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Legal Framework of Conflict Related Sexual Violence; the Kosovo Case

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Abstract

The principal aim of this paper is to analyze the legal framework of conflict related sexual violence in general and the legal framework and the measures that have been taken from the Kosovo context. The legal framework will be analyzed and reviewed through institutional and non-institutional level, and the steps that have been taken towards providing a virtuous legal framework and reparation for survivors of conflict related sexual violence in Kosovo after the 1999 Kosovo-Serbia conflict. The overall sexual violence experiences have shown that information and acknowledge about sexual violence perpetrated during armed conflicts are scarce, scattered and very often very selective due to numerous challenges that such victims face. While there has been an increase awareness that sexual violence is a war crime over the past decades, the long term effects of the crimes are still felt by the victims, families, community and the country. The paper describes the challenges that have been put forward to the victims of conflict related sexual violence such as: ending the stigma, impunity for the perpetrators, implementation of comprehensive reparation programs for the victims, the denials of the survivor's access to justice, survivors right to reparation, and empower women to support sustainable peace-building within the Kosovo context.

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1. The context

When conflicts occur they convey many changes to the societies. Conflicts generally encompass a general breakdown of law and order and have direct or indirect impact within the societies itself. Conflict related sexual violence (CRSV) occur in many different circumstances. They might occur in homes, fields, places of detention, military sites, camps, however they mostly happen at the height of conflict, during population displacement and continues after the conflict.¹ In all such events, these forms of sexual violence destabilize social structures of the society and terrorize the civilian population. In conflict settings people from a specific population groups may be targeted for sexual violence based upon their ethnicity, or at a greater risk of such abuse for many reasons during conflicts.² Very often one of the most vulnerable population that is affected as a result of the conflict are women, including single women, women heads of households and displaced women.³ It remains very difficult to ascertain the exact prevalence of CRSV on female victims, as a result of many challenges. Such challenges embrace underreporting which results from the intimidation and stigmatization of women, social norms and structural reporting barriers, impunity for the perpetrators, access to justice of victims, reparation and women empowerment for sustainable peace-building. Though the majority of victims are women, men from a specific population or ethnicity are also targeted and are considered vulnerable groups. Unfortunately, infrastructure to support men and boys who have suffered sexual violence is very often limited, and have not been the focus of documentation efforts from the countries in conflict. Sexual violence does not confined only to conflict settings, however it is a global scourge. Conflict incidents in the recent years confirm that sexual violence continues to be present in many conflict areas, and it has been used as part of a broader strategy of conflict in order to displace the communities of a country in order to seize the necessary

¹ Megan Bastick, Karim Grimm & Rahel Kunz, *Sexual Violence In Armed Conflict, Global Overview and Implications for the Security Sector*, (2007), pg. 14. Some examples include: South Sudan, allied militias raped women and girls as part of a campaign to drive opponents out of southern Unity State; Tanganyika Province of the Democratic Republic of the Congo, warring Twa and Luba militias violated women, girls and boys from each other's ethnic communities; Syrian Arab Republic and Burundi, armed actors' gang-raped and sexually humiliated detainees perceived as political opponents; Nigeria, where women and girls were targeted for abduction and sexual abuse by extremist groups as part of their financial calculus and self-perpetuation.

² Megan Bastick, Karim Grimm & Rahel Kunz, *Sexual Violence In Armed Conflict, Global Overview and Implications for the Security Sector*, (2007), pg.15.

³ Ibid, pg.15

resources, as a means of repression, terror and control, and tactic of terrorism.⁴ It has been used also strategically to advance military objectives, such as clearing of a civilian population from an area, or as a result of a lack of organizational structure and discipline. Internally displaced persons have reportedly suffered sexual violence at the hands of state authorities, armed groups, smugglers, traffickers and others who control resources and services in humanitarian contexts.⁵ Even when violent conflict has ceased, sexual violence is often prevalent because of the insecurity and lack of accountability that typically ensues.⁶ In all such occurrences, women are mostly the once who face grief and need support to overcome this challenge.

Sexual violence encompasses acts of a sexual nature perpetrated against one or more persons or that cause such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.⁷ CRSV refers to incidents or patterns of sexual violence against women, men, girls or boys occurring in a conflict or post-conflict setting that have direct or indirect links with the conflict itself or that occur in other situations of concern in the context of political repression.⁸ To define CRSV merely on terms of rape it is insufficient. It encompasses other meanings: forced pregnancy, forced abortion, forced sterilization, forced nudity, forced prostitution, sexual exploitation, trafficking, sexual enslavement, forced circumcision, castration, other forms of sexual violence of comparable gravity,⁹ enforced sterilization; trafficking; inappropriate medical examinations; strip searches; and any other form of sexual violence of comparable gravity, to the extent of including indecent assault.¹⁰

⁴ Conflict Related Sexual Violence report of the United Nations Secretary-General, S/2019/280 29 March 2019, pg.4

⁵ Ibid, pg. 5

⁶ Women's International League for Peace and Freedom, Sexual Violence Monitoring, 2019. See: <http://www.peacewomen.org/security-council/sexual-violence-indicators-and-monitoring>

⁷ See International Criminal Court, Elements of Crimes, art. 7 (1) (g)-6. The terms sexual violence and sexual gender based violence are often used as a synonym to emphasize the element of sexual violence.

⁸ Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence (2014), p. 3.

⁹ Ibid, pg.2.

¹⁰ See 1998 Rome Statute of the International Criminal Court. The "Elements of Crimes" of the ICC defines sexual violence as follows: "The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such

Historically, armies in conflict settings considered rape as one of the tools of legitimate spoils of war. Even in World War II, all sides of the conflict were accused of mass rapes, however none of the two courts (Tokyo and Nuremberg) recognized sexual violence as a crime. Rape and other forms of sexual violence have long been mischaracterized and dismissed by military and political leaders as private crimes or the unfortunate behavior of renegade soldiers.¹¹ Aftermath events did not bring to the attention until 1992, when widespread rapes of women happened in the Former Yugoslavia.¹² At that point the Security Council declared the “massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina” that sexual violence should be considered as an international crime that must be addressed worldwide. Subsequently the International Criminal Tribunal for Former Yugoslavia (ICTY) statute was the first legal instrument to explicitly recognize rape as a crime against humanity¹³, International Criminal Tribunal for Rwanda (ICTR),¹⁴ International Criminal Court (ICC),¹⁵ declared rape and alongside other crimes such as torture and extermination, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity when committed in armed conflict and directed against a civilian

person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent”.

¹¹ Human Rights Watch, Kosovo: Rape as a Weapon of “Ethnic Cleansing”, 2000, pg. 2 available at: https://www.hrw.org/legacy/reports/2000/fry/Kosov003-02.htm#P168_31111

¹² Outreach Programme on the Rwanda Genocide and the United Nations: www.un.org/preventgenocide/rwanda, pg.2 see: <https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf>

¹³ St-Germain, Tonia; Dewey, Susan (2012). Conflict-related sexual violence : international law, local responses, pp. 55-57. International Criminal Tribunal for the Former Yugoslavia (1993) included rape, slavery and alongside other crimes such as torture and exterminations as crimes against humanity. ICTY became the first international court to find an accused person guilty of rape as a crime against humanity. The *Prosecutor v. Anto Furundzija*, defined the objective elements of rape. The trial chamber in *Furundzija Judgment*, case no. IT-95-17/1-T, p. 73, para. 185, also noted that “international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. *Celebici Judgment*, the trial chamber relied upon the definition of rape and sexual violence formulated in the case of the *Prosecutor v. Jean-Paul Akayesu* (Case no. ICTR-96-4-T, Trial Chamber 1, 2 September 1998). *Prosecutor v. Delalic, Mucic, Delic, and Landzo*, Case no. IT-96-21-T, 16 November 1998, p. 173, para. 478), the Court noted that violence includes psychological as well as physical harm.

¹⁴ International Criminal Tribunal for Rwanda (1994) included rape as a war crime and crime against humanity. ICTR became the first international court to find an accused person guilty as a crime of genocide. Jean-Paul Akayesu case – the Tutsi ethnic group. In *Akayesu Judgment* the court wrote: “The chamber defines rape as a physical invasion of a sexual nature, committed on a person under any circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed under circumstances which are coercive.”

¹⁵ International Criminal Court (2002) included rape, sexual slavery, enforced prostitution, forced pregnancy enforced sterilization, or “any other form of sexual violence of comparable gravity” when committed in a widespread or systematic way as a crime against humanity.

population and in a widespread or systematic are crimes of genocide, and crimes against humanity. ICTY and ICTR broke new ground in securing the first convictions for rape, and it was not until the setup of the ICC through the Rome Statute that would hold sexual violence perpetrators accountable.¹⁶

There are inherent difficulties in obtaining accurate data on CRSV in armed conflict settings. However, since the early 1990s, awareness of CRSV during conflict and documentation of such crimes increased, and during the conflict in Kosovo in 1999, the international press focused heavily on sexual atrocities committed against Albanian women.¹⁷ In the Western Balkans systematic CRSV was used to terrorize the society and to displace populations from their nation state in the form of ethnic cleansing has been managed to be documented through various forms. Starting with the intervention of the international organizations, national authorities, international women's organizations through various reports and documentaries and continuing with the setting up of the ICTY are just some of the sources that have documented the sexual violence in conflict settings. As sexual violence happened continually in conflict settings, many resolutions either in the context of states, or international organizations¹⁸ were adopted in order to: incorporate policies and procedures to protect the affected women,¹⁹ end impunity of the perpetrators,²⁰ protect women from sexual violence in conflict situations,²¹ establish of monitoring, analysis and reporting to conflict related sexual violence,²² monitor and prevent

¹⁶ Jean-Pierre Bembo Gombo in the Central African Republic, available at: <https://casebook.icrc.org/case-study/international-criminal-court-trial-judgment-case-prosecutor-v-jean-pierre-bemba-gombo>

¹⁷ Megan Bastick, Karim Grimm & Rahel Kunz, *Sexual Violence In Armed Conflict, Global Overview and Implications for the Security Sector*, (2007), pg. 113-114

¹⁸ The Statute of the International Tribunal for the Former Yugoslavia (1993, Art.2, 5); Statute of the International Criminal Court (1998, Art, 7,8) refer to rape as war crimes and crimes against humanity; Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974); Additional Protocol I to the 1949 Geneva Conventions (1977); Convention on the Elimination of All Forms of Discrimination against Women (1979); (1979); Declaration on the Elimination of Violence against Women (1993); Resolution 1670 (2009) of the Parliamentary Assembly of the Council of Europe; and un Security Council Resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1960 (2010), 2106 (2013), 2122 (2013), 2242 (2015), 2247 (2019), 2467 (2019).

¹⁹ Security Council Resolution 1325 (2000), called on Member States to increase the participation of women in the "prevention and resolution of conflicts" and in the "maintenance and promotion of peace and security."

²⁰ Security Council Resolution 1820 (2008), called for an end to the use of acts of sexual violence against women and girls as a tactic of war and an end to impunity of the perpetrators.

²¹ Security Council Resolution 1888 (2009), condemned continuing sexual violence against women in conflict situations, and urged UN Member States and civil society to consider the need for protection and empowerment of women.

²² Security Council Resolution 1960 (2010), called for the establishment of monitoring, analysis, and reporting arrangements specific to conflict-related sexual violence.

sexual violence conflict,²³ involve women in peace-building,²⁴ increase representation of women at all decision making levels,²⁵ strengthen legislation to foster accountability for sexual violence.²⁶ In addition the Convention on Elimination of all forms of Discrimination against Women (CEDAW) Committee recommends that States ensure reparations are gender sensitive, need to promote women's rights and include women in the design.²⁷ However the situation of confronting the sexual violence as a breach of human right norm and international sexual crime did not occur until 1993²⁸.

2. The Kosovo context

With the break-up of the Former Yugoslavia, one of the countries that experienced armed conflict was Kosovo. Being under the ottoman rule for centuries, it was integrated into Yugoslavia in 1913.²⁹ Under the Tito's regime Kosovo was granted substantial autonomy,³⁰ with an attempt to secede from Serbia in 1990³¹ but unsuccessfully. This attempt came as a result of systematic human rights violations including incidents of rape, primarily by members of the Serbian police force,³² against Kosovo Albanian.

Between 1998 and 1999 an internal armed conflict erupted between Kosovo and Serbia. The intensity of human rights violations perpetrated by Serbian police forces increased whereby an internal armed conflict between Kosovo Liberation Army (KLA) and Serb police forces and paramilitary groups occurred. Through this one year period, Kosovo Albanian were subjected to

²³ Security Council Resolution 2106 (2013), aimed for strengthening the monitoring and prevention of sexual violence in conflict.

²⁴ Security Council Resolution 2122 (2013), aimed for the importance of women's involvement in conflict prevention, resolution and peace-building.

²⁵ Security Council Resolution 2242 (2015), calls for increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, and resolution of conflict.

²⁶ Security Council Resolution 2467 (2019), encourages national authorities in this context to strengthen legislation to foster accountability for sexual violence.

²⁷ UN Committee on the Elimination of Discrimination against Women, General Recommendation 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, CEDAW/C/GC/30, 1 November 2013.

²⁸ International Criminal Tribunal for Rwanda (1994) included rape as a war crime and crime against humanity.

²⁹ International Crisis Group (March 2006) Conflict history: Kosovo: http://www.crisisgroup.org/home/index.cfm?action=conflict_search&l=1&t=1&c_country=58.

³⁰ Ward, J. (2002) If not now, when? Addressing Gender-based Violence in Refugee, Internally Displaced, and Post-conflict Settings: A Global overview, New York, RHRC, 91.

³¹ International Crisis Group (March 2006).

³² Amnesty International, FRY (Kosovo), A Decade of Unheeded Warnings, Vols. 1 & 2, (Index: EUR 70/39/99 & EUR 70/40/99).

arbitrary arrests, torture and other ill-treatment, unlawful killings and other deliberate and indiscriminate attacks.³³ As no agreement could be reached between, it led to NATO air strikes, and a Military Technical Agreement between Serbia and the KLA.³⁴ An estimated 800,000 ethnic Albanians were forced out of the province by Serbian government forces. Tens of thousands more were internally displaced.³⁵ After Serbian forces were driven out of Kosovo in summer 1999, the United Nations took over the administration of the Kosovo province.³⁶ Through Resolution 1244/99 it established UN Interim Administration in Kosovo (UNMIK) with executive powers to govern the country of Kosovo with the responsibility among many others for “protecting and promoting human rights” and re-establishing the rule of law.³⁷ Such responsibility included also the investigation and prosecution of crimes under international law, including war crimes.³⁸ At that period, NATO through Kosovo Force (KFOR), under the same resolution was deployed in order to secure and ensure a safe environment for Kosovo inhabitants.³⁹ With the “Ahtisaari Plan”, which proposed Kosovo’s internationally-supervised independence⁴⁰, Kosovo government declared its independence in 2008, and a new Constitution of the Republic of Kosovo came into effect.⁴¹ With UNMIK remaining in Kosovo until its independence, the limited executive powers were led to European Union (EU). The EU specific role in Kosovo was the establishment of an Interim Civilian Office (ICO) and an EU mission in

³³ A Decade of Unheeded Warnings; Human Rights Watch (HRW), FRY, Kosovo: Rape as a Weapon of “Ethnic cleansing”, March 2000, Vol 12, No. 3 (D), <https://www.hrw.org/legacy/reports/2000/fry/index.htm#TopOfPage>, Rachel Wareham, No Safe Place, An Assessment on Violence against Women in Kosovo, UNIFEM, 2000, p.57-78, http://iknowpolitics.org/sites/default/files/nosafeplace_kosovo.pdf

³⁴ Under this agreement, NATO ground forces entered Kosovo as the VJ, Serbian police and paramilitary forces withdrew from Kosovo, before the end of July 1999, Kumanovo Agreement, 9 June 1999, <http://www.nato.int/kosovo/docu/a990609a.htm>; NATO, Undertaking Of Demilitarisation And Transformation By The UCK, 20 June 1999, <http://www.nato.int/kosovo/docu/a990620a.htm>

³⁵ Human Rights Watch, Kosovo: Rape as a Weapon of “Ethnic Cleansing”, 2000, pg. 2 available at: https://www.hrw.org/legacy/reports/2000/fry/Kosov003-02.htm#P168_31111

³⁶ BBC News (12 June 2007) Regions and Territories: Kosovo: http://news.bbc.co.uk/2/hi/europe/country_profiles/3524092.stm.

³⁷ Resolution 1244 (1999), Adopted by the Security Council at its 4011th meeting, on 10 June 1999, see Article 10, Article 11 (j) 11(i); S/RES/1244 (1999), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>;

³⁸ International Amnesty, “Wounds that burn our souls”, compensation for Kosovo’s wartime rape survivors, but still no justice, see at: <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>

³⁹ UNSC resolution 1244/99, Article 9.

⁴⁰ Comprehensive Proposal For the Kosovo Status Settlement, 2 February 2007, <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>

⁴¹ Constitution of the Republic of Kosovo (2008), available at: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>

the rule of law area the so-called European Union Rule of Law Mission in Kosovo (EULEX),⁴² with the responsibility also for the investigation and prosecution of crimes under international law.

CRSV were reported and recorded by many sources not only at the peak of the conflict, but even before the conflict. Conflict-related rapes were recorded from at least the early 1990s, but became more frequent in 1998-1999.⁴³ Local NGOs and international observers, including the 1998 Kosovo Verification Mission, documented rape and sexual violence⁴⁴ at the time of the conflict. The Centre for the Protection of Women and Children reported that women were raped by Serbian police officers and Yugoslav Army soldiers.⁴⁵ Sexual violence was committed by various Serbian groups including: police forces, paramilitary groups or prison guards, often taking place over several days or weeks of forced sexual and domestic servitude. They occurred during attacks on homes, but also during displacement or in detention.⁴⁶ Most victims were women and girls under the age of twenty-five.⁴⁷ Extremely brutal sexual violence involving injuries to women's breasts, genitals and faces, biting, the rape of pregnant women, and the use of drugs to either blank out a woman's memory or to kill her were used as a form of sexual violence.⁴⁸ They did not take place in isolation, but in the context of other violations including: Serb forces coming to their village where women were separated from men and were taken away and killed; rape in their homes, or abducted from their homes, hiding in the woods or outbuildings, or when they ventured out to find food. Other assaults continued when they were forced to displace out of Kosovo to neighbor countries, where women and girls were pulled out of the columns of refugees, taken off to be raped and then returned shortly or after several days

⁴² European Security Defense Policy, Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission, EULEX Kosovo, available at: https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf

⁴³ UNIFEM (2000) No Safe Place: An Assessment on Violence against Women in Kosovo, Prishtina, 61; Byrne, B., Marcus, R. and Powers-Stevens, T. (1995) "Gender, Conflict and Development. Volume II: Case Studies", BRIDGE Report 35,65; Human Rights Watch (2000) Federal Republic of Yugoslavia: Kosovo: Rape as a Weapon of "Ethnic Cleansing", section II: <http://www.hrw.org/reports/2000/fry/>.

⁴⁴ The OSCE Kosovo Verification Mission, charged with verifying whether Serb and FRY forces were observing an agreement made in October 1998, with the aim of establishing a ceasefire. The KVM collected testimonies of rape, some of which are published in, As Seen, As Told, <http://www.osce.org/odihr/17772?download=true>, February 1999.

⁴⁵ Human Rights Watch, Kosovo: Rape as a Weapon of "Ethnic cleansing", p, 7.

⁴⁶ UNIFEM (2000), 65; UNFPA (28 May 1999) Assessment Report on Sexual Violence in Kosovo: <http://www.ess.uwe.ac.uk/Kosovo/Kosovo-Current%20News196.htm#synthesis>.

⁴⁷ UNIFEM (2000), 61, 64; Ward, J. (2002), 93.

⁴⁸ Human Rights Watch, Kosovo: Rape as a Weapon of "Ethnic cleansing (2000), section II.

or weeks.⁴⁹ Most women report being raped multiple times, and most often by more than one individual.⁵⁰ Although no official number does exist, the widespread rape and sexual violence of victims is estimated to be approximately 20,000.⁵¹ The estimation of victims is even higher according to Center for Disease Control and Prevention in a survey that conducted a population-based of 1,358 Kosovar Albanians that were internally displaced. It found that between August 1998 and August 1999 approximately 23,200 to 45,600 Kosovo Albanian women were raped.⁵² High number of rape victims, and having had ICTY investigators gathering evidence for war crimes against humanity in Kosovo,⁵³ unfortunately there are very limited cases, only seven cases that have been brought to national and international courts on CRSV and that have been completed.

CRSV cases in Kosovo have taken place through three fold separate courts, including the ICTY, Special War Crimes Court in Serbia and Special Prosecution Office of the Republic of Kosovo. Within the ICTY, General Nebojsa Pavkovic was convicted in the first instance, but Nikola Sainovic, Sreten Lukic, and Vlastimir Djordjevic were found not guilty, because only a handful of witnesses testified.⁵⁴ Within the Special War Crimes Court in Serbia, in proceedings against Kosovo Albanians, only one case has been convicted; and within the Kosovo national courts

⁴⁹ International Amnesty, "Wounds that burn our souls", compensation for Kosovo's wartime rape survivors, but still no justice, Available at: <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>

⁵⁰ Human Rights Watch, Kosovo: Rape as a Weapon of "Ethnic cleansing" (2000).

⁵¹ Kadriu, Arber; Morina, Die (18 October 2018). "Pioneering Kosovo Rape Victim Relives Battle for Justice". Birn. Balkaninsight. Available at: <https://balkaninsight.com/2018/10/18/pioneering-kosovo-rape-victim-relives-battle-for-justice-10-18-2018/>

⁵² Hynes, P. and Lopes Cardozo, B. (2000) "Sexual Violence Against Women in Refugee Settings", *Journal of Women's Health & Gender-based Medicine* 9(8), 819-823. The survey was conducted among 1,358 Kosovar Albanians who had been internally displaced. They found that the prevalence of rape among the women sampled was 4.3 per cent, while 6.1 percent had either been raped or witnessed rape.

⁵³ CPCW NGO provided information and testimonies to ICTY investigators, see CPCW, Relationships between ICTY and NGOs: A bitter experience; See for example information made available by the ICTY, <http://www.icty.org/en/in-focus/crimes-sexual-violence>. One international women's organization that maintains a website on rape in war including in the Western Balkans is <http://www.womenundersiegeproject.org>. Films have also been made on the issue of wartime rape including Nečujni Krik (Silent Scream, 2014) and In the Land of Blood and Honey (2011).

⁵⁴ Prishtina Insight, Wartime sexual violence: new evidence as hundreds of survivors come forward (2018), available at: <https://prishtinainsight.com/wartime-sexual-violence-was-a-tool-of-ethnic-cleansing-in-kosovo-mag/> Pavković (IT-03-70) ICTY, Nebojša Pavković, was charged with committing crimes against humanity and war crimes during the Kosovo War. The ICTY convicted Pavković of the charges and sentenced him to 22 years in prison. His sentence was upheld in January 2014; Šainović et al. (IT-05-87) ICTY, Nikola Šainović was charged for crimes against humanity and war crimes, including deportations and forcible transfers, murders and other persecutions. In 2015, he was released from the prison after serving two third of his sentence.

through the Special Prosecution Office of the Republic of Kosovo, only three cases have been completed, where in each of the cases the defendants were acquitted.⁵⁵

Being under UNMIK and EULEX international administration with all the responsibility for the investigation and prosecution of crimes under international law to war crimes, and handing over such responsibilities to Kosovo institutions after the independence, both UNMIK and EULEX with all the un-investigated case-files available to them, have failed to effectively investigate, prosecute cases of conflict related sexual violence, provide victims of their right to equal and effective access to justice,⁵⁶ and have created a legacy of impunity for the perpetrators.

In Serbia⁵⁷ and also in Kosovo, police and prosecutors have failed in their obligation to investigate violations promptly, thoroughly and impartially and, where admissible evidence exists, bring all those suspected of responsibility to justice, in accordance with international law. Arrest warrants and open proceedings against the perpetrators, would bring Kosovo in a very similar position as was the case of *Maktouf and Damjanović v. Bosnia and Herzegovina* case⁵⁸ where it would be difficult to convict the perpetrator for rape or other forms of it as a crime against humanity. Several reasons are to be considered. Prosecutions, in both Kosovo and Serbia have been brought for “War Crimes against the civilian population” under Article 142 (1) of the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY CC). The SFRY CC defines the offence of rape, referring only to “forcible prostitution or forcible rape”.⁵⁹ This may lead to a very difficult prosecution as it requires proof that the victim received physical injuries

⁵⁵ International Amnesty, “Wounds that burn our souls”, compensation for Kosovo’s wartime rape survivors, but still no justice, available at: <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>

⁵⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, (UN Basic Principles), VII, 11 (a), Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

Under international law, the victims of gross violations of international human rights law and serious violations of international humanitarian law have the right to equal and effective access to justice.

⁵⁷ Amnesty International, Serbia: Ending Impunity for Crimes under International Law, Index: EUR 70/012/2014, June 2014.

⁵⁸ *Maktouf and Damjanović v. Bosnia and Herzegovina* case refers to two convicted war criminals that challenged their sentence on grounds of non-retroactivity. Both were sentenced according to the 2003 Criminal Code of Bosnia, rather than the 1976 Criminal Code that was in effect when they committed their offences. Bosnia and Herzegovina argued that the 2003 law was more lenient because it did not allow for the death penalty (but which had in any event ceased to be applied, and would not have arisen for the crimes at issue). However the 2003 Code was more strict when it came to lesser offences, such as the ones that really were at issue, and so the European Court found a violation of Article 7 ECHR, which prohibits the retroactive application of criminal law if it is to the disadvantage of the accused. The ECtHR held that the court ought to have used the more lenient sentencing provisions of the SFRY CC when sentencing the defendants.

⁵⁹ Socialist Federal Republic of Yugoslavia Criminal Code (1976).

and/or tried to fight back.⁶⁰ To be consistent with international human rights law and standards, the definition of rape should make reference to “force, threat of force or coercion”⁶¹ to allow for the element of coercion.⁶² The new Criminal Code of the Republic of Kosovo (CCRK) stipulates that no criminal sanction or measure of mandatory treatment may be imposed on a person for an act, if prior to the commission of the act, the law did not define the act as a criminal offense and did not provide a criminal sanction or measure of mandatory treatment for the act.⁶³ Moreover, the law in effect at the time a criminal offense was committed shall be applied to the perpetrator.⁶⁴ Even if the cases would have been opened through the article of the non-applicability of statutory limitations for crimes against international law⁶⁵ of the CCRK the most number of committed crimes of sexual violence have taken place between 1998 and 1999. In situations like this, where potentially two clashing laws would apply, there is a presumption that in order to avoid retroactivity, the *lex mitior* – the more lenient law – should be applied.⁶⁶ Under Article 52 of the Constitution of Kosovo, the European Convention of Human Rights (ECtHR) like other human rights instruments is applicable in Kosovo, and has priority over the provisions of domestic laws. If ECtHR is applied through Article 7,⁶⁷ which allows for an interpretation that such offence did constitute a criminal offence under international law,⁶⁸ even where the offence did not exist in domestic law the court must have enough witnesses to testify, because to qualify the act of rape as a crime against humanity it has to be either part of a “widespread or systematic attack” directed against a civilian population or constitute such an attack on its own.⁶⁹ Human rights guarantees in the Constitution of the Republic of Kosovo establish the societal and

⁶⁰ UNMIK, EULEX, Special Prosecution Office of the Republic of Kosovo, international and national organizations reports and documentaries, including those of women’s organizations and the Criminal Tribunal for the Former Yugoslavia documents

⁶¹ International Amnesty, “Wounds that burn our souls”, compensation for Kosovo’s wartime rape survivors, but still no justice, pg.23 available at: <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF>

⁶² *Ibid*, 23.

⁶³ Criminal Code of Kosovo (2019), Article 2, Principle of legality, pg.1

⁶⁴ Criminal Code of Kosovo (2019), Article 2, Application of the most favorable law, pg.1

⁶⁵ Criminal Code of Kosovo (2019), Article 104, Non-applicability of statutory limitation for crimes against international law and aggravated murder.

⁶⁶ James A. Sweeney, Genocide and Cosmopolitanism in Europe, available at: <https://lanclaw.wordpress.com/2014/04/02/genocide-cosmopolitanism/#comments>

⁶⁷ European Convention on Human Rights, Article 7 provides as follows: (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

⁶⁸ See, ICTY, ICC.

⁶⁹ St-Germain, Tonia; Dewey, Susan (2012). Conflict-related sexual violence : international law, local responses, pp. 55-57.

political conditions for national reconciliation, through guaranteeing societal and political processes to function and develop through elimination of previous patterns that have caused the conflict.⁷⁰ The Constitution of the Republic of Kosovo establishes an integrated European and international human right protection in order to claim interrelated cases of CRSV.

3. Reparations for the survivors of conflict related sexual violence

Designing and implementing reparation programs is different from country to country. This due to very different context of the conflict that every country faces, such as: historical context, legal traditions, region and socio-economic development, and social stigma. Nevertheless, the lessons learnt from each process that a country has undergone through are very valuable.

International law and national legislation affirms that the court system of a state is responsible for providing justice for victims of sexual violence and ensuring accountability for the crimes committed. States must provide reparation to victims of gross violations of international human rights law and international humanitarian laws, and persons and entities found liable for violations during conflict may also be liable to provide reparations.⁷¹ The right to an effective remedy is enshrined under international human rights law and humanitarian law.⁷² International law establishes different forms of reparations including compensation, rehabilitation, satisfaction, restitution and guarantees of non-repetition.⁷³

⁷⁰ Remzije Istrefi, European Union Support and Transitional Justice Processes in Kosovo, *Europolity*, vol.11, no.2, 2017, pg. 145-146;

⁷¹ Basic Principles and Guidelines on the Right to Remedy and Reparation, principle 15.

⁷² Under international human rights law the right to an effective remedy is guaranteed by: Universal Declaration on Human Rights, art. 8; the International Covenant on Civil and Political Rights, art. 2; the International Convention on the Elimination of All Forms of Racial Discrimination, art. 6; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14; the Convention on the Rights of the Child, art. 39; the International Convention for the Protection of All Persons from Enforced Disappearances, art. 24. Under international humanitarian law the right to an effective remedy is guaranteed by: The Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), art. 3; the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1997, art. 91 (applicable to international armed conflict but the obligation is now considered as part of customary international law applicable to non-international armed conflict); the Rome Statute of the International Criminal Court, arts. 68 and 75.

⁷³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, should be provided for any economically assessable damage such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and

Not successfully to condemn acts of conflict related sexual violence from national and international institutions through justice by sentencing perpetrators for the crimes committed, Kosovo has encountered complementary means to heal victims' wounds.

Under international administration the key documents for undertaking a gender based sensitive approach and reconciliation processes for dealing with the past was the Ahtisaari Plan.⁷⁴ Together with the EU mission, the main activities for implementing the Ahtisaari Plan were cooperation with the Government and the Kosovo Assembly in establishing an inter-ministerial working group on dealing with the past. It intervened and proposed amendments to draft texts on the Laws on Witness Protection, War Crimes Prosecution, Political Prisoners, War Veterans, and Victim Compensation with particular interest in victims of sexual violence.⁷⁵

After the conflict, the key documents for undertaking a gender based sensitive approach begun with the consolidation of the Constitution of the Republic of Kosovo.⁷⁶ Afterwards, institutions have taken further steps to achieve recognition and reparations for sexual violence in Kosovo. It started officially with the set-up of the Inter-Ministerial Working Group on Dealing with the Past and Reconciliation,⁷⁷ Government Action Plan for Implementation of UNSCR 1325,⁷⁸ National Council on the Survivors of Sexual Violence during the war in Kosovo (the National Council),⁷⁹

psychological and social services. Rehabilitation should include medical and psychological care as well as legal and social services. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

⁷⁴ Comprehensive Proposal for the Kosovo Settlement, 2007, Article 2.5.

⁷⁵ Remzije Istrefi, European Union Support and Transitional Justice Processes in Kosovo, *Europolity*, vol.11, no.2, 2017, pg. 145-146; Rafaeli 2012; Bernhardt and Ferizi, 2011).

⁷⁶ Constitution of the Republic of Kosovo 2008, Chapter II, III). The Constitution of the Republic of Kosovo stipulates that Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions: (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols; (4) Council of Europe Framework Convention for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination Against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. Available at: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>

⁷⁷ The Inter-Ministerial Working Group on Dealing with the Past and Reconciliation (2012) was set-up with the purpose of drafting a transitional justice strategy. The four sub-working groups are structured on the four traditional pillars of transitional justice: the right to reparation sub-group; the right to justice sub-group; the right to know sub-group; and the guarantees of non-recurrence sub-group.

⁷⁸ Government approval of the Action Plan for Implementation of UNSCR 1325 (2014), includes as one of its three outcomes the provision of redress to survivors of conflict-related sexual and gender-based violence.

⁷⁹ The National Council (2014) brought together representatives of key ministries, civil society and international stakeholders that can support violence survivors towards an improved, better coordinated response. It was

approval of the Law no. 04/L-172 on Amending and Supplementing the Law no.04/L-054 on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Sexual Violence victims of the War, Civilian Victims and their Families,⁸⁰ Regulation no. 22/2015 on Defining the Procedures for Recognition and Verification of the Status of Sexual Violence Victims during the Kosovo Liberation War,⁸¹ Government Commission on Recognition and Verification of the Status of Sexual Violence Victims During the Kosovo Liberation War.⁸²

Under Law no. 04/L-054 the benefits that CRSV victims are entitled to: pension,⁸³ health services⁸⁴, priority in employment in the public or private sector,⁸⁵ release of property tax for victims who are in difficult economic conditions,⁸⁶ residential care,⁸⁷ and urgent medical assistance.⁸⁸ However, the law does apply timeline limitations timeline, it applies only within the period 27 February 1998 until 20 June 1999.⁸⁹ Such timeline might excludes persons who have experienced sexual violence as a result of the conflict even outside of the scope of this timeframe. Though positive discrimination has been established this law, however with Kosovo's burden of economic, employment and health situation it would be very difficult to realize it without disclosing a recipient's identity as a survivor of CRSV. The social shame and stigma that the victims face do prevent many of them in requesting and accessing these rehabilitation services. Consequently women's organization efforts have taken up the needed activism to convince their governments to set up and improve reparation programs, and they

composed of one representative each from office of Prime Minister, Ministry of Labour, Ministry of Justice, Ministry of Health, Institute for War Crimes, as well as a psychologist, a psychiatrist, a lawyer, and a civil society representative.

⁸⁰ Law no.04/L-054 on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Sexual Violence victims of the War, Civilian Victims and their Families, recognizes the status of civilian victims of the sexual violence during the Kosovo-Serbia 1998-1999 conflict.

⁸¹ Regulation no. 22/2015 on defining the Procedures for Recognition and Verification of the Status of Sexual Violence Victims during the Kosovo Liberation War establishes the criteria and procedures for verification of conflict related sexual violence victims.

⁸² Government Commission on Recognition and Verification of the Status of Sexual Violence Victims During the Kosovo Liberation War.

⁸³ Law no. 04/ L-054 art. 5 (1.2.3).

⁸⁴ Law no. 04/L-054 art. 6 (1.5).

⁸⁵ Law no. 04/L-054 art. 6 (1.8).

⁸⁶ Law no. 04/L-054 art. 6 (4).

⁸⁷ Law no. 04/L-054 art. 6 (6).

⁸⁸ Regulation no. 22/2015, art. 28.

⁸⁹ Law no. 04/L-172 art. 4 (3.6).

thereafter supported survivors apply for reparations.⁹⁰ Therefore, the timeline limitation for only five years as has been envisaged by the Law, may discourage many women who for some reason adjust their observation and apply for benefits.

Generally, Kosovo tends to focus on the first two forms: compensation and to some lesser extent, rehabilitation.⁹¹ Because, relying on the judiciary to secure reparations is sometimes a fraught with challenges. Even though ICTY was crucial in developing recognition and understanding of sexual violence as a crime under international law, trials also exerted a heavy toll on survivors because of inadequate witness preparation and protection, aggressive cross-examination, lack of psychological counseling and support which left some feeling revictimised and humiliated.⁹²

IV. Conclusion

CRSV has been an acute threat in many of the countries that have undergone through conflict, and it remains an acute threat in many current conflicts who are in conflict. Nonetheless, it is important to learn lessons from those that have experienced it but taking into account the different context that every country faces, including the historical context, legal traditions, region and socio-economic development, and social stigma. Unfortunately just as it has happened in the territory of Western Balkans, even in Kosovo strong social taboos for the victims of CRSV need to be changed. Because, these social taboos have closed the victims to speak about their experiences and the opportunity to report the abuses that they have undergone through. Although, changing international and national laws are major steps towards pushing the agenda of discussing to open up the related cases, and towards punishing and ending sexual violence they cannot be successful without a fundamental change in people's attitudes and disgrace of the

⁹⁰ Examples of women's organizations that have been involved in this work include: Medica Kosova and Kosova Women's Network in Kosovo.

⁹¹ Sabine Freizer, *Reparations after Conflict Related Sexual Violence: the Long Road in the Western Balkans*, Security and Human Rights 27 (2016) 1-14, pg.8

⁹² On the trauma of giving evidence see Teufika Ibrahimfendic, "Traumatic Experience and Giving Evidence," in *Rehabilitation of Victim's of Torture*, Journal of Articles, published by the Civic Association Vive Zene, Tuzla, 2013, pp. 29-46. ICTY is also aware of the trauma of testifying and reliving the past (<http://www.icty.org/en/in-focus/crimes-sexual-violence/reliving-past>) and has included in its Rules or Procedure Rule 96 that provides that corroboration of the testimony of a victim of sexual violence is not required (<http://www.icty.org/en/in-focus/crimes-sexual-violence/innovative-procedures>).

victims of CRSV. Therefore opening society to accept the victims of CRSV would allow further progress to the impunity of perpetrators, which is one of the most conclusive element in healing victim's wounds. This would allow for a different social sanction on the positive side of the women. That would mean, the victim receives the support by the community and the perpetrator is stigmatized and excluded and indicted by law and the community.

Therefore reparation programs should be envisaged through the overall international recommendations and must be inclusive victim centric, gender sensitive, transformative, adequate reparation, and linking reparation with development. It is very important to link the reparation with development because, unfortunately inequality makes women more vulnerable to violence, and to subsequent discrimination and stigma. Consequently, programs that are broader than just a cash payment is not sufficient. Those programs must be gender sensitive to address gender empowerment issues in every field that they are more vulnerable to be discriminated including access to land, inheritance, employment, education, health and psycho-social services and access to income generating opportunities which allows these women to re-build further their lives. Ultimately, transformative compensation would progress societies in a sustainable peace whereby the society instigates to be treated equally.

Finally, clear policies and laws that make violence illegal and strong enforcement mechanisms with the involvement of all related actors of CRSV including collaboration with women's organizations, civil society organizations and group who work specifically in these related fields together with professional and academics do contribute towards a more comprehensive mechanism to deal with CRSV concerns.

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