

**ENDING IMPUNITY IN KOSOVO: CLOSING THE  
ACCOUNTABILITY GAP FOR CRIMES COMMITTED  
DURING THE KOSOVO CONFLICT**

Testimony of Dr. Paul R. Williams  
Rebecca I. Grazier Professor of Law and International Relations  
American University  
President and Co-Founder, Public International Law and Policy Group

House Committee on Foreign Affairs

“Kosovo’s Wartime Victims: The Quest for Justice”

April 30, 2019

## **ENDING IMPUNITY IN KOSOVO: CLOSING THE ACCOUNTABILITY GAP FOR CRIMES COMMITTED DURING THE KOSOVO CONFLICT**

Good morning Chairman Eliot Engel, Ranking Member Michael McCaul, and members of the Committee. It is an honor to testify before you today. In particular, it is an honor to be invited here by Chairman Engel given his long-standing commitment to peace and justice in Kosovo. It is also a privilege to share this platform with the other individuals testifying before the committee, each of whom have poignant, direct, and personal experiences and insight relating to the quest for justice for Kosovo's wartime victims.

I have been asked by Chairman Engel to discuss the international legal violations committed during the Kosovo War of 1999. In particular, I have been asked to speak from the perspective of an international lawyer with experience in designing accountability mechanisms. I will address the remedies which have been made available to victims and potential claimants, including families of those murdered and victims of rape and conflict-related sexual violence, whose cases derive from the Kosovo conflict. I have been asked to assess the degree to which these mechanisms have effectively served the purpose of justice, accountability and reconciliation for the people of Kosovo. Specifically, I have been asked to share my thoughts on the future role of the Kosovo Specialist Chambers as a viable mechanism to afford justice to the hundreds of thousands of victims of that conflict.

This testimony will identify what I call an "accountability gap" in Kosovo, and it will seek to explain some of the reasons behind this gap. I will first detail a brief history of the conflict in Kosovo and discuss the mechanisms that have been created for accountability so far—namely, the Yugoslav Tribunal, the UN Mission in Kosovo's Regulation 64 Panels, the European Union Rule of Law Mission in Kosovo's assistance to domestic courts, the Serbian War Crimes Chamber, and the more recent Specialist Chambers and Specialist Prosecutor's Office. I will then assess how and why access to justice, with particular attention to conflict-related sexual violence, has to date been beyond the reach of a significant number of victims in Kosovo. Lastly, I will articulate a number of steps we can take to begin closing this accountability gap.

To contextualize my contribution to today's hearing, I should mention my previous work on accountability in the former Yugoslavia as well as in other post-conflict regions, including Syria, Uganda, Côte d'Ivoire, and Libya. I was an Attorney Advisor in the U.S. Department of State's Office of European and Canadian Affairs during the State Department's initial development of an American response to the conflict in the former Yugoslavia. In this position, I played a role in the formulation of the UN Security Council Resolution that authorized the Yugoslav Tribunal. I also served as an advisor to the Kosovo Albanian delegation at the Rambouillet, Paris, and Vienna Conferences, and I provided assistance to the development of the Kosovo constitution.

I have provided legal assistance to more than two dozen parties involved in peace negotiations, the drafting of post-conflict constitutions, and the creation of transitional justice mechanisms, including those designed to prosecute war criminals. Notably, I advised the Ugandan government on the development of a domestic war crimes chamber within the state's High Court, the Libyan Transitional National Council on the creation of transitional justice

mechanisms, the Government of Côte d'Ivoire on mechanisms for the investigation and prosecution of atrocity crimes, and the Syrian opposition on the proposal for a hybrid tribunal to prosecute those responsible for crimes against humanity in Syria.

## **HISTORY OF THE KOSOVO CONFLICT**

The war in Kosovo has its origins in the dissolution of the former Yugoslavia. Located in the heart of the Balkans, Kosovo became a Serbian province after the First Balkan War. Then, when Serbia was incorporated into Yugoslavia following World War II, Kosovo's status shifted to a Socialist Autonomous Province within Serbia.<sup>1</sup> In 1991, the dissolution of Yugoslavia began as Slovenia and Croatia declared independence and the national army of Yugoslavia responded to these declarations with violence, which led to armed conflict in Slovenia, Croatia, and subsequently in Bosnia.<sup>2</sup>

During the conflicts in Croatia and Bosnia, widespread mass violence and atrocity crimes occurred, including genocide,<sup>3</sup> rape camps,<sup>4</sup> torture, mass killings, and mass detentions. The genocide at Srebrenica carried out by Bosnian Serb forces with the assistance of forces from Serbia proper prompted NATO airstrikes that continued for one month until the parties met to negotiate peace in Dayton, Ohio in November of 1995. The resulting Dayton Peace Accords brought an end to the conflict in Bosnia, but left unresolved the crisis brewing in Kosovo.<sup>5</sup>

Kosovo Albanians had sought separation from Serbia and full republic status within Yugoslavia for years before Yugoslavia's dissolution.<sup>6</sup> In response, Serbian leader Slobodan Milošević called for the restoration of full Serbian sovereignty over Kosovo. Milošević became increasingly oppressive towards the Albanian majority, and he sought a new constitution that would revoke Kosovo's semi-autonomous status and allow full Serbian control over the territory. The People's Movement of Kosovo (*Lëvizja Popullore e Kosovës*) organized non-violent political resistance advocating for Kosovo self-determination. Then, in 1996, the Kosovo Liberation Army ("KLA") began mobilizing in armed protest.<sup>7</sup> Serbia responded to the KLA

---

<sup>1</sup> CIA, *The World Factbook: Kosovo* (Feb. 2011); Michael Waller, editor, *KOSOVO: THE POLITICS OF DELUSION* viii (2001).

<sup>2</sup> Susan L. Woodward, *Costly Disinterest: Missed Opportunities for Preventive Diplomacy in Croatia and Bosnia and Herzegovina, 1985-1991*, in *OPPORTUNITIES MISSED, OPPORTUNITIES SEIZED: PREVENTIVE DIPLOMACY IN THE POST-COLD WAR WORLD* 137 (ed. Bruce Jentleson, 2000), available at <http://www.wilsoncenter.org/subsites/ccpdc/pubs/opp/4.pdf>; Noel Malcolm, *BOSNIA: A SHORT HISTORY*, (NYU PRESS, 1994).

<sup>3</sup> *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement (Aug. 2, 2001); *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgement (Mar. 5, 1998); *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60-2-S, (Dec. 10, 2003).

<sup>4</sup> *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-, Judgement (Feb. 22, 2001).

<sup>5</sup> Ivo H. Daalder, *Decision to Intervene: How the War in Bosnia Ended*, BROOKINGS, (December 1, 1998), available at <https://www.brookings.edu/articles/decision-to-intervene-how-the-war-in-bosnia-ended/>.

<sup>6</sup> CIA, *The World Factbook: Kosovo* (Feb. 2011); Michael Waller, editor, *KOSOVO: THE POLITICS OF DELUSION* viii (2001); Noel Malcolm, *KOSOVO: A SHORT HISTORY* (Perennial/Harper Collins, 1991).

<sup>7</sup> CIA, *The World Factbook: Kosovo* (Feb. 2011).

insurgency with an even harsher repression campaign, with violence peaking in 1998.<sup>8</sup> Serbian forces destroyed homes and mosques, and engaged in mass looting, rape, and murder.<sup>9</sup>

The vast majority of international crimes perpetrated during the conflict in Kosovo were committed by the Serb army, police, and paramilitary who waged a systematic and targeted campaign of violent terror against ethnic Albanians.<sup>10</sup> According to Human Rights Watch, Serb forces had three main motives for acting violently against the Kosovo Albanians: expediting the "cleansing" process through intimidation and fear, targeting of individuals suspected of fighting with or assisting the KLA, and killing for revenge.<sup>11</sup> The atrocity crimes carried out in Kosovo were extensive, including kidnapping, enforced disappearances, expulsions, rape, murder, and forced displacement.<sup>12</sup> In particular, rape and sexual violence were used as methods of ethnic cleansing with the systematic threat and instigation of violence terrorizing Kosovo Albanian villagers into fleeing their homes.<sup>13</sup> In total, the Serb army, paramilitary forces, and police forcibly displaced nearly 90% the Kosovo population.<sup>14</sup> A report by the Organization of Security and Co-operation in Europe estimated that around 850,000 Kosovar Albanians were forcibly expelled from Kosovo and about 590,000 were internally displaced by the conflict.<sup>15</sup>

In an attempt to resolve the conflict in Kosovo, the parties to the conflict met for peace negotiations in Rambouillet, France and then in Paris, France. The delegation representing Kosovar Albanians signed the Rambouillet Accords alongside the American and British delegations in Paris.<sup>16</sup> Serbia, however, did not sign the Accords.

Then, Serb security forces killed 45 Kosovo Albanians in the village of Račak, in an incident known as the Račak Massacre.<sup>17</sup> In response to these killings, Yugoslav Tribunal prosecutor Judge Louise Arbour sought access to Račak to investigate the massacre. Milošević

---

<sup>8</sup> CIA, *The World Factbook: Kosovo* (Feb. 2011).

<sup>9</sup> International Crisis Group, *Kosovo Conflict History* (2010), available at <http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/kosovo.aspx>.

<sup>10</sup> *Under Orders: War Crimes in Kosovo*, HUMAN RIGHTS WATCH, (October 26, 2001), available at <https://www.hrw.org/report/2001/10/26/under-orders-war-crimes-kosovo>.

<sup>11</sup> *Under Orders: War Crimes in Kosovo*, HUMAN RIGHTS WATCH, (October 26, 2001), available at <https://www.hrw.org/report/2001/10/26/under-orders-war-crimes-kosovo>.

<sup>12</sup> UNHCR Evaluation and Policy Analysis Unit, *The Kosovo refugee crisis: an independent evaluation of UNHCR's emergency preparedness and response*, UNHCR EVALUATION AND POLICY ANALYSIS UNIT (Feb. 2000) available at <https://www.unhcr.org/en-lk/excom/standcom/3ae68d19c/kosovo-refugee-crisis-independent-evaluation-unhcrs-emergency-preparedness.html>.

<sup>13</sup> *Under Orders: War Crimes in Kosovo*, HUMAN RIGHTS WATCH, (October 26, 2001), available at <https://www.hrw.org/report/2001/10/26/under-orders-war-crimes-kosovo>.

<sup>14</sup> *Human Rights in Kosovo: As Seen, As Told. Volume I, October 1998 - June 1999*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Nov. 5, 1999), 167, available at <https://www.osce.org/odihr/17772>

<sup>15</sup> *Human Rights in Kosovo: As Seen, As Told. Volume I, October 1998 - June 1999*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Nov. 5, 1999), 167, available at <https://www.osce.org/odihr/17772>

<sup>16</sup> Interim Agreement for Peace and Self-Government In Kosovo ("Rambouillet Accords") (1999), available at [http://www.usip.org/library/pa/kosovo/kosovo\\_rambtoc.html](http://www.usip.org/library/pa/kosovo/kosovo_rambtoc.html).

<sup>17</sup> *A Kosovo Chronology*, FRONTLINE, available at <https://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html>.

and Serbian forces under his control would not to allow Judge Arbour to enter Kosovo.<sup>18</sup> This massacre would play a key role in NATO's decision to undertake a humanitarian intervention.<sup>19</sup>

In March 1999, NATO began a 78-day air campaign against Serb forces in Kosovo after efforts to negotiate an end to the violence collapsed.<sup>20</sup> NATO's intervention led to Serbia's agreement to cease all military activity in Kosovo. To facilitate the withdrawal of Serbian forces from Kosovo, NATO and the Serbian government agreed on the removal of Serb military units and the deployment of an international security force ("KFOR").<sup>21</sup> The United Nations Security Council then passed Resolution 1244 on June 10, 1999, which established the UN Interim Administration Mission in Kosovo ("UNMIK") as a temporary government until Kosovo's own institutions had developed and demonstrated the capacity to self-govern.<sup>22</sup> Among its various powers, UNMIK possessed the authority to administer justice in Kosovo, including the ability to investigate and prosecute serious crimes committed during the war.

Kosovo declared independence on February 17, 2008.<sup>23</sup> The declaration was rejected by Serbia, which claimed ongoing sovereignty over Kosovo, but has since received the recognition of over 100 states,<sup>24</sup> including the United States, 23 of the 28 European Union member states, and a number of regional powers, such as Turkey.<sup>25</sup>

## **PRIOR MECHANISMS FOR PURSUING ACCOUNTABILITY IN KOSOVO**

While there have been a number of attempts to secure accountability for war crimes that were committed in Kosovo, there have been repeated shortcomings. Below, I will detail the limited impact of the Yugoslav Tribunal, the minimal role of UNMIK's brief effort to prosecute those responsible for war crimes, and the restricted jurisdiction that prevented European Union Rule of Law Mission in Kosovo ("EULEX") from trying many cases. The inability of these mechanisms to hold a significant number of perpetrators accountable has created an accountability gap for the crimes committed in Kosovo.

---

<sup>18</sup> *A Kosovo Chronology*, FRONTLINE, available at

<https://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html>.

<sup>19</sup> *Under Orders: War Crimes in Kosovo*, HUMAN RIGHTS WATCH, (October 26, 2001), available at <https://www.hrw.org/report/2001/10/26/under-orders-war-crimes-kosovo>.

<sup>20</sup> NATO, *The Evolution of NATO's Role in Kosovo* (Nov. 2010), available at [http://www.nato.int/cps/en/natolive/topics\\_48818.htm](http://www.nato.int/cps/en/natolive/topics_48818.htm).

<sup>21</sup> Secretary-General, *Letter dated 15 June 1999 from the Secretary-General addressed to the President of the Security Council*, annex, U.N. Doc. S/1999/682 (June 15, 1999).

<sup>22</sup> Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, para. 1, U.N. Doc. S/1999/779 (July 12, 1999).

<sup>23</sup> U.S. Department of State, *Summary of the Comprehensive Proposal for the Kosovo Status Settlement* (January 2009).

<sup>24</sup> U.S. Department of State, *U.S. Relations With Kosovo* (October 10, 2018), available at <https://www.state.gov/r/pa/ei/bgn/100931.htm>.

<sup>25</sup> *Kosovo Thanks You*, available at <https://www.kosovothankyou.com/>.

## The Yugoslav Tribunal

The primary judicial mechanism used to hold those responsible accountable for war crimes was the Yugoslav Tribunal. The Tribunal grew out of the UN Security Council's *Commission of Experts to Investigate War Crimes in the Former Yugoslavia*. The Commission, headed by Professor Cherif Bassiouni, was charged with investigating and analyzing evidence of violations of the Geneva Convention and international law on the territory of the former Yugoslavia.

On May 25, 1993, at the recommendation of the Bassiouni Commission, the United Nations Security Council adopted Resolution 827 which established the Yugoslav Tribunal for the “purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory for the former Yugoslavia since January 1, 1991.”<sup>26</sup> The cases brought before the Yugoslav Tribunal came to cover a number of interconnected conflicts—namely, the violence in Slovenia, Croatia, Bosnia and Herzegovina, and Kosovo.<sup>27</sup>

The Yugoslav Tribunal was mandated to “bring to justice those responsible for serious violations of international humanitarian law” and “contribute to the restoration and maintenance of peace in the region.”<sup>28</sup> The specific categories of international crimes the Tribunal was authorized to prosecute included: grave breaches of the Geneva Conventions, violations of the laws of war, genocide, and crimes against humanity.<sup>29</sup> The Yugoslav Tribunal did not have jurisdiction to hold states, governments or political parties accountable, only individuals.<sup>30</sup>

During its 24-year tenure, the Yugoslav Tribunal indicted 161 individuals,<sup>31</sup> convicted 90 individuals, and acquitted 19 individuals.<sup>32</sup> The remainder of those indicted were transferred to other courts, passed away, or had their cases withdrawn for various reasons.<sup>33</sup> Of the 161 indictees, 68% (109 individuals) were associated with atrocities alleged to be committed by

---

<sup>26</sup> Security Council Resolution 827, U.N. Doc. S/RES/827 (May 25, 1993) as quoted in Milena Sterio and Michael P. Scharf, *THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 2* (2019).

<sup>27</sup> *Sreten Lukic*, TRIAL INTERNATIONAL (2017), available at <https://trialinternational.org/latest-post/sreten-lukic/>.

<sup>28</sup> *Mandate and Crimes under Yugoslav Tribunal Jurisdiction*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>.

<sup>29</sup> *Mandate and Crimes under ICTY Jurisdiction*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>.

<sup>30</sup> *Mandate and Crimes under ICTY Jurisdiction*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-Yugoslav-Tribunal-jurisdiction>; *Updated Statute of the International Criminal Tribunal for the former Yugoslavia*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (adopted May 25, 1993, updated September, 2009) [Article 7 specifies that any individual who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” referred to in the statute “shall be individually responsible for the crime.”]

<sup>31</sup> Milena Sterio and Michael P. Scharf, *THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 3* (2019).

<sup>32</sup> *Infographic: ICTY Facts & Figures*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at <http://www.icty.org/en/cases/key-figures-cases>.

<sup>33</sup> *Key Figures of the Case*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at <http://www.icty.org/en/cases/key-figures-cases>.

Serbian forces, 21% associated with Croatian forces (33 individuals), 4% associated with Bosniaks forces (7 individuals), and 4% associated with Kosovar Albanian forces (6 individuals).<sup>34</sup> Notably, the vast majority of these indictments were for crimes committed in Croatia and Bosnia.

### *The Yugoslav Tribunal and the Kosovo Conflict*

Only seven members of the Serbian regime were indicted by the Yugoslav Tribunal for crimes committed in Kosovo. Surprisingly, not a single one of these seven indictments included an explicit count of rape as a crime against humanity. Four of these indictments, however, did account for the use of sexual violence as a method of committing other atrocity crimes.<sup>35</sup>

The most prominent individual indicted was Serbian President Slobodan Milošević. Milošević was the first sitting head of state to be indicted for war crimes by an international tribunal.<sup>36</sup> Milošević was initially indicted under the theory of command responsibility for atrocity crimes committed by Serb forces in Kosovo. His alleged crimes included murder and persecution of civilian populations on political, racial, or religious grounds. Milošević's indictment alleged that he "as President of the [Federal Republic of Yugoslavia], Supreme Commander of the [Yugoslav Army] and President of the Supreme Defence Council" was "criminally responsible for the acts of his subordinates."<sup>37</sup> His indictment did not include any details about conflict-related sexual violence. The indictment was subsequently amended to include charges related to the conflicts in Croatia and Bosnia, and included charges of genocide in Bosnia. Milošević died from natural causes during the course of his trial, preventing the Tribunal from rendering a decision in his case.

The Tribunal also indicted Nikola Šainović, Deputy Prime Minister of the Federal Republic of Yugoslavia.<sup>38</sup> The Tribunal found Šainović guilty of possessing the intent to displace the Kosovo Albanian population and convicted him of individual criminal responsibility for deportation, forcible transfer, murder, and persecution through sexual assault.<sup>39</sup> Šainović was sentenced to 22 years of imprisonment.<sup>40</sup>

A third high profile indictee was former Serbian President Milan Milutinović. Milutinović was indicted on the basis of individual criminal responsibility and superior criminal responsibility for war crimes including murder and persecutions on political, racial or religious grounds and crimes against humanity related to deportation, murder, and persecutions.<sup>41</sup>

---

<sup>34</sup> *Key Figures of the Case*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at <http://www.icty.org/en/cases/key-figures-cases>.

<sup>35</sup> *In Numbers*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at <http://www.icty.org/en/features/crimes-sexual-violence/in-numbers>.

<sup>36</sup> Jennifer Trahan, *Examining the Benchmarks by Which to Evaluate the Yugoslav Tribunal's Legacy*, in THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 25, 33 (Milena Sterio and Michael P. Scharf, eds., 1st ed., 2019).

<sup>37</sup> *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, (June 29, 2001).

<sup>38</sup> *Prosecutor v. Šainović et al.*, Case No. IT-06-87, Judgement (Feb. 26, 2009).

<sup>39</sup> *Prosecutor v. Šainović et al.*, Case No. IT-06-87, Judgement (Feb. 26, 2009).

<sup>40</sup> *Prosecutor v. Šainović et al.*, Case No. IT-06-87, Judgement (Feb. 26, 2009).

<sup>41</sup> *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, (June 29, 2001).

Milutinović was found not guilty on all charges. Notably, Šainović and Milutinović headed the Serbian delegation to the Rambouillet Accords negotiations.

The additional four indictments of perpetrators associated with the Serbian regime involved evidence of sexual violence, although rape was not a distinct count in any of the indictments. Colonel General Vlastimir Đorđević,<sup>42</sup> Chief of Staff of the Priština Corps Vladimir Lazarević, Chief of the General Staff of the Armed Forces of Yugoslavia Nebojša Pavković,<sup>43</sup> and Head of the Serbian Police in Kosovo Sreten Lukić<sup>44</sup> were convicted of the deportation of municipal communities, forcible transfer, and murder.<sup>45</sup> The indictment argued that all four individuals were found to have directed, encouraged, and supported the sexual assault of Kosovo Albanians, particularly women, by Serb forces as a means of committing the charged crimes.<sup>46</sup> However, the Tribunal found that intent to discriminate had not been proven and thus “the charge of persecutions committed through sexual assault [could] not be established.”<sup>47</sup> Đorđević was sentenced to 18 years imprisonment.<sup>48</sup> Lazarević was sentenced to 15 years imprisonment,<sup>49</sup> Pavković was sentenced to 22 years imprisonment.<sup>50</sup> Lukić was sentenced to 22 years imprisonment.<sup>51</sup>

The Yugoslav Tribunal also indicted seven Kosovar Albanians for crimes committed during the Kosovo conflict. Four of these seven indictments were members of the KLA and officers at the Lapušnik/Llapushnik Prison camp: Agim Murtezi, Fatmir Limaj, Haradin Bala, and Isak Musliu.<sup>52</sup> They were indicted for the imprisonment, torture, and murder of detainees at the Prison Camp.<sup>53</sup> Murtezi’s indictments were withdrawn.<sup>54</sup> Limaj and Musliu were acquitted.<sup>55</sup> Bala was convicted and sentenced to 13 years’ imprisonment, but was granted early release.<sup>56</sup>

---

<sup>42</sup> *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1, Judgement (Feb., 23, 2011).

<sup>43</sup> *Prosecutor v. Pavokvić et al.*, Case No. IT-03-70-I, (Sept. 25, 2003).

<sup>44</sup> *Prosecutor vs. Pavokvić et al.*, Case No. IT-03-70-I, (Sept. 25, 2003).

<sup>45</sup> *Prosecutor v. Pavokvić et al.*, Case No. IT-03-70-I, (Sept. 25, 2003).

<sup>46</sup> *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1, Judgement (Feb., 23, 2011).

<sup>47</sup> *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1, Judgement (Feb., 23, 2011).

<sup>48</sup> *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1, Judgement (Feb., 23, 2011).

<sup>49</sup> *Conviction for Kosovo crimes upheld for four senior Serbian officials*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, (Jan. 23, 2014) available at <http://www.icty.org/en/press/convictions-kosovo-crimes-upheld-four-senior-serbian-officials>.

<sup>50</sup> *Conviction for Kosovo crimes upheld for four senior Serbian officials*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, (Jan. 23, 2014) available at <http://www.icty.org/en/press/convictions-kosovo-crimes-upheld-four-senior-serbian-officials>.

<sup>51</sup> *Conviction for Kosovo crimes upheld for four senior Serbian officials*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, (Jan. 23, 2014) available at <http://www.icty.org/en/press/convictions-kosovo-crimes-upheld-four-senior-serbian-officials>.

<sup>52</sup> *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Judgement (Sept. 27, 2007).

<sup>53</sup> *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Judgement (Sept. 27, 2007).

<sup>54</sup> *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Judgement (Sept. 27, 2007).

<sup>55</sup> *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Judgement (Sept. 27, 2007); *Fatmir Limaj and Isak Musliu Acquitted - Haradin Bala Convicted*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (30 Nov. 2005), available at <http://www.icty.org/en/press/fatmir-limaj-and-isak-musliu-acquitted-haradin-bala-convicted>.

<sup>56</sup> *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Judgement (Sept. 27, 2007).



The fifth Kosovo Albanian indicted was Ramush Haradinaj, who served as Prime Minister of Kosovo and was a former KLA commander.<sup>57</sup> He was indicted for crimes against humanity and war crimes for mounting a systematic campaign to seize control of the area between villages of Glodjane/Gllogjan and Decani/Deçan.<sup>58</sup> Haradinaj was acquitted of all charges.<sup>59</sup>

Relatedly, the sixth and seventh Kosovar indictees were Idriz Balaj, a member of the KLA and commander of a KLA special unit, and Lahi Brahimaj, a member of the KLA and Deputy Commander of the Dukagjin Operative Staff. They were both indicted for persecution, deportation, imprisonment, murders, cruel treatment, and rape.<sup>60</sup> Balaj was acquitted.<sup>61</sup> Brahimaj was convicted and sentenced to 6 years in prison.<sup>62</sup>

The Yugoslav Tribunal completed its mandate in 2017 and no longer takes on new cases. The Hague Branch of the Mechanism for International Criminal Tribunals, established in 2013, is now responsible for “maintaining protective measures granted to victims and witnesses by the ICTY, hearing any appeals from judgements or sentences issued by the ICTY... [and] handling requests for review of judgements.”<sup>63</sup> This residual mechanism, as it is called, is also responsible for monitoring cases transferred to national jurisdictions and for handling any future appeals that are filed.<sup>64</sup>

## UN Mission in Kosovo and Regulation 64 Panels

In June 1999, the UN Security Council council passed Resolution 1244 establishing a UN Interim Administration Mission in Kosovo (“UNMIK”).<sup>65</sup> In 2000, UNMIK passed Regulation 64, which created panels for the investigation and prosecution of war crimes in local courts.<sup>66</sup> These structures, called Regulation 64 Panels, were hybrid international-domestic courts that consisted of an international prosecutor, an international judge, and/or a panel composed of three

---

<sup>57</sup> *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Acquittal (Sept. 27, 2007).

<sup>58</sup> *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Acquittal (Sept. 27, 2007).

<sup>59</sup> *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Acquittal (Sept. 27, 2007).

<sup>60</sup> *Fatmir Limaj and Isak Musliu Acquitted - Haradin Bala Convicted*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (30 Nov. 2005), available at: <http://www.icty.org/en/press/fatmir-limaj-and-isak-musliu-acquitted-haradin-bala-convicted>.

<sup>61</sup> *Fatmir Limaj and Isak Musliu Acquitted - Haradin Bala Convicted*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (30 Nov. 2005), available at: <http://www.icty.org/en/press/fatmir-limaj-and-isak-musliu-acquitted-haradin-bala-convicted>.

<sup>62</sup> *Fatmir Limaj and Isak Musliu Acquitted - Haradin Bala Convicted*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (30 Nov. 2005), available at: <http://www.icty.org/en/press/fatmir-limaj-and-isak-musliu-acquitted-haradin-bala-convicted>.

<sup>63</sup> *Mechanisms for International Criminal Tribunals (MICT) begins work in the Hague*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (July 1, 2013), available at <http://www.icty.org/en/press/mechanism-international-criminal-tribunals-mict-begins-work-hague>

<sup>64</sup> *Mechanisms for International Criminal Tribunals (MICT) begins work in the Hague*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (July 1, 2013), available at <http://www.icty.org/en/press/mechanism-international-criminal-tribunals-mict-begins-work-hague>

<sup>65</sup> Security Council Resolution 1244, U.N. Doc S/RES/1244, Para 10 & Annex 2 Para 3.

<sup>66</sup> Dominik Zaum, *International Justice and the Prevention of Atrocities: Case Study: Kosovo*, EUROPEAN COUNCIL OF FOREIGN RELATIONS (November 2013) 1, available at [https://www.ecfr.eu/page/-/IJP\\_Kosovo.pdf](https://www.ecfr.eu/page/-/IJP_Kosovo.pdf).

judges, including at least two international judges.<sup>67</sup> UNMIK opened more than a thousand case files, but only initiated a small number of prosecutions. Specifically in relation to sexual violence, “UNMIK conducted two appeals and retrials in cases involving allegations of [conflict-related sexual violence] which had been tried before December 2000 by Kosovo Albanian judiciary. Both cases ended in acquittals.”<sup>68</sup> In its eight year mandate, UNMIK completed just 37 war crimes cases.<sup>69</sup> UNMIK lacked the time and resources to move a significant number of these case files into the court system successfully, resulting in a small number of actual prosecutions.

### **European Union Rule of Law Mission in Kosovo (“EULEX”)**

The EULEX mission was established to “assist the Kosovo authorities in establishing sustainable and independent rule of law institutions.”<sup>70</sup> When UNMIK was re-organized in 2008 and 2009 and scaled down, EULEX’s original mandate included the authority to assist Kosovar institutions with the prosecution of crimes, including war crimes. From 2008 to 2018, mixed panels of EULEX and local judges delivered 46 verdicts, only four of which involved war crimes.<sup>71</sup>

EULEX received almost 1,200 war crimes case files that had been compiled by UNMIK prior to its re-organization. These 1,200 cases each likely had multiple victims and multiple perpetrators, presenting EULEX with thousands of victims in need of justice and thousands of perpetrators not yet held responsible for their crimes. In 2018, EULEX ended its judicial mandate and “[handed] over 900 unresolved [case files] to the local Special Prosecutor’s Office.”<sup>72</sup> The local Special Prosecutor’s Office only has two prosecutors assigned to war crimes.<sup>73</sup>

Additionally, as noted by Bernd Borchardt, who served as EULEX Head of Mission, the majority of individuals suspected of war crimes committed against Kosovar Albanians during the war are individuals associated with Serb military or police forces who are no longer in Kosovo.<sup>74</sup> As Kosovo and EULEX only have jurisdiction over individuals within Kosovo’s territory, they can take extremely limited action to prosecute these individuals.<sup>75</sup>

---

<sup>67</sup> UNMIK Resolution 64, U.N. Doc UNMIK/REG/2000/64.

<sup>68</sup> “*Wounds that Burn Our Souls*”: *Compensation for Kosovo’s Wartime Rape Survivors But Still No Justice*, AMNESTY INTERNATIONAL, 19 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>69</sup> *Kosovo’s War Crimes Trials: An Assessment Ten Years On 1999 – 2009*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, 8 (May 2010), available at <https://www.osce.org/kosovo/68569>.

<sup>70</sup> *About EULEX: The Mission*, available at: <https://www.eulex-kosovo.eu/?page=2,60>.

<sup>71</sup> Human Rights Watch, *Serbia/Kosovo Events of 2018*, HUMAN RIGHTS WATCH (2018), available at <https://www.hrw.org/world-report/2019/country-chapters/serbia/kosovo>.

<sup>72</sup> Human Rights Watch, *Serbia/Kosovo Events of 2018*, HUMAN RIGHTS WATCH (2018), available at <https://www.hrw.org/world-report/2019/country-chapters/serbia/kosovo>.

<sup>73</sup> Human Rights Watch, *Serbia/Kosovo Events of 2018*, HUMAN RIGHTS WATCH (2018), available at <https://www.hrw.org/world-report/2019/country-chapters/serbia/kosovo>.

<sup>74</sup> Bernd Borchardt, *EULEX and War Crimes*, EUROPEAN UNION EXTERNAL ACTION, available at <https://www.eulex-kosovo.eu/en/news/000427.php>.

<sup>75</sup> Bernd Borchardt, *EULEX and War Crimes*, EUROPEAN UNION EXTERNAL ACTION, available at <https://www.eulex-kosovo.eu/en/news/000427.php>.

## Serbian War Crimes Chamber

Serbia has made minimal effort to investigate and prosecute crimes perpetrated by Serbian forces during the Bosnian, Croatian and Kosovo conflicts. Until 2003, Serbia left such prosecutions to local courts that were ill-equipped to prosecute such cases. In 2003, under international pressure for greater accountability, the Serbian Assembly created a War Crimes Chamber and an Office of the War Crimes Prosecutor to handle the prosecution of war crimes committed in Serbia.<sup>76</sup> However, these entities have been plagued by the “lack of political will, adequate resources, and weak witness support mechanisms.”<sup>77</sup> Through 2018, the Chambers had issued 44 final judgments, convicted 74 perpetrators, and acquitted 50 individuals for crimes in the conflicts in Bosnia, Croatia, and Kosovo. Very few of these prosecutions were of high-ranking officials.<sup>78</sup> Moreover, only a couple of the cases pertained to crimes committed in Kosovo, or addressed conflict-related sexual violence.

## The Specialist Chambers and Specialist Prosecutor’s Office

In 2015, the Assembly of the Republic of Kosovo amended its Constitution to provide for the authority to create a Specialist Chambers and a Specialist Prosecutor’s Office within Kosovo.<sup>79</sup> Acting upon this authorization, the Kosovo Assembly passed the Law on Specialist Chambers and Specialist Prosecutor’s Office (Law No. 05/L-053), which establishes the two institutions and provides for their jurisdiction, rules of procedure and evidence, structure, and competencies.<sup>80</sup> The Kosovar government and the Dutch government agreed to locate the Chambers and Office in The Hague.

The Specialist Chambers has subject-matter jurisdiction over the crimes set out in Articles 12-16 of the Law, including: crimes against humanity, war crimes, and other crimes under Kosovo law.<sup>81</sup> The Specialist Chambers’ temporal jurisdiction covers crimes that occurred between January 1, 1998 through December 31, 2000. The Specialist Chambers has territorial jurisdiction over crimes either commenced or committed in Kosovo.

Public commentary suggests that the Specialist Chambers’ jurisdiction may be narrowly interpreted to focus only on the alleged crimes of ethnic Albanians and members of the KLA. This interpretation looks to be guided by the court’s history rather than a precise legal analysis of its founding documents. The court was created in the wake of an inquiry authorized by the

---

<sup>76</sup> Bogdan Ivanišević, *Against the Current—War Crimes Prosecutions in Serbia* (2007), INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (2007), available at [http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Crimes-Prosecutions-2007-English\\_1.pdf](http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Crimes-Prosecutions-2007-English_1.pdf).

<sup>77</sup> *Serbia/Kosovo: Events 2018*, HUMAN RIGHTS WATCH (World Report 2019), available at <https://www.hrw.org/world-report/2019/country-chapters/serbia/kosovo>.

<sup>78</sup> *Serbia/Kosovo: Events 2018*, HUMAN RIGHTS WATCH (World Report 2019), available at <https://www.hrw.org/world-report/2019/country-chapters/serbia/kosovo>.

<sup>79</sup> KOSOVO CONST. art. 162 amendment no. 24 (2008, 2015), available at <http://www.kuvendikosoves.org/common/docs/Amendment%20of%20the%20Constitution%20-no%2024.pdf>

<sup>80</sup> *On Specialist Chambers and Specialist Prosecutor's Office*, Law No.05/L-053 (Kosovo, 2015), available at <https://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf>.

<sup>81</sup> Criminal Code of the Republic of Kosovo 2012 (Law No. 04/L-082), available at <http://www.assembly-kosova.org/common/docs/ligjet/Criminal%20Code.pdf>.

Council of Europe, and led by Swiss diplomat, Dick Maarty, into allegations of serious offences perpetrated by organized crime and members of the KLA during and in the immediate aftermath of the Kosovo conflict.<sup>82</sup>

As explained below, a close reading of the Chambers' constituting law reveals an even broader mandate that includes the authority to investigate and prosecute perpetrators of any ethnicity. Currently, the Chambers are still engaged in the initial stages of investigation and have yet to indict any suspects. This offers an important opportunity to clarify the Chambers' ability and commitment to closing the accountability gap.

## **THE UNMET NEED FOR JUSTICE**

Despite the efforts of the Yugoslav Tribunal, the attempts of the UNMIK Regulation 64 Panels, and the efforts of EULEX, there is a dramatic accountability gap for war crimes and crimes against humanity committed against the people of Kosovo. An estimated 850,000 Albanians were forcibly expelled from Kosovo, 590,000 internally displaced within Kosovo, 20,000 victims of conflict-related sexual violence, and several thousand civilians murdered during the conflict.<sup>83</sup> Selectively prosecuting a few military and political leaders from the Serbian regime is undeniably valuable, but nevertheless insufficient.

Perpetrating mass atrocity requires multiple actors to jointly commit international crimes.<sup>84</sup> These actors can range from regular civilians co-opted by the state or paramilitaries to facilitate heinous acts, to ordinary soldiers, senior military officers, and political leaders.<sup>85</sup> Following the Bosnian war, an International Crisis Group Report found that while some perpetrators had been indicted by the Yugoslav Tribunal, many "continue[d] to work in the police force, hold public office, exercise power through the legal and illegal economy, or influence politics from behind the scenes."<sup>86</sup> Undoubtedly, a similar phenomenon has occurred in Kosovo as well. The range of perpetrators involved in perpetrating international crimes during the Kosovo conflict spanned the broadest spectrum, but only a handful of select and mostly high-level actors have been prosecuted to date. Although the previous judicial bodies made important progress, a vast number of perpetrators continue to walk free in Serbia.

For example, a recent report prepared by the Humanitarian Law Centre details the absence of any inquiry into mass graves found in Serbia that contained the bodies of 940 Kosovo

---

<sup>82</sup> Council of Europe, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, (7 Jan. 2011).

<sup>83</sup> *Human Rights in Kosovo: As Seen, As Told. Volume I, October 1998 - June 1999*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, 96 (Nov. 5, 1999), available at <https://www.osce.org/odihr/17772>. "Wounds that Burn Our Souls": *Compensation for Kosovo's Wartime Rape Survivors But Still No Justice*, AMNESTY INTERNATIONAL, 14n17 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>84</sup> Mark Drumbl, *Atrocity, Punishment, and International Law*, CAMBRIDGE UNIVERSITY PRESS (2007).

<sup>85</sup> Mark Drumbl, *Atrocity, Punishment, and International Law*, CAMBRIDGE UNIVERSITY PRESS (2007).

<sup>86</sup> *War Criminals in Bosnia's Republika Srpska*, INTERNATIONAL CRISIS GROUP (Balkans Report 103, Nov. 2, 2000), available at <https://www.crisisgroup.org/europe-central-asia/balkans/bosnia-and-herzegovina/war-criminals-bosnias-republika-srpska>

Albanians, mainly civilians, who were killed outside of combat situations.<sup>87</sup> The report, which compiles eyewitness testimony corroborated by evidence from the Yugoslav Tribunal, suggests the graves were part of a coordinated plan carried out by senior Serbian leadership in 1999 to conceal evidence of crimes against Kosovo Albanian civilians.<sup>88</sup> However, nearly all those who planned and carried out the crimes have not been indicted for their actions.<sup>89</sup>

The accountability gap was further aggravated by the limited capacity of UNMIK and EULEX professionals to properly administer war crimes cases. In addition to struggling with meagre resources and narrow mandates, UNMIK and EULEX officials possessed little to no expertise on how to handle war crimes matters.<sup>90</sup> The deficit in capacity extended to the entire justice system, including judges, prosecutors, defense lawyers, and investigators. This limited the ability of UNMIK and EULEX to deliver accountability appropriate to the volume of perpetrators and crimes involved.<sup>91</sup>

### **The Importance of Accountability**

It is imperative to obtain accountability for mass atrocities. In post-conflict settings, securing justice plays five key roles. First, it helps to establish individual responsibility and deny collective guilt.<sup>92</sup> Particularly in ethno-political conflicts, accountability helps to distinguish between the culpability of individual perpetrators and the social, ethnic, and religious groups they belong to, preventing that group from being blamed as a whole.<sup>93</sup> Isolating the blameless from the blameworthy through criminal processes can foster acknowledgement of the commonality rather than division that exists between a plurality of the individuals belonging to rival groups. This can also help establish a pathway to reconciliation between the ordinary civilians caught in the ethno-cultural crossfires of conflict.

Second, the pursuit of justice helps to discredit the leaders and institutions responsible for the crimes.<sup>94</sup> The indictment of Milošević, for instance, was a key part of the effort to delegitimize his rule. Third, in undergoing judicial proceedings, the collection and presentation

---

<sup>87</sup> Humanitarian Law Center, *Dossier: The cover-up of evidence of crimes during the war in Kosovo: THE CONCEALMENT OF BODIES OPERATION*, (January 2017), available at [http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije\\_OPERACIJA\\_SKRIVANJA\\_TELA.\\_eng.pdf](http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije_OPERACIJA_SKRIVANJA_TELA._eng.pdf).

<sup>88</sup> Humanitarian Law Center, *Dossier: The cover-up of evidence of crimes during the war in Kosovo: THE CONCEALMENT OF BODIES OPERATION*, (January 2017), available at [http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije\\_OPERACIJA\\_SKRIVANJA\\_TELA.\\_eng.pdf](http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije_OPERACIJA_SKRIVANJA_TELA._eng.pdf).

<sup>89</sup> Humanitarian Law Center, *Dossier: The cover-up of evidence of crimes during the war in Kosovo: THE CONCEALMENT OF BODIES OPERATION*, (January 2017), available at [http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije\\_OPERACIJA\\_SKRIVANJA\\_TELA.\\_eng.pdf](http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije_OPERACIJA_SKRIVANJA_TELA._eng.pdf).

<sup>90</sup> *Kosovo's War Crimes Trials: An Assessment Ten Years On 1999 – 2009*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, 8 (May 2010), available at <https://www.osce.org/kosovo/68569> at 23-24

<sup>91</sup> *Kosovo's War Crimes Trials: An Assessment Ten Years On 1999 – 2009*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, 8 (May 2010), available at <https://www.osce.org/kosovo/68569> at 23-24

<sup>92</sup> Paul R. Williams and Michael P. Scharf, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 16 (2002).

<sup>93</sup> Daniel Bar-Tal and Gemma H. Bennink, *The Nature of Reconciliation as an Outcome and as a Process*, in FROM CONFLICT RESOLUTION TO RECONCILIATION (Yaacov Bar-Siman-Tov, 2004).

<sup>94</sup> Paul R. Williams and Michael P. Scharf, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 17 (2002).

of evidence aids in the establishment of an accurate historical record.<sup>95</sup> The chaos of conflict can bury evidence, but the concentrated and intentional efforts of criminal investigators can help to unearth evidence of serious atrocities and illuminate truth amidst revisionist history.

Fourth, justice plays a large role in providing victim catharsis.<sup>96</sup> Without justice, perpetrators are seen to be “getting away with it,” a feeling that can breed individual and communal dissatisfaction and resentment.<sup>97</sup> Finally, efforts to achieve accountability play a role in the deterrence of future atrocity crimes.<sup>98</sup> Sending perpetrators to jail sends an important message to the broader world that there are consequences for committing of such crimes.

In the context of the serious and widespread violations suffered by victims during the Kosovo conflict, accountability has not yet been satisfied. Justice requires a comprehensive investigation into conflict-related abuses and steps to hold perpetrators accountable. Rarely has the conducting of a few criminal trials satisfied the requirements of international law. Each individual victim, not the collective, has a right for their violation to be investigated and punished where appropriate. To this point, the pursuit of accountability for crimes committed during the Kosovo conflict remains incomplete. While the Yugoslav Tribunal, the UN, the EU, and domestic justice actors have made some progress, there remains an accountability gap, particularly in relation to the prosecution of conflict-related sexual violence.

### **A Critical Gap: Conflict-related Sexual Violence**

A particularly egregious example of the gap in accountability left by the previous judicial mechanisms is their failure to appropriately seek justice for conflict-related sexual violence. Conflict-related sexual violence is defined as “rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict.”<sup>99</sup> Reports approximate that 20,000 individuals were the victims of conflict-related sexual violence during the Kosovo conflict.<sup>100</sup> A Human Rights Watch investigation concluded that “rape and other forms of sexual violence were used in Kosovo in 1999 as weapons of war and instruments of systematic ‘ethnic cleansing.’ Rapes were not rare

---

<sup>95</sup> Paul R. Williams and Michael P. Scharf, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 19 (2002).

<sup>96</sup> Paul R. Williams and Michael P. Scharf, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 20 (2002).

<sup>97</sup> Ronald C. Slye, *Amnesty, Truth, and Reconciliation* in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 170 (Robert I. Rotberg, Dennis Thompson ed., 2000).

<sup>98</sup> Paul R. Williams and Michael P. Scharf, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 21 (2002).

<sup>99</sup> *Report of the Secretary-General on Conflict-Related Sexual Violence*, para. 2, delivered to the Security Council, U.N. Doc. S/2018/250 (April 16, 2018), available at <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/report/s-2018-250/SG-REPORT-2017-CRSV-SPREAD.pdf>.

<sup>100</sup> “*Wounds that Burn Our Souls*”: *Compensation for Kosovo’s Wartime Rape Survivors But Still No Justice*, AMNESTY INTERNATIONAL, 14n17 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF> (“The most frequently quoted estimate suggests that the number may be as high as 20,000. This figure is based a survey conducted by the US-based Centre for Disease Control, which estimated that 4.4% of the female population of Kosovo had been raped or sexually assaulted.”) Studies by the WHO Kosovo Health Sector Situation report and the The Center for Protection of Women and Children found similar numbers.

and isolated acts committed by individual Serbian or Yugoslav forces, but rather were used deliberately as an instrument to terrorize the civilian population, extort money from families, and push people to flee their homes.”<sup>101</sup> Despite this, only a handful of perpetrators have been held accountable for their actions.<sup>102</sup>

There a number of factors that contribute to the difficulties in providing accountability for conflict-related sexual violence. The deterioration of public institutions and infrastructure during conflict contributes to a “near universal failure to collect evidence of crimes of sexual violence during the emergency and conflict periods.”<sup>103</sup> In Kosovo, however, the failure extended beyond evidence collection difficulties. According to a report by Amnesty International, UNMIK possessed hundreds of statements on conflict-related sexual violence that had been collected by NATO’s peacekeeping force in Kosovo or given to UNMIK directly. Yet, UNMIK rarely opened an investigation into these cases, and for those it did, it took years for an investigation to begin.<sup>104</sup> Overall, UNMIK showed “a shocking disregard for the rights of victims” with UNMIK officers failing in a large number of cases to record statements, send files to appropriate personnel, promptly document evidence, or properly apply safeguards to protect witnesses.<sup>105</sup> Ultimately, UNMIK only performed two retrials for cases of conflict-related sexual violence, and the transcripts of both reveal improper application—whether intentional or due to lack of proper training—of the particular evidentiary standards that apply to victim testimony.<sup>106</sup> UNMIK officials did not issue a single new indictment for a crime involving conflict-related sexual violence.<sup>107</sup>

Moreover, when UNMIK’s cases were later passed along to EULEX, officials similarly failed to fill the accountability gap. From 2008 to 2018, EULEX prosecuted 38 war crimes cases of the almost 1,200 war crimes files it inherited from UNMIK. Only two of these 38 cases addressed conflict-related sexual violence.<sup>108</sup>

---

<sup>101</sup> *Kosovo: Rape as a Weapon of "Ethnic Cleansing,"* HUMAN RIGHTS WATCH (1 March 2000), available at <https://www.refworld.org/docid/3ae6a87a0.html>

<sup>102</sup> “*Wounds that Burn Our Souls*”: *Compensation for Kosovo’s Wartime Rape Survivors But Still No Justice*, AMNESTY INTERNATIONAL, 7 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>103</sup> Kim Thuy Seelinger, *Domestic accountability for sexual violence: The potential of specialized units in Kenya, Liberia, Sierra Leone and Uganda*, INTERNATIONAL REVIEW OF THE RED CROSS 539, 548 (2014), available at <https://www.icrc.org/en/international-review/article/domestic-accountability-sexual-violence-potential-specialized-units>.

<sup>104</sup> “*Wounds That Burn Our Souls*”: *Compensation for Kosovo’s Wartime Rape Survivors, But Still No Justice*, AMNESTY INTERNATIONAL, 19 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>105</sup> “*Wounds That Burn Our Souls*”: *Compensation for Kosovo’s Wartime Rape Survivors, But Still No Justice*, AMNESTY INTERNATIONAL, 7 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>106</sup> “*Wounds That Burn Our Souls*”: *Compensation for Kosovo’s Wartime Rape Survivors, But Still No Justice*, AMNESTY INTERNATIONAL, 19 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>107</sup> “*Wounds That Burn Our Souls*”: *Compensation for Kosovo’s Wartime Rape Survivors, But Still No Justice*, AMNESTY INTERNATIONAL, 19 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>108</sup> “*Wounds that Burn Our Souls*”: *Compensation for Kosovo’s Wartime Rape Survivors But Still No Justice* (2017) 20, available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>

Progress in achieving accountability has been limited by the strong social stigma that surrounds conflict-related sexual violence in Kosovo,<sup>109</sup> as it does in many countries. Victims are often reluctant to come forward for fear of an impending backlash by members of their family or community.<sup>110</sup> This is compounded by the lack of effective witness anonymity. Testifying before courts carries the very strong risk of victims being re-traumatized by the process or rejected by society.<sup>111</sup> The availability of protective measures and psychosocial support can help alleviate those risks, but judicial institutions have been failed to offer the assistance necessary to make victims feel safe and prepared to testify.<sup>112</sup>

Investigators, prosecutors, and judges also regularly lacked the training necessary to successfully pursue justice for victims of conflict-related sexual violence.<sup>113</sup> These trials require an added level of sensitivity, compromise, and understanding, which the judicial actors often lacked, in order to account for the psychological and social effects of the physical violence. According to a Senior Medical Advisor at the International Committee of the Red Cross, such trauma may include behavioral disorders, such as post-traumatic stress disorder, and often carries a strong stigma causing victims to be shamed, ostracized, and even “treated by their families and communities as if they have committed a crime.”<sup>114</sup> Appropriately supporting victims of conflict-related sexual violence and combating these psychosocial ramifications thus requires additional judicial measures, such as confidentiality protections, post-investigation follow through, and the provision of additional medical support resources to victims. Yet, many involved with investigating and prosecuting sexual violence in Kosovo lacked specific training on how to approach such issues. Investigators, prosecutors, and judges often did not know what evidence to look for, how to collect it, or appropriate ways of managing the testimony process.<sup>115</sup>

---

<sup>109</sup> *Human Rights in Kosovo: As Seen, As Told. Volume I, October 1998 - June 1999*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, 96 (Nov. 5, 1999), available at <https://www.osce.org/odhr/17772>.

<sup>110</sup> “*Wounds That Burn Our Souls: Compensation for Kosovo’s Wartime Rape Survivors, But Still No Justice*,” AMNESTY INTERNATIONAL, 47 (Dec.13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>111</sup> “*Wounds That Burn Our Souls: Compensation for Kosovo’s Wartime Rape Survivors, But Still No Justice*,” AMNESTY INTERNATIONAL, 47 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>112</sup> “*Wounds That Burn Our Souls: Compensation for Kosovo’s Wartime Rape Survivors, But Still No Justice*,” AMNESTY INTERNATIONAL, 19 (Dec.13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>113</sup> “*Wounds That Burn Our Souls: Compensation for Kosovo’s Wartime Rape Survivors, But Still No Justice*,” AMNESTY INTERNATIONAL, 18 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF> [“In 2006, UNMIK Police’s then Director of Criminal Investigations, told Amnesty International that none of the international police officers recruited to conduct war crimes investigations had any expertise in cases of gender-based violence, nor had they been trained in how to approach survivors. In addition, criteria for selecting international judges and prosecutors did not include previous expertise in war crimes or crimes of gender-based violence, nor did they receive any training in the adjudication or prosecution of CRSV.”]

<sup>114</sup> Paul Bouvier, *Sexual Violence, Health and Humanitarian Ethics: Towards a Holistic, Person-centered Approach*, INTERNATIONAL REVIEW OF THE RED CROSS 565, 569 (2014), available at <https://www.icrc.org/en/international-review/article/sexual-violence-health-and-humanitarian-ethics-towards-holistic-person>.

<sup>115</sup> “*Wounds That Burn Our Souls: Compensation for Kosovo’s Wartime Rape Survivors, But Still No Justice*,” AMNESTY INTERNATIONAL, 7 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.



This lack of appropriate training has led to inappropriate and harmful decisions by the involved justice mechanisms. For instance, in the Furundzija case, the Tribunal ordered the release of a rape victim's psychotherapy records to the chamber after finding the records material to assessing the victim's credibility as a witness.<sup>116</sup> In its order, the Tribunal subpoenaed the non-governmental counseling organization to turn over all documents related to the victim's treatment, which, after being reviewed by the Chamber, were disclosed to both the prosecution and defence.<sup>117</sup> The order was criticized by victim's groups and survivors who argue the Tribunal's decision has chilling effect on the willingness of victim's seek therapy and come forward.<sup>118</sup>

Notably, many Serbian military and paramilitary perpetrators responsible for conflict-related sexual violence live outside of the territory of Kosovo.<sup>119</sup> Lacking jurisdiction over individual perpetrators outside of its territory, Kosovo's domestic accountability mechanisms have struggled to investigate and charge perpetrators located in Serbia.<sup>120</sup> As reported by Amnesty International, these difficulties have been aggravated by Serbia's "continuing culture of impunity [which] prevents the prosecution of police, para-military groups and military commanders reasonably suspected of war crimes, including CRSV [conflict-related sexual violence] in Kosovo."<sup>121</sup> Serbia's minimal cooperation with Kosovo's judiciary has thus added to the accountability gap.

## **CLOSING THE ACCOUNTABILITY GAP**

### **Kosovo Specialist Chambers**

A close analysis of the the Specialist Chambers' constituting law indicates that the body's jurisdiction is broader than simply prosecuting ethnic-Albanians and members of the KLA. The court's subject matter jurisdiction is triggered for crimes that "relate to" the Counsel of Europe report.<sup>122</sup>

---

<sup>116</sup> Susana SaCouto, Katherine Cleary, *Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW. 337, 352-353 (2009).

<sup>117</sup> Susana SaCouto, Katherine Cleary, *Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW. 337, 352-353 (2009).

<sup>118</sup> Susana SaCouto, Katherine Cleary, *Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW. 337, 352-353 (2009).

<sup>119</sup> "Wounds That Burn Our Souls:" *Compensation for Kosovo's Wartime Rape Survivors, But Still No Justice*, AMNESTY INTERNATIONAL, 7 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>120</sup> "Wounds That Burn Our Souls:" *Compensation for Kosovo's Wartime Rape Survivors, But Still No Justice*, AMNESTY INTERNATIONAL, 7 (Dec. 13, 2017), available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>121</sup> "Wounds that Burn Our Souls": *Compensation for Kosovo's Wartime Rape Survivors But Still No Justice* (2017) 7, available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>122</sup> *Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, Article 6, available at: <https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office>.

For the purposes of interpreting the court’s jurisdiction, it is important to distinguish between what prompted the report and what the report contains. In addition to alleged KLA abuses, the report reveals crimes that may involve other perpetrators, such as the thousands of disappeared who are still unaccounted for,<sup>123</sup> and acts of conflict-related sexual violence.<sup>124</sup> These findings suggest the court’s subject matter jurisdiction includes the authority to inquire into criminal acts that extend beyond the abuse allegations which prompted the report. This would include the authority to investigate and prosecute perpetrators of *all* crimes that were committed during the Kosovo conflict. In addition to identifying crimes that may relate to perpetrators from multiple ethnicities, the contents of the report, which are not meant to be exhaustive findings, include general conclusions about the accountability gap. The report explains that the purpose of its inquiry “was not to conduct a criminal investigation,”<sup>125</sup> and instead emphasizes the requirement to deliver accountability for *all* conflict-related crimes.<sup>126</sup>

The existence of and need to address widespread impunity are at the heart of the report’s findings. Such findings square with the obligations embodied under international law, which require states to investigate and prosecute those responsible for committing serious violations of international human rights and humanitarian law.<sup>127</sup> To characterize the Council of Europe report as merely concerned with evidence of crimes alleged to have been committed by one party to the conflict does not paint a complete picture. The report also highlights broad gaps in accountability and demands that impunity for crimes should be ended comprehensively. In this light, the court’s jurisdiction necessarily includes both the authority to investigate crimes revealed by the report—including disappearances and conflict-related sexual violence—as well the crimes it did not. Contrary to some perceptions, therefore, the court is bestowed with a broad and ethnically neutral mandate.

Additionally, a narrow interpretation would be at odds with customary international practice in the creation of similar accountability mechanisms. In the modern era of international criminal law, courts and tribunals have been established to look into situations and contexts, not specific ethnicities or predetermined groups. In this context, an ethno-specific tribunal would widely be viewed as illegitimate. The mandates of international courts and tribunals have all broadly included the ability to deeply investigate and prosecute whomever is responsible for the international crimes related to a specific geographic and temporal scope. The Yugoslav Tribunal, for example, prosecuted individuals for crimes perpetrated in the dissolution of the former Yugoslavia, the Rwanda Tribunal prosecuted individuals for the Rwandan genocide and its associated violence, the Special Court for the Sierra Leone prosecuted individuals for crimes

---

<sup>123</sup> Council of Europe, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, (7 Jan. 2011) at 8.

<sup>124</sup> Council of Europe, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, (7 Jan. 2011) at 15, 23.

<sup>125</sup> Council of Europe, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, (7 Jan. 2011) at 26.

<sup>126</sup> Council of Europe, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, (7 Jan. 2011) at 4, 5, 7, 8 10.

<sup>127</sup> A/RES/60/147, *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*, Principle III, (16 December 2005) UNITED NATIONS GENERAL ASSEMBLY, available at: <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>.

committed during the Sierra Leone civil war, the Extraordinary Chambers in the Courts of Cambodia prosecuted individuals responsible for atrocities committed during the Khmer Rouge regime, and even the Special Tribunal for Lebanon—which was created to investigate and prosecute those responsible for the assassination of former Lebanese President, Rafic Hariri—is empowered to prosecute whoever is most responsible for the assassination, regardless of ethnic or group affiliation.

Nevertheless, it may be important to clarify the issue and Kosovo should take the opportunity to confirm the court’s broad mandate. The Chambers is a product of the Kosovo Constitution, so Kosovo has the power to decisively affirm the court’s jurisdiction and commitment to ending impunity for all war-related crimes. If necessary, the Kosovo Parliament may even direct the Specialist Chambers to prioritize particularly heinous crimes largely ignored by other mechanisms, such as conflict-related sexual violence. Explicitly clarifying the court’s broad mandate will strengthen the court’s legitimacy and help support intercommunal reconciliation efforts. Doing so is also consistent with Kosovo’s international obligations, which require it to ensure accountability for all serious abuses of international law.<sup>128</sup>

#### *An Added Advantage: Victim Participation*

The Specialist Chambers, if appropriately reconceptualized, would also be particularly well-placed to address gaps in accountability because of its innovations regarding victims participation in the trial process. In traditional criminal proceedings, victims may only participate as witnesses—they cannot make submissions, test evidence, or deliver statements. Those rights belong to the prosecution and defense, meaning victims must rely on the two parties with standing to pose questions that are sufficiently capable of revealing the truth. Previous attempts at accountability in Kosovo have all famously lacked victim participation rights, leading some to suggest that the historical record established by those mechanisms fails to fully capture victim interests or the impact of the crimes on their lives.<sup>129</sup> To address this concern, the Kosovo Specialist Chambers has rules that permit victim participation through a court-appointed lawyer.<sup>130</sup> These provisions represent the cutting edge of international criminal justice, and mirror similar measures adopted by the ICC and the Cambodia Tribunal. Under these rules, victims have the opportunity to independently add to and correct the factual record by way of their involvement. This ensures a more complete accounting of the violations and harm perpetrated during the Kosovo war.

The right to victim participation is codified in the Specialist Chambers statute and rules of procedure, which broadly permit victims to engage in all stages of proceedings,<sup>131</sup> and include measures to ensure victim security. Among other things, the statute creates a Victims

---

<sup>128</sup> A/RES/60/147, *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*, Principle III, (16 December 2005) UNITED NATIONS GENERAL ASSEMBLY, available at: <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>.

<sup>129</sup> Susana SaCouto, *Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?*, 18:2 Michigan Journal of Gender and Law at 300 (2012), available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1016&context=mjgl>.

<sup>130</sup> *Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office*, Article 26(2).

<sup>131</sup> *Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office*, Article 26(2).

Participation Office in the court Registry<sup>132</sup> and entitles victims to group representation by an appointed lawyer, known as “Victims’ Counsel.”<sup>133</sup> The modalities of participation provided by the court’s laws are broad, empowering victims to participate through their legal representative in a variety of ways, including: (i) applying for protective measures and the non-disclosure of identity; (ii) attending depositions and questioning deponents; (iii) presenting opening and closing statements; (iv) delivering oral and written submissions; (v) and asking questions of witnesses.<sup>134</sup> Importantly, Victims’ Counsel is entitled to full disclosure from the prosecutor, including the evidence supporting the indictment and any other material evidence within the prosecutor’s possession.<sup>135</sup> Victims’ Counsel may also petition the court to order the submission of additional evidence if that produced by the parties fails to adequately address the impact of the alleged crimes on the victims of those crimes.<sup>136</sup>

A key challenge to addressing gaps in accountability in Kosovo is establishing an accurate historical record. The right to victim participation at the Specialist Chambers is one measure that promises to strengthen the record by offering victims an opportunity to tell and clarify their stories. While the concept of victim participation is still evolving under international criminal law, the robust provisions of the Specialist Chambers, and in particular, the ability for Victims’ Counsel to protect and articulate victim impact, can help facilitate greater recognition of the harms suffered, empower victim communities, and identify gaps in accountability.

## Universal Jurisdiction

As the Specialist Chambers moves forward and continues to develop, there are a number of other mechanisms for accountability and victim reparations that could be pursued to increase accountability for international crimes in Kosovo.

One method for international accountability includes the prosecution of war criminals through foreign domestic courts under the principle of universal jurisdiction. According to the principle of universal jurisdiction, states are authorized to investigate and prosecute certain heinous international crimes regardless of the accused’s nationality, country or residence, or connection to the prosecuting state.<sup>137</sup> The rationale behind universal jurisdiction is that some international crimes are of such magnitude that all states have an interest in preventing and prosecuting those crimes.<sup>138</sup> The crimes that trigger universal jurisdiction are accordingly limited in scope and concern the most serious violations of international law, including: genocide, crimes against humanity, war crimes, ethnic cleansing, and torture.<sup>139</sup>

---

<sup>132</sup> *Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office*, Article 26(5).

<sup>133</sup> *Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office*, Article 26(2).

<sup>134</sup> *Rules of Procedure and Evidence Before the Kosovo Specialist Chambers*, Rule 114.

<sup>135</sup> *Rules of Procedure and Evidence Before the Kosovo Specialist Chambers*, Rule 102.

<sup>136</sup> *Rules of Procedure and Evidence Before the Kosovo Specialist Chambers*, Rule 114(5).

<sup>137</sup> M.D. Evans, *International Law*, 326-27 (2010), available at <https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf>; Amnesty International, *UNIVERSAL JURISDICTION: Questions and Answers*, AMNESTY INTERNATIONAL, available at <https://www.amnesty.org/en/documents/ior53/020/2001/en/>

<sup>138</sup> *UNIVERSAL JURISDICTION: Questions and Answers*, AMNESTY INTERNATIONAL, available at <https://www.amnesty.org/en/documents/ior53/020/2001/en/>.

<sup>139</sup> *UNIVERSAL JURISDICTION: Questions and Answers*, AMNESTY INTERNATIONAL, available at <https://www.amnesty.org/en/documents/ior53/020/2001/en/>.

While states are not obliged to exercise universal jurisdiction, some have enshrined the principle within their domestic laws.<sup>140</sup> Others have created dedicated special prosecutors offices to investigate and try the most serious crimes under international law.<sup>141</sup> States have begun using these tools to bring universal jurisdiction cases for war crimes related to Syria, for example, where the principle has enjoyed renewed interest from the international community. A similar approach could be taken for Kosovo, where states could bring cases under the principle of universal jurisdiction to fill gaps in accountability related to the war. Taking this approach cannot singlehandedly end the impunity of course; it can merely supplement complementary efforts. However, states are not prevented from taking action on their own and may use universal jurisdiction to prosecute Kosovo war criminals who enter their territory.

### **Independent Evidentiary Mechanism**

Recently, the international community has begun establishing Independent Mechanisms for the documentation of international crimes committed during particularly heinous conflicts. In December 2016, the UN General Assembly created the first of these mechanisms for the Syria conflict. The International, Impartial, and Independent Mechanism (“IIIM”) was established to “collect, consolidate, preserve and analyze evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”<sup>142</sup> Then, in September 2018, the UN Human Rights Council followed the General Assembly’s lead and created a similar Impartial and Independent Mechanism for evidence of the genocide committed against the Rohingya population in Myanmar.<sup>143</sup> The Mechanisms for Myanmar and for Syria work to document the atrocities of their respective regions and prepare files that can be used in accountability proceedings when appropriate mechanisms—whether international *ad hoc* tribunals or otherwise—are established.

The pursuit of justice in Kosovo does not require a mechanism to prepare files in *anticipation* of a judicial mechanism, but Kosovo could benefit from a similar institution that properly consolidates and preserves both the evidence already collected by prior judicial bodies and that not yet collected. The proceedings at the Yugoslav Tribunal, UNMIK Regulation 64 Panels, and EULEX hybrid courts all required significant evidentiary work that should not be lost or hidden in non-accessible archives. Moreover, there are substantial amounts of additional testimony, witness reports, and other corroborating evidence that exists yet has never been

---

<sup>140</sup> S.C. 2000, c. 24, *Crimes Against Humanity and War Crimes Act (2000)*, CANADA, available at <http://laws-lois.justice.gc.ca/PDF/C-45.9.pdf>; Denmark Criminal Code, Article 8 (2005), available at <http://www.legislationline.org/documents/section/criminal-codes>.

<sup>141</sup> Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands* (Sept. 16, 2014), available at <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and>; Birgitte Vestberg, *Prosecuting and Investigating International Crimes in Denmark*, Guest Lecture Series of the Office of the Prosecutor, 2 (April 5, 2006), available at [https://www.icc-cpi.int/NR/rdonlyres/9C4449DE-B59B-40E2-BF72-062764FFCBEB/0/Vestberg\\_paper.pdf](https://www.icc-cpi.int/NR/rdonlyres/9C4449DE-B59B-40E2-BF72-062764FFCBEB/0/Vestberg_paper.pdf).

<sup>142</sup> G.A. Res. 71/248, ¶4 (Dec. 21, 2016), <https://undocs.org/A/RES/71/248>.

<sup>143</sup> H.R.C. Res. 39/2, ¶22 (Sept. 27, 2018), <https://undocs.org/A/HRC/res/39/2>.

formally recorded or organized. For example, Kosovo Police War Crimes Investigators reported there are a number of cases for which women provided testimonies years ago that do not have proper records, and a number of women's group have protested that information on rape and sexual assaults that they spent resources gathering in the aftermath of the conflict was lost by the UN Mission in Kosovo.<sup>144</sup> The creation of an evidentiary institution could thus serve an important role in establishing an accurate historical record. In turn, the knowledge amassed would help to validate the pain endured by individual victims as well as provide collective recognition of the atrocity crimes that occurred during the conflict.

### **Non-Amnesty Based Truth Commission**

In the absence of the full and complete prosecution of all perpetrators, the existence of an independent mechanism for the documentation of crimes would be a significant step towards justice and reconciliation. There are also other mechanisms that can assist in the codification of an accurate historical record. The most notable of these mechanisms is a non-amnesty based Truth and Reconciliation Commission. These commissions differ from the Independent Mechanisms created for Syria and Myanmar as they are not focused on preparing documents according to evidentiary standards of international law. While the later is preferable for accountability, the former may still help in the healing and reconciliation process by providing a degree of closure and assuaging some of the lasting trauma of the atrocity crimes.

Moreover, the creation of such a record by either an Independent Mechanism or non-amnesty based Truth Commission can be instrumental in providing a foundation from which other forms of transitional justice are based. Victim compensation, for instance, relies on there being accurate information on those who have status as victims, a status that may be contentious without a reliable historical record from which to ground the claim. Other forms of reparations are similarly undergirded by the establishment of an accurate historical record. These include restitution, such as the restoration of property, residence, employment or other liberties, and rehabilitation, whether through the provision of medical and psychological services or forms of communal support.<sup>145</sup> Memorialization is also a form of "symbolic reparations" that relies heavily on documentation to build sites within fraught communities that can bridge the tense legacies of the conflict.<sup>146</sup> The process of constructing physical testaments to collective memories has a gained traction in recent years as an essential pillar of transitional justice.<sup>147</sup>

---

<sup>144</sup> "Wounds that Burn Our Souls": Compensation for Kosovo's Wartime Rape Survivors But Still No Justice, AMNESTY INTERNATIONAL (Dec. 13, 2017) 26, available at <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>.

<sup>145</sup> UNGA Res 60/147, *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*, (16 December 2005), available at <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>.

<sup>146</sup> Yasmin Sooka, *Forward in Ereshnee Naidu, From Memory to Action: A Toolkit for Memorialization in Post-Conflict Societies* (International Coalition of Sites of Conscience), available at <https://www.sitesofconscience.org/wp-content/uploads/2016/08/Memorialization-Toolkit-English.pdf>.

<sup>147</sup> Ereshnee Naidu, *From Memory to Action: A Toolkit for Memorialization in Post-Conflict Societies* (International Coalition of Sites of Conscience) 3, available at <https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a9c268c5-365a-aeaf-7e62-b848dd893eca>.

## CONCLUSION

During the Kosovo conflict, hundreds of thousands of Kosovo Albanians were subjected to war crimes and crimes against humanity, including forced deportation, murder, torture, rape and other acts of conflict-related sexual violence. Despite there seeming to be a plethora of international and domestic mechanisms designed to bring to justice those responsible for these crimes, there is a dramatic accountability gap. Only a small handful of individuals have been indicted and prosecuted for their actions. Thousands of perpetrators remain free and enjoy *de facto* immunity. Hundreds of thousands of victims remain without justice.

The Specialist Chambers for Kosovo presents an opportunity to afford justice to the victims of the Kosovo conflict. It is imperative that the international community not be allowed to distort the jurisdiction of the Court and narrowly tailor its focus to a defendant class of ethnic Albanians and the KLA. To do so would run counter to the core foundations of justice and accountability, and to basic principles of fairness and of equal justice.

Moreover, the Specialist Chambers embraces state of the art provisions for victim participation and the protection and facilitation of witness testimony related to conflict-related sexual violence. Given the dramatic under-prosecution of those responsible for these crimes, the Specialist Chambers presents a rare opportunity to correct earlier failure to provide adequate judicial redress to victims.

The United States should work with the government of Kosovo to affirm, and if necessary clarify, that the mandate of the Specialist Chambers covers *all* crimes committed in the territory of Kosovo, and is not limited to prosecuting members of a specific ethnic group of alleged perpetrators. The United States should also work with the government of Kosovo to encourage the Specialist Prosecutor's Office, a part of the judicial system of Kosovo, to prioritize the investigation and prosecution of rape and other conflict-related sexual violence.