a norm of superior status and the idea that criminal courts produce authoritative knowledge about the conflict. Transitional justice as an ideational structure, therefore, is influential in the constitution of meaning and defining what practices of GNRs are in the first place.<sup>777</sup> As a collection of norms and ideas, transitional justice offers practitioners 'a repertoire of actions' to address all kinds of situations in and post-transition.<sup>778</sup> Yet, only some decades ago, this now seemingly ubiquitous claim that courts make history was only an idea and a very controversial one. Its rise to fame was quick. The UNSC resolution that established the ICTY in 1993 states that such a decision was made 'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law' and in belief that the violations would be 'halted and effectively redressed' through such a tribunal.<sup>779</sup> The statute of the ICTY itself, adopted through the same resolution, makes no mention of history-making, truth recovery or otherwise education properties. However, already in 1994, before the Srebrenica genocide was committed and the conflict in BiH ended, the then-US Ambassador to the UN, Madeleine Albright had cautioned the emerging critics of the ICTY – founded in 1993 - that 'establishing the truth about what happened in Bosnia', which this tribunal was set to do, 'is essential to – not an obstacle to – national reconciliation.'<sup>780</sup> On 24 November 1995, upon the signing of the Dayton Peace Agreement, the President and the Prosecutor of the ICTY issued a joint statement.<sup>781</sup> In it, they made the symbolic ideational connections between criminal

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<sup>777</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 20.

<sup>778</sup> Nicolas Lamp, 'The "practice Turn" in International Law: Insights from the Theory of Structuration' in Moshe Hirsch and Andrew Lang (eds), *Research handbook on the sociology of international law* (Edward Elgar Publishing 2020) 277.

<sup>779</sup> UN Security Council Resolution 827 (25 May 1993) UN Doc S/RES/827, Preamble and para 2.

<sup>780</sup> Press release by Albright made on 18 April 1994, cited in Bronwyn Anne Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 *Human Rights Quarterly* 95, 96.

<sup>781</sup> International Criminal Tribunal for the former Yugoslavia, 'The Tribunal welcomes the parties' commitment to justice. Joint statement by the President and the Prosecutor' CC/PIO/027-E (24 November 1995, The Hague)

prosecutions and non-recurrence. They repeated the claim that justice is “indispensable” for national reconciliation and furthermore stated that justice ‘breaks the cycle of violence, hatred and extra-judicial retribution’ due to which ‘Peace and Justice go hand-in-hand.’<sup>782</sup> Additionally, as stated in Chapter 5, the promises of ‘Never Again’ have been since then made by the ICTY judges even in the courtroom. These claims made in favour of the ICTY (and the International Criminal Tribunal for Rwanda<sup>783</sup>) in the mid-1990s enshrined several new, rather contentious ideas: one, that courts can write the truth about conflict and two, that criminal justice leads to reconciliation. In the field-defining UN Secretary-General Report on the rule of law and TJ, discussed in Chapter 2, criminal tribunals were positioned as ‘helping establish a historical record,’ although this was to be done in cooperation with other TJ mechanisms to compensate for the limitations of criminal justice.<sup>784</sup> The literature on criminal prosecutions and amnesties, as explained in Chapter 3, reflected these assertions and multiple arguments were made for courts as history-making and educational establishments.

The treatment of the knowledge produced by transitional justice’s star mechanisms, criminal trials and truth commissions, as authoritative for the general public has had mixed results in the cases preceding the BiH conflict. Leebaw provides an overview of this, explaining how, for instance, the work of the Nuremberg trials was not doubted by key political parties, while the Argentine truth commission sold as many as 200,000 copies of its final report on a weekly basis.<sup>785</sup> On the other hand, in cases such as El Salvador, the work of the truth commission was accused of political bias by none other than the Supreme Court of the country.<sup>786</sup> The case of Bosnia and Herzegovina demonstrates both occurrences. In an environment specific to Bosnia and Herzegovina, where there had been no state-wide fact-finding bodies or TRCs, and where the country’s accession to the EU had been conditional on its

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<https://www.icty.org/en/press/tribunal-welcomes-parties-commitment-justice-joint-statement-president-and-prosecutor> accessed 8 June 2021.

<sup>782</sup> *ibid.*

<sup>783</sup> The UNSC Resolution 955 establishing the *ad hoc* tribunal for Rwanda expressed conviction that criminal prosecutions ‘would contribute to the process of national reconciliation.’ See UN Security Council Resolution 955 (8 November 1994) UN Doc S/RES/955.

<sup>784</sup> Report of the Secretary-General (n 37).

<sup>785</sup> Leebaw (n 780) 108.

<sup>786</sup> *ibid.*

cooperation with the ICTY,<sup>787</sup> the truth-making and didactic attributes of criminal justice are largely embraced by the practitioners in all sectors. In the context of GNRs therefore, the institutionalised forms of anti-impunity are primarily valued for their truth recovery (and not only justice) potential and much more so than the prospect of a TRC. Criminal law and its institutions are seen as objective, or at least more objective than the alternatives, a civilisational way of addressing the grievances harmful for non-recurrence. The ICTY in particular is seen as more credible than domestic institutions. Not all TJ actors negate the political power of the ICTY but see it as a more suitable option when compared to domestic politics that is captured by ethnonationalism.

Institutions such as courts, and all the norms and ideas enshrined in them, are among the more enduring elements of social life and therefore transitional justice.<sup>788</sup> A thesis in international criminal law or otherwise written by an international lawyer might not find this prescription problematic. The dominance of the objects within the criminal justice pillar in shaping GNRs understandings and practices is after all an example of how successful the criminal turn in international human rights advocacy has been.<sup>789</sup> The anti-impunity turn has also been the most effective way to maintain the idea that law and its institutions lead to peace, justice, reconciliation or whatever other unquantifiable social phenomena. However, with its sociological approach towards law, this thesis understands well that all legal tools including courts and criminal prosecutions are forms of knowledge infused with the power to, among other, maintain the influence of both ideational and material structure such as TJ, giving it existence over time and space. Critics such as Janine Clark have previously argued that the initial idea that the ICTY establishes the truth and thus leads to reconciliation offered an oversimplified notion of the truth due to its limited capacity to hear cases and other procedural reasons such as resorting to plea bargains.<sup>790</sup> As Teitel argues, when the ICTY presented itself as ‘advancing the aim of “deterrence” of prospective humanitarian tragedies’ what was new to this assertion was ‘the notion that law itself can define what constitutes peace and stability internationally,’ and

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<sup>787</sup> For further information on this conditionality, see, Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (n 63).

<sup>788</sup> See Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 24.

<sup>789</sup> Engle (n 285).

<sup>790</sup> Janine Natalya Clark, ‘Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship’ (2011) 11 *International Criminal Law Review* 241.

further that ‘it could somehow displace politics to resolve international conflict.’<sup>791</sup> But more so, because criminal justice is heightened to the ultimate level of purity and formality in TJ, the power dynamics it creates is often neglected, which allows it to prescribe what the ‘good’ acceptable truths are in a society. Criminal justice in that sense is promoted for both helping make sense of complex social phenomena as well as managing them.<sup>792</sup> In the outcome-oriented stream of TJ, the proposed indicators of the success of criminal justice interventions, such as its ability to issue judgments that construct historical records, are forms of power over the knowledge that influences political decision-making, public perceptions of justice and violence, and ultimately, as I have showed, how GNRs are contextualised.

Coated in the attributes of neutrality, objectivity, science, and civilisation, the institutions and norms of criminal justice are coercive, generating as well as constraining the agency through which GNRs are conceptualised and practised. The documented practices seeking to realise different aspects of the cycle of GNRs thus simultaneously allow for the continuation of hierarchical superiority of the anti-impunity norm and its attributes, prolonging the idea that the model is generalisable and applicable to multiple contexts.<sup>793</sup> As Chapter 6 showed, court records remain treated as an authoritative body of knowledge to which most practitioners refer to in their fact-finding and education practices; most accept it, some build on it, and very few challenge it. Although acting in distinct ways, these actors keep the idea of courts writing history alive and undoubtedly tied to how people in BiH look at the conflict and its potential recurrence. Chapter 6 showed how the agency to reject the idea that courts can write the truth is organised on ethnic bases and produces parallel fact-finding for the sake of non-recurrence that is overall ill-received by other actors as revisionism. The importance of this phenomenon is twofold. Firstly, it demonstrates that transitional justice does not transcend domestic political wrangling and ethnic divisions that come with it,<sup>794</sup> but instead directly aids the perpetuation of some of the interethnic grievances. Secondly, even the agency to revise is triggered by certain ideas within the TJ structure, and the resulting publications and educational practices are a direct reaction to

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<sup>791</sup> Teitel, ‘Humanity’s Law: Rule of Law for the New Global Politics’ (n 282) 385.

<sup>792</sup> Kevin E Davis, Benedict Kingsbury and Sally Engle Merry, ‘Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance’ in Kevin E Davis, Benedict Kingsbury and Sally Engle Merry (eds), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (Cambridge University Press 2015) 2.

<sup>793</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 20–21.

<sup>794</sup> See, for example, Teitel, *Transitional Justice* (n 189).

the superiority of the judicially established facts as ‘the knowledge’ of the conflict. In other words, revisionist fact-finding is on the rise in RS precisely out of the widespread treatment of the ICTY records as history.

On the opposite side of the spectrum, we find practitioners who treat the ICTY as apolitical and therefore superior to the messy ethnonationalist politics on the local level, capable of unearthing the objective ‘knowledge’ necessary for GNRs. For them, international law transcends or ought to transcend domestic politics.<sup>795</sup> The middle ground includes actors who integrate judicially established facts as a source of knowledge about the conflict but seek to tell and/or educate about the stories not yet told to courts by numerous witnesses, victims, survivors, perpetrators and all others at intersections of these roles. For some of them, the ICTY legitimacy and wealth of resources enable the actors to intervene in community spaces in which atrocities happened but were left unaddressed by the ICTY and domestic courts for temporal or otherwise procedural limitations.

Due to these same limitations, the judgments and court records are inherently contested, across contexts. This is particularly visible in the fact that the adherence to a single idea can be selective. As shown in Chapter 6, court established facts can generally be interpreted as ‘the knowledge’ of the conflict except when it comes to the qualification of crimes where certain actors insist on qualifying numerous cases or even the entire conflict as ‘genocide.’ Yet, even these distinct, novel categorisations are referential to court judgments as authoritative truth or even representative of social reality. With the very final judgments being issued by the IRMCT in 2021, much contestation remains about the tribunals qualification of ‘genocide’ being limited to a single area in and around Srebrenica. For example, in a recent news article, Borger, of *The Guardian*, is quoted to have said that not including ‘the war crimes in [other] towns in Mladić’s genocide conviction could be emotionally scarring for those whose experiences are very similar to what happened in Srebrenica.’<sup>796</sup> It is claimed that this is due to the powerful emotive force the term genocide carries with itself. What is often absent from these discussions is a reminder about the legal functions of the court. The Mladić case is a case adjudicating on a single person’s

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<sup>795</sup> *ibid.*

<sup>796</sup> Aleksandar Brezar, ‘Not bad enough for genocide? The Bosnian towns cheated by Mladić verdict’ (*Euronews*, 11 June 2021) <https://www.euronews.com/amp/2021/06/11/not-bad-enough-for-genocide-the-bosnian-towns-feeling-cheated-by-mladic-verdict> accessed 15 June 2021.

criminal accountability for ordering, organising, aiding, abetting or otherwise committing the said crimes. As per courts' operations in general, not qualifying a case as legally 'genocide' simply states that there is no sufficient evidence to do so in relation to the specific accused individual. To be more precise, just because Ratko Mladić was not convicted of genocide in the area of Brčko, for example, should not be interpreted as a definite claim that in fact genocidal agendas were not pursued in that area; yet it is. In fact, part of the reasoning in the Jelisić case, which concern the crimes committed in the Brčko area, included not only if the said crimes constitute genocide but also if "low-ranking perpetrators" such as Jelisić have the capacity to perpetrate a complex crime such as genocide and, if yes, whether they ought to be prosecuted for it, to which the ruling was eventually in the negative.<sup>797</sup> Still, 'reducing genocide to law'<sup>798</sup> and treating the ICTY as a history making institution that causes disagreement about the ICTY's seemingly conclusive facts does exactly that, leaving non-recurrence on rather shaky grounds. These acts of acceptance and rejection of the history-making potential of courts can change over time and depending on desirable political agenda. The word 'genocide' itself is used towards political gains in a variety of context to, e.g., enlarge one's victimhood as well as justify aggressive interventions as retaliation for the 'crime of crimes.'<sup>799</sup> Yet, what pertains, is that through these albeit distinct engagements with the educational and history-making properties of the anti-impunity norm and its adjacent institutions, practitioners both produce and reproduce the structure of transitional justice as it exists in Bosnia and Herzegovina. The normative superiority of the institutions and values of the criminal justice pillar in transitional justice continues through these actors' knowledgeable, situated practices.

It follows that TJ as an ideational structure and the power in ideas it exhibits are both enabling and constraining, but that neither operates in isolation from actors' own motives, reasons, intentions, and actions. The ideas of criminal justice's superiority among TJ pillars and its capacity to produce historical records are most enabling for the actors found 'in the middle' between those who reject it and adhere to it unconditionally. This is because these ideas give such actors a foundation to build on and attach their agency to, providing legitimacy to their

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<sup>797</sup> Payam Akhavan, *Reducing Genocide to Law. Definition, Meaning, and the Ultimate Crime* (Cambridge University Press 2012) 154.

<sup>798</sup> *ibid* 10.

<sup>799</sup> *ibid* 8.

novel fact-finding and educational activities. These ideas are also enabling for the practitioners who seek to challenge this dominance of criminal justice because, without them, there would be no reasons for fact-finding practices of such kind, which would in turn change the contextualised understandings of what GNRs require. Then, perhaps better said, in such cases, certain aspects of TJ as a structure are *triggering* certain acts done with the thought of non-recurrence, although the validity of such acts is questioned in certain circles. Finally, the structure is constraining because it influences which ideas are even considered in domestic conceptualisations of GNRs and any subsequent practices.<sup>800</sup> Even though these contextualised understandings tend to stem out the lessons learned from the past, the idea that authoritative fact-finding ought to have been conducted for the WWII atrocities is an idea influenced by the birth of TJ and its promotion of the ‘right to truth.’ In the absence of an overarching, non-judicial fact-finding platform, the ICTY and, to a lesser degree, domestic courts become institutions of history-writing without which the cycle of GNRs cannot be practised. In a way, transitional justice can constrain agency by limiting which options are available to actors practising distinct elements of GNRs in Bosnia and Herzegovina.<sup>801</sup> In addition, although the establishment of any authoritative body of knowledge raises questions of which actors inhabit it, why they are more trustworthy than others, and how they will uncover the missing information, all of which are inevitably political decisions,<sup>802</sup> such questions are rarely asked by BiH practitioners. Such is the persuasive power of paradigmatic transitional justice, deeply rooted in legalism and carrying with itself ‘anti-impunity’, with its truth-making and didactic attributes, as a hierarchically superior norm in the contested normative space of ‘dealing’ with the past.

#### 7.4. Legalism, malleability, and non-realisation of contextualised GNRs

If one is to observe the realisation of the contextualised GNRs in BiH, they would be quick to see that it has not been a success story. At the domestic policy level, the transitional justice strategy and action plan that would enforce some of the contextualised GNRs (Section

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<sup>800</sup> Although it is important to note that is not constraining by way of compulsions, as natural forces would be. See Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (n 229) 181.

<sup>801</sup> See *ibid* 176–9.

<sup>802</sup> See Berit de Guevara and Roland Kostić, ‘Knowledge Production in/about Conflict and Intervention: Finding “Facts”, Telling “Truth”’ (2017) 11 *Journal of Intervention and Statebuilding* 1.

4.3.), most notably non-judicial state-wide truth recovery, has proven difficult to resurrect. During my stay in BiH, there were rumours about the strategy being restarted by the Ministry of Justice and MHRR and some behind-closed-doors plans by a handful of relevant TJ actors. The interviewed representative of the Ministry of Justice confirmed this, stating that the European Commission had ‘highlighted restarting the question of transitional justice as one of its priorities’ for BiH and that since then, the representatives of the two ministries have tried to restart the process and the draft strategy.<sup>803</sup> Yet, in the time that has passed since the interview took place in January 2020, no news about the renewed initiative has been made public. Outside this coordinated strategy, as far as truth recovery and education are concerned, no coordinated state-wide initiatives have been in the works as of April 2021.

The only aspect of the cycle of GNRs that has been widely discussed in public debates has been prohibiting atrocity crimes denial, trivialisation and minimisation. The draft amendment to the state Criminal Code, which had been in circulation since 2011, ordering financial penalties and criminalisation of the acts of denial repeatedly failed to gain sufficient support in the Parliament. There was little hope for the realisation of the desired legal improvement at the time of my fieldwork and eventually, the draft law was voted against again in April 2021.<sup>804</sup> Concerned citizens’ groups turned to the OHR to enforce legislation criminalising genocide denial. The then-High Representative Valentin Inzko responded by urging the authorities to amend the Criminal Code to this end and promising to enforce the legislation himself through his legislative powers.<sup>805</sup> At the time of my visit to BiH, many of my interlocutors doubted that the High Representative would follow through with his promises, seeing how he had not used his powers to impose decisions since 2014. Yet, Inzko surprised the BiH public when on the 23<sup>rd</sup> July 2021 he issued a decision enacting the Law on Amendment to the Criminal Code of BiH which, among others, criminalises public condonement, denial, gross trivialisation or attempts at justification of genocide, crimes against humanity or war crimes.<sup>806</sup> As expected, this Law is also

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<sup>803</sup> Interview with Džihanović (n 627).

<sup>804</sup> Nežra Džaferagić, 'BiH pod pritiskom da usvoji zakon o poricanju genocida u Srebrenici' (*BIRN*, 16 April 2021) <https://balkaninsight.com/2021/04/16/bih-pod-pritiskom-da-usvoji-zakon-o-poricanju-genocida-u-srebrenici/?lang=sr> accessed 24 May 2021.

<sup>805</sup> *ibid.*

<sup>806</sup> For full details on the implemented amendments, see Office of the High Representative, ‘HR’s Decision on Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina’ (23 July 2021)

referential to criminal justice as it restricts the conceptualisation of the said crimes as per the judgements of a handful of tribunals: the Nuremberg Tribunal, the ICTY, the ICC and courts of BiH. As such, this act of prohibition of atrocity crimes denial therefore does not restrict glorification of individuals who committed violent acts in WWII or the later conflicts but were never prosecuted or otherwise acquitted.

Another initiative successfully triggered through the HR's pressures was the removal of the 'Radovan Karadžić' plaque on a student dormitory in Pale, Republika Srpska (Section 5.3.2.4.).<sup>807</sup> After it had been officially placed on the dormitory in 2016 at an event attended by Milorad Dodik the Bosnian Serb member of the BiH presidency, the plaque was critiqued by concerned citizens, particularly after Karadžić was convicted of genocide by the ICTY in 2019. This led the HR to threaten to forbid Dodik from travelling to the EU member states if he does not order the plaque to be removed and ultimately resulted in the successful removal of the plaque in December 2020.<sup>808</sup> Similarly, the less common but nevertheless valuable bottom-up initiatives to create and enable transethnic spaces and individual reckoning with the painful past take place as I write this thesis. Such agency may not contribute to the creation of an authoritative source of the truth, but it facilitates "sentimental education" where similarities among people may begin to outweigh their differences.<sup>809</sup>

It can be deduced from these observations that the practices of context-specific understandings of GNRs in the sphere of education and truth recovery are primarily done by civil society organisations and, exceptionally, two entity-based research institutes. As I have shown throughout Chapter 6, many civil society groups conduct their own fact-finding initiatives, preserving and safely storing documents as the conflict was ongoing, mapping sites of atrocities and detention, and collecting survivors' testimonies. Whilst many such initiatives reach wide audiences and are directly used to shape public consciousness about the conflict, there is no coordination among these distinct actors. The practices are also referential to the institutions and

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<http://www.ohr.int/hrs-decision-on-enacting-the-law-on-amendment-to-the-criminal-code-of-bosnia-and-herzegovina/> accessed 9 August 2021.

<sup>807</sup> Lamija Grebo and Vladimir Kovačević, 'Uklonjena tabla sa imenom Radovana Karadžića' (*BIRN*, 10 Dec 2020) <https://balkaninsight.com/2020/12/10/uklonjena-tabla-sa-imenom-radovana-karadzica/?lang=sr> accessed 8 June 2021.

<sup>808</sup> *ibid.*

<sup>809</sup> See Akhavan, *Reducing Genocide to Law. Definition, Meaning, and the Ultimate Crime* (n 797) 173.

values of criminal justice and the idea that courts can write history in competing ways which results in distinct and often contested knowledge produced and transferred for the sake of non-recurrence. Moreover, all such fact-finding seeks to disturb some of the dominant narratives or even myths about the figures, dates, persons, causes or consequences of the conflict and such practices are expectedly always resisted by some groups in the society who prefer the *status quo*. Any non-centralised fact-finding efforts are subject to politicians' public acceptance of the fact presented, which are currently done on a selective basis as per one's political agenda and therefore frequently their ethnicity. These ethnonationalist narratives at the executive level co-exist with the institutional narrative by the ICTY and domestic courts and as well as the minority individual narratives of those resisting collective categorisations.<sup>810</sup>

The review of international law and TJ literature have shown that GNRs tend to be constructed as measures the state is obliged or inspired to implement. Transitional justice practitioners in BiH present a multi-actor view of duty bearers, complicating the picture further by bringing in the international community as responsible to pressure domestic actors to act or single-handedly pass certain GNRs-relating policies. The interviewed international actors themselves reject such responsibility due to sovereignty concerns, although what is sought from them is not a military intervention but making more careful policy choices when such arise. In the decade after the conflict, the international community present in BiH engaged in a box-ticking exercise whereby all major state sectors have been restructured and vetted. These processes, the interviewed international actors report, were filled with political obstacles typical during and after peace-making, such as the operations of criminal networks and corruption, which have had an impact on the incompleteness of such institutional reform. At the same time, however, international actors did not concern themselves much with the afterlives of such reforms, their implementation and adequacy over time. The international community has lost both interest and influence over transitional justice matters, seeking to maintain the order created with the DPA and failing to engage with the consequences of their initial transitional justice design in the country and how it shaped prospects for (non)recurrence. Instead, as Chapter 5 has shown, the interviewed members of the international community tend to understand the

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<sup>810</sup> Johanna Mannergren Selimovic, 'Challenges of Postconflict Coexistence: Narrating Truth and Justice in a Bosnian Town' (n 79).

undertaken institutional reforms as already applications of GNRs. Guarantees of non-recurrence, as understood in international law, are therefore largely realised by this population. Thus, while numerous TJ practitioners entrust both the international community and the state to create conditions for contextualised GNRs to be implemented, the (international) legal obligation for doing so does not exist.

Whilst practices of non-recurrence are notable, particularly in the non-governmental sector, the absence of state and international community engagement in creating the conditions for contextualised GNRs makes the cycle of non-recurrence in BiH rather non-applicable and almost impossible to realise in the current climate. However, I argue that the influence of structure on agency cannot be entirely isolated, but that instead such situation of under-realisation of the cycle of GNRs stems from two core conditions: the policy choices undertaken during the ‘transitional moment’ in BiH and the tension between TJ’s malleability and adherence to legalism which hampers holistic approaches to the progressive goals of transitional justice. In that sense, the story of GNRs in BiH is only partly a story about TJ’s self-sabotage in achieving its own goals.

#### 7.4.1. The transitional moment and the politics of GNRs

The cycle of guarantees of non-recurrence in Bosnia and Herzegovina is contingent on the transitional moment, the political act of drawing the line between the old and the new. In Bosnia and Herzegovina, like many other post-conflict societies, the transitional moment was marked by a political and legal agreement, that is, by signing and ratifying a peace-making as well as peace-confirming document. The Dayton Peace Agreement ended the four-year-long conflict, therein drawing that symbolic line between war and peace, and for transitional justice, between the past and the future. In BiH, like in many other societies, the signing of the peace accord makes transitional moment coincide with the foundational moment. Although BiH declared independence from SFR Yugoslavia in 1992, it is in 1995 that the new state and new structures within the state were established, and these jointly shaped GNRs. Consequently, the DPA created the complex political structure that exists in BiH today, with a majority Serb entity of RS, the mixed Croat-Bosniak Federation (Annex II of the DPA) and rotating tri-partite presidency (Article V of Annex IV), while Annex IV of the DPA became and still is the

Constitution of BiH. The nature of negotiations of the peace agreement, with presidents of Croatia and Yugoslavia present and active parties to the agreement, made sure that ethnic representation and equality is ensured in all spheres of life in BiH, ultimately creating a ‘perfect’ system of divisions.

While a domestic occurrence, this transitional moment was shaped by a range of actors operating on international, state, and domestic grassroots levels. The transitional moment in BiH coincides with the era in which transitional justice grew as a legalised field of intervention where the ideas of anti-impunity, structural reform, and ethnic representation prevailed over, for example, socioeconomic justice, reparations and transethnic spaces. In the post-Cold War politics of regime change, the overwhelming emphasis in transitional countries was placed on good governance and the rule of law.<sup>811</sup> Measures of institutional reform in particular were promoted as crucial for restarting the rule of law in transitional societies and, as argued in Chapter 2, transitional justice and the rule of law became “mutually reinforcing phenomena.”<sup>812</sup> In addition to shaping the field initial conceptual boundaries,<sup>813</sup> this post-Cold War, securitisation context also moulded TJ interventions in places such as BiH. Consequently, much of what is discussed in this thesis in the context of transitional justice stems from the DPA, chiefly, obligatory cooperation with the ICTY and assorted measures of institutional reform, such as police reform (Annex XI) and elections (Annex III). The numerous international actors present in the country after the DPA was enforced, led by the High Commissioner, prioritised criminal prosecutions at the ICTY and security measures which meant demobilising, training, and vetting state officials and revamping BiH’s constitutional order. In that sense, the drivers of transitional justice in BiH preferred ‘quick fixes’ with easily quantifiable outcomes over the ‘messy’ long-term aspects such as truth recovery and education.

The contextualised GNRs in BiH reflect this dynamic. More precisely, in observing how GNRs are understood and (not)practised in BiH today, I notice multiple ways in which they are responding to the events of the transitional moment. What I entitled ‘immediate GNRs,’ consisting of transparent and overarching institutional reform, are referential to the institutional

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<sup>811</sup> Davidovic (n 769).

<sup>812</sup> Pdraig McAuliffe, ‘Transitional Justice and the Rule of Law’ (n 187).

<sup>813</sup> Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (n 11).

reform that took place in the first few years after the DPA was enforced, as a result of the transitional moment. The interviewed actors critically reflected on all past legal and institutional reforms in order to detect what went wrong to the detriment of non-recurrence. As I elaborated before, practitioners detected many omissions in the vetting processes in particular, such as unclear criteria for termination of employment and allowing convicted war criminals to still run for public offices.<sup>814</sup> The consequences of this are gravely reflected on citizens' trust in the state and its institutions as well as in community relations that are hampered by frequent encounters of victims and their perpetrators. As one interviewee illustratively observed, by being flawed, past existing processes 'sent a message that violence means success ... legitimate and legalizing the state produced by violence.'<sup>815</sup> Because the past practice of vetting appear too flawed to confirm the break from the past, more transparent and wider-reaching vetting becomes a fundamental immediate GNRs. Yet, the more transparent and stringent processes of institutional reform that are sought after by the practitioners are not considered by policymakers in BiH or by the international community that continues to invest in the country and mingle in its domestic politics. The time for institutional reform and therefore immediate GNRs is considered to have been in the transitional moment.

Moving on to the more prevalent gradual GNRs, the idea of truth recovery through non-judicial institutions was completely overlooked in the DPA and any subsequent peace and justice developments. As I noted previously, various truth commissions initiatives encountered resistance from multiple parties, including the ICTY itself. No real momentum existed around the idea or the need to have an overarching non-judicial body mandated specifically to produce a body of knowledge about the conflict around which a consensus could be made. While non-judicial truth recovery was not realised in BiH, it was the criminal justice sector that has been widely promoted for its truth-seeking and therefore history-writing capabilities in and since the transitional moment. Investing in courts was seen as the quickest, most appealing, yet at the same time, least engaging mechanism of TJ for international actors. The resources put into the ICTY, Court of BiH's War Crimes Chamber, and domestic courts adjudicating on atrocity crimes, are

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<sup>814</sup> To reiterate, Article IX of Annex IV of the DPA (and the BiH Constitution) prohibits those who are 'serving a sentence imposed by the' ICTY or are 'under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal' to stand as a candidate or hold public office (n 425).

<sup>815</sup> Interview with Tokača (n 608).

unprecedented and unmatched with any other aspects of TJ, as this thesis understands it.<sup>816</sup> In addition to the conditionality to cooperate with the ICTY enshrined in the DPA, the EU has further conditioned the state to cooperate and served as a key funder of domestic courts and prosecutors' offices. To illustrate, the indicative funding allocation between 2014 and 2020 for BiH under Instrument for Pre-accession Assistance II, the so-called IPA II projects, was €552.1 million.<sup>817</sup> Out of this sum, 232.2 million has been allocated towards 'democracy and rule of law' to, *inter alia*, prosecute war crimes and strengthen democratic institutions. On the other hand, education, employment and social services were deserving of sum nearly 3.5 times smaller than the investment in the rule of law. Similarly, the major international actors running their field missions in BiH, such as the OSCE, attached their resources to the most promising intervention in criminal justice. To this day, as Chapter 6 showed, such actors remain almost solely focused on monitoring war crimes while understanding that more is needed for the guarantees of non-recurrence.

Furthermore, practising GNRs as transfers of knowledge through education aims to fill in the gaps in the knowledge of the conflict that exist today, stemming from the lack of a central fact-finding body, as well as the flaws of the current educational system. The principles of ethnic equality and sovereignty on which the DPA is built expanded to areas such as school textbooks allowing public schools to teach separate, 'ethnicity-specific' histories for the past 25 years. It was DPA that gave the OSCE a range of competencies concerning 'confidence- and security-building' (see Annex 1-B). Ultimately, these entrusted powers led the OSCE to introduce the 'Two Schools under One Roof' policy which still keeps ethnic Croat and ethnic Bosniak pupils segregated and learning two different histories. Like school pupils, the public is overwhelmingly exposed to ethnically biased new outlets, media channels and overall ethnically segregated spaces, which obstructs informal education and more personal processes of ensuring non-recurrence. The very few actors who seek to enable transethnic spaces for the sake of non-recurrence do so as a reaction to the ethnic divisions enshrined in BiH's constitutional design and

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<sup>816</sup> To illustrate, running the ICTY cost upward of 300 million US dollars a year. See, International Criminal Tribunal for the former Yugoslavia, *The Cost of Justice*, <https://www.icty.org/en/about/tribunal/the-cost-of-justice> accessed 24 May 2021.

<sup>817</sup> European Commission, *Bosnia and Herzegovina – financial assistance under Instrument for Pre-accession Assistance II (IPA II)*, [https://ec.europa.eu/neighbourhood-enlargement/instruments/funding-by-country/bosnia-herzegovina\\_en](https://ec.europa.eu/neighbourhood-enlargement/instruments/funding-by-country/bosnia-herzegovina_en) accessed 8 June 2021.

the subsequent damages such design has on non-recurrence. Protecting the knowledge about the conflict, either through legislation or organically, was not something that was taken into consideration by relevant policymakers in the immediate transitional period when the momentum for structural changes existed. Laws prohibiting minimisation and denial of atrocity crimes were not among the package of new and amended laws passed since the signing of the DPA although such laws would be largely in line with the European human rights standards. Thus, for all the listed reasons, the specific structure/agency interplay in BiH, out of which contextualised GNRs emerge, is conditioned by the ‘transitional moment’ and the policy choices and omissions made then in the name of transitional justice.

#### 7.4.2. The holism of transitional justice

The second, interrelated core condition of the contextualised GNRs in BiH concerns their apparent dependency on the prospective existence of a holistic approach to transitional justice to nurture public trust in TJ bodies, encourage practitioners’ agency and create the infrastructure for the realisation of the cycle of GNRs. As an idea, holistic transitional justice requires a complementarity of distinct TJ measures and mechanism, rejecting any hierarchy among them.<sup>818</sup> Instead, a holistic approach to transitional justice would see simultaneous operations of several different mechanisms, projects and processes, tackling different known mechanisms and tools of TJ and without any normative superiority of one over the other. However, such hierarchy is inherent to legalistic thinking and is what helped promote the idea that the ICTY and domestic tribunals are more ‘truth recovery worthy’ than non-judicial fact-finding institutions and TRCs. The normative superiority of certain ideas over others is problematic because it hampers certain avenues for GNR practice and overall contributes to the contextualised norm’s non-applicability. The cycle of GNRs, as explained in Chapter 5, advocates a similarly holistic approach and is normatively non-hierarchical. Therefore, to fully realise contextualised GNRs in BiH would necessitate not only that the practices of GNRs are multiple, but also that they are interdependent and linked to one another in complementary ways.

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<sup>818</sup> Rebekka Friedman and Andrew Jillions, ‘The Pitfalls and Politics of Holistic Justice’ (2015) 6 *Global Policy* 141; See also Boraine (n 8).

The absence of a holistic approach to TJ of course stems from the policy choices made then, as well as, as Chapter 6 demonstrates in everyday practice, the tension between core characteristics that, together with its other objects, bind TJ together as an ideational structure: malleability, that privileges flexibility, and the initial, overwhelming dominance of legalistic thinking that privileges determinative and conclusive actions. The field's overarching characteristic of malleability works in direct tension with its initial reliance on legalism and superior positioning of the criminal justice pillar in Bosnia and Herzegovina *vis-à-vis* other TJ pillars. Committing to leave certain aspects of the field such as GNRs open for interpretation is, in the case of BiH, incompatible with the field's initial, still quite dominant legalistic approaches to fulfilling its progressive goals. The desire to remain open, flexible and adaptable to all possible contexts sits uncomfortably with law's desire for certainty, precision and predictability. Furthermore, the lack of consensus over how to do transitional justice or even what TJ is in the first place is inharmonious with project-like, outcome-oriented thinking. In situations of confusion over the scope of TJ and a parallel need for precision, it becomes easy and quite convenient to define TJ through its most developed pillar – criminal justice.

In BiH, several governmental and international actors report their agency relating to practices of GNRs as constrained. More than non-governmental actors whose practices are not limited to their initial mission statements, these actors tend to operate within strategies, action plans and textual frameworks that guide their work. In fact, all of the state institutions I studied have rooted their activities relating to TJ in the laws that establish them and give them legitimacy and a specific mandate to work under. Any treatment of transitional justice therein becomes a combination of some of the available means, that is, mechanisms or projects, to pursue specific end goals. Many of these mandates stem from the obligations of the state and international community enshrined in the Dayton Peace Agreement and were developed in the subsequent state- and peacebuilding processes. One key implication is that if GNRs or their distinct elements are not a clearly outlined policy tool or if non-recurrence is not at least loosely defined as one of the desired end goals, the actor in question could find it difficult or impossible to assert agency with respect to guarantees of non-recurrence. For example, various international actors previously involved in institutional reform whose applications of the more transparent and stringent vetting could be a catalyst for domestic applications of contextualised GNRs but are not. Thus, the foundational laws, policies and strategies also restrict and/or shape the actors'

agency and their perceptions of what their agency could and should be and this is not something a more malleable TJ can easily undo.

Furthermore, the noted flexibility in approaches to GNRs sometimes results in confused understandings of what transitional justice is and what its aims are and have been in the past 25 years. The clashing understandings of TJ as ‘logically criminal justice’, or a hodgepodge of top-down and bottom-up approaches obstructs the creation of a coherent or at least vaguely coordinated approach to different elements of transitional justice. In fact, TJ initial adoption of largely legalistic approaches led to the conflation between criminal justice and transitional justice and perpetuating the idea that criminal prosecution can contribute to other core goals of TJ such as truth recovery. As Chapter 6 has shown, when the researched practitioners do not exhibit any practices of contextualised GNRs despite identifying the need to do so, they tend to reference the lack of a coordinated, holistic approach as a key obstacle. Such a situation limits, diminishes or even entirely prevents certain types of practices seen as important for non-recurrence. Judges and prosecutors in particular report that their own work is made more difficult due to the unequal development of TJ pillars and a complete lack of coordinated action with respect to truth recovery and reparations. The non-existence and perhaps even impossibility of this holistic approach to TJ in Bosnia and Herzegovina harms the perceptions of civic trust in the reformed state institutions which in turn demotivates certain actors from being more assertive in their work. Due to this lack of an overarching strategy or even an agreed-upon course of action about ‘the knowledge’ necessary for GNRs, and how it fits into the broader transitional justice, what we are witnessing in BiH is contested truths and overlapping mandates.

That the lack of holistic approaches and unified understandings of TJ is detrimental for the practices of GNRs has been discussed for several years in BiH. The outdated transitional justice section on the official website of the Ministry of Human Rights and Refugees states four reasons as to why the planned results of the national TJ strategy, that would provide a cross-sectoral foundation for GNRs, have not been delivered despite all efforts. All four are linked to the issues of cooperation, coordination, and holism. These are: partially completed activities and separation from other mechanisms of transitional justice; regionally limited initiatives and activities in the field of TJ; absence of direct action in this initiative from governmental officials;

and, lack of a unified strategy at the state level.<sup>819</sup> The draft TJ strategy itself similarly lists a number of key obstacles to TJ in BiH, including ‘insufficient coordination and link among the activities launched within different transitional justice mechanisms.’<sup>820</sup>

The politics of transitional justice proves that the ideas of holism are difficult to achieve, at least initially, as the proposed ideas, all contested, are traded against one another during and after peace negotiations.<sup>821</sup> In the case of BiH, the trade-off was struck between an overarching emphasis on (criminal) justice over non-judicial forms of institutionalised truth in the immediate years after the DPA. Yet, as this thesis has shown, these should be analysed together with the purposeful malleability of transitional justice. On the one hand, the complex post-DPA constitutional structure in BiH makes agreements among the two entities or three ‘constituent people’ difficult and relevant authorities are sometimes even impossible to agree on the establishment of a new central institution or policy. Similarly, the structure allows for easy delegation of responsibility when making such decisions is politically undesirable. On the other hand, the state of confusion about what TJ is and should do, which is partly influenced by the normative superiority of the anti-impunity norm and institutional reforms, also means that coordinated interventions on TJ are impossible to implement and this overall discourages state actors in particular from being more assertive or leads them to turn to the most visible pillar of TJ that is criminal justice. As a result, certain realisations of GNRs are obstructed. In sum, malleable transitional justice gives normative flexibility to guarantees of non-recurrence and this is beneficial for the generation of context-specific meanings of this value-rich norm. However, the impossibility of adopting holistic approaches to malleable transitional justice proves detrimental to the practice of guarantees of non-recurrence and is one of the reasons why many of these context-specific conceptualisations are not realised.

## 7.5. Conclusion

The ideas and norms enshrined in transitional justice simultaneously provide the medium for practitioners’ agency with regards to non-recurrence and are also transformed by this agency,

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<sup>819</sup> BiH Ministry for Human Rights and Refugees and BiH Ministry of Justice (n 434).

<sup>820</sup> *ibid* 6.

<sup>821</sup> De Greiff, ‘Theorizing Transitional Justice’ (n 47).

at least domestically. International legal frameworks on GNRs have the potential to generate practices relating to non-recurrence, such as e.g., vetting, or motivate broader interpretations of ‘institutional reform’ to include, e.g., the media. At the same time, practitioners’ context-specific conceptualisations and practices of GNRs in BiH also have the potential to generate further international legal and policy developments on non-recurrence and promote the understanding of GNRs as a function rather than a set of measures of a specific character. In transitional justice as a set of prescriptive norms, not all ideas and norms are mediating and transformed at the same time. This thesis has shown that instead, as practitioners transform the content of the flexible norm of non-recurrence domestically, their practices also tend to be referential to and enabled by criminal justice institutions and their attributes. Courts, as long-lasting institutions of transitional justice as well as ordinary justice, tend to be more enduring aspects than, for instance, reconciliation or non-material reparations that are not easily visible and tangible. In maintaining referential to the didactic and history-making attributes of courts, these actors also allow the idea of the anti-impunity-heavy model where the anti-impunity norm and its institutions are normatively superior to others to be applicable across contexts and therefore generalisable. It is through law and its institutions such as courts that transitional justice is able to exist across time and space. As a result, in this chapter, I have argued that transitional justice structure and practitioners’ agency are in interplay as the structure radiates power in ideas while practitioners in turn exhibit power through ideas.

Since I have sought to explore context-specific understandings and practices of GNRs in this thesis, it is expected that I have also been interested in the prospects of implementing the cycle of GNRs or at least aspects of it. In this chapter, I have shown that such prospects remain poor, nevertheless with notable exceptions. Most fact-finding and educational practices are undertaken by non-governmental actors, and international and state actors in particular manifest constrained agency. Not everyone wishes to act towards GNRs, or thinks they should of course, but even those who identify the need to ‘do more’, report mandate-relating constraints and the inability to drastically transform their missions that initially heavily focus on the ICTY and domestic atrocity crimes prosecutions. These missions and the general emphasis on institutions in the early days of transitional justice in BiH are underpinned by the previously dominant stream of legalistic, outcome-oriented thinking in international TJ policy. For this reason, the influence of transitional justice as a set of prescriptive norms and ideas should not be examined

in isolation, I argued, but instead connected to the policy choices made during the transitional moment in the second half of 1990s. Then, the rule of law and state security reforms were prioritised. As a result, for many international actors, GNRs as measures of institutional reform, as they are found in IHRL, are already matters of the past for Bosnia and Herzegovina. However, there is something to be said about the more recent scholarly efforts to reinvent transitional justice as transformative and ultimately, reassert its malleability. Not only does it run counter to the primacy of legalism and policy-oriented quick fixes still overly visible in BiH, but it also creates conceptual confusion for the practitioners and their general practice of aligning with international legal and policy frameworks, at least as a guidance point. The resulting absence of a holistic, coordinated approach, as demonstrated, impacts the work of all involved actors to varying, detrimental degrees, keeping the contextualised contents of GNRs in BiH mainly at the conceptual level, rarely practiced and fragmented, when they are put to practice. The most important implication of such a complex situation is that the risk of recurrence of conflict, without any of the desired GNRs fully implemented thus far, continues to live in perceptions and discourses.<sup>822</sup> Ethnonationalist political elites maintain the perception of threat from ‘the other’ ethnic group(s) in public discourses and this in turn keeps the fear of conflict repetition very much alive among the public. However, saying that it is all due to ethnonationalist, populist politics would be an over-simplification and would obscure the structural conditions that have both given rise to and sustained such politics. Instead, the structure of transitional justice itself, with its multiple, often competing characteristics, I have argued, is partly to blame for this devastating result and the general lack of realisation of the cycle of GNRs.

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<sup>822</sup> Much has been written on the ‘fragility’ of Bosnia and Herzegovina and the prospects of renewed conflict. For academic research, see, for example, Argyro Kartsonaki, ‘Twenty Years After Dayton: Bosnia-Herzegovina (Still Stable and Explosive)’ (2016) 18 *Civil Wars* 488. As an English-language news source written by a Bosnian-Herzegovinian author, see, for example, Emir Hadzikedunic, ‘Dayton peace (dis)agreement, 25 years on’ (*AlJazeera*, 14 Dec 2020) <https://www.aljazeera.com/opinions/2020/12/14/dayton-peace-disagreement-25-years-on> accessed 8 June 2021.

## CONCLUSION

This thesis has had three central objectives. The first objective was to uncover various conceptual engagements with the fluid norm of GNRs by the researched TJ bodies and the practitioners who inhabit them. I have shown that while both international law and international TJ advocacy retain influence over how practitioners conceive of GNRs, especially in texts, by and large practitioners within these TJ bodies internally adopt understandings of GNRs specific to the context of Bosnia and Herzegovina. To that end, the thesis has proposed that conceptually, GNRs in BiH can be understood as both immediate and gradual and operating in a cycle, a non-hierarchical web of interdependent processes. The central aspect of this cycle of GNRs is truth recovery and establishing authoritative ‘knowledge’ of the conflict. This aspect is further linked to education as a means of transferring the knowledge into schools as well as among the public and two distinct processes – legislative and bottom-up – of acknowledging and respecting the knowledge as authoritative ‘truth’. None of these processes in isolation are sufficient for non-recurrence and the cycle of GNRs demonstrates deep links and dependencies between different immediate and gradual GNRs. Fulfilling this objective has enabled the thesis to contribute to the literature on actors of transitional justice, demonstrating the practitioners’ ability to use international legal frameworks and TJ advocacy documents as ‘a starting point’ and further develop new knowledge on GNRs that spreads in practitioners’ circles. Like Oduro and Nagy<sup>823</sup> and Merry and Stern,<sup>824</sup> for instance, I demonstrate the power of domestic actors and their ideas and show that the contextual understandings of GNRs are not necessarily imposed from the outside but are in this case developed in line with the current needs, the effects of the existing legal and institutional reforms, as well as upon reflection on the ‘lessons learned’ from the past. In providing new knowledge on domestic understandings of GNRs in BiH, I have also been able to add a layer of complexity to the vast literature (as reviewed in Sections 3.3.1. to 3.3.5.) that causally links individual pillars of transitional justice to the objective of non-recurrence. Rather than arguing that an isolated intervention on one aspect of TJ or a linearly sequenced set of such interventions constitutes GNRs, I proposed that distinct GNRs are intertwined, contingent on

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<sup>823</sup> Oduro and Nagy (n 384).

<sup>824</sup> Merry and Stern (n 382).

each other and on effective realisation of what I entitled ‘immediate GNRs’, constituted primarily of transparent and stringent vetting. The cycle of GNRs, and the work I have completed on each aspect of it therefore contributes particularly to the vast reviewed literature that links truth recovery, education, and institutional reform to non-recurrence or otherwise equates them with GNRs by showing that those processes are indeed seen as most crucial for non-recurrence. Yet, my theorisation of the cycle complicates linear assertions in the literature claiming that common truth narratives lead to non-repetition when inclusive of educational practices or reparations. It does so by pointing to the complexity of both truth recovery and education (i.e., formal and non-formal) for non-recurrence as well as the reliance of these processes on the foundations established through institutional reform and on more bottom-up approaches to reckoning with the past. Moreover, it shows that while institutional reform inclusive of vetting does indeed play a role in non-recurrence especially for creating the conditions in which truth recovery and transfer of the knowledge about the conflict can be practised, practitioners in BiH are strongly against the equating of institutional reform to GNRs which obscures the everyday lived experiences of non-recurrence. Through this contextualisation of the content of GNRs in BiH, practitioners also show potential to shape the structure of TJ in this country and the position of GNRs within in. Such a position, the thesis has shown, is not one of a singular pillar, but rather as a function that blurs the lines between the established pillars.

The second objective of this thesis has been exploring practitioners’ practices of these contextualised GNRs in Bosnia and Herzegovina, and what they jointly show about GNRs. This thesis has investigated how contextualised conceptualisations and practices help constitute an international legal norm ‘as a social reality.’<sup>825</sup> In line with the conceptual cycle of GNRs that is centred on ‘the knowledge’ of the conflict, and its establishment, transfer and protection, when practitioners resort to practice for the sake of non-recurrence, they primarily do so by way of fact-finding and education. Through numerous empirical examples such as the ‘Bosnian Atlas of the Dead’ and ‘Marking the Unmarked Sites of Atrocity’, I have shown that this kind of agency seeks to disturb the transitional *status quo* created with the Dayton Peace Agreement. These processes of fact-finding and education are conducted in order to challenge some of the dominant, ethnonationalist narratives and policies, either nationally or at the grassroots, that rests

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<sup>825</sup> Lamp (n 778) 287.

on divisive rhetoric, ethnic ‘purity’, and distortion of ‘facts’, and are all identified by the practitioners as maintaining the risk of repetition of conflict and/or mass violence. In addition, I presented a few rare examples of initiatives seeking to criminalise atrocity crimes denial, trivialisation and minimisation, or create transethnic spaces as a way of working towards acknowledgement and recognition of the violence and injustices. Overwhelmingly, however, the cycle of GNRs remains under-realised and the work done towards GNRs in BiH tends to be undertaken by civil society organisations and, exceptionally, state-funded research centres.

In explaining why the agency of state and international actors can be constrained, I contributed to two bodies of TJ literature. Firstly, like McEvoy and colleagues,<sup>826</sup> I showed that state actors in particular tend to be constrained due to their adherence to and influence of legalism whereby prefer predictability and certain that set mandates and objective offer and shy away from the prospect of reinterpreting the norm of non-recurrence in ways that would be more compatible with the realities and histories of BiH. My contribution to the studies conducted by McEvoy and colleagues is my methodological approach which allows the research to expand these assertions beyond a single profession (e.g., lawyers) and include a variety of actors working within different areas of transitional justice. Observing how legalism constrains the practices of non-recurrence of those international and domestic actors involved in processes of institutional reform has been especially worthwhile seeing how this population has been previously under-researched in this context. Secondly, I argued that ‘TJ as legalistic’ works in tension with the other competing characteristic of ‘TJ as malleable’ and that this influences the lack of practices of contextualised GNRs. Here is where I build on the works of Rowen and Miller. Through extensive empirical examples of the conflicting understandings of TJ as ‘logically criminal justice’ and a hodgepodge of bottom-up and top-down interventions, the thesis has exhibited practical consequences of TJ’s simultaneous “predictability and ... difference”<sup>827</sup> and strategic maintaining of the ambiguity about TJ interventions so that inherent TJ ideas can be promoted to different beneficiaries.<sup>828</sup> Like Rowen, I show that the malleability of TJ allows practitioners to practice truth recovery, as a core idea of TJ, in conflicting ways, which even results in the production of clashing ‘knowledge’ about the conflict. Just as Rowen

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<sup>826</sup> McEvoy (n 390); McEvoy and Schwartz (n 395); Bryson and McEvoy (n 392).

<sup>827</sup> Miller (n 52) 371.

<sup>828</sup> Rowen, *Searching for Truth in the Transitional Justice Movement* (n 51).

argues malleability can be both a strength and a weakness, my research shows that malleability is a strength but also leads to non-action and makes it difficult to establish a coordinated strategy among state and international actors that would accommodate the developing conceptualisations of GNRs. As a result, much of the context-specific cycle of GNRs remains at the conceptual level.

Fulfilling this second objective has also led to new knowledge about state responsibility for ensuring non-repetition and how it translates to domestic advocacy efforts towards non-recurrence. In GNRs' origin story in Chapter 2, I identified the transformation of the norm of non-recurrence in and by transitional justice whereby GNRs were transformed from being an interstate form of redress into an obligation of states in respect of their own domestic arrangements. The transformation also entailed giving content to the otherwise ambiguous international norm and decontextualising measures of prevention of non-recurrence specific to certain domestic context in Latin America into positive obligations of states found in violation of IHRL or international humanitarian law. This relatively recent transformation of state obligation to ensure non-recurrence of mass violations, my thesis has shown, has taken root in Bosnia and Herzegovina. In fact, practitioners' understanding of the state of BiH obligation is stricter than that in the Basic Principles in the sense that, in this country, the responsibility of the state is treated as a given and not to be decided on a case-by-case basis. The state is expected and urged to create adequate conditions for the cycle of GNRs to be realised and, when they do act towards non-recurrence, TJ actors aim to fulfil the gaps created by the state inaction. Although creating these conditions could involve measures very similar to those enshrined in Article 23 of the Basic Principles, the case of BiH demonstrates the need to better understand what creating such conditions is for. Contrary to many of the claims in the literature (Section 3.3.4.), such legal and institutional reform would not only eliminate individuals with suspicious pasts and make mass violence structurally more difficult to perform by state institutions, but also support nationwide truth recovery and teaching of the history of the conflict in public schools. International community, with no obligations to ensure non-recurrence as per international law, is also trusted a position of responsibility by the practitioners. Much advocacy regarding prohibition of atrocity crimes denial has been directed towards the Office of the High Representative, resulting in amendments to the Criminal Code of BiH and outlawing not only denialist public statements but also memorialisation that glorifies convicted war criminals.

The final objective of the thesis has been to position these contextualised conceptualisations and practices of GNRs in BiH *vis-à-vis* the broader structure of transitional justice. Much of the research I have engaged with in my contributions either structure- or actor-oriented, which is why I argue that the core significance of my study lies in its theoretical and methodological choices that allowed me to focus on the practitioners while investigating transitional justice as a structure. Rowen, for example, urges researchers working in the context of malleable transitional justice to focus on those who promote and mobilise around TJ ideas.<sup>829</sup> It is through these actors and practitioners that certain aspects of TJ such as GNRs can appear to be experienced and practised in “unrecognisable” ways.<sup>830</sup> What I have shown is that transitional justice as an ideational structure nevertheless has a hold over these context-specific experiences and practices. In observing transitional justice as a contested normative space with multiple global norms in place,<sup>831</sup> I argue that the anti-impunity norm and its institutions in particular have been treated as hierarchically superior and that this status has translated onto their claimed didactic and history-making attributes fed into the cycle of GNRs. As an ideational structure, transitional justice thus exerts power in ideas, shaping how truth recovery and/or education over past violence should be conducted. Seeing how truth recovery and education are viewed as important in the cycle of GNRs, transitional justice as a discursive structure therefore shapes how practitioners understand the ‘knowledge’ that needs to be recovered and educated about. Out of all ideas reviewed in Chapter 3, most fact-finding and education practices towards non-recurrence, I have argued, are referential to the idea that courts can write history. Some unconditionally accept this idea, others build on it and, very rarely, actors entirely challenge it with novel fact-finding, all of them maintaining the power of this idea. The practices of contextualised GNRs explored in this thesis caution about the practitioners’ ability to make GNRs context-specific while simultaneously prolonging the superiority of the didactic and history-making attributes of courts in transition. Such occurrences essentially suggest that the anti-impunity-heavy model is successful and generalisable because it is so central to public life in BiH. This interplay between agency and structure results in multiple overlapping pools of ‘knowledge’ of the conflict and, as mentioned above, no successful coordination among actors to

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<sup>829</sup> *ibid.*

<sup>830</sup> Subotic, ‘Truth, Justice, and Reconciliation on the Ground’ (n 22) 362.

<sup>831</sup> Finnemore and Sikkink (n 3).

date. Therefore, the overarching conclusion is that while GNRs are flexible in content in transitional justice practice and practitioners retain significant power through ideas to conceptualise GNRs beyond international legal definitions, the ideational structure of transitional justice shapes which ideas are considered in the context of GNRs as well as how they are realised. This interplay has a bearing on non-recurrence both conceptually and practically and is worth observing over time.

The overall aim of this thesis has of course been to contribute to the ongoing theorisation of guarantees of non-recurrence in transitional justice research, policy and practice. Throughout this thesis, I have highlighted the conceptual tension between the positioning of the GNRs as a pillar of TJ – often equated with an object of TJ, that is ‘institutional reform’ – and an organising objective of other TJ pillars, including institutional reform. I claimed that the mandate of the Special Rapporteur symbolised GNRs becoming as a separate pillar of transitional justice while non-recurrence has remained a normative expectation, if not requirement, of criminal justice, truth recovery, reparations, institutional reform and memorialisation practices. Although made distinct from reparations, contrary to the Basic Principle, and expanded in content beyond institutional reform, such a pillar of GNRs is still seemingly inclusive of a set of practices linked in a linear fashion. My findings on contextualised understandings of GNRs in BiH offer a contribution to this conceptual debate as I argue against seeing GNRs as a pillar in the pillar-like model of transitional justice. I make this argument for two reasons. Firstly, containing GNRs in a pillar would restrict them to a set of measures which, although it may be non-exhaustive, will surely be of certain defining character such as, for example, reformatory or reparational. My findings demonstrate that guarantees of non-recurrence tie together multiple intertwined processes including education, which cuts across different pillars, or truth recovery, that is considered to be its own pillar in transitional justice. Secondly and relatedly, treating GNRs as a pillar fails to fully capture their ever-changing nature which results from the interplays between the ideational structure of transitional justice and practitioners’ agency to contextualise GNRs. While currently in BiH, much of the contextualisation of GNRs may be responding to the idea that courts write history, this should by no means be understood as a policy recommendation for other contexts. Instead, it should be treated as a signal of the ways in which GNRs are referential to the existing TJ policy choices and (non)holistic designs.

It follows that the thesis' findings and the core arguments made generally adhere to the understanding of GNRs as a 'function', an umbrella process cutting across different sectors of the society and achievable through multiple TJ mechanisms. In other words, as per the Special Rapporteur's normative expansion (Section 2.4.3.), the case of BiH shows that GNRs are not a sequence of seemingly isolated singular activities that somehow form a state of non-recurrence when they are all realised, but they are a web of connected and sequenced processes.<sup>832</sup> Yet, I elevate this theorisation by pointing to the complexity of the *cycle* – and not a linear list (see Table 1, Section 2.4.3.) - of GNRs in practice, that develops over time and in continuous engagement with the ideas found within transitional justice as a structure. The complexity of such exercise, as I have shown in the preceding chapters, does not lie only in making sure that these various measures of transitional justice are applied and that this is done in a logical sequence. It also lies in seeing how all of these existing mechanisms and institutions influence constructions of both perceptions of non-recurrence and any subsequent practices by different TJ actors *over time*. Other key characteristics of GNRs in practice are largely those found in the literature and TJ's normative expansions – preventative, seeking to disturb the *status quo*, and transformative. While the disturbance of the *status quo* remains at the core of GNRs, different societies may take a different stance towards the pre-conflict *status quo* and the new, transitional *status quo*, depending on the stage of their transition. GNRs in BiH are referential to the latter. It is the transitional *status quo* that needs to be disturbed as it is believed it creates interethnic divides, knowledge biases, and distorted visions of the conflict causes and consequences, all of which keep the risk of recurrence real. The content of GNRs in BiH is therefore partly informed by the need to unearth the causes and patterns of violence of the conflict,<sup>833</sup> which arises from past experiences of the seeming repetition of violations in WWII and the 1990s, and importantly is referential to the existing non-holistic structure of TJ in the country.

I am less enthusiastic about GNRs being theorised as a 'bridge' or as a magical transformative tool (as per Section 3.4). My empirical research on the cycle of GNRs in BiH does imply that certain 'backward-looking' elements of TJ, such as recovering the truth about something already passed are 'bridged' with certain 'forward-looking' elements such as

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<sup>832</sup> 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 86).

<sup>833</sup> Roht-Arriaza, 'Measures of Non-Repitition in Transitional Justice: The Missing Link?' (n 337).

education of the new generations. Do GNRs bridge the shortcomings of legalistic transitional justice and overpromising of transformative justice, as per Roht-Arriaza contestation?<sup>834</sup> Indeed, contextualised GNRs require much more than paradigmatic transitional justice has had to offer with quick institutional reform and heavy financial and resource investment in institutions of law, but such institutional reform remains essential. Yet, treating GNRs as a ‘bridge’ between the backward- and forward-looking elements as per Mayer-Rieckh for example<sup>835</sup> presumes linearity of time which I do not adhere to in this thesis. Seeing GNRs as a ‘bridge’ between the goals of repairing the past and ensuring a peaceful future assumes that the past, the future and the present, where GNRs are conducting the bridging, are all static. This is not the case. Instead, this research has demonstrated that while the characteristics of GNRs are stable, the content and practices of the norm changes over time and in reference to past transitional justice interventions and lived experiences that embrace both linearity and circularity of time. The past is not over when the line between conflict and peace is drawn but it continues to be reconstructed in the present.

Contextualised GNRs also retain some ‘transformative’ qualities, namely when it comes to challenging and altering the dominant transitional justice *status quo*. Thus, if the cycle of GNRs in BiH was realised, it would entail a combination of legalistic and transformative approaches. Other transformative aspirations of GNRs in the literature whereby they enhance structural transformation through institutional reform or facilitate lasting institutional changes by transforming policing have not manifested in my empirical study.<sup>836</sup> Such studies approach GNRs *legally*, that is, by exploring the transformative potential of the measures found in existing legal materials, contemplating what would happen if a transitional society implemented most of all measures of legal and institutional reform found in, for example, the Basic Principles, and replicated in a range of policy documents that equate GNRs with institutional reform. Yet, my sociological approach to GNRs allows me to state that such approaches ask the wrong kinds of questions to assess the transformative potential of GNRs. Asking whether GNRs can be transformative or not is misplaced because GNRs, even in the most simplistic understandings in both law and practice, presume that some things will and must change to differentiate the future conditions from those pre-existing the conflict or otherwise achieved with peace-making. Hence,

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<sup>834</sup> *ibid* 123.

<sup>835</sup> Mayer-Rieckh (n 159).

<sup>836</sup> Garcia-Godos (n 310); McGonigle Leyh (n 376).

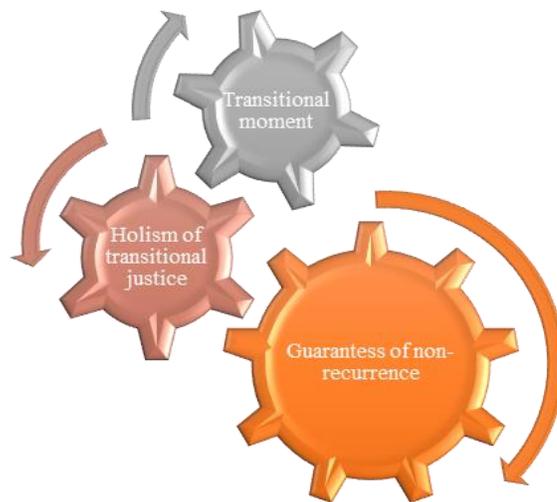
my research urges scholarly attention to be directed towards what constitutes, as well as what prevents, these necessary transformative practices in light of any social, economic and political realities - some structural, others short-lived - in a given context.

Rather than bridge, I argue GNRs are better visualised as balance wheels with cogs on a mechanical clock. As one wheel turns, the cogs move the other wheels, back and forth. Thinking of GNRs in this way allows us to capture the multidirectional flow of how the understandings and practices of GNRs are constructed, and to emphasise the longevity and fluidity of the process, as well as the politics of it. The clock is the transitioning society working towards non-recurrence of violations. The main wheel is that of GNRs, the organising telos and the key function of transitional justice. Supporting it are the different actors, ideas, and practices stemming from the transitional moment on the one hand, and those stemming from the overarching holistic infrastructure of transitional justice, or lack thereof. The scope of guarantees of non-recurrence, the case of BiH shows, is larger than the scope of transitional justice, inherently political and relational to the peace-making and state-building processes, projects and actors who run them. As per Giddens' assertion, temporality and time-space intersections are essential for understanding any social practices.<sup>837</sup> To that end, the surrounding arrows, as visualised below, show that the supporting wheels keep moving with the passage of time, they adapt and so do guarantees of non-recurrence. Had this research been done just after the Basic Principles were issued in 2005, the recorded understandings and practices of GNRs would have inevitably been different as the flaws of institutional reform were not yet noticeable and criminal justice was only beginning to fully operate on the domestic level. Additionally, the structure/agency interplay I have documented should not be seen as singular, isolated events in linear time, but as continuously flowing, developing, being re-thought and amended, especially as policy choices stemming from the transitional moment are re-prioritised and the holism balance is potentially reorganised. The temporality of GNRs therefore requires exploring time as both linear and circular and seeing how these dichotomies operate and shift *vis-à-vis* the transitional justice structure. Ensuring non-recurrence is thus a process of *longue durée*, a long-time span of transitional justice, both its institutions and the claims made in its name, and it requires understanding temporal regimes in transitional justice as well as the temporal limitations

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<sup>837</sup> Giddens, *Central Problems in Social Theory. Action, Structure and Contradiction in Social Analysis* (n 227).

of certain interventions, particularly with regards to criminal prosecutions as mechanisms most prioritised in BiH's transitional justice. Treating non-recurrence as a matter of short-term application would make the possibility of practising guarantees of non-recurrence, as they are understood domestically, impossible to achieve or achieved in oversimplified forms, obscuring the complexity of the cycle of guarantees non-recurrence.



*Visualisation 2: Guarantees of non-recurrence in transitional justice practice.*

The significance of my research, as per my theoretical and methodological choices, lies in showing how GNRs exist, are thought of and put to practice as a social norm, and how these are constituted in line with or as a reaction to both GNRs as a legal norm and other norms and ideas attached to transitional justice. The thesis, to my knowledge, remains the only English-language thesis on GNRs in transitional justice to do so. The thesis is, of course, not without limitations. Methodologically, the single country case study poses limitations that urge the reader not to assume that the findings of this thesis are easily transferrable elsewhere. Nevertheless, the findings do provide complex new insights into how transitional justice with its ideas, mechanisms, and institutions may condition domestic applications of the flexible norm of non-recurrence (and how it does not) and could be treated as a hypothesis in future studies on GNRs.

Finally, a note on the potential afterlives of this thesis and its potential implications for future research. Speaking about the politics of knowledge production in transitional justice, Jones and Lühe assert that:

the journey itself changes the destination. In the process of researching, talking about, trying to establish, and measuring and assessing, we determine what it is we are seeking. ‘Justice’, ‘reconciliation’, ‘truth’ and many other of the field’s key concepts and concerns emerge from our debates and conflicts, a product of the varied and perhaps competing ways in which we approach transitional justice as an object of knowledge.<sup>838</sup>

As a piece of work written by a social scientist, this thesis inevitably creates a framework of meaning for future discussions on guarantees of non-recurrence. It follows that the engagements of this thesis with the concept of ‘guarantees of non-recurrence’ will result in at least a discussion about how scholars of transitional justice understand the concept and how international norm entrepreneurs and policymakers the scholars often consult further treat these continued debates and conceptual expansions. The implications of this thesis have the potential to engage interdisciplinary scholarship, not only in law, politics, and sociology but in, for instance, anthropology. In particular, future research could take an ethnographic approach to investigating the individual and bottom-up reckoning with the past towards non-recurrence. Such ethnographic research may wish to study the more material expressions of ‘Never Again’ in the family or observe grassroots movements that aim to trigger small but notable systemic changes, such as the one in Jajce. Similarly, political economists may take interest in the findings of this thesis, as the empirical chapters tease further questions about the resource-intensive investments in the ICTY and domestic courts and the potential influence of financial and marketing forces in the non-realisation of contextualised GNRs.<sup>839</sup>

Future research on GNRs should seek to investigate understandings and practices of this norm in other contexts that have distinct TJ designs and even different nature of the transition. It should avoid mere confluences between GNRs and ‘institutional reform’ and instead inspire relevant donors and decision-makers to seek and support more or equally meaningful practices

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<sup>838</sup> Briony Jones and Ulrike Lühe, ‘Knowledge for Peace: Transitional Justice and the Politics of Knowledge in Theory and Practice’ in Briony Jones and Ulrike Lühe (eds), *Knowledge for Peace. Transitional Justice and the Politics of Knowledge in Theory and Practice* (Edward Elgar Publishing 2021) 1–2.

<sup>839</sup> On the political economy of international criminal law and the anti-impunity norm, see, for example, Christine Schwobel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press 2021).

towards non-recurrence. This research could be used as an authoritative source to demonstrate that the legal norm of non-recurrence, as it is currently found in IHRL, does not necessarily adequately capture the social norm of ‘Never Again’ and caution towards acknowledging this in future TJ interventions. Upcoming research should also aspire to further monitor how initial TJ policy choices across contexts develop and shape how ideas central to transitional justice, not only non-recurrence, but also ‘truth’, ‘justice’ and ‘reparation’ are thought, adopted, and/or rejected. In contexts other than BiH, the disbalance in holistic transitional justice might be different, and criminal prosecutions may be completely absent. In future research on re-contextualisation of the flexible norm of GNRs outside BiH then, it will be worth observing how this dynamic between different tools of TJ and its goals is balanced. Particular focus should be placed on the tension that may arise between the need to act holistically and stay flexible and ambiguous, and whether practitioners have a common understanding of ‘transitional justice’ to begin with and what happens when they do not. Above all, future research should seek to go beyond the design of this thesis and complement its findings by exploring everyday engagements with GNRs among non-practitioners’ population in different contexts and theorise non-recurrence as lived experience. Like a mantra, ‘Never Again’ continues to echo across all spheres of post-atrocities societies, and it is imperative that scholarly work on this monumental promise continues.

## Appendices

Appendix 1: Table of all researched TJ bodies and interviewed representatives

	<b>Name of TJ body</b>	<b>Data collection</b>	<b>Interviewee name</b>	<b>Interview date and place</b>	<b>Categorisation</b>
1	<b>Srebrenica Commission</b>	Desk research, interview	Gordon Bacon	03 Oct 2019, Durham, UK	State institution
2	<b>International Commission on Missing Persons</b>	Desk research, interview, field notes	Gordon Bacon; Samira Krehić.	03 Nov 2019, Durham, UK. 06 Dec 2019, Sarajevo, BiH.	IO
3	<b>Nansen Dialogue Centre</b>	Desk research, interview	Nebojša Savića-Valha	04 Nov 2019, Sarajevo, BiH	NGO
4	<b>Post-Conflict Research Center</b>	Desk research, interview, field notes	Tatjana Milovanović	06 Nov 2019, Sarajevo, BiH	NGO
5	<b>Institute for research on crimes against humanity and IL</b>	Desk research, interview, field notes	Rasim Muratović; Meldijana Arnaut Haseljić	07 Nov 2019, Sarajevo, BiH. 15 Nov 2019, Sarajevo BiH	State institution
6	<b>Foundation Truth, Justice and Reconciliation</b>	Desk research, interview	Sinan Alić	11 Nov 2019, Sarajevo, BiH	NGO
7	<b>Helsinki Committee for HR RS</b>	Desk research, interview, field notes	Aleksandra Letić; Mirjana Cuskić	12 Nov 2019, Bijeljina, BiH	NGO
8	<b>Transitional Justice Strategy Working Group</b>	Desk research, interview	Aleksandra Letić; Admir Operta;  Goran Šimić;  Saliha Đuderija; Marko Jurišić	12 Nov 2019, Bijeljina, BiH 13 Dec 2019, Sarajevo, BiH 12 Dec 2019, Sarajevo, BiH 17 Dec 2019, Sarajevo, BiH 17 Dec 2019, Sarajevo, BiH	Mixed
9	<b>Basic Court of the Brčko District</b>	Desk research, interview	Nebojša Savić	13 Nov 2019, Brčko, BiH	State institution
10	<b>Prosecutor's Office of the Brčko District</b>	Desk research, interview	Prosecutor 1, Prosecutor 2	13 Nov 2019, Brčko, BiH	State institution
11	<b>RECOM Coalition Working Group</b>	Desk research, interview	Midhat Izmirlija	14 Nov 2019, Sarajevo, BiH	NGO (as of 2021)
12	<b>PRO-FUTURE</b>	Desk research, interview	Representative 1,	18 Nov 2019, Sarajevo, BiH	NGO

			Representative 2		
13	<b>Memorial Center Potočari</b>	Desk research, interview, field notes	Curator 1, Curator 2	20 Nov 2019, Potočari, BiH	State institution
14	<b>OSCE</b>	Desk research, interview	Nedžad Smailagić, Irma Balta Adnan Kadribašić (former)	21 Nov 2019, Sarajevo BiH  11 Dec 2019, Sarajevo, BiH	IO
15	<b>TRIAL International</b>	Desk research, interview	Representative	22 Nov 2019, Sarajevo, BiH	NGO
16	<b>UN International Police Task Force</b>	Desk research, interview	Richard Monk	25 Nov 2019, via email	IO
17	<b>Prosecutor's Office Banja Luka</b>	Desk research, interview	Igor Cimeša	26 Nov 2019, Banja Luka, BiH	State institution
18	<b>BiH Ombudsmen</b>	Desk research, interview	Predrag Raosavljević	26 Nov 2019, Banja Luka, BiH	State institution
19	<b>Republika Srpska Institute for research on war, war crimes and missing persons</b>	Desk research, interview, field notes	Representative	27 Nov 2019, Banja Luka, BiH	State institution
20	<b>Prosecutor's Office of East Sarajevo</b>	Desk research, interview	Tarik Crnkić	29 Nov 2019, East Sarajevo, BiH	State institution
21	<b>Memorial Fund of Sarajevo Canton</b>	Desk research, interview, field notes	Halima Husić	29 Nov 2019, Sarajevo, BiH	State institution
22	<b>Municipal Court of East Sarajevo</b>	Desk research, interview	Judge	03 Dec 2019, East Sarajevo, BiH	State institution
23	<b>ICTY Outreach</b>	Desk research, interview	Almir Alić	5 Dec 2019, Sarajevo, BiH	IO
24	<b>High Judicial and Prosecutorial Council</b>	Desk research, interview	Representative	10 Dec 2019, Sarajevo BiH	State institution
25	<b>Youth Initiative for Human Rights BiH</b>	Desk research, interview	Muhamed Tucaković	11 Dec 2019, Sarajevo BiH	NGO
26	<b>Federal Ministry of Justice</b>	Desk research, interview	Goran Šimić	12 Dec 2019, Sarajevo, BiH	State institution
27	<b>Office of the Coordinator of Brcko District</b>	Desk research, interview	Admir Operta	13 Dec 2019, Sarajevo, BiH	State institution
28	<b>Ministry of Human Rights and Refugees – Human Rights Sector</b>	Desk research, interview	Saliha Đuderija	17 Dec 2019, Sarajevo, BiH	State institution
29	<b>Ministry of Human Rights and Refugees –</b>	Desk research, interview	Dragana Kovač	24 Jan 2020, Sarajevo, BiH	State institution

	<b>Refugees Sector</b>				
30	<b>Missing Persons Institute</b>	Desk research, interview	Marko Jurišić	17 Dec 2019, Sarajevo, BiH	State institution
31	<b>NATO Defence Reform Commission</b>	Desk research, interview	Raffi Gregorian	27 Dec 2019, online	IO
32	<b>Court BiH, War Crimes Chamber</b>	Desk research, interview, field notes	Judge	10 Jan 2020, Sarajevo, BiH	State institution,
33	<b>Research and Documentation Center</b>	Desk research, interview, field notes	Mirsad Tokača	21 Jan 2020, Sarajevo, BiH	NGO
34	<b>International Independent Judicial Commission</b>	Desk research, interview	Timothy Hughes	23 Jan 2020, online	IO
35	<b>Center for Non-Violent Action</b>	Desk research, interview, field notes	Tamara Zrnović	4 Feb 2020, Sarajevo, BiH	NGO
36	<b>Anonymous</b>	Desk research, interview	Anonymous	7 Feb 2020, Sarajevo, BiH	IO
37	<b>Ministry of Justice</b>	Desk research, interview	Selma Džuhanović-Gratz	10 Feb 2020, Sarajevo, BiH	State institution
38	<b>UNDP</b>	Desk research, interview	Amila Kurtović	11 Feb 2020, Sarajevo, BiH	IO
39	<b>Balkan Investigative Reporting Network</b>	Desk research, interview	Jovana Prusina	19 Feb 2020, Belgrade, Serbia	NGO
40	<b>Humanitarian Law Fund</b>	Desk research, interview	Jelena Đureinović	26 Feb 2020, Belgrade, Serbia	NGO
41	<b>National War Crimes Strategy</b>	Desk research, interview	Judge	10 Jan 2020, Sarajevo, BiH	State mechanism
42	<b>Commission for truth and reconciliation in Bijeljina</b>	Desk research, interview	Sinan Alić	11 Nov 2020, Sarajevo, BiH	State mechanism
43	<b>State Prosecutor's Office BiH</b>	Desk research only	N/A	N/A	State institution
44	<b>Municipal Court in Banja Luka</b>	Desk research only	N/A	N/A	State institution
45	<b>Women's Court</b>	Desk research, field notes	N/A	N/A	Non-governmental mechanism
46	<b>Human Rights Chamber of BiH (no longer operational)</b>	Desk research only	N/A	N/A	State institution
47	<b>Transitional Justice, Accountability and Memory Association</b>	Desk research only	N/A	N/A	NGO
48	<b>Center for Democracy and Transitional</b>	Desk research only	N/A	N/A	NGO

	<b>Justice</b>				
49	<b>The ICTY</b>	Desk research only	N/A	N/A	International body
50	<b>Republika Srpska International Independent Commission on the Siege of Sarajevo</b>	Desk research only	N/A	N/A	State institution
51	<b>Republika Srpska International Independent Commission of Srebrenica</b>	Desk research only	N/A	N/A	State institution

## Appendix 2: Ethics approval by Durham University



Shaped by the past, creating the future

23<sup>rd</sup> July 2019

Dear Ms Davidovic

Re: The Law and Practice of 'Never again': Assessing Guarantees of Non-Recurrence in Transitional Justice

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Please accept this letter as formal ethical approval of your research project.

The Ethics Committee through the on-line platform did not raise any objections to your proposal and concluded that your protocol meets our ethical standards.

If you have any questions that you want to raise concerning your approval, please contact

Graeme Harris at [sgia.ethics@durham.ac.uk](mailto:sgia.ethics@durham.ac.uk).

We wish you well with your fieldwork and your research.

Yours sincerely



**Professor. Shaun Gregory**  
**Chair of Ethics & Risk Committee**

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Durham University is the trading name of the University of Durham

### Appendix 3: Sample interview questions

Sample interview questions asked in most interviews (different sub-questions apply in different interviews):

1. Could you please share some background information about your work in X? How did you first get involved working with/for X?
2. What is the mandate of your institution/organisation/mechanism?
3. What were/are the goals of your institution/organisation/mechanism?
4. Have these goals changed since the beginning of the mandate? If yes, how and why?
5. Do you see your institution/organisation/mechanism as contributing to the goals of transitional justice and if yes, how?
6. What is the X's relation to guarantees non-repetition of mass human rights violations, if any? Do you believe that any activities of your institution/organisation/mechanisms contribute to these guarantees? Why yes, why not?
7. (If any connections are made) Where do you draw these connections from?
8. In your personal view, as a practitioner in BiH, what do you see as a necessary guarantee of non-recurrence of mass human rights violations?
9. What are some of the major obstacles to achieving these guarantees?
10. What can be done to overcome these obstacles?
11. Whose obligation is guaranteeing non-recurrence?
12. Are guarantees of non-recurrence a human right in your opinion?
13. Could you please tell me more about your cooperation with other institutions, organisations and mechanisms in achieving some of the discussed goals?
14. What makes 'good' cooperation in your view? Could you give some examples of good practice?
15. What are some of the key obstacles to cooperation?

## Appendix 4: Nodes in NVivo

The list below shows main nodes only, organised thematically.

Nodes						Search Proj
Name	Files	References	Created On	Created By		
● Balkans as conflict-prone region		15	25	12/31/2019 11:02 AM	M.D.	
● Comparative TJ practices		10	17	12/31/2019 11:11 AM	M.D.	
⊕ ● Cooperation		53	105	9/10/2019 5:13 PM	M.D.	
● GNRs		28	59	9/10/2019 5:12 PM	M.D.	
● GNRs and memorialization		9	16	1/2/2020 8:28 AM	M.D.	
● GNRs as anti genocide denial		20	29	1/2/2020 8:26 AM	M.D.	
● GNRs as education		27	43	11/25/2019 12:07 PM	M.D.	
● GNRs as institutional reform		8	17	1/2/2020 1:39 PM	M.D.	
● GNRs as knowing the truth		25	52	1/2/2020 8:25 AM	M.D.	
● GNRs as reparation		1	2	1/13/2020 9:59 AM	M.D.	
● GNRs as security		3	7	1/11/2020 10:13 AM	M.D.	
● GNRs as vetting		7	8	1/2/2020 9:56 AM	M.D.	
● GNRs public opinion		14	21	1/3/2020 10:15 AM	M.D.	
● Holistic TJ		30	59	12/31/2019 11:05 AM	M.D.	
● Institutional reform		6	13	4/30/2020 8:45 AM	M.D.	
● International community		39	95	12/31/2019 10:57 AM	M.D.	
● Judicial fact finding		26	47	11/25/2019 12:08 PM	M.D.	
● Limitations of criminal justice		26	67	12/31/2019 11:11 AM	M.D.	
● National strategy relevance		7	11	12/31/2019 10:57 AM	M.D.	
● Never Again		28	100	9/10/2019 5:13 PM	M.D.	
● Obstacles to cooperation		12	14	11/25/2019 12:04 PM	M.D.	
● Obstacles to TJ goals		38	98	10/2/2019 3:46 PM	M.D.	
● Practices of GNRs desk research		13	23	3/16/2020 12:57 PM	M.D.	
● Prevention		12	15	12/31/2019 11:01 AM	M.D.	
● Reference to intl hr frameworks		12	24	12/31/2019 11:05 AM	M.D.	
● References to law		61	168	9/10/2019 5:13 PM	M.D.	
● References to projects - frameworks		39	87	3/19/2020 7:36 AM	M.D.	
⊕ ● Role of TJ professionals		24	40	1/2/2020 12:02 PM	M.D.	
● Storytelling		5	13	1/2/2020 1:46 PM	M.D.	
● Time		28	57	12/31/2019 11:35 AM	M.D.	
● TJ		16	25	4/30/2020 8:57 AM	M.D.	
● Trust		16	26	4/30/2020 8:40 AM	M.D.	
● Vetting		6	13	4/30/2020 8:39 AM	M.D.	
⊕ ● Vision of own role		36	101	12/31/2019 11:34 AM	M.D.	

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Giannis Papanikos, ‘Members of the Jewish Community of Thessaloniki march in the center of the city, during the 70<sup>th</sup> anniversary of the Jews deportation to Nazi extermination camps’, Royalty-free stock photo ID: 512152312 (purchased and accessed via Shutterstock)