



International Justice and the Prevention of Atrocities

Case Study: Kosovo

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The 1998-9 conflict in Kosovo, while shorter than some of the other wars that resulted from the collapse of Yugoslavia, especially in Croatia and Bosnia and Herzegovina, still resulted in widespread war crimes and a major humanitarian emergency. 860,000 Albanians fled the country and a further 250,000 were internally displaced by Serb forces and paramilitaries. After the war, Albanian revenge attacks meant that 65,000 – 70,000 Serbs (out of an estimated Serb population of 190,000) left Kosovo. War crimes by both sides have been extensively documented by the OSCE.² The UN Mission in Kosovo (UNMIK), whose police and justice pillar retained the authority to investigate and try war crimes until 2008 identified just short of 1,200 acts of war crimes during the war and its immediate aftermath.³

Jurisdiction for war crimes in Kosovo rests with two bodies. The first is the International Criminal Tribunal for the Former Yugoslavia (ICTY), which already in March 1998 asserted that events in Kosovo would fall under its jurisdiction, over half a year before violence escalated in the province. Kosovo is thus one of the few cases where an international criminal tribunal was already established and working by the time the conflict escalated and atrocities and war crimes accumulated.

¹ This paper was prepared as part of a project of the European Council on Foreign Relations to compare the experience of different situations where international responses to crises involving mass atrocities have faced the dilemma of seeking accountability while trying to bring the crisis to an end. Please cite fully in the event of reference or quotation.

² OSCE, *Human Rights in Kosovo: As Seen, As Told* (Pristina: OSCE, 1999).

³ OSCE Mission in Kosovo, *Kosovo's War Crimes Trials: An Assessment 10 years on – 1999 – 2009*; Pristina, May 2010.

The second body were the so-called “64-panels” in Kosovo’s local courts, which had a majority of international judges and which focussed on ethnic and war crimes. These panels, named after the regulation that established them, were first established in December 2000 by UNMIK reflecting concerns about the impartiality of the local judiciary.⁴ When UNMIK was “re-configured”⁵ in 2008/9, its judicial functions were largely handed over to the new EU rule of law mission, EULEX, which continues to employ international judges and prosecutors to investigate and prosecute war crimes. Overall, the international judicial mechanisms to address war crimes in Kosovo have been well-resourced. The budget of the ICTY was over \$250 million in 2012/13, and has been substantially higher in the past.⁶ Salaries for international police and judges – whose remit covered other issues than war crimes as well – declined from a high of €130-140 million in the early years of UNMIK to ca. €70 million in 2007/8.⁷

Despite substantial resources dedicated to these judicial instruments, the outcome in terms of addressing war crimes is rather sobering. The ICTY, which has explicitly focussed on key decision-makers and military leaders, has tried several high-profile defendants, including former Yugoslav president Slobodan Milosevic and Serbian president Milan Milutinovic, as well as former UCK commander and Kosovar Prime Minister Ramush Haradinaj. However, the overall number of cases related to Kosovo at the ICTY has been small – three cases against a total of 8 Serb defendants, and two cases against a total of six Kosovo Albanian defendants.⁸ Of these fourteen defendants, one died before conclusion of the trial (Milosevic), five were acquitted (including Ramush Haradinaj, who was re-tried and acquitted again), seven have ongoing appeals to their sentence, and one has been sentenced and imprisoned. The number of war crimes trials in the Kosovar judicial system is equally low. While UNMIK identified almost 1,200 possible war crimes, the OSCE has suggested that between 1999 and 2009, there have only been trials for war crime allegations against 37 individuals.⁹ When EULEX took over, it dismissed 500 cases for lack of evidence, and by 2013 had completed a further 15 trials.

What, then, has been the impact of this effort? Has it prevented atrocities? Has it facilitated or hindered processes of reconciliation and political settlement? With regard to the prevention of atrocities, a central argument of many proponents of international judicial mechanisms such as

⁴ Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford: Oxford University Press, 2007), 148-50.

⁵ Following Kosovo’s declaration of independence in February 2008, Russia threatened to veto any decision by the UN Security Council to close UNMIK, considering this tantamount to recognising Kosovo. Against Russian resistance, the SRSG in 2008/9 reconfigured the mission from an administration to a monitoring mission, dramatically reducing its size and activities in Kosovo.

⁶ According to the tribunal’s website, <http://www.icty.org/sid/325>.

⁷ For details and sources, see Dominik Zaum with Verena Knaus, “The Political Economy of Statebuilding in Kosovo”, in Mats Berdal and Dominik Zaum (eds.), *Political Economy of Statebuilding: Power after Peace* (Abingdon: Routledge, 2012), 245n14.

⁸ This excludes appeals and re-trials.

⁹ OSCE Mission in Kosovo, *Kosovo’s War Crimes Trials*, 8.

the ICTY or the ICC, there is not really any evidence that the presence of the court and its assertion of jurisdiction in March 1998, or the indictment of Milosevic in May 1999 (several weeks into the bombing campaign against Yugoslavia), had an impact on the conflict. While the court's assertion of jurisdiction was arguably intended as a warning that atrocities would have judicial consequences, violence escalated. The G8 principles, which formed the basis for an agreement to end the conflict, make no reference to justice for war crimes or the ICTY. The indictment of the Serbian military and political leadership in May 1999 arguably contributed to a growing sense of isolation by the Serbian regime, and Milosevic in particular, which fed into his decision to accept the G8 proposals, but was only one amongst a range of factors, including the continued military pressure, or the need to maintain Russian support once it had become engaged in negotiations through the G8.¹⁰

What about reconciliation, or the establishment of a lasting political settlement that includes both Serbs and Kosovo Albanians? Here, even though any impact has clearly been rather limited, a judgement is not as straightforward. One function that war crimes trials (or even only indictments, if they drive the indicted underground) can help with is the management of peace spoilers, by marginalising them or even taking them out of the political equation through arrest. The indictment of senior Serb leaders does not seem to have changed the position of the Serb elite or public towards Kosovo, and certainly did not make them more accepting (let alone supportive) of Kosovo independence. The engagement of Kosovo Serbs with the new Kosovar institutions – both under UNMIK and after the declaration of independence – has not been shaped by war crime trials by either the ICTY or local courts. The indictment of Ramush Haradinaj, who at the time was Prime Minister of Kosovo, was seen by many in the international community as destabilising Kosovo politics, and the then Special Representative of the Secretary-General, Jessen-Petersen, managed to convince the ICTY that Haradinaj could return to Kosovo and await his trial, where he continued to exercise substantial political influence.

Neither in Serbia, nor in Kosovo has there been public support to try one of their own for war crimes. Serb authorities were for a long time very reluctant to cooperate with the ICTY, and Albanian indictees have generally been portrayed locally as war heroes rather than suspected criminals. In Kosovo, international justice has arguably polarised rather than reconciled.

Overall, though, what stands out is the quite limited scale of international justice efforts to address war crimes in Kosovo, in contrast to the high rhetoric of international actors and the high profile of a few select cases. Compared to other factors that have shaped the political dynamics both in Kosovo, and between Kosovo and the Belgrade – e.g. the substantial military presence from NATO; the political and administrative role of UNMIK, and later EULEX and the

¹⁰ See for example Tim Judah, *Kosovo: War and Revenge* (New Haven: Yale University Press, 2000), 280-5.

International Civilian Office (ICO), the deep involvement of the key Western states in local politics (especially the US and to a lesser extent the UK), and not least the pull of prospective EU membership – international justice mechanisms have played only a marginal role. In some respect, this reflects the weakness of the judiciary in Kosovo, with all its consequences for the rule of law. In other respects, the continued perception of most war crimes trials through an ethnic lens by many local protagonists, rather than through the lens of individual criminal responsibility for atrocities, suggests that greater prominence of war crimes trials might have done little to entrench the slow and still fragile progress that both Kosovo and Serbia have made in recent years towards a political settlement and greater stability.

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