Università
Ca'Foscari
Venezia

Master's Degree

in Comparative
International Relations

Final Thesis

# Kosovo Specialist Court: a new way to seek justice for unpunished crimes and human rights violations in Kosovo?

A possible solution against the weakness of international and domestic systems

**Supervisor**
Chiar.ma Prof.ssa Sara De Vido

**Assistant supervisor**
Chiar.mo Prof. Fabrizio Marrella

**Graduand**
Annalisa Canova
Matriculation number: 876622

**Academic Year**
2019 / 2020

*Ai miei genitori*

# TABLE OF CONTENT

Credits for this image go to the talented Costanza Zaetta, who was able to seize the essence of my thesis and to visually bring to life the quote below.

"We must fight uncompromisingly against impunity for the perpetrators of serious human rights violations. The fact that these were committed in the context of a violent conflict could never justify a decision to refrain from prosecuting anyone who has committed such acts. There cannot and must not be one justice for the winners and another for the losers."

*Committee on Legal Affairs and Human Rights*


Source: Cleve Baldwin, "Minority Rights in Kosovo under International Rule", Minority Rights Group International report, July 2006.

# ABSTRACT

Tra il 1990 e il 1999, appena cinquant'anni dopo la fine del conflitto mondiale più sanguinoso nella storia dell'umanità in termini di perdite di vite umane, distruzione sistematica e pianificata di interi popoli, brutalità della violenza e utilizzo di armi di distruzione di massa sulla popolazione civile e inerme, il territorio dei Balcani venne insanguinato da nuovi violenti conflitti inter-etnici, fomentati dall'imperante nazionalismo riemerso a seguito della morte del Presidente della Repubblica Socialista Federale di Jugoslavia Josip Broz Tito. La violenza dei crimini e le violazioni dei diritti umani e del diritto internazionale umanitario commessi in questo decennio non si limitarono a destabilizzare gli equilibri nella regione e portare alla definitiva dissoluzione dell'ex Jugoslavia, ma attirarono l'interesse dell'intera comunità internazionale sul tema della giustizia e della responsabilità penale dell'individuo a livello internazionale: l'idea alla base di tali concetti è che le norme internazionali vòlte alla tutela di interessi e beni universali non vincolano né creano degli obblighi solo in capo agli Stati ma anche direttamente in capo ai singoli individui.

Tale visione moderna della responsabilità penale per la commissione di crimini internazionali, ossia delle violazioni più gravi delle norme internazionali a tutela dei diritti umani e del diritto umanitario (crimini di guerra, crimini contro l'umanità, genocidio e crimini di aggressione), ha permesso di superare definitivamente lo schema classico della responsabilità esclusivamente statale per la violazione di norme internazionali: l'individuo autore di tali condotte lesive, anche se commesse in quanto organo statale od obbedendo a degli ordini superiori, risulta penalmente responsabile agli occhi dell'intera comunità internazionale. È per questo motivo che dalla creazione dei Tribunali internazionali di Norimberga e Tokyo all'istituzione di specifiche "corti ibride", passando per i Tribunali Penali Internazionali per l'Ex Jugoslavia (ICTY) e il Ruanda (ICTR), entrambi istituiti dal Consiglio di Sicurezza delle Nazioni Unite, i presunti responsabili di tali violazioni sono stati perseguiti con l'obiettivo di rendere giustizia alle vittime e alle loro famiglie e porre fine al ciclo di impunità che ha minato, giorno dopo giorno, la loro fiducia nei confronti di un sistema spesso considerato inefficiente e tendenzioso.

Questa moderna prospettiva ha trovato una concreta applicazione nella persecuzione ed eventuale conseguente condanna di numerosi criminali sospettati di aver commesso od ordinato seri crimini durante le guerre nell'ex Jugoslavia, soprattutto da parte dell'ICTY, istituito nel 1993 tramite una risoluzione del Consiglio di Sicurezza delle Nazioni Unite. Nonostante le gravi ed evidenti violazioni dei diritti umani e del diritto internazionale umanitario non possano esimere alcuna parte in conflitto dalla responsabilità penale che ne deriva, emerge con chiarezza come la narrativa

dominante sia a livello internazionale sia nella stessa regione dei Balcani sia sempre stata in funzione anti-serba. Non è un caso che quasi tutti i principali autori di etnia serba responsabili dei crimini di guerra commessi tra il 1991 e il 1999 nei Balcani siano stati perseguiti e condannati dai tribunali internazionali e/o dalle corti domestiche.

Tuttavia, seppur di più breve durata rispetto ai conflitti in Croazia e Bosnia Erzegovina, la guerra che ha devastato il Kosovo nel 1998-1999 ha creato un clima di instabilità, insicurezza e impunità per i crimini internazionali e le violazioni di diritti umani commessi sia dalle forze militari e paramilitari jugoslave al comando del Presidente serbo Slobodan Milošević, sia dall'Esercito di Liberazione Nazionale del Kosovo (UCK). Il caso del Kosovo è emblematico e unico nel panorama del diritto internazionale per due motivi. Da un lato, poiché si tratta di una regione storicamente contestata sia dai serbi sia dagli albanesi in quanto "terra santa e culla della loro nazione"[1] e di uno Stato autoproclamatosi indipendente nel 2008 e non ancora riconosciuto dall'intera comunità internazionale come tale; dall'altro, perché una consistente quantità di crimini che hanno avuto luogo durante il conflitto e, soprattutto, nel periodo immediatamente successivo all'intervento aereo della NATO che ha segnato la fine delle guerre iugoslave, rimane ad oggi ancora senza responsabili.

Infatti, nonostante l'intensa attività dell'ICTY abbia permesso di perseguire gli ufficiali d'alto rango di nazionalità serba e portato a processo sette membri dell'UCK, condannandone solo uno, Haradin Bala, a tredici anni per crimini di guerra, il mandato e la giurisdizione del Tribunale dell'Aia si sono rivelati estremamente limitati nel perseguire i responsabili di violazioni di diritti umani e crimini di guerra perpetrati dopo il ritiro delle forze serbe e jugoslave dalla regione nel giugno 1999. Tali crimini fanno riferimento in particolare, seppur non esclusivamente, ai crimini commessi dai membri dell'UCK nei confronti sia delle minoranze etniche in Kosovo, tra cui le comunità serba, rom, ashkali e bosniaca, sia dei kosovari albanesi sospettati di aver collaborato con il governo serbo durante la guerra e di essersi opposti ai leader dell'UCK dopo la sua smilitarizzazione nel settembre 1999.[2] Nei ventiquattro anni del suo mandato, l'ICTY è stato oggetto di numerose critiche e accuse, non solamente per aver concentrato la sua attività giudiziale principalmente sui criminali di etnia serba, ma anche per aver riscontrato evidenti problemi nel gestire in modo rapido, imparziale ed efficace i numerosi casi aperti. L'estrema lentezza nel condurre le indagini in un contesto caratterizzato da un conflitto armato in corso e da seri problemi strutturali e di generale insicurezza, soprattutto in simili scenari post-bellici, ha indubbiamente ostacolato l'attività del Tribunale e

[1] Joze Pirjevec, *Le guerre iugoslave. 1991-1999*, Einaudi, 1994.

[2] Il piano di smilitarizzazione e trasformazione (*Undertaking of Demilitarisation and Transformation by the UCK*), firmato il 20 giugno 1999, prevedeva che l'UCK cessasse di esistere come organizzazione militare a partire dal 20 settembre 1999 e i suoi membri fossero reintegrati nella società civile. Per maggiori informazioni, consultare il sito: https://peacemaker.un.org/kosovo-demilitarisationuck99 (Ultimo accesso: 22 gennaio 2021).

fomentato le accuse di numerosi esperti di diritto penale internazionale. Le ingenti spese che il Tribunale dell'Aia ha dovuto sostenere sin dall'inizio e la distanza fisica, oltre che culturale, dai luoghi in cui si sono consumati i crimini che l'ICTY era chiamato a giudicare sono stati oggetto di critiche persistenti. Tra i limiti è infine necessario annoverare le continue minacce ed intimidazioni nei confronti delle vittime e dei testimoni oculari che, in molti casi, hanno rifiutato di parlare e prendere parte alle udienze, hanno rilasciato testimonianze e dichiarazioni incoerenti e contraddittorie o cambiato più volte versione, con la conseguente assoluzione di numerosi indagati per assenza di prove.

Va inoltre ricordato come, alla fine del ventesimo secolo, la sempre più frequente associazione e interrelazione tra i concetti di responsabilità penale internazionale e giustizia globale abbia favorito l'istituzione della Corte Penale Internazionale (International Criminal Court, ICC): si tratta della prima corte internazionale *permanente* e con *giurisdizione universale* creata di comune accordo dalla quasi totalità della comunità internazionale. Fortemente voluta per sviluppare e consolidare il rispetto per lo stato di diritto ed evitare che future gravi violazioni del diritto internazionale rimanessero impunite, l'ICC, mediante il suo trattato istitutivo noto come "Statuto di Roma", ha indubbiamente contribuito allo sviluppo del diritto penale internazionale. Al contempo, ha rappresentato una pietra miliare nel comune sforzo vòlto alla creazione di un mondo più giusto, in cui la responsabilità individuale per crimini di guerra, crimini contro l'umanità, genocidio e crimini di aggressione supera i confini nazionali, minacciando quindi la comunità internazionale nel suo insieme. Tale concezione si basa, in particolare, proprio sull'idea secondo cui le vittime dei crimini più gravi e i loro familiari debbano ottenere giustizia indipendentemente dal luogo in cui il crimine è stato commesso e dall'autore dello stesso. Tuttavia, nonostante l'apparente universalità del suo mandato, l'ICC continua ad essere ampiamente criticata poiché la sua giurisdizione copre solamente i crimini commessi nel periodo successivo all'entrata in vigore del suo Statuto costitutivo, ossia dopo il 2 luglio 2002. Di conseguenza, la competenza *ratione temporis* della Corte, prevista dall'Articolo 11 dello Statuto, rappresenta un notevole ostacolo per la persecuzione dei crimini commessi sia durante la guerra in Kosovo sia nel periodo compreso tra il 9 giugno 1999 e l'entrata in vigore del suo trattato istitutivo.

Appare quindi evidente come le due corti internazionali preesistenti siano state incapaci di, o non intenzionate a, perseguire tutti i responsabili dei crimini commessi durante e dopo la fine della guerra in Kosovo, soprattutto nei confronti delle minoranze etniche nell'ex provincia jugoslava, a causa dei limiti del loro mandato e dei problemi strutturali e organizzativi derivanti dall'ingente numero di gravi violazioni del diritto internazionale commesse nella regione dei Balcani. Ne va da sé, ed è sempre necessario ricordarlo, che per i migliaia di crimini ancora senza responsabili vi siano

altrettante vittime a cui continuano ad essere negate giustizia ed equa riparazione per la violenza subita.

Nel giugno 1999, il ritiro delle forze serbe e iugoslave – compresi i giudici e i procuratori che avevano rivestito tale carica nell'ultimo decennio – da una regione completamente devastata dal bombardamento della NATO implicò l'assenza di un personale legale locale incaricato di aprire nuove indagini e occuparsi di casi riguardanti gravi violazioni di diritti umani e del diritto internazionale nella regione. Di conseguenza, al "vuoto giurisdizionale" a livello internazionale venne ad aggiungersi anche un vuoto giurisdizionale locale, che richiese l'intervento diretto delle forze internazionali, in particolare delle Nazioni Unite e della NATO. Il mandato "senza precedenti" affidato alle Nazioni Unite a partire dal giugno 1999 mediante il dispiegamento della Missione di Amministrazione ad Interim in Kosovo (UNMIK) e finalizzato a stabilire e supervisionare lo sviluppo di "istituzioni provvisorie democratiche di auto-governo" in un drammatico contesto post-bellico, prevedeva, tra l'altro, l'istituzione di nuove corti nazionali kosovare. Forti della collaborazione tra giudici e procuratori locali e internazionali, le nuove corti si sarebbero dovute occupare dei casi "minori" riguardanti crimini di guerra commessi negli anni del conflitto. Anche in questo caso, tuttavia, le persistenti minacce e violenze nei confronti del personale locale e internazionale impegnato nelle indagini dei crimini commessi in Kosovo, i frequenti episodi di corruzione, la mancanza di competenza del personale legale, una pessima gestione dell'elevato numero di dossier e l'influenza dei leader dei partiti politici locali ostacolarono e indebolirono l'operato di un sistema ancora in fase embrionale, incapace di rendere giustizia alle vittime, soprattutto per quanto concerne le minoranze etniche in Kosovo. Inoltre, secondo quanto riportato dal Human Rights Advisory Panel (HRAP), ossia l'organo incaricato di esaminare le denunce da parte di individui che ritenevano di aver subito una violazione dei diritti umani da parte dell'UNMIK, le forze internazionali non vennero ampiamente criticate per la sola presunta mancanza di adeguate e approfondite indagini penali in relazione alla scomparsa, ai rapimenti e alle uccisioni in Kosovo, ma sarebbero addirittura responsabili per aver commesso serie violazioni dei diritti umani nel periodo di protettorato dell'ONU. Tuttavia, l'immunità del personale internazionale e la natura non giuridicamente vincolante delle raccomandazioni e dei pareri dell'HRAP complicarono ulteriormente il processo di persecuzione dei crimini commessi durante il decennio di protettorato ONU che, di conseguenza, non rese giustizia alle vittime né alle loro famiglie.

Analogamente, l'intervento della Missione dell'Unione Europea in Kosovo (EULEX) a partire dal 2008 portò nell'auto-dichiaratosi Stato indipendente giudici, procuratori e forze di polizia europei e nordamericani incaricati di supportare e collaborare con i loro omologhi kosovari. Nello specifico, EULEX si sarebbe dovuta occupare dei casi che, a detta del personale internazionale, sarebbero stati

troppo complessi da gestire dalle nuove corti locali. Inoltre, avrebbe dovuto occuparsi del rafforzamento dello stato di diritto in Kosovo in modo imparziale. Nonostante ciò, la presenza di altre forze internazionali nella regione, soprattutto a seguito dell'indipendenza del Paese e del fallimento dell'UNMIK, ha sollevato sin dall'inizio del suo dispiegamento forti contestazioni, scetticismo e resistenza locale, nel timore che la missione dell'UE ostacolasse il pieno controllo del Kosovo sul proprio sistema giudiziario.

Va inoltre sottolineato come l'evidente inefficienza e incapacità dei sistemi internazionali nel proteggere la popolazione kosovara – e in particolare le minoranze etniche – da ulteriori violazioni dei diritti umani e nel rendere giustizia alle vittime per i crimini e gli abusi subiti durante e dopo il conflitto del 1998-1999 si rispecchia anche in un simile fallimento delle corti domestiche kosovare. L'ingente numero di casi civili e penali da analizzare, la mancanza di esperienza in ambito legale dei giudici e dei procuratori kosovari ostacolata da una difficile collaborazione con il personale internazionale, la percezione di un'attività tendenziosa e l'iniziale incapacità delle forze di polizia nel mettere in sicurezza una regione caratterizzata da un contesto politicamente e socialmente instabile rafforzarono il clima di impunità in Kosovo e non riuscirono ad impedire ulteriori violazioni dei diritti umani nei confronti delle minoranze etniche.

In un contesto intriso di scetticismo, odio inter-etnico e mancanza di fiducia nei confronti dei sistemi giudiziari locali e internazionali dimostratisi palesemente incapaci di rendere giustizia a tutte le vittime di gravi crimini e violazioni dei diritti umani, la comunità internazionale sentì il pressante bisogno di risolvere definitivamente il problema dell'impunità per i crimini commessi in Kosovo ancora senza responsabili, consapevole che un'ulteriore rinvio delle indagini avrebbe notevolmente ostacolato, se non reso impossibile, la raccolta di prove e testimonianze, e conseguente accusa degli autori dei crimini. Tale esigenza portò, nel 2015 all'istituzione delle *Kosovo Specialist Chambers* (KSC) e dello *Specialist Prosecutor Office* (SPO). Composta da giudici internazionali ma parte della magistratura kosovara, questa nuova "corte ibrida" con sede a L'Aia, nei Paesi Bassi, si pone l'obiettivo di superare le lacune dei meccanismi giuridici preesistenti combinando elementi internazionali e domestici: ciò significa che dovrebbe, almeno in termini teorici, consentire sia il rispetto degli odierni standard processuali internazionali sia la praticità e i costi minori delle giurisdizioni territorialmente competenti sui crimini perpetrati.

Alla base del nuovo meccanismo giudiziario vi è il "Rapporto Marty", presentato nel 2010 dal senatore svizzero Dick Marty in qualità di *rapporteur* presso il Consiglio d'Europa (CoE). Nel famoso e alquanto discusso documento, Marty porta alla luce le violenze e i crimini perpetrati contro le minoranze etniche nel Paese e gli albanesi sospettati di collaborazione con i serbi od opposizione all'UCK, accusando gli ex leader di spicco dell'Esercito di Liberazione del Kosovo – oggi politici a

capo della struttura statale kosovara – di esserne direttamente responsabili. Secondo il rapporto, e in linea con quanto riportato da Human Rights Watch, infatti, le violenze ad opera dell'UCK non si limiterebbero a meri attacchi di rivalsa per i crimini subiti dalle forze serbe e iugoslave. Al contrario, dimostrerebbero la presenza di un chiaro obiettivo politico fomentato da un profondo odio inter-etnico, ossia la rimozione dal Kosovo di tutti gli individui non albanesi al fine di giustificare e legittimare la creazione di uno Stato indipendente.[3]

Nel 2014, la gravità delle accuse, che includevano omicidi, torture, stupri, deportazioni, roghi ed espianto di organi ai prigionieri a fini di lucro, venne confermata dalla *Special Investigative Task Force* (SITF) dell'UE e aprì la strada, l'anno successivo, alla creazione delle KSC, operative dal 2016. Ad oggi,[4] sette ex membri dell'UCK sono sotto processo dopo essere stati accusati dalla Procura per il coinvolgimento diretto nei numerosi e gravi crimini di guerra commessi durante il conflitto del 1998-1999 e nel periodo successivo contro le minoranze serba e rom e gli avversari politici di etnia albanese. Tra questi, l'ex leader dell'UCK e Presidente del Kosovo Hashim Thaçi, indagato per crimini contro l'umanità e crimini di guerra, persecuzioni e torture: secondo la Procura, in particolare, Thaçi sarebbe responsabile, insieme ad altri tre sospettati, di un centinaio di omicidi.

Sebbene le ragioni alla base dell'istituzione della nuova corte ibrida non possano non ritenersi promettenti e necessarie in una società contemporanea in cui il concetto di giustizia transnazionale riveste un ruolo sempre più centrale, la prospettiva di rinascita delle KSC non è così rosea come ci si potrebbe aspettare. Non a caso, l'istituzione della Corte, che richiese un emendamento della Costituzione da parte dell'Assemblea del Kosovo e fu fortemente supportata dalla comunità internazionale e in particolare dall'UE, venne contestata sin dall'inizio dalla maggioranza della popolazione kosovara per ingerenza straniera negli affari domestici del Paese, pregiudizi etnici, incapacità di proteggere i testimoni e mancanza di imparzialità. Ciò dimostra come il quadro entro cui si colloca la nuova istituzione ibrida sia particolarmente ampio, ossia non si limiti alla sola questione dell'impunità dei membri dell'UCK: al contrario, l'attività delle *Specialist Chambers* è destinata ad avere delle forti ripercussioni non solo giuridiche ma anche politiche e sociali in uno Stato che non gode ancora del riconoscimento da parte della totalità della comunità internazionale.

Nonostante la recente apertura dei primi casi – tutti ancora in corso e che, di conseguenza, non possono ancora essere oggetto di un'analisi dettagliata, soprattutto dal punto di vista processuale –, emerge con evidenza come all'inziale dedizione della comunità internazionale e alla dichiarata volontà di superare i limiti dei meccanismi giuridici precedenti non abbia corrisposto un altrettanto

[3] *Internazionale*, "La lezione inascoltata del Kosovo sul nazionalismo", 11 aprile 2019, available at: https://www.internazionale.it/opinione/jacopo-zanchini/2019/04/11/kosovo-nazionalismo-jugoslavia-anniversario (Ultimo accesso: 25 gennaio 2021).
[4] April 2021.

forte sostegno della popolazione, principalmente albanese, che continua a considerare gli ex leader dell'UCK come eroi nazionali e la nuova Corte come un insulto all'indipendenza del Paese.

In un contesto caratterizzato dalla generale mancanza di legittimazione e fiducia nei confronti delle KSC e del loro operato, il presente elaborato si pone l'obiettivo di valutare, mediante l'analisi dei punti di forza e dei limiti delle KSC, se l'istituzione di questo nuovo meccanismo ibrido possa essere utile o meno alla ricostruzione giudiziaria in un Paese in cui sono state commesse gravi violazioni del diritto penale internazionale e dei diritti umani al fine di rendere giustizia alle vittime. Al contempo, si cercherà di comprendere se l'attività della Corte possa condurre alla riconciliazione tra serbi e albanesi, alla promozione del progresso e della stabilità della società civile in Kosovo, al fine di avvicinare il Paese alla comunità internazionale come auspicato dagli organi europei e kosovari che le hanno istituite, o se invece otterrà l'effetto opposto, infiammando lo scontro inter-etnico di lunga data che è ancora lontano dall'essere superato e rischiererebbe di innescare un possibile effetto destabilizzante sull'intera regione balcanica.

# INTRODUCTION AND METHODOLOGY

The present work is the result of an increasing interest on the topics of international criminal law and human rights violations in the Balkans in the 1990s which I had the chance to develop during an internship in journalism in Amsterdam, in summer 2020. Despite its small size, the Netherlands has been – especially after the end of World War II – the host country of numerous international organisations dealing with the themes of peace, justice and security, including several European Union (EU)[5] and United Nations (UN) organisations,[6] some North Atlantic Treaty Organisation (NATO) agencies,[7] as well as several international courts and tribunals persecuting international crimes, such as the International Criminal Tribunal for Former Yugoslavia (ICTY), the International Criminal Court (ICC), the Special Tribunal for Lebanon and the Kosovo Specialist Chamber and Specialist Prosecutor Office (KSC and SPO). As a writer contributor for an online magazine focused on Dutch and international current affairs taking place in the Netherlands, I was in charge of carrying out some research and interviews with experts, academics and the local population in order to write the articles and analysis on the above-mentioned topics.

When former President of Kosovo Hashim Thaçi was accused of war crimes by the Special Prosecutor of the SPO in The Hague on 24 June 2020, I began conducting some research on the "hybrid mechanism" that had recently been established by the EU in order to persecute the individuals responsible for crimes against humanity, war crimes and other crimes under Kosovo law, which were commenced or committed in Kosovo between 1 January 1998 and 31 December 2000. Why did it take so long for this indictment to be issued? Why did the international community feel the urgent need to establish a new court with such a specific mandate and jurisdiction? For which reasons had the existing justice systems been unable or unwilling to persecute and try the former KLA leaders for the crimes committed during and after the bloody conflict in Kosovo? And what will the future impact of the KSC and SPO's activity be?

Not only did I try to answer these questions for a mere editorial purpose, but I was also particularly interested in conducting further research on the KSC and SPO as a unique and innovative hybrid court, whose activity could have a landmark impact on the international relations scenario and

[5] For instance, the European Medicines Agency (EMA), the European Union Agency for Criminal Justice Cooperation (EuroJust) and the European Investment Bank (EIB).
[6] For instance, the International Court of Justice (ICJ), the International Residual Mechanism for Criminal Tribunals (IRMCT), the High Commissioner for Refugees (UNHCR) and the UN Interregional Crime and Justice Research Institute: Centre for Artificial Intelligence and Robotics (UNICRI).
[7] For instance, the NATO Airborne Early Warning & Control (AEW&C) Programme Management Agency (NAPMA), the NATO Allied Joint Force Command Brunssum (JFC Brunssum) and the NATO Communications and Information Agency (NCIA).

contribute to the development of international criminal law. Moreover, the decision to focus on a controversial country in the Balkans – Kosovo – was mainly due to the fact that I personally perceive it as geographically close to our reality, but at the same time extremely far from a cultural and historic point of view. I have also noticed that both Kosovo and the whole Balkans region are often at the centre of numerous misconceptions I aimed to dismantle through my research and the interviews with some members of the local population I had the pleasure to interview. This is how the project of this master thesis was born.

The case of Kosovo is emblematic and unique in the context of human rights and international law for at least two main reasons. On the one hand, the State's self-proclaimed independence has not been recognised by the international community on its whole, hindering Kosovo's adhesion to many international organisations, including the EU, and the consequent lack of willingness of some States to enter into political, economic and other relations with Kosovo, to send or receive diplomatic personnel and to conclude treaties and other agreements with the country.[8] On the other hand, the justice mechanisms investigating and dealing with the heinous international crimes and human rights violations committed during the 1998-1999 Kosovo war have often been accused of anti-Serb ethnic bias and unwillingness to impartially persecute the individuals responsible for planning, ordering, authorising or directly committing international crimes, namely war crimes, crimes against humanity, genocide and crimes of aggression. Consequently, this has led to the evident failure of the international and local mechanisms to provide the victims of the minority groups in Kosovo with the justice they have long been waiting for but denied for more than two decades.

This second aspect, in particular, seems to strongly contradict two concepts that have been at the core of the international community's concerns and agenda in the last decades, namely restorative justice and transitional justice, which are rooted in responsibility and redress for victims in countries emerging from periods of conflict and repression. These concepts are based on the recognition of the dignity of all individuals as human beings, the acknowledgment and redress of serious crimes, violations and abuses, and the aim to prevent them from happening again in the future. In a world in which the legal discourse and practice place a greater emphasis on conflict-related crimes and atrocities that are directly prohibited under international law for their exceptional gravity, individual criminal responsibility cannot be hidden by the veil of States' authority any longer. And it is especially in regard to the individual criminal responsibility that the case of Kosovo has deeply contributed to further develop the concept of "international criminal justice", whose evolution is

[8] Hans Kelsen, "Recognition in international law. Theoretical observations", in *The American Journal of International Law*, Vol. 35, No. 4, October 1941, pp. 605-617.

taking place "at such a rapid pace"[9] that following its developments proves to be increasingly challenging – though necessary – in a "new age of responsibility" where truth, justice and effective remedies play a crucial role for the deterrence of future violations and for the respect for the rule of law.

Despite this, however, more than twenty years after the end of the Kosovo war, hundreds of crimes are still unaccounted for, perpetrators have escaped prosecution and too many survivors have been marginalised, forgotten and denied access to justice. Both the victims and their families have lost their faith in the international and local justice systems, whilst the tensions between the ethnic groups living in Kosovo have escalated and risk to undermine the feeble equilibrium that the international community has tried to create in the post-conflict Kosovar society. This is the context that witnessed the establishment of the KSC and SPO in 2015 as the last available solution to guarantee the prosecution of the individuals responsible for violating human rights and humanitarian law in the region. Will this new judicial mechanism be able to address individual criminal responsibility without ethnic bias and to deliver justice impartially and independently, learning from the failures of its predecessors and therefore finally succeeding in reconciling the ethnic groups in Kosovo?

In order to objectively assess the potential impact – either successful or failing – of the KSC and SPO in a comparative judicial perspective, it will be necessary to first recall and understand the causes and developments of the war that bathed Kosovo in blood in 1998-1999 – where serious crimes on ethnic-based hatred were committed by both sides taking part in the conflict – as well as of the period in its aftermath, until the 2008 Kosovo's unilateral declaration of independence from Serbia (chapter 1). A special focus will then be placed on the atrocities committed against the minority groups in Kosovo – including Serbs and Roma – and the Kosovar Albanians suspected of collaboration with the FRY's forces, and finally on the role of stigma that has prevented the victims to report the crimes they have directly or indirectly suffered, therefore hindering the process of justice ever since.

Successively, after quickly recalling the main milestones that have marked the path of international criminal law in the 20th century, from the Nuremberg and Tokyo criminal tribunals after World War II to the new "hybrid tribunals" – to which belongs the KSC and SPO, – passing from the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Court (ICC) in 1990s, – the second chapter will be specifically dedicated to a deep analysis of the shortcomings of the international justice mechanisms in effectively holding individuals accountable for all the

[9] Carsten Stahn, *A critical introduction to international criminal law*, Universiteit Leiden, Cambridge University Press, 6 December 2018, p. 1.

international crimes ordered or committed during the Kosovo war and in its aftermath. What will emerge is that, regardless of their remarkable contribution to the significant development and codification of international criminal law and international humanitarian law, the ICTY and the ICC have been limited in terms of mandate and jurisdiction, and their activity was often ethnically biased and impartial with respect to the case of Kosovo.

However, it would be incorrect to claim that the international tribunals and courts were the only mechanisms to be blamed for failing in successfully providing the Kosovar victims with justice. The third chapter will indeed demonstrate that the international forces – namely the United Nations Mission in Kosovo (UNMIK) and the European Union Mission in Kosovo (EULEX) – in charge of reconstructing a totally devastated post-conflict region and society, actively contributing to build a new impartial, competent and trustful local justice system, and protecting all the individuals from human rights violations – miserably failed in their judicial purpose and betrayed their initial strong commitment. Serious acts of violence and gross and systematic human rights abuses continued to take place in the region, especially against the Kosovo Serbs and the other minority groups, strengthening people's feelings of disappointment towards both the international and local justice systems. This contributed to create a widespread climate of impunity and hopelessness that the international community could not elude. The case of Kosovo highlights how a substantive commitment to high human rights standards and principles without corresponding and clear local and international legal remedies is not sufficient to fully and effectively protect the whole population from serious violations of human rights and international law.

Finally, the fourth chapter will be entirely dedicated to the KSC and SPO, from its establishment to the first cases that are currently ongoing and waiting for a final judgement. The Kosovo Specialist Chambers have emerged as a new hybrid mechanism, which aims at combining the most effective and successful elements of both the international and national justice systems, in order to finally provide the victims with justice, truth and reparations for the crimes they have suffered, as well as to strengthen the credibility of the international justice systems. However, it will be noticed how the lack of legitimacy and support of the local population could jeopardise even more the weak and already tense social equilibrium in the country and in the whole region, therefore definitely undermining the reconciliation process; the stake for the KSC and SPO is therefore extremely high.

---

As far as the methodology is concerned, the first period of research has been conducted in the Netherlands, in summer 2020. I had the pleasure to interview some Kosovar journalists, academics and NGOs coordinators, and to discuss and exchange some enriching information with my line

manager and director of the magazine I collaborated with. It was therefore possible begin to gather some useful and detailed information, personal witnesses and material that proved to be crucial to better understand the broad historical, social and political context that led to the establishment of the hybrid mechanism that would constitute the core of this work, and which consequently allowed me to draft the first chapter of this thesis. From September 2020 to February 2021 the study has been continued in Italy, where I could benefit from the numerous physical and online resources on the one hand, and few more interviews I had the pleasure to carry out with experts on the topic and working in the field on the other. Unfortunately, the concerning sanitary situation prevented me from meeting directly with the experts, academics, journalists and human rights activist who provided me with useful material and information through online platforms and social media, as well as to travel directly to Kosovo, where I could have broadened the scope of my research and visit the country this thesis is focused on.

Concerning the resources that were consulted, the backbone of the study was represented by books, articles and papers in English, Italian, French and Albanian from experts, professors, diplomats, human rights activists, legal personnel and members of international organisations, which allowed me to analyse and compare the already existing literature on the topic in order to draw my personal conclusions and answer to the research question of this thesis. At the same time, international and criminal law manuals, judgements by the international and domestic courts and tribunals, and updated data and statistics on the topic have supported, demonstrated and enriched the thesis of the study. Moreover, governmental sites, IGOs and NGOs official websites and online newspaper articles have been constantly checked and monitored, especially the KSC and SPO website and *Balkan Insight* – a website of the Balkan Investigative Reporting Network (BIRN) focused on news, analysis and investigative reporting from southeast Europe – for any news on Kosovo in English. A significant portion of the research has been made possible thanks to interviews conducted with experts, academics, and journalists living in Kosovo, whose contacts have been mostly provided by kind concessions of my line manager and former bachelor professors. Other names have been encountered throughout the online research for this study and include both the authors of some articles and papers I used as a source of information, and experts directly mentioned in the text. Most of them – mainly journalists and reporters – have given me their consent to be mentioned in this work, while others specifically asked their identity to be concealed under a pseudonym. In both cases, more specific information will be provided in the footnotes, which also allow monitoring citations and quotations. More specifically, the Latin expression "*Supra note*" refers to the same work mentioned above, "*Op. cit*." to the one in the previous page and "*Ibid*." to the one preceding. In some cases, the page number is not specified: this because it either remains the same or refers to a general thought included in the

thesis. A complete bibliography and webliography in alphabetical order can be found at the end of the study.

In order to fully assess the potential of the new hybrid mechanism that constituted the backbone of this analysis and to provide a specific answer to the research question it was necessary to combine legal, judicial, historic social and political aspects, all of them representing fundamental elements of the discipline of international relations. Finally, a consistent part of the research was carried out and supported through a detailed chronological reconstruction of the historical events related to the Kosovo case, which could be found in different volumes and thanks to several documentary resources.

To conclude, it is true that the present work is quite intricate – maybe a bit ambitious in its aim of elucidating the inexplicable and complex case of Kosovo. However, I wish it could provide the reader with a general overview and sufficient tools to reflect on the initial research question: will the KSC and SPO be able to finally provide the victims of international crimes and human rights abuses with the justice they have been long waiting for?

# ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| BIRN | Balkan Investigative Reporting Network |
| CAT | Convention Against Torture |
| CEDAW | Convention on the Elimination of all forms of Discrimination Against Women |
| CERD | Convention of the Elimination of All Forms of Racial Discrimination |
| CivPol | UNMIK International Civilian Police |
| CPWC | Center for the Protection of Women and Children |
| CRC | Convention on the Rights of the Child |
| CSDP | Common Security and Defence Policy (EU) |
| ECCC | Extraordinary Chambers in the Courts of Cambodia |
| EU | European Union |
| EULEX | EU Rule of Law Mission in Kosovo |
| FARK | Armed Forces of the Republic of Kosovo |
| FRY | Federal Republic of Yugoslavia |
| FYROM | Former Yugoslav Republic of Macedonia |
| HLC | Humanitarian Law Center |
| HRAP | Human Rights Advisory Panel |
| HRRP | Human Rights Review Panel |
| HRW | Human Rights Watch |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICG | International Crisis Group |
| ICL | International Criminal Law |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for Rwanda |

| | |
|---|---|
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| ILC | International Law Commission |
| IMT | International Military Tribunal of Nuremberg |
| IMTFE | International Military Tribunal for the Far East |
| IRMCT | International Residual Mechanism for Criminal Tribunals |
| JCE | Joint Criminal Enterprise |
| JIAS | Joint Interim Administration Structure |
| KFOR | Kosovo Force |
| KLA | Kosovo Liberation Army |
| KPS | Kosovo Protection Service |
| KRCT | Kosovo Rehabilitation Center for Torture victims |
| KSC | Kosovo Specialist Chambers |
| KVM | Kosovo Verification Mission |
| LDK | Lidhja Demokratike e Kosovës (Democratic League of Kosovo) |
| NATO | North Atlantic Treaty Organization |
| NGO | Non-Governmental Organisation |
| OCHA | United Nations Office for the Coordination of Humanitarian Affairs |
| OHCHR | Office of the High Commissioner for Human Rights |
| OIK | Ombudsman Institution in Kosovo |
| OSCE | Organization for Security and Cooperation in Europe |
| PDK | Partia Demokratike e Kosovës (Democratic Party of Kosovo) |
| PGoK | Provisional Government of Kosovo |
| PISG | Provisional Institutions of Self-Government |
| RPE | Rules of Procedure and Evidence |
| SCSL | Special Court for Sierra Leone |
| SFRY | Socialist Federal Republic of Yugoslavia |
| SITF | Special Investigative Task Force |

| | |
|---|---|
| SPO | Specialist Prosecutor Office |
| SPS | Socialist Party of Serbia |
| SRSG | Special Representative of the Secretary General for Kosovo |
| STL | Special Tribunal for Lebanon |
| UN | United Nations |
| UNHCR | United Nations High Commissioner for Refugees |
| UNMIK | United Nations Mission in Kosovo |
| UNSC | United Nations Security Council |
| VWS | Victims and Witnesses Section |

# CHAPTER 1

## Human rights abuses and humanitarian law violations in Kosovo

Between 1998 and 1999, serious human rights and humanitarian law violations bathed Kosovo in blood. Torture, rapes, forced expulsions, killings, ethnic cleansing and other war crimes and State-sponsored violence were committed by the Serbian and Yugoslav forces towards ethnic Albanians living in Kosovo. Such crimes have been at the centre of many reports and articles both during the war and in its aftermath. The position of the international community towards the case of Kosovo shifted from the initial negligence to the 1999 NATO military intervention, aiming at stopping the Serbian president Slobodan Milošević's ethnic-cleansing campaign against Kosovar Albanians. International criminal tribunals, such as the ICTY, and domestic courts have succeeded in prosecuting some of the individuals at the top of the command chain and in charging them with war crimes, crimes against humanity and genocide.

However, human rights abuses and international crimes were also systematically committed by the Kosovo Liberation Army (KLA), the ethnic Albanian insurgency group that sought the separation from the Federal Republic of Yugoslavia (FRY). According to the non-governmental organisation (NGO) Amnesty International, the KLA was responsible for abducting and killing an estimated 800 members of minority groups in Kosovo, both during the 1998-1999 war and in its aftermath.[10] The reports and documentation provided by other NGOs and humanitarian organisations, such as Human Rights Watch (HRW),[11] the International Committee of the Red Cross (ICRC),[12] the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and the Organisation for Security and Cooperation in Europe (OSCE), confirm this data; the information drawn from numerous interviews with the refugees, displaced persons and eyewitnesses, the press accounts and the declassified information from government and international organisation sources have highlighted the atrocities committed by both parties involved in the conflict. In many cases, only few bodies were found and the families of the victims are still waiting for justice to be served.

[10] Amnesty International, "If they are not guilty, who committed the crimes?", 29 November 2012, available online at: https://www.amnesty.org/en/latest/news/2012/11/kosovo-if-they-are-not-guilty-who-committed-war-crimes/ (Accessed: 3 April 2021).
[11] Human Rights Watch, *Under Orders. War crimes in Kosovo*, 31 October 2001.
[12] ICRC, "Kosovo: le CICR continue de demander davantage d'informations sur les personnes portées disparues", 8 April 2010, available at: www.icrc.org/fr/doc/resources/documents/news-release/2010/kosovo-news-090410.htm (Accessed: 12 November 2020).

Moreover, the intervention of NATO forces to put an end to the conflict, known as "Operation Allied Force", killed hundreds of civilians, raising questions about potential serious violations of the laws of war.

The first part of this chapter will briefly deal with the history of Kosovo, from the historical and political background of the 1998-1999 conflict to the 2008 unilateral declaration of independence of the country. This excursus is crucial in order to better understand the complex context in which gross humanitarian law violations and human rights abuses took place. The second part will be focused on the international crimes and human rights violations committed during the 15-month conflict in Kosovo. What is important to highlight here is that the FRY forces were not the only ones responsible for these crimes: the KLA and the NATO forces seriously violated the international humanitarian law provisions as well. Afterwards, the international crimes that took place in Kosovo after the end of the conflict will be analysed in the third part of this chapter. Although the NATO forces' intervention marked the beginning of a crucial stage in the development of the Kosovo war, it did not prevent atrocities to be committed. By contrast, it is mainly in this period that Serbs, Roma, other minority groups and even Kosovar Albanians suspected of collaboration with the FRY's forces suffered casualties at the hands of the KLA in a series of systematic revenge attacks. Finally, the fourth part will deal with the role of stigma and the psychophysical and economic support victims and their families have received from the civil society, NGOs and human rights activists, especially the survivors of rape and sexual abuses.

## 1.1. A brief history of struggle for independence

### 1.1.1. Historical and political background of the 1998-1999 conflict and the role of ethnicity

The process of democratisation that some countries went through in the aftermath of the Cold War has revealed the deep-rooted ethnic, cultural and religious differences of the groups constituting many societies in different parts of the world. In some instances, the long-standing historical tensions and animosities between them have caused violent conflicts and bloody civil wars. The events that took place in Yugoslavia and Kosovo perfectly illustrate such a case, in which a multi-ethnic and multicultural society was wracked with conflict and disintegration. And it is precisely in this context

that ethnicity, which can be defined as "the fact that someone belongs to a particular ethnic group",[13] emerged as a real threat for the unity of the new autonomous States.

The roots of the 1998-1999 Kosovo ethnic conflict were longstanding and strictly connected to migrations, historic battles and important religious sites in the region.[14] Both the Kosovar Albanians and the Kosovar Serbs claimed strong and exclusive ties with the land. Nevertheless, the 1998-1999 conflict cannot be attributed to simple historical and ethnic facts: it needs to be related to the new nationalism that emerged in the 1970s and 1980s.

After the collapse of the Soviet Union and its one-party authoritarian leadership, the newly established institutions and governments in Yugoslavia were not able to accommodate all the claims of the different ethnic groups living within their borders. Consequently, deep ethnic cleavages came to the surface, especially the one between Albanians and Serbs living in Kosovo.

Located in a mountainous region in the heart of the Balkan Peninsula in South-eastern Europe, the territory of Kosovo has been disputed between Serbs and Albanians for many centuries. On the one side, Albanians have always considered themselves to be the descendants of the Illyrians, who lived in the Balkans before the arrival of the Romans; on the other side, Serbs have always claimed Kosovo to be the territory of Old Serbia and the cradle of their statehood and religion, whose manifestation finds expression in the many orthodox churches located in the region.

More specifically, Kosovo's ethnic tension is symbolised in the Serbian myth surrounding the 1389 Battle of Kosovo between the army under the command of the Serbian Prince Lazar Hrebeljanović and an invading army led by the Turkish forces, with whom the Albanians had chosen to align. The battle resulted in the annihilation of the Serb forces and the beginning of the end of medieval Serbia. Kosovo remained in the Ottoman empire until the First and Second Balkan Wars (1912-1913), when it became, once again, a province of Serbia, which had gained its independence in 1878. In the next decades, Kosovo fell under the control of different powers and ethnic groups: each time, the ethnic group coming into power exacted vicious retaliation against the others, as it considered the territory to be strictly associated with the development of its national identity.

In the centuries between the 1389 battle and the late 1980s, an increasing number of Muslim Albanians emigrated to Kosovo from the mountains of Albania, while most Serbs migrated north into Serbia. The Albanian population continued to grow, reaching 77.5% of the total Kosovar population in 1981 (Table 1). Even though statistics and data must be regarded with caution, it is evident that the Serb community experienced a remarkable decline during the decades.

---

[13] Definition by the Macmillan Dictionary (online), available at: https://www.macmillandictionary.com/dictionary/british/ethnicity (Accessed: 5 February 2021).

[14] Tritaki Panagiota, "Human rights violations in Kosovo", in *Southeast European and Black Sea Studies*, 17 April 2008, pp. 198-203.

**Table 1** – Ethnic composition of Kosovo, the censuses of 1961, 1971 and 1981 (%).

| | **1961** | **1971** | **1981** |
|---|---|---|---|
| **Albanians** | 67.1 | 73.7 | 77.5 |
| **Serbs** | 23.5 | 18.3 | 13.2 |

Source: Miranda Vickers. *Between Serb and Albanian: A History of Kosovo*, Hurst and Co., London (1998), p. 318.

For Albanians, Kosovo was crucial in the development of Albanian nationalism, since in the southern city of Prizren the development of their national identity "received a powerful boost".[15] It is in this city that the Albanians had formed in 1878 the "League of Prizren", a political organisation to support the Turkish control of the Albanian inhabited parts and prevent the dismemberment of the Ottoman Empire by the European powers.[16] Therefore, since Kosovo was extremely important to both the Serb and Albanian national identity, it was destined to become a contested territory, with the Albanian population accusing the Serbs of occupying the region and continuously repressing its members in the past.

Nevertheless, the conflict between Serbs and Albanians – as well as the one between Serbs and the other ethnic and religious groups living in Yugoslavia in the 1990s – was not determined by ethnicity itself: rather, ethnicity was shrewdly exploited as a manipulative tool by the political elites who aimed at pursuing specific political and social objectives. One of the Serbs' purposes was the establishment of the so-called "Greater Serbia", a unified State that would incorporate all regions inhabited by and relevant to Serbs, including Kosovo. In this sense, ethnicity became the backbone of a political mobilisation in pursuit of resurgent claims to power and territory.

Moreover, the concept of ethnicity is strictly connected to the one of nationalism and ultra-nationalism, whose role in the Kosovo war cannot be underestimated. Nationalism as an "ideology based on the premise that the individual's loyalty and devotion to the nation-State surpass other individual or group interests"[17] is founded on real or assumed ethnic ties. However, it has a deeper political and ideological dimension.[18] Not only is nationalism an ideology that tries to promote the interests of the nation, but also a political behaviour, intricately linked to ethnocentrism and patriotism. It is based on a strong feeling of belonging to a community that should correspond to the

[15] Paul Latawski, Martin A. Smith, *The Kosovo crisis and the evolution of post-Cold War European security*, Manchester University Press; 1st edition (2004), p. 5.
[16] Tajar Zavalani, "Albanian nationalism", in Peter Sugar and Ivo Lederer, *Nationalism in Eastern Europe*, University of Washington Press, Seattle (1973), pp. 61–66.
[17] Definition by Britannica (online), available at: https://www.britannica.com/topic/nationalism (Accessed: 5 February 2021).
[18] James G. Kellas, *The Politics of Nationalism and Ethnicity*, 2nd edition (1998), Macmillan press, London, p. 5.

nation. Consequently, those who do not belong to the nation are considered as foreigners and therefore to be excluded.[19]

After the end of World War II, communist marshal Josip Broz Tito became president of the Socialist Federal Republic of Yugoslavia (SFRY). The new State was composed of six republics (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia) and two autonomous provinces (Kosovo and Vojvodina). For forty-seven years, the different ethnic groups in the territory of the SFRY enjoyed a period of relative peace under Tito's charismatic leadership and mediation. According to Tito – who successfully succeeded in keeping Yugoslavia out of the Eastern block – a spirit of "brotherhood and unity" was crucial and necessary for a prosperous, coherent and stable federation. He always stressed the importance of solidarity among the different ethnic groups in the name of a "Yugoslav identity" that surpassed the ethnic differences on the basis of two elements: a common struggle for independence and freedom of the Yugoslav populations during World War II, and a shared set of ideological values, which had to be found in the SFRY's socialism. These ideals, together with the cult of Tito's personality, succeeded in suppressing the hatred hindering social unity.

However, after Tito's death in 1980, the internal cohesion of Yugoslavia was replaced by strong ethnic sentiments exacerbated by the State media and connected with the rising popularity and influence of the Serbian nationalist politician and future president Slobodan Milošević. Between 1987 and 1990, more than two-hundred new political parties were founded in the territory of Yugoslavia. Most of them based their political rhetoric on the idea of ethnic distinctiveness of their members and invoked a national mythical past for political purposes; traditional symbols and themes were more and more often linked to contemporary socio-economic issues. The parties that won the elections in the late 1980s and early 1990s had "a clear nationalist orientation",[20] including the Socialist Party of Serbia (SPS), led by Milošević, and "called for ethnic solidarity and hostility to the other groups".[21]

In this context, Slobodan Milošević was able to draw fully from the already existing chauvinistic nationalism as a theory of political legitimacy in order to justify the political reality he would create – the "Great Serbia" – on a nationalist platform that deemed control over the region of Kosovo a central principle, no matter its social composition.[22] In 1989, Belgrade abolished the autonomous status of Kosovo, which had enjoyed a high degree of political, economic and educational autonomy until that moment, and brought it under its control. For Milošević, "Serbia will be united or there will

[19] James G. Kellas, *Op. cit.*
[20] Gordana Rabrenović, "The dissolution of Yugoslavia: Ethnicity, Nationalism and Exclusionary Communities", in *Dialectical Anthropology,* 1997, pp. 95-101.
[21] Gordana Rabrenović, *Ibid.* p. 98.
[22] Although Kosovo was approximately 90% Kosovar Albanian, minority Kosovar Serb populations claimed strong historic ties with Serbia. These populations were mainly concentrated in enclaves (i.e. Mitrovica).

be no Serbia".[23] Meanwhile, the communists failed in establishing efficient political institutions to effectively regulate the relations and release the tensions among the different Yugoslav ethnic groups.

### 1.1.2. Kosovo War and NATO's intervention

In the 1990s, the control of the court, the educational systems, the police and the language policies passed from Kosovar to Serbian authorities, who ruled Kosovo "with repression and abuse".[24] The Albanian population was victim of discriminatory measures, intimidations and systematic or voluntary layoffs. The control over Kosovar State-owned companies was passed to the hands of the Serbian government and many Albanians refused to work for it. Moreover, the Albanian-language media was suppressed; schoolteachers were expected to adopt the Serbian curriculum and textbooks. Boycotts, strikes and mass riots began replacing the Kosovar Albanians' initial resistance and non-violent approach promoted by President Ibrahim Rugova since the early 1990s.

In the meanwhile, Yugoslavia was embroiled in bloody civil wars after Slovenia, Croatia and Bosnia Herzegovina declared their secession from the FRY. The 1995 Dayton Peace Accords, which marked the end of the Bosnian War, represented another crucial moment for the dissolution of Yugoslavia. However, they totally failed to address the issue of Kosovo's status, which was not even mentioned. The Kosovo leadership was not invited to the negotiation table either.

Therefore, in such a stalemate atmosphere, an increasing number of Kosovar Albanians started joining and supporting the activities of the Kosovo Liberation Army (KLA). Created in the early 1990s, the KLA began targeting several Serbian police stations and claiming for Kosovo's independence from Serbia in 1996. By the summer of 1998, its operations had evolved into a significant armed insurrection and, little by little, tensions between the KLA and the Serb authorities escalated into a full-scale armed conflict.

The Serbian government's response was immediate and resolute: the Kosovar Albanians were victims of raids, forced expulsion from their homes and villages, rapes, destruction of property, massacres and torture to extort confessions and information about the KLA. These episodes of violence led to a general increasing support for the KLA, which attracted thousands of new recruits and intensified its attacks and reprisals. Serb civilians were often victims of beatings, abductions and

---

[23] *The Economist*, Slobodan Milosevic Obituary, 16 March 2006, available at: https://www.economist.com/obituary/2006/03/16/slobodan-milosevic (Accessed: 30 August 2020).

[24] Tom Perriello, Marieke Wierda, "Lessons from the Deployment of International Judges and Prosecutors in Kosovo", the International Center for Transitional Justice (ICTJ), March 2006, p. 5.

executions by the KLA forces, which also threatened and used violence towards ethnic Albanians who were merely suspected of collaboration with the Serbs.

On 16 October 1998, a temporary cease-fire brought the Organisation for Security and Co-operation in Europe (OSCE) to Kosovo. The Kosovo Verification Mission (KVM) was established in order to monitor, document and report allegations of human rights and humanitarian law violations in the region. However, despite the presence and efforts of the international community, violent incidents and acts of provocation continued on both sides. On 15 January 1999, Serbian paramilitaries attacked the village of Račak and killed 45 ethnic Albanians. This episode was seen as a turning point regarding the previous efforts to peacefully resolve the conflict in Kosovo: for the first time, the international community recognised that human rights violations were at the conflict's core.

In the beginning, the international community was not too concerned about the growing tensions in Kosovo because of the "relatively low level of violence" compared to other conflicts, such as the one in Bosnia and Rwanda.[25] Nevertheless, when the OSCE-KVM reports brought to light the human rights and humanitarian law violations that were taking place in Kosovo, the international community response shifted from inaction to intervention.

A two-round negotiations, known as the "Rambouillet Accords", took place in February and March 1999. The international effort to find a definitive solution to the bloody conflict in Kosovo was facilitated by the "Contact Group" for the Balkans, composed of France, Germany, Italy, Russia, the United Kingdom and the United States, that wished to reinstate substantive autonomy and self-government in Kosovo. However, the FRY refused to sign the accords. In the meanwhile, on 24 March 1999, the OSCE-KVM had withdrawn from Kosovo due to the continuous obstruction by the Serbian military and police.

The collapse of the Rambouillet accords was followed by an intensification of Serbian operations against the Kosovar Albanians, who began fleeing the region. According to the UNHCR data published on 4 August 1999,[26] an estimated 850,000 ethnic Albanians left Kosovo during the war and found shelter in Former Yugoslav Republic of Macedonia (FYROM) and Albania. Nevertheless, the number of refugees was such that no agency nor NGO ever truly had a complete overview of the situation.

[25] Paul Latawski, Martin A. Smith, *Supra note 15*, p. 5.
[26] UNHCR, Kosovo crisis update, 4 August 1999, www.unhcr.org/news/updates/1999/8/3ae6b80f2c/kosovo-crisis-update.html (Accessed: 17 September 2020).

On 23 March 1999, the failure of the international negotiations to resolve the conflict and put an end to the massive attacks and ethnic cleansing[27] on the Kosovar Albanian population, led the Secretary-General of the North Atlantic Treaty Organization (NATO) to announce the beginning of an air strike campaign against Yugoslav and Serbian security forces and paramilitary groups. The eleven-week air campaign – known as "Operation Allied Force" – was expected to be successfully concluded within a few days, but ended only on 8 June 1999 with the withdrawal of FRY's forces from Kosovo. The day after, a "Military Technical Agreement" was signed in Kumanovo, North Macedonia, by the FRY, the Republic of Serbia and the International Security Force (KFOR), a NATO-led international peacekeeping force.[28] The agreement provided for the withdrawal of all FRY authorities from Kosovo, including military, judicial and police. The signatories also agreed on the deployment of the KFOR forces in Kosovo.

Despite its final result, the NATO's decision to use military force over Kosovo has raised many critics from the very beginning. The lack of "an explicit mandate" through a UNSC Resolution[29] and the killing of at least 500 civilians by the air-strike campaign were the most common arguments against the NATO forces. However, on humanitarian and regional stability basis, NATO members stressed several times that their decision to employ military power was the last available option "to stop serious, systematic human rights violations and prevent a humanitarian catastrophe in Kosovo" and to support the political aims of the international community.

On 27 May 1999, Louise Arbour, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) – the UN special tribunal that had been established six years before to prosecute international crimes that took place during the conflicts in the Balkans in the 1990s – announced the indictment of Slobodan Milošević and other members of the Serbian chain of command, charging them with crimes against humanity and violation of the laws of war in Kosovo from January to late May 1999.[30]

---

[27] Ethnic cleansing can be defined as "the attempt to create ethnically homogeneous geographic areas through the deportation or forcible displacement of persons belonging to particular ethnic groups." It can also involve "the removal of all physical vestiges of the targeted group through the destruction of monuments, cemeteries, and houses of worship.", definition by Britannica (online), available at www.britannica.com/topic/ethnic-cleansing (Accessed: 18 September 2020).

[28] Kumanovo Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, available at: https://unmik.unmissions.org/kumanovo-military-technical-agreement (Accessed: 3 April 2021).

[29] Paul Latawski, Martin A. Smith, *Supra note 15*, p. 12.

[30] ICTY, Prosecutor Louise Arbour, announcing the indictment against Slobodan Milošević for crimes committed in Kosovo, 27 May 1999, available on the ICTY website, www.icty.org/en/content/indictments (Accessed: 18 September 2020).

### 1.1.3. International administration and the reconstruction of the judicial system

On 10 June 1999, the day after the end of the NATO's air campaign, the UN Security Council adopted Resolution 1244/1999: not only did it establish the United Nations Mission in Kosovo (UNMIK) to be deployed in the region, but it also turned Kosovo into a UN protectorate. Resolution 1244/1999 deferred the question of Kosovo's status by stressing the existing territorial boundaries of the FRY and calling for "substantial autonomy" and "meaningful self-administration of Kosovo."[31] Besides establishing a civilian administration (UNMIK), Resolution 1244/1999 created an international force composed of NATO troops, the Kosovo Force (KFOR). The KFOR forces were in charge of preventing the resumption of hostilities, ensuring "public safety and order until the international civil presence can take responsibility for this task" and taking "all necessary action to establish and maintain a secure environment for all citizens of Kosovo",[32] especially for refugees and displaced persons returning to Kosovo.

The mandate that was conferred to the UN in Kosovo was "unprecedented" in terms of challenges and responsibilities for peacekeeping operations.[33] In particular, from 1999 to 2005, the UN was required to recreate the judiciary and the entire public sector, both at the local and national levels. It was engaged in building new State institutions, an efficient public transport and road system, and new social services. Moreover, it had to provide the country with the necessary conditions for its economic growth and development and to ensure the provision of all levels of education. Finally, the UN was in charge of creating a public-broadcasting system. All these activities obviously needed a new legal framework within which to be effectively carried out. The re-establishment of the rule of law in Kosovo included the UNMIK responsibility for the investigation and prosecution of crimes under international law, including war crimes.

The UNMIK structure was divided into four main "pillars", each of which headed by different international organisations: the humanitarian assistance was led by the UN High Commissioner for Refugees (UNHCR); the OSCE was responsible for democratisation and institution building; the civil administration was coordinated by the UN itself; and the European Union headed the reconstruction and economic development of the region.

When the UNMIK and KFOR forces entered Kosovo in June 1999, marking the beginning of the international administration of the region, the previous law enforcement, judicial, economic and

---

[31] UN Resolution 1244/1999, available at https://digitallibrary.un.org/record/274488 (Accessed: 18 September 2020).
[32] Kumanovo Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, available at: https://unmik.unmissions.org/kumanovo-military-technical-agreement (Accessed: 18 September 2020).
[33] Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor", in *The American Journal of International Law*, January 2001, Vol. 95, No. 1, pp. 46-63.

political system in Kosovo had collapsed. The NATO intervention had not prevented the different ethnic groups involved in the conflict from continuing to carry out gross violations of human rights after the end of the war, especially against minorities. Moreover, the KLA – whose main leaders had come into power after the Yugoslav withdrawal from Kosovo – was installing its own administrative structure and urging the Serb population to leave. In the first period, the only official Yugoslav presence in the territory was the Committee for Cooperation with the United Nations, established by Resolution 1244/1999. However, its mandate was very limited.

Among the numerous missions the UNMIK forces were assigned to, one of the most urgent was the establishment of a basic judicial system since the very beginning of their deployment. In fact, an efficient and well-established judiciary was the only solution to guarantee the prosecution of those who were accused of violating human rights and humanitarian law in the region.

The large-scale arrests carried out by the KFOR forces to restore public order led to the detention of more than two hundred suspects, who were accused of both serious crime offenses and gross violations of international humanitarian and human rights law. Consequently, UNMIK had to provide these detainees with qualified defence counsel – which they usually accepted only from their own ethnic group. This was only possible by re-establishing the core functions of the Kosovo judiciary. However, during the 1990s, Kosovar Albanians had been pushed or obliged to leave the civil service: in the judicial sector, for instance, only 30 out of 756 judges and prosecutors were Kosovar Albanians.[34] Differently from the politicisation of the judiciary that had characterised the previous regime, the UNMIK process to appoint the new judges and prosecutors was particularly transparent and professional, in order to avoid corruption and another exacerbation of ethnic dissents. Specific commissions composed of both national and international legal experts[35] were in charge of selecting and appointing judges and prosecutors on the basis of the merit. This proved to be fundamental for several reasons. First of all, it was crucial in order to establish an impartial and independent judiciary, which UNMIK wanted to reflect the various ethnic communities living in Kosovo and, by consequence, to promote the prosecution and trials of individuals who were accused of international human rights and humanitarian law violations regardless the ethnic group they belonged to. Furthermore, the appointment of local judges was extremely symbolic for the Kosovar population's desire to achieve both self-determination and self-governance after two decades of Serbian regime. Finally, the presence of both international and national judges allowed a continuous exchange of

[34] Hansjörg Strohmeyer, *Op. cit.*, p. 50.
[35] The Joint Advisory Council on Judicial Appointments – later replaced by the Advisory Judicial Commission – was composed of two Kosovar Albanians, a Bosniak, a Serb, and three international lawyers. See Hansjörg Strohmeyer, *Ibid.*, p. 52.

knowledge: highly-trained international judges could collaborate with the local ones and familiarise with the regional legal systems.

Despite the UNMIK efforts to appoint national judges and prosecutors, however, many Kosovar lawyers were suspected of collaboration with the previous regime, and were therefore victims of threats and violence. The initial perceived overrepresentation of Serbs in the judiciary was soon belied by the appointment of new judges and prosecutors of other ethnic groups. Furthermore, Kosovo Albanians were extremely reluctant to apply the laws in force in Kosovo prior to 24 March 1999 – especially Serb criminal law – as provided in the UNMIK regulation No. 1999/1 of 10 June 1999:[36] these laws were considered to promote a system of oppression and a revocation of Kosovo's autonomous status.

Legal assistance was also affected by the scarcity of experienced legal personnel. This constituted a real issue since, at its arrival in Kosovo, UNMIK was in charge of ensuring an adequate legal counsel to the high number of detainees. For this reason, as mentioned in the 1999 Secretary General's Kosovo report,[37] newly appointed judges needed to be constantly trained, particularly in the area of the law and the application of international instruments on human rights. This was extremely true for Kosovar Albanian lawyers who had been prevented from practicing their profession or trained by parallel institutions.[38] Moreover, UNMIK's task also consisted in reconstructing the judicial infrastructures, courtrooms and offices that had been seriously damaged or totally destroyed during the 1998-1999 violent conflict.

In 2005, UNMIK regulations established a new Ministry of Justice and the Kosovo Judicial Council, both of them independent. The ministry was granted limited responsibilities over the justice sector, and the judicial council became the authority for appointing and disciplining judges.

The UN experience in Kosovo has clearly demonstrated that the establishment of a basic judicial system in a post-conflict society represents one of the top priorities since the very beginning of

[36] UNSC Resolution 1244/1999, available at www.nato.int/kosovo/docu/u990610a.htm (Accessed: 18 September 2020).
[37] Report of the Secretary General on the United Nations Interim Administration in Kosovo, 23 December 1999, available at https://undocs.org/S/1999/1250 (Accessed: 18 September 2020).
[38] On 2 July 1990, 114 deputies of the former Kosovo Assembly – which had been dissolved the month before – declared Kosovo independent from Serbia as a full republic within the SFRY. Nevertheless, both Serbia and the SFRY considered this unilateral decision illegal and refused to support it. As a reaction, on 7 September 1990, 111 deputies met secretly in Kacanic and proclaimed the independence of the Republic of Kosovo. In December, the elections to the Serbian parliament were boycotted by the Kosovo Albanian population. In the aftermath of a referendum on sovereignty that was organised in September 1991, a provisional clandestine government coalition was established, with the aim of running Kosovo police forces and collecting taxes from Kosovo Albanians. Nevertheless, by May 1992, when the first parallel elections were organised, the geopolitical framework in Yugoslavia had changed: four republics had declared their independence and Kosovo had been designated as autonomous province. Despite this, Kosovo Albanians continued on boycotting Serbian elections and any other parallel election organised by Kosovo was considered illegal by Serbia. When the Democratic League of Kosovo (LDK) won the 1992 parallel elections, its leader Ibrahim Rugova was appointed President of the Republic of Kosovo. A second round of elections held in March 1998 confirmed Rugova's presidency despite the failure of his non-violent approach.

deployment, affecting peace-building operations and regional stabilisation both the short- and long-term. An effective and functioning judicial system – with highly trained judges and prosecutors, well-functioning infrastructures and a widely accepted legal framework – positively affects reconciliation and brings to justice those who are responsible for gross violations of humanitarian and human rights law. "Multiethnicity" was one of the main purposes of the international presence in Kosovo, since the international community perceived the Kosovo war as an ethnic conflict. However, while promoting tolerance and mutual respect between different communities, the UNMIK strategy led to even more segregation between Albanians and Serbs: new "Serb enclaves" were created in the region, with Northern Kosovo witnessing the most violent inter-ethnic clashes.

Despite their efforts, both the UN and the new local authorities were accused on several grounds for their mandate. First of all, they were criticised for failing in protecting minorities, especially Kosovo Serbs, who were victims of "killings, abductions, threats, beating, discrimination in access to basic public services and grenade attacks against property".[39] Second, the UNMIK internal structure resulted in "different policy priorities and varying degrees of commitment" in the implementation of the international leadership's policies.[40] Competition and lack of collaboration among the four pillars of the mission represented another source of friction that hindered the effectiveness of UNMIK's mandate. Third, any decision or policy adopted by the international administration was considered by Kosovo Serbs and Kosovo Albanians as promoting the interests of just one of the two sides, and was therefore contested and/or undermined. Both ethnic groups were ready to pursue their objectives by any means, as showed in the case of Mitrovica:[41] preservation of Yugoslav sovereignty for the Kosovo Serbs; secession and independence for the Kosovo Albanians. This tension risked to undermine the work and legitimacy of the international administration in the region. Fourth, the transfer of competencies from UNMIK to the provisional Kosovo institutions was very slow and the UNMIK and KFOR forces, as well as the new judges and prosecutors, were accused of corruption. Finally, many influential former KLA leaders came to power after the 1999 Yugoslav withdrawal from the region: despite the charges of corruption and human rights and humanitarian law violations against them, the weakness of the new judiciary determined their impunity.

---

[39] Report of the Secretary General on the United Nations Interim Administration in Kosovo, *Op. cit.*

[40] Alexandros Yannis, "Kosovo under international administration", in *Survival*, 2001, 43:2, p. 33.

[41] The city and municipality of Mitrovica became the center of ethnic clashes between Kosovo Albanians and Kosovo Serbs, which were exacerbated by the presence of extremists on both sides. In March 2004, violent rioting by ethnic Albanians, following inaccurate reports Serbs' involvement in the drowning of three young Albanian children, led to the worst ethnic violent case in Kosovo since the end of the 1998-1999 war. For two days, the UNMIK, KFOR and Kosovo Police Service (KPS) lost control of the situation and catastrophically failed in their mandate to protect minorities, both in Mitrovica and in the rest of Kosovo. See Human Rights Watch, "Failure to protect. Anti-minority violence in Kosovo, March 2004", 25 July 2004, available at: https://www.hrw.org/report/2004/07/25/failure-protect/anti-minority-violence-kosovo-march-2004 (Accessed: 5 September 2020).

### 1.1.4. Kosovo's unilateral declaration of independence and the reconfiguration of the international presence

Despite UNMIK and KFOR presence in the region, the contested status of Kosovo and the opposite positions of its population prevented the international administration to successfully carry out its mandate. Riots, violence, threats and destruction of properties increased the tensions in the area, especially between Kosovo Albanians and Kosovo Serbs. In a context of continuous revolts, the death of president Ibrahim Rugova – "the man who led Kosovo on the path towards independence"[42] – on 21 January 2006 highlighted the need to open the negotiations and discuss about the political future of Kosovo. Some months before, UN Secretary-General Kofi Annan had appointed the former Finnish president Martti Ahtisaari as his special envoy for the Kosovo status talks.

Seventeen rounds of negotiations between delegations from Serbia and Kosovo took place in the UN mission's headquarters in Vienna. During the so-called "Vienna talks", Ahtisaari worked closely with and followed the guidelines of the Contact Group, which prompted the adoption of a new plan for Kosovo's future status that could guarantee both multiethnicity and the participation of all communities in the new government. At the same time, the new settlement should not provide for a return to the pre-March 1999 situation, a partition of Kosovo, nor its union to other countries, and had to be "acceptable to the people of Kosovo".[43] This statement had a clear meaning, since independence was the main purpose of 90% of the Kosovo's population.

Ahtisaari presented the new plan in March 2007. His report provided for the independence of Kosovo within international supervision as "the only viable option".[44] Both a reintegration of Kosovo into Serbia and a long-term international administration were considered to be "unsustainable". Nevertheless, the Ahtisaari's plan failed to forge a compromise between Serbia and Kosovo Albanians; neither side was willing to change its position on the question of the status of Kosovo.

On 17 February 2008, the Parliament of Kosovo issued a statement declaring "Kosovo to be an independent and sovereign State".[45] The Kosovar government accepted the principles of the Ahtisaari Plan and welcomed the continued support of the international community on the basis of Resolution

---

[42] *Balkan Insight*, "Ibrahim Rugova: Pacifist father of Kosovo's independence", 21 January 2020, available at https://balkaninsight.com/2020/01/21/ibrahim-rugova-pacifist-father-of-kosovos-independence/ (Accessed: 5 September 2020).

[43] Kosovo Contact Group statement, 31 January 2006, available at: https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/declarations/88236.pdf.

[44] Report of the Special Envoy of the Secretary-General on Kosovo's future status, 26 March 2007, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kosovo%20S2007%20168.pdf.

[45] Kosovo Declaration of Independence, 17 February 2008, available at: www.refworld.org/docid/47d685632.html (Accessed: 5 September 2020).

1244.[46] Kosovo unilateral declaration of independence opened a debate on the international diplomatic recognition[47] of its independence from Serbia, which had declared that it "will never recognise the independence of Kosovo […]. For the citizens of Serbia and its institutions, Kosovo will forever remain a part of Serbia", as provided by UNSCR 1244. While many States have recognised the Republic of Kosovo's independence, either right after its declaration[48] or in the following years, and insisted on the "unique" or "sui generis" character of the Kosovo case,[49] other States firmly announced that they would not recognise its independence, most notably Russia and China.[50] As of March 2021, Kosovo has received 117 diplomatic recognitions as an independent State, eighteen of which have been withdrawn.

However, independently from the question of diplomatic recognition – which is a purely political discretionary act that a State issues under its own assessments of the effectiveness and independence of the new State, often in the light of political criteria (i.e. ideological affinity), and demonstrates its will to establish international relations with this entity[51] – the auto-declared status of Kosovo as a nation became a matter of international dispute. In fact, under international law, recognition is not an essential element of international subjectivity. The 1993 Montevideo Convention on the Rights and Duties of States provides that a State must possess a "permanent population, a defined territory, a government, and the capacity to enter into relations with the other States" (article 1) and that "the political existence of the State is independent of recognition by the other States" (article 3). However, in order for a State to be considered as a subject of international law, it must

[46] The final clause of the Declaration states: "We hereby affirm, clearly, specifically and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including especially the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistently with the principles of international law and resolutions of the Security Council, including resolution 1244. We declare publicly that all States are entitled to rely upon this Declaration, and appeal to them to extend us their support and friendship."

[47] As defined by Article 6 of the 1993 Montevideo Convention on the Rights and Duties of the States, "The recognition of a State merely signifies that the State which recognizes it accepts the personality of the other with all the rights and duties determined by international law."

[48] The United States and most members of the European Union immediately recognised Kosovo as an independent State. Some European States, such as Spain and Cyprus, were facing (and still are) their own separatist problems, and have therefore been reluctant to recognise it.

[49] The birth of a Kosovar independent State represents the first case of secession that has occurred in Europe after the Second World War, and therefore has no other precedent.

[50] As of November 2020, the Republic of Kosovo has received 116 diplomatic recognitions as an independent State, 15 of which have been withdrawn.

[51] Under international law, recognition is a unilateral declarative political act through which a State acknowledges an act or status of another State – therefore accepting it as a subject of international law and expressing its will to establish international relations with it – and, potentially, declares it considers this situation to be legitimate. Recognition can be accorded either on a *de iure* or *de facto* basis, the former being permanent, definitive, unconditional and irrevocable, while the latter being provisional, often related to the acknowledgment of a new State by a non-committal act. Moreover, the recognition of a State must be distinguished from the recognition of its government: when a State recognises a government, it usually acknowledges a person or group of persons as competent to act as the organ of the State and to represent it in its international relations. However, the only criterion in international law for the recognition of an authority as the government of a State is its exercise of effective control over the State's territory. See Dominique Carreau, Fabrizio Marrella, *Diritto internazionale*, 2nd edition, Giuffré Editore, 9 July 2018, pp. 225-226.

exercise an effective and independent control of a territory and the community living there (internal and external sovereignty respectively).[52] Nevertheless, in the case of Kosovo, it was (and it is still) not possible to affirm that these principles are fully satisfied: on the one side, some of the country's activities were – and are – still carried out by international forces in charge of supervising Kosovo's process of independence; on the other side, the Kosovar government was – and is – not able to exercise its power in the Northern part of the region, mainly inhabited by the Serbian minority.

On 8 October 2008, the UN General Assembly asked the International Court of Justice (ICJ) to render an advisory opinion,[53] according to Article 96 of UN Charter,[54] on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" After verifying whether it possessed jurisdiction to give the advisory opinion requested by the UN General Assembly,[55] the Court delivered its advisory opinion on 22 July 2010, affirming that "the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law."[56] From a legal point of view, it is interesting to notice that the Court did not express its opinion on the achievement of Kosovo's statehood or not, nor "whether the declaration of independence is in accordance with any rule of domestic law",[57] but rather whether or not international law prohibits that unilateral declaration of independence. In particular, the advisory opinion of the UN Court highlighted that the practice of States "does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases" [like Kosovo's] and that "the scope of the principle of territorial integrity is confined to the sphere of relations between States".[58] Furthermore, it stressed that it did not respond to the argument according to which the population of Kosovo should have the right to separate from Serbia as a demonstration of the right to self-determination (which under international law emerges in case of racial segregation, colonial domination or foreign occupation), or "whether international law provides for a right of 'remedial secession'." Therefore, since the ICJ clearly distinguished

[52] The concept of "internal sovereignty" refers to the relationship between a sovereign power and its subjects and therefore can be defined as the supreme authority of the government within its own territory. By contrast, the concept of "external sovereignty" refers to the capacity of the State to act independently and autonomously on the world stage, without any foreign interference in its domestic affairs, and implies that States are legally equal and that the territorial integrity and political independence of a State is inviolable.
[53] UN General Assembly Request for Advisory Opinion, 10 October 2008, available at: www.icj-cij.org/public/files/case-related/141/14799.pdf (Accessed: 13 November 2020).
[54] Chapter XIV – The International Court of Justice. Article 96: "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."
[55] According to the Court, there were "no compelling reasons for it to decline to exercise its jurisdiction" in respect of the request of the General Assembly.
[56] ICJ Summary of the Advisory Opinion, available at: www.icj-cij.org/public/files/case-related/141/16010.pdf (Accessed: 13 November 2020).
[57] ICJ, *Ibid*.: "The Court can respond to that question by reference to international law without the need to enquire into any system of domestic law."
[58] ICJ, *Ibid*.

between the legal and political character of the question,[59] as highlighted by Conforti, the Court's advisory opinion cannot support the legitimacy of Kosovo's independence.

Right after Kosovo unilateral declaration of independence, a new planning for the "international supervision" by NATO and the EU began. The NATO forces retained their commitment to KFOR[60] while the UNMIK ceded most of its judicial responsibilities to Kosovar control. However, the newly established European Union Rule of Law Mission in Kosovo (EULEX) – whose mission to be deployed had been included in Kosovo's Declaration of independence – brought to Kosovo judges, prosecutors, and police forces from European and North American countries, who were supposed to support and work closely with their Kosovar counterparts. EULEX was in charge of processing cases it considered to be quite hard for Kosovo's newly established institutions to handle. Nevertheless, despite the evident endorsement at the highest political levels, EULEX's presence in the region raised contestations and local resistance[61] from the very beginning of its deployment. In fact, its mission was considered to restrict Kosovo's control over its own justice system, since it dealt with cases involving organised crimes, war crimes, corruption and terrorism.

Nonetheless, despite the two-decade attempt of the international community to lay the basis for a long-lasting peace, the inter-ethnic relations between the two major ethnic groups in the region continue to be tense and fragile. This is especially true for the North of Kosovo, inhabited by a Serbian majority who has never accepted Kosovo's unilateral declaration of independence. Atrocities and human rights violations, both during and after the conflict, dramatic changes of ethnic composition structure and a huge number of refugees have left a legacy of animosities and mutual mistrust between Kosovo Albanians and Serbs in the newly created State.

In conclusion, disputes between the different communities that reside within Kosovo were, and still remain, a highly burdening issue that risks to destabilise the already fragile situation in the region created by the international administration. If other minorities have better integrated into the new reality of independent Kosovo, it is the long-dating controversial relation between Albanians and Serbs that causes the main inter-ethnic tensions in the country. Added to this is the contested political status of Kosovo after its unilateral declaration of independence in 2008. However, it was during the Yugoslav and Kosovo wars that the hatred between the main ethnic groups reached its peak, leading

---

[59] ICJ, *Op. cit.*, "The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have".

[60] Statement by the NATO Secretary General in reaction to the Kosovo declaration of independence, 17 February 2008, available at: www.nato.int/docu/pr/2008/p08-021e.html (Accessed: 13 November 2020).

[61] In August 2009, a protest resulted in damage to 28 EULEX vehicles (see *EU Observer*, "Violent protests against EU mission in Kosovo", 26 August 2009, available at: https://euobserver.com/news/28583) and in March 2011 thousands of protesters joined rallies after the EULEX forces had arrested some KLA veterans suspected of war crimes (see *Balkan Insight*, "Kosovo: protesters rally in support of KLA", 24 March 2011, available at: https://balkaninsight.com/2011/03/24/kosovo-protesters-rally-in-support-of-kla/).

to gross human rights and humanitarian law violations. The next paragraph will better tackle this point.

## 1.2. Human rights and humanitarian law violations during the Yugoslav and Kosovo wars

### 1.2.1. FRY obligations, application of relevant norms and violations of international instruments

On 24 March 1999, the NATO forces began a military operation against the Federal Republic of Yugoslavia to put an end to the Kosovo war, officially claiming that their actions were "driven by concerns about the human rights situation in Kosovo and the implications of a further escalation of the latent conflict there."[62] The idea laying at the basis of the international community's military intervention was that the international crimes committed in Kosovo by the Yugoslav and Serbian security forces and paramilitary groups were so extreme that the State responsible for them – in this case the FRY – could properly be subject of military intervention despite the principle of sovereignty underlying public international law. In fact, contemporary international law allows, under specific conditions, a military intervention in a State where systematic and serious violations of fundamental human rights (*ius cogens* norms) are perpetrated against either foreigners or the nationals of the State that commits them.[63]

Although the legitimacy of the NATO air-strike campaign under international law has been seriously questioned from the very beginning, what is evident is that the FRY was in breach of both its international human rights and humanitarian law obligations and bore direct legal responsibility on the basis of several elements. Since international criminal law "derives its origins from and continuously draws upon both international humanitarian law and human rights law",[64] a short analysis of these segments of international law proves fundamental to understand and contextualise the case of Kosovo and the international crimes that were committed in the region.

Human rights law and international humanitarian law are separate branches of public international law with distinct modes of application. Both of them, however, aim at protecting

[62] Christopher Williams, "Kosovo, the fuse for the lightening", in *The Kosovo Crisis: the last American war in Europe*, London Pearson Education, 2001.
[63] The contested "right to intervene" has been further developed by the United Nations since 2001 through the concept of the "responsibility to protect" ("R2P"). See Dominique Carreau, Fabrizio Marrella, *Supra note 51*, p. 666.
[64] Antonio Cassese, *International Criminal Law,* 2nd edition, Oxford University Press, New York, 2008.

individuals from abuse by those in power and, in some instances, they apply simultaneously: they can also overlap in that violations of humanitarian may also be gross violations of human rights. However, if human rights law essentially applies to a "vertical relationship" between unequal parties (governors and governed), international humanitarian law, on the other hand, regulates the "horizontal relationship" between two equal parties that are confronting each other during an armed international or non-international armed conflict.[65] Moreover, the two systems are also characterised by methodological and structural differences, which do not merely consist in distinct judicial approaches.

Under human rights law, which derives primarily from binding international agreements that sovereign States decide to sign and ratify, States have the obligation to protect, respect and fulfil the civil, political, economic, cultural and social rights of individuals within their territory or subjected to their jurisdiction. Human rights belong to every human being and include, for instance: right to life; prohibition of slavery, torture and inhuman or degrading treatment; right to a fair trial; prohibition of discrimination on the basis of political, sexual, religious or ethnic grounds; freedom of expression and thought; freedom of movement. Human rights law also lays down the fundamental rights of victims and witnesses, as well as of suspects and accused persons.

Only States are bound by international human rights law, while private or non-State actors cannot be in breach of such international legal obligation. This does not mean, however, that human rights cannot be violated by single private actors. Furthermore, States have both positive and negative obligations: not only must they guarantee the enjoyment of human rights, but also abstain from human rights violations – for instance, States are under the "supreme duty" to prevent genocide.[66]

Human rights law applies in all times, meaning both in times of war and peace, but in few limited cases – namely when "strictly required by the exigencies of the situation"[67] – some human rights can be derogated. Nevertheless, certain core rights can never been derogated: right to life, freedom from torture and inhuman or degrading treatment, and prohibition to be held in slavery or servitude. Although the history of human rights can be traced back to the ancient times, it is widely recognised that the most important and relevant contribution to this discipline at the international level can be found in the UN system, which sets the promotion, protection and fulfilment of human rights at the universal level among its main objectives[68] and has as first political and judicial reference

[65] Magdalena Forowicz, *The reception of international law in the European Court of Human Rights*, Oxford University Press, New York, 2010, p. 314.
[66] Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), available at: http://hrlibrary.umn.edu/gencomm/hrcom6.htm (Accessed: 1 February 2021).
[67] International Covenant on Civil and Political Rights (ICCPR), Art. 4(1).
[68] Augusto Sinagra, Paolo Bargiacchi, *Lezioni di diritto internazionale pubblico*, Giuffré editore, 2009, p. 474.

the Universal Declaration of Human Rights, a milestone document adopted by the UN General Assembly on 10 December 1948 with Resolution 217(iii).[69]

On the other side, the concept of international humanitarian law – also known as "the law of war" or "the law of armed conflicts" – refers to the current understanding of the *ius in bello*, that is to say the legal framework applicable to situations of armed conflict and occupation. International humanitarian law – which does not apply in time of peace – aims at limiting the effects of armed conflict and protecting people who are not participating in the hostilities, setting specific prohibitions or restrictions on the use of offensive means, sophisticated weapons and methods of warfare.[70]

It is true that laws of war have always existed to limit the destructive effects of international conflicts.[71] However, international lawyers tend to refer to the Battle of Solferino (24 June 1859) as a crucial moment in the history of modern humanitarian law. It was on that occasion that the Swiss businessman and social activist Henry Dunant witnessed the atrocities of the conflict and, horrified and touched by the suffering of injured soldiers, was inspired to create the International Committee of the Red Cross (ICRC), an independent and neutral organisation with the aim of ensuring humanitarian protection and assistance for victims of armed conflicts.[72] The ICRC became "a promoter and custodian of the humanitarian idea and the primary initiation for its transition into international humanitarian law".[73] Dunant's personal experience and humanitarian action played a pivotal role in the codification of international humanitarian law that took place in the following decades: the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (or First Geneva Convention), which marked "the start of the Geneva tradition of humanitarian law";[74] the 1899 and 1907 Hague Conventions, largely based on the 1863 Lieber Code;[75] the 1949 Geneva Conventions[76] and their three Additional Protocols. Although international

[69] UN Declaration of Human Rights, available at: www.un.org/en/universal-declaration-human-rights/ (Accessed: 15 November 2020).
[70] The UN has always considered warfare as the last and non-desirable available option to solve international controversies.
[71] Amanda Alexander, "A short history of International Humanitarian Law", in *The European Journal of International Law*, Vol. 26 no. 1, 2015, pp. 109-138, p. 111.
[72] More information on the International Committee of the Red Cross (ICRC) are available on its official website: www.icrc.org/en (Accessed: 4 April 2021).
[73] Michael A. Meyer and Hilaire McCoubrey, *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D Draper*, Springer, 1st edition, 1998, p. 69.
[74] Amanda Alexander, *Op. cit.*, p. 112.
[75] The "Lieber Instructions", also known as the "Lieber Code", represent the very first attempt to codify the laws of war. Prepared during the American Civil War by Francis Lieber, they were binding only on the US forces but correspond to a great extent to the laws and customs of war that existed at that time.
[76] The "Geneva Conventions" comprise four treaties (the First "for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field"; the Second "for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea"; the Third "relative to the Treatment of the Prisoners of War"; the Fourth "relative to the Protection of Civilian Persons in Time of War") and three amendment protocols (Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts; Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts; and Protocol III (2005) relating to the Adoption of an Additional Distinctive Emblem).

humanitarian law predates human rights law, the bulk of modern humanitarian law is embodied in the 1949 Geneva Conventions and its Additional protocols (especially Protocols I[77] and II[78]).

The main reason why international humanitarian law is often criticised is that it applies "different rules depending on whether an armed conflict is international or internal in nature"[79]: most provisions of humanitarian law apply only during international conflicts, where two or more States are involved,[80] and Protocol II applies to internal armed conflict (i.e. civil war, colonial conflicts, or wars of religion). However, much of the protection that is provided to civilians in Protocol I is absent from Protocol II. The distinction between internal and international armed conflicts is considered by many international lawyers and critics as either "arbitrary"[81] or "difficult to legitimate"[82], and has opened a debate on the so-called "internationalised armed conflicts" that are taking place more and more often in the contemporary globalised and interdependent world. Internal conflicts easily tend to become "internationalised" for several different reasons: for instance, when the internal factions are backed by different foreign States, which may also military intervene in an internal armed conflict, or when foreign States intervene to support an insurgent group fighting against an established government. A clear example of an internationalised armed conflict in recent history is represented by NATO's intervention during the 1998-1999 Kosovo War between the Serbian and Yugoslavian forces and the KLA.[83] Consequently, this recent phenomenon has highlighted the shortcomings of the historical clear distinction of conflicts as either wholly international or wholly non-international provided by the Geneva Conventions, their Additional Protocols and customary international law.

Differently from some human rights, humanitarian law can never be derogated and most of it has evolved into customary law during the years.[84] This means that all States are bound to it,

---

[77] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at: https://ihl-databases.icrc.org/ihl/INTRO/470 (Accessed: 15 November 2020).

[78] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475 (Accessed: 15 November 2020).

[79] James Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law", in *International Review of the Red Cross*, 30 June 2003, pp. 313–350.

[80] It is not a case that in 1948 the ICRC issued a report recommending that the Geneva Conventions apply the full extent of international humanitarian law to "all cases of armed conflict which are not of an international character […] which may occur in the territory of one or more of the High Contracting Parties". See Andrew Clapam, Paolo Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions. A commentary*, Oxford University Press, 2015, p. 80.

[81] Réné-Jean Dupuy, Antoine Leonetti, "La notion de conflict armé à caractère non international" in Antonio Cassese, *The New Humanitarian Law of Armed Conflict*, Editoriale scientifica, Naples, 1971, p. 258: "Elle produit une dichotomie arbitraire entre les conflits, puisque la distinction, purement formelle, ne se fonde pas sur une observation objective de la réalité…".

[82] Ingrid Detter, *The Law of War*, Cambridge University Press, London, 2002, p. 49: "It is difficult to lay down legitimate criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulations of the Law of War for the two types of conflict."

[83] James Stewart, *Ibid*, p. 315.

[84] As for international criminal law (ICL), violations of international humanitarian rules originally only generated State responsibility, but over the years, an increasingly important attention was placed on individual criminal liability.

regardless of whether they are parties to the treaties or not. Nevertheless, the problem is that international humanitarian law principles can be questioned when it comes to the law applicable to internal armed conflicts, since Protocol II is usually not considered to be declaratory of customary international law. Furthermore, in some instances, international humanitarian law also applies directly to non-State actors.

Two principles underly humanitarian law and are often necessary to determine whether an action constitutes a violation: the former is the principle of distinction between legitimate and illegitimate targets;[85] the latter is the principle of proportionality, which requires that during an armed conflict, the parties must not launch an attack against lawful military objectives if the attack "may be expected" to result in excessive civilian harm (deaths, injuries, or damage to civilian objects).[86] An intentionally disproportionate attack may constitute a war crime.

As for the substantive provisions of law of internal armed conflict, Common Article 3 of the Geneva Conventions prohibits the following acts towards "[…] Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause": "[…] (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court". Furthermore, Protocol II protects individuals from collective punishment, acts of terrorism, slavery, corporal punishment, rape, enforced prostitution, pillage and threats. Art. 13(2) of this protocol also states that "the civilian population as such, as well as individual civilians, shall not be the object of attack." Subsequent articles prohibit the destruction of cultural property and essential civilian objects, forced movement of civilians, demolition of indispensable objects (i.e. drinking water installations such as wells) and hostile acts against historic monuments and holy places.

[85] Article 48 of the Additional Protocol I (API) of the Geneva Conventions of 12 August 1949: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish be- tween the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." and Rules 1 and 7 of the ICRC Customary IHL Study: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." and "The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects."

[86] Article 51(5)(b) of the Additional Protocol I (API) of the Geneva Conventions of 12 August 1949: "An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." and Rule 14 of the ICRC Customary IHL Study: "Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited."

Under the 1948 Genocide Convention States parties have the obligation to prevent and punish all acts of genocide, both in times of peace and in times of war. According to Article 2, genocide includes: "(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[87] In order for an act to be considered as "genocide", the perpetrator must have the specific intent (*dolus specialis*) to destroy, either totally or partially, the targeted group. Moreover, an act could constitute a genocide even if no one dies and may be committed by a private, or non-State actor.

During the 1998-1999 Kosovo war, Yugoslav sovereignty was evident and unquestioned by the international community, as well as the existence of an armed conflict.[88] The FRY had binding legal obligations deriving from the international instruments it had signed and ratified. In particular, it was party to the International Covenant on Civil and Political Rights (ICCPR)[89]. It had signed and ratified the Covenant on 8 August 1967 and 2 June 1971 respectively, and therefore was bound by its provisions. The FRY had also signed the Optional Protocol to the International Covenant on Civil and Political Rights on 14 March 1990.

Moreover, it had accepted the non-discrimination norms listed in the 1966 International Convention of the Elimination of All Forms of Racial Discrimination (CERD)[90] and in the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[91] and had signed and ratified both the 1984 Convention Against Torture (CAT),[92] desiring to make more effective the struggle against torture and other inhuman or degrading treatment and punishment, and the 1989 Convention on the Rights of the Child (CRC).[93]

Additionally, the FRY was also party both to the core of international humanitarian law, that is to say the 1949 Geneva Conventions, and to its Additional Protocols. Since much of the Geneva

---

[87] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Art. 2.

[88] According to the ICTY's definition, "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within the State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there […]", in Tadić Duško (IT-94-1).

[89] The International Covenant on Civil and Political Rights (ICCPR) is a binding legal treaty adopted by the UN General Assembly in 1966, which entered into force ten years later, on 23 March 1976, in accordance with Article 49 – three months after the date of the deposit of the thirty-fifth instrument of ratification or accession. The parties committed themselves to respect, protect and fulfill the civil and political rights of individuals, such as the right to life, freedom of thought, conscience and religion, freedom of assembly, and the right to a fair trial.

[90] The former Yugoslavia had signed and ratified the Convention on 15 April 1966 and on 2 October 1967 respectively.

[91] The former Yugoslavia had signed and ratified the Convention on 17 July 1980 and on 26 February 1982 respectively.

[92] The former Yugoslavia had signed and ratified the Convention on 18 April 1989 and on 10 September 1991 respectively.

[93] The former Yugoslavia had signed and ratified the Convention on 26 January 1990 and on 3 January 1991 respectively.

Conventions' substantive law, including the prohibition of genocide, has acquired the status of customary law, the FRY was also bound by these norms.

On a constitutional ground, Articles 10 and 16 of the FRY Constitution stated, respectively, that "The Federal Republic of Yugoslavia shall recognize and guarantee the rights and freedoms of man and the citizen recognized under international law" and "The Federal Republic of Yugoslavia shall fulfil in good faith the obligations contained in international treaties to which it is a contracting party. International treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the internal legal order."

Another element that needs to be considered is the nature of the actors, since human rights and humanitarian law only bind certain actors. In the case of Kosovo, during the 1998-1999 war abuses were mainly committed by the Yugoslav police and paramilitary forces: the former is clearly a State actor;[94] despite being a non-State actor in the strict sense, the latter were however supported by the FRY and fighting on its behalf.

Finally, during the Kosovo war civilians were victims of abuse, threat, rape, violence, expropriation of property, forced expulsions and killings. The FRY's government clearly aimed at expelling the entire Kosovo Albanian population from a region it considered to be the cradle of its national identity and religion.

All these elements considered, it is definitely possible to affirm that the FRY was in violation of both human rights and international humanitarian law. Not only did it violate the legal obligations deriving from the international instruments it had signed and ratified, but it also did not succeed in preventing non-State actors from committing human rights and international human rights violations.

In conclusion, since serious and evident breaches of international obligations *erga omnes* have occurred during the Kosovo war, the FRY could not justifiably claim that the international community should not have responded in the name of its "responsibility to protect" the population of Kosovo from serious and systematic human rights violations.

### 1.2.2. OSCE-KVM's reports and major war crimes during the conflict

The OSCE Kosovo Verification Mission (OSCE-KVM) was established by the Permanent Council in October 1998 and dissolved in June 1999, when it was replaced by the OSCE Mission in

[94] States are directly responsible for human rights violations committed by the police forces since the police is an organ of the State.

Kosovo. Recognising that the Kosovo crisis was in large part a human rights crisis, the OSCE-KVM was in charge of verifying compliance by the Serbian and Yugoslav forces – and more in general by all parties involved in the Kosovo war – with the 1999 UNSC Resolution, to be then reported to the UN, the OSCE Permanent Council, the FRY's authorities and other international organisations. Other tasks included the promotion of a liaison between all the parties involved in the conflict, the supervision of elections in Kosovo and the draft of reports and recommendations.[95]

During its two-phase mandate,[96] the OSCE-KVM utilised both international and domestic humanitarian and human rights law provisions and instruments to analyse and then classify in an impartial way the systematic and widespread abuses that were committed by the parties involved in the conflict. Besides the international instruments mentioned above, it relied on the provisions and obligations of the Helsinki Final Act and the Paris Charter, as well as on the 1992 FRY Constitution, which defined the Federal Republic of Yugoslavia as a democratic State "founded on the rule of law" and guaranteed basic political, civil, economic, social and cultural rights and freedoms to all its citizens without discrimination.

The OSCE-KVM analysis was based on hundreds of individual case reports, daily and weekly reports made by human rights officers at the Regional Centres and field offices, and interviews with Kosovo refugees in the FYROM and in Albania. In particular, the OSCE-KVM played a crucial role in carrying out interviews to both survivors and witnesses of human rights and humanitarian law violations that took place in Kosovo during the two phases of its deployment and that were then presented in details in the 1999 OSCE report *Kosovo/Kosova: As seen, as told. An analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999*. A second volume entitled *As seen, as told. Part II* documents the period between 14 June to 31 October 1999. The analysis highlights a pattern of human rights and humanitarian law violations "on a staggering scale, often committed with extreme and appalling violence".[97] In fact, despite the presence of the international community in the region, the acts of provocation on both sides and the disproportionate use of the force by the Serbian army continued to increase the international community's concern over the relations between Kosovar Albanians and Serbs.

Data collected in the OSCE-KVM report highlights an increase in gross violations of human rights and humanitarian law after the beginning of NATO's air attack. Although the monitoring international forces' position was not one-sided and reports were made both by Kosovo Albanians

[95] OSCE Kosovo Verification Mission, available at https://www.osce.org/kvm-closed (Accessed: 5 April 2021).
[96] The first phase began in October 1998 and ended on 20 March 1999, when the OSCE-KVM withdrew from Kosovo after having tackled Serbia's opposition. The second phase started with the deployment of the OSCE-KVM forces in Albania and FYROM and was then dissolved on 9 June 1999.
[97] OSCE report, *Kosovo/Kosova: As seen, as told. An analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999*, p.1.

and other ethnic minorities, including Kosovo Serbs, the final results of their analysis show that the nature and the scale of the human rights violations committed by each side were certainly not balanced. Human rights abuses and serious crimes during the period monitored by the OSCE-KVM were overwhelmingly perpetrated against the Kosovo Albanian population by the Yugoslav and Serbian state military and security apparatus.

The sheer number of allegations of human rights violations reported to the OSCE-KVM during its mandate made it impossible to investigate them all thoroughly. Direct complaints from victims and witnesses of human rights abuses and humanitarian law violations[98] were therefore given priority. However, specific forms allowed all survivors and witnesses to report incidents, abuses, statements and names of missing people. The human rights division received mainly reports of "extra judicial killings, summary executions, arbitrary killings, persons going missing following abductions; incommunicado detention; abuse by the police and security forces; indiscriminate and disproportionate attacks against the civilian population, the destruction of civilian property, pillaging, illegal evictions; and restricted freedom of movement for Kosovo Albanians."[99] Human rights officers benefitted from the support of medical authorities, extensive photographic material and videotapes to corroborate the witnesses' statements, and set up a human rights database aiming at recording and tracking all reported human rights violations in Kosovo. In the refugees camps outside Kosovo, where ethnic Albanians had fled and sought protection during the war, the OSCE-KVM was committed in collecting information from both men and women belonging to different socio-economic groups with geographic diversity.[100]

Summary executions and arbitrary killings of civilian non-combatants took place at the hands of both parties to the conflict. Since 1998, mass killing had been used by the Serbian and Yugoslav forces as an instrument of terror, coercion and punishment against Kosovo Albanians with the final aim of tactically expelling the entire population from the region. The OSCE-KVM report estimates that over 90 percent of the Kosovo Albanian population – that is to say over 1.45 million individuals – were forcibly displaced by the end of conflict in June 1999, resulting in the "worst humanitarian crisis" that had occurred in Europe in over 50 years.[101] Young Kosovo Albanian men of fighting age were summarily executed at a much higher rate than women,[102] since they were perceived as "potential terrorists".

---

[98] Allegations of humanitarian law violations by the parties in conflict were accorded a higher priority especially after the ICTY's Chief Prosecutor was prevented from entering Kosovo by Belgrade authorities. In this context, OSCE-KVM human rights officers were in charge of documenting the crime scene, obtaining statements from victims and witnesses and preserving forensic evidence until the arrival of experts from Finland.
[99] OSCE report, *Op. cit.*, p. 41.
[100] Sandra Mitchell, "Human rights in Kosovo", in *OSCE Yearbook 2000,* Baden-Baden, 2001, pp. 241-255.
[101] Sandra Mitchell, *Ibid.*
[102] Human Rights Watch, *Supra note 11*, p. 420.

This bracket of the Kosovo Albanian society was also the specific target of arbitrary detention and torture and ill-treatment, which were becoming systemised practices in the Serb controlled administration of justice. These unlawful acts often resulted in the suppression of Kosovo Albanians' civil and political rights, including the right to a fair trial. The use of violence towards people under arrest or detention was frequent and aimed at both emphasizing the authority of the police over detainees and extorting confessions or information about alleged criminal and "terrorist" activities.

In the meanwhile, forced expulsions took place on a massive scale, highlighting the strategic planning of an ethnic cleansing operation and clearly violating the laws and customs of war. These brutal acts were often accompanied by looting and deliberate destruction of properties. Throughout the entire territory of Kosovo, villages and towns that were considered to be sympathetic to the KLA were systematically cleared and destroyed by Yugoslav and Serb forces.

Furthermore, rape and other forms of sexual violence against vulnerable women and girls were constantly used as a weapon of war. In some instances, children were also target of murders with the aim of frightening and punishing Kosovo Albanian communities.

The contribution of the OSCE-KVM was pivotal to document and raise awareness on human rights and humanitarian law violations committed in Kosovo. Moreover, its presence and work contributed to reduce the general level of fear among the Kosovo population, who had assisted to a breakdown in security until that moment.[103] For instance, fewer cases of police abuses were reported after the deployment of human rights officers in intercity public transportation. As far as trial monitoring, the presence of both OSCE-KVM officers and other members of international organisations such as the UNHCR, HRW, Amnesty International and the Humanitarian Law Center, allowed detainees to access legal counsel in their language more easily and judges began to convict suspect terrorists only if they disposed of enough credible evidence.

Nevertheless, the OSCE report does not cover the violations carried out outside Kosovo nor the ones that were committed after the end of its mandate, meaning after 9 June 1999. Furthermore, it is important to consider the difficulty in gathering objective reports due to the sensitive nature of the details and information required to the traumatised and confused victims and witnesses during the interviews.[104]

After the end of OSCE-KVM withdrawal from Kosovo in March 1999, the Human Rights Division continued to monitor the human rights situation in the region in close collaboration with the ICTY. The numerous[105] interviews carried out in the FYROM and Albania provided human rights

[103] The respect for human rights and fundamental freedoms, democracy and the rule of law are essential components of security.
[104] Tritaki Panagiota, *Supra note 14*.
[105] According to the OSCE-KVM report, 1,111 refugee interviews were carried out in Albania and 1,653 in the FYROM.

officers with crucial information about the violent situation in Kosovo, especially dealing with mass graves. 11,334 bodies were initially reported;[106] however, as for 2018, more than 2,000 people were still missing in mass graves.

In the same period – between March and December 1999 – Human Rights Watch researchers also carried out more than 600 interviews with survivors and witnesses of human rights and humanitarian law violations in Kosovo. More than 35,000 unduplicated violations were recorded.[107] The HRW research was mainly focused on the Kosovo municipalities that were hit the most by the war, including Djakovica, Glogovac Orahovac, Prizren and Srbica, but some interviewees were also carried out in North Albania, where heavy flows of refugees had been registered. According to the UNHCR, in fact, more than 850,000 Kosovar Albanians were expelled from Kosovo, and thousands more were internally displaced.[108] Human rights abuses and humanitarian law violations reported to HRW researches were the same of the ones reported to the OSCE-KVM officers: separation of men, women and children, forced displacements, detentions, executions, beatings, harassments, robbery, indiscriminate shelling, private property destruction and missing persons.

In conclusion, OSCE-KVM human rights findings clearly proved that the high number acts of "extreme lawlessness"[109] committed by the paramilitaries and, in some instances, armed civilians were generally systematic and organised, especially after 20 March 1999. Although both parties to the conflict violated human rights and humanitarian law, the nature and scale of those violations was unbalanced and not equivalent. The HRW research on human rights abuses and humanitarian law violations corroborated the OSCE-KVM findings.

### 1.2.3. Civilian causalities during NATO's Operation Allied Force: a violation of humanitarian law?

> "Whether NATO action was lawful is a very different question from whether NATO action was right. We believe that, while legal questions in international relations are important, law cannot become a means by which universally acknowledged principles of human rights are undermined."[110]

[106] Human Rights Watch, "War crimes in Kosovo – 4. March-June 1999: An Overview", available at: https://www.hrw.org/reports/2001/kosovo/undword-03.htm (Accessed: 15 September 2020).
[107] Human Rights Watch, *Supra note 11*, p. 418.
[108] Human Rights Watch, *Supra note 11*, p. 419.
[109] Sandra Mitchell, *Supra note 100*, p. 250.
[110] Proceedings of the UK House of Commons Foreign Affairs Committee, published 23 May 2000, paragraph 137.

In the 20th century, and more specifically in the 1990s, the extension of the concept of "international justice" has deeply affected the legal weight that the international community had attached to State sovereignty as an obstacle to external judgement and intervention in other States' internal affairs. De facto rule of a State over a territory can no longer legitimise the denial of justice or the abuse of human rights. Furthermore, the decision about what constitutes justice and rights for the citizens of a country is not in the hands of the elected governments anymore.

Many human rights advocates and commentators consider the NATO military intervention during the conflict in Kosovo as a crucial turning point for human rights in international relations. Launched on 24 March 1999, the Operation Allied Force was indeed conceived as a legitimate war over the denial of justice and gross violations of human rights committed by the Serbian forces against the Kosovo Albanians in the region. For the first time, the international community decided to intervene in what it considered to be a "war for human rights", where the abuses and international crimes perpetrated by the Serbian and Yugoslav forces had undiscussed priority over the concept of sovereignty of the FRY. In fact, the NATO military intervention to end the hostilities during the Kosovo war was not justified through a threat to international peace and security; nor was it carried out to defend a neighbouring State. It was carried out to stop war crimes and crimes against humanity committed by a State within its own borders.

The NATO's intervention in Kosovo has certainly inaugurated a new era of human rights protections while modestly redefining the unquestioned primacy of the concept of sovereignty.[111] However, it has also opened a new international debate, both before and after the bombing, on different grounds. First of all, NATO's Secretary General declaration of intervention raised questions on the lack of an authorisation by the UN Security Council for the use of force against the FRY. Second, a military intervention was considered by the human rights movement as a temporary solution that would have only risked to exacerbate the conflict once concluded.[112] Third, many critics and diplomats considered other options, such as diplomatic alternatives, economic sanctions or blockades to be more effective and less lethal.[113] Despite this, the main critics that emerged during the military intervention and in its aftermath concern the high number of civilians that were killed during the eleven-week air campaign.

From the beginning of the Operation Allied Force, NATO's members stressed their intent to limit any form of harm to the civilian population. However, despite the use of precautions, such as a higher percentage of precision-guided munitions than in any other past conflict, hundreds of civilian casualties occurred. Human Rights Watch assumed a crucial undertaking in documenting and

[111] Dominique Carreau, Fabrizio Marrella, *Supra note 51*, p. 666.
[112] Adam Roberts, "NATO's 'humanitarian War' over Kosovo", in *Survival*, vol. 41, no. 3, Autumn 1999, pp. 102-123.
[113] Peter Gowan, Tariq Ali and Noam Chomski were very critical of the Western countries' actions.

assessing the impact and effects of the NATO military operation in the FRY and carried out a thorough investigation of civilian deaths. The findings were then published in February 2000, in the report "Civilian Deaths in the NATO Air Campaign", which showed that "ninety separate incidents involving civilian deaths during the seventy-eight day bombing campaign. Some 500 Yugoslav civilians are known to have died in these incidents."[114] The deaths in Kosovo were between 278 and 317, that is to say between 56 and 60 percent of the total number of casualties.[115] A third of the total incidents – and more precisely 32 out of 90 – took place in Kosovo.[116]

The most lethal incidents were related to the lack of precautions of NATO's forces in identifying the presence of civilians when attacking convoys and other mobile targets, such as trains and buses. However, another factor contributing to the high number of civilian deaths in the FRY was the use of Kosovo Albanians as "human shields".[117] On 14 May 1999, during the bombing of the village of Korisa, NATO forces killed 87 villagers and left 60 more wounded: in this case, there is evidence proving that Serbian and Yugoslav forces had used internally displaced civilians as human shields.[118] Furthermore, the use of cluster bombs by NATO forces during the Operation Allied Force has also raised concerns among the international community. Human Rights Watch estimates that between 90 and 150 civilians died from NATO cluster bombs throughout Yugoslavia.[119] The most lethal incident using cluster bombs occurred on 7 May 1999 in Nis (Serbia). Cluster bombs submunitions fell in three different areas of the city: 14 civilians were killed and 28 were seriously wounded. NATO admitted its responsibility and few days later the US Pentagon restricted the use of cluster bombs.[120]

In assessing NATO's use of military force in the FRY during the conflict in Kosovo, the most relevant standards are provided by the laws of war. NATO's intervention on 24 March 1999 turned the Kosovo war – which until that moment had been defined as an internal armed conflict in which the 1949 Geneva Conventions, additional Protocol II, and the customary rules of laws applied – into an international armed conflict. This shift entailed that the entire body of international law applied. As mentioned above, Protocol I of the Geneva Conventions stresses that "the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations"[121]. The parties are expected to take any possible measure to distinguish between combatants and

[114] Human Rights Watch, "Civilian Deaths in the NATO Air Campaign", February 2000, Vol. 12, No. 1, p. 2.
[115] Human Rights Watch, *Ibid*, p. 5.
[116] Human Rights Watch, *Ibid*, p. 437.
[117] Human Rights Watch, *Ibid*, p. 27.
[118] US Department of Defense, "NATO, U.S. Claim Milosevic Uses Refugees as Human Shields", available at: https://archive.defense.gov/news/newsarticle.aspx?id=42060 (Accessed: 14 September 2020).
[119] Human Rights Watch, *Supra note 11*, Part III, p. 451.
[120] Human Rights Watch discussions with U.S. Air Force and Joint Chiefs of Staff officers, October 1999.
[121] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 51(1).

civilians, and to avoid or minimise harm to civilians. In all the incidents that involved the death of civilians in Kosovo, the principal concerns were, on the one hand, whether every feasible precaution had been taken to accurately distinguish between civilians and combatants, and on the other hand, if the decisions to attack had been based on incomplete information.

However, NATO's casualties during the bombing of Kosovo were mainly due to: the so-called "collateral damage" – the unintended damage to civilian objects and civilian casualties during a lawful attack on military objectives;[122] errors in identifying and attack targets (i.e. US bombing of the Chinese embassy in Belgrade on 7 May 1999); and high pressure to attack fixed targets whose destruction could have a direct effect on the civilian population, such as bridges, buildings or the electricity system.[123] Other critics concerned the release of chemicals after specific air attacks and toxic materials, such as the depleted uranium.

In conclusion, although NATO's military intervention in Kosovo was intended to protect the Kosovo Albanian population from evident gross violations of human rights and humanitarian law, it is still highly controversial not only from a legal point of view, but also for the human losses it entailed. NATO's humanitarian bombs killed hundreds of civilians and hit not only military forces and facilities but also Yugoslavia's entire public infrastructures, showing clear organisational mistakes. So, "the record of post-war intervention does not lend much support to the overall proposition that the use of force has promoted humanitarian values".[124] Furthermore, many critics highlighted the fact that most war crimes and ethnic cleansing took place in Kosovo after the NATO bombing began and that the deployment of ground troops instead of air-forces would have proved a more effective solution. "Air power alone took too long and it did not quickly stop the killing. NATO action did not do what it specifically intended to do, which was to stop Serbs killing and displacing Kosovars".[125]

---

[122] In order to assess the incidents that had involved civilian deaths in Kosovo, Human Rights Watch sought to gather all the possible evidence that could allow analysts to evaluate "the legitimacy of the real or perceived military objectives targeted; the care taken and procedures and criteria employed to confirm the military nature of the targets; the proportionality of the civilian deaths and the means employed in the attack in relation to the military objectives, where these were known; the correlation of civilian deaths to the location and nature of the targets selected; the timing of target selection as a factor in its appropriateness and the minimization of civilian harm; the methods and conditions under which distinct weapons systems were employed; and, the potentially indiscriminate nature of some weapons systems in general and under certain conditions." see Human Rights Watch, *Supra note 11*, pp. 441-442.

[123] Adam Roberts, *Supra note 112*, p. 115.

[124] John Janzekovic, *The use of force in humanitarian intervention*, Ashgate Publishing, London, 2006, p. 129.

[125] John Janzekovic, *Ibid*, p. 121.

## 1.3. Human rights abuses and violations after the war: the KLA between suspicion and revenge

The impact of the Kosovo war left the unaware international community and public opinion in shock: by the end of the conflict in June 1999, an estimated 12,000 Kosovo Albanians had been brutally murdered; 3,000 people were missing and more than half of Kosovo's civilian population had fled to neighbouring Albania and the FYROM, where they were living in refugee camps.[126] The Kosovo population hoped that the Military Technical Agreement concluded between NATO and the governments of the Republic of Serbia and FRY would finally mark the end of hostilities with the KLA. Nevertheless, the aftermath of the conflict was characterized by a new phase of enforced abductions, disappearances, rapes and sexual violence, and brutal murders. This time, however, these human rights abuses were committed mainly by the KLA forces, who embarked on a series of revenge attacks against minority groups, Kosovo Serbs and ethnic Albanians allegedly suspected of collaboration with the Serbian and Yugoslav forces.

In the aftermath of the Kosovo war, when the KFOR's forces entered the region, a reconstruction period began. At the same time, human rights tasking priorities changed, as well as the focus of human rights activists. Their new tasks started to include: the treatment of returnees and the protection of minorities; research of evidence and documentation of mass graves related to human rights violations perpetrated during the Kosovo war; and the control of the new self-styled authorities' measures, especially to avoid discrimination in the access to employment and vital services, including health, education and social assistance. The establishment of the UNMIK allowed a close and strong collaboration between OSCE, UNHCR, KFOR and the other pillars of the mission, as well as between international organisations and non-governmental organisations, especially to prevent ethnic-minorities in Kosovo from becoming the new targets of human rights abuses by the KLA. Furthermore, information and evidence related to gravesites and humanitarian law violations was shared with the Office of the Prosecutor of the ICTY.

Established to provide security in the territory, one of the first and most crucial tasks that was assigned to the KFOR's forces in the aftermath of the Kumanovo military-technical agreement was to oversee the process of demilitarisation and transformation of the KLA into a civilian corps, in compliance with the UN Security Council Resolution 1244. On 20 July 1999 an agreement setting out the terms, process and timeline of KLA demobilisation was signed by the KFOR and the KLA,

[126] Amnesty International, "Wounds that burn our souls. Compensation for Kosovo's wartime rape survivors, but still no justice", 2017, p. 6.

and on 20 September 1999 UNMIK promulgated Regulation No. 1999/8 on the establishment of the mostly unarmed Kosovo Protection Corps (KPC). On that day, KFOR leaders duly confirmed that the demilitarisation was complete. Despite this, the KLA demilitarisation and the transformation of its structure did not prevent human rights abuses to be committed in Kosovo.

### 1.3.1. Violations of minority's rights

> "Nowhere in Europe is there such segregation as Kosovo. Thousands of people are still displaced and in camps. Nowhere else are there so many 'ethnically pure' towns and villages scattered across such a small province. Nowhere is there such a level of fear for so many minorities that they will be harassed simply for who they are. And perhaps nowhere else in Europe is at such a high risk of ethnic cleansing occurring in the near future – or even a risk of genocide."[127]

The withdrawal of the Yugoslav and Serbian security forces in June 1999 brought an end to more than a decade of bloody and systematic persecution of Kosovar Albanians. However, it did not stop violence nor gross violations of human rights in Kosovo. The latter six months of 1999 are indeed remembered for shocking and extremely violent, albeit on a lesser scale, human rights violations against ethnic minorities that were committed by the KLA forces despite the presence of international peacekeepers.[128] The lack of a resolute international response to the lawlessness contributed to the revenge and impunity that has pervaded the region in the post-war Kosovo.

The term "minority" refers to a group based on ethnicity, nationality, language or religion that happens to be a minority in a particular location.[129] In the case of Kosovo, ethnic-minorities included every group apart from the Albanians: Serbs, Roma, Ashkali, Egyptians, Bosniaks, Croats, Gorani, Turks, Circassians, Jews and Vlachs. Even if Albanians constituted a minority in some areas that had become Serb-dominated – and more especially in the three most northern municipalities of Zubin Potok, Leposavic/Leposaviq and Zvecan/ Zveçan, in the north of Mitrovice/Mitrovica city and in the southern municipality of Strpce/Shterpce – they represented the majority of Kosovo's population. It is difficult to estimate the population in Kosovo before the 1998-1999 conflict since no census was carried out by the SFRY's government after the 1991 one, which had been boycotted by Kosovo Albanians. Furthermore, precise data is even more complicated to be obtained due to the high number

[127] Cleve Baldwin, "Minority Rights in Kosovo under International Rule", Minority Rights Group International report, July 2006, https://www.refworld.org/pdfid/469cbfc20.pdf.
[128] Sandra Mitchell, *Supra note 100*, p. 241.
[129] Cleve Baldwin, *Ibid*, p. 8.

of migration flows. However, it is estimated that in 1991 Kosovo Albanians accounted for 82,2% percent of a total population of over 1,954,000.[130]

According to the UNHCR "Second Assessment of the Situation of Ethnic Minorities in Kosovo"[131], published in September 1999, Serb and Roma minorities continued to be collectively regarded by many Kosovo Albanians and the KLA forces as complicit in atrocities committed by the Serbian and Yugoslav forces during the war. In particular, Roma[132] – who had taken the Albanians' state employment positions in the 1990s and were often used by the Serb and Yugoslav forces to bury dead people during the 1999 ethnic cleansing – were often accused by the Albanian population of collaboration with the Serbs,[133] and had therefore to be punished.

Although thousands of Serbs and Roma had already left during the Kosovo war, those who remained in the region were immediately targeted for revenge after June 1999. Serb and Roma minorities were either forced to leave by the KLA forces[134] or concentrated in mono-ethnic enclaves. The outcome of these displacements was that Kosovo became a province rigidly divided by ethnicity. Looting and arson continued; Serb owned properties became the targets of grenade attacks. Serbs and Roma were victims of beatings, detentions, rapes, torture and murders. The most notorious incident took place in the village of Gracko on 23 July 1999, when fourteen Serb farmers were brutally killed. According to Human Rights Watch, around 1,000 Serbs and Roma were reported unaccounted.[135]

The KLA's violence began very quickly to include attacks on other minorities, especially Muslims Slavs, Croats and Turks, "without significant protection from KFOR or UNMIK troops".[136] Systematic and widespread looting and burning of minorities' homes, destruction of Orthodox churches and monasteries, abductions, intimidations, harassments and killings were carried out more and more frequently in the immediate aftermath of KFOR's arrival in the region. The minorities that remained in Kosovo lived in a situation of constant fear and violence. They were prevented from moving freely and in many cases they had to rely on KFOR armed escorts even to make the shortest journeys.

The KLA forces' intent behind many of the abductions, crimes and killings seemed to be the expulsion of Kosovo's Serb and Roma population from the province rather than a single desire for

---

[130] Data from the Federal Statistical Office (FSO) of the FRY.
[131] UNHCR/OSCE, "Second Assessment of the Situation of Ethnic Minorities in Kosovo", 6 September 1999, available at https://www.unhcr.org/news/updates/1999/9/3c3c52a04/second-assessment-situation-ethnic-minorities-kosovo.html (Accessed: 16 September 2020).
[132] According to the 1999 UNHCR report, the Roma population in Kosovo was "far from cohesive, comprising various groups with different allegiances, linguistic and religious traditions."
[133] Cleve Baldwin, *Op. cit.*, p. 9.
[134] By October 1999, the Yugoslav Red Cross stated that 234,000 Serb and Roma had been internally displaced from Kosovo in Serbia and Montenegro. See OSCE, "As seen. As told.", part. 2, paragraph XVI.
[135] Human Rights Watch, *Supra note 11*, p. 454.
[136] Human Rights Watch, "The Violence: Ethnic Albanian Attacks on Serbs and Roma", available at https://www.hrw.org/reports/2004/kosovo0704/7.htm (Accessed: 16 September 2020).

revenge alone. Back to that time, Human Rights Watch found "clear evidence" about KLA units' involvement in gross violence and human rights violations against minorities in Kosovo since the summer of 1999. However, there was still no evidence that the political or military leadership of the former KLA had coordinated the attacks. KLA leaders had in fact condemned every type of violence and attack against minorities in several public statements. In two interviews, the former KLA leader and future president of Kosovo Hashim Thaçi stressed his personal desire for "a democratic and multi-ethnic Kosovo"[137] and declared that he was "committed to establishing a society where tolerance will rule, not revenge"[138].

Although many incidents that took place in this period were disparate individual acts of revenge, the overwhelming evidence is that the intimidation and crimes committed by the KLA were systematic and directly aimed at forcing minorities to leave, and therefore constitute what is known as "ethnic cleansing".[139] Not only did minorities' limited access to education, public services, healthcare and employment constitute on-going violations of civil, political, economic, social and cultural rights, but it also contributed to lock segments of the Kosovo population into a cycle of poverty and divide communities on both ethnic and economic grounds.

### 1.3.2. Attacks on Ethnic Albanians

In the aftermath of the Kosovo war, the KLA's violence and killings were not limited to Kosovo Serbs and the other ethnic minorities: Albanian-on-Albanian violence began to spread in the province, contributing to exacerbate the already tense situation, as anticipated by Veton Surroi, publisher of the influential ethnic Albanian newspaper *Koha Ditore*: "Anyone who thinks that the violence will end once the last Serb has been driven out of Kosovo is living an illusion. The violence will simply be redirected against other Albanians."[140] In fact, some Kosovo Albanians were believed to be "collaborators" or sympathisers with the Serbian authorities or political opponents of the KLA, and therefore chosen as target of human rights violations. They were beaten and forced to leave their homes, especially in the municipalities of Djakovica, Klina and Prizren. Albanian Catholic families

---

[137] ICG Balkans report, "Who's killing whom", No. 78, 2 November 1999, available online at https://reliefweb.int/sites/reliefweb.int/files/resources/2B63858627572F8185256824007E5A5B-Full_Report.pdf (Accessed: 17 September 2020).

[138] *BBC news*, "UK police uncover Kosovo mass grave", 2 September 1999, available at http://news.bbc.co.uk/2/hi/uk_news/politics/436493.stm (Accessed: 17 September 2020).

[139] Cleve Baldwin, *Supra note 127*, p. 14.

[140] *Washington Post*, "Forces of intolerance threaten to consume Kosovo", 13 October 1999, available at: www.washingtonpost.com/archive/politics/1999/10/13/forces-of-intolerance-threaten-to-consume-kosovo/43858e71-f2d3-45c3-92c3-2808ac01aa8b/.

and communities were persecuted because of their religion and alleged collaboration with the Orthodox Serbs.

Furthermore, in an instable and fractured internal political scenario, tensions and violence also increased within the Kosovo Albanian community, especially due to the struggle for primacy between its two main political factions: the Democratic Party of Kosovo (*Partia Demokratike e Kosovës*, PDK) – established from the demilitarised KLA after the war – and the Democratic League of Kosovo (*Lidhja Demokratike e Kosovës*, LDK), led by Ibrahim Rugova, who had administered the province of Kosovo since its creation in 1991. Strong supporter of a non-violent approach and resistance against the Serbian regime during the 1990s, Rugova continued to exercise his moral authority but over the years he lost the support of many Kosovo Albanians, including the members of the KLA, who claimed he had no control over the events taking place in the province, especially during wartime. The LDK leader was also accused of focusing on the consolidation of the role of his political party rather than taking concrete action against the Serbs' violence. Moreover, political tensions had already emerged during wartime since the Kosovo Armed Forces (FARK) had joined fought against Belgrade's rule, but separately from the KLA. Many LDK politicians and supporters became the target of the KLA forces during the Kosovo war, and of the PDK in the aftermath of the conflict. They were kidnapped, interrogated, imprisoned and tortured just for refusing to provide their help and for belonging to Rugova's party.[141] Many political opponents went missing and have never been found out.

Furthermore, Albanian political moderates and journalists were also victims of continuous threats. In October 1999, the Kosova Press – the official news agency of the KLA founded on 4 January 1999 – accused Veton Surroi and Baton Haxhiu, respectively the publisher and editor of the leading Albanian language daily *Koha Ditore*, of being "pro-Serb vampires" who "should not have a place in free Kosovo".[142] The Kosova Press article stated that "it would not be surprising if they become victims of possible and understandable revenge acts": these words aimed at threatening the two journalists who were firmly condemning the continuous brutal attacks against minorities and feared that the tense atmosphere and discriminatory acts carried out by the parties involved in the conflict would have "profound and negative consequences for democracy in Kosovo".[143]

---

[141] Balkan Transnational Justice, "Kosovo's Political Murders: Unpunished but Not Forgotten", 6 March 2018, available online at: https://balkaninsight.com/2018/03/06/kosovo-s-political-murders-unpunished-but-not-forgotten-03-05-2018/ (Accessed: 19 September 2020).
[142] *The Washington Post*, *Op. cit.*
[143] Human Rights Watch, *Supra note 11*, p. 464.

### 1.3.3. Violence in Serbian detention centres

Arbitrary arrests and detentions of Kosovar Albanians were commonplace throughout the Kosovo conflict in 1998 and early 1999. Reports of physical abuse and torture against the detainees in FRY's prisons are widespread, and there is evidence that these practices intensified in the period between March and June 1999, during the NATO bombing. Arrested by the Serbian forces, many Kosovo Albanian prisoners were hastily transferred to jails and penitentiaries throughout Serbia in the wake of the Kumanovo military-technical agreement. On that occasion, the Serbian Ministry of Justice Dragoljub Janković declared that the detainees had been moved from Kosovo to Serbia "for their own safety". He also promised to inform the prisoners' families of their relatives' whereabouts.[144] However, this rarely occurred, and throughout 1999 and 2000 the Serbian government sporadically released some of the prisoners.

It is estimated that retreating Serb forces took some 2,000 detainees with them to Serbian detention centres, notably in Sremska Mitrovica, Nis, Prokuplje, and Pozarevac.[145] Despite its defeat, Belgrade seemed indeed to have little interest in releasing the Kosovo Albanian prisoners, the majority of which had unlawfully been arrested as "terrorists" and held as hostages in Milošević's efforts to destabilise Kosovo and demonstrate that the province remained under his rule. The detainees who had been involved in the KLA's actions constituted just a small minority. According to Human Rights Watch, in March 2001 approximately 1,400 Kosovar Albanian detainees had been released, but many other remained in prison. The conditions of detention in Serbia represented a serious concern for the international community, with a high number of reports of ill-treatment and inadequate care.

The ICRC had already entered Kosovo in 1992 to visit detainees and to verify and promote compliance with international humanitarian law and other human rights standards. In 1999, the ICRC team based in Belgrade began making visits to the detainees held in the Serbian detention centres. The organisation's purpose was to establish a dialogue with the authorities, to prompt an improvement of the detainees' treatment and to ensure their psychological and material support.[146] The ICRC collected information about the prisoners' arbitrary arrests and conditions of detention, and carried out a prison census. Nevertheless, data should be carefully considered, since the ICRC and other human rights groups were only allowed to access a limited number of detention facilities that figured in two lists published by the Serbian Ministry of Justice and in which an estimated 2,300 prisoners

[144] Glas Javnosti (Belgrade), 18 June 1999.
[145] Human Rights Watch, *Supra note 11*, p. 469.
[146] ICRC, "Kosovo: activities of the International Red Cross and the Red Crescent Movement", 1 March 2000, available at: https://www.icrc.org/en/doc/resources/documents/misc/57jqah.htm (Accessed: 23 September 2020).

were held. What is evident is that the total number of Kosovo Albanian and ethnic-minorities detainees in Serbian prisons is far lower than the estimated number of people who went missing and were never found.

Human Rights Watch was also committed in verifying Serbian authorities' compliance with human rights and humanitarian law standards, as well as in carrying out interviews with the detainees. Not only were the Kosovo Albanian prisoners direct victims of human rights abuses in the detention centres, but they also reported the violence and crimes they experienced during the war and while in prison.

Once arrested, Kosovo Albanian men were first separated from women and imprisoned in makeshift detention facilities, such as factories or schools. They were usually beaten with sticks, metal bars and shovel handles, and interrogated by the Serbian forces, who used violence, intimidation and, in many cases, torture in the attempt to extort useful information about the KLA. In the meanwhile, women were held in barns or abandoned homes, where they were sexually abused or raped before being released. Prisoners were usually prevented from maintaining regular contact with their families, who were often effectively ransomed by Serbian lawyers with the false promise to secure the release of their relatives in exchange for high sums of money. According to the International Crisis Group (ICG), fees could range between 10,000 and 50,000 DM.[147]

Convictions of Kosovo Albanian detainees in Serbian courts continued even after the end of the Kosovo war. The most common indictments were conspiracy against the State, terrorism and collaboration with the KLA – in some cases women were also sentenced for providing shelter, food and clothes to the KLA members. Both the ICRC and HRW, as well as the Humanitarian Law Center (HLC), monitored the trials and observed several procedural violations, including the admission of dubious evidence and collusion between the prosecutor and the chief judge. Furthermore, the rights of detainees to a fair trial and legal aid were often violated, detention periods were excessively long and many detainees were forced to confess crimes they had not committed. Some of the lawyers representing and defending Kosovo Albanians detainees were also victims of threats, and physical and psychological violence.

Although the presence of the ICRC, HRW and the HLC during the trials allowed many prisoners to be released, usually after they had been proved innocent, throughout 1999 and 2000, the issue of Kosovar Albanian prisoners in Serbian detention centres remained extremely sensitive in Kosovo in the aftermath of the conflict, raising several questions on the international community's

[147] International Crisis Group, "Kosovar Albanians in Serbian Prisons: Kosovo's Unfinished Business", 26 January 2000, available at https://www.refworld.org/docid/3ae6a6e10.html#_ftnref3 (Accessed: 24 September 2020).

inability to guarantee the prisoners' release and to punish the perpetrators of human rights and humanitarian law violations against the detainees.

## 1.4. Fighting the stigma: civil Society, NGOs and Human Rights Activists supporting the victims

The UNHCR, the ICRC, the OSCE and Human Rights Watch have carried out thousands of interviews with survivors and witnesses of human rights abuses, international and humanitarian law violations during the Yugoslav wars and in the aftermath of the conflict in Kosovo. However, the day to day care of survivors and vulnerable people has been handled by a multiplicity of non-governmental organisations (NGOs) and human rights activists. Since the 1990s, they have strongly been committed in the promotion and protection of human rights, focusing on the rights of children, women, ethnic minorities, persons with disabilities and pensioners, as well as on the rehabilitation of victims of torture and inhuman or degrading treatment. They have provided the survivors with psychological, social and economic support, and listened to their personal stories and testimonies. The details about the crimes NGOs and human rights activists have obtained are extremely cruel and have highlighted the atrocity of such systematic abuses.

Most of the reports of international crimes and human rights violations have focused upon unlawful killings, but a consistent part has also brought light to the continuous psychological abuses on the Kosovar population and the mental anguish people had to suffer. In fact, not only were the members of the different ethnic groups direct victims of abuses and violence, but the extent of their witness to acts of violence suggested that there had been a planned attempt by the perpetrators to make sure that all the generations of every family had personally experienced some deeply mentally frightening acts. The direct demonstration of violence was perhaps much more significant to its perpetrators than simply the numbers of killings. And it was likely that the members of the Kosovar society – very patriarchal and based on family honour – would also be scarred of the oral tradition in the large and extended families that constitute it.[148] This was particularly true and evident in the case of rape and other forms of sexual violence.

[148] Robert N. Gent, "Balkan Briefing. Abuses of Human Rights in the Kosovo Region of the Balkans" in *Journal of Epidemiology and Community Health*, 1 October 1999, Vol.53(10), pp. 594-596.

Being in a position of vulnerability, women and girls were usually specific objects of violence targeted at their gender during conflicts. As highlighted by Tadeusz Mazowiecki, the special rapporteur appointed by the UN Commission on Human Rights, rape was used in Kosovo as an attack on the individual victim but also as a method of ethnic cleansing, aimed to "humiliate, shame, degrade and terrify the entire ethnic group".[149] In fact, rape and other forms of sexual violence were applied as a weapon of war by both sides taking part in the conflict to destroy the other groups' identity and honour. However, for women and girls seeking justice, the obstacles remain immense.

First, shame and stigma in Kosovo's conservative society have often prevented survivors of sexual violence and rape from speaking out about the assaults and reporting the crimes they suffered both during the war and in its aftermath. The condition of Kosovar women who were subjected to these abuses is peculiar: not only do they have to bear such a burden, but also a feeling of shame and guilt for a crime they were the victim of. Being considered as "impure", they have been rejected, stigmatised and ostracised by their families and communities, often pushed to commit suicide. In many instances, they had to deal with unwanted pregnancies and raise children that are the result of sexual violence and who are therefore rejected by their community on the basis of their "ethnically mixed blood".[150]

Furthermore, when it comes to reports of rape and sexual violence, the main problem is that the victim must provide details of her assaults during a lengthy application process requiring clear evidence of rape, such as medical records, therapy notes and witness testimonies. These requirements are difficult to be met, especially after many years, so the victim often restrains herself from reporting the crime.

Finally, many survivors have lost hope in justice. Cases involving women and girls raped and assaulted by rank-and-file soldiers have often been passed to lower-level regional courts, where an effective witness-protection program was hard to be find – especially in the aftermath of the war – and the survivors feared for their anonymity.

All these elements considered, it has been very hard for Kosovar survivors of rape and sexual violence to report their crimes to the police or other judicial bodies in Kosovo in the last two decades. "Our country, our society stigmatises us", has recently declared Vasfije Krasniqi Goodman,[151] one of the few victims of wartime sexual violence in Kosovo who has found the courage to speak publicly

[149] Tadeusz Mazowiecki, Report on the situation of human rights in the territory of the former Yugoslavia, UN Doc. A/48/92-S/25341, Annex, at 20, 57 (1993), in Theodore Meron, "Rape as a crime under international humanitarian law", in *The American journal of international law*, July 1993, Vol. 87 No. 3, pp. 424-428.
[150] Tatjana Takševa, "Genocidal Rape, Enforced Impregnation, and the Discourse of Serbian National Identity" in *CLCWeb: Comparative Literature and Culture*, Vol. 17 No. 3, September 2015.
[151] Vasfije Krasniqi-Goodman Duhet t'i vijë turp gjithë shoqërisë kosovare, available at https://www.youtube.com/watch?v=DLxCTvbVPio&ab_channel=RTK (Accessed: 26 September 2020).

about how she was raped by some Serbian policemen during the war, when she was only 16 years old.[152]

This is the main reason why survivors often rely on doctors and counsellors from the few NGOs in Kosovo that are active in this area to tell their stories, aiming at healing and moving forward with their lives. One of the NGOs that has been providing psycho-social support to the victims of sexual violence and torture during the war in Kosovo is the Kosova Rehabilitation Center for Torture victims (KRCT).[153] Since its establishment in 1999, this independent, non-profit organisation has played a crucial role in raising public awareness on this vulnerable category of people. It has organized many campaigns to fight stigma and prompted sexual violence survivors to speak up, both at the family and institutional level, in order to encourage other women to do the same. "If sexual violence survivors do not speak up, the perpetrators will never be punished for the crimes they committed. Justice has to be served and the victims need to go back to their life", affirmed Mehmet Musaj, general coordinator of the KRCT. "The biggest achievement of the KRCT is that it has contributed to a shift in the status of sexual violence survivors: from a marginalised group within society to very active citizens, who can raise their voice to bring justice in Kosovo and punish the perpetrators of such cruel abuses and crimes."[154]

Thanks to the collective efforts and to several successful campaigns organised by the KRCT and other NGOs, such as the Center for the Protection of Women and Children (CPWC), survivors of sexual violence have been legally recognised as civilian war victims, making them eligible for reparations, including financial assistance in the form of monthly pensions.[155] However, many victims still suffer in silence. To date, no individual perpetrator has been sentenced to prison for rape and sexual violence committed during the war and its aftermath.

Beside the KRCT, other NGOs and human rights activists have been working to support the victims of human rights abuses and violence in Kosovo, and have encouraged them to speak up for justice to be served. However, social stigma still represents an obstacle to be overcome in a conservative society in which rape is still considered a dishonour for the victim's family and

---

[152] *Balkan transnational justice*, "Kosovo War Rape Survivor Condemns Stigmatisation of Victims", 9 March 2020, available at https://balkaninsight.com/2020/03/09/kosovo-war-rape-survivor-condemns-stigmatisation-of-victims/ (Accessed: 26 September 2020).

[153] The Kosovo Rehabilitation Center for Torture victims (KRCT) website, available at: https://krct.org/ (Accessed: 21 September 2020).

[154] This information has been obtained thanks to the collaboration of Dr. Mehmet Musaj, general coordinator of the Kosova Rehabilitation Center for Torture Victims (KRCT), who kindly accepted to answer some questions about the history, main achievements and missions of this Kosovar NGO.

[155] UN Women, "In Kosovo, legal recognition of war-time sexual violence survivors after 18 years", 19 October 2017, available at https://www.unwomen.org/en/news/stories/2017/10/feature-kosovo-legal-recognition-of-war-time-sexual-violence-survivors (Accessed: 27 September 2020).

community. As stated by Musaj, "Rape entails dishonour and destroys families. By destroying a family, you automatically destroy its neighbourhood and the community on its whole".

Finally, both the civil society and the human rights activists have joined the NGOs in expressing their frustration over the continued uncertain fates of the 1,600 people that are still missing in Kosovo. Year after year, activists and family members of the missing persons have taken the streets and asked the government to hold the perpetrators behind the disappearances accountable while urging the international community to play an active role in raising awareness on the issue and promoting a dialogue between the Serbian and Kosovar authorities.

## 1.5. Conclusions

Exacerbated by a new wave of nationalism, the conflict in Kosovo was the culmination of ethnic strife and historical animosities among the different ethnic groups which had inhabited the area for centuries and considered it as a crucial part of their cultural identity. Both during the war and in its aftermath, gross human rights, humanitarian law violations and international crimes stained Kosovo with blood. The presence of the international forces in Kosovo did not prevent atrocities and systematic abuses on the unarmed and civil population, who is still suffering from long-lasting physical consequences and psychological trauma in post-war Kosovo.

In the last two decades, domestic and international criminal courts have worked and collaborated to bring perpetrators of the worst crimes to justice. The impunity of those responsible for such serious crimes undermines the rule of law, distorts the notion of justice and hinders the establishment of a peaceful and stable society. Nevertheless, despite the domestic and international efforts, many victims of crimes in Kosovo are still waiting for justice to be served, especially the survivors of rape and sexual violence and the victims of crimes perpetrated by the KLA at the end of the conflict. Lacking resources, funding and political support, Kosovo's war crimes prosecutors and international bodies continue to struggle with a caseload of more than one thousand unsolved war crimes.

# CHAPTER 2

# International and hybrid criminal courts prosecuting international crimes

Since the fall of the Berlin wall in 1989, hundreds of violent conflicts have waged across the globe, involving frequent human rights violations as well as serious international crimes. Hundreds of thousands of people have been victims of killings, tortures, sexual abuses, forced migrations and property destruction. While shorter than some of the conflicts that progressively led to the dissolution of the Federalist Republic of Yugoslavia, such as the ones in Croatia and in Bosnia and Herzegovina, the 1998-1999 Kosovo War also resulted in widespread international crimes and human rights abuses.

The most serious violations of international humanitarian law and international human rights law are considered nowadays as international crimes and include: genocide, war crimes, crimes against humanity and crimes of aggression. These four crimes have been defined over time in a range of international agreements and conventions, starting with the 1899 and 1907 Hague Conventions,[156] which established rules for military conduct during wartime. Today, articles 5 to 8 of the Statute of the International Criminal Court (ICC), also known as "the Rome Statute", provide for the general globally recognised definition of international crimes, the four of which share a common feature: they tend to be the expression of collective criminality, meaning that they are perpetrated by a multitude or persons.[157] Therefore, identifying the specific contribution made by each single individual in the commission of a collective crime can be particularly hard or problematic. This is the reason why the notion of joint criminal enterprise (JCE), which denotes a specific mode of criminal liability covering all participants in a common criminal plan who share the requisite criminal intent, has been developed and will be discussed later (see chapter 2.1.2).[158]

The branch of public international law that deals with the criminal responsibility of individuals who commit these crimes is the international criminal law (hereafter ICL). This body of public international law exposes perpetrators of such conduct to criminal liability and provides for criminal sanctions to all perpetrators, either to those who directly commit the crimes and to those who are involved in the planning and authorisation of these unlawful acts (Article 25 of the Rome Statute). Consequently, also the individuals who hold the highest political and military offices in a State can

[156] Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, and Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.
[157] Antonio Cassese, *Supra note 64*, p. 189.
[158] Antonio Cassese, *Ibid*, p. 191.

be held to account for international crimes. The common perception of international crimes is that they are so serious to affect the international community as a whole, since they violate the most basic principles of humanity, morality and dignity. Therefore, prosecutorial responses to such crimes have occurred at both the national and international levels, with varying degrees of success and failure. Although in many instances international crimes share commonalities with domestic categories of crimes (i.e. rape and sexual violence, forced expulsions, torture or murder), what distinguishes them from the "ordinary" domestic crimes is the specific context in which they take place: the presence of an armed conflict and/or the systematic or large-scale nature of the violations and of the use of force.[159] Since both conditions can be recognised in the case of the 1998-1999 conflict in Kosovo, it is possible and legitimate to define the crimes and most serious human rights abuses that were committed either by the Serb and Yugoslavian military and paramilitary forces and the KLA in 1998-1999 as international crimes.

Nowadays, the legal discourse and practice place a great emphasis on these conflict- and atrocity-related crimes that are directly prohibited under international law for their exceptional gravity, and that are therefore usually associated with individual criminal responsibility. And it is especially in regard to the individual criminal responsibility that a discussion on the new concept of "international criminal justice"[160] has been deeply developed in the last twenty years.[161]

It is widely recognised that international criminal law emerged, at least partly, as a reaction against the shortcomings of States' responsibility when dealing with international crimes committed by single individuals. If in the past the notion of international crimes presumed the involvement of the States, through which the individual was mediated,[162] the contemporary definitions of these crimes also include the conduct of non-State entities and modern forms of violence: every individual or entity is nowadays bound under international criminal law not to commit these serious crimes. The evolution

---

[159] In the case of crimes against humanity, the organized violence consists of a systematic and widespread attack on a civilian population; in the case of genocide, it consists of the intention of destruction of a particular group of people; as for war crimes, it consists of an armed conflict, in the course of which the criminal act have been occurred; finally, in the case of the crime of aggression, the use of organized violence is immediately as such a crime against peace.

[160] Augusto Sinagra, Paolo Bargiacchi. *Supra note 68*, p. 400.

[161] However, the idea of universal criminal justice is not recent and can be traced back in history. Reflections about the nature of abusive and serious acts committed during violent conflicts have evolved over the centuries and there is a whole set of crimes that were recognized as such even before the common definition of today's "core crimes". Piracy is frequently considered to be the first universal jurisdiction crime, since it usually occurred in high seas – where no State had jurisdiction – and therefore pirates were regarded as an enemy of all mankind. In this case, universal jurisdiction was related to the fact that, on the one side, pirates were acting against individual nations, and on the other side they were challenging trade and communication within the rules governing sea travels and the community of States. This is the reason why in his *Mare Liberum* (*The Free Sea*), Hugo Grotius claims pirates should be extradited and punished. Other international crimes that were already widespread in the past were slavery and slavery-related activities, and terrorism.

[162] As highlighted by Antonio Cassese (2008), for many decades, either treaties or customary rules had only been limited to *prohibiting* certain criminal acts, such as bombing civilians or killing prisoners of war. Nevertheless, these prohibitions were not addressed to individuals, but only to States. Consequently, when an international crime was committed, it was the State to which the individual belonged to that was responsible, under international law, vis-à-vis the victims' State.

of international criminal justice is taking place "at such a rapid pace that is difficult to follow its developments"[163] and some critics have talked about a "new age of responsibility". This idea of a new era of responsibility is strictly related to three main concepts – truth, justice and effective remedies – that have been promoted by many international organisations, with the United Nations at the forefront, and NGOs, with the common idea that prosecuting people who are responsible of international crimes is crucial to fight against impunity, to provide the victims or their relatives with justice, and with regard to the deterrence of future violations and for the respect for the rule of law.

Over the past decades, the practice of the international courts and tribunals has been pivotal in adjusting international crimes to the new contexts and in developing the ICL. During the years, and especially after the end of World War II, the international community felt a strong need to bring to justice those who had committed serious crimes during the conflict. This chapter will go through the main milestones that have marked the path of ICL in the 20th century, with the States' aim to enforce humanitarian law: from the establishment of the Nuremberg and Tokyo criminal tribunals after World War II to the creation of the International Criminal Tribunal for Rwanda (hereafter ICTR) and the International Criminal Tribunal for Yugoslavia (hereafter ICTY) in 1990s as ad hoc criminal tribunals to deal with the serious violations of international humanitarian law committed on the territory of former Yugoslavia in the early 1990s and the massacre of the Tutsi minority in Rwanda in 1994 respectively (chapter 2.1) – a special focus will be given to the ICTY's investigations and prosecutions for international crimes committed in the FRY and in Kosovo (chapter 2.2); the institution of the first permanent international criminal court, the ICC[164] and the adoption of the Statute of Rome, with a focus on the limitations of the Court's jurisdiction over Kosovo (chapter 2.3); and finally the emergence of "hybrid" courts as a new mechanism for justice in post-conflict societies (chapter 2.4), to which belongs the Kosovo Specialist Chambers and Specialist Prosecutor's Office that will constitute the core of chapter 4.

However, this chapter will not be limited to a mere historic perspective: by contrast, the analysis of the successes and shortcomings of these courts in holding individuals accountable for international crimes will be related to the case of the FRY and of Kosovo in particular.[165] What will emerge with a clear evidence is that, despite their crucial contribution to the establishment of important principles of individual responsibility and to the production of significant codification of IHL and ICL, before the creation of the Kosovo Specialist Chambers and Prosecutor's Office, the pre-existing systems

[163] Carsten Stahn, *Supra note 9*, p.1.
[164] The International Criminal Court (ICC) shall not be confused with the International Court of Justice (ICJ), which is the principal judicial organ of the United Nations. Established in June 1945 by the Charter of the United Nations, the ICJ began its work in April 1946. For more information: www.icj-cij.org (Accessed: 11 November 2020).
[165] In the case of the Nuremberg and Tokyo criminal tribunals, the analysis will be focused on their role as the first tribunals to hold individuals responsible for international crimes regardless of their position.

have failed in investigating and persecuting the individuals who committed serious international crimes during the 1998-1999 Kosovo War and in its aftermath – especially the members of the KLA – due to the limits of their mandate and jurisdiction, as well as to their generally supported decision to focus mainly on the Serb forces. Will the Kosovo Specialist Court be able to address individual criminal responsibility without ethnic bias and to deliver justice impartially and independently, learning from the failures of its predecessors?

## 2.1. Accountability for violations of international criminal law: from Nuremberg and Tokyo to the ICTR and ICTY

The idea of establishing an international criminal tribunal dates back to the aftermath of World War I, when the Allies attempted and failed to prosecute the German Kaiser Wilhelm II of Hohenzollern and twenty-one other suspects for war crimes.[166] Never before had a head of State been tried for starting a war and the idea of prosecuting an individual for war crimes was particularly innovative, since until that moment war crimes were considered as an integral part of wars. Moreover, a widely-accepted idea of "victors' justice" held that the atrocities and crimes committed by the victorious part of the conflict would go unpunished, while the defeated parties had to undergo punishment and executions. However, the attempt was thwarted when the Kaiser fled to the neutral Netherlands.[167] The same logic of the "victors' justice" emerged again at the end of World War II, when the first successful international organs of criminal justice, namely the International Military Tribunals in Nuremberg and Tokyo, were established, marking the main catalysts for the development of ICL. Their aim was to prosecute the high-level political officials and military authorities for war crimes and other atrocities that took place during the deadliest war in history, regardless their immunity as acting on behalf of the State.[168] On the one hand, the IMT in Nuremberg was established by an agreement among the victorious quadripartite powers – France, the Soviet Union, the United Kingdom and the United States – to prosecute and punish "the major war criminals of the European

[166] Articles 227 and 228 of the Treaty of Versailles provided for the prosecution of the Kaiser before a special tribunal "for a supreme offence against international morality and the sanctity of treaties".
[167] The Dutch government refused to extradite him, claiming this decision would compromise the Netherlands' neutrality to take sides. Consequently, Wilhelm II never stood trial and died in exile in 1941.
[168] IMT Charter, Article 7: "The official position of defendants, whether as Heads of State or responsible officials in the Government Departments shall not be considered as freeing them from responsibility or mitigating punishment".
IMTFE Charter, Article 6: "The official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged."

Axis";[169] on the other hand, the lesser-known International Military Tribunal for the Far East (IMTFE) was set up in Tokyo pursuing the 19 January 1949 order by US General MacArthur with the aim to "try and punish Far Eastern war criminals".[170]

Although, the origins, composition and jurisdiction of the two international military tribunals differed in several relevant respects, beside the geographical factor, the two Tribunals marked the first crucial milestone for the development of individual responsibility for international crimes. In fact, since the Nuremberg and Tokyo trials, the ICL has broadened its scope and has recognised a number of offenses as "international crimes". What emerged from the trials was the attempt to expose areas of international law that dealt with issues of immunity for public officials and representatives of the State, besides of serious violations of human rights.

The next major advance in ICL and IHL was the establishment, in May 1993, of the International Criminal Tribunal for the Former Yugoslavia (ICTY) at The Hague, Netherlands, followed by the creation of the International Criminal Tribunal for Rwanda (ICTR) at Arusha, Tanzania, eighteen months later, in November 1994. Both ad hoc tribunals were established by the UN Security Council, acting under Chapter VII of the United Nations Charter,[171] to punish the crimes committed during the early 1990s Yugoslav wars and the 1994 genocide in Rwanda.[172] Differently from the Nuremberg and Tokyo predecessors, the ICTY and ICTR were the very first international criminal tribunals to be established by the international community, which aimed to prosecute war crimes suspects from both the winning and the losing side of armed conflicts. Furthermore, the ICTY and ICTR's mandate concerned, for the first time, an internal conflict,[173] in which the 1949 Geneva Conventions, additional Protocol II, and the customary rules of laws applied. This historic step has marked the development of ICL, highlighting the role of individual criminal responsibility for some crimes that can be considered as international, or even universal.

The ICTY's mandate, jurisdiction, rules of procedure and evidence and indictments will be analysed in chapter 2.2., as well as its achievements and limitations.

In conclusion, as much as the ICTY and ICTR had looked to the Nuremberg and Tokyo Tribunals as examples for legal guidance, they also took deliberate steps towards a broader

---

[169] UN, Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), London, 8 August 1945, available at: www.refworld.org/docid/3ae6b39614.html (Accessed: 12 November 2020).

[170] International Military Tribunal for the Far East Charter, Tokyo, 19 January 1946, available at: www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml (Accessed: 12 November 2020).

[171] The crimes committed during the two conflicts were considered by the UN Security Council as a threat for international peace and security. See UN Charter, Chapter VII: Action with respect to threats to peace, breaches of the peace, and acts of aggression. Available at: https://www.un.org/en/about-us/un-charter/chapter-7 (Accessed: 5 April 2021).

[172] In just 100 days, about 800,000 people were slaughtered in Rwanda by ethnic Hutu extremists who were targeting members of the minority Tutsi community, as well as their political opponents, irrespective of their ethnic origin.

[173] The ICTY had jurisdiction over crimes in both international armed conflicts and internal armed conflicts, while the ICTR had jurisdiction over crimes committed in internal armed conflicts only.

international justice.[174] Few years after the completion of the two UN-established tribunals, it is indeed possible to affirm that the victor's justice system, which had characterised the Nuremberg and Tokyo tribunals and had attracted an harsh criticism, appears to have been transcended by the ICTY and the ICTR given their mandate to prosecute all serious violations of international humanitarian law, from both sides of the conflicts. As Charney states, "The ICTY and the ICTR have legitimated the prosecution of international crimes to the international community and have elaborated on the pertinent law through their Statutes, rules, and judgments. They have thus created a substantial and tangible body of jurisprudence, which was lacking in the past."[175] The establishment of the ICTY and the ICTR marked the end of an era in which the persecution of international crimes was merely considered as victors' vengeance, therefore representing a landmark step in the name of justice.

### 2.1.1. Individual responsibility for crimes under international law

The principle of individual responsibility for crimes under international law was recognised both in the Charter[176] and the Judgment[177] of the IMT of Nuremberg and it proved to be crucial since it allowed the Tribunal to prosecute and punish individuals for serious violations of international law. Furthermore, the high-level position of an individual and the mere existence of a superior order he or she had been obliged to execute were not considered as a valid ground for relieving individuals of responsibility for international crimes any longer.[178] The IMT Charter and Judgement inspired the International Law Commission (ILC) – established by the UN General Assembly in 1947 to undertake its mandate, under article 13(1)(a) of the Charter of the United Nations to "initiate studies and make recommendations for the purpose of […] encouraging the progressive development of international

---

[174] Victor Peskin, "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda", in *Journal of Human Rights*, 2006, pp. 213-231.
[175] Jonathan I. Charney, "International criminal law and the role of domestic courts", in *The American Journal of International Law*, January 2001, Vol. 95, No. 1, pp. 120-124.
[176] IMT, Section II: Jurisdiction and General principles, Article 6: "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility […]."
[177] IMT Judgement of 1 October 1946: "The Tribunal now turns to the consideration of the Crimes Against Peace charged in the Indictment. Count One of the Indictment charges the defendants with conspiring or having a Common Plan to Commit Crimes Against Peace. Count Two of the Indictment charges the defendants with committing specific Crimes Against Peace by planning, preparing, initiating, and waging wars of aggression against a number of other States. It will be convenient to consider the question of the existence of a common plan and the question of aggressive war together, and to deal later in this Judgment with the question of the individual responsibility of the defendant", available at crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf.
[178] Reinhold Gallmetzer, Mark Klamberg, "Individual responsibility for crimes under international law the un ad hoc tribunals and the international criminal court", in *The summer school of International criminal law*, Stockholm University, 21 March 2007, pp. 60-77.

law and its codification"[179] – in the preparation of the so-called Nuremberg Principles[180], which were included in Article 7 of the ICTY and in Article 6 of the ICTR Statutes in the 1990s, according to which individual criminal responsibility is not limited to those who actually commit the crime, but it raises any time an individual plans, instigates, orders, commits, aids or abets in the planning, preparation or execution of the crimes mentioned in the Statutes. Furthermore, the Statutes reiterate that the official position of any accused person shall not relieve him or her of criminal responsibility nor mitigate the punishment, and that any criminal act committed by a subordinate does not relieve the superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit a criminal act. At the same time, the fact that an indicted person acted pursuant to an order of a Government or superior shall not relieve him or her of criminal responsibility – although it may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[181] Additionally, even though Article 7(1) of the ICTY Statute does not explicitly mention joint criminal enterprise (JCE), according to the Tribunal's jurisprudence, the individuals who contribute to the commission of crimes in execution of a common criminal purpose are subject to criminal liability. For this to happen, the Tribunal must prove the existence of a "common plan, design or purpose" involving international crimes provided for in the Statute and the active participation of a plurality of persons, including the accused.[182]

The emergence of individual criminal responsibility directly under international law highlights the association of elements of traditional international law with the modern approaches to humanitarian law and human rights law, and entails the consideration of both domestic and international enforcement mechanisms.

## 2.2. ICTY's investigations and prosecutions for international crimes in Kosovo

### 2.2.1. ICTY mandate, structure and jurisdiction

The brutality and atrocity of the crimes committed during the Yugoslav wars in the early 1990s began to raise the concerns of the international community, especially of the United Nations, which

[179] International Law Commission (ILC) website, available at: https://legal.un.org/ilc/ (Accessed: 11 October 2020).
[180] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, 1950, Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf.
[181] ICTY Statute, Article 7.
[182] *Tadić* Appeal Judgement, paragraph 227 and *Vasiljević* Appeal Judgement, paragraphs 95-101.

had carefully followed the increasing tensions in the region and the development of the conflict. Gross violations of human rights and international humanitarian law were committed against the unarmed and defenceless civilian population, a concerning situation that required criminals to be arrested and prosecuted in order for justice to be provided to the victims and their families. For this reason, on 25 May 1993, the UN Security Council passed Resolution 827, formally establishing the International Criminal Tribunal for the former Yugoslavia (ICTY).

According to Article 1 of the ICTY Statute, the Tribunal has territorial and temporal jurisdiction "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991 […]". As far as its subject matter jurisdiction, the ICTY has the authority to prosecute natural persons[183] – meaning living human beings with rights and responsibilities under the law and not legal subjects[184] – for committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5). Furthermore, although the Tribunal has concurrent jurisdiction with national courts under Article 9, it has primacy over national courts, meaning that it can formally request national courts to defer to the competence of the ICTY at any stage of the procedure. This mechanism, together with the principle of non-bis-in-idem[185] aims at ensuring that individuals are prosecuted for the crimes they have committed while guaranteeing that no one is twice tried for the same offence.[186]

Composed of the Prosecutor, the Chambers and the Registry, the ICTY's judges adopted the Tribunal's Rules of Procedure and Evidence[187] under the recommendation[188] of the UN Secretary General and according to Article 15 of the ICTY Statute on 11 February 1994. Deeply inspired by the national rules of adversarial systems,[189] the Rules of the ICTY focused mainly on the rights of the accused (in compliance with Article 21 of the ICTY Statute) and the right to a fair trial (Article 20),

---

[183] ICTY Statute, Article 6.
[184] The notion of "natural person" is in contrast with the concept of "legal persons" or "artificial persons", which includes more individuals considered by the law to be acting as a single one, such as companies, political organisations or States. See Legal dictionary, available at: legaldictionary.net/natural-person/ (Accessed: 12 October 2020).
[185] The literal translation is "not twice against the same [thing]".
[186] However, the ICTY may deal with a case that has already been heard by a national court, since the jurisdiction of the Tribunal prevails over national jurisdictions in the name of the "international public order". For this mechanism to be effective, the collaboration of the national courts is fundamental: national courts shall indeed "comply without undue delay with any request for assistance or an order issued by a Trial Chamber" according to Article 29 of the Statute.
[187] During the years, some of the ICTY's Rules were amended several times, in some cases with a very short-time interval between the changes, but those concerning the Functions of the President, the Chambers, the Prosecutor and the Registry were confirmed.
[188] Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), presented on 3 May 1993 (S/25704), available at: www.refworld.org/docid/3ae6af0110.html (Accessed: 12 October 2020).
[189] The Tribunal did not adopt a pure adversarial system and some elements were taken from the inquisitorial system to guarantee fair and speed trials, especially what concerns the rules of evidence. Like the Nuremberg and Tokyo Tribunals, the ICTY has "no technical rules for admissibility of evidence". See Report of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991, 29 August 1994, paragraph 72.

which includes the guarantee of protection measures for victims and witnesses (Article 22), and the availability of closed hearings.[190]

It must be remembered that the early practice of the Tribunal was hampered by the refusal to cooperate of a number of the ex-Yugoslav States, and the Bosnian government was the only one supporting the ICTY establishment and activity.[191] The general lack of cooperation led the Tribunal to focus first on minor cases involving low-ranking soldiers and therefore instigated some criticism.[192] Furthermore, when the ICTY was established in 1993, it was intended to be a temporary institution: this because the national judicial systems in the FRY were "not able nor willing"[193] to prosecute the criminals who had committed gross violations of human rights and humanitarian law from 1991 onwards. However, in 2003 they began to show more competence in their role and started dealing with some minor cases. Not only did this shift of competences allow the ICTY to focus on the most serious leaders suspected of war crimes and to transfer the cases against intermediate and lower-level accused to competent national jurisdictions, but it also aimed at strengthening the new-born judicial system in the Former Yugoslavian countries, including Kosovo.[194] This decision was also intended to put an end to the "challenging" and "expensive" experience of the ICTY, which was UN-budget funded.[195]

### 2.2.2. ICTY's first investigations in Kosovo and FRY's lack of cooperation

The ICTY's first public reference to Kosovo dates from 10 March 1998, right after the Serbian government's first large-scale attack carried out in the Drenica region. On this occasion, the tribunal's Prosecutor issued a declaration stating that "The jurisdiction is ongoing and covers the recent violence in Kosovo"[196] and was followed by the U.S. government decision to financially support the ICTY's investigations in the region. In June, the Tribunal was urged by the Contact Group to undertake a "rapid and thorough investigation" of human rights abuses and humanitarian law violations in

[190] *Tadić* case, No. IT-94-1-T, Protective measures for victims and witnesses, 10 August 1995, paragraph 55: "[a] fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses."
[191] Malcom D. Evans, *International law*, 5th edition, Oxford University Press, New York, 2018, p. 761.
[192] Heikelina Verrijn Stuart, Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings*, Amsterdam University Press, Amsterdam, 2009.
[193] ICTY website, available at: www.icty.org/en/about/tribunal/completion-strategy (Accessed: 14 October 2020).
[194] This was possible thanks to the so-called "Completion Strategy" plan, approved by the UN Security Council, which required the ICTY to provide the UN body with a biannual assessment on the progress that had been made.
[195] Augusto Sinagra, Paolo Bargiacchi, *Supra note 68*, p. 411.
[196] ICTY, Prosecutor's statement regarding the Tribunal's jurisdiction over Kosovo, CC/PIO/302-E, The Hague, 10 August 1998, available at: www.icty.org/en/press/prosecutors-statement-regarding-tribunals-jurisdiction-over-kosovo (Accessed: 15 October 2020).

Kosovo. The Tribunal's first team of investigators was sent to Kosovo in early June 1998 to carry out investigations during the conflict and was then followed by other small teams.

In the beginning the Yugoslav government considered the conflict in Kosovo to be an internal dispute with the KLA "terrorists" and therefore did not accept the jurisdiction of the ICTY. The Yugoslav authorities tried to hinder the investigators' work in the region in several ways, such as by denying them visas or prohibiting interviews and evidence gathering. A Finnish forensic team under the mandate of the EU was granted permission by the Yugoslav authorities and the local Kosovo courts to exhume bodies from several sites in the Kosovo region[197] only in December 1998. The brutal massacres in the region, committed either by the Serb military and paramilitary forces and the KLA forces, were receiving considerable international attention, especially the incident in Račak, whose victims had sustained varying numbers of gunshot wounds that were established to be the cause of death.[198] However, once in Kosovo, the Finnish team was often blocked by the Serbian police and its ambassador's diplomatic immunity[199] violated "by opening the doors of his diplomatic vehicle, grabbing his camera, and removing the film from the camera".[200] Despite this, the Finnish forensic team was allowed to conduct the autopsies on forty victims of the Račak massacre, after the Yugoslav authorities had prevented Chief prosecutor Louise Arbour to enter Kosovo through Macedonia to carry out the investigations.

Additionally, the ICTY established an office in Tirana, Albania, during the eleven-week NATO air-campaign with the aim of carrying out interviews with the refugees and collecting information and evidence on human rights abuses and humanitarian law violations from Kosovo's neighbouring countries. The interviews allowed the U.S. State Department to issue a statement accusing nine commanders of the Yugoslav Army of war crimes and crimes against humanity in Kosovo.[201] On 27 May 1999 the UN-established Tribunal announced the indictments of President Slobodan Milośevič and four other Yugoslav officers[202] at the top of the chain of command in the FRY, accusing them of

---

[197] Golubovac/Golubofc, Glodjane, Gornje Obrinje, Klecka, Orahovac and Volujak.

[198] Juha Rainio, Kaisa Lalu, Antti Penttilä. "Independent forensic autopsies in an armed conflict: investigation of the victims from Racak, Kosovo", in *Forensic Science International*, March 2001, 116(2-3), pp. 171-185.

[199] Under international law, the diplomatic personnel is provided with a series of immunities and privileges due to the functions it is asked to perform in the receiving State as an organ and representative of the sending State, with the aim of contributing to the establishment of the international relations between the two. Both the immunities and privileges are "functional", meaning they aim at protecting the functions of the organisation and not the best interest of the personnel. See Dominique Carreau, Fabrizio Marrella, *Supra note 51*, p. 446.

[200] Human Rights Watch, *Supra note 11*, p. 477.

[201] U.S. Department of State, Daily Press Briefing by James P. Rubin, 7 April 1999, available at: https://1997-2001.state.gov/briefings/9904/990407db.html (Accessed: 17 October 2020).

[202] Dragoljub Ojdanic, Chief of Staff of the Yugoslav Army; Milan Milutinovic, President of Serbia and member of the Supreme Defense Council; Nikola Sainovic, Deputy Prime Minister of the FRY; Vlajko Stojiljkovic, Minister of Internal Affairs of Serbia.

violating the customs of war and crimes against humanity, namely "murder, persecution and deportation in Kosovo" during the first five months of 1999.[203]

Another ICTY office was established in Pristina after NATO's entry in Kosovo in June 1999 with the aim of conducting investigations, especially on the exhumations in the region. The preliminary analysis of the first findings were presented to the UN Security Council by the new Chief Prosecutor Carla Del Ponte in November 2000. Del Ponte, who made the investigations in Kosovo a top priority during her mandate, provided the UN body with detailed information about the numbers of bodies that had been found in the mass graves, but recognised that an accurate figure would never be possible "because of deliberate attempts to burn the bodies or to conceal them in other ways."[204] Moreover, she also highlighted that the Tribunal did not have "neither the mandate nor the resources" to be the principal investigatory and procedural body in Kosovo[205] and highlighted the need for the majority of the crimes committed during the Kosovo war to be dealt with by local Kosovo police and judiciary – which was at the time under the UNMIK' mandate. In 2000, Del Ponte also urged the Serbian authorities to actively cooperate in the arrest and extradition of Slobodan Miloševič to the Netherlands in order for justice to be served. By contrast, her proposal to amend the ICTY Statute to allow the Tribunal to carry out investigations on the crimes committed by the KLA in the aftermath of the Kosovo war was rejected. After a visit in Belgrade in 2001, the ICTY Chief Prosecutor expressed her disappointment for the lack of cooperation of the newly elected Yugoslav government.[206]

From March 2001, the level of cooperation of the Yugoslav government improved: on the one hand, The Hague Tribunal was allowed to carry out investigations inside the Yugoslavian territory, to hear the witnesses and victims, and to access documents and archives; on the other hand, some of the criminals who had been accused of war crimes and human rights abuses during the conflict were arrested by the Serbian police and handed over to the ICTY. President Miloševič was arrested on 1 April 2001 and charged of corruption, and few months later, on 28 June 2001 the Serbian government transferred him to the Tribunal in The Hague.

---

[203] ICTY, Prosecutor v Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic & Vlajko Stojililkovic, Decision on review of indictment and application for consequential orders, Decision of 24 May 1999, available at: https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/052499rev.htm (Accessed: 17 October 2020).

[204] ICTY Weekly Press Briefing, 22 November 2000, available at: https://www.icty.org/en/press/icty-weekly-press-briefing-22nd-nov-2000 (Accessed: 17 October 2020).

[205] ICTY, "Statement by Carla Del Ponte Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the investigation and Prosecution of crimes committed in Kosovo", press release, The Hague, 29 September 1999, available at: https://www.icty.org/sid/7733/en (Accessed: 17 October 2020).

[206] ICTY, "Statement by Prosecutor, Carla Del Ponte on the Occasion of her visit to Belgrade", press release, The Hague, 30 January 2001, available at: www.icty.org/en/press/statement-prosecutor-carla-del-ponte-occasion-her-visit-belgrade (Accessed: 17 October 2020).

### 2.2.3. The Tribunal's achievements and limitations

The ICTY's contribution to the development of ICL has been crucial, as well as its role in dismantling the tradition of impunity for war crimes. In the twenty-four years of its mandate, it is widely accepted that the Tribunal accomplished many – though not all – of the tasks that had been assigned to it by the UN Security Council.

The first and most relevant achievement The Hague Tribunal has accomplished concerns the indictments and judgments of individuals regardless of their position: 161 persons – including heads of State, prime and government ministers, army chief-of-staff and other political leaders – were indicted for the serious international crimes and humanitarian law violations committed in the territory of the former Yugoslavia since 1991. Among them, 90 have been sentenced to imprisonment, 18 acquitted, 13 referred to national jurisdictions pursuing Rule 11bis and 37 had either their indictments withdrawn or died.[207] The Tribunal succeeded in indicting all the major leaders who organised and carried out the most serious human rights and humanitarian law violations in Yugoslavia, including Kosovo: President Slobodan Miloševič – who died in his prison cell in The Hague from a heart attack in 2006, few months before the verdict; Ratko Mladić[208], also known as "Butcher of Bosnia",[209] who was charged with war crimes, crimes against humanity and genocide[210] for the slaughter of 8,000 unarmed Bosnian Muslim men and boys in the town of Srebrenica and for his forces' 43-month-long siege of Sarajevo in which thousands of civilians were killed;[211] and Radovan Karadžić,[212] who was sent to life imprisonment in 2019 after his appeal was rejected.[213]

A second achievement the Tribunal obtained was bringing justice to victims and giving them a voice to denounce the violence and suffering they had experienced through an oral testimony, a deposition or an evidence in a form of written declaration.[214] This proved to be extremely difficult, as many of the victims did not have the courage to speak up; they felt ashamed and feared to be rejected by their family and community (see chapter 1.4). In order to overcome this obstacle, the Tribunal

---

[207] ICTY, Key figures of the cases, available at: www.icty.org/en/cases/key-figures-cases (Accessed: 19 October 2020).
[208] ICTY, *Mladić* (IT-09-92), Case information sheet, available at: www.icty.org/case/mladic/ (Accessed: 19 October 2020).
[209] Human Rights Watch, "ICTY/Bosnia: Life sentence for Ratko Mladic", 22 November 2017, available at: www.hrw.org/news/2017/11/22/icty/bosnia-life-sentence-ratko-mladic (Accessed: 19 October 2020).
[210] Both the ICTY and the ICJ concluded that the Srebrenica massacre constituted genocide.
[211] *Reuters*, "Once triumphant Bosnian Serb commander Mladic reduced to frail genocide defendant", 22 November 2017, available at: https://www.reuters.com/article/us-warcrimes-mladic-newsmaker-idUSKBN1DL2WS (Accessed: 18 October 2020).
[212] ICTY, *Karadžić* (IT-95-5/18), Case information sheet, available at: www.icty.org/en/case/karadzic (Accessed: 19 October 2020).
[213] On 24 March 2016, Karadžić was found guilty of the genocide in Srebrenica, war crimes and crimes against humanity, 10 of the 11 charges in total. He was sentenced to 40 years' imprisonment and filed an appeal against his conviction on 22 July 2016.
[214] ICTY, Achievements, available at: www.icty.org/en/about/tribunal/achievements (Accessed: 18 October 2020).

introduced and strengthened the system of protection of the victims' identity during interviews and public trials. These protecting measures – which could only be ordered by the Trial Chamber when a real risk to the person testifying was believed to exist – consisted, for instance, in withholding the name of the victims, disguising their voice on the audio broadcast or even deciding to go into private session in certain cases. Both victims and witnesses played a pivotal role in the process of establishing the truth and seeking justice. Thanks to the forensic data, video evidence and numerous testimonies of eyewitnesses and survivors, the Hague Tribunal has established beyond a reasonable doubt crucial facts related to crimes committed in the FRY. Its landmark judgments contributed to the creation of a historical record, allowed to combat crimes denial and paved the way for future transitional justice initiatives in the whole region. Admission of guilt from a number of perpetrators who had been accused by the ICTY for the heinous crimes committed since 1991 also contributed to the Tribunal's establishment of facts.[215] Their statements provided the judges with detailed information concerning the military operations, the planning and execution of the unlawful acts and crimes committed in the region, and the location of the mass graves for the victims' mourning families to bury their dead.

Finally, the ICTY's work contributed to the development of both ICL and IHL, and inspired the establishment of new international criminal courts in the following years, both the International Criminal Court (ICC) and the so-called "hybrid courts" – which will be afterwards analysed. The Hague Tribunal, which can be defined as a "pioneer in international legal proceedings",[216] was the truly first international tribunal prosecuting war crimes created to maintain international peace and security. Furthermore, for the very first time, individual criminal responsibility was also extended to high-level political and military leaders, who had played a central role in planning the crimes against the other ethnic groups in the region. The concept of the so-called "command responsibility" was particularly developed in the jurisprudence of the ICTY and clearly defined in its Statute.

However, at the moment of its establishment, the ICTY had "no premises, no permanent staff and […] no legal framework to guide the work of the prosecution staff and Judges."[217] The limitations that characterised its mandate had a clear and direct impact on the persecution of all the individuals responsible for international crimes during the conflict in Kosovo and disappointed many people's expectations, especially those of the Serbian minority community living in some areas of Kosovo. Three shortcomings have emerged with particular emphasis during its mandate and are therefore worth stressing.

---

[215] ICTY, *Supra note 214*.
[216] ICTY, *Ibid*.
[217] Gabrielle Kirk McDonald, "Problems, obstacles and achievements of the ICTY", in *Journal of International Criminal Justice*, vol. 2, No. 2/2004, pp. 558-571.

A first limitation concerns the impossibility of the ICTY to deal with the extremely high number of cases and its failure in collaborating with the domestic courts. As established by the ICTY Statute, although The Hague international criminal tribunal could theoretically try all the individuals who had been accused of serious international crimes, the high number of cases and length of the trials obliged the ICTY judges to concentrate their efforts on the criminals who represented a real threat to the international public order that the ad hoc tribunal had to promote. By contrast, the intermediate-level defendants who had been accused of war crimes in the region should have been tried by the national courts after having been indicted by the ICTY Prosecutor. Nevertheless, this procedure proved failing for two reasons. On the one hand, the local courts were still at an embryonal phase, too weak and lacking competent legal professionals to effectively investigate and prosecute the cases involving gross human rights and humanitarian law violations (see chapter 3.2.). They were often asked to undertake some reforms to harmonise their domestic jurisdiction with the international one, as well as to apply fair trial standards. On the other hand, although serious crimes were committed by both parts involved in the conflict – namely the Serb and Yugoslav forces on the one side, and the KLA on the other – the ICTY investigations focused mostly on the role and responsibility of Serbian political, military and police leaders for the crimes they committed in Croatia, Bosnia and Kosovo. The first indictment against a KLA commander was issued only in January 2003, when, after the signature of the ICTY prosecutor, Haradin Bala, Isak Musliu, and Agim Murtezi were transferred to The Hague following their indictment for crimes against humanity and war crimes.[218] One of the central cases involving former KLA members is the *Haradinaj et al*. (Case No. IT-04-84bis-T): on 29 November 2012, three former commanders of the KLA accused of war crimes, Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, were acquitted[219] after the prosecution had failed to prove that the three defendants were part of a joint criminal enterprise aiming at establishing KLA control in western Kosovo using detention camps.[220] In particular, the acquittal of the former KLA commander and Prime Minister of Kosovo Ramush Haradinaj showed the Tribunal's failure to indict the Kosovar leader despite the forced displacement of thousands of Serbs and Roma people from the province in the last part of the Kosovo war and in its aftermath. The Hague tribunal's decision obviously undermined the trust of minority groups of Kosovo, and especially the Serb community, towards an international justice system that had been welcomed as the solution against the impunity for heinous

[218] ICTY, "Haradin Bala, Isak Musliu, and Agim Murtezi Transferred to the ICTY following their Indictment for Crimes against Humanity and War Crimes", The Hague, 18 February 2003, available at: www.icty.org/en/press/haradin-bala-isak-musliu-and-agim-murtezi-transferred-icty-following-their-indictment-crimes (Accessed: 11 December 2020).
[219] ICTY, Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84bis-T in Trial Chamber II, final judgement, available at: www.icty.org/x/cases/haradinaj/tjug/en/121129_judgement_en.pdf.
[220] *Balkan Insight*, "Haradinaj Acquittal is Final, Hague Tribunal Says", 9 January 2013, available at: https://balkaninsight.com/2013/01/09/icty-final-verdict-for-haradinaj-case/ (Accessed: 11 December 2020).

international crimes committed by both sides of the conflict. After the verdict, Kosovo Prime Minister Hashim Thaçi,[221] himself a former KLA commander, stated that "this verdict is the strongest evidence that the Kosovo Liberation Army fought a just war for freedom and never committed the crimes of which we were unfairly accused,"[222] a decision that was strongly supported by almost all the ethnic Albanian community in Kosovo. The focus of the ICTY on the Serbs high-ranking officers at the top of the command chain during the Yugoslav wars and the acquittal of the KLA members who had allegedly committed or ordered the crimes in question was one of the causes leading to the establishment in 2015 of the Kosovo Specialist Chambers by the EU, whose mandate specifically focuses on the crimes committed by the KLA forces between 1998 and 2000. This hybrid tribunal will be deeply analysed in the fourth chapter of this thesis.

Second, although the Tribunal succeeded in reinforcing the protective measures for both victims and witnesses of human rights and humanitarian law violations during the Yugoslav Wars,[223] it had no resources to provide them with an extensive support after their return to their community and country. In order to fill this gap, the newly established[224] Victims and Witnesses Section (VWS) strongly committed with local authorities and NGOs to establish a network of agencies that would provide ongoing counselling and psychological and physical support in an independent and impartial way. As confirmed by Mr. Musaj, however, most of the Kosovars who had suffered from serious human rights abuses and international crimes in the 1990s and early 2000s felt abandoned, forgotten and not supported by the international institutions who were supposed and expected to protect them. This is why the local and international NGOs and activists played an essential role in filling this vacuum.

Third, the creation of this ad hoc Tribunal did not prevent the recurrence of ethnic-based crimes and abuses in the former Yugoslavia after its establishment in May 1993, as clearly demonstrated in the massacre of more than 8,000 men in Srebrenica and the bloody conflict in Kosovo, during which an estimated 13,500 people from both sides were killed or went missing[225] and between 1,2 and 1,5 millions were displaced. Some critics have also claimed that the ICTY trials reinforced pre-existing

[221] Thaçi resigned from office on 5 November 2020 to face war crimes charges after his indictment was confirmed by a judges of the Kosovo Specialist Chambers.
[222] *Reuters*, "Kosovo ex-premier Haradinaj cleared of war crimes again", 29 November 2012, available at: www.reuters.com/article/us-kosovo-tribunal-haradinaj-idUSBRE8AS0B820121129 (Accessed: 19 December 2020).
[223] The Statute of the ICTY incorporates the duty to protect victims and witnesses testifying before the Tribunal and the Tribunal's Rules of procedure and evidence include several relevant provisions, in particular in Rules 69 (Protection of Victims and Witnesses) and 75 (Measures for the Protection of Victims and Witnesses).
[224] The Victims and Witnesses Section (VWS) was an independent and impartial section of the Tribunal's Registry.
[225] OSCE, *Supra note 97*.

nationalist narratives and hatred, fomenting again the "cycles of hatred"[226] that inundated the Balkans region after the disintegration of Former Yugoslavia.

Finally, the ICTY has mainly been criticised for its management of time, failing in rendering justice quickly and effectively. Time management is undoubtedly a problem that concerns all judicial systems, but it is particularly strenuous in the work of the international courts when linked to distance, as visible in the case of the ICTY: the Tribunal being established in the Netherlands, its investigations were carried out in a distant region and, consequently, required much more time and involved more than two competing legal theories. In fact, situating international trials outside of the community in which the atrocities had occurred made it harder to gather evidence, due to the international tribunal's incapacity to arrest suspects and subpoena witnesses. Moreover, the time passing, it became increasingly complex to prove the reported crimes. Time management represented an issue also for the individuals who had been accused, whose pre-trial detention was prolonged, the international community and the survivors or the victims' families who were waiting for justice to be served in a reasonable time.

The ICTY's mandate ended on 31 December 2017 and its remaining work, including all outstanding appeals, tracking and prosecuting the remaining fugitives, and the protection of victims and witnesses, were transferred to the Residual Mechanism for International Tribunals (IRMCT).[227] The ICTY has undoubtedly played a landmark role in furthering the global justice norm by holding most of the high-ranking criminals of the former Yugoslavia to account for their crimes, strengthening the rule of law and contributing to the development of ICL, and inspiring the creation of the International Criminal Court (ICC) in 1998. Despite this, given the nature of the crimes, the long-dating and deep-rooted ethnic hatred in the region, and its broad mandate, it is not surprising that the ICTY– the very first international tribunal – was not able to provide justice to all victims and fostering national reconciliation. This is especially true for the members of minority communities in Kosovo, since the ICTY prosecution failed to prove both the presence of a link between the direct perpetrators and the accused KLA commanders, and the existence of a joint criminal enterprise aiming at strengthening the control of the KLA forces over parts of Kosovo through an arbitrary campaign of crimes against the minority groups.

[226] Martha Minow, *Breaking the Cycles of Hatred: Memory, Law, and Repair*, introduced and with commentaries edited by Nancy L. Rosenblum, Princeton University Press, 2002.
[227] The newly-established institution was also in charge of handling the residuals of the ICTR, whose activities closed two years before, on 31 December 2015. More information on the IRMCT can be found on the official website: www.irmct.org/en (Accessed: 11 November 2020).

## 2.3. ICC: the first permanent international criminal court

> "The international community has been chastened by the recent record of brutal civil wars. Violations of humanitarian standards has become a tactic of war. The attempt to strengthen enforcement of the law of war through a permanent international court is thus a signal event."[228]

The establishment of the ICTY and ICTR in the 1990s marked a landmark step towards international justice. In the two decades of their existence, the two UN-established international tribunals irreversibly changed the landscape of IHL and ICL, and succeeded in providing the victims with the opportunity to voice the horrors they had witnessed and experienced. However, the mandate of the Arusha and The Hague international tribunals was temporally and geographically limited, and there was a general recognition of the fact that many of the serious violations of international law that had been committed around the world would have risked to remain unpunished without the establishment of a court with a universal jurisdiction.

Therefore, the international community felt the increasingly urgent need to create a permanent international criminal court to deal with global justice and to develop and consolidate the respect for the rule of law in all States. The idea was that the concept of "peace through justice",[229] strongly supported by the UN, would only be achieved if and when international tribunals would exercise jurisdiction irrespectively of where and by whom international crimes are committed, stressing the crucial role of individual criminal responsibility and bringing justice both to the victims and their families. The result of this aspiration led to the adoption in 1998 of the Rome Statute, which established the institution of the International Criminal Court, which Malcom D. Evans defines as "probably the most important development in international criminal law, at least since Nuremberg".[230]

### 2.3.1. ICC mandate, structure and jurisdiction

Although a first draft of a statute for an international criminal court had been submitted by a special rapporteur appointed by the International Law Commission (ILC) in March 1950[231] and

[228] Ruth Wegdoog, "The International Criminal Court: an American view", in *European Journal of International Law*, Vol. 10, 1999, pp. 93-107.
[229] Vesselin Popovski, "International Criminal Court: A necessary step towards global justice", in *Security Dialogue*, 31/4, (2000), pp. 405-419.
[230] Malcom D. Evans, *Supra note 191*, p. 762.
[231] One year before, in 1949, a Diplomatic Conference in Geneva, led by the International Committee of the Red Cross (ICRC), adopted the 1949 Geneva Conventions. They would be followed by Additional Protocols I and II in 1977, providing additional requirements to international and internal armed conflicts respectively. The four conventions and

despite the several revisions to which the draft was subjected, no further progress was made during the Cold War.[232] It was only in 1992 that the ILC presented a preliminary report to the UN General Assembly on jurisdictional, substantive, administrative and procedural issues pertaining to the proposed permanent international criminal court.[233] The discussion on the amendments and finalisation of the draft statute led to the organisation of the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court that took place in Rome from 15 June to 17 July 1998 and saw the participation of more than 130 governments. After five weeks of intense deliberations, the Statute of an International Criminal Court (ICC) was adopted with 120 States voted in favour, 7 against[234] and 21 abstained. The ICC Statute entered into force four years after, on 1 July 2002, thirty days after the sixtieth ratification.[235] The first permanent international criminal court in human history finally came into existence and it was decided that it would be seated in The Hague, the Netherlands.[236] The 1998 Statute of the International Criminal Court, also known as "the Rome Statute", is composed of the Preamble, which articulates the purpose and vision of the ICC, and 128 Articles, which outline the details of the Court, including its jurisdiction, bodies, rules of procedure and relationship to the UN, as well as the mechanism for States to cooperate with the Court and the penalties against the indicted. As of April 2021, 123 States are parties to the Rome Statute – meaning they have both signed and ratified the treaty – and 32 States have signed but not ratified it yet.

In order to understand the relationship between the ICC and Kosovo, and the limits of the Court in investigating and prosecuting the individuals responsible for international crimes during the Kosovo war and in its aftermath, it is necessary to briefly underline the Court's mandate, structure and jurisdiction.

Unlike the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, the ICC is a permanent and autonomous judicial body, so its mandate is not limited in space and time (at least in terms of future dissolutions), since "[...] the most serious crimes of concern to the international

---

their additional protocols constitute the backbone of international humanitarian law and are binding for all States and other actors in armed conflict. Each convention guarantees special protection to civilians in armed conflicts and other specific groups, including wounded people and aid workers taking part in hostilities. Their content has actively contributed to the codification of war crimes in the Rome Statute.

[232] During the Cold War, however, some episodes marked the development of the international criminal justice system. First, Adolf Eichmann, a German high official hanged by the State of Israel for his part in the Holocaust, was arrested in Argentina by the Israeli secret police in 1960. He was later prosecuted in Israel and convicted for the Nazi extermination of millions of Jews in concentration camps during World War II. His indictment marked the first retroactive conviction for genocide and a pivotal step in the application of universal jurisdiction for international crimes by a national court. Second, in June 1989, the idea of establishing an international criminal court was brought back to life by Trinidad and Tobago, which at the time was particularly concerned over the international drug trade. Finally, in the 1990s, the atrocities committed in the Balkans and in Rwanda led to the creation of the ICTY and ICTY in 1993 and 1994 respectively.

[233] Ved P. Nanda, "The Establishment of a Permanent International Criminal Court: Challenges Ahead", in *Human Rights Quarterly*, The Johns Hopkins University Press, Vol. 20, No. 2 (May, 1998), pp. 413-428.

[234] China, India, Israel, Turkey, Sri Lanka, the Philippines and the United States.

[235] The minimum number required to bring the statute into force as provided by Article 126.

[236] Although according to Article 3(2) the Court may sit elsewhere whenever the judges consider it desirable.

community as a whole must not go unpunished".[237] As a conventional system established by a treaty, it is open to ratification by any State but it is binding only for those who have ratified it, which have the obligation to "collaborate fully" with the ICC in the investigation and persecution of the crimes within its jurisdiction.[238] This collaboration includes the arrest and extradition to The Hague of the individuals[239] who are suspected or accused of committing international crimes, and this proves to be fundamental since the ICC cannot benefit from its own coercive body (i.e. police forces). Differently, the States that are not party to the Statute do not have a legal obligation to cooperate with the ICC.

The Court – which is composed of the Presidency, the Judicial Divisions (organised into Pre-Trial, Trial and Appeals Divisions), the Office of the Prosecutor and the Registry[240] – has competence, under Article 5 of the Rome Statute,[241] over the most serious crimes, which include crimes of aggression, crimes of war, crimes against humanity and genocide[242] committed during both international and internal armed conflicts. The definitions of these crimes are nowadays considered the core of international criminal law. As provided by its precedent tribunals, when the Court deals with crimes committed by an individual who is an organ of the State, the individual cannot invoke the immunity he or she usually benefits from to avoid persecution and the eventual punishment by the ICC or the respective domestic court, and a person in a position of authority may even be held responsible for crimes committed by those acting under his or her orders or command. Moreover, the ICC is not a substitute for national courts, but its jurisdiction has the aim of completing the national jurisdictions and the Court intervenes only in the cases in which a State is unable or unwilling to carry out the investigations and prosecute the perpetrators.[243]

As far as the ICC jurisdiction is concerned, it has long been a controversial and debated issue in ICL. The Rome Statute requires the existence of four criteria before an individual can be prosecuted by the Court, and all must be met for a case to proceed: subject-matter jurisdiction (what acts constitute crimes); territorial jurisdiction (where the crimes were committed) or personal jurisdiction (who committed the crimes); and temporal jurisdiction (when the crimes were committed).

---

[237] Preamble of the ICC Statute.
[238] ICC Statute, Article 86.
[239] The mandate of the Court is to try individuals rather than states.
[240] Additionally, the Trust Fund for Victims was established in 2004 by the Assembly of States Parties with the aim of providing assistance and psychological, material and physical support both to the victims of the crimes within the ICC jurisdiction and their families.
[241] ICC Statute, Article 5: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression."
[242] The four categories of crimes over which the ICC has jurisdiction, namely genocide, crimes against humanity, crimes of aggression and war crimes are strictly determined in the Statute from Article 6 to 9, in order to limit any interpretation.
[243] ICC Statute, Article 17(1).

- The subject-matter jurisdiction refers to the four crimes prosecuted by the Court according to Article 5, namely genocide, crimes against humanity, war crimes and crimes of aggression.
- The concept of territorial jurisdiction is related to the territory over which the ICC may exercise its power and functions, namely on the territory States party – which implicitly accept the jurisdiction of the Court when ratifying the Rome Statute – and on the territory of third States that have accepted the jurisdiction of the ICC.[244, 245]
- As for the personal jurisdiction, the ICC cannot prosecute individuals who were minors at the moment in which the crime was committed;[246] it can prosecute both the nationals of States parties and the individuals who are nationals of non-party States provided that these States have accepted the ICC's jurisdiction or when the UN Security Council refers what it considers to be an international crime to the ICC Prosecutor.
- The temporal jurisdiction of the ICC has often been considered as a limitation especially for what concerns the persecution of the heinous crimes that took place in the 1990s, including the ones that occurred in Kosovo. In fact, the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute: this means that the jurisdiction is no retrospective and it is only limited to the crimes that were committed after the 1 July 2002. In the case in which a State has become party of the Rome Statute after this date, the Court's jurisdiction only applies from the date when the Statute came into force with respect of that particular State, as mentioned by Article 11(2).[247]

### 2.3.2. Individuals indicted by the ICC

As of April 2021, thirty cases were brought before the Court, some of them having more than one suspect, and the Court's judges have issued thirty-five arrest warrants.[248] As mentioned above, States collaboration with the ICC has proved crucial, since it has allowed seventeen individuals to be detained in the ICC detention centre of Scheveningen, in The Hague, and to appear before the Court. However, thirteen people still remain at large and charges against three accused people have been

[244] ICC Statute, Article 12(2).
[245] Therefore, the territorial jurisdiction of the ICC is wider than the ones of the ICTY and ICTR, which were limited to the territory of former Yugoslavia in one case, and to the territory of Rwanda or the territory in which Rwandan citizens had committed international crimes in the other case.
[246] ICC Statute, Article 26.
[247] ICC Statute, Article 11(2).
[248] ICC cases, available at: www.icc-cpi.int/Pages/cases.aspx (Accessed: 5 April 2021).

dropped due to their deaths.[249] The ICC judges have also issued nine summonses to appear, nine convictions and four acquittals. As of April 2021, the ICC has opened investigations in Burundi, the Central African Republic, Côte d'Ivoire, Darfur (Sudan), the Democratic Republic of the Congo, Georgia, Kenya, Libya, Mali and Uganda.[250] Primary investigations are being carried out in Bolivia, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, Republic of the Philippines, Ukraine and Venezuela.[251] As it is evident, due to the limits of its temporal jurisdiction, the ICC has not opened investigations nor prosecuted individuals for the crimes committed during the Kosovo war and in its aftermath.

### 2.3.3. The limits of the ICC's jurisdiction in the Kosovo war

The creation of the ICC and the Rome Statute in 1998 was in itself a historic event, which has marked a milestone in humankind's efforts towards a more just world. The duty for the criminal prosecution of serious violations of international law, which once were considered as the sole responsibility of the country that had jurisdiction where such crimes occurred, has nowadays been expanded beyond the borders of national systems. If the priority of peace over justice has prevented the punishment of many war criminals in the past centuries,[252] the international criminal tribunals created in the 20th century – including the ICC – established important principles of individual responsibility and contributed to the production of significant codification of IHL. The idea underlying the institution of a permanent international criminal tribunal was that justice for the victims of the most serious crimes has to be applicable no matter where and by whom these crimes have been committed. Furthermore, the victims and survivors' families should no longer be forgotten behind the curtain of cynical political motives.

Nevertheless, the ICC's jurisdiction over many countries remains problematic and limited, especially for what concerns the grave international crimes and human rights abuses that were committed in Kosovo in the aftermath of the 1998-1999 conflict by the KLA forces.

Before analysing the preconditions to the exercise of the ICC's jurisdiction fixed by the Rome Statute and its limitations in the Kosovo case, it is important to remember that Kosovo unilaterally

[249] For more and updated information, see: www.icc-cpi.int/about (Accessed: 5 April 2021).
[250] There is an ongoing discussion on the ICC's investigations in the African continent. Many critics have talked about "Western Imperialism", claiming that the OTP's focus on the African countries has been inappropriate and unfair, and the Africans have become the "sacrificial lamb" of the ICC's struggle to establish itself as a proper court of law and to gain international legitimacy.
[251] ICC, Preliminary Examinations, available at: www.icc-cpi.int/pages/pe.aspx (Accessed: 1 November 2020).
[252] Vesselin Popovski, *Supra note 229*.

declared its independence from Serbia in February 2008 and despite its efforts, the self-proclaimed State has not yet been universally recognised by the international community on its whole, with many countries still refusing to consider it as an independent State.[253] Consequently, Kosovo is not a member of the majority of the international organisations nor the international treaties and conventions subject to membership to these international institutions.[254] Therefore, notwithstanding the domestication of the norms of international criminal justice in its Constitution, Kosovo is neither a signatory party to any Conventions that fall within the field of international criminal justice, nor a signatory party to the ICC Statute. So, the country's lack of membership to the ICC entails a series of limits as far as the Rome Statute is concerned.

On a hypothetical ground, however, if Kosovo was recognised by the international community on its whole as an independent State and became a signatory of the Rome Statute, the ICC jurisdiction would be limited in prosecuting the criminals responsible for gross human rights and humanitarian law violations during the Kosovo war and in its aftermath, bringing to light some of the flaws in the Court's jurisdiction. A first obstacle is related to the ICC's *ratione temporis* (temporal jurisdiction). As already mentioned, the ICC has jurisdiction only with respect to the events and crimes that took place after the entry into force of its Statute, that is to say on 1 July 2002. For this reason, in the case of Kosovo, all the crimes that were committed both during the 1998-1999 conflict and in its aftermath by the KLA would not fall into the ICC's jurisdiction. This limit represents a real problem when related to the principle of non-retroactivity to crimes, such as forced disappearances, which were commenced before the entry into force of the Statute and continued thereafter. Moreover, the Rome Statute also currently prevents the ICC from exercising its jurisdiction in Kosovo from a territorial point of view (*ratione loci*). The Court may exercise jurisdiction when either the State of the territory where the crime is committed or the State of nationality of the accused is party to the Statute. Although it is true that a third way for the ICC to prosecute an individual who has committed a serious violation of international law consists in a deferral through the UN Security Council, this condition must always be bounded by the respect of the temporal and subject-matter jurisdictions: the former criteria, however, is not met in the case of international crimes committed in Kosovo as previously mentioned. Additionally, the 1998 Rome Statute imposes an obligation on State parties to fully cooperate with the ICC in terms of investigation and prosecution. They must also cooperate in arresting the individuals against whom the ICC has issued an arrest warrant, provide evidence for the proceedings, relocating witnesses and enforcing the sentences. However, such duty does not exist in

[253] As of April 2021, 110 countries recognise Kosovo as an independent State.
[254] Despite not being a member of the UN, Kosovo has intensively cooperated with the ICTY, as the main international institution with jurisdiction over the gross violations of human rights that occurred in the territory of Former Yugoslavia in the 1990s.

respect of non-State parties, including Kosovo – although the Rome Statute provides that the ICC may invite non-State parties to provide assistance on the basis of an hoc arrangement.[255] Nevertheless, hindering these processes is the fact that despite the demilitarisation of the KLA,[256] some of its former commanders are today Kosovo's most-powerful leaders, and benefit from the support of the Albanian majority in the country, which has always considered them as national heroes.

In conclusion, some of the weaknesses of the Rome Statute, and especially those based on preconditions to the exercise of ICC jurisdiction, could only be overcome by universal ratification of the ICC Statute and by full State cooperation with ICC. However, several countries – including the US, Israel and China – have often clearly stated their firm intention not to become parties of the Rome Statute. The legal regime created by the Rome Statute is clearly not all-inclusive, especially when analysing its relationship with Kosovo and the crimes committed both during the conflict and in its aftermath by the KLA forces.

## 2.4. The emergence of new "hybrid" courts

Runaway costs, temporal and territorial limitation of their statutes, time management issues and impossibility to try all the individuals who had been accused of international crimes, the ad hoc tribunals (ICTY and ICTR) have recently called into question the efficacy of international criminal justice. At the same time, the creation of the first permanent International Criminal Court (ICC), which is often presented as the most appropriate alternative to international ad hoc tribunals, has not succeeded in putting an end to the need for a concerted response to international law-breaking in our increasingly interconnected world.[257] While the international community continues to discuss on the

[255] ICC Statute, Article 87(5):
(a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.
(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

[256] A part of the KLA members have established a political party – the Party of Democratic Progress of Kosovo (PPDK) –, others have joined the Kosovo Protection Corps (KPC) and the Kosovo Police Service (KPS). It is widely recognised that among its members, some have also been involved into organised crime and violence.

[257] As already mentioned, on the one hand, the conflicts that took place before the Rome Statute came into force (1 July 2002) and present conflicts in non-signatory nations lie beyond the temporal and territorial jurisdiction of the ICC. On the other hand, the ICC will never be able to try all individuals accused of international crimes, with a consequent focus on the senior figures involved in the conflicts. Additionally, the ICC's approach of complementarity, based on the idea of either providing wholly international justice or leaving the conflict to post-war domestic courts, often limits its ability to provide a genuine accountability. In many instances, international courts have proved to be unable to gather the most relevant information from the local context and have also been accused of "imperialism" (*see* supra note 157), while local courts are often still at their embryonal stage, trying to face logistics or financial obstacles, corruption and politicisation.

best judicial response to the transnational challenges of the new millennium, there is a parallel emerging need to address the "unfinished business from the 1990s"[258] while finding a remedy for the shortcomings of the international criminal courts established in the past century. In particular, the second half of the 20th century having witnessed an increasing number of bloody inter-ethnic armed conflicts while bringing to light the need for a global justice to be served, States were encouraged to ask more and more often for the intervention of a neutral party in trials involving violations of human rights and international humanitarian law[259] which could not be tackled by the inexperienced local courts (when present). This is how a new sub-species of ad hoc tribunals adapted to both national and international circumstances was created: the "hybrid criminal tribunals". Despite the terminological debate on how to call the new species given the quite recent nature of the hybrid phenomenon, – hybrid or mixed international criminal courts/tribunals, internationalised courts, hybrid domestic-international courts, mixed domestic-international courts, semi-internationalised criminal courts, internationalized domestic courts, etc. – this new typology of tribunals (hereinafter referred to as "hybrid courts") was welcomed by the international community "with great expectations".[260] The hybrid model, which is constituted by a mix of national and international components applying a mixture of domestic law – reformed to include international standards, – international law or some combination of both, is considered to be the best solution to ensure "a good deal of promise and actually offers an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the other."[261] In fact, the unique characteristic of hybrid courts allows them to possess, at the same time, relevant information from the local context, but also the necessary expertise in international humanitarian law to adjudicate the crime of genocide, war crimes, crimes against humanity and other gross violations of human rights as part of wider peace-building and development efforts, and to finally provide justice to the victims and their families, especially in post-atrocity areas. It is not a case that hybrid courts emerged in particular in post-conflict situations to address cases involving mass atrocity and international crimes, either where no politically full-fledged international tribunal existed, as in the case of Sierra Leone and East Timor, or where an international tribunal existed but was unable to cope with the sheer number of cases and lacked the necessary judicial competences, as in Kosovo.

---

[258] Matthew E. Cross, "Equipping the Specialist Chambers of Kosovo to Try Transnational Crimes. Remarks on Independence and Cooperation", in *Journal of International Criminal Justice*, Vol. 14(1), March 2016, pp. 73-100.
[259] Etelle R. Higonnet, "Restructuring hybrid courts: local empowerment and national criminal justice reform", in *Arizona Journal of International & Comparative Law*, Vol. 23, No. 2 (2006), pp. 347-435.
[260] Sarah M. H. Nouwen, "'Hybrid courts'. The hybrid category of a new type of international crimes courts", in *Utrecht Law Review*, 1 December 2006, Vol. 2(2), pp. 190-214.
[261] Laura A. Dickinson, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", in *New England Law Review* (2003), pp. 1059-1072.

In the last decades, and more precisely since 1999, an increasing number of hybrid courts have been established in a wide variety of circumstances, including post-conflict situations, around the world to respond to different needs: the Special Panels for Serious Crimes in East Timor; the Special War Crimes Chamber of the Courts of Bosnia and Herzegovina; the Special Court for Sierra Leone (SCSL); the Extraordinary Chambers in the Courts of Cambodia (ECCC); the Special Tribunal for Lebanon (STL); the Extraordinary African Chambers (EAC); the Regulation 64 Panels and the Kosovo Specialist Chambers in Kosovo. Some of these hybrid courts have already been dissolved (i.e. the Special Court for Sierra Leone in 2013) while others are still working to end the cycle of impunity after atrocity situations and to provide justice to the victims and their families where the previous courts had failed. Despite the different context that saw their establishment and the consequent differences of their mandate, structure, jurisdiction and rules of procedure and evidence, the best practices from each of these hybrid courts can inspire the design and creation of future tribunals with the final aim of providing the victims of international crimes with justice. The first part of this paragraph will first briefly compare international and hybrid courts and analyse how these two systems can coexist, while the second part will be focused on the strengths and weaknesses of hybrid tribunals as a mechanism for justice in post-conflict societies. This information will prove to be crucial to better understand the structure, mandate and main characteristics of the Kosovo Specialist Chambers and Prosecutor's Office, as well as the context in which it was established, which will be deeply analysed in chapter four.

### 2.4.1. International and hybrid criminal courts: how can they coexist?

Until recently, the primary mechanisms to impose individual criminal responsibility for serious breaches of international humanitarian and human rights law had fallen into two separate categories: either the newly-established regimes in post-conflict areas had attempted domestic trials, or the international community had created specific ad hoc or permanent international tribunals to hold criminals accountable for the unlawful acts that concerned humanity as a whole in the name of global justice (ICTY, ICTR and ICC).[262] Although their precise definition is still evolving, the mechanism of all hybrid courts, by contrast, is based on the idea that both their institution and their applicable law consist of a "blend of the international and the domestic":[263] foreign judges collaborate with their domestic counterparts to try cases that are prosecuted and defended by both local and foreign lawyers.

[262] Laura A. Dickinson, *Op. cit.*, p. 1064.
[263] Laura A. Dickinson, *Ibid.*, p. 1059.

At the same time, their hybridity concerns the application of the law: international and national legal professionals can decide whether to apply domestic law (with the relative specific reforms aimed at including international standards), international law or a combination of both. Therefore, as a result of on-the-ground innovation rather than a grand institutional design, hybrid courts offer an important approach to transitional justice.

Blending the international and the domestic with legal and organisational innovations, important divergences between hybrid courts and the other international tribunals emerge with evidence, making the former a unique and innovative judicial entity in the international criminal law scenario.

The first difference between international and hybrid courts to be highlighted concerns the way they are established and therefore their jurisdiction. International criminal courts have been created by the international community to persecute and try individuals accused of committing the most heinous crimes of concern to the international community as a whole. Consequently, their mandate makes their jurisdiction universal. By contrast, hybrid courts are based on agreements between the State in which the conflict has taken place, involving serious human rights abuses and gross violations of international humanitarian law, and a UN body[264] or international organisations (i.e. the EU). Therefore, this agreement provides the court with a specific – and limited – regional jurisdiction, which might become a relevant obstacle when prosecuting an individual travelling or hiding in a foreign country, which can refuse to cooperate.

The composition of the courts represents a second element distinguishing the two types of tribunals, as mentioned above. Whilst international criminal tribunals are not composed of nationals from the State in which the conflict has taken place, the institutional apparatus of the hybrid courts (judges, prosecutor, registry and staff) is usually mixed. The "staff spectrum"[265] can range from predominantly international (i.e. ECSL) to predominantly national (i.e. ECCC). In all these cases, the dual composition of the institutional apparatus guarantees the neutrality and impartiality of the hybrid courts thanks to the presence of international figures while benefitting from the national judges and prosecutors' knowledge of the local law and mentality. Furthermore, the mixed composition of the new hybrid courts allows a continue and enriching exchange of experience, knowledge and information between the judges, fostering a permanent, constructive and complementary collaboration and dialogue between legal systems.

Finally, another difference between hybrid courts and international criminal courts concerns the way they are funded. Adequate funding is crucial as it represents "a cornerstone for the

[264] Generally the UN Secretary General.
[265] Sarah M. H. Nouwen, *Supra note 260*, p. 211.

independence of a judiciary".[266] On the one side, the full costs of the ICTY and ICTR were incorporated in the UN budget as subsidiary organs of the UN Security Council in accordance with article 17 of the UN Charter and therefore all the Member States were required to contribute on the basis of the regular budget scale;[267] on the other side, the ICC, which is not established within the UN sphere, had to determine its own financial system: it is mainly funded by assessed contribution of the States Parties to the Rome Statute or voluntary contributions from "Governments, international organisations, individuals, corporations and other entities".[268] By contrast, hybrid courts are generally largely funded by the Office of the Prosecutor and the national authorities of the concerned State, and can also accept voluntary contributions. However, the cost of hybrid courts is "markedly low" compared to the huge expenses that have characterised the activity of the ICTY, ICTR and ICC.[269] Despite this, in some instances, the lack of resources of hybrid tribunals has been so severe that the "third generation"[270] of tribunals has failed to meet the "minimum standards of independent judiciary and fair trials."[271]

It is generally recognised that the establishment of hybrid courts does not render the ICC superfluous; vice-versa, the pre-existence of the International Criminal Tribunal would not have been a valid reason not to establish the "third generation" of international criminal tribunals. This is evident for at least two reasons.

First, before the creation of the first hybrid courts, the world had faced a "judicial vacuum"[272] in the field of international humanitarian and human rights law violations previous to the entry into force of the Rome Statute on 1 July 2002 (jurisdiction *ratione temporis*) as well as in non-signatory States. For this reason, many of the international crimes committed before that moment – such as the international crimes that occurred during the Kosovo war and in its aftermath – had fallen out of the ICC's jurisdiction, leaving the victims and their families with a bitter thirst for justice and requiring the establishment of new hybrid courts to fill the gaps in the ICC's non-retroactive jurisdiction. This apparently insurmountable flaw of the ICC is related to the idea that, under the principle of

---

[266] Thordis Ingadottir, "The Financing of Internationalized Criminal Courts and Tribunals", in Romano et al. (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, 2004, OUP Oxford, pp. 271-289, p. 275.
[267] ICTY Statute, Article 32; ICTR Statute, Article 30.
[268] ICC Statute, Article 115 to 117.
[269] The cost of these tribunals is largely inflated by the need for a high number of translations, as well as by huge costs of collection and production of evidence, which requires, for instance, expensive travel costs and lack of cooperation with the local authorities.
[270] Nowadays, there is a general tendency to agree on a classification of tribunals in three different generations: the Nuremberg and Tokyo Tribunals are known as "first generation tribunals"; the ICTY and ICTR, and the ICC can be defined as "second generation tribunals"; and the "third generation criminal tribunals" include the newly established "hybrid courts".
[271] Thordis Ingadottir, *Ibid*, p. 288.
[272] Etelle R. Higonnet, *Supra note 259*, p. 430.

complementarity to national jurisdictions, the Court intervenes only when domestic courts are "unwilling" or "unable" to prosecute and try individuals accused of international crimes. This principle limits the scope of action of the ICC, which only deals with few high-ranking human rights abusers, but makes the work of hybrid courts essential in handling minor cases, especially when the domestic courts are still too weak and not well-functioning to try serious cases.

Second, the lack of connection of the ICC with the local population in post-conflict areas, especially in linguistic and cultural terms, highlights the crucial and essential need for hybrid courts. Notwithstanding the capability of the ICC to bring the most political and sometimes controversial cases at the centre of attention in a way that domestic or hybrid courts under pressure would and could not do, and to represent the benchmark of a global justice system, in post-atrocity countries it is very likely that the local population considers the ICC as a "deus ex machina",[273] detached from their daily concerns, ignoring their strong desire to live in a peaceful and secure environment and providing only symbolic justice to the victims.[274] By contrast, the activity of the hybrid courts, with their dual international and local composition, can prove to be the right solution to overcome this limit. What is evident is that both typologies of criminal tribunals are not only complementary, but they also prove to be effective in contributing to the right to justice and an effective remedy, to end a culture of impunity and to promote social reconciliation in contexts and countries that have witnessed gross violations of international humanitarian and human rights law. And considering that hybrid courts have the potential to bring justice much closer to the population concerned while preserving national sovereignty, they often emerge as the most adapted approach to international justice in a world in which the ICC continues to play a pivotal role in putting an end to impunity for the most serious crimes of concern to the international community as a whole.

### 2.4.2. Strengths and weaknesses of hybrid tribunals as a mechanism for justice in post-conflict societies

During the years, hybrid courts have been embraced by the international community as a pragmatic strategy to legitimate involvement in post-conflict areas, to develop local capacity, to overcome the shortcomings of the previous generations of courts, and to provide the victims of international crimes and their families with the justice they had long been prevented from.

[273] Etelle R. Higonnet, *Supra note 259*, p. 433.
[274] Catherine Gegout, "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace", in *Third world quarterly*, 1 June 2013, Vol.34(5), pp. 800-818.

First of all, hybrid courts have often proved to be an effective solution to establish the legitimacy of the processes as well as to strengthen the capacity of the local actors. In fact, purely international or purely domestic institutions often lack legitimacy among the population: the former for sitting in a distant country where the judges are often not familiar with the conflict and culture in which the crimes have been committed; the latter for lacking the basic legal competences and expertise (in the case of Kosovo, see chapter 3). The lack of connection to local population has therefore been problematic and has often led to a failure in promoting local capacity-building. By contrast, in the case of hybrid courts, the appointment of international legal professionals in charge of working with and supporting the local judges and prosecutors is pivotal in creating a degree of dialogue, consultation and collaboration that usually boosts the perception of the institution's legitimacy while sharing responsibilities.[275] In the meanwhile, the involvement of the foreign judges in highly sensitive cases in post-atrocity contexts has proved particularly useful to enhance the perception of the independence and impartiality of the judiciary and, consequently, its legitimacy and support among the local population.

A second element of strength of hybrid courts is that they are "a necessary complement to international tribunals". Although there have been harsh criticism and fear among the supporters of international justice that hybrid tribunals may be used as an alternative to, and even as a means "to undermine, the use of full-fledged international criminal courts",[276] it would impossible for the ICC to try more than a handful of cases arising from any given post-conflict situation[277] and it is not a coincidence that its activity is mainly focused on the higher ranking profiles.[278] Similarly, local courts – especially the ones established in the aftermath of a conflict involving international law violations and human rights abuses – may not be able to effectively cope with massive war crimes trial either, due to their financial and logistical limitations, the damage sustained by physical infrastructures by bombing, arson, shelling and looting during the conflict, the lack of experienced and skilled legal professionals, and a climate still stained by mistrust, social division, grief and despair. It is not a coincidence that all these elements have strongly characterised the work of a weak domestic system in Kosovo during the UN international protectorate after the end of the war, leading the UN interim administration to promote the intervention of international judges also in the judicial system to support their local counterparts (see chapter 3). Nevertheless, while a strong and well-functioning

[275] Laura A. Dickinson, *Supra note 261*, p. 1069.
[276] Laura A. Dickinson, "The promise of hybrid courts", *The American Journal of International Law*, Apr., 2003, Vol. 97, No. 2 (April 2003), pp. 295-310.
[277] This is particularly evident in the case of the territory of Former Yugoslavia due to the sheer numbers of cases the ICTY and the ICC were not able to deal with alone.
[278] It is worth reminding that according to the Rome Statute, the ICC can only assume jurisdiction when national courts are unwilling or unable to investigate and try individuals accused of international crimes.

domestic courts may eliminate the need for hybrid courts, "the presence of international tribunals does not render hybrids superfluous."[279] These elements and shortcomings considered, it is very likely that the activity of the new hybrid courts will fill the existing gap without replacing international criminal tribunals nor local courts, but supporting both categories in dealing with the sheer number of cases that none of them would be able to investigate alone.

Furthermore, in post-conflict areas, seeing the local judicial system involved, at least partially, in war crimes trials – especially in high-profile ones – can be crucial to rebuild a sense of faith in the courts and the justice system that so far had been run almost exclusively by "perceived oppressors",[280] while benefitting the government's credibility. Local legal professionals can better understand the local culture and therefore interpret and effectively respond to their population's criticisms and exigences, especially in a multi-ethnical society such as the one of Kosovo. By contrast, excluding local institutions and judges from the trials of individuals directly or indirectly involved in human rights and humanitarian law violations in that specific context tends to undermine their authority and to cause mistrust on their capabilities.

Finally, not only does the proximity of the court allow the victims' relatives to physically attend the proceedings and the witnesses to testify and benefit from trials which are held in their local language, but it also avoids them to incur in expensive travel costs (i.e. visa and accommodation abroad).

So, the activity of hybrid courts is not expected to show positive results in the short-run, that is to say in the post-atrocity context that has seen their establishment, but rather in the long-run, to help creating a culture of justice and accountability, strengthening the rule of law and ensuring that "whatever solutions offered by the war crimes tribunals will not vanish" after their potential dissolution.[281] However, the activity and characteristics of the existing hybrid courts have also provoked a fair share of criticism.

First of all, war crimes trials that take place *in situ* – where the violence and conflict had occurred – risk to be influenced by the same individuals that committed or ordered the crimes in question, such as heads of State, military and paramilitary forces, and police leaders, who sometimes hold high-ranking public office in their respective countries and can therefore be dangerous.[282]

Moreover, hybrid courts have to find effective solutions and precautions to ensure the protection of sensitive witnesses that may also be frightened, and therefore reluctant, to give testimony and to

[279] Etelle R. Higonnet, *Supra note 259*, p. 354.
[280] Laura A. Dickinson, *Supra note 276*, p. 301.
[281] Etelle R. Higonnet, *Supra note 259*, p. 359.
[282] Ivana Nizich, "International law weekend proceedings: International Tribunals and their ability to provide adequate justice: lessons from the Yugoslav Tribunal", in *ILSA Journal of international and comparative law*, Vol.7, Issue 2 (2001), pp. 354-368.

protect the international legal personnel that can easily become victim of intimidation and even physical attacks.[283] Furthermore, since post-conflict societies are usually still characterised by ethnic and socio-political divisions, one of the consequent risks of the establishment of hybrid courts is that they can lead to "rising perceptions of bias or favouritism if members of one group are appointed over others."[284]

A final limit of hybrid courts, which distinguishes them from the international criminal tribunals established by the UN Security Council, is related to the fact that there is no requirement of States' cooperation pursuant to Chapter VII. Consequently, hybrid courts cannot force third countries to cooperate or extradite alleged criminals located or hiding within their borders. Neither can they impose sanctions to third States.

In conclusion, despite the underfunding and other logistical difficulties that characterise the activity of hybrid courts, this "third generation" of international criminal tribunals has emerged more and more often as a new transitional justice mechanism to provide justice to the victims of international crimes where the already-existing institutions had failed in the past. By responding to the shortcomings of both purely international and purely domestic approaches, hybrid courts can effectively contribute to address the brutality of the past and help to build a more peaceful future.

## 2.5. Conclusions

Over the past decades, issues of individual responsibility and reconciliation in the aftermath of violent bloody conflicts involving mass atrocities have increasingly dominated the field of international human rights and international law. The duty for the criminal prosecution of gross violations of the law, which until the mid-20th century were considered as the sole responsibility of the country that had jurisdiction where such crimes occurred, has been expanded beyond the borders of national systems. The establishment of the Nuremberg and Tokyo criminal tribunals after the end of World War II, and of the ICTY and ICTR in the 1990s played a landmark role in establishing principles of individual responsibility and producing a significant codification of international criminal law, while reinforcing the emerging widespread international consensus on the need to put an end to impunity for international crimes. The adoption and entry into force of the Rome Statute of the ICC is a further consolidation of this consensus, with the ICC Statute representing the benchmark of contemporary international criminal law. The strengths, shortcomings and limits of jurisdictions

[283] A possible measure could be, for instance, the presence of armed bodyguards.
[284] Etelle R. Higonnet, *Supra note 259*, p. 413.

and mandate of these tribunals have inspired the creation of a "third generation of international criminal tribunals" to better respond to the international community's need to provide the victims of human rights abuses and humanitarian law violations with justice: hybrid courts seem therefore to represent the most suitable mechanism for justice especially in post-conflict societies, including the Kosovar one, in which the limits of the ICTY and ICC have prevented the population – especially the members of the minority groups who had suffered from the violence of the KLA – to be provided with justice, truth and answers, and to finally end the cycle of impunity.

To conclude, despite the evolutionary process characterising international criminal justice, what has emerged in the past seven decades is the idea that perpetrators can no longer hide behind sovereignty and State immunity. Certain acts occurring within national borders cannot be tolerated by the international community any longer, since they are considered to violate international law, and the idea of national and international responsibility has emerged into a unified and determined approach to sanction human rights violations. At the same time, international peace and security will continue to be at stake if individual perpetrators remain unpunished, nor if demands for truths, justice and compensation for victims and their families are not satisfied.[285]

[285] Vesselin Popovski, *Supra note 229*.

# CHAPTER 3

## Failure of domestic and international systems in prosecuting violations in Kosovo

The international community has often justified both NATO's military intervention in Kosovo[286] and the costly reconstruction efforts in the aftermath of the 1998-1999 conflict with the need to improve human rights dramatic situation in the region. From the very beginning of the international interim administration of Kosovo and the UN peacebuilding operations, the protection of human rights of all the ethnic groups living in the region became a top priority on the international agenda.

The UN international administration in the region (UNMIK) incorporated human rights in its mandate and structure. Two years after the peacekeeping forces' deployment in the region, the Constitutional Framework for Provisional Self-Government adopted in May 2001 by UNMIK also included a series of human rights commitments and clearly provided for some protection mechanisms. Nonetheless, serious violations of human rights, especially against the Kosovo Serbs and the other minority groups, continued to take place in the region despite the presence of international forces. As clearly highlighted in the numerous reports issued by several international organisations and NGOs, such as the OSCE,[287] Human Rights Watch[288] and Amnesty International,[289] the continuing lack of justice, truth and reparation for the victims of serious human rights violations (some of which may constitute crimes under international law) and their families and communities have contributed to create a climate of impunity and hopelessness.

After Kosovo's unilateral declaration of independence on 17 February 2008, the EULEX mission in Kosovo, which replaced the UNMIK, was welcomed by a part of the local population with high expectations and thirst for justice. However, despite being the largest and most ambitious mission ever deployed by the EU until that moment and its unprecedented mandate, the international community failed another time in protecting the population and providing the victims with justice. EULEX's poor performances, irrational allocation of resources, common logistical and strategic

---

[286] The intervention of the NATO forces was considered to be necessary to put an end to the continuous abuses of human rights perpetrated by the Serbian military and paramilitary forces against the ethnic Kosovo Albanians. In fact, Article 39 of the UN Charter provides that the UN Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression" and consequently determine what recommendations or measures shall be taken "to maintain or restore international peace and security". However, the UN Charter does not clearly define the notion of "act of aggression", which is still nowadays at the centre of an international debate. See Dominique Carreau, Fabrizio Marrella, *Supra note 51*, p. 657.

[287] See, for instance, OSCE, "Report on the administrative justice system in Kosovo", 12 April 2007, available at: www.osce.org/kosovo/24637 (Accessed: 6 December 2020).

[288] Human Rights Watch, *Supra note 11*.

[289] See, for instance, Amnesty International, *Supra note 10*.

mistakes, and accusation of corruption and political interference confirmed the untouchable status of the criminal segments of Kosovo Albanians élites, and indirectly – albeit unintentionally – helped them strengthening their control over the country.

In the meanwhile, especially in the years before Kosovo's unilateral declaration of independence, a functioning judiciary system had not been established. The presence of a weak and unexperienced Judiciary contributed to an atmosphere of impunity and in many cases, almost two decades after the end of the war, the perpetrators have not been identified and the survivors have consequently started losing hope in a justice system that has not been able to make their voices heard.

The first part of this chapter (chapter 3.1.) will be specifically dedicated to the shortcomings and failure of the UNMIK and EULEX international systems in protecting the Kosovar population from violations of human rights in the region and in prosecuting the criminals despite the international forces' strong initial commitment. Then, the second part (chapter 3.2.) will be focused on the Kosovar judiciary, whose weakness and lack of experience and legal competences contributed to reinforce a climate of impunity in Kosovo. What will clearly emerge from this analysis is that neither the international nor the domestic justice systems succeeded in protecting the Kosovar population, and especially the minority groups living the region, from gross and systematic human rights abuses, and to deliver justice and reparations to the relatives of the abducted. The case of Kosovo highlights how a substantive commitment to high standards and principles without corresponding and clear local and international legal remedies is not sufficient to fully protect the whole population from violations of human rights.

## 3.1. UNMIK and EULEX's failure

### 3.1.1. UNMIK's lack of protection and violations of human rights

> "The apparent lack of any adequate reaction from UNMIK Police may have suggested to perpetrators that the authorities were either not able, or not willing to investigate such criminal acts. Such an attitude of the authorities towards the gravest crimes in any society, and especially in post-conflict circumstances, inevitably creates a culture of impunity among the criminals and can only lead to a worsening of the situation. The problems which UNMIK had encountered at the beginning of its mission, […], do not justify such inaction, either at the outset or subsequently."
>
> UNMIK Human Rights Advisory Panel[290]

[290] UNMIK Human Rights Advisory Panel's Opinion, Case 312/09, *Momčilo Milenković, v. UNMIK*, Opinion, 6 June 2013, para 87, available at: www.worldcourts.com/unmik_hrap/eng/decisions/2013.06.06_Milenkovic_v_UNMIK.pdf.

In its Resolution 1244 of 10 June 1999, the UN Security Council stressed its objective to create "substantial autonomy and meaningful self-administration in Kosovo"[291] through the deployment of the UN Interim Administration Mission in Kosovo (UNMIK) after the end of NATO's eleven-week campaign against Yugoslav and Serbian armed forces. Although the Resolution did not clearly define whether State sovereignty over the territory of Kosovo was entirely transferred to UNMIK, it listed a series of "main responsibilities"[292] of the international civil presence in the region: from "basic civilian administrative functions"[293] to the facilitation of "a political process" to determine the future of Kosovo's status; from the economic support for the reconstruction of the post-war society to the maintenance of "civil law and order". UNMIK forces were also in charge of appointing and removing international judges and prosecutors, who were placed in the courts of Kosovo with the aim to ensure ethnically unbiased court rulings. Therefore, it is evident that although UNMIK was deployed as a peace-related UN mission, its mandate reached far beyond guaranteeing the absence of an armed conflict: the international forces being granted wide-ranging powers in all fields of society, UNMIK functioned as the "surrogate State" in Kosovo from both a legal and political point of view[294] and undertook what has often been defined as the UN largest and most challenging mandate in the field of territorial administration.

One of UNMIK's most important responsibilities mentioned in Resolution 1244 consisted in "protecting and promoting human rights", even though the text did not go into details nor explained who should be protected and from whom; it did not mention the best strategies and mechanisms to pursue this fundamental objective either. The numerous recommendations issued by international human rights groups and NGOs stressed the importance of effectively protect human rights in the region but without specifying how the protectorate should be practically implemented.[295] Support in monitoring the human rights situation in the region also continued to be provided by the UNHCR, although it left Kosovo and the UNMIK's four-pillar structure in 2000, as well as by the Office of the High Commissioner for Human Rights (OHCHR) and the Council of Europe (CoE). Within the UNMIK, in particular, it was the OSCE mission in Kosovo that was in charge of monitoring, protecting and promoting human rights (Pillar III). This objective represented a top priority for the

[291] UN Resolution 1244(1999), Adopted by the Security Council at its 4011th meeting, on 10 June 1999, available at: https://unmik.unmissions.org/sites/default/files/old_dnn/Res1244ENG.pdf.
[292] *Ibid*, para. 11.
[293] The post-conflict situation UNMIK found at its arrival in Kosovo was so serious that it required *all* administrative functions to be carried out by the international forces, making it the only legitimate authority in Kosovo together with NATO's KFOR military forces. Consequently, this situation has opened a discussion on the responsibility for the crimes and human rights abuses committed in the aftermath of the Kosovo's war, involving in particular the KLA forces.
[294] Jonas Nilsson, "UNMIK and the Ombudsperson Institution in Kosovo: Human Rights Protection in a United Nations 'Surrogate State'", in *Netherlands Quarterly of Human Rights*, Vol. 22/3, 1 September 2004, pp. 389-411.
[295] See, for example, Amnesty International, "Amnesty International's recommendations for the protection of human rights in post-conflict peace building and reconstruction in Kosovo", 3 June 1999, available at: https://www.amnesty.org/en/documents/EUR70/091/1999/en/ (Accessed: 19 November 2020).

UNMIK international forces in a post-conflict region where social fragmentation, insecurity, instability and political polarisation were still widespread and difficult to eradicate, often leading to serious human rights violations against the other ethnic groups.

UNMIK's commitment to protect the population of Kosovo was also reiterated in the establishment of an Ombudsman Institution in Kosovo (OIK)[296], whose mandate aimed to "promote and protect the rights and freedoms of individuals […] and to ensure that all persons in Kosovo are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards, in particular the European Convention on Human Rights and […] the International Covenant on Civil and Political Rights." UNMIK Regulation No. 2000/38 provided the Ombudsperson with a mandate to investigate complaints against UNMIK and local public administration. After the OIK was placed under the responsibility of Kosovo's local administration, this task was undertaken by the newly-established Human Rights Advisory Panel (HRAP):[297] under Article 1.2 of Regulation No. 2006/12, the HRAP was in charge of examining "complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of [the] human rights" set out in international standards applicable in Kosovo.

A regulation issued on 27 October 2000 by the Special Representative of the Secretary General for Kosovo (SRSG)[298] – the head of the mission in charge of exercising legislative and executive authority and responsible for the administration of justice – provided that "the law in force in Kosovo on 22 March 1989" should be implemented in the province of Kosovo as long as it did not conflict with the regulations promulgated by the SRSG.[299] However, in case of legal gaps, the law applicable after this date could also be applied provided that it was not discriminatory and it complied with internationally recognised human rights standards and principles. Similarly, section 2 of Regulation No. 1/1999 confirms the political commitment to human rights standards:

> "In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status."

[296] UNMIK Regulation No. 2000/38 of 30 June 2000 on the establishment of the Ombudsperson institution in Kosovo.
[297] UNMIK Regulation No. 2006/12, "On the Establishment of the Human Rights Advisory Panel."
[298] UNMIK Regulation No. 2000/59 Amending UNMIK Regulation No. 1999/24 "On the Law Applicable in Kosovo", UNMIK/REG/2000/59, 27 October 2000, Section 1.1.
[299] At times, the Regulations signed and issued by the SRSG were also given retroactive force. The Regulations regarded a wide range of subjects, such as banking issues, pensions and taxes, the organisation of the judiciary, criminal investigations, etc.

Moreover, the Constitutional Framework for Provisional Self-Government, adopted on 21 May 2001 by the Special Representative of the Secretary-General for Kosovo (SRSG) Hans Haekkerup, which established the main structure for the future self-governance of Kosovo, clarified the direct applicability of the human rights standards in territory of Kosovo,[300] reserving certain "reserved powers" and the ultimate authority for UNMIK alone despite giving broad competences to the self-government institutions, the elected Assembly, and the President and government of Kosovo.[301] Finally, it must be remembered that the UNMIK forces were acting on behalf of the UN in Kosovo, and therefore were automatically bound by the respect for the international standards provided by the UN Charter, including the protection of human rights, which is a core principle enshrined in the values of the UN. This was especially true considering UNMIK's role as a "surrogate State" in Kosovo.

All these elements considered, it is evident that the UNMIK forces were expected to provide the Kosovar population, whether ethnic Albanian, ethnic Serb, or any other ethnicity, with non-discriminatory, effective and long-term protection from human rights abuses and violations, fully consistent with international standards, and to monitor and report them. Moreover, UNMIK was also expected to ensure the protection of refugees and other displaced persons who wanted to return to Kosovo after the end of the conflict and to provide them with all the necessary information regarding the situation of human rights in their area of origin (i.e. availability of houses and other infrastructures, danger of land mines, potential presence of unexploded munitions, etc.). The analysis and assessment of the best strategies and mechanisms to be implemented in order to purchase these ambitious and crucial objectives were obviously in the hands of UNMIK itself.

However, what clearly emerges from the reports by several NGOs and human rights bodies and activists, as well as from the numerous interviews with witnesses and victims of human rights violations, is that in exercising its wide powers, UNMIK had to face an increasing tension between the demands of security within Kosovo, on the one hand, and the respect for human rights, on the other: whilst UNMIK made extensive commitments to protect human rights in the region and achieved positive results in its extremely broad mandate,[302] it was not able – or willing – to effectively comply with the human rights standards provided by international instruments and bodies. The UN

---

[300] There had been an intense discussion on whether the international declarations and conventions mentioned in Regulation No. 1999/24 (i.e. UDHR, ICCPR, CERD, ICRC, etc.) were directly applicable and had direct effect in the territory of Kosovo or not. Consequently, the Constitutional Framework made an important progress in clarifying the applicability of international human rights standards in the region, although it did not extend to the international officials acting on behalf of UNMIK, only referring to the future provisional institutions of self-government.

[301] Constitutional Framework for Political Self-Government, 21 May 2001, Chapter 3.3. available at: http://www.regione.taa.it/biblioteca/statuti/Kosovo.pdf.

[302] Just to mention few examples, much of Kosovo's administration was undertaken by the local Provisional Institutions of Self-Government (PISG); numerous infrastructures that had been seriously damaged or destroyed during the 1998-1999 conflict, including judicial courtrooms and offices, were rebuilt; security was guaranteed through the deployment of the UN Civilian Police (CIVPOL) and Kosovo Police Service (KPS).

international mission's commitment in ensuring human rights protection rarely matched the actual and effective enforcement of the international standards, not just in the aftermath of the conflict but during the whole period of its mandate in Kosovo. Between July 1999 and November 2008, not only did UNMIK fail in conducting prompt, impartial and independent investigations into the enforced disappearance of ethnic Albanians by Serbian police and paramilitary forces, and in preventing the abduction of Kosovo Serbs and individuals belonging to the other minority ethnic groups by members of the KLA and other human rights violations,[303] but it was also accused by the HRAP[304] and several NGOs[305] of violating itself the Kosovar population's human rights in the years of its protectorate in the region.

During the one-decade long UN administration of Kosovo, the OIK before and the HRPA after 2006 evolved into Kosovo's primary human rights defenders: they played a fundamental role in receiving individual complaints as "the only human rights mechanism in existence that deals specifically with human rights violations allegedly committed by or attributable to a United Nations field mission".[306] Consequently, UNMIK's exercise of public power in Kosovo was carefully scrutinised against the international standards guaranteed by the ECHR[307] and the ICCPR. During their mandate, both the OIK and the HRAP received hundreds of complaints,[308] most of which were related to alleged violations of the right to life (which included UNMIK's failure in effectively investigating into numerous cases of murder and enforced disappearances), right to a fair trial (i.e. lack of access to court, undue delays in criminal and civil proceedings), right to liberty (i.e. police entry without arrest warrant), right to employment (i.e. unlawful dismissals) and right to an effective remedy (especially for the individuals who had been ill-treated by the UNMIK police forces). In almost all the cases, the complaints highlighted the shortcomings and failures of both the international and local administration in effectively and impartially carrying out the investigations, stressed UNMIK's lack of cooperation – especially in cases involving the UNMIK police and its refusal to

[303] According to the 2009 report by Amnesty International "Burying the past. 10 years of impunity for enforced disappearances and abductions in Kosovo", an estimated 800 Kosovo Serbs, Roma and members of other minority groups were abducted by members of the KLA during and in the aftermath of the 1998-1999 conflict. Report available online at: https://www.amnesty.org/download/Documents/EUR700072009ENGLISH.PDF.

[304] See, for instance, the HRAP's 2015/2016 report, available at: https://assets.documentcloud.org/documents/2993333/U-N-Panel-s-Report-on-Kosovo.pdf.

[305] See, for instance, Amnesty International, "UN must make up for failure to investigate Kosovo missing", 27 August 2013, available at: https://www.amnesty.org/en/latest/news/2013/08/un-must-make-failure-investigate-kosovo-missing/ (Accessed: 21 November 2020).

[306] Alexander Momirov, "Local impact of 'UN accountability' under international law; the rise and fall of UNMIK's Human Rights Advisory Panel", in *International Peacekeeping*, 19:1, 2012, pp. 3-18, p. 9.

[307] A strong collaboration between the HRAP and the ECtHR was established after 2006.

[308] Even though the HRAP could not order compensations to the victims of human rights violations or their relatives, it played a crucial role, since it could determine whether UNMIK forces were responsible for alleged violations of human rights. The case being, it could provide the SRSG with recommendations regarding compensation or other specific relief.

make files accessible[309] – and aligned with the OSCE human rights division's findings and reports[310] asserting an active involvement of the KLA and, after its demilitarisation, of the Kosovo Protection Corps (KPC) in committing human rights abuses. In many cases, the Ombudsperson criticised UNMIK's length of procedure as well as the frequent practice of keeping individuals in detention despite a decision ordering their release had already been issued. Some Kosovar citizens were also unreasonably prevented from the possibility to run for political and institutional positions.[311] Despite the OIK's strong commitment for and crucial role in bringing to light the human rights violations that were occurring in Kosovo, it is not possible to consider it an effective remedy in the sense of the international human rights standards, since it could only issue recommendations to the local authorities, which were therefore not binding.

As far as the HRAP is concerned, it was intended to fill the structural accountability gap arising from the inability of Kosovar individuals to hold UNMIK accountable for the crimes committed by its personnel, and the limits of its temporal jurisdiction from 23 April 2005 onwards did not prevent it from extensively assuming jurisdiction with respect to UNMIK's allegations of human rights violations. Despite the advisory nature of its opinions and its weak independence,[312] the HRPA chose to adopt a proactive and determined approach in carrying out its mandate, which was especially evident in its investigations of the minority rights violations. Although the international protectorate in Kosovo was established in circumstances in which it was clear that the main priority would be to guarantee cooperation and harmony between the different ethnic groups, while protecting their rights without any distinction,[313] from 2006 to 2017 more than 250 complaints were filled by the relatives of missing persons, mainly from Kosovo Serbs believed to have been abducted by the KLA. The complainants always claimed that UNMIK had failed to investigate the abduction and murder of their relatives and accused the international bodies of the UN international forces (i.e. UNMIK police, the SRSG and the PISG) of committing unlawful acts and crimes.[314] Even where UNMIK and KFOR troops were present, they often proved ineffective and outnumbered to protect the members of minority communities. In many cases, such as on the occasion of the onslaught that occurred in mid-

[309] OIK, "Forth annual report 2003-2004", 12 July 2004, p. 16, available at: https://upload.wikimedia.org/wikipedia/commons/8/86/Kosovo_Ombudsperson_of_Kosovo_Fourth_Annual_report_2003_%E2%80%93_2004.pdf (Accessed: 21 November 2020).
[310] OSCE, *Supra note 97*.
[311] Jonas Nilsson, *Supra note 294*, p. 399.
[312] According to Human Rights Watch, "since the panel is created by UNMIK regulation and its procedures are subject to amendment by UNMIK, it is hard to see how the panel can be considered independent." See Human Rights Committee, 87th Session, "Considerations and reports submitted by States Parties under Art. 40 of the Covenant, Concluding observation of the Human Rights Committee, Kosovo (Serbia)", UN Document, CCPR/UNK/CO/1, 14 August 2006, para. 10. Available at: https://digitallibrary.un.org/record/592297 (Accessed: 25 November 2020).
[313] OSCE/UNHCR, Preliminary Assessment of the Situation of Ethnic Minorities (First Assessment), Pristina, 1999.
[314] See, for instance, HRAP, *Brahim Sahiti v. UNMIK*, Case No. 03/08, 10 April 2008, Decision on admissibility, available at: http://www.worldcourts.com/unmik_hrap/eng/decisions/2008.04.10_Sahiti_v_UNMIK.pdf.

March 2004 led by the Kosovo Albanian extremists against minority Serb, Roma and Ashkali communities, the international forces' intervention was too late, and therefore allowed organised and widespread inter-ethnic violence to continue. In just two days, 19 people had been killed, 954 injured and 730 houses burned or damaged,[315] and the security institutions in Kosovo risked to face a total collapse. UNMIK's failure was also visible in that the specific bodies focused on minorities that it established (i.e. Civil Affairs Minority Officers, Office of Returns and Communities, Advisory Board on Communities[316]) did not succeed in integrating and coordinating minority policies, and therefore in protecting the rights of minorities.

As reported by several NGOs, not only did inter-ethnic violence continue to represent a main concern for the international community, but also the practical strategies and mechanisms that the UNMIK forces adopted to protect human rights and to improve the "deplorable situation of certain groups" in Kosovo, such as the Serb minority, Roma, Bosniaks and Gorani. In many cases, in fact, the UNMIK and KFOR forces decided to apply ethnic segregation in enclaves with the purpose of physically protect all ethnic groups from the potential abuses and attacks of the others; however, no major attempt was made, especially in the aftermath of the conflict, in order to prevent ethnic cleansing, nor to identify those who had perpetrated these heinous crimes. Consequently, these strategies only led to additional social divisions and increasing suspects among the already fragmented population, with daily-basis intimidations towards the members of the other ethnic groups and frequent request for UNMIK to dismantle them.[317] By allowing verbal and physical intimidations and violence to continue, UNMIK and KFOR somehow showed they tolerated the ethnic cleansing and ethnic division of Kosovo. It is not a coincidence that the arrival of the international forces in Kosovo saw a new mass exodus from and displacement within Kosovo of the minorities, many of which became permanently displaced and ended up in overcrowded displacement camps, where even their basic human rights were not guaranteed. Furthermore, both the NATO-led KFOR troops and the UNMIK international civilian police were unsuccessful in providing the minorities with effective protection on the occasion of the frequent rioting that took place during their administration of Kosovo, often leaving besieged Serbs and other minority groups at the mercy of large Kosovo Albanian crowds for hours before intervening and responding.

---

[315] UN Security Council press release (SC/8056), 13 April 2004, "March violence in Kosovo 'huge setback' to stabilization, reconciliation, under-secretary-general for peacekeeping tells security council", available at: www.un.org/press/en/2004/sc8056.doc.htm (Accessed: 24 November 2020).

[316] Cleve Baldwin, *Supra note 127*, p. 13.

[317] Osservatorio Balcani e Caucaso – Transeuropa, "UNMIK: Necessario smantellare le enclaves", 13 May 2020, available at: www.balcanicaucaso.org/aree/Kosovo/UNMIK-necessario-smantellare-le-enclaves-20555 (Accessed: 2 December 2020).

Despite HRAP crucial role as a pioneer and only institution to which people in Kosovo could complain about and report unlawful acts and human rights abuses committed by UNMIK, the promulgation of UNMIK administrative directive 2009/1 reduced and limited its powers.[318] In many instances, the UNMIK forces against whom complaints about alleged human rights violations had been filled have not been arrested nor prosecuted for two main reasons: the interplay of international and local legal norms – which had to be selected and established by UNMIK after its arrival in Kosovo[319] and that, in many cases, did not provide a clear legal framework within which the responsibilities and powers of the international personnel could be addressed – and the immunity from any legal actions[320] that the UNMIK forces were granted through Regulation No. 2000/47[321] "not for their personal benefit, but for the benefit of the Organisation".[322] Even though the Nuremberg and Tokyo Tribunals, the ICTY and ICTY, the ICC and several new hybrid courts all contain "express provisions to the effect that the official capacity of an individual shall in no case exempt them from criminal responsibility",[323] the situation in Kosovo raised several concerns, especially considering that UNMIK was operating in Kosovo as a "State-like entity"[324] and therefore those responsible for human rights violations were expected to be arrested and prosecuted despite their position. The climate of impunity contributed to undermine public confidence in the actions of the international institutions that were administrating Kosovo, increasing the desire for independence of the Kosovar population: how could human rights be entrenched in the Kosovo's society and administration, if the

[318] UNMIK Administrative Direction 2009/1, 17 October 2009, available at: https://media.unmikonline.org/hrap/Documents%20HRAP/AD2009-01.pdf (Accessed: 22 November 2020).
[319] At the beginning of UNMIK administration in Kosovo a clear and well-established set of legal rules within which it could operate did not exist. Consequently, the strategy adopted by the legal personnel of the international mission consisted in a combination of laws from the previously applicable legal system (namely the law in force in Kosovo on 22 March 1989), new laws, and amendments of the laws adopted by the PISG of Kosovo. This system – at the top of which were the regulations issued by the SRSG followed by the internationally recognized human rights standards – was strongly criticised by several human rights bodies, such as the CoE Venice Commission, mainly for its complexity.
[320] The UN General Convention on Privileges and Immunities grants the UNMIK personnel, as a subsidiary of the UN, with "immunity from every form of legal process", although it can be waived in specific cases through a decision of the UN Secretary General. Consequently, when a waiver of immunity is denied, there is an increasing risk that the right to an effective remedy cannot take place. Nowadays, in fact, the relationship between the IGO personnel's immunity and human rights violations is particularly complex, as demonstrated by the *Stitching Mothers of Srebrenica v. Netherlands* case, App. No. 65542/12 before the European Court of Human Rights(ECtHR). On 11 June 2013, a Chamber of the ECtHR found that the Dutch courts' grant of immunity to the UN battalion's personnel in the case brought by and on behalf of the relatives of the individuals killed by the Serbian forces in Srebrenica in 1995 did not run afoul of Articles 6 and 13 of the ECHR, which guarantee the right to access to a court and the right to an effective remedy before a national authority if any Convention right is violated. Therefore, the Court declared the application inadmissible. This decision was welcomed by a harsh criticism especially by the human rights activists who claimed that, once again, the Court's invocation of the UN personnel's immunity seemed to justify the impunity for evident violations of human rights law. See Jacob K. Cogan, "Stitching Mothers of Srebrenica v. Netherlands", in *The American Journal of International Law*, Vol. 107, No. 4 (October 2013), pp. 884-890 and Dominique Carreau, Fabrizio Marrella, *Supra note 51*, p. 468.
[321] UNMIK Regulation No. 2000/47 "On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo", 18 August 2000, Section 3.1.
[322] Malcom D. Evans, *Supra note 191*, p. 371.
[323] Malcom D. Evans, *Ibid*, p. 377.
[324] Alexandar Momirov, *Supra note 302*, p. 6.

only legitimate authorities, namely the UNMIK and KFOR personnel and their locally recruited staff, were protected by immunities and privileges,[325] and could therefore operate above the law? At the same time, how could the international personnel effectively protect human rights be if the applicable law was often unclear or too vague? Accountability for crimes and transparency in decision making and the rule of law are the key elements of good governance and they also prove to be essential to the enjoyment of human rights. This was not, however, the case of Kosovo during UNMIK's protectorate.

So, despite the UNMIK international administration in post-conflict Kosovo was organised "with many good intentions"[326] and the protection of and respect for human rights of all ethnic groups was one of the leading principles and priorities of the international community, ethnic violence and abuses against the other groups have continued to persist in the region, as well as a climate of uncertainty of the legal framework. What is striking about the post-conflict context and international protectorate in Kosovo is that neither UNMIK nor KFOR was willing or able to effectively take action to protect the population from human rights abuses and violations. UNMIK was severely understaffed, particularly in terms of policing, to fully cover all the tasks that it had been assigned to it by Resolution 1244 and its mandate was extremely broad, as the post-conflict situation in Kosovo was much more dramatic than initially expected and therefore required a new reconfiguration of every aspect and sector of socio-economic, administrative and cultural life. At the same time, the NATO-led Kosovo Force, supported by the locally recruited Kosovo Police Service (KPS), failed "catastrophically"[327] in ensuring a climate of security in the region, protecting the minorities and promoting their integration in a post-conflict context (see chapter 3.2.). Several NGOs and human rights activists operating in Kosovo have talked about a "near-complete collapse" of Kosovo's international institutions,[328] based on numerous interviews with victims of human rights violations and security officials: violations of property rights, allegations of arbitrary detention, sexual abuses and other criminal misconducts, and lack of intervention to protect the minorities have raised many concerns on the international personnel's accountability in an already fragile and fragmented scenario.

[325] As highlighted by Marcus G. Brand ("Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation", in *Nordic Journal of International Law*, 70:2001, p. 478), not only did the immunity from local jurisdiction in respect of any civil or criminal act committed in the territory of Kosovo concern the SRSG, his Deputies and the Police Commissioner, but also other high-ranking officials appointed "from time to time" by the SRSG. It is evident that this formulation was too vague and could therefore extend immunity also to many other "public figures" responsible for human rights abuses.
[326] Marcus G. Brand, *Ibid*, p. 488.
[327] Human Rights Watch, "Kosovo: Failure of NATO, U.N. to Protect Minorities", published online on 26 July 2004, available at: www.hrw.org/news/2004/07/26/kosovo-failure-nato-un-protect-minorities (Accessed: 24 November 2020).
[328] Human Rights Watch, *Supra note 11*.

### 3.1.2. EULEX: from hope to disappointment

UNMIK's responsibilities for the rule of law ceased in December 2008. Shortly before Kosovo's unilateral declaration of independence on 17 February 2008 – which emphasises the centrality of human rights in accordance with international standards from the very beginning – the European Union Rule of Law in Kosovo (EULEX) was launched as the largest civilian mission under the Common Security and Defence Policy (CSDP) of the EU[329] to "monitor, mentor and advise" (MMA)[330] the Kosovar institutions and authorities in all areas related to the rule of law, with high priorities such as addressing immediate concerns regarding the protection of minority communities and fighting against organised crime and corruption. EULEX's mandate also provided that the mission should ensure the independence of the judicial system from any political interference and the investigation of war crimes, organised crime, terrorism and other serious crimes, such as financial crimes and inter-ethnic crimes (the so-called executive powers).[331] Still, the notion of human rights is not present in the main EULEX-related official documents.

So, in a context characterised by the evident failure of UNMIK in effectively carrying out investigations over the post-conflict crimes and in preventing inter-ethnic violence and human rights violations to occur, EULEX took over UNMIK's residual powers[332] policing, prosecutorial and judicial functions to ensure that cases of war crimes and inter-ethnic crimes could be "properly investigated, prosecuted, adjudicated and enforced, according to the applicable law".[333] Not only is Kosovo the largest EU civilian mission, but also the first integrated operation involving staff for police, rule of law and customs and border patrol.

In 2008, after ten years of international protectorate – which had created a climate of impunity for those who had committed human rights violations during the UNMIK presence in Kosovo and had failed in preventing the establishment of Serbian and other minorities' enclaves unwilling to cooperate with the Pristina government – EULEX inherited 1,187 war crimes files and almost 2,000 other files relating to missing persons,[334] and committed not to repeat UNMIK's mistakes. Not only had the deployment of the EU mission been included in Kosovo's declaration of independence

[329] It counted almost 3,000 staff at the peak of its activities.
[330] EU Council 2008/124/CFSP, "Council Joint Action on the European Union Rule of Law Mission in Kosovo." 4 February 2008, Article 3, available at: http://www.eulex-kosovo.eu/en/info/docs/JointActionEULEX_EN.pdf.
[331] Articles 3(c) and 3(d) , Council Joint Action 2008/124/CFSP, 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008E0124 (Accessed: 28 November 2020).
[332] During its mandate in Kosovo, UNMIK had gradually transferred some of its powers and functions to the newly created local institutions of self-government. In the wake of Kosovo's unilateral declaration of independence, the residual powers of UNMIK (namely police, justice and customs) were transferred to EULEX.
[333] EU Council, *Op. cit.*
[334] Amnesty International, "'Wounds that burn our souls.' Compensation for Kosovo's wartime rape survivors, but still no justice", available at: https://www.ecoi.net/en/file/local/1421351/1226_1515575553_eur7075582017english.pdf.

(paragraph 5), but it was also accepted and welcomed by Serbia provided that the Ahtisaari plan would not be implemented through EULEX and that the mission would keep a "neutral status".[335]

When the mission was launched, the former EU High Representative for the Common Foreign and Security Policy (CFSP) Javier Solana contributed to create high expectations among both the European and Kosovar citizens during his speech:

> "The mission will be crucial for the consolidation of rule of law in Kosovo, and furthermore, the development of rule of law and strengthening of multi-ethnic institutions will be to the benefit of all communities in Kosovo. The mission is proof of the EU's strong commitment towards the Western Balkans and it will contribute to the enhancement of stability in the whole region."[336]

Although most of the Kosovar population, especially those who strongly supported Kosovo's adhesion to the EU, was expected to welcome EULEX with a feeling of trust and hope, the mission soon started raising widespread contestations, regardless of the different ethnic origin of the Kosovar citizens and from a broad range of actors. The aversion towards the EULEX mission – which took the form of both demonstrations and protests, and public criticism through the mass media – was dual in nature: on the one hand, it laid on the perception of a violation of sovereignty by EULEX, and on the other on the perception of its lack of effectiveness, especially after the failure of the UNMIK mission in Kosovo.[337]

As far as sovereignty is concerned, the population of Kosovo perceived the EU mission as an attempt of an external entity to hinder the local institutions' exercise of State's sovereignty, although the EU itself had presented it as a mission offering advice and support to the government of Kosovo in the political process and contributing to the development and consolidation of respect for human rights and fundamental freedoms in Kosovo. However, as it usually happens during international peacebuilding operations, in order to build institutions and structures that are needed for a sovereign State to operate, the external forces are obliged to compromise a State's sovereignty.[338] The contestations were however organised on an ethnic level.

---

[335] The Serbian government welcomed the EU mission as "a great diplomatic victory", underlying both its neutral status and the fact that it was about to be deployed in accordance with a UN decision, rather than according to the Ahtisaari plan, which had envisaged independence for the former Serbian province. See *Balkan Insight*. "UN Approves EU Kosovo Mission", 27 November 2008, available at: https://balkaninsight.com/2008/11/27/un-approves-eu-kosovo-mission/ (Accessed: 26 November 2020).

[336] Council of the European Union, Javier Solana, "EU high representative for the CFSP, announces the start of EULEX Kosovo" (S400/08), Brussels, 5 December 2008, available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/esdp/104525.pdf.

[337] Ewa Mahr, "Local contestations against the European Union Rule of Law in Kosovo", in *Contemporary Security Policy*, 39:1, 2018, pp. 72-94, p. 73.

[338] Simon Chesterman, Richard B. Bilder, "The Sovereignty Paradox: The Norms and Politics of International Statebuilding", in *American Journal of International Law*, Vol. 102, pp. 405-939.

On the one hand, demonstrations and protests by a small minority of Kosovo Albanians who did not accept the presence of EULEX in their country can be explained by a strong nationalist frame deriving from their recent auto-declared independence. Two reasons can be found at the basis of their aversion towards EULEX. First, the members of the Albanian community rarely accepted EULEX's refusal to acknowledge the independence of Kosovo from Serbia and the neutral approach the EU mission had decided to adopt, especially in the north of the province – which was, and still is, a strongly contested area inhabited mainly by the Serb minority but considered by the ethnic Albanian population as part of Kosovo.[339] Second, the Albanian majority strongly contested the first war crimes proceedings against former KLA commanders,[340] who were generally regarded as the founders of Kosovo after the end of the so-called "just war" that had successfully expelled the Serbian military and paramilitary forces from the province. EULEX's decision to investigate over the crimes committed by the KLA members both during the 1998-1999 conflict and in its aftermath was based on a protocol on police cooperation that the EU had signed with the Serbian government in 2009[341] to which the Kosovo government strongly opposed holding that EULEX did not have the mandate to sign international agreements. For the Kosovar authorities, as for most of the ethnic Albanian population, this represented a clear and intolerable violation of Kosovo's sovereignty.

On the other hand, the members of the Serb community were suspicious towards the EULEX mission, which they believed was supporting Kosovo's sovereignty and independence with the final aim of bringing the north of the country under the Albanian control.[342] What emerged from several interviews carried out in the Serb communities in the north of Kosovo is that these convictions were rooted in a general misinformation about the EULEX's mandate and neutral status in Kosovo. Moreover, there was a widespread belief that the EU mission was intended to strengthen the relationship between Pristina and Brussels for a potential accession of Kosovo to the EU. The EULEX mission was also criticised for failing in protecting the minorities' rights and investigating the violence and attacks of the ethnic Albanian community against them. In the case of the Serbs, the aversion took the form of both protests and petitions, such as the "STOP-EULEX" petition launched by the Serb municipality's Assembly of Kosovo.[343] Furthermore, similarly to the aversion of the

---

[339] See, for instance, *Reuters*, "Peacekeepers and locals hurt in Kosovo riot", 12 September 2010, available at: https://in.reuters.com/article/us-kosovo-clashes-idUSTRE68B14K20100912 (Accessed: 27 November 2020); and *BBC News*, "Clashes in Kosovo's Mitrovica over bridge blockade", 23 June 2014, available at: www.bbc.com/news/world-europe-27969297 (Accessed: 27 November 2020)

[340] Ewa Mahr, *Op. cit.*, p. 82.

[341] *Balkan Insight*, "Serbia to sign protocol with EULEX", 17 August 2009, available at: https://balkaninsight.com/2009/08/17/serbia-to-sign-protocol-with-eulex/ (Accessed: 27 November 2020).

[342] Andrew Radin, "Analysis of current events: 'towards the rule of law in Kosovo: EULEX should go'", in *Nationalities papers*, 4 March 2014, Vol.42(2), pp.181-194.

[343] *Balkan Insight*, "Kosovo Serbs in petition against EULEX", 24 October 2008, available at: https://balkaninsight.com/2008/10/24/kosovo-serbs-in-petition-against-eulex/ (Accessed: 27 November 2020).

Kosovo Albanian community, the Serb minority contested EULEX's jurisdiction over the crimes committed by both ethnic groups, as provided by its mandate, pushing the EU forces in focusing on the violence and attacks perpetrated by the Kosovo Albanians.

As far as EULEX lack of effectiveness is concerned, it is important to remember that the population of Kosovo had developed a growing feeling of disappointment and hopelessness as a result of the decade-long UN protectorate's inability to effectively carry out its mandate, especially in the field of human rights: lack of security for non-Albanian communities and consequent impossibility for them to access basic public services, incapacity to prevent corruption and human trafficking, unfairness and excessive length of trials, and failure in effectively investigating into abductions and ethnic killings had also been highlighted by the CoE Venice Commission in a 2004 Opinion.[344] All these shortcomings led the local actors to draw a parallel between the work and mandate of UNMIK and EULEX from the very first months of the EU forces arrival in the region. The deployment of another mission composed of international forces risked to be as failing as the previous one, especially in a political and social scenario characterised by the increasing tensions following Kosovo's declaration of independence. EULEX's lack of effectiveness was not just a commonly widespread feeling among the population of Kosovo, it was also brought to light several times by the European Commission. In its "Kosovo 2013 Progress Report",[345] the EU Commission highlighted the existence of a general confusion with regard to responsibilities in dealing with human rights-related issues, criticised "the unsatisfactory implementation of recommendations issued by the Ombudsperson" and the mission's incapacity to enforce the "decisions remedying human rights infringements". In 2015, another report stressed that the implementation of human rights was "hindered by a lack of resources and political commitment, including at local level" and that Kosovo had witnessed "an increasing trend of incidents" targeting the Kosovo Serb community in some areas of the country, which included thefts and intimidations, leading to a widespread feeling of insecurity.[346] Moreover, in a report published on 30 October 2012, the European Court of Auditors found out that EULEX was also facing remarkable delays as well as financial and human resources problems.[347] Although these documents proved crucial to bring to light EULEX shortcomings in the protection of human rights and the prevention of their violations in the region, they did not present a strategy to effectively

[344] Council of Europe (CoE). "Opinion on human rights in Kosovo : possible establishment of review mechanisms", Opinion No. 280 / 2004, CDL-AD (2004)033, Strasbourg, 11 October 2004, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)033-e.
[345] European Commission, "Kosovo 2013 Progress Report", Brussels, 16 October 2013, SWD(2013) 416, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ks_rapport_2013.pdf.
[346] European Commission, "Kosovo 2015 Progress Report", Brussels, 10 November 2015, SWD(2015) 215, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_kosovo.pdf.
[347] European Court of Auditors, "European Union assistance to Kosovo related to the rule of law", Special Report No. 18/2012, available at: https://www.eca.europa.eu/Lists/ECADocuments/SR12_18/SR12_18_EN.PDF.

address the existing abuses nor to prevent the population for potential future ones.[348] Sharp critics also pinpointed the low prioritisation for human rights issues in the Kosovo government's agenda and a general lack of political will to cope with an evident phenomenon.

Additionally, the Kosovo population soon realised that the mission's lack of resources constituted a remarkable obstacle, hindering not only the effective protection of human rights but also the fight against the widespread and high-level corruption. It is not a coincidence that a "rampant corruption"[349] of the local authorities was generally perceived as the most concerning issue in post-independent Kosovo, a factor that together with inter-ethnic violence threatened the stability of the country, worsened the quality of democracy and diverted crucial resources from the most strategic sectors. However, as stated by Agron Bajrami, editor in chief of *Koha Ditore*, "instead of Europeanizing Kosovo, we have Balkanized EULEX": in fact, not only was EULEX often accused of focusing on other and less pressing social issues and activities rather than investing its financial and human resources in the fight against corruption, but during the twelve years of its mandate in Kosovo its credibility also happened to be at stake following allegations of "corruption, malpractice and skulduggery" of some of its senior officers.[350] These shortcomings could be recognised as the main reason leading to the emergence of a presumed lack of effectiveness of the mission, which, combined with the already existing feeling of frustration and disappointment, "ruined the mission's reputation".[351] Several corruption scandals contributed to damage EULEX public image beyond repair.

Coming back to the question of human rights protection and accountability in case of violations, similarly to UNMIK, the EULEX's obligation to apply human rights law in Kosovo arose from both its constituting documents and the applicable law in the territory of Kosovo. Under Article 3(i) of the Council Joint Action, in the fulfilment of its mandate, the EULEX personnel has to "ensure that all its activities respect international standards concerning human rights and gender mainstreaming".[352] However, in line with what applies to other international and diplomatic missions, EULEX personnel has been accorded immunity against local legal and administrative processes.[353] While local

---

[348] Branislav Radeljić, "European Union approaches to human rights violations in Kosovo before and after independence", in *Journal of Contemporary Central and Eastern Europe*, 2016, pp. 131-148, p. 142.
[349] "Rampant corruption" is the term used by Transparency international to define Kosovo's Corruption Perception Index (CPI).
[350] *Politico*, "EU courts trouble with Kosovo scandal", 17 November 2017, available at: www.politico.eu/article/malcolm-simmons-eulex-eu-courts-chaos-with-kosovo-scandal/ (Accessed: 28 November 2020).
[351] Ewa Mahr, *Supra note 337*, p. 87.
[352] Article 3(i), Council Joint Action 2008/124/CFSP, 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008E0124 (Accessed: 28 November 2020).
[353] *Ibid*., Article 10: "The status of EULEX KOSOVO and its staff, including the privileges, immunities and further guarantees necessary for the completion and smooth functioning of EULEX KOSOVO, shall be agreed as appropriate."

legislation cannot be enforced against EULEX staff members, however, they still are required to observe local legislation.

On 29 October 2009, the EU established the Human Rights Review Panel (HRRP) to review the alleged human rights violations by EULEX members in the conduct of the mission's executive mandate in Kosovo after 9 December 2008. Although the HRRP may consider complaints pertaining to alleged breaches of the most relevant international human rights instruments (UDHR, ICCPR, ECSECR, CEDAW, CERD, ECHR, CAT, CRC), it is important to remember that it is neither a judicial nor a disciplinary body: by contrast, the HRRC's mandate is only intended to verify whether or not a violation of human rights has been committed by the EULEX forces and consequently to issue non-binding recommendations for remedial actions that are not linked to compensation. Its role is therefore similar to the one of the previous OIK and HRAP during the UN protectorate.

Since the establishment of EULEX's HRRP, its reports have highlighted that the vast majority of the complaints filed against the EULEX personnel concern violations related to lack of conducting proper investigations, especially in the case murder and "enforced disappearances", unfair trial hearings and violation of property.[354] The 2020 annual report confirms that the complaints examined by the HRRP predominantly concern cases of enforced disappearances, which took place either "during and after the 1998-1999 conflict in Kosovo"[355] and which clearly violate economic, social and cultural rights of both the victims, who are deprived of all their rights and are at the mercy of their captors, and their families, who have to suffer the pain of not knowing whether their relatives are still alive or not, and in many instances have not received a compensation yet.[356] Moreover, the feeling of insecurity caused by this unlawful practice is not limited to the close relatives of the disappeared, but it also affects their community and society as a whole, especially in Kosovo, where the social bonds are very strong. As of 2020, enforced disappearances continued to represent the majority of the HRRP's pending cases and 1,640 people were still unaccounted for in Kosovo.[357] The persistent situation of impunity that still characterises the Kosovar society even two decades after the end of the bloody 1998-1999 conflict has undermined the local population feelings of trust towards

[354] All the HRRP's annual reports, from 2010 to 2020, are available at: https://hrrp.eu/annual-report.php (Accessed: 6 April 2021).
[355] Human Rights Review Panel (HRRP), European Union Rule of Law Mission Kosovo, Annual Report 2020, 1 January to 31 December 2020, available at: https://hrrp.eu/docs/HRRP%20Annual%20Report%202020.pdf (Accessed: 6 April 2021).
[356] To cope with the increasing widespread phenomenon of enforced disappearances all around the world, on 21 December 2010, the UN decided to adopt, by its Resolution 65/209, the "International Convention for the Protection of All Persons from Enforced Disappearance" (available at: www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf) and declared 30 August the International Day of the Victims of Enforced Disappearances.
[357] *EULEX-Kosovo.eu*, "'Up to 20 missing persons could be identified through DNA, if the families of all missing persons provide blood samples,' says an EU Rule of Law Mission forensic expert", 30 August 2020, available at: www.eulex-kosovo.eu/?page=2,10,1241#:~:text=August%2030%20marks%20the%20International,of%20certain%20human%20remains%20in (Accessed: 29 November 2020).

the international forces operating in Kosovo, and compounded the suffering and anguish of many Kosovar families and communities. As stated by UN Secretary General António Guterres, "under international human rights law, families and societies have a right to know the truth about what happened."[358]

One of the main reasons why EULEX has generally been considered as an unsuccessful mission, unable to cope with the problem of impunity and therefore indirectly violating the human rights of the Kosovar citizens, is related to its bad management and support of the judiciary, one of the three rule-of-law components[359] it was in charge of through the provision of MMA activities.

As already mentioned, after the NATO's intervention in 1999, the UN international forces in charge of the peacebuilding operations in Kosovo had to cope with a shortfall of a competent and trained legal personnel to administer the justice system in the region. However, despite its efforts, UNMIK's administration over the judicial sector did not bring the expected results in building up the local capacity, and therefore proved disappointing and problematic (see chapter 3.2.). When EULEX took over UNMIK's residual powers in 2008, it was in charge of improving the rule of law also to boost the economy and to stabilise the country: a fundamental precondition for doing so was the reduction of the impunity for both corruption and organised crimes, as well as for the war crimes that still remained unaccounted for, and which were seen as too sensitive and complex to be handled by local judges. In order to do so, the Kosovar judiciary needed to be independent from any political interference and multi-ethnic, in order to avoid social tensions between the different ethnic groups in the country. Nevertheless, the EU judges where often accused of failing in convicting some high-ranking Kosovo officials on charges of corruption and organised crime, and in undertaking the necessary steps to ensure an active engagement of Kosovo jurists and prosecutors in the adjudication of complex and serious crimes – most of which still remain unaccounted for. These shortcomings have therefore hindered a successful gradual transfer of competences to the Kosovo judiciary and have deeply weakened the Kosovar population's trust in EULEX for the accountability of crimes.

In conclusion, many academics and critics[360] have noticed that while EULEX has provided fundamental support to the consolidation of the rule of law institutions in post-independence Kosovo, it has only made very limited progress with the judiciary, especially for what concerns the fight against organised crime and corruption. The EU mission has also failed in effectively addressing the issue of human rights violations in the country, especially the ones of minority groups, which had

[358] UN Secretary General's message for 2020, available at: www.un.org/en/observances/victims-enforced-disappearance/message (Accessed: 29 November 2020).
[359] The other two were police and customs.
[360] See, for instance, Andrew Radin, "Analysis of current events: 'Towards the rule of law in Kosovo: EULEX should go'", in *Nationalities Papers*, 2014, 42(2), pp. 181–194. The author stresses that EULEX main functions would rather be better fulfilled by other international organisations, such as KFOR.

been victims of continuous intimidations and abuses especially in the aftermath of the war and which were still waiting for justice. It also proved unsuccessful in providing the relatives of the victims of war crimes and numerous enforced disappearances with the justice they were asking for. Consequently, since a climate of impunity is still present in Kosovo, it would be inappropriate to define EULEX as a "successful mission". Others critics[361] even believe that its presence has worsened Kosovo and should have therefore be immediately recalled. However, the failure of both international missions – namely UNMIK and EULEX – in protecting and promoting human rights and in providing the victims with justice cannot be deeply understood without analysing the weaknesses of the Kosovar judiciary, especially in the aftermath of the conflict and during UNMIK protectorate.

## 3.2. The weakness of the Kosovar judiciary

> "The security problem in Kosovo is largely a result of the absence of law and order institutions and agencies. Many crimes and injustices cannot be properly pursued."
>
> UNMIK Secretary General[362]

When UNMIK and KFOR international forces entered Kosovo in 1999, the local judicial system was "in a state of collapse". Not only did the Kumanovo Military Technical Agreement on 9 June 1999 established the withdrawal of the Serbian police, military and paramilitary forces, but it also led to the withdrawal of all the Serbian authorities, including the representatives of the judiciary and of the security forces. Kosovo was experiencing a judicial gap, since during the Serbian administration of the region the ethnic Kosovar Albanians had been systematically excluded from the legal profession. Moreover, after the deployment of the UNMIK international staff many Serbs also left Kosovo for security concerns – especially for fear of reprisals – and for the refusal to serve the newly established international protectorate. The Kosovar jurists who had worked in the judicial system during the 1990s were usually regarded as collaborators of the oppressive Serb regime, and the absence of law, police forces and order institutions and agencies had resulted in a concerning and widespread security problem in the whole region. Moreover, most of the courts and buildings used by the legal personnel had been destroyed or seriously damaged during the conflict, mainly after the

[361] Andrea L. Capussela, *State-building in Kosovo: Democracy, corruption and the EU in the Balkans*, 2015, London: I.B. Tauris & Co Ltd.
[362] Report of the Secretary-General on the UN Interim Administration Mission in Kosovo, 12 July 1999, available at: https://reliefweb.int/report/albania/report-secretary-general-un-interim-administration-mission-kosovo-12-jul-1999 (Accessed: 29 November 2020).

NATO's bombing, and Kosovo had to cope with a shortage of equipment and supplies.[363] Therefore, as a matter of priority, during the UN decade-long international protectorate, the UNMIK and KFOR international forces were tasked to rebuild a multi-ethnic and democratic judicial system for Kosovo in the aftermath of the 1999 ceasefire. When the EULEX mission replaced UNMIK after the 2008 unilateral declaration of independence of Kosovo, the newly-proclaimed independent country still lacked an efficient, trusted and impartial court system. However, in the meanwhile, the transfer of authority from the UN to the EU mission represented a significant reduction in international police monitoring of Kosovo.

Despite their claimed efforts and strong commitment, the local leaders and representatives of the civil society as well as the national and international judges and prosecutors working for the reconstruction of the Kosovar judicial system were often accused of failing in the support of UNMIK and EULEX activities for the establishment and reinforcement of the rule of law in Kosovo. In particular, the shortcomings of post-conflict administration of Kosovo and the weaknesses of the Kosovar judiciary before the 2008 declaration of independence were particularly visible, on the one hand, in the police and prosecutors' lack of professionalism in effectively investigating and prosecuting human rights violations and in protecting the victims who had suffered from serious crimes and abuses, and on the other hand, in the domestic courts inability to manage all the civil and criminal cases that they had begun to accumulate – especially after the 2004 riots and inter-ethnic violence – and to coordinate the work of local and international judges and prosecutors.

### 3.2.1. Kosovar police and prosecutors' failure in investigating human rights violations and lack of professionalism

As previously mentioned (see chapter 1), the security institutions in Kosovo have been shaped and controlled by international actors since the very end of the 1998-1999 conflict. In fact, the UN Security Council Resolution 1244 on 10 June 1999, which replaced Serbian control over Kosovo, provided that the maintenance of civil law and order, including the establishment of local police forces to protect human rights and the Kosovar population from violence and crimes would be assigned to an "international security presence", namely the 50,000 NATO-led military forces (KFOR). These security forces were mandated to collaborate with and provide support to the UNMIK international civilian police (CivPol) and the locally trained Kosovo Police Service (KPS) and Kosovo Protection Forces (KPF) in the maintenance of day-to-day security in the region. A first phase

[363] Sandra Mitchell, *Supra note 100*, p. 252.

of the UNMIK protectorate in Kosovo was characterised by the presence of local judges and prosecutors but the deployment of international police forces; a second phase by the intervention of international legal personnel with the aim of assisting local judges and prosecutors in the exercise of their functions. Nevertheless, the final purpose of the UNMIK and KFOR intervention was to gradually transfer all their tasks to local police forces, judges and prosecutors in order to allow the judicial system of Kosovo to finally achieve its independence and impartiality.

However, it is generally agreed that, in both phases, the judicial and security sectors suffered from the lack of systematic institutional development, underfunding, frequent episodes of corruption[364] and political manipulation, and lack of expertise. Consequently, both the police and the prosecutors have been accused of failing in their obligations to carry out investigations promptly, thoroughly and impartially during the UN protectorate of Kosovo, and even when admissible evidence was available, they often did not succeed in bringing the suspects to justice.

As far as the judicial system is concerned, in the very beginning, UNMIK considered the idea of bringing international jurists and legal personnel to Kosovo to fill the existing vacuum in the judicial system, with the aim of facilitating their collaboration with and support to the local judges and prosecutors who needed to be trained. However, this initial option was soon rejected, fearing that "adding international judges and prosecutors to [the Kosovars'] executive and legislative power would make them vulnerable to accusations of neo-colonialism."[365] Therefore, UNMIK first attempted to re-establish a new local criminal justice system entirely with local judges and prosecutors, who would have constituted the "Emergency Judicial System" from 30 June 1999. The newly appointed judiciary was expected to carry out fair and impartial investigations and prosecutions. Within the UNMIK structure, specific judicial bodies[366] were established by the SRSG to deal with the applications of judges and prosecutors, the administration of the courts, the development and review of legal policies and the assessment of the quality of the justice system in Kosovo.

However, numerous challenges hindered UNMIK effectiveness in the domestic judicial system from the beginning. First, the majority of the newly appointed Kosovar judges and prosecutors had no experience in the judiciary and prosecutor's office, while a small minority of those who did have some expertise in the legal field had only worked since 1989 and not during the regime of Milośevič

[364] High-ranking public administrators and members of the local and international police forces have engaged in unethical behaviours, such as taking bribes and racial discrimination during their mandate.
[365] Elton Skendaj, *Creating Kosovo: International oversight and the making of ethical institutions*. Ithaca, 2014, New York, Cornell University Press.
[366] Namely the Judicial Affairs Office, the Legal Adviser of the SRSG, the Court of Final Appeal with the powers of a Supreme Court, the Public Prosecutor's Office, the Advisory Judicial Commission and the Technical Advisory Commission on Judiciary and Prosecution Service.

in Kosovo. Nevertheless, even before this period, it would be incorrect to define the work of the legal personnel as impartial, since the Yugoslavian judiciary had never been truly and fully independent from the federation's executive. Second, not only did Kosovo count a very limited number of professionals with sufficient experience to deal with complex criminal and civil law cases and knowledge of international law and human rights law, but preserving a multi-ethnic judiciary was also an extremely challenging task, especially in a context where the growing atmosphere of fear and the numerous intimidations and threats against the legal personnel imperilled UNMIK's efforts to re-establish the rule of law. The impartial attitude of the local judges and prosecutors was particularly evident in that they tended to "over-charge" Serbs, carrying out criminal investigations and proposing detentions based on clearly insufficient evidence; by contrast, they were often criticised for "under-charging" ethnic Albanians, abandoning cases and refusing to investigate against them.[367] Third, the witnesses of human rights violations rarely accepted to report the crimes, violence and abuses they had suffered, as well as to provide the police with information that could have helped identifying and punishing their perpetrators. And since the investigations over the crimes in the aftermath of the 1998-1999 war required the testimony of witnesses, only a very limited number of cases ended with the indictment of the accused in the post-conflict period. Consequently, impunity soon began to emerge as a concerning problem undermining the UNMIK's attempt to create an independent legal system and has characterised Kosovo ever since the end of the war. The slow pace of the investigations by the judicial system and the difficulty in finding local judges and prosecutors also resulted in a high number of individuals held in pre-detention for months.

In the meanwhile, the first phase of international administration of Kosovo was characterised by the deployment of the KFOR, CivPol and the locally trained KPS and KPF forces to ensure a safe environment for both the Kosovar population and the international forces working in the region, and to oversee the process of KLA's demilitarisation as provided by the agreement signed on 20 June 1999. Notwithstanding the extensive foreign military presence in Kosovo, an ethnic cleansing of the Serbs and other minorities, as well as the destruction of hundreds of Orthodox monasteries and churches occurred in the first months of international protectorate.[368] Tensions between the different ethnic groups led to massive riots, inter-ethnic violence and murders, especially in the already divided and contested city of Mitrovica, representing a priority concern for the international security forces operating in Kosovo. On these occasions, however, KFOR, UNMIK, KPS and KPF "almost lost

[367] Michael E. Hartmann, "International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping", *US Institute of Peace*, 2003.

[368] "More than 80 Orthodox churches have been either completely destroyed or severely damaged since the end of the war. The ancient churches, many of which had survived 500 years of Ottoman Moslem rule, could not survive 8 months of the internationally guaranteed peace. Regretfully, all this happens in the presence of KFOR and UN.", from the US Congress Statement of Bishop Artemije of the Diocese of Racka and Prizren, 28 February 2000, Washington D.C.

control" of the situation:[369] they proved to be ineffective in controlling social disorders and in providing protection to Kosovo's minority communities, refusing to promptly intervene during the riots or the arson of villages in contested areas, firing tear gas into the crowds and using violence against the protestors. In a 2004 Report,[370] OSCE even claimed that:

> "The ethnic character of the violence and allegations that individual Kosovo Albanian KPS officers actively participated in the disturbances (or did not prevent the attacks taking place) may give rise to concern amongst minority communities that police investigations against alleged perpetrators will be compromised if KPS officers participate."

In the meanwhile, the riots in March 2004 clearly unveiled the weaknesses of the judiciary. As reported by OSCE,[371] evidence gathering difficulties due to impossibility of the witnesses to appear before the domestic courts and frequent contradictory statements, delays in starting the main trials and in issuing the verdicts, and failure of the courts in accounting for ethnic motive as an aggravating factor in the riots have been identified as the most evident shortcomings of a weak and unexperienced domestic judicial system.

Furthermore, Kosovars were reluctant to approach police during the early years of police reform and had the impression that the international security forces were more concerned with the protection of the international staff working in a tense post-conflict Kosovo rather than the local population's. This has often been highlighted during the numerous interviews carried out by local and international NGOs with women victims of sexual abuses, who rarely reported the abuses occurring both within and outside their family and domestic unit both to avoid social isolation, divorce or rejection from family members and for fear of not being believed. Consequently, a widespread stigmatisation, combined with the lack of recognition and reparation from authorities, has often prevented most of the women victims of conflict-related sexual violence from seeking services and justice.[372]

The tense situation characterised by inter-ethnic violence was partially overcome when one international judge and one international prosecutor were appointed in Mitrovica. This landmark step was followed by the SRSG's decision to allow international judges and prosecutors to be appointed to the Kosovar judiciary under Regulation 2000/6 of the 15 February 2000. Few months before, in

---

[369] Human Rights Watch, "Failure to Protect. Anti-minority violence in Kosovo, March 2004", 25 July 2004, available at: www.hrw.org/report/2004/07/25/failure-protect/anti-minority-violence-kosovo-march-2004 (Accessed: 6 December 2020).
[370] OSCE, "Human rights challenges following the March riots", 25 May 2004, available at: www.osce.org/kosovo/32379 (Accessed: 6 December 2020).
[371] OSCE, "Four Years Later: Follow up of March 2004 Riots Cases before the Kosovo Criminal Justice System", 3 July 2008, available at: www.osce.org/kosovo/32700 (Accessed: 4 December 2020).
[372] Council of Europe (CoE), "Mapping support services for victims of violence against women in Kosovo", 10 June 2017, available at: https://rm.coe.int/seminar-pristina-report-eng/16807316df.

December 1999, the leaders of the main parties in Kosovo[373] agreed in participating in the UNMIK Joint Interim Administrative Structure (JIAS) under Resolution 1244, which recognised the authority of the SRSG and required the dissolution of all the parallel structures in Kosovo by 31 January 2000. Initially constituted of three main bodies – Kosovo Transitional Council, the Interim Administrative Council and twenty Administrative Departments – the JIAS was expanded in the following months to include new independent institutions with specific tasks to protect human rights, assess the functioning and impartiality of the courts and make recommendations to the SRSG.

In May 2001, the new Constitutional Framework for Provisional Self-Government in Kosovo established the creation of the Provisional Institutions of Self-Government (PISG), including the President and Assembly of Kosovo, the Government, the Courts and other judicial bodies. The twenty JIAS Administrative Departments were turned into Ministries of the Government and headed by the Prime Minister of Kosovo. Most of the responsibilities in the field of judicial affairs were transferred to the PISG, except for the executive and legislative responsibilities and the power to administer and appoint officials to the judiciary that remained under the sole competence of the SRSG. Therefore, the Constitutional Framework divided responsibilities between UNMIK and PISG to develop self-government in Kosovo during the second phase of the UNMIK protectorate. From a judicial point of view, a major step concerned the establishment of the "International Judges and Prosecutors Programme",[374] which was specifically aimed at promoting the direct involvement of international legal personnel in all cases[375] related to war crimes, crimes against humanity and genocide. Local judges and prosecutors were supported and trained by the international ones: this collaboration was crucial for both categories, who could benefit one from the international judges' expertise in the legal field, and the other from the local judges' deep knowledge of the territory and of the social context of Kosovo. Not only were the international judges and prosecutors expected to assist their local counterparts with sensitive cases in an impartial way, in a context where the Serbs were often overcharged for their crimes while the Albanians undercharged, but also to raise their awareness of international human rights standards in a context that was still characterised by evident serious violations of human rights law. It was because of this collaboration of local and international judges and prosecutors that the Kosovar courts under UNMIK have sometimes been defined as "hybrid courts":[376] never before had international judges or prosecutors been appointed to assist their

[373] The Democratic League of Kosovo (LDK), the Kosovo Democratic Progress Party (PPDK) and the United Democratic Movement (LDB).
[374] UN Regulation 2000/6, "On the appointment and Removal from Office of International Judges and International prosecutors", 15 February 2000, and Regulation 2000/64 "On assignment of International Judges/Prosecutors and/or Change of Venue", 15 December 2000.
[375] The cases involving high-ranking officials were however tackled by the ICTY.
[376] John Cerone, Cleave Baldwin, "Explaining and Evaluating the UNMIK Court System", 28 January 2003, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647211 (Accessed: 2 December 2020).

counterparts in operating within a judicial system under existing law and procedure. Regulation 2000/64 "On Assignment of International Judges and Prosecutors and Change of Venue", adopted on 15 December 2000, even provided for a method to ensure the majority of international control of voting under the control of the SRSG.

Many efforts were also made to increase the representation of ethnic minorities in the Judiciary by opening additional court liaison offices in the areas inhabited mainly by the Serb communities, such as the north of Kosovo, even though Serbs judges and prosecutors were rarely willing to participate in the JAIS system. Between 2005 and 2008, new judicial bodies were established by UNMIK to implement legislation in the field of justice, to recruit, appoint and train the judges, to make recommendations to the SRSG, to investigate over the most serious crimes and to manage both local and international legal cooperation.[377]

### 3.2.2. Shortcomings of domestic courts and trials

The vast majority of the individuals accused of having committed war crimes and human rights abuses during the 1998-1999 conflict either left Kosovo after the war or were prosecuted by the ICTY when at the highest positions of the chain command. However, a few suspects[378] remained in Kosovo, where they were investigated and prosecuted locally before domestic courts. In the aftermath of the conflict, as well as during the period of the UNMIK protectorate of Kosovo, the domestic courts opened an increasing number of new civil and criminal cases, many of them related to inter-ethnic hatred and violence between the different ethnic groups constituting the population of Kosovo. Since the number of cases continued to increase dramatically, especially due to the broad subject matter jurisdiction of domestic courts and beyond their capacity, several jurists and academics considered the idea of establishing a Kosovo War and Ethnic Crimes Court (KWECC) with a specific mandate to prosecute politically sensitive and ethnically motivated war crimes committed during the conflict and its aftermath. However, this option was soon abandoned and the court never materialised, leaving the domestic courts, composed first of local attorneys and then of both local and international ones under the International Judges and Prosecutors Programme, to deal with a backlog of cases that it was clearly not able to handle. According to the EU Commission, in 2007, one year before the end of the UNMIK protectorate in Kosovo, more than 50,000 civil cases and 36,000 criminal cases were still

[377] A new Ministry of Justice, the Kosovo Judicial Council, the Legal Aid Commission, the Kosovo Special Prosecutor's Office, the Office of the Disciplinary Council and the Judicial Audit Unit.
[378] According to Human Rights Watch, the exact number is very hard to determine, since many of them succeeded in escaping the hospitals and detention facilities and were never found again. See *Supra note 11*, p. 483.

pending.[379] The accumulation of cases negatively affected the domestic courts' ability to spend an appropriate amount of time for each case and verdict preparation, research and drafting. Consequently, this situation led to frequent procedural errors, such as the failure in giving some crucial witnesses the possibility to attend the trials and to testify the violence they had personally witnessed, especially in the case of Serbian defence witnesses, the lack of well-reasoned arguments when accusing an indicted as well of citations to relevant case law, and an insufficient allocation of resources for judges and prosecutors in charge of trying war crimes cases.[380] A consistent number of cases was delayed in the judicial system for years while others had to be dismissed due to improperly collected evidence, as brought to light by the Humanitarian Law Center.[381] Moreover, most of the local judges and prosecutors were used to holding their hearings in their private offices with the parties, therefore preventing the public to attend them.[382] This was an evident violation of the right of the indicted "to a fair and public hearing by a competent, independent and impartial tribunal established by law."[383]

Hampering the work of the domestic courts was also the unwillingness of the local population who had suffered from war crimes and human rights abuses to testify. This is especially for minority groups, since the domestic courts were mainly composed of ethnic Albanian citizens who were considered and often publicly accused to be impartial,[384] and for the victims of crimes related to sexual violence – who feared the reject from their family and community and in most cases felt guilty for the abuses they had suffered from. "The justice system was even discouraging them to report the crimes to the police," stated Mr. Musaj, and "even though, in some cases, the victims succeed in recognising the perpetrators, the entire process failed due to procedural and administrative problems of the national justice system. This was obviously discouraging the others survivors of sexual violence to report the violence and abuses they suffered." Moreover, several NGOs – such as the KRCT – have reported the evident lack of expertise of the judges working in the domestic courts in dealing with cases of sexual violence perpetrated against Kosovar women both during the war by the parties involved in the conflict and by the NATO forces immediately after their arrival in 1999. Very few

[379] Commission staff working document, "Kosovo under UNSCR 1244/2007 - Progress report accompanying the communication from the Commission to the European Parliament and the Council. Enlargement strategy and main challenges 2007-2008", SEC(2007) 1433, Brussels, 6 November 2007, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2007/nov/kosovo_progress_reports_en.pdf, p. 12.
[380] OSCE Mission in Kosovo, Legal Systems Monitoring Section (LSMS), "Kosovo's War Crimes Trials: A Review," September 2002, available at: www.osce.org/kosovo/12549 (Accessed: 3 December 2020).
[381] Humanitarian Law Center, "Transitional justice report: Serbia, Montenegro and Kosovo: 1999-2005, 27 June 2006.
[382] Tristan Dreisbach, "An eye on justice: monitoring Kosovo's courts, 2008–2014", Princeton University, March 2015, available at: https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/TD_CitizenMonitoring_Kosovo.pdf.
[383] ICCPR, Article 14(1).
[384] In reality, some Kosovan Albanian judges and prosecutors clearly showed bias against Serbs after a long decade characterised by continuous oppression, discrimination, baseless arrests, physical and psychological abuses, killings and enforced disappearances and then genocide, war crimes and crimes against humanity during the 1998-1999 conflict.

limited attempts were made to seek any international judges and prosecutors with a specific expertise and direct experience in sexual or gender-based violence. Additionally, the local judges and prosecutors collaborated with and were supported by an international legal and judicial personnel who was often believed to be pro-Albanians. Overall, the execution of the judgements issued by the domestic courts remained very weak and both the judges and prosecutors and their families were victims of increasingly more frequent intimidations and threats.

Notwithstanding the presence of Resolution 2000/64, under which local judges and prosecutors were theoretically supposed to work with their international counterparts in all cases involving war crimes, genocide or crimes against humanity, the collaboration between local and international legal staff in domestic courts was often disappointing and criticised. Despite the training of the local judges and prosecutors, almost all domestic war crimes trials were handled exclusively by international legal personnel, sometimes in collaboration with the ICTY in case of international crimes, mainly due to the lack of expertise of the local legal personnel to handle complex crimes. Moreover, the international judges and prosecutors did not limit their activity to criminal law cases, but they were also often responsible for cases involving inter-ethnic crimes, organised crime and corruption at the national level.

The critics and accusations by several NGOs and human rights activists also concerned the unclear criteria that were used to appoint the international legal staff.[385] Although it had been agreed that the candidates should have had a long experience (at least ten years) as legal professionals for both criminal and civil law cases in their home jurisdiction and be familiar with international human rights standards and principles, in many cases these requirements were not met: for instance, Amnesty International[386] underlines the staff's refusal of making the curriculum vitae of the judges and prosecutors available, making the selection procedure arguably vulnerable to political abuses and manipulation, and the shortcomings in the international judges' proficiency in any of the official languages of Kosovo, namely Albanian, Serbian and English. This deficiency, in particular, entailed a double consequence: on the one hand, it hindered the communication between the international judges and their local counterparts, creating frequent misunderstandings and dissent; on the other hand, it prevented the victims and the parts in the legal proceedings to enjoy their rights to a due process, which includes the right to have access to fully and correctly interpreted proceedings and transcripts in a language that the accused can understand.

[385] It must be remembered that at the beginning of 2000, the world's only international criminal law and humanitarian law judges and prosecutors were part of the ICTY and ICTR. See Michael E. Hartmann, "International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping", *US Institute of Peace*, 2003, p 3.
[386] Amnesty International, "Kosovo (Serbia): the challenge to fix a failed UN justice system", 29 January 2008, available at: www.amnesty.org/en/documents/EUR70/001/2008/en/ (Accessed: 3 December 2020).

Furthermore, many critiques were also brought against the domestic courts' lack of independence considering the high presence and crucial role of international judges and prosecutors in the courts, even though Regulations 2000/6 and 2000/34 mention the purpose of infusing international personnel in the Kosovo justice system only to "assist" the local one in the judicial process. In general, it is widely recognised that for a judicial system to be effective, independence of interference by both other arms of the government – especially the executive branch – and external sources is a central element. Nevertheless, under the International Judges and Prosecutors Programme, the international personnel was ultimately subject to and dependent from the executive arm of the UNMIK administration, therefore contributing to increase the idea that the domestic courts could be easily manipulated and corrupted, especially by the political forces. The continuous interference of the UNMIK executive branch was visible, for instance, in the pressure that some officials put in the judges to resign from their office or to definitely close a case although the evidence gathered was insufficient and the witnesses' statements clearly contradicted it.[387]

Furthermore, despite the claimed urgent need for the perpetrators to be prosecuted for their crimes, and for the domestic judicial system to function properly as soon as possible, the work of the domestic courts was however plagued by underfunding and poor organisation. The training activities of the local judges by their international counterparts remained limited due to budgetary constraints.

Finally, another limit domestic courts had to face in post-conflict Kosovo and during the UNMIK protectorate, which contributed to weaken their position and undermined the trust of the Kosovar population, concerned the failure in providing the victims of human rights violations with a just reparation. Under international law, the government is responsible for providing the victims' of human rights abuses and international crimes with their rights to justice, truth and reparation. This obligation includes equal and effective access to justice and the right to adequate, effective and prompt reparation for the harm they have suffered, including compensation, rehabilitation, satisfaction and a guarantee of non-repetition. Collectively, these measures are specifically intended to address and try to alleviate the suffering of the victims in the attempt to help them rebuild their lives. In the case of Kosovo, however, it is widely recognised that since 1999 both UNMIK and the Kosovar newly-established government failed in their international obligation to protect the survivors, who have instead received support and assistance from several NGOs, both at the local and international levels. In March 2014, following a sustained campaign of activism and advocacy led by several NGOs working with survivors of human rights abuses and violence, the rights of the survivors to reparation, including compensation, were finally recognised in amendments to the existing law on

[387] See, for instance, *Zoran Stanojević* case, *The Guardian*, "Amnesty and UN staff accuse Kosovo war crimes tribunal of ethnic bias", 20 June 2001, available at: www.theguardian.com/world/2001/jun/20/warcrimes.balkans (Accessed: 4 December 2020).

the rights of combatants and other civilian victims of war. For example, "for the first time, the victims of sexual violence were recognised as civilian war victims. Before that moment, the institutional level had refused to treat them separately in the legal system. This is a clear example of how the commitment of NGOs and human rights activists has succeeded in overcoming the deficiencies of an inefficient justice system," declares Mr. Musaj. Despite this landmark progress, much more still needs to be done, and there is especially a continuous need for higher amounts of funding to be destined to safe houses and equipment to support the victims, as well as for agreements with the governments of other countries to welcome, protect and relocate Kosovar survivors and witnesses of human rights violations.

## 3.3. Conclusions

All the slow steps and continuous changes undertaken during the ten-year long UNMIK protectorate of Kosovo in the field of the justice system have demonstrated that the intervention and active participation of international police forces, judges and prosecutors in the judicial scenario of post-conflict Kosovo should have been immediate and resolute, rather than gradual and adapted to the shortcomings of the previous and already existing institutions. Despite the situation had improved when the EULEX mission took over UNMIK in 2008, it would be incorrect to depict the Kosovar scenario as efficient, impartial and protecting and promoting human rights. The numerous deficiencies in the law enforcement capability provided by the international forces, the impossibility of the local judges and prosecutors to handle the increasing backlog of criminal and civil law cases in a tense social context and despite the direct intervention of international counterparts, and the initial incapacity of the security forces to ensure a safe environment for both the Kosovar citizens and the international forces operating on the ground fostered a climate in which human rights violations continued to take place. Impunity for the acts committed, either by the local population and the international forces, contributed to perpetuate the violence and undermined the feeling of trust among the Kosovar population – especially of the survivors of human rights violations and the families of the victims – towards a justice system that suffered from lack of resources and was generally perceived by the local population as corrupted, ineffective[388] and far from being impartial. From cases of unlawful and excessively long pre-trial detention to procedural breaches in the conduct of domestic trials, the administration of justice failed to be conducted in a way that was consistent with

[388] A 2007 report of the UN Development Programme (UNDP) highlighted that only 1 out of 5 Kosovars was satisfied with the court system and the prosecutor's office.

international human rights standards. As of April 2021, many Kosovar citizens are still waiting to enjoy their right to justice and truth for the human rights violations they – or their family – have been victims of, and the institutions of the Kosovo justice system continue to face extremely low levels of trust (21%) compared to the security sector ones, as highlighted by the 2019 Kosovo Security Barometer.[389]

[389] Kosovar Center For Security Studies, "Kosovo Security Barometer", ninth edition, December 2019, available at: http://www.qkss.org/repository/docs/KSB2019_339996.pdf.

# CHAPTER 4

## Kosovo Specialist Chambers and Specialist Prosecutor's Office: a new solution for justice?

In the 1990s, the increasing attention and concern of the international community had long focused on the mass killings, human rights violations and atrocities committed by the Serbian forces acting under the orders of President Slobodan Miloševič and the other high-ranking Serb commanders. The 78-day NATO bombing campaign, which led to the withdrawal of the Yugoslav and Serbian troops from the predominantly ethnic Albanian territory in June 1999, opened a season of investigations in Kosovo with the aim of trying and persecuting the individuals responsible for committing or ordering the heinous crimes that bathed the province in blood. The commitment and determination of the judges and prosecutors of the ICTY succeeded in indicting and accusing many Serb leaders and high-ranking commanders, while the newly-established domestic system in Kosovo[390] began dealing with some minor cases, therefore actively contributing to fight against impunity and the strive of people to justice.

Nevertheless, as analysed in the previous chapters, the limits of the international courts' mandate and jurisdiction, on the one side, and the structural problems and lack of experience of a weak domestic system still at its embryonal phase, on the other, prevented the alleged crimes committed by the KLA against the minority groups in Kosovo, including Serbs and Roma, and the fellow Albanians deemed to be collaborators of the regime of Slobodan Miloševič, to attract the attention of the international and domestic judges and prosecutors. The failure of the UNMIK international protectorate before 2008 and the EULEX mission in the region after Kosovo's unilateral declaration of independence to probe "a widespread, as well as a systematic, attack on a civilian population and, potentially, crimes against humanity"[391] and to prevent ethnic-based atrocities and human rights to be perpetrated in the region deceived the expectations of a mourning, frustrated and historically fragmented population. As reported by the UN advisory panel (HRAP) set up to examine complaints against UNMIK, not only did the mission fail in properly investigating allegations into serious cases of abduction, disappearances and killings, inhumane treatment and abuse of property,

[390] A relatively consistent number of cases involving war crimes committed in Croatia, Bosnia Herzegovina and Kosovo were also tried in Serbian national courts, more specifically after the establishment of a War Crimes Chamber in July 2003 with support from the US government and the ICTY.
[391] Amnesty International, "Kosovo: UNMIK's legacy the failure to deliver justice and reparation to the relatives of the abducted", 2013, www.amnesty.org/download/Documents/16000/eur700092013en.pdf.

but the international forces even violated the Kosovar population's human rights. "As such, [the complainants] have been victimised twice by UNMIK: by the original human rights violations committed against them and again by putting their hope and trust into this process."[392] Fostering a prevailing climate of impunity in Kosovo was also the fact that the post-conflict Kosovo had been created "on the existing structures of the Kosovar Albanian homeland movement",[393] in which the new ruling élite – mainly composed of former KLA members – was generally benefitting from the support of an ethnic Albanian majority that regarded them as the national heroes who had fought a "just war" to free Kosovo from the Serb oppressor. And this happened despite criminality, organised crime and corruption had been recognised by many studies as an intrinsic characteristic of the political class in Kosovo. Additionally, only the requests for justice of the ethnic Albanians, who were seen as the innocent victims of the bloody conflict in Kosovo and had also been supported by the Western powers in the war against Milośevič, seemed to be considered by the existing international and domestic justice systems.

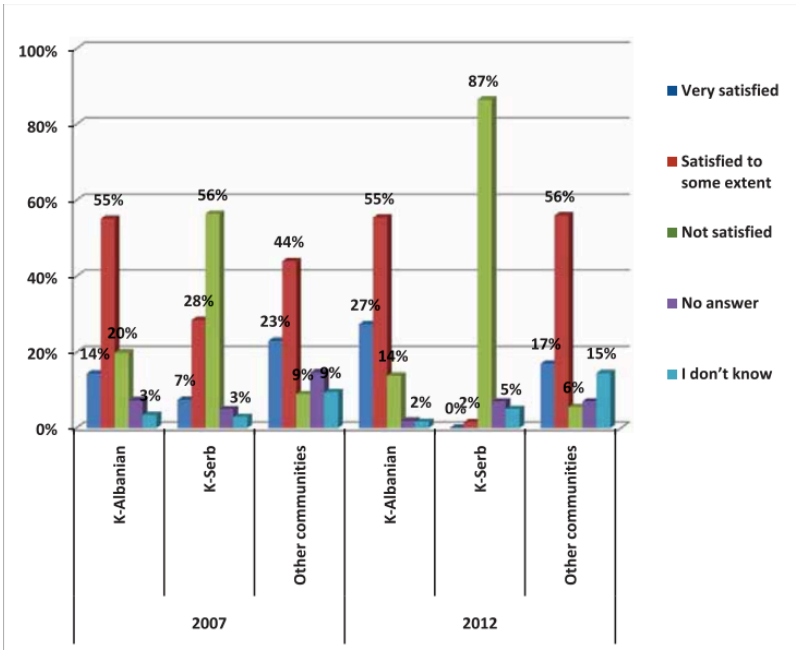


**Table 2.** Satisfaction with the work of the ICTY in 2007 and 2012 according to the different ethnic groups in Kosovo. Source: UNDP, "Perceptions on transnational justice – Kosovo 2012".

[392] The Human Rights Advisory Panel (HRAP), Annual Report 2015/2016, p. 30, available at: https://assets.documentcloud.org/documents/2993333/U-N-Panel-s-Report-on-Kosovo.pdf.
[393] CoE Parliamentary Assembly, "Inhuman treatment of people and illicit trafficking in human organs in Kosovo", 7 January 2011, available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12608 (Accessed: 27 December 2020).

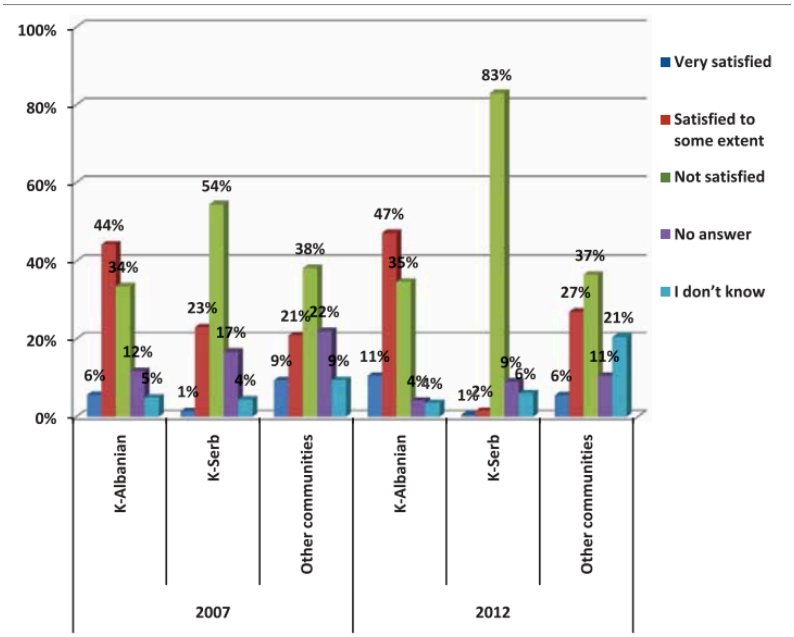


**Table 3.** Satisfaction with the work of the Kosovo courts in 2007 and 2012 according to the different ethnic groups in Kosovo. Source: UNDP, "Perceptions on transnational justice – Kosovo 2012".

In such a context of grief, deceived expectations, disappointment and long-dating ethnic animosity, the survivors of the heinous crimes and human rights abuses, their families and communities, as well as those of the thousands of people who were abducted after the end of the armed conflict in June 1999 as part of a widespread and systematic attack on a civilian population and are still missing today, have the right to receive a final answer from an impartial, effective and competent judicial system, the right to a reparation and to a fair compensation, and the certainty that the widespread climate of impunity will eventually be overcome. Whilst often ignored by the existing international courts and the domestic tribunals, the minority communities' desperate requests for the international community to open specific and deep investigations over the crimes allegedly committed by the KLA forces – especially in the immediate aftermath of the end of the NATO air campaign, when the KLA had almost an exclusive control on the ground – only came to a concrete turning point in early 2011, when a CoE report entitled "Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo", better known as the "Marty Report", confirmed the horrible facts enshrined in the memoirs of the Kosovar population and found evidence of the serious crimes committed in the region. And it was this crucial and landmark document that would pave the way for the establishment, on 3 August 2015, of the Kosovo Specialist Chambers and Specialist Prosecutor's Office (hereinafter KSC and SPO).

The fourth and final chapter of this thesis will therefore aim at analysing the Kosovo Specialist Court from its establishment on the basis of the findings of the Marty Report to the comparison of the mandate and jurisdiction of this new hybrid justice mechanism with the pre-existing international

courts' ones, namely the ICTY and ICC (chapter 4.1.). A second part (chapter 4.2.) will then try to assess the potential impact of the KSC and SPO, objectively balancing its limits and opportunities, and then a third part (chapter 4.3.) will instead focus on the public perception of the different ethnic groups in Kosovo on its regards. In particular, this analysis will be based and supported by the information and material gathered through several interviews carried out with journalists, producers, coordinators of local NGOs and researchers on the ground, in order to benefit from both their local contact with the population and their experience and deep knowledge on some relevant topics for this thesis, including international law and transitional justice, human rights protection, political science, EU-Kosovo relations and mass media communication. Finally, a fourth part (chapter 4.4.) will tackle the first cases before the KSC and SPO, focusing in particular on the indictment of the recently-resigned President of Kosovo Hashim Thaçi of war crimes and crimes against humanity. Is this the demonstration that a new era of individual responsibility for the crimes committed and ordered by the former KLA commanders during the conflict in Kosovo and in its aftermath is finally about to begin before the KSC and KPO? Will the new Court promote the reconciliation between ethnic Serbs and Albanians, boost economic and social progress, contribute to finally create a peaceful and stable society, and approach the country to the international community, especially to the EU?

## 4.1. Dick Marty's report and the establishment of the KSC and SPO

> "We must fight uncompromisingly against impunity for the perpetrators of serious human rights violations. The fact that these were committed in the context of a violent conflict could never justify a decision to refrain from prosecuting anyone who has committed such acts. There cannot and must not be one justice for the winners and another for the losers."
>
> Committee on Legal Affairs and Human Rights

The origins of the KSC and SPO date back to late 2008, when the former Chief Prosecutor of the ICTY, Carla Del Ponte, published a memoirs about her personal working experience at The Hague tribunal. In *La caccia. Io e i criminali di guerra* ("*The hunt. Me and the war criminals*")[394] Del Ponte's allegations – which she formulated after carrying out a series of credible and detailed interviews with victims and witnesses – clearly accused the KLA leading commanders of being involved in a series of heinous crimes against the other ethnic minorities in Kosovo, including trafficking in human organs

[394] Carla Del Ponte, Chuck Sudetic, *La caccia. Io e i criminali di guerra*, Feltrinelli, April 2008.

taken from Serb prisoners.[395] Before that moment, however, some international journalists[396] working on the ground had already called upon the international community and the ICTY to draw more attention on the alleged crimes perpetrated by the KLA forces in the region, which Del Ponte describes as "the most frustrating cases". Nevertheless, despite the existence of some concrete evidence of such crimes already at the beginning of the decade, the international authorities in the region had either not considered it necessary to carry out detailed examinations of the allegedly criminal circumstances, or done it too superficially. Consequently, the cases had always dropped before the ICTY, also due to the extremely low numbers of official testimonies (see chapter 1.4.). In the meanwhile, the international forces that were mandated to carry out the peacekeeping operations in Kosovo – namely the UNMIK and KFOR forces – had to deal with the serious structural problems characterising the Kosovar post-conflict "chaotic" society[397] as well as with the lack of cooperation with the local authorities and the difficulties to establish contacts with the local sources (see chapter 3).

The publication of Del Ponte's memoirs was followed by the prompt decision of the Committee on Legal Affairs and Human Rights of the Council of Europe (CoE) to set up a team in charge of conducting thorough investigations into the acts mentioned by Del Ponte and the serious consequences of the potential KLA leaders' active participation in the organ-harvesting and trafficking network involving the Serb prisoners. Led by the former Swiss politician and prosecutor Dick Marty, the team aimed "to ascertain their veracity, deliver justice to the victims and apprehend the culprits of the crimes"[398] regardless of political opinions to finally reach a long-lasting peace in the region. In January 2011, after the "Marty Report" found evidence of all heinous crimes mentioned by the former ICTY's Chief Prosecutor, the CoE's Parliamentary Assembly passed a resolution providing for both the EULEX mission and the Kosovar local authorities involvement in the

[395] The term "organ trafficking" refers to a wide range of illegal activities aimed at commercialising human organs and tissues for the purpose of transplantation. Del Ponte talks about an estimated 300 Serbs being abducted and moved across the border to Albania by the KLA in order to be systematically killed and deprived of their organs.

[396] See, for instance, the case of the American journalist Michael Montgomery, whose work in Kosovo in 1999 to co-produce a radio documentary allowed him to gather information about the alleged crimes of organ trafficking committed by the KLA in the city Cuska. When his team came back to the area few years later, "medical equipment, including syringes, intravenous drip bags and stomach tranquilisers" were found. Despite the existence of several concrete and specific allegations on the existence of detention centres in which inhuman and degrading treatment was systematically inflicted on the prisoners, the case was abandoned for lack of evidence and those responsible for the crimes never persecuted nor tried. For more information, see *Balkans Insight*, "Kosovo Organ-Trafficking: How the Claims were Exposed", 4 September 2015, available at: https://balkaninsight.com/2015/09/04/kosovo-organ-trafficking-how-the-claims-were-exposed-09-04-2015-1/ (Accessed: 27 December 2020).

[397] In his report, Dick Marty wrote that "It was chaos: there was no functioning administration on the part of the Kosovars, and KFOR took quite some time to gain control of the situation, evidently not possessing the know-how needed to cope with such extreme situations. […] Thus, during the critical period that is the focus of our inquiry, the KLA had effective control over an expansive territorial area, encompassing Kosovo as well as some of the border regions in the north of Albania."

[398] CoE Parliamentary Assembly, *Supra note 393*.

investigations on organ-trafficking related cases as well as the other criminal activities allegedly carried out by the KLA forces, such as systematic abductions, inhuman and degrading treatments, killings and forced disappearances.

Moreover, a Special Investigative Task Force (SITF) entirely composed of international personnel to ensure impartiality and funded by the EU[399] was appointed to conduct independent criminal investigations in the region in September 2011. Three years later, the SITF claimed it had gathered enough evidence to file an indictment and therefore needed a specific and adequate institution to try the individuals accused of human rights violations and carry out a proper proceeding. In particular, the SITF claimed that: "certain KLA elements intentionally targeted the minority populations with acts of persecution that included unlawful killings, abductions, enforced disappearances, illegal detentions in camps in Kosovo and Albania, sexual violence, other forms of inhumane treatment, the forced displacement of individuals from their homes and communities, and the desecration and destruction of churches and other religious sites."[400] It also raised the fact that "certain KLA elements engaged in a sustained campaign of violence and intimidation in 1998 and 1999 directed at Kosovo Albanian political opponents, which also included acts of extrajudicial killings, illegal detentions and inhumane treatment."[401]

In September 2016 the SPO replaced the SITF's mandate as provided by the Special Law on the Specialist Chambers and the Specialist Prosecutor's Office, which had been adopted by the Kosovo Assembly almost one year before, in August 2015.

One year before, in 2014, during a rather informal exchange of letters with the President of Kosovo Atifete Jahjag, the High Representative of the European Union for Foreign Affairs and Security Policy Catherine Aston requested the Kosovo government to establish a "special Court" to address the alleged crimes committed or ordered by the KLA members and deeply analysed by Del Ponte and Marty, paving the way for the Kosovo Assembly's amendment of Article 162 of the Kosovo Constitution, which aimed at allowing the creation of the specific institution Marty had requested in his report. Despite the difficulties and opposition of some deputies, on 3 August 2015 the "Law No.05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office" (hereinafter "the Law") was adopted[402] and the KSC finally came into existence.

---

[399] The SITF derives its jurisdiction and authority from the EU Council's decision establishing the EULEX mission in Kosovo, and therefore operates within the justice system of Kosovo and in compliance with the country's applicable law.
[400] Report (S/2014/558) of the Secretary-General to the Security Council, 1 August 2014, p. 13.
[401] *Ibid*, p. 18.
[402] Kosovo Specialist Chambers and Specialist Prosecutor's Office, Law on the Specialist Chambers and Specialist Prosecutor's Office" available at: https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office (Accessed: 28 December 2020).

### 4.1.1. The Tribunal's mandate and structure

According to Article 3 of the Law, the "Specialist Chambers shall be attached to each level of the court system in Kosovo (…)": this means that despite being independent in their functions, the temporary and recently established KSC are formally part of the Kosovar legal system and an organ of the government of Kosovo. Therefore, they have to operate, adjudicate and rule first of all in accordance with the Constitution of Kosovo, and then, second in rank, with the customary international law[403] and international human rights instruments "which set criminal justice standards, including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights".

Nevertheless, the Tribunal's headquarters are located in The Hague, Netherlands,[404] and it enjoys primacy over the other courts in Kosovo,[405] which are always expected and required to transfer the cases involving the violations that potentially fall into the subject-matter jurisdiction of the KSC at any stage of the proceeding. Not only does the Tribunal's mandate and jurisdiction cover war crimes, crimes against humanity and other crimes related to the allegations contained in the Marty Report,[406] but it also extends to a series of crimes provided by the Kosovo Criminal Code (i.e. administration of justice) under Article 15 of the Law. The KSC jurisdiction is very specific, since it is limited in time and space[407] to the crimes commenced or committed in the territory of Kosovo in the period between 1 January 1998 and 31 December 2000 by or against citizens of Kosovo or the FRY. This means that the personal jurisdiction[408] covers both active and passive personality over individuals of Kosovo or FRY citizenship or over those who committed the crimes within its subject matter jurisdiction against persons of Kosovo/FRY citizenship wherever these crimes were committed. It is also crucial to remember that the KSC's mandate only covers individual criminal responsibility and it allows the victims to participate in the proceedings (see chapter 4.1.2).

The KSC is composed of the Chambers, which are attached to every level of the court system in Kosovo – namely Basic Court Chambers, Court of Appeals Chambers, Supreme Court Chamber

---

[403] The reference to international customary law is quite broad, since it includes all the criminal offences under international customary law as may be related to the crimes contained in the Marty Report and as applicable at the time the crimes were committed.

[404] In January 2016 the Netherlands and Kosovo signed an interim host State agreement providing for the preparation of the future KSC in The Hague. The official host State agreement would enter into force one year later, in January 2017, after the appointment of the Registrar and the President of the KSC in April and December 2016 respectively.

[405] Law No. 05/L-053, Article 10, "Concurrent jurisdiction", available at: https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf.

[406] The subject-matter jurisdiction of the KSC and SPO does not extend to organised crime.

[407] Law No. 05/L-053, Article 7, "Temporal jurisdiction", and Article 8, "Temporal jurisdiction", respectively.

[408] Law No. 05/L-053, Article 9, "Personal jurisdiction".

and Constitutional Court Chamber – led by a President elected for a four-year term,[409] and the Registry – Judicial Services Division,[410] Immediate Office of the Registrar, Public Information and Communications Unit, Audit Office, Administration Division and Ombudsperson.[411] The SPO, by contrast, is an independent office[412] that has inherited both the staff and mandate of the SITF,[413] and therefore is responsible to carry out the investigations and prosecute the individuals allegedly responsible of international crimes, including war crimes and crimes against humanity as defined by customary international law within the KSC's jurisdiction. Despite the evident and strong ties with the Kosovar Criminal Code and Constitution, the KSC and SPO maintain a whole international structure: their staff is entirely composed of international judges and prosecutors, and the legal and administrative personnel and officers (analysts, investigators, security professionals, witness-protection specialists, support staff, etc.) are also international. More specifically, all the staff working for the KSC and SPO are citizens of either a EU Member State or of the five non-EU contributing countries, namely Canada, Norway, Switzerland, Turkey and the United States.

At the beginning, the KSC was established with a temporary five-year mandate, as provided by Article 162(13) of the Kosovo Constitution. However, after the agreed period had expired in August 2020 and in order to avoid that all the investigations commenced by the KSC and SPO could be interrupted and invalidated, Article 162(13) and (14) was amended to allow the Court to continue its work and investigations until notification by the Council of the European Union of completion of the mandate.[414]

### 4.1.2. KSC rules of procedure and evidence (RPE) and victims' participation in the proceedings

The Rules of Procedure and Evidence (RPE) of the KSC govern the conduct of the proceedings before the Court at each stage and aim at giving specificity to the articles and principles that are contained in the Law and that guide the judicial work of this recently established judicial mechanism.

---

[409] Judge Ekaterina Trendafilova has recently been reappointed to the Presidency for her second term in accordance with Article 30 of the Law. See Kosovo Specialist Chambers and Specialist Prosecutor's Office, "Reappointment of KSC President Ekaterina Trendafilova", 26 November 2020, available at: www.scp-ks.org/en/reappointment-ksc-president-ekaterina-trendafilova (Accessed: 28 December 2020).

[410] The Judicial Services Division is composed of: Court Management Unit; Language Services Unit; Defence Office; Detention Management Unit; Victims Participation Office; Chambers Legal Support Units; and Witness Protection and Support Office.

[411] The Ombudsperson is tasked to monitor, defend and protect the human rights and fundamental freedoms of all the persons that interact with the KSC and SPO.

[412] Not only is it independent from the KSC but also from the other prosecution authorities in Kosovo.

[413] The SITF Lead Prosecutor was appointed by the Head of EULEX as the Specialist Prosecutor.

[414] Judgement on the referral of the proposed constitutional amendments, 26 November 2020, available at: www.scp-ks.org/en/judgment-referral-proposed-constitutional-amendments (Accessed: 29 December 2020).

They were created to guarantee fair, efficient, secure and expeditious proceedings while ensuring the protection and application of the highest standards of international human rights and fundamental freedoms. Therefore, the judges of the KSC have to take all the necessary measures for the proceeding to respect these fundamental standards, including meeting the deadlines of the delivery of the judgements, identifying false evidence and testimony, guaranteeing the right to a fair trial without any type of ethnic bias, access to a lawyer, right to appeal and to a due compensation in case of unlawful arrest or detention.

Following the example of the ICC and aware of the crucial role that the victims[415] may play in finally persecuting and trying the individuals responsible for the serious crimes and human rights violations that took place in Kosovo during the war and in its immediate aftermath, the KSC and SPO have strongly committed and worked to provide them with the possibility to safely participate in the proceedings before the Court.[416] Moreover, the fact that the KSC must comply with international human rights principles and standards as well as with the domestic legislation represents an extraordinary and landmark opportunity for the KSC and SPO to actively contribute to take a step forward on victim's involvement in international proceedings.

In this context, the RPE contain a detailed procedure for the admission and participation of the victims in all stages of the proceeding, after having provided the KSC with sufficient evidence of the physical, mental or material harm they personally[417] suffered with respect to the crimes contained in the indictment and over which the Court has jurisdiction. The participating victims appear before the KSC in small groups and participate through a lawyer known as the "Victims' Counsel", who is mandated to make opening and closing statements and has to take part during the proceedings in all the cases in which the rights of the victims risk to be violated.

Since many victims may be reticent to participate in the proceedings and provide the judges with their testimony (see chapter 1.4.), the KSC – and in particular the Witness Protection and Support Office – has been working from the very beginning of its institution to protect them with all the necessary measures to ensure their safety, psychological and physical well-being, privacy and dignity. This includes, for instance, measures to conceal the identity of the person with pseudonyms, voice or facial distortions, ordering anonymity from the public or the defendant, and prohibiting the questions

[415] Rule 2 of the RPE define a victim as "a natural person who has suffered physical, material, or mental harm as a direct result of a crime alleged in an indictment confirmed by the Pre-Trial Judge."
[416] The participations of the victims in the proceedings has seen a remarkable change in the 20th century. Before the establishment of the international criminal tribunals in the 1990s, namely the ICTY, ICTR and ICC, the victims had almost no voice in the trials; they were not considered as a useful source of information and evidence to help clarifying the facts. Nowadays, by contrast, victims are regarded as key elements with the aim of determining the truth and searching for justice.
[417] This specific requirement – the fact that the victim must have suffered the harm personally – is innovative and was not present in the case of the ICC regulations.

that may potentially reveal the identity of the victim. Additionally, all the victims have the possibility to choose whether to participate in open or closed sessions. Another measure includes the presentation of evidence by electronic or any other special means. Moreover, special measures have been adopted for the individuals who are considered to be more at risk or have special needs, such as women that have suffered brutal sexual violence and abuses, elderly people or minors, and who can enjoy from the support of psychologists or counsellors, as well as of the testimony of a closed relative on their behalf. The Court offers individually-tailored support to the vulnerable individuals who are still traumatised or may require particular medical, gender, cultural or family needs.[418]

Finally, considering the extreme gravity of the heinous crimes over which the Court has jurisdiction and the long-lasting consequences on the victims and their families, the Law highlights the right of the victim to obtain restitution. More specifically, Article 22 of the RPE provides for the victims' right to request to the Chambers a compensation for both the losses and the suffering they had to experience. As underlined by the Group for Legal and Political Studies,[419] this specific measure provided by the Law is advanced, since the Kosovar Criminal Code does not foresee a systematised status for the victim. Within the system of the KSC and SPO, by contrast, if the trial panels of the first and appeal chambers assess that an individual accused of one of the crimes contained in the indictment is guilty of a crime, an appropriate reparation to the victim may even be specified.

So, the participation of victims in trials and proceedings can promote their individual healing and rehabilitation by providing them with a crucial sense of agency and empowerment. Similarly, the right to a compensation for the suffering caused by the abuses and crimes they were subjected to either during the Kosovo war or in its aftermath represents a key element to increase their trust in a justice system that is generally still not regarded as sufficiently effective and reliable by most of the Kosovar population. Finally, it is important to underline that the victims' participation in the proceeding and in restorative practices entails a fundamental learning purpose. The continuous exchanges between the victims and their legal representatives are particularly useful for the former to learn about their rights in the proceedings, the rule of law and the Court's activities, mandate and jurisdiction. Thus, empowered with such important information, victims are more likely both to claim their rights in the future and to encourage the other victims who have suffered from a similar experience to speak up and give their testimony.

---

[418] Kosovo Specialist Chambers and Specialist Prosecutor's Office, *First Report*, p. 43, available at: https://www.scp-ks.org/sites/default/files/public/content/ksc_spo_first_report_en.pdf.

[419] Group for Legal and Political Studies, "The (Pen-) Ultimate Guide to the Specialist Chambers (II) Law and process", December 2018, available at: http://www.legalpoliticalstudies.org/wp-content/uploads/2018/12/GLPS-Specialist-Chambers-2.pdf.

### 4.1.3. KSC, ICTY and ICC: a comparison with respect to the case of Kosovo

When the KSC and SPO were established in 2015, the international community – and in particular the EU member States – aimed at filling the judicial vacuum that had prevented justice to be served among the destroyed and fragmented Kosovar population in relation to the crimes committed or commenced during the Kosovo war and in the period immediately after the end of the NATO's intervention. The ambitious and impelling need to bring the individuals responsible for these heinous crimes before a new court that would be established outside Kosovo was welcomed by the international community as the last available opportunity to overcome the limits of the mandate and jurisdiction of the previously established courts, namely the ICTY and the ICC, as well as of the justice systems that had characterised the UN interim administration before Kosovo's declaration of independence and the weak intervention of the EULEX mission after 2008. Furthermore, the establishment of a new institution, which would be designed and structured as a hybrid court (see chapter 2.4), was also expected to be illustrative for several historic developments in international criminal law and transnational justice.

However, before analysing the main differences related to the nature, mandate and jurisdiction of the ICTY, the ICC, and the KSC and SPO, it is worth remembering that Kosovo had already experienced the presence of a so-called "hybrid tribunal" before the adoption of the Law on 3 August 2015: the famous though strongly criticised "Regulation 64 Panels", established by the UNMIK through Regulation 2000/64, provided in fact that a majority of international judges and prosecutors should collaborate, assist, train and support their local counterparts in a post-conflict society where the judicial system was almost inexistent after the withdrawal of the Serb and Yugoslav forces in June 1999. The idea underlying the international community's pressing need to intervene in the Kosovar domestic justice system was that strengthening, at least at the beginning, the collaboration between international and local domestic legal personnel would have proved crucial to promote the emergence of an independent, competent and impartial judiciary, which could have handled the cases that did not fall into the ICTY jurisdiction as well as the minor cases. Despite the efforts, several shortcomings hindered this ambitious purpose, from the lack of finances to the numerous organisational and structural problems, from the continuous raising political and ethnic-based tensions in the region to the lack of expertise and language proficiency of the international judges and prosecutors who were supposed and expected to train the local ones (see chapter 3). Consequently, what emerged from this unstable and disappointing situation was that the activity of the Regulation 64 Panels resulted in unsubstantiated verdicts and acquittals, undermining the local population's trust in the justice system.

Nevertheless, the KSC and SPO is a different, innovative and unique hybrid tribunal, which is destined to have a landmark effect and to contribute to the development and codification of IHL and ICL regardless of its future verdicts. Not only is it possible to bring to light all the elements and features that characterise the KSC and SPO, but it is also particularly interesting to focus on and analyse the main differences that distinguish this Court from the ICTY and ICC in terms of nature, mandate and jurisdiction in order to better understand how this recently established mechanism can potentially fill the gap in the judicial vacuum concerning the alleged crimes and human rights violations committed in Kosovo that have not been addressed by the other international justice mechanisms. Despite the differences, all these courts and tribunals have placed the concepts of justice, truth and effective remedies for the victims of serious human rights violations (some of which may constitute crimes under international law) and their families and communities at the core of their activity, and promoted the development of transitional justice in a world in which individual criminal responsibility plays an increasingly important role.

First of all, the ICTY was established by UN Security Council Resolution 827 "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991 […]". This means that the conflicts that took place in Croatia, Bosnia Herzegovina and Kosovo were all included in the ICTY's mandate. Nevertheless, due to the extremely high number of allegations of human rights and humanitarian law violations brought before the Court, the activity of the UN ad hoc Tribunal mainly focused on the international crimes committed by the Serb military and paramilitary forces, and in particular on the individuals holding high-ranking positions in the Serbian government in the 1990s. As pointed out by the SITF Lead Prosecutor, the crimes committed in Kosovo in the pre-war period and during the war itself have largely been dealt with by the ICTY, with the majority of them involving Serb perpetrators; therefore, the purpose of the SITF investigations, as well as of the KSC and SPO, was to fill the void left by the ICTY jurisdictional limitations.

Furthermore, Article 1 of the ICTY Statute seems to exclude the crimes committed by the KLA forces in the period in the aftermath of the NATO's air bombing campaign and the Serbian forces withdrawal from its jurisdiction, since the presence of an armed conflict after the withdrawal of the forces led by Milośevič has often been questioned. This is particularly true for the period immediately after 9 June 1999,[420] when the UNMIK and KFOR international forces had just begun to be deployed in the region. Although the KLA was *de facto* controlling the Kosovar post-conflict society, it is not always agreed that it possessed the conditions that usually allow the hostilities to be defined as an

[420] The hostilities between the KLA and FRY government forces before June 1999 reached a level of conflict to which the obligations of Common Article 3 applied.

internal armed conflict, namely "an organised military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the [Geneva] Conventions".[421] In fact, considering that an internal armed conflict can be hard to define, since it is sometimes debatable whether the hostilities within a State have reached the level of an armed conflict or rather are just limited to tensions, riots or isolated acts of violence, most of the ethnic Albanian community in Kosovo agrees on the fact that "the KLA was so disorganised that any war crime that occurred was more an act of a personal revenge for the killings of its members' own family by the Serbs than anything organised by the KLA commanders.[422] In fact, the KLA did not had real commanding structure."[423] Aware of the disproportionality between the victims of the Miloševič regime and the victims of the KLA, and strongly supporting the KLA acts regarded as "legitimate" to free the region from the Serbian and Yugoslav oppression, few people believed that the heinous crimes over which the KSC and SPO has competence had indeed been purposely committed, though the consensus[424] was that they had been carried out on a limited scale and by rogue KLA operatives. It should also be remembered that in the *Haradinaj et. al* case, the ICTY had assessed that the acts committed by the KLA were "not on a scale or frequency that would allow for a conclusion that there was an attack against a civilian population", which would therefore constitute a crime against humanity.[425] So, notwithstanding this common perception and the decision of the UN established Tribunal, the investigative findings of the SITF clearly conclude that the KLA members committed crimes both on a high scale and with a high degree of associative coordination[426] and the Yugoslav government had clearly recognised the KLA as an organised armed force during the

[421] Common Article 3 of the Geneva Conventions, which regulates internal armed conflicts, underlines the conditions that, although not obligatory, provide some convenient guidelines to understand whether a conflict can be defined as "internal armed conflict".

[422] The draft resolution of the report "Inhuman treatment of people and illicit trafficking in human organs in Kosovo" already claimed that "[…] the KLA was not a single, unitary combatant faction in the manner of a conventional Army. There was no formally appointed overall leader, or "commander-in-chief", whose authority was universally recognised by the other commanders and whose orders were met with compliance among all the rank and file." Furthermore, "the KLA was divided by a deep-rooted internal factionalism"; available at: https://assembly.coe.int/committeedocs/2010/20101218_ajdoc462010provamended.pdf.

[423] This information has been obtained through an interview with Dr. Visar Duriqi, journalist and film maker, author of a series of documentaries at InDoks, which aim at exploring the circumstances and truth about some of the most emblematic events on the politics, economics and criminality in Kosovo. Mr. Duriqi s personal experience on the ground as a journalist and son of a KLA member was particularly helpful to understand the activities, objectives, (lack of) organisation and beliefs leading to the KLA's rebellion against the Serb during the war and in its aftermath.

[424] At least among the PDK, Social Democratic Initiative (NISMA) and Alliance for the Future of Kosovo (AAK) representatives.

[425] *Haradinaj et al*. (Case No. IT-04-84), Judgement of the Trial Chamber I, 3 April 2008, p. 66.

[426] "The *widespread* or *systematic* nature of these crimes in the period after the war ended in June 1999 justifies a prosecution for crimes against humanity" and "the evidence is compelling that these crimes were not the acts of rogue individuals acting on their own accord, but rather that they were conducted in an *organized* fashion and were sanctioned by certain individuals in the top levels of the KLA leadership', see Statement of the Chief Prosecutor of the Specialist Investigative Task Force, 29 July 2014, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/07/Statement_of_the_Chief_Prosecutor_of_the_SITF_EN.pdf.

conflict.[427] Therefore, what emerges is that there is not a general agreement on the status of the KLA, and the general perception of the ethnic-Albanian population usually differs from the ethnic-Serbs' one and the SITF findings.

On the other side, despite being established as a permanent international court to avoid that the serious violations of international law that had been committed around the world would risk to remain unpunished, the jurisdiction of the ICC over the serious international crimes that occurred in Kosovo is temporarily limited. As previously mentioned (see chapter 2.3.3), the ICC has jurisdiction only with respect to the events that took place after the entry into force of the Rome Statute on 1 July 2002 (*ratione temporis*). Thus, in the case of Kosovo, the crimes that were committed either during the 1998-1999 conflict or in its immediate aftermath by the KLA members would not fall into the ICC's jurisdiction, reinforcing the judicial vacuum enshrined in the ICTY activity.

This is the reason why, in order to overcome the temporal shortcomings of the ICTY and ICC, the KSC mandate clearly states that the Court has jurisdiction over the crimes against humanity, war crimes and other crimes under the Kosovo law that were allegedly committed or commenced in Kosovo between 1 January 1998 and 31 December 2000. The time-span over which the KSC and SPO have jurisdiction is shorter though more specific than the ICTY's one and refers to a period that fell out of the ICC temporal jurisdiction.

Moreover, another difference distinguishing the three tribunals concerns their nature. On the one hand, the ICTY was an ad hoc international tribunal established through a UN Security Council resolution (Resolution 827) to deal with the humanitarian law violations and international crimes committed during the wars in Yugoslavia. On the other hand, the ICC was established to remedy the deficiencies of the UN ad hoc tribunals, to end impunity and deter future war criminals, and to take over when national criminal justice institutions were unwilling or unable to act, after the majority of the States participating UN Diplomatic Conference of Plenipotentiaries voted in favour of the latest amendments of a draft for the institution of the first permanent international criminal court and its founding statute. By contrast, as previously mentioned, the KSC and SPO is the first hybrid tribunal to be ever established as an independent institution through the Kosovar legislation. In fact, to provide the legal basis for the new Court, the Assembly of Kosovo amended the national constitution and Law No.05/L-053 "On the Specialist Chambers and Specialist Prosecutor's Office" was approved. Consequently, although this innovative Court is based in the Netherlands, only employs EU judges, prosecutors and administrative staff to prevent any potential interference, risk of intimidation and lack of ownership, and has many of the features of an international court, it is an hybrid court whose

[427] Human Rights Watch, "Legal standards and the Kosovo conflict", available at: https://www.hrw.org/legacy/reports98/kosovo/Kos9810-11.htm (Accessed: 30 December 2020).

legal basis can be found in the Kosovar Constitution and which differs significantly from its hybrid predecessors, adding further complexity to the already varied legal landscape of hybrid courts.

Furthermore, as regards concurrent jurisdiction with other Kosovo courts, the KSC have, within their jurisdiction, primacy over all other courts in Kosovo, meaning that the judges have the authority to order the transfer of proceedings within its jurisdiction from any other court or prosecutor in the territory of Kosovo to the KSC and SPO, similarly to what had been established between the ICTY and the national courts. In the case of the ICC, by contrast, the principle of complementary provides that the Court will complement, but not supersede, national jurisdiction.

Finally, another remarkable difference between the three courts and tribunals, which makes the KSC and SPO unique and innovative, as well as promising as a new mechanism to provide the victims with justice, concerns their funding. Critics of the international criminal justice tend to highlight that the ICTY has held a relatively low number of cases despite its annual budget.[428] More specifically, the budget of the UN institution had grown substantially to keep pace with the increasing costs and number of legal proceedings, even if the concrete number of cases effectively tried was relatively low – despite the high-ranking profile of the indicted. Consequently, the ICTY has often been at the centre of strong critics due to its excessive costs and expenses. As far as the ICC is concerned, it is an independent body funded mainly by its member States in relation with their income. The Court also receives voluntary contributions from international organisations, corporations, individuals and other entities. However, the ICC has also been criticised[429] for the extremely law number of indictments[430] it has issued with respect to its budget[431] since the entry into force of the Rome Statute. By contrast, in the case of the KSC and SPO, its costs are part of the EU Common Foreign and Security Policy (CFSC) budget. The KSC are also funded through a direct grant agreement the EU signed with the Registrar, as well as through additional financial contributions of Third countries.

Although the proceedings held before UNMIK and EULEX had also taken the form of a hybrid tribunal, the creation of a court outside the territory of Kosovo with an exclusive participation of international judges and prosecutors seems to be particularly promising, and shows how hybrid justice mechanisms can effectively combine all the best attributes of the previous generations of international tribunals with the benefits of local prosecutions as a promising solution for transitional justice in Kosovo. In particular, in the case of the KSC and SPO, the hybridity rests in the combination an

---

[428] David Wippman, "The Cost of International Justice", in *American Journal of International law*, Vol. 100, issue 4, October 2006, pp. 861-880.
[429] See, for instance, *BBC news*, "Ten years, $900m, one verdict: Does the ICC cost too much?", 14 March 2012, available at: www.bbc.com/news/magazine-17351946 (Accessed: 1 January 2021).
[430] 30 cases as of April 2021, for more information visit: https://www.icc-cpi.int/cases (Accessed: 6 April 2021).
[431] All the information concerning the ICC budget is available at: https://asp.icc-cpi.int/en_menus/asp/bureau/WorkingGroups/budget/Pages/default.aspx (Accessed: 1 January 2021).

entirely international staff and the location of their headquarters in the Netherlands as the main international features, and the fact that the Court operates within the jurisdiction of the country where serious crimes and human rights abuses occurred as a local feature.

## 4.2. An assessment of the potential impact of the KSC and SPO: opportunities and limits

As a new ambitious and innovative effort that structurally and legally amends and tries to overcome the shortcomings of the previous failing attempts to bring justice in Kosovo, the KSC and SPO have aroused many expectations that this new hybrid mechanism will end the widespread sense of impunity that has characterised post-conflict Kosovo from 1998 onwards. After having brought to light the main elements that distinguish this new court from its international predecessors (see chapter 4.1.3), it remains to be analysed whether the KSC and SPO can manage to take advantage of their hybrid nature and features, and therefore will possibly contribute to the advancements of the transitional justice process in Kosovo, or rather this new attempt will end up as just another failure. Both the potential impacts and opportunities of the Court and the obstacles it would encounter will be analysed in this section.

### 4.2.1. Potential positive impacts and opportunities

Similarly to all previous attempts to investigate war crimes and human rights violations in Kosovo, the KSC and SPO was established as a result of a remarkable pressure of the international community, and in this case especially of the EU, both to provide the victims of these crimes with justice and to promote the creation of a peaceful society. Yet, the hybrid features characterising this new tribunal would enable it to avoid the ethnic bias, social intimidation and political pressure that plagued war crimes investigations during the mandate of its international predecessors. As such, the KSC and SPO can play a crucial role in shoring up the legitimacy and capacity of war crime trials, and have a potentially positive impact on a society which is still very latent and characterised by deep and long-dating ethic animosities and structural problems at least under four aspects.

First of all, and most importantly, the KSC and SPO is expected to finally bring justice to the victims of the serious crimes and abuses perpetrated against the minority groups and the ethnic

Albanian population suspected of collaborating with the Serbs – sometimes simply according to baseless accusations by members of rival clans or people who held long-standing animosities and vendettas against them. Holding the responsible persons to account for the heinous crimes they have committed or ordered will eventually contribute to put an end to the cycle of impunity in Kosovo. Several surveys and opinion polls carried out among the Kosovar population, and especially among the ethnic Serbs living in Northern Kosovo,[432] have shown that there is a general agreement on the importance of delivering justice to the victims, no matter the position held by the perpetrator and in accordance with the crimes he or she has been accused of. In the case of Kosovo, the Court would therefore eventually promote justice on all sides of the conflict, with an activity and mandate that should be considered and analysed in an optic of complementary with the ICTY's ones, as well as offer the potential for an increased legitimacy.

A second, innovative element, which can be crucial to boost cooperation at the international and transnational level, is the fact that, unlike the other Kosovo courts, the KSC and SPO have full domestic legal personality, as well as the capacity "to enter into arrangements with States, international organisations and other entities for the purpose of fulfilling their mandate".[433] In fact, in today's increasingly interconnected world, where the concepts of justice and individual criminal responsibility have acquired an increasingly greater importance and transcend the domestic boundaries as universal concepts, the cooperation and collaboration between States and international organisations are experiencing a new renaissance. International organisations, with the UN at the front line, are expecting States to conform to a growing body of international legal standards that have been set in the field of transnational justice and to cooperate to exchange information, data, recordings and any documentation that could help bringing the perpetrators of past large-scale human rights abuses and international law violations to justice. In the case of the KSC and SPO, international treaties with another State on judicial cooperation do not have to be ratified by the Assembly of Kosovo, and the KSC must only seek the agreement of the Government of Kosovo before entering into such a treaty,[434] allowing this mechanism to accelerate the process, save time and avoid political interferences.

Third, the presence of an entirely international personnel – which includes international judges, prosecutors, members of the Registrar and of the administrative staff – should enable the KSC and SPO to avoid the ethnic bias, social intimidation and political pressure that had plagued the mandate

---

[432] PAX For Peace, "Assessing the potential impact of the Kosovo Specialist Court", 9 October 2017, available at: https://www.paxforpeace.nl/publications/all-publications/assessing-the-potential-impact-of-the-kosovo-specialist-court (Accessed: 1 January 2021).

[433] Law No. 05/L-053, Art. 4 "Legal personality and capacity", available at: https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf.

[434] *Ibid*.

of the other international tribunals mandated to conduct investigations over the crimes committed in Kosovo.

The concept of ethnic bias is particularly delicate, since the animosities between Serbs and Albanians have not been overcome yet and the Kosovar society remains extremely divided (see chapter 1.1.1). "Establishing real contacts with the Serb community in Kosovo is very difficult for us, the young Albanians. We don't speak Serbian and they don't speak Albanian. Even if English could potentially allow us to communicate, this rarely happens. It seems like we were living in two parallel universes, and there is generally no desire to go over the seven-century abyss that divides us," explains Mr. Duriqi. It is fundamental to remember that not only was ethnic bias related to the activities of the international tribunals, and more specifically of the ICTY – which has often been accused of concentrating its activities on the crimes committed by the Serb and Yugoslav forces and not the other ethnic groups – but the legal proceedings at the national level were also often burdened with fear of bias or lack of judicial independence, which restrained the victims and witnesses of crimes and abuses to report them. These obstacles emerged with great emphasis during the UNMIK protectorate in Kosovo, when the UN peace-building international presence in the region and collaboration with the locally trained judges and prosecutors was regarded by the Kosovo Serb minority as a perilous alliance between the ethnic Albanian majority and the West. In this context, the choice of the KSC and SPO not to include local judges and prosecutors could avoid to instigate further ethnic misconceptions and rivalries.

Additionally, as far as social intimidation is concerned, the aim of hiring a wholly international legal personnel and staff, whose activity is mainly carried out in a foreign country, is intended to protect them from the potential threats and physical and psychological violence that some of the lawyers, judges and prosecutors working for the other hybrid and international tribunals had been victims of in the past, consequently imperilling all the efforts to re-establish the rule of law (see chapter 1.3.3).

The previous concepts are also strictly related to the KSC and SPO personnel's idea that there is an impelling need to avoid the political pressure that had characterised the period of the UNMIK international protectorate. Before the 2008 declaration of Kosovo, a generally spread local resistance towards the international governance of the region had been articulated and put in place by several different actors, through the use of different means. Among them, the KLA war veterans had made use of political pressure through public media appearances and frequent statements with the parallel aim to protect the dignity of the ex-combatants as well as to improve the legal and welfare conditions

of the ethnic Albanian families of community.[435] The logical consequence of these acts had led to increasingly exclusionary practices and decisions that have deeply affected the individuals belonging to minority and vulnerable communities ever since.

Fourth, the supporters of the KSC and SPO tend to agree that the establishment of the court on Dutch soil will also be extremely beneficial for the victims and witnesses who decide to testimony about the crimes and abuses they have personally or indirectly experienced. As previously mentioned (see chapter 4.1.2), the measures adopted by the KSC and SPO to protect the victims who testify against powerful defendants aim at avoiding them to potentially change testimonies during the proceedings and trails,[436] become the target of threats or even mysteriously disappear or be killed.

Finally, beyond providing a measure of justice to the victims and their families and ending impunity in Kosovo, the KSC and SPO could have a positive societal impact by encouraging other similar initiatives dealing with the ignored causes, drivers and legacies of the conflict that bathed Kosovo in blood, and whose effects are still evident twenty years later. The activity and commitment of the Court could in fact effectively contribute to support the creation of a discussion forum between the local actors to analyse the causes, drivers and legacies of the conflict in Kosovo.

### 4.2.2. Potential risks and mitigating solutions

Nevertheless, despite the high expectations that the establishment of the KSC and SPO has raised both among the international community and the Kosovo population – especially the minority groups and communities – many critics and experts of international criminal justice fear that the activity of this hybrid court could be – or even is already – hindered by important and undeniable obstacles, which would require some mitigating solutions in order to prevent it from definitively undermining the Kosovar population's trust in the justice system, obstructing the reconciliation process and proving to be another failure in the long quest for justice.

A first critic of the KSC and SPO portrays the new mechanism's effort as a one-sided, anti-Albanian campaign. This opinion is reinforced by the fact that the ethnic Albanian majority in Kosovo considers the activity of the former KLA members as an "heroic struggle" against the Serbian repressive regime. Therefore, the mandate of the new hybrid court tends to be viewed as unjust and

[435] Gëzim Visoka, "International Governance and Local Resistance in Kosovo: the Thin Line between Ethical, Emancipatory and Exclusionary Politics", in *Irish Studies in International Affairs*, 2011, Vol. 22 (2011), pp. 99-125.
[436] *Balkan Insight*, "Kosovo war witnesses 'Intimidated into changing stories'", 30 March 2016, available at: https://balkaninsight.com/2016/03/30/witness-intimidation-and-political-interference-in-trials-hlc-said-03-29-2016/ (Accessed: 2 January 2021).

illegitimate. "A court directed to one community alone brings no justice and just fosters asymmetrical justice," confirmed Mr. Gashi, journalist of *Prishtina Insight*, a magazine published by BIRN Kosovo,[437] who stressed how the Kosovar population generally agrees that that the KSC and SPO's remit is politically sensitive. This perception, which dates back to the early 2015, has remarkably hindered the establishment of the new hybrid mechanism: many members of the Kosovo's Assembly strongly opposed the court in principle, since they did not want to be seen to side with and support a distant institution that appeared to be committed to undermining one of Kosovo's core foundational narratives, namely the "heroic" struggle waged by the KLA forces in the region. "To do so, one noted, would be 'political suicide'."[438] Even former Prime Minister Hashim Thaçi initially described the new justice mechanism as "the biggest injustice and insult which could be done to Kosovo and its people".[439] However, it is true that the personal jurisdiction of the Court extends to individuals of both Kosovo or FRY citizenship, as well as over those who committed the crimes over which is has jurisdiction against persons of Kosovo/FRY citizenship wherever these crimes were committed. This means that the members of the Serb community or any other minority group in Kosovo can also be accused, indicted and tried by the Court if there is enough evidence of their involvement in human rights abuses and crimes committed between 1 January 1998 and 31 December 2000. Thus, the extension[440] of the KSC and SPO's mandate to conduct investigations over the Serbian attacks, as well as to prosecute crimes committed by both sides of the 1998-1999 Kosovo conflict would contribute to increase trustworthiness in both the justice system and the Court among the Kosovar citizens of all ethnicities.

Second, while the KSC and SPO may succeed in escaping much of the political influence from inside Kosovo, one of the main challenges the new hybrid mechanism is destined to tackle is convincing the victims of heinous crimes and human rights abuses to testify and then bring them to its headquarters in The Hague to do so. This ambitious purpose can be extremely hard to realise, especially considering that witness intimidation and interference are a well-documented issue in the whole Balkans area. Former ICTY Chief Prosecutor Carla Del Ponte was the first to publicly highlight that "the investigation of the Kosovo Liberation Army fighters appeared to be the most frustrating of

[437] This information has been obtained through an interview with Mr. Gashi (pseudonym), former journalist at the Pristina based magazine Kosovo 2.0. and Prishtina Insight. His career as a journalist has also provided him with the opportunity to contribute to other prestigious international magazines, including El País and Al Jazeera.
[438] Aidan Hehir, "Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and Its Implications", in *Human Rights Review*, Vol. 20, 19 July 2019, pp. 267-287.
[439] *Foreign Policy*, "A Reckoning Hasn't Happened. Foreign Policy", 13 August 2014, available at: https://foreignpolicy.com/2014/08/13/a-reckoning-hasnt-happened/ (Accessed: 10 January 2021),
[440] Not only to the findings and crimes contained in the Marty Report.

all the investigations done by the ICTY"[441] mainly because the "witnesses were so afraid and intimidated that they even feared to talk about the KLA presence in some areas, not to mention actual crimes".[442] She even claimed that she believed the intimidation and threats against the witnesses seriously affected the final verdicts in the cases against former KLA officials Fatmir Limaj and Ramush Haradinaj, both of whom were eventually acquitted in 2012. Therefore, the Court, the EU and the other supporters need to continue to ensure robust victims and witness protection, the lack of which has already undermined previous cases against other former KLA leaders. A pivotal measure to guarantee the victims and witnesses of international crimes and human rights abuses to feel safe before, during and after trials consists in permanently move both them and their families out of Kosovo, as suggested by Capussela.[443]

Third, the KSC and SPO have often been accused of bringing traces of past colonial projects and Western imperialism. According to most of the Kosovars, the law establishing this hybrid mechanism was adopted under pressure from Kosovo's international allies, namely the EU, and therefore it proves to be an unfair imposition from abroad rather than a local initiative. It is not a case that in 2015 the opposition parties and a consistent number of members of the governing coalition rejected both the first amendments to the Constitution and the law considering them as a violation of the sovereignty of the Republic of Kosovo and a significant interference with Kosovo's judicial system. Even after the establishment of the KSC and SPO, former leader of the KLA and Prime Minister Hashim Thaçi has subsequently reiterated that he only supported the new hybrid mechanism because he was "under great pressure from the international community".[444] Not only was this a widespread impression among the ethnic Albanian community, but the ethnic Serb minority also expressed the feeling that since the establishment of the KSC and SPO was mainly promoted by the international community, the aim was more "the need of Kosovo's international allies to clean the image of the political leaders that emerged from the KLA who now hold positions of power" rather than seeking for justice to be done.[445] This is also the reason why it has often been considered by the local population as a "political court" and not a judicial one.

---

[441] *Balkan Insight*, "Can the new Kosovo Court keep witnesses safe?", 20 January 2016, available at: https://balkaninsight.com/2016/01/20/can-the-new-kosovo-court-keep-witnesses-safe-01-20-2016/ (Accessed: 2 January 2021).

[442] Carla Del Ponte, *Madame Prosecutor, Confrontations With Humanity's Worst Criminals and the Culture*, Other Pr Llc, 20 January 2009.

[443] Andrea L. Capussela, *Supra note 361*.

[444] *B92*, "Special court for KLA crimes 'cannot be abolished' – Thaci", 1 February 2018, available at: www.b92.net/eng/news/politics.php?yyyy=2018&mm=02&dd=01&nav_id=103403 (Accessed: 10 January 2021).

[445] *OpinioJuris*, "The Kosovo Specialist Chambers: In Need of Local Legitimacy", 8 June 2020, available at: http://opiniojuris.org/2020/06/08/the-kosovo-specialist-chambers-in-need-of-local-legitimacy/ (Accessed: 2 January 2002).

Another peculiar issue that needs to be raised and addressed more closely is the question under which provision of the Law the allegations of organ trafficking involving the KLA members could potentially be prosecuted. Are these acts prosecuted by the KSC and SPO under the criminal law of Kosovo, war crimes law or the law of crimes against humanity?[446] Additionally, as noticed by Mr. Gashi, "I remember that after the publication of the Marty report in 2010, the international media and public discourse was primarily focused on the accusation of 'organ trafficking' that Thaçi and the other KLA leaders had been involved in during the 1990s. With the allegations confirmed in 2020, we saw that the count 'organ trafficking' did not appear in the indictment, which only focused on war crimes."

Furthermore, a fifth critic to be considered, which may seem to contradict one of the previously defined strengths of the KSC and SPO and which is linked to the concept just mentioned above, is the perception that the lack of local judges and prosecutors – with their deep knowledge of the nuanced cultural and social context in which they operate as well as their proficiency in both the local languages and English – could potentially contribute to reinforce the general scepticism towards another international "deus ex machina". However, the choice of the KSC and SPO to employ a wholly international staff has been based on a deep analysis and assessment of the shortcomings and strength that a mixed composition of the Kosovo justice system had entailed during the UNMIK and EULEX. What emerged is that the previous attempts of the international community to promote the collaboration between international and local judges and prosecutors, especially in the aftermath of the conflict, had proved to be a complete failure. Not only had it been extremely hard to find local legal personnel in Kosovo after the withdrawal of the Serbian and Yugoslav forces – which implied that the Kosovars needed to be trained and constantly supported by their international counterparts in the exercise of their profession – but in many instances the international judges and prosecutors sent to the region also lacked some of the basic skills to effectively collaborate with the local actors and conduct investigations (see chapter 3.2). Consequently, it was decided that the KSC and SPO's personnel (Judges, Specialist Prosecutor and Registrar) should be international, and more specifically with the citizenship of the EU member States. The judges' competence, diverse backgrounds and experience of different legal systems are considered to be an extremely valuable resource for the Court, whose President Ekaterina Trendafilova even affirmed that the "judges are like racing horses that are just waiting for the pistol to let them do their job. […] They are respectful of the universal

[446] Mathias Holvoet, "The continuing relevance of the hybrid or internationalized justice model: the example of the Kosovo Specialist Chambers", in *Criminal Law Forum* (2017) Volume 28, pp. 35-73.

standards of fairness vis-à-vis the suspect, the accused and the victims, in particular that criminal proceedings should be conducted within a reasonable time."[447]

Finally, there has sometimes been harsh criticism also related to the temporal jurisdiction of the KSC and SPO, especially for the fact that it does not cover the violations of human rights committed after 31 December 2000, including those allegedly committed by the UNMIK international personnel during the UN protectorate of Kosovo. Even though this observation could indeed potentially be raised as far as the period between the end of the KSC and SPO's jurisdiction and the beginning of the ICC's (1 July 2002) is concerned, it must be remembered that the UNMIK's immunity from all legal processes precluded the reach of national courts, despite the hundreds of allegations brought before the HRAP – whose opinions between 1999 and 2008 were of an advisory nature only, and therefore not binding. These elements considered, it may be seem that some of the crimes and violent acts committed in Kosovo even after the end of the period under the KSC and SPO's jurisdiction will never be prosecuted and those responsible never tried for their crimes.

Thus, the establishment of another court through external transitional justice processes is often considered as a counter-productive solution, which risks to result in further political polarisation in an already tense and divided society.

## 4.3. Public perception of the KSC and SPO

When the KSC and SPO were established in 2015 to follow up on allegations of grave trans-boundary and international crimes committed during the conflict in Kosovo and in its immediate aftermath, Kosovo was still victim of a social and political turmoil. In January, clashes and demonstrations were organised by the opposition parties in Pristina against the government and, more specifically, against the Serb minister Aleksandar Jablanović, accused of minimising the war crimes committed against the ethnic Albanian community during the Kosovo war. This episode – one of the most violent after Kosovo's unilateral declaration of independence in 2008[448] – was only the last of a series of events that have revealed the animosities and deep hatred between the ethnic groups in the country during the centuries. This divisive situation, which was also reflected by an unstable political

[447] *Peace Palace Library*, "Interview President Kosovo Specialist Chambers : Judge Ekaterina Trendafilova", 4 November 2020, available at: www.peacepalacelibrary.nl/2020/11/interview-president-kosovo-specialist-chambers-judge-ekaterina-trendafilova/ (Accessed: 3 January 2021).
[448] *Il Post*, "Le grandi proteste di Pristina", 27 January 2015, available at: www.ilpost.it/2015/01/27/le-grandi-proteste-pristina/ (Accessed: 5 January 2021).

scenario, was combined with the lack of resources and political commitment – both at the local and at the international levels – in the implementation of human rights, although some progress had been made with the adoption of a package of human rights law[449] to promote and reinforce them.[450] Moreover, the unresolved fate of 1,670 missing persons related to the war in Kosovo remained a humanitarian concern,[451] hindering the local process of reconciliation and stability, and the local population had little faith in both the local justice systems and the international mechanisms that were mandated to investigate over the serious crimes and human rights abuses committed in the region. The UNMIK mission had been unprecedented in complexity and scope, but it had proved to be a complete failure in promoting the security, stability and respect for human rights in Kosovo. In 2008, the EULEX mission inherited thousands of legal cases from UNMIK – 1,200 of which were war crimes – and initiated dozens more, though being hindered in its investigations by the extremely little material evidence left; witness testimony was also incredibly fragile. Despite the strong commitment, many critics claim the twelve-year long program has failed to hold high-level criminals and corrupt officials to account, and two decades after the end of the conflict against the Serbian and Yugoslav forces, the population of Kosovo remains sceptical about the possibility to be delivered with the justice they had long being denied.

Thus, while the Assembly's amendment of the Kosovo constitution to establish the KSC and SPO was welcomed with very high expectations by the international community – and especially by the EU – as the last possible solution to address the unpunished crimes documented in the Marty Report and therefore to finally end the cycle of impunity in Kosovo, most of the local population has been very cynical about the ultimate impact of this body in Kosovo from the very beginning of its establishment. This has particularly been shown by the numerous interviews carried out by journalists, international and local NGOs and human rights activists. And despite the great efforts and strong commitment of the international community in carrying out impartial and effective investigations to prosecute the individuals responsible for the war crimes and human rights violations between 1998 and 2000, as well as in overcoming the limits and void of the previous justice mechanisms, the lack of legitimacy among the Kosovar population poses potentially grave obstacles for the KSC's proceedings, and consequently, for the stability in the whole region. As explained by Jelena Subotić,[452] the courts that lack local popular legitimacy may worsen the already existing social

[449] Namely the laws on the Ombudsperson, gender equality and protection from discrimination.
[450] EU Commission staff working document, Kosovo 2015 report, Brussels, 10 November 2015, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_kosovo.pdf.
[451] Data from the International Committee of the Red Cross (ICRC).
[452] Jelena Subotić, "Legitimacy, Scope, and Conflicting Claims on the ICTY", in *Journal of Human Rights*, 13:2, (2014), pp. 170–185.

ethnic tensions, since the judgements, either prosecution or acquittals of the indicted, risk to strongly reinforce people's support for the ideologies and ethnic bias that originated the conflict.

### 4.3.1. A strongly disputed tribunal: between hope and scepticism

"We [the legal personnel of the KSC and SPO] were mindful of the need to integrate the best approaches not only from the domestic system, but also from other international institutions, such as the ICC, ICTY, Special Tribunal for Lebanon (STL) or the Extraordinary Chambers in the Courts of Cambodia (ECCC), in order to not repeat some of the mistakes from the past":[453] these are the words of the KSC President Ekaterina Trendafilova, who has often reiterated in her interviews and speeches the strong commitment of the new hybrid system's highly trained judges and prosecutors as well as their desire not to commit the same mistakes that had characterised the mandate of the previous judicial systems. The relatively recent establishment of the KSC and SPO in Kosovo provides other clear evidence of the continuing relevance of hybrid criminal tribunals, whose "less intrusive nature" tribunal into a State's sovereignty is more and more often considered to enhance the political legitimacy of these institutions.[454]

Nevertheless, a 2017 study led by PAX in Kosovo on the public perception of the KSC and SPO[455] concluded that a consistent majority of ethnic Albanians in Kosovo (76.4%) viewed the KSC's mandate to prosecute the war crimes and crimes against humanity committed mainly by the KLA members as unfair, and the Court as a political mechanism, aimed at fulfilling Serbia's desires of revenge after the high number of final verdicts that have convicted Serbian high-ranking leaders and other officials, while generally acquitting other ethnic groups' leaders. Nevertheless, the Serbian community's level of trust in the KSC and SPO also seems to be particularly low in Kosovo. Similar results to the ones brought to light by PAX were also confirmed by other studies and interviews carried out by journalists, experts in transitional justice, international and local NGOs, and human rights activists in Kosovo.[456] Four main reasons seem to emerge with a particular and strong evidence.

First of all, a consistent part of the ethnic Albanian population tends to believe that the establishment of the KSC and SPO was not as necessary as the international community had

[453] Czech Center for Human Rights and Democracy, "Interview with the President of the Kosovo Specialist Chambers in The Hague, Ekaterina Trendafilova: The Court is Ready for its First Indictments", 18 January 2019, available at: https://www.humanrightscentre.org/node/689 (Accessed: 6 January 2021).
[454] Mathias Holvoet, *Supra note 446*, p. 45.
[455] PAX For Peace, *Supra note 432*.
[456] The information gathered through the interviews with Mr. Duriqi, Mr. Fazliu, Mr. Musaj and Mr. Krasniqi clearly highlights the low expectations and level of trust towards the KSC and SPO.

continuously claimed. First, because the KLA had legitimately and fiercely fought to protect the ethnic Albanian population in Kosovo – "the main victim" of the human rights violations before and during the Kosovo conflict[457] – against the oppressive Serb regime. Consequently, its leaders should only be considered as "national heroes" and "freedom fighters", and not as criminals. "For sure there were violations of the Geneva Conventions and core principles of international humanitarian law during the war. However, the disproportionality between the number of victims between the Serbs and the members of the other ethnic groups – including ethnic Albanians in Kosovo – is undeniable and evident", explains Mr. Shpend Krasniqi – member of a Kosovar NGO. Second, because the jurisdictional impediments of the ICTY – whose mandate had not yet come to its end in 2015 – were not as insurmountable as depicted by the EU. In other words, the establishment of another mechanism to conduct investigations over the crimes committed in Kosovo could have been avoided by amending and extending the ICTY's mandate – which had proved to be limited from a temporal, territorial and subject matter jurisdiction point of view – in order to include the prosecution of the crimes revealed by the Marty and SITF reports. It is not a coincidence that in 2000, former Prosecutor Carla Del Ponte requested revisions to the ICTY Statute to allow the Tribunal to conduct investigations and prosecute the crimes that did not fall into its jurisdiction (i.e. those committed in the Albanian territory and in Kosovo after the withdrawal of the Serbian and Yugoslav forces), but her request was not accepted. Furthermore, a decision to amend the ICTY Statute could have also helped contrasting the still prevailing narrative among the Serb community that the ICTY was a blatantly anti-Serb and ethnic-biased international tribunal. Not to underestimate the fact that the ICTY had already a decade-long history and experience over the international crimes related to conflicts that had bathed the region in blood since 1991.

Second, as previously mentioned, the Kosovar population – and in particular the ethnic Albanian majority – tends to support the thesis that the establishment of the KSC and SPO was mainly a result of the US and the EU "undemocratic and illegitimate pressure"[458] on the Kosovo political class, whose political, diplomatic and financial dependency on the Western countries cannot be underestimated. Consequently, politicians in Kosovo agreed to the establishment of the KSC under duress, but since the beginning of its activities and investigations they have been either hostile or ambivalent towards it. In this context, it must also be remembered that the accession of Kosovo to the EU has always been a real issue at stake: even though five countries – namely Cyprus, Greece,

[457] UNDP, "Perceptions on transnational justice – Kosovo 2021".
[458] PAX for Peace, *Supra note 432*.

Romania, Slovakia and Spain[459] – strongly hinder this process, Kosovo currently holds a membership status of potential candidate. Since 2008, the EU has frequently reiterated its willingness to assist the political and economic development of Kosovo through a clear European perspective, as demonstrated by the establishment of the EULEX mission on the region, and both the Kosovar political class and population have expressed their strong commitment to join the EU. However, what emerges from the polls and interviews carried out in Kosovo is that the citizens are quite disappointed by the EU, which seems to be unable to put its commitment into practice. "It is undeniable that Kosovo needs a more robust effort to fight corruption and improve the rule of law, […] but it is the European Union's anaemic approach and lack of unity that might keep Kosovo out of the EU integration process", claims Mr. Gashi, who underlines the sense of frustration among the Kosovar population since the EU Council has not yet completed the visa liberalisation process with the country.[460] This bureaucratic obstacle, combined with the strong direct and indirect pressure of the Kosovo's international allies on the local government to establish a wholly new court to prosecute the crimes committed after the end of the war against Serbia, has contributed to reinforce the idea that the KSC and SPO were an unfair imposition from abroad rather than a local initiative, therefore compromising both local ownership and legitimacy. And, as underlined by Hehir,[461] "there is a widespread acceptance in the literature that transitional justice mechanisms […] cannot be effective in the absence of popular legitimacy, understood as when the subject population accept the mandate of the court and have 'trust' in both its procedures and enforcement mechanisms".

Third, there is a general perception that the Court will serve very little – if nothing – to the victims. Even though the KSC and SPO were established as a hybrid mechanism to avoid all the mistakes and judicial vacuum of the previous international justice initiatives (ICTY, UNMIK and EULEX) – which have all failed to deliver justice to the victims of Kosovo and therefore have not contributed to the reconstruction of a peaceful, tolerant and inclusive post-conflict society – they were instituted more than sixteen years after the end of the conflict in the region. This time span is extremely broad when referring to justice and the passing of time is certainly an obstacle in shading light on war crimes: in fact, when conducting investigations over both human rights abuses and war crimes that have taken place several years or even decades before, such as in the case of Kosovo, reliable evidence becomes increasingly hard to gather. Furthermore, the more time passes, the more

[459] At present (April 2021), these countries do not recognise Kosovo's independence, claiming that a recognition of the unilaterally auto-proclaimed independent country could set a dangerous precedent for the minority groups living in their territory (i.e. Catalans) aim at gaining their independence.
[460] Schengen Visa Info, "EP Rapporteur for Kosovo Urges EU to Deliver on Visa Liberalisation Promises", 14 December 2020, available at: https://www.schengenvisainfo.com/news/ep-rapporteur-for-kosovo-urges-eu-to-deliver-on-visa-liberalisation-promises/ (Accessed: 7 January 2021).
[461] Aidan Hehir, *Supra note 438*.

the testimony of victims and witnesses tends to be confusing, less detailed and sometimes even contradictory, despite the undeniable long-lasting psychological – and in some instances even physical – effects of the violence they personally experienced or witnessed. By contrast, as often reiterated by the legal personnel of the KSC and SPO, as well as by transitional justice experts, war crimes do not have a statute of limitations, meaning that the related trials can be conducted even though a relatively long period of time has passed, since the investigation, persecution and trial of individuals accused of committing war crimes reinforces the feeling of hope for justice to be served among the victims, their families and communities.

Moreover, the distance of the Court the deeply-rooted fear of social stigma, discrimination, dishonour and exclusion from both families and communities, as well as a general loss of trust in both the international and transitional justice systems, also continue to play a pivotal role in reinforcing the Kosovars' feeling of rejection of the KSC and SPO, as shown by the results of many polls and the interviews with the Kosovar population.

Furthermore, the ethnic-Albanian population continues to be quite sceptical about the KSC and SPO's lack of transparency about the prosses of conducting the investigations and gathering evidence. It is still not clear how much the Serbian government is contributing to the investigations.

Finally, as far the ethnic-Serbs is concerned and differently from the ethnic Albanians' case, the Serb community in Kosovo appears to be divided on the social, political and judicial future impact of the KSC and SPO. Deeply influenced by Belgrade, Serbs living in Kosovo are generally unsatisfied with the work and final verdicts issued by the justice mechanisms that have been established since the 1990s in terms of war crime trials, reparations and recognition for both the victims and the survivors. More specifically, as regards the KSC and SPO, the majority part of the ethnic-Serb community in Kosovo believes it is unlikely or even very unlikely that the Court will successfully bring justice to those who committed serious war crimes in the region, especially in the period after the withdrawal of the Serbian and Yugoslav forces and the beginning of the UNMIK protectorate. Many fear that the new hybrid mechanism will only be able to prosecute a limited number of former KLA members, omitting many of the unpunished crimes and abuses against the ethnic-minority communities committed as individual revenge acts. Moreover, beyond this scepticism, there is a widespread feeling that the KSC and SPO will trigger the long-dating ethnic tensions in the region, especially in the northern areas of Kosovo, threatening security and ethnic reconciliation. On the other hand, several members of the local Serb civil society groups are quite optimistic that a Court specifically focusing its activity on the crimes committed by the KLA forces in a period characterised by an evident judicial void will finally belie the dominant narrative that the Serb regime was the only

responsible for the war crimes committed in Kosovo,[462] and will therefore contribute to promote the gradual and long-waited process of social and ethnic reconciliation.[463] In particular, they strongly believe that justice will be finally served if all the high-ranking officials of the KLA are held responsible for the heinous crimes they committed against the Serb community and the other minorities in Kosovo. And the establishment of the KSC and SPO could be the last attempt to stabilise what has so far been considered as an unbalanced and ethnic-biased justice system.

In conclusion, it is undeniable that the KSC and SPO were established in a context where the Kosovar civil society is still entrapped by mono-ethnic narratives regarding the turbulent past of the region and both the causes and effects of the 1998-1999 conflict. Notwithstanding the different perceptions among the ethnic communities concerning the victims of human rights violations before, during and after the conflict, the responsibility for such crimes[464] and the expectations about the KSC and SPO, a common element can be underlined: the overwhelming majority of the Kosovar population agrees on the urgent need to finally find the truth about the fate of the all the persons who are still missing, the circumstances of their disappearance and the process of investigations regardless of their nationality and ethnic group. As demonstrated by the 2012 UNDP survey, according to the Kosovar population it is extremely important for justice that all war crime perpetrators are prosecuted, tried and punished. And revealing the truth represents a crucial step towards reconciliation, which can be achieved through effective transitional justice mechanism.[465]

## 4.4. The first cases and President Thaçi's war crimes indictment

> "The indictment brings hope for thousands of victims of the Kosovo war who have waited for decades to find out the truth about the horrific crimes committed against them and their loved ones. Charges, which are the first for the Special Prosecutor's Office, show that senior officials are not above the law"
>
> Jelena Sesar, Amnesty International[466]

[462] The results of a 2012 survey carried out in Kosovo by the UNDP and published in "Perceptions on transnational justice – Kosovo 2012" show that almost 80% of the Kosovo Albanians believed that the members of the KLA had not committed war crimes.
[463] PAX for Peace, *Supra note 432*.
[464] The Kosovar population generally tends not to consider that the members of its own community are responsible for systematic and widespread crimes.
[465] Justice and reconciliation are not synonyms and not necessarily interrelated. In the case of Kosovo, while the local population agrees on the need to provide the victims and their families with justice for the crimes they have directly or indirectly experienced, the reconciliation between the different ethnic groups is still not conceived as a urgent goal to be achieved.
[466] Amnesty International, "Serbia/Kosovo: Confirmed indictment of Kosovo's President for war crimes brings victims one step closer to long-awaited justice", 5 November 2020, available at: www.amnesty.org/en/latest/news/2020/11/serbiakosovo-confirmed-indictment-of-kosovos-president-for-war-crimes-brings-victims-one-step-closer-to-long-awaited-justice/ (Accessed: 26 December 2020).

Before the establishment of the KSC and SPO, the ICTY – which was undoubtedly a milestone in the pursuit of international justice and individual criminal responsibility, with a total of 161 cases – had only dealt with five cases related to the Kosovo conflict: *Milošević*, *Šainović et al.*, *Vlastimir Đorđević*, *Limaj et al.*, and *Haradinaj et al.* The first three are all cases against Serbian leaders and officials, while the *Limaj et al.* and *Haradinaj et al.* cases are against KLA leaders.

Slobodan Milošević died on 11 March 2006 and three days later the Trial Chamber concluded the proceeding against the other accused. In February 2009, former Deputy Prime Minister of the FRY Nikola Šainović and two other high-ranking Serb politicians were indicted for deportation, forcible transfer, persecution on racial, religious and political basis and murder and sentenced to twenty two years' imprisonment by the ICTY Trial Chamber. On 27 January 2014, Assistant Minister of the Serbian Ministry of Internal Affairs (MUP) and Chief of the Public Security Department (RJB) Vlastimir Đorđević was sentenced to eighteen years' imprisonment for deportation, other inhumane acts (forcible transfer), murder and persecutions. By contrast, Ramush Haradinaj, former Prime Minister of Kosovo, has been the first suspect to be tried twice for the same offences, namely murder, persecution, rape and torture, at the ICTY. In both cases, however, he was acquitted. As far as the *Limaj et al.* case is concerned, Fatmir Limaj and Isak Musliu – commanders responsible for the operation of the Lapušnik/Llapushnik area and KLA prison camp – were found not guilty on all charges, while Haradin Bala[467] – guard at the abovementioned prison camp – was convicted and sentenced to thirteen years' imprisonment for torture, cruel treatment and murder.

Given this quick overview on the five cases before the ICTY that involved the Serb and KLA leaders accused of war crimes committed during the 1998-1999 war, it is now opportune to proceed first with the analysis of the social impact the Tribunal's decision had on the population of Kosovo – either ethnic Serb and Albanian – and the context in which the KSC and SPO began to operate, and second, the three proceedings the KSC has dealt with since the beginning of its mandate,[468] with a specific focus on the *Hashim Thaçi et al. case*.

The acquittal of the former KLA members and the conviction of many Serb leaders by the ICTY entailed a series of political and social consequences, raised contrasting feelings among both the local population in Kosovo and the international community, and proved to be a pivotal element for the establishment of the KSC and SPO few years later.

On the one side, the final decision of the ICTY judges was welcomed by the ethnic Albanian population as the demonstration that the dominant narrative comprising a stark binary between the aggressor (the Serbs) and the victims (the Albanians living in Kosovo) was not ethnic-biased but a

[467] Bala died on 31 January 2018, so he did not serve the whole term of imprisonment.
[468] Kosovo Specialist Chambers and Special Prosecutor's Office. Cases, available at: https://www.scp-ks.org/en/cases (Accessed: 10 January 2021).

real fact, which the international community seemed to support through the activity of the international tribunals and courts. However, notwithstanding this landmark event, the Kosovar population was still not satisfied with the activity of the UN international tribunal with respect to the conflict in Kosovo. "The cases against the Serbs in the Court were low compared to the huge number of violations they committed in the region. Some of the most heinous massacres in Kosovo were never brought before the Court", affirmed Mr. Gashi. There was – and there is still today – a general perception among the Kosovar population that neither the ICTY, UNMIK nor EULEX have succeeded in carrying out thorough investigations in Kosovo, an element that contributed to undermine the Kosovars' trust towards the international community and the justice mechanisms established in the past to deal with the crimes committed in the region.

On the other side, by contrast, the overwhelming majority of the ethnic Serb community in Kosovo was obviously strongly disappointed and unsatisfied with the verdicts of the ICTY (see Table 2 at page 135).[469] First, the decision seemed to contradict the evidence found by the SITF and brought to light by the recently published Marty Report, portraying the Kosovo Albanians as the only victims of a conflict where, by contrast, serious war crimes were also committed by the KLA, either during war against Serbia and, especially, in its aftermath. Second, the ICTY mandate and jurisdiction only covered the crimes committed during the war, meaning until 9 June 1999. Nevertheless, since an estimated 800 members of minority communities in Kosovo were allegedly abducted and murdered by KLA members, most of them in the aftermath of the war, who was responsible for such crimes if the high-ranking KLA members persecuted and tried by the ICTY were are not guilty? And why did both UNMIK and EULEX fail in conducting thorough investigation over the crimes committed in post-conflict Kosovo and deliver justice to the mourning families, especially those belonging to the minority groups?

As far as the proceedings before the KSC are concerned, three cases are currently ongoing.[470] The proceedings are all at their very early stage and have been opened five years after the establishment of the KSC and SPO.

The first (case KSC-BC-2020-05) involves Salih Mustafa, Commander of a unit within the KLA called "BIA Guerrilla" in north-east Kosovo. Arrested on 28 September 2020, he was charged with four counts, namely arbitrary detention, cruel treatment, torture and murder of at least six civilian prisoners detained at the Zllash/Zlaš detention compound in April 1999. The prosecution alleges that Mustafa was part of a JCE with a "shared common purpose to interrogate and mistreat detainees" who had been deprived of food and water, sanitation and medical care, and who were repeatedly

[469] UNDP, *Supra note 457*.
[470] As of April 2021. For the updates of the proceedings, see the KSC case website https://www.scp-ks.org/en/cases (Accessed: 11 January 2021).

subjected to "beatings with various instruments, burning and the administration of electric shocks".[471] Nevertheless, the accused has pleaded not guilty to all counts of the indictment, describing himself as "a former warrior for freedom and soldier of the KLA" and repeatedly claimed that KLA's acts were justified "due to the occupation [of Kosovo] by the Serbs, directed by Slobodan Milosevic". On 26 January 2021 his detention has been extended due to the possibility he could interfere with witnesses or escape.

A second case (KSC-BC-2020-07) – the last of the indictments confirmed by the KSC – involves Hysni Gucati and Nasim Haradinaj, then Chairman and Deputy Chairman of the KLA War Veterans Association. Confirmed on 11 December 2020, the indictment charges the two KLA leaders of obstructing justice[472] and intimidating witnesses.[473] Haradinaj claimed that the prosecutors "are blaming us for the mistakes and errors made by this prosecution". On 8 January 2021, Pre-trial judge Guillou entered not-guilty plea on behalf of Nasim Haradinaj who, in accordance with KSC regulations, did not appear in court. The lawyer told the Court that his client refused to take part in the hearing "as a protest about the way he has been treated".

However, the case that has drawn more attention on the KSC and SPO activity so far is the *Thaçi et al*. case (KSC-BC-2020-06). Confirmed on 26 October 2020, the 68-page indictment involves recently resigned President of Kosovo Hashim Thaçi and three other high-ranking leaders of the KLA and prominent political figures at the time of the facts reported in the indictment, namely Kadri Veseli, Rexhep Selimi and Jakup Kraniqui.[474] The indicted will face charges of crimes against humanity (persecution, imprisonment, other inhuman acts, enforced disappearances, torture and murder) and war crimes (illegal or arbitrary arrest and detention, cruel treatment, torture and murder) allegedly committed and ordered "against hundreds of civilians and persons not taking part in hostilities" in the period between March 1998 and September 1999 mainly in detention centres in Kosovo and Albania. With an evident "superior responsibility" over the abovementioned crimes, despite the former KLA leaders have all pleaded not guilty for the crimes, they are accused of being

[471] KSC, Basic Court Chamber, Annex 1 to public redacted version of "Submission of confirmed indictment", filing KSC-BC-2020-05/f00011 dated 19 June 2020, available at: https://repository.scp-ks.org/details.php?doc_id=091ec6e9803599fa&doc_type=stl_filing_annex&lang=eng (Accessed: 11 January 2021).
[472] After some confidential case files from the KSC were leaked to them, both the indicted urged media to publish this material and information without authorisation.
[473] KSC, Basic Court Chamber, Annex 2 - Redacted Indictment, 14 December 2020, available at: https://repository.scp-ks.org/details.php?doc_id=091ec6e9803b6a23&doc_type=stl_filing_annex&lang=eng (Accessed: 11 January 2021).
[474] In the period from at least March 1998 to September 1999: Thaçi was the Head of the Political and Information Directorates of the KLA and then Prime Minister of the Provisional Government of Kosovo (PGoK) and KLA Commander-in-Chief during the period covered by the KSC indictment; Veseli was member of the KLA Political Directorate and Head of the KLA intelligence services, then Court chief of the Kosovo Intelligence Service and PGoK Minister of the Intelligence Service; Head of the KLA Operational Directorate and KLA Inspector General, then PGoK Minister of Public Order and Minister of Internal Affairs; and Krasnisqui was Member of the KLA Political Directorate and official KLA spokesperson, then officially appointed as a KLA Deputy Commander and PGoK spokesperson.

part of a JCE whose purpose was "to gain and exercise control over all of Kosovo […] unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents".[475] The victims included persons suspected of opposing to the KLA and then, after June 1999, to the Provisional Government of Kosovo (PGoK), namely the Serbian, Roma and Ashkali minorities, ethnic Albanians allegedly accused of collaborating with the Serb authorities or supporting other political parties (i.e. LDK), Catholics and all the individuals involved in current or past employment perceived as anti-KLA.

As previously mentioned, the polls and interviews with the ethnic Albanian population of Kosovo have shown the general aversion to an indictment which is considered as an "insult" to the KLA's war for liberation from Serbian rule, even though critics have clarified that, during his mandate as President (2016 – 2020), Thaçi became the personification of a political élite whose corruption and mismanagement have proved unable, after 2008, to lift the inhabitants of Kosovo out of grinding poverty and socio-economic instability. On 5 November 2020, Hashim Thaçi resigned to face the war crimes he is accused of "to protect the integrity of the office of the President and the country, as well as of the dignity of the citizens", as stated at a press conference in Pristina, during which he also expressed his will to "collaborate closely with justice." His indictment had been expected by both the local population and the international community, since the SPO claimed Thaçi was "criminally responsible for nearly 100 murders", torture and enforced disappearances. Local and international human rights groups and activists welcomed the news of the indictment with optimism and hope for thousands of victims and families who have been waiting for justice to be finally served for more than two decades. Moreover, it must be highlighted that Thaçi's indictment did not only imply social consequences, but it also had crucial geopolitical implications, since the former President of Kosovo and Serbian President Aleksandar Vucic were expected to meet at the White House on 27 June 2020 to discuss on an economic agreement as a possible prelude to a future mutual recognition between the two countries.

As far the judicial implications of the three indictments that have been issued by the KSC so far, the Basic Court Chamber has already taken some crucial positions, which are clearly visible in the current available sources, especially in the case involving former President Thaçi.

First of all, the "hybridity" of the KSC was particularly visible in the decision to refer to both the Law and the FRY Criminal Code that was in force in the period covered by the KSC and SPO jurisdiction as the legal basis for the ten counts reported in the indictment. Consequently, the nature

[475] KSC, Basic Court Chamber, Annex 3 to Submission of corrected and public redacted versions of confirmed Indictment and related requests, 4 November 2020, available at: https://repository.scp-ks.org/details.php?doc_id=091ec6e98037f115&doc_type=stl_filing_annex&lang=eng (Accessed: 11 January 2021).

of the crimes Thaçi, Veseli, Selimi and Krasniqi are accused of has been guaranteed as foreseeable in the period in which they were committed and ordered.

Moreover, the Court has defined the period between March 1998 and September 1999 – which means even after the NATO's intervention – as "a non-international armed conflict" under Article 14(2) of the Law "between the Serbian forces and the KLA." This claim can prove fundamental in setting the context not only for the three cases that are currently ongoing, but also for future proceedings covering the whole period over which the KSC and SPO have temporal jurisdiction,[476] and therefore bring further clarifications over the nature of the conflict in post-war Kosovo.

Another crucial step the Court has taken, which is particularly visible in the *Thaçi et al*. case, concerns the centrality of the JCE – to which the indicted are accused of belonging – and its relation with individual criminal responsibility. In other words, the four indicted will be held responsible for the charges if the Court demonstrates that they purposely contributed with their actions and orders to the common purpose of the JCE, namely carrying out systematic and widespread crimes against the abovementioned categories.

Finally, the hybrid Court has already implemented all the measures allowing the victims to safely participate in the legal proceedings with the support of a Victims' Counsel in order to prevent them to become the target of intimidation, as in the previous cases before the other international tribunals, and consequently undermining evidence gathering from the testimony of other victims and witnesses who may be reticent to report the violence and crimes they suffered.

Thus, even though the proceedings before the KSC are still at an early stage and the new hybrid mechanism has taken five years before issuing the first indictments, the Court's decisions have already entailed judicial, political and social consequences, as a demonstration of the unicity of the Kosovo case, in which these spheres are strictly interrelated. Consequently, the success of both the current and future cases the KSC and SPO will conduct investigations on and open will be strongly influenced by the past events and failures of the previous international and national justice systems; they will be perceived differently according to the ethnic groups living in the region and the existing narrative, and will undoubtedly have a crucial impact on both the Kosovar society, while influencing the potential establishment of new hybrid systems in post-conflict situations to finally provide the victims with justice.

[476] *Ius in Itinere*, "Time for action at the Kosovo Specialist Chambers", 19 December 2020, available at: https://www.iusinitinere.it/time-for-action-at-the-kosovo-specialist-chambers-33718 (Accessed: 11 January 2021).

## 4.5. Conclusions

All these elements considered, the KSC and SPO can play a crucial role in finally providing the victims and their families with justice through an impartial, evidence-based and transparent activity, avoiding asymmetrical justice, with the final aim to facilitate the reconciliation process. Thus, as stated by Hehir, the KSC and SPO have been charged with a "particularly emotive issue" that risks to hinder the jurisdictional efforts of the international judges and prosecutors, and that touches the heart of contemporary Kosovo Albanian identity: the "heroic" war that the KLA fought against Serbian oppressors.[477] Therefore, the stake for the KSC and SPO is very high: if the legal and judicial activity of the Court is based on impartiality and effectiveness, it will undermine the existing ethnic-based narrative blurring the line between the perpetrators and the victims, and demonstrate that the KLA leaders were also involved in oppressive, unlawful and brutal behaviours and acts against the ethnic Serb community the other ethnic minorities and the ethnic Albanians accused of collaboration with the Milošević regime.

[477] Aidan Hehir, *Supra note 438*.

# CONCLUSIONS AND FINAL CONSIDERATIONS

"Will the Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSC and SPO) be able to finally provide the victims of international crimes and human rights abuses with the justice they have been long waiting for?" This was the research question at the beginning of the present work, which was structured in four different chapters in order to provide the reader with the most important elements to objectively and critically assess the potential impact of this relatively new justice mechanism as the last attempt to impartially persecute and try the individuals responsible for international crimes and serious violations of human rights during and after the Kosovo war.

With this ambitious purpose, it was first necessary to recall the origins and developments of the 1998-1999 war in Kosovo, a relatively short but extremely cruel ethnic conflict, whose roots can be found back to the 14th century but which was fomented by the strong nationalism that overflew the Balkans in the 1980s and 1990s. A bloody war that witnessed serious breaches of both international and humanitarian law, for which a high number of individuals – mainly ethnic Serbs – were found responsible and consequently prosecuted by both international and domestic justice systems.

However, it is always worth remembering that the numerous episodes of violence in the region were not limited to the Serb and Yugoslav forces, nor to the period of the conflict itself: by contrast, brutal revenge acts and international crimes were also perpetrated in the aftermath of the war, especially by the KLA leaders. This time, the members of minority groups and the ethnic Albanians allegedly suspected of collaborating with the Serbs or simply considered anti-KLA became the target of planned attacks, killings, physical and psychological abuses, tortures and rapes, organ trafficking, and enforced disappearances[478] (chapter 1). Their voice was however hardly heard, and more than two decades after the end of the war, in a context that has always been dominated by a clear anti-Serb narrative, the serious international crimes and human rights abuses that still remain unaccounted for risk to be neglected and forgotten. The more the time passes, the harder it becomes to find clear evidence and to obtain detailed testimonies, undermining the victims' feeling of trust towards the justice system, especially in the communities where social stigma continues to play a pivotal role and speaking up and reporting the crimes is therefore harder than it may appear.

In a "new era of responsibility", where the concepts of truth, justice and reparation have surpassed the national boundaries and have acquired a universal dimension, the limits of the existing

[478] According to Human Rights Watch, from June 1999, a thousand of Serbs and Rom have either been killed or gone missing. See *Internazionale*, "La lezione inascoltata del Kosovo", 11 April 2019, available at: https://www.internazionale.it/opinione/jacopo-zanchini/2019/04/11/kosovo-nazionalismo-jugoslavia-anniversario (Accessed: 1 March 2021).

international tribunals'[479] mandate and jurisdiction in relation to the case of Kosovo on the one hand, and the inexperience, ethnic bias and lack of impartiality of embryonic and weak domestic justice systems on the other, cannot hinder the process of justice and the victims' right to truth and reparation, regardless of their ethnicity (Chapters 2 and 3).

Therefore, in order to achieve this ambitious – though necessary – purpose and to finally promote a peaceful and long-lasting reconciliation between the ethnic groups living in Kosovo, the institution of an innovative hybrid mechanism combining the best and most successful elements of the wholly international and local mechanisms appeared to be the most effective solution, and was therefore supported by both the EU and the United States (chapter 4). The KSC and SPO were indeed welcomed by the international community with high expectations, strongly committed to overcome, through their specific mandate and blended characteristics, the shortcomings that had prevented the victims of minority groups and alleged KLA opponents to have access to justice and had undermined their trust and hope in both the local and international justice mechanisms.

However, a deep analysis of the Kosovo case and the context that saw the establishment of this new court has highlighted how the institution, activity and potential impact of a judicial mechanism dealing with sensitive cases in this post-atrocity region is also strongly affected by and dependent from the historic, social and political variables. In today's increasingly complex and interconnected world, in fact, all the disciplines need to be taken into account when critically and fully assessing a phenomenon and its consequences, even when they may seem to be related to a single variable – either economic, social, historic, political or judicial. And it is especially this approach, which characterises the studies of international relations, that has been chosen to try to answer the research question that inspired the draft of the present work.

More specifically, as far as the KSC and SPO are concerned, a critical evaluation of the sources and the interviews conducted with some Kosovar citizens on the perception and potential impact of this recently-established hybrid mechanism have demonstrated that its future success or failure will surpass the mere judicial sphere. What has clearly emerged is that the KSC and SPO – whose establishment lies on a delicate "balance game" – have been generally seen as an impartial, ethnic-biased and useless international court since their establishment, especially by the ethnic-Albanian majority of the Kosovar population, as well as a new imperialistic attempt of the international community to interfere in the domestic affairs of an "independent sovereign State". It is therefore not surprising that the KSC and SPO do not benefit from the trust of the Kosovar population – which in some cases has even defined this court as a "political insult" to the KLA's war for liberation from the

[479] Namely the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Court (ICC).

Serbian rule – and are still lacking the local legitimacy that a judicial system should require as one of the necessary conditions to effectively and successfully carry out its mandate.

These considerations clearly demonstrate how the political and social spheres have always affected – and will continue to affect – the work of the hybrid court that is supposed to finally solve the long-dating plague of injustice in the region. A broader and more comprehensive approach allows both the experts and the readers of his work to focus their attention on at least two main aspects that will help assessing the potential impact of the KSC in the future.

First, the case of Kosovo and the KSC shows that an initial strong commitment for a cause – either judicial, political, economic or social – does not necessarily and obviously entail a successful outcome. Although the international community had expressed its engagement and determination in establishing an innovative, unique and necessary new hybrid mechanism to provide the victims of human rights abuses and international crimes in Kosovo with justice and to finally foster the reconciliation between the ethnic groups in the country, its activity has lacked the social support and legitimisation for the very beginning of its creation. The establishment of a Court dealing with international crimes committed in a country that is still struggling to recover from the devastating effects of a brutal conflict, and where ethnic animosities between its communities are still evident, risks to exacerbate the tensions and feed people's feeling of hatred towards the other ethnic groups, no matter which decisions will be taken,[480] leading to "rising perceptions of bias or favouritism if members of one group are appointed over others."[481]

Second, it is true that the international community – with the EU at its forefront – has aimed at combining the best characteristics of purely international and purely domestic legal systems in the new hybrid mechanism to better respond to the need of victims for justice and to overcome the limits of the pre-existing justice systems; however, the apparent strengths of the KSC have always been criticised and have already turned into unexpected obstacles. As an example, only few months have passed since the Court has issued the first indictments, but the KSC has already been at the centre of a harsh criticism after a series of confidential files – including the identity of both ethnic Serbs and Albanians who agreed to testify as witnesses in cases involving the KLA – was leaked to the KLA War Veterans' Organisation.[482] Therefore, the urgent need to ensure the protection of sensitive witnesses from intimidations and threats through the implementation of specific measures and by

[480] The judgements, either prosecution or acquittals of the indicted, risk to strongly reinforce people's support for the ideologies and ethnic bias that originated the conflict.
[481] Etelle R. Higonnet, *Supra note 259*, p. 413.
[482] *Balkan Insight*, "Kosovo War Crimes File Leaks Deliver a Blow to Justice", 1 October 2020, available at: https://balkaninsight.com/2020/10/01/kosovo-war-crimes-file-leaks-deal-a-blow-to-justice/ (Accessed: 5 March 2021).

locating the Court's headquarters in a third country has been hindered by an unforeseen episode, which risks to seriously endanger its investigations and work.

In conclusion, the analysis of the KSC and SPO has demonstrated, once again, that it is now ascertained that certain acts occurring within national borders cannot be tolerated by the international community any longer – since they clearly violate international law and human rights principles – and the idea of national and international responsibility has emerged into a unified and determined approach to sanction human rights violations and international crimes.

However, since the case of Kosovo is unique and extremely complicated in the international scenario from a political, judicial, ethnic and social point of view, and since the activity of the new hybrid Court will be strongly dependent from the national framework within which it has been established and will deeply affect the future of the country, it seems very unlikely that the KSC will be able to finally solve the question of justice in Kosovo through the prosecution of the former KLA leaders two decades after the crimes were committed. The establishment of a specific and innovative hybrid mechanism represents an ambitious project, which will undoubtedly contribute to the continuous development of international criminal justice in today's new era of individual responsibility; nevertheless, the scenario that saw the creation of this Court has not evolved from the beginning of the Kosovo war and the ethnic tensions in the region have not been overcome yet. Therefore, in order to finally achieve a reconciliation between the different ethnic groups living in Kosovo and, consequently, ensure international peace and security in the whole Balkan area, the activity and commitment of a judicial system will not be sufficient. I hope a sincere and collaborative dialogue will be established between the two main communities in Kosovo, so that the concepts of justice, truth and reparation for the victims and their families will finally surpass the existing ethnic animosities as universal and necessary values.

To this day, the scenario in Kosovo is still unstable, and its future uncertain. I hope my interest in the case of Kosovo will allow me to further and closely analyse its developments from a political, social and judicial perspective. In the meanwhile, it is possible to affirm that the three cases that have been opened before the KSC – and which are still ongoing – will certainly have a crucial impact on the future of this country, especially the *Hashim Thaçi et al.* case, since it seems to strengthen even more the relationship between the political and judicial spheres. However, the former President's decision to resign to face the charges he is currently accused of could be a demonstration of his will to preserve the integrity of an country – Kosovo – that is ready to become a fully independent and recognised State, where the concept of justice is able to surpass all the historic ethnic tensions.

"Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have lived under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus peace and justice go hand in hand."

*Antonio Cassese, former ICTY President*

# BIBLIOGRAPHY


Adam Roberts, "NATO's 'humanitarian War' over Kosovo", in *Survival*, Vol. 41, No. 3, Autumn 1999, pp. 102-123.

Aidan Hehir, "Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and Its Implications", in *Human Rights Review*, Vol. 20, 19 July 2019, pp. 267-287.

Alexandros Yannis, "Kosovo under international administration", in *Survival*, 2001, 43:2, p. 33.

Alexander Momirov, "Local impact of 'UN accountability' under international law; the rise and fall of UNMIK's Human Rights Advisory Panel", in *International Peacekeeping*, 19:1, 2012, pp. 3-18.

Amanda Alexander, "A short history of International Humanitarian Law", in The European Journal of International Law, Vol. 26 no. 1, 2015, pp. 109-138.

Andrea L. Capussela, *State-building in Kosovo: Democracy, corruption and the EU in the Balkans*, 2015, London: I.B. Tauris & Co Ltd.

Andrew Clapam, Paolo Gaeta and Marco Sassoli, *The 1949 Geneva Conventions. A commentary*, Oxford University Press, 2015.

Andrew Radin, "Analysis of current events: 'towards the rule of law in Kosovo: EULEX should go'", in *Nationalities papers*, 4 March 2014, Vol.42(2), pp.181-194.

Antonio Cassese, *International Criminal Law,* 2nd edition, Oxford University Press, New York, 2008.

Augusto Sinagra, Paolo Bargiacchi, *Lezioni di diritto internazionale pubblico*, Giuffré editore, 2009.

Carla Del Ponte, Chuck Sudetic, *La caccia. Io e i criminali di guerra.*, Feltrinelli, April 2008.

Carla Del Ponte, *Madame Prosecutor, Confrontations With Humanity's Worst Criminals and the Culture*, Other Pr Llc, 20 January 2009.

Carsten Stahn, *A critical introduction to international criminal law*, Universiteit Leiden, Cambridge University Press, 6 December 2018.

Catherine Gegout, "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace", in *Third world quarterly*, 1 June 2013, Vol.34(5), pp. 800-818.

Christopher Williams, "Kosovo, the fuse for the lightening", in *The Kosovo Crisis: the last American war in Europe*, London Pearson Education, 2001.

David Wippman, "The Cost of International Justice", in American Journal of International law, Vol. 100, issue 4, October 2006, pp. 861-880.

Dominique Carreau, Fabrizio Marrella, *Diritto internazionale*, 2nd edition, Giuffré Editore, 9 July 2018.

Elton Skendaj, *Creating Kosovo: International oversight and the making of ethical institutions*. Ithaca, 2014, New York, Cornell University Press.

Etelle R. Higonnet, "Restructuring hybrid courts: local empowerment and national criminal justice reform", in *Arizona Journal of International & Comparative Law*, Vol. 23, No. 2 (2006), pp. 347-435.

Ewa Mahr, "Local contestations against the European Union Rule of Law in Kosovo", in *Contemporary Security Policy,* 39:1, 2018, pp. 72-94.

Gabrielle Kirk McDonald, "Problems, obstacles and achievements of the ICTY, in *Journal of International Criminal Justice*, vol. 2, No. 2/2004, pp. 558-571.

Gëzim Visoka, "International Governance and Local Resistance in Kosovo: the Thin Line between Ethical, Emancipatory and Exclusionary Politics", in *Irish Studies in International Affairs*, 2011, Vol. 22 (2011), pp. 99-125.

Gordana Rabrenović, "The dissolution of Yugoslavia: Ethnicity, Nationalism and Exclusionary Communities", in *Dialectical Anthropology,* 1997, pp. 95-101.

Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor", in *The American Journal of International Law* , January, 2001, Vol. 95, No. 1, pp. 46-63.

Heikelina Verrijn Stuart, Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings*, Amsterdam University Press, Amsterdam, 2009.

Humanitarian Law Center, "Transitional justice report: Serbia, Montenegro and Kosovo: 1999-2005, 27 June 2006.

Human Rights Watch, "Civilian Deaths in the NATO Air Campaign", February 2000, Vol. 12, No. 1.

Human Rights Watch, *Under Orders. War crimes in Kosovo*, 31 October 2001.

Ingrid Detter, *The Law of War*, Cambridge University Press, London, 2002.

Ivana Nizich, "International law weekend proceedings: International Tribunals and their ability to provide adequate justice: lessons from the Yugoslav Tribunal", in *ILSA Journal of international and comparative law*, Vol.7, Issue 2 (2001), pp. 354-368.

Juha Rainio, Kaisa Lalu, Antti Penttilä, "Independent forensic autopsies in an armed conflict: investigation of the victims from Racak, Kosovo", in *Forensic Science International*, March 2001, 116(2-3), pp. 171-185.

Jacob K. Cogan, "Stitching Mothers of Srebrenica v. Netherlands", in The American Journal of International Law, Vol. 107, No. 4 (October 2013), pp. 884-890.

James G. Kellas, *The Politics of Nationalism and Ethnicity*, Macmillan press, London; 2nd edition (1998).

James Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law", in *International Review of the Red Cross*, 30 June 2003, pp. 313-350.

Jelena Subotić, "Legitimacy, Scope, and Conflicting Claims on the ICTY", in *Journal of Human Rights*, 13:2, (2014), pp. 170–185.

John Janzekovic, *The use of force in humanitarian intervention*, Ashgate Publishing, London, 2006.

Jonas Nilsson, "UNMIK and the Ombudsperson Institution in Kosovo: Human Rights Protection in a United Nations 'Surrogate State", in *Netherlands Quarterly of Human Rights*, Vol. 22/3, 1 September 2004, pp. 389-411.

Jonathan I. Charney, "International criminal law and the role of domestic courts", in *The American Journal of International Law*, January 2001, Vol. 95, No. 1., pp. 120-124.

Joze Pirjevec, *Le guerre iugoslave. 1991-1999*, Einaudi, 1994.

Laura A. Dickinson, "The promise of hybrid courts", *The American Journal of International Law*, Apr., 2003, Vol. 97, No. 2 (April 2003), pp. 295-310.

Laura A. Dickinson, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", in *New England Law Review* (2003), pp. 1059-1072.

Magdalena Forowicz, *The reception of international law in the European Court of Human Rights*, Oxford University Press, New York, 2010.

Malcom D. Evans, *International law*, 5th edition, Oxford University Press, New York, 2018.

Marcus G. Brand, "Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation", in *Nordic Journal of International Law*, 70:2001.

Martha Minow, *Breaking the Cycles of Hatred: Memory, Law, and Repair*, introduced and with commentaries edited by Nancy L. Rosenblum, Princeton University Press, 2002.

Mathias Holvoet, "The continuing relevance of the hybrid or internationalized justice model: the example of the Kosovo Specialist Chambers", in *Criminal Law Forum* (2017) Volume 28, pp. 35-73.

Matthew E. Cross, "Equipping the Specialist Chambers of Kosovo to Try Transnational Crimes. Remarks on Independence and Cooperation", in *Journal of International Criminal Justice*, Vol. 14(1), March 2016, pp. 73-100.

Michael A. Meyer, Hilaire McCoubrey, *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D Draper*, 1st edition, Springer, 1998.

Michael E. Hartmann, "International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping", *US Institute of Peace*, 2003.

Miranda Vickers, *Between Serb and Albanian: A History of Kosovo*, Hurst and Co., London (1998).

OSCE, *Kosovo/Kosova: As seen, as told. An analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999.*

Paul Latawski, Martin A. Smith, *The Kosovo crisis and the evolution of post-Cold War European security*, Manchester University Press; 1st edition (2004).

Reinhold Gallmetzer, Mark Klamberg, "Individual responsibility for crimes under international law the un ad hoc tribunals and the international criminal court", in *The summer school of International criminal law*, Stockholm University, 21 March 2007, pp. 60-77.

Réné-Jean Dupuy, Antoine Leonetti, "La notion de conflict armé à caractère non international" in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale scientifica, Naples, 1971.

Robert N. Gent, "Balkan Briefing. Abuses of Human Rights in the Kosovo Region of the Balkans" in *Journal of Epidemiology and Community Health*, 1 October 1999, Vol.53(10), pp. 594-596.

Ruth Wegdoog, "The International Criminal Court: an American view", in *European Journal of International Law*, Vol. 10, 1999, pp. 93-107.

Sandra Mitchell, "Human rights in Kosovo", in *OSCE Yearbook 2000,* Baden-Baden, 2001, pp. 241-255.

Sarah M. H. Nouwen, "'Hybrid courts'. The hybrid category of a new type of international crimes courts", in *Utrecht Law Review*, 1 December 2006, Vol. 2(2), pp. 190-214.

Simon Chesterman, Richard B. Bilder, "The Sovereignty Paradox: The Norms and Politics of International Statebuilding", in *American Journal of International Law*, Vol. 102, pp. 405-939.

Tadeusz Mazowiecki, Report on the situation of human rights in the territory of the former Yugoslavia, UN Doc. A/48/92-S/25341, Annex, at 20, 57 (1993), in Theodore Meron, "Rape as a crime under international humanitarian law", in *The American journal of international law*, July 1993, Vol. 87 No. 3, pp. 424-428.

Tajar Zavalani, "Albanian nationalism", in Peter Sugar and Ivo Lederer, *Nationalism in Eastern Europe*, University of Washington Press, Seattle (1973), pp. 61–66.

Tatjana Takševa, "Genocidal Rape, Enforced Impregnation, and the Discourse of Serbian National Identity" in *CLCWeb: Comparative Literature and Culture*, Vol. 17 No. 3, September 2015.

Thordis Ingadottir, "The Financing of Internationalized Criminal Courts and Tribunals", in Romano et al. (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, 2004, OUP Oxford, pp. 271-289.

Tom Perriello, Marieke Wierda, "Lessons from the Deployment of International Judges and Prosecutors in Kosovo", the International Center for Transitional Justice, March 2006.

Tritaki Panagiota, "Human rights violations in Kosovo", in *Southeast European and Black Sea Studies*, 17 April 2008, pp. 198-203.

Vesselin Popovski, "International Criminal Court: A necessary step towards global justice", in Security Dialogue, 31/4, (2000), pp. 405-419.

Ved P. Nanda, “The Establishment of a Permanent International Criminal Court: Challenges Ahead”, in *Human Rights Quarterly*, The Johns Hopkins University Press, Vol. 20, No. 2 (May, 1998), pp. 413-428.

Victor Peskin, “Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda”, in *Journal of Human Rights*, 2006, pp. 213-231.

# WEBLIOGRAPHY


Amnesty International, "If they are not guilty, who committed the crimes?", 29 November 2012, available online at: https://www.amnesty.org/en/latest/news/2012/11/kosovo-if-they-are-not-guilty-who-committed-war-crimes/.

Amnesty International, "'Wounds that burn our souls.' Compensation for Kosovo's wartime rape survivors, but still no justice", available at: https://www.ecoi.net/en/file/local/1421351/1226_1515575553_eur7075582017english.pdf.

Amnesty International, "Burying the past. 10 years of impunity for enforced disappearances and abductions in Kosovo", available at: https://www.amnesty.org/download/Documents/EUR700072009ENGLISH.PDF.

Amnesty International, "Kosovo (Serbia): the challenge to fix a failed UN justice system", 29 January 2008, available at: www.amnesty.org/en/documents/EUR70/001/2008/en/.

Amnesty International, "Kosovo: UNMIK's legacy the failure to deliver justice and reparation to the relatives of the abducted", 2013, www.amnesty.org/download/Documents/16000/eur700092013en.pdf.

Amnesty International, "Serbia/Kosovo: Confirmed indictment of Kosovo's President for war crimes brings victims one step closer to long-awaited justice", 5 November 2020, available at: www.amnesty.org/en/latest/news/2020/11/serbiakosovo-confirmed-indictment-of-kosovos-president-for-war-crimes-brings-victims-one-step-closer-to-long-awaited-justice/.

Amnesty International, "Amnesty International's recommendations for the protection of human rights in post-conflict peace building and reconstruction in Kosovo", 3 June 1999, available at: https://www.amnesty.org/en/documents/EUR70/091/1999/en/.

Amnesty International, "UN must make up for failure to investigate Kosovo missing", 27 August 2013, available at: https://www.amnesty.org/en/latest/news/2013/08/un-must-make-failure-investigate-kosovo-missing/.

*B92*, “Special court for KLA crimes "cannot be abolished" – Thaci”, 1 February 2018, available at: www.b92.net/eng/news/politics.php?yyyy=2018&mm=02&dd=01&nav_id=103403.

*Balkan Insight*, “Can the new Kosovo Court keep witnesses safe?”, 20 January 2016, available at: https://balkaninsight.com/2016/01/20/can-the-new-kosovo-court-keep-witnesses-safe-01-20-2016/.

*Balkan Insight*, “Haradinaj Acquittal is Final, Hague Tribunal Says”, 9 January 2013, available at: https://balkaninsight.com/2013/01/09/icty-final-verdict-for-haradinaj-case/.

*Balkan Insight*, “Ibrahim Rugova: Pacifist father of Kosovo’s independence”, 21 January 2020, available at https://balkaninsight.com/2020/01/21/ibrahim-rugova-pacifist-father-of-kosovos-independence/.

*Balkan Insight*, “Kosovo Organ-Trafficking: How the Claims were Exposed”, 4 September 2015, available at: https://balkaninsight.com/2015/09/04/kosovo-organ-trafficking-how-the-claims-were-exposed-09-04-2015-1/.

*Balkan Insight*, “Kosovo Serbs in petition against EULEX”, 24 October 2008, available at: https://balkaninsight.com/2008/10/24/kosovo-serbs-in-petition-against-eulex/.

*Balkan Insight*, “Kosovo war witnesses ‘Intimidated into changing stories’”, 30 March 2016, available at: https://balkaninsight.com/2016/03/30/witness-intimidation-and-political-interference-in-trials-hlc-said-03-29-2016/.

*Balkan Insight*, “Kosovo War Crimes File Leaks Deliver a Blow to Justice”, 1 October 2020, available at: https://balkaninsight.com/2020/10/01/kosovo-war-crimes-file-leaks-deal-a-blow-to-justice/.

*Balkan Insight*, “Kosovo: protesters rally in support of KLA”, 24 March 2011, available at: https://balkaninsight.com/2011/03/24/kosovo-protesters-rally-in-support-of-kla/.

*Balkan Insight*, “Serbia to sign protocol with EULEX”, 17 August 2009, available at: https://balkaninsight.com/2009/08/17/serbia-to-sign-protocol-with-eulex/.

*Balkan Insight*, "UN Approves EU Kosovo Mission", 27 November 2008, available at: https://balkaninsight.com/2008/11/27/un-approves-eu-kosovo-mission/.

*Balkan Transnational Justice*, "Kosovo's Political Murders: Unpunished but Not Forgotten", 6 March 2018, available online at: https://balkaninsight.com/2018/03/06/kosovo-s-political-murders-unpunished-but-not-forgotten-03-05-2018/.

*BBC news*, "Ten years, $900m, one verdict: Does the ICC cost too much?", 14 March 2012, available at: www.bbc.com/news/magazine-17351946.

*BBC news*, "Clashes in Kosovo's Mitrovica over bridge blockade", 23 June 2014, available at: www.bbc.com/news/world-europe-27969297.

*BBC news*, "UK police uncover Kosovo mass grave", 2 September 1999, available online at http://news.bbc.co.uk/2/hi/uk_news/politics/436493.stm.

Cleve Baldwin, "Minority Rights in Kosovo under International Rule", Minority Rights Group International report, July 2006, available at: https://www.refworld.org/pdfid/469cbfc20.pdf.

CoE Parliamentary Assembly, "Inhuman treatment of people and illicit trafficking in human organs in Kosovo", 7 January 2011, available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12608.

Commission staff working document, "Kosovo under UNSCR 1244/2007 - Progress report accompanying the communication from the Commission to the European Parliament and the Council. Enlargement strategy and main challenges 2007-2008", SEC(2007) 1433, Brussels, 6 November 2007, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2007/nov/kosovo_progress_reports_en.pdf.

Council Joint Action 2008/124/CFSP, 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008E0124.

Council of Europe (CoE), "Mapping support services for victims of violence against women in Kosovo", 10 June 2017, available at: https://rm.coe.int/seminar-pristina-report-eng/16807316df.

Council of Europe (CoE), "Opinion on human rights in Kosovo : possible establishment of review mechanisms", Opinion No. 280 / 2004, CDL-AD (2004)033, Strasbourg, 11 October 2004, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)033-e.

Council of the European Union. Javier Solana, "EU high representative for the CFSP, announces the start of EULEX Kosovo" (S400/08), Brussels, 5 December 2008, available at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/esdp/104525.pdf.

Czech Center for Human Rights and Democracy, "Interview with the President of the Kosovo Specialist Chambers in The Hague, Ekaterina Trendafilova: The Court is Ready for its First Indictments", 18 January 2019, available at: https://www.humanrightscentre.org/node/689.

EU Commission staff working document, Kosovo 2015 report, Brussels, 10 November 2015, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_kosovo.pdf.

EU Council 2008/124/CFSP, "Council Joint Action on the European Union Rule of Law Mission in Kosovo." 4 February 2008, Article 3, available at: http://www.eulex-kosovo.eu/en/info/docs/JointActionEULEX_EN.pdf.

*EU Observer*, "Violent protests against EU mission in Kosovo", 26 August 2009, available at: https://euobserver.com/news/28583.

EULEX-Kosovo.eu, "'Up to 20 missing persons could be identified through DNA, if the families of all missing persons provide blood samples,' says an EU Rule of Law Mission forensic expert", 30 August 2020, available at: www.eulex-kosovo.eu/?page=2,10,1241#:~:text=August%2030%20marks%20the%20International,of%20certain%20human%20remains%20in.

European Commission, "Kosovo 2013 Progress Report", Brussels, 16 October 2013, SWD(2013) 416, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ks_rapport_2013.pdf.

European Commission, "Kosovo 2015 Progress Report", Brussels, 10 November 2015, SWD(2015) 215, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_kosovo.pdf.

European Court of Auditors, "European Union assistance to Kosovo related to the rule of law", Special Report No. 18/2012, available at: https://www.eca.europa.eu/Lists/ECADocuments/SR12_18/SR12_18_EN.PDF.

*Foreign Policy*, "A Reckoning Hasn't Happened. Foreign Policy", 13 August 2014, available at: https://foreignpolicy.com/2014/08/13/a-reckoning-hasnt-happened/.

Group for Legal and Political Studies, "The (Pen-) Ultimate Guide to the Specialist Chambers (II) Law and process", December 2018, available at: http://www.legalpoliticalstudies.org/wp-content/uploads/2018/12/GLPS-Specialist-Chambers-2.pdf.

HRAP, *Brahim Sahiti v. UNMIK*, Case No. 03/08, 10 April 2008, Decision on admissibility, available at: http://www.worldcourts.com/unmik_hrap/eng/decisions/2008.04.10_Sahiti_v_UNMIK.pdf.

HRAP's 2015/2016 report, available at: https://assets.documentcloud.org/documents/2993333/U-N-Panel-s-Report-on-Kosovo.pdf.

Human Rights Advisory Panel (HRAP), Annual Report 2015/2016, available at: https://assets.documentcloud.org/documents/2993333/U-N-Panel-s-Report-on-Kosovo.pdf.

Human Rights Committee, 87th Session, "Considerations and reports submitted by States Parties under Art. 40 of the Covenant, Concluding observation of the Human Rights Committee, Kosovo (Serbia)", UN Document, CCPR/UNK/CO/1, 14 August 2006, available at: https://digitallibrary.un.org/record/592297.

Human Rights Review Panel (HRRP), European Union Rule of Law Mission Kosovo, Annual Report 2019, 1 January to 31 December 2019, available at: https://hrrp.eu/docs/HRRP%20Annual%20Report%202019.pdf.

Human Rights Watch, "Failure to protect. Anti-minority violence in Kosovo, March 2004", published online on 25 July 2004, available at: https://www.hrw.org/report/2004/07/25/failure-protect/anti-minority-violence-kosovo-march-2004.

Human Rights Watch, "ICTY/Bosnia: Life sentence for Ratko Mladic", 22 November 2017, available at: www.hrw.org/news/2017/11/22/icty/bosnia-life-sentence-ratko-mladic.

Human Rights Watch, "Kosovo: Failure of NATO, U.N. to Protect Minorities", 26 July 2004, available at: www.hrw.org/news/2004/07/26/kosovo-failure-nato-un-protect-minorities.

Human Rights Watch, "Legal standards and the Kosovo conflict", available at: https://www.hrw.org/legacy/reports98/kosovo/Kos9810-11.htm.

Human Rights Watch, "The Violence: Ethnic Albanian Attacks on Serbs and Roma", available at https://www.hrw.org/reports/2004/kosovo0704/7.htm.

Human Rights Watch, "War crimes in Kosovo – 4. March-June 1999: An Overview", available at: https://www.hrw.org/reports/2001/kosovo/undword-03.htm.

ICC cases, available at: www.icc-cpi.int/Pages/cases.aspx.

ICC, Preliminary Examinations, available at: www.icc-cpi.int/pages/pe.aspx.

ICG Balkans report, "Who's killing whom", No. 78, 2 November 1999, available online at https://reliefweb.int/sites/reliefweb.int/files/resources/2B63858627572F8185256824007E5A5B-Full_Report.pdf.

ICRC, "Kosovo: activities of the International Red Cross and the Red Crescent Movement", published online on March 1, 2000, available at: https://www.icrc.org/en/doc/resources/documents/misc/57jqah.htm.

ICRC, "Kosovo: le CICR continue de demander davantage d'informations sur les personnes portées disparues", 8 April 2010, available at: www.icrc.org/fr/doc/resources/documents/news-release/2010/kosovo-news-090410.htm.
ICTY website, available at: www.icty.org/en/about/tribunal/completion-strategy.

ICTY Weekly Press Briefing, 22 November 2000, available at: www.icty.org/en/press/icty-weekly-press-briefing-22nd-nov-2000.

ICTY, "Haradin Bala, Isak Musliu, and Agim Murtezi Transferred to the ICTY following their Indictment for Crimes against Humanity and War Crimes", The Hague, 18 February 2003, available at: www.icty.org/en/press/haradin-bala-isak-musliu-and-agim-murtezi-transferred-icty-following-their-indictment-crimes.

ICTY, "Statement by Carla Del Ponte Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the investigation and Prosecution of crimes committed in Kosovo", press release, The Hague, 29 September 1999, available at: www.icty.org/sid/7733/en.

ICTY, "Statement by Prosecutor, Carla Del Ponte on the Occasion of her visit to Belgrade", press release, The Hague, 30 January 2001, available at: https://www.icty.org/en/press/statement-prosecutor-carla-del-ponte-occasion-her-visit-belgrade.

ICTY, Achievements, available at: www.icty.org/en/about/tribunal/achievements.

ICTY, *Karadžić* (IT-95-5/18), Case information sheet, available at: www.icty.org/en/case/karadzic.

ICTY, Key figures of the cases, available at: www.icty.org/en/cases/key-figures-cases.

ICTY, *Mladić* (IT-09-92), Case information sheet, available at: www.icty.org/case/mladic/.

ICTY, Prosecutor Louise Arbour, announcing the indictment against Slobodan Milošević for crimes committed in Kosovo, 27 May 1999, available on ICTY website, https://www.icty.org/en/content/indictments.

ICTY, Prosecutor's statement regarding the Tribunal's jurisdiction over Kosovo, CC/PIO/302-E, The Hague, 10 August 1998, available at: www.icty.org/en/press/prosecutors-statement-regarding-tribunals-jurisdiction-over-kosovo.

ICTY, Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84bis-T in Trial Chamber II, final judgement, available at: www.icty.org/x/cases/haradinaj/tjug/en/121129_judgement_en.pdf.

ICTY, Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic & Vlajko Stojililkovic, Decision on review of indictment and application for consequential orders, Decision of 24 May 1999, available at: www.icty.org/x/cases/slobodan_milosevic/tdec/en/052499rev.htm.

*Il Post*, "Le grandi proteste di Pristina", 27 January 2015, available at: www.ilpost.it/2015/01/27/le-grandi-proteste-pristina/.

International Committee of the Red Cross (ICRC) official website, available at: www.icrc.org/en.

International Crisis Group, "Kosovar Albanians in Serbian Prisons: Kosovo's Unfinished Business", January 26, 2000, available at https://www.refworld.org/docid/3ae6a6e10.html#_ftnref3.

International Law Commission (ILC) website, available at: https://legal.un.org/ilc/.

*Internazionale*, "La lezione inascoltata del Kosovo sul nazionalismo", 11 aprile 2019, available at: https://www.internazionale.it/opinione/jacopo-zanchini/2019/04/11/kosovo-nazionalismo-jugoslavia-anniversario.

*Ius in Itinere*, "Time for action at the Kosovo Specialist Chambers", 19 December 2020, available at: https://www.iusinitinere.it/time-for-action-at-the-kosovo-specialist-chambers-33718.

John Cerone, Cleave Baldwin, "Explaining and Evaluating the UNMIK Court System", 28 January 2003, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647211.

Kosovo Specialist Chambers and Special Prosecutor's Office, Judgement on the referral of the proposed constitutional amendments, 26 November 2020, available at: www.scp-ks.org/en/judgment-referral-proposed-constitutional-amendments.

Kosovar Center For Security Studies, "Kosovo Security Barometer", ninth edition, December 2019, available at: http://www.qkss.org/repository/docs/KSB2019_339996.pdf.

Kosovo Specialist Chambers and Special Prosecutor's Office, Cases, available at: https://www.scp-ks.org/en/cases.

Kosovo Specialist Chambers and Specialist Prosecutor's Office, *First Report*, p. 43, available at: https://www.scp-ks.org/sites/default/files/public/content/ksc_spo_first_report_en.pdf.

Kosovo War Rape Survivor Condemns Stigmatisation of Victims", in *Balkan transnational justice* (online), 9 March 2020, available at https://balkaninsight.com/2020/03/09/kosovo-war-rape-survivor-condemns-stigmatisation-of-victims/.

KSC, Basic Court Chamber, Annex 1 to public redacted version of "Submission of confirmed indictment", filing KSC-BC-2020-05/f00011 dated 19 June 2020, available at: https://repository.scp-ks.org/details.php?doc_id=091ec6e9803599fa&doc_type=stl_filing_annex&lang=eng.

KSC, Basic Court Chamber, Annex 2 - Redacted Indictment, 14 December 2020, available at: https://repository.scp-ks.org/details.php?doc_id=091ec6e9803b6a23&doc_type=stl_filing_annex&lang=eng.

KSC, Basic Court Chamber, Annex 3 to Submission of corrected and public redacted versions of confirmed Indictment and related requests, 4 November 2020, available at: https://repository.scp-ks.org/details.php?doc_id=091ec6e98037f115&doc_type=stl_filing_annex&lang=eng.

Kosovo Specialist Chambers and Special Prosecutor's Office, "Reappointment of KSC President Ekaterina Trendafilova", 26 November 2020, available at: www.scp-ks.org/en/reappointment-ksc-president-ekaterina-trendafilova.

Law No. 05/L-053, Art. 4 "Legal personality and capacity", available at: https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf.

Law No. 05/L-053, available at: https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf.

Specialist Chambers and Specialist Prosecutor's Office, Law on the Specialist Chambers and Specialist Prosecutor's Office, available at: https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office.

Legal dictionary, available at: legaldictionary.net/natural-person/.

Ombudsperson Institution in Kosovo (OIK), "Forth annual report 2003-2004", 12 July 2004, p. 16, available at: https://upload.wikimedia.org/wikipedia/commons/8/86/Kosovo_Ombudsperson_of_Kosovo_Fourth_Annual_report_2003_%E2%80%93_2004.pdf.

*OpinioJuris*, "The Kosovo Specialist Chambers: In Need of Local Legitimacy", 8 June 2020, available at: http://opiniojuris.org/2020/06/08/the-kosovo-specialist-chambers-in-need-of-local-legitimacy/.

OSCE Kosovo Verification Mission, available at https://www.osce.org/kvm-closed.

OSCE Mission in Kosovo. Legal Systems Monitoring Section (LSMS), "Kosovo's War Crimes Trials: A Review," September 2002, available at: www.osce.org/kosovo/12549.

OSCE, "Four Years Later: Follow up of March 2004 Riots Cases before the Kosovo Criminal Justice System", 3 July 2008, available at: www.osce.org/kosovo/32700.

OSCE, "Human rights challenges following the March riots", 25 May 2004, available at: www.osce.org/kosovo/32379.

OSCE, "Report on the administrative justice system in Kosovo", 12 April 2007, available at: www.osce.org/kosovo/24637.

Osservatorio Balcani & Caucaso Transeuropa, "UNMIK: Necessario smantellare le enclaves", 13 May 2020, available at: www.balcanicaucaso.org/aree/Kosovo/UNMIK-necessario-smantellare-le-enclaves-20555.

PAX For Peace, "Assessing the potential impact of the Kosovo Specialist Court", 9 October 2017, available at: https://www.paxforpeace.nl/publications/all-publications/assessing-the-potential-impact-of-the-kosovo-specialist-court.

*Peace Palace Library*. "Interview President Kosovo Specialist Chambers : Judge Ekaterina Trendafilova", 4 November 2020, available at: www.peacepalacelibrary.nl/2020/11/interview-president-kosovo-specialist-chambers-judge-ekaterina-trendafilova/.

*Politico,* EU courts trouble with Kosovo scandal", in *Politico*, published online on 17 November 2017, available at: www.politico.eu/article/malcolm-simmons-eulex-eu-courts-chaos-with-kosovo-scandal/.

Report of the Secretary General on the United Nations Interim Administration in Kosovo, 23 December 1999, available at https://undocs.org/S/1999/1250.

Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), presented on 3 May 1993 (S/25704), available at: www.refworld.org/docid/3ae6af0110.html.

Report of the Secretary-General on the UN Interim Administration Mission in Kosovo, 12 July 1999, available at: https://reliefweb.int/report/albania/report-secretary-general-un-interim-administration-mission-kosovo-12-jul-1999.

Report of the Special Envoy of the Secretary-General on Kosovo's future status, 26 March 2007, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kosovo%20S2007%20168.pdf.

*Reuters*, "Kosovo ex-premier Haradinaj cleared of war crimes again", 29 November 2012, available at: www.reuters.com/article/us-kosovo-tribunal-haradinaj-idUSBRE8AS0B820121129.

*Reuters*, "Once triumphant Bosnian Serb commander Mladic reduced to frail genocide defendant", 22 November 2017, available at: www.reuters.com/article/us-warcrimes-mladic-newsmaker-idUSKBN1DL2WS.

*Reuters*, "Peacekeepers and locals hurt in Kosovo riot", 12 September 2010, available at: https://in.reuters.com/article/us-kosovo-clashes-idUSTRE68B14K20100912.

Schengen Visa Info, "EP Rapporteur for Kosovo Urges EU to Deliver on Visa Liberalisation Promises", 14 December 2020, available at: https://www.schengenvisainfo.com/news/ep-rapporteur-for-kosovo-urges-eu-to-deliver-on-visa-liberalisation-promises/.

Statement by the NATO Secretary General in reaction to the Kosovo declaration of independence, 17 February 2008, available at: www.nato.int/docu/pr/2008/p08-021e.html.

Statement of the Chief Prosecutor of the Specialist Investigative Task Force, 29 July 2014, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/07/Statement_of_the_Chief_Prosecutor_of_the_SITF_EN.pdf.

*The Guardian*, Zoran *Stanojević* case, "Amnesty and UN staff accuse Kosovo war crimes tribunal of ethnic bias", 20 June 2001, available at: www.theguardian.com/world/2001/jun/20/warcrimes.balkans.

The Kosovo Rehabilitation Center for Torture victims (KRCT) website, https://krct.org/.

Tristan Dreisbach. "An eye on justice: monitoring Kosovo's courts, 2008–2014", Princeton University, March 2015, available at: https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/TD_CitizenMonitoring_Kosovo.pdf.

U.S. Department of State. Daily Press Briefing by James P. Rubin, 7 April 1999, available at: https://1997-2001.state.gov/briefings/statements/1999/1999_index.html.

UN Resolution 1244(1999), Adopted by the Security Council at its 4011th meeting, on 10 June 1999, available at: https://unmik.unmissions.org/sites/default/files/old_dnn/Res1244ENG.pdf.

UN Secretary General's message for 2020, available at: www.un.org/en/observances/victims-enforced-disappearance/message.

UN Security Council press release (SC/8056), 13 April 2004, "March violence in Kosovo 'huge setback' to stabilization, reconciliation, under-secretary-general for peacekeeping tells security council", available at: www.un.org/press/en/2004/sc8056.doc.htm.

UNHCR, Kosovo crisis update, 4 August 1999, www.unhcr.org/news/updates/1999/8/3ae6b80f2c/kosovo-crisis-update.html.

UNHCR/OSCE, "Second Assessment of the Situation of Ethnic Minorities in Kosovo", 6 September 1999, available online at https://www.unhcr.org/news/updates/1999/9/3c3c52a04/second-assessment-situation-ethnic-minorities-kosovo.html.

United Nations International Residual Mechanism for Criminal Tribunals (IRMCT) official website, available at: IRMCT can be found on the official website: www.irmct.org/en.

UNMIK Administrative Direction 2009/1, 17 October 2009, available at: https://media.unmikonline.org/hrap/Documents%20HRAP/AD2009-01.pdf.

UNMIK Human Rights Advisory Panel's Opinion, Case 312/09, Momčilo Milenkovič, v. UNMIK, Opinion, 6 June 2013, para. 87, available at: http://www.worldcourts.com/unmik_hrap/eng/decisions/2013.06.06_Milenkovic_v_UNMIK.pdf.

UNSC Resolution 1244/1999, available at www.nato.int/kosovo/docu/u990610a.htm.

US Department of Defense, "NATO, U.S. Claim Milosevic Uses Refugees as Human Shields", available at: https://archive.defense.gov/news/newsarticle.aspx?id=42060.

Vasfije Krasniqi-Goodman Duhet t'i vijë turp gjithë shoqërisë kosovare, available at: https://www.youtube.com/watch?v=DLxCTvbVPio&ab_channel=RTK.

*Washington Post*, "Forces of intolerance threaten to consume Kosovo", 13 October 1999, available at: https://www.washingtonpost.com/gdpr-consent/?next_url=https%3a%2f%2fwww.washingtonpost.com%2farchive%2fpolitics%2f1999%2f10%2f13%2fforces-of-intolerance-threaten-to-consume-kosovo%2f43858e71-f2d3-45c3-92c3-2808ac01aa8b%2f.

# LIST OF TREATIES, CONVENTIONS, AGREEMENTS, CONSTITUTIONS AND REGULATIONS

1993 Montevideo Convention on the Rights and Duties of the States, available at: https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml.

Accordance with international law of the unilateral declaration of independence in respect of Kosovo ICJ Summary of the Advisory Opinion, available at: www.icj-cij.org/public/files/case-related/141/16010.pdf.

Charter of the International Military Tribunal (Nuremberg), 1945, available at: https://www.jus.uio.no/english/services/library/treaties/04/4-06/imt-charter.xml.

Constitutional Framework for Political Self-Government, 21 May 2001, Chapter 3.3. available at: http://www.regione.taa.it/biblioteca/statuti/Kosovo.pdf.

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, available at: https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx.

Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), available at: http://hrlibrary.umn.edu/gencomm/hrcom6.htm.

IMT Judgement of 1 October 1946, available at: crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf.

International Covenant on Civil and Political Rights (ICCPR), available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

International Military Tribunal for the Far East Charter (IMTFE Charter), available at: https://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml.

Kosovo Declaration of Independence, 17 February 2008, available at: www.refworld.org/docid/47d685632.html.

Kumanovo Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, available at: https://unmik.unmissions.org/kumanovo-military-technical-agreement.

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, 1950, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf.

Proceedings of the UK House of Commons Foreign Affairs Committee, published 23 May 2000.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at: https://ihl-databases.icrc.org/ihl/INTRO/470.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475.

Regulation 2000/64 "On assignment of International Judges/Prosecutors and/or Change of Venue", 15 December 2000.

Rome Statute of the International Criminal Court, available at: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), available at: http://hrlibrary.umn.edu/icty/statute.html.

Treaty of Peace with Germany (Treaty of Versailles), 1919, available at: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf.

UN Charter, Chapter VII: Action with respect to threats to peace, breaches of the peace, and acts of aggression, available at: https://www.un.org/en/about-us/un-charter/chapter-7.

UN Declaration of Human Rights, available at: www.un.org/en/universal-declaration-human-rights/.

UN, Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), London, 8 August 1945, available at: www.refworld.org/docid/3ae6b39614.html.

UN General Assembly Request for Advisory Opinion, 10 October 2008, available at: www.icj-cij.org/public/files/case-related/141/14799.pdf.

UN Regulation 2000/6, "On the appointment and Removal from Office of International Judges and International prosecutors", 15 February 2000.

UN Resolution 1244/1999, available at https://digitallibrary.un.org/record/274488.

UNMIK Regulation No. 2000/38 of 30 June 2000 on the establishment of the Ombudsperson institution in Kosovo.

UNMIK Regulation No. 2000/47 "On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo", 18 August 2000.

UNMIK Regulation No. 2000/59 Amending UNMIK Regulation No. 1999/24 "On the Law Applicable in Kosovo", UNMIK/REG/2000/59, 27 October 2000, Section 1.1.

UNMIK Regulation No. 2006/12, "On the Establishment of the Human Rights Advisory Panel."

# RINGRAZIAMENTI

Vorrei innanzitutto ringraziare la Professoressa Sara De Vido, relatrice di questa tesi di laurea magistrale, non solo per la preziosa disponibilità, dedizione e precisione dimostratemi durante il periodo di stesura dell'elaborato, ma anche e soprattutto per le conoscenze che mi ha trasmesso in questi anni. Senza il suo supporto e la sua guida questo elaborato non sarebbe nato. Ringrazio inoltre il Professor Fabrizio Marrella, correlatore della presente tesi, per avermi affiancata durante il periodo di studio che ho avuto la fortuna di poter svolgere presso l'Università Paris 1 Panthéon-Sorbonne.

Un ringraziamento particolare va ai miei genitori e ai miei nonni, che con il loro instancabile sostegno, sia morale sia economico, mi hanno permesso di raggiungere questo importante risultato, contribuendo alla mia formazione e alla mia crescita personale. I loro consigli e le loro critiche costruttive sono stati per me fonte di stimolo e arricchimento.

Infine, un ulteriore ringraziamento va alle mie amiche, alle mie coinquiline, alle mie compagne di corso e a Giacomo per aver sempre creduto in me e per avermi sostenuta nei momenti di sconforto e difficoltà. Grazie per aver condiviso con me il meraviglioso percorso accademico che oggi si conclude e i cui meravigliosi ricordi porterò sempre nel cuore.

L'affetto e l'incoraggiamento di tutti Voi rendono questo traguardo ancora più prezioso, punto di arrivo e, al contempo, punto di partenza della mia formazione e della mia vita.

Annalisa