

NO AMNESTY FOR WAR CRIMES

An overview of how
international law and Kosovo
law prohibit amnesty of war
crimes and other crimes
under international law

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ABBREVIATIONS

Vienna Convention – Vienna Convention on the Law of Treaties

Genocide Convention – Convention on the Prevention and Punishment of the Crime of Genocide

Rome Statute – Rome Statute of the International Criminal Court

Convention against Torture – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Geneva Convention I – Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

Geneva Convention II – Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

Geneva Convention III – Geneva Convention relative to the Treatment of Prisoners of War

Geneva Convention IV – Geneva Convention relative to the Protection of Civilian Persons in Time of War

Protocol I to the Geneva Conventions – Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977

Protocol II to the Geneva Conventions – Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 1977

Geneva Conventions – Geneva Convention I; Geneva Convention II; Geneva Convention III; and Geneva Convention IV

European Convention on Human Rights – Convention for the Protection of Human Rights and Fundamental Freedoms

UN – United Nations

Hague Conventions – Convention for the Pacific Settlement of International Disputes; Convention with respect to the Laws and Customs of War on Land; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864; Declaration concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods; Declaration concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases; Declaration concerning the Prohibition of the Use of Bullets which can Easily Expand or Change their Form inside the Human Body such as Bullets with a Hard Covering which does not Completely Cover the Core, or containing Indentations; Convention respecting the Limitation of the Employment of Force for Recovery of

Contract Debts; Convention relative to the Opening of Hostilities; Convention relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land; Convention relative to the Legal Position of Enemy Merchant Ships at the Start of Hostilities; Convention relative to the Conversion of Merchant Ships into War-ships; Convention relative to the Laying of Automatic Submarine Contact Mines; Convention concerning Bombardment by Naval Forces in Time of War; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 6 July 1906; Convention relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War; and Convention relative to the Establishment of an International Prize Court.

USSR – Union of Soviet Socialist Republics

ICCPR – International Covenant on Civil and Political Rights

Declaration on Protection from Forced Disappearance – Declaration on the Protection of all Persons from Forced Disappearance

Chemical Weapons Convention – Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

Draft Articles on State Responsibility – Draft Articles on Responsibility of States for Internationally Wrongful Acts

NO AMNESTY FOR WAR CRIMES - AN OVERVIEW OF HOW INTERNATIONAL LAW AND KOSOVO LAW PROHIBIT AMNESTY OF WAR CRIMES AND OTHER CRIMES UNDER INTERNATIONAL LAW

Letting major war criminals live undisturbed to write their 'memoirs' in peace would 'mock the dead and make cynics of the living.'

- *Justice Robert Jackson*

INTRODUCTION

International conventions, international customs, general principles recognized by civilized nations, judicial decisions and teachings of the most highly qualified provide that amnesty of war crimes and other crimes under international law contradicts international law. A number of these international conventions are applicable in Kosovo through expressed recognition, whereas international customs are applicable in Kosovo without need of expressed recognition, as in any other state around the world. On the other hand, Kosovo domestic law also provides that amnesty cannot be provided for acts constituting serious violations of international humanitarian law including war crimes, crimes against humanity and genocide.

Hence, amnesty of war crimes and other crimes under international law contradicts the letter and the spirit of international law and domestic law. Due to recent discussions in the media about the possibility of amnesty of war crimes being part of the Kosovo-Serbia dialogue and in the final agreement between the two, this policy analysis aims to elaborate how such an agreement – in addition to being despicable and immoral to say the least – contradicts international law and Kosovo domestic law. Amnesty of war crimes and other crimes under international law should never be brought to the table of the Kosovo-Serbia dialogue, and much less be put in the final agreement. It is a red line that should not be crossed, and according to international and domestic law, it cannot be crossed.

I. GENERAL PRINCIPLES AND DEFINITIONS

The relationship between Kosovo and Serbia and subsequently any agreement between the two is governed by international law. To establish how an agreement to amnesty war crimes and other crimes under international would contradict international law, we must first recount the sources of international law and how they define such crimes. The sources of international law are: (1) international conventions, which are rules expressly recognized by states, (2) international customs, which are general practices accepted as law, (3) general principles of law recognized by civilized nations, and (4) judicial decisions and teachings of the most highly qualified publicists of various nations, as a subsidiary means for the determination of the rules of law.¹

¹Statute of the International Court of Justice, Article 38 (25 Dec. 2020), <https://www.icj-cij.org/en/statute>.

In principle, international conventions are only binding upon state parties.² Whereas international customs are binding upon all states, regardless whether a state is party to a convention expressly stating the certain rule or not.³ For a rule to be considered as customary international law, two elements must be present: (1) state practice (*usus*) and (2) a belief that such practice is mandatory (*opiniojurisnecessitatis*).⁴ The practice of states which contributes to the creation of customary international law includes both physical and verbal acts of states, such as: national legislation, national case-law, battlefield behavior, types of weapons used, military manuals, the manner how people are treated, instructions given to armed forces and statements at international conferences.⁵ The practice of international organizations can also form international customary law.⁶ Additionally, it should be noted that international customs can be derived from international conventions as well, because it is considered that “the number of parties, the explicit acceptance of rules of law, and, in some cases the declaratory nature of the provisions produce a strong law-creating effect at least as great as the general practice considered sufficient to support a customary rule.”⁷ In the *North Sea Continental Shelf* cases for instance, the International Court of Justice considered the number of state ratifications of a treaty as relevant to the assessment of international customary law, whereas in the *Nicaragua* case, when assessing the customary status of a rule, the International Court of Justice put significant weight on the fact that a treaty (*UN Charter*) was almost universally ratified and that the UN resolutions relevant to the certain case were widely approved.⁸ Hence, treaties can reflect international customary law when there is sufficient similar practice so that there is little chance that the rule would be opposed.⁹ According to Sir Ian Brownlie, law-making treaties are for instance “Declaration of Paris 1856 (on neutrality in maritime warfare), the Hague Conventions of 1899 and 1907 (on the law of war and neutrality), the Geneva Protocol of 1925 (on prohibited weapons), the General Treaty for the Renunciation of War of 1928, and the Genocide Convention of 1948,” as well as all parts of the UN Charter not concerning the competence of organs.¹⁰ Whereas, law-making UN resolutions are for instance, the “Resolution affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal; the Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes, the Declaration on the Granting of Independence to Colonial Countries and Peoples...”¹¹

In addition to the above, international law consists of a number of peremptory norms, known also as *jus cogens* or compelling law, which are fundamental principles of international law from which no derogation is allowed by any state, and which are binding upon all states. For instance, according to Professor Francisco F. Martin, the right to life, the right to humane treatment, the prohibition of genocide, the prohibition of war crimes and the prohibition of crimes against humanity constitute – among others – global peremptory norms which may not be derogated (*jus cogens*).¹² In this respect, Article 53 of the Vienna Convention, known also as the ‘treaty on treaties,’ provides that a treaty is void if it conflicts a peremptory norm. It further explains that a peremptory norm is a norm accepted and recognized by the international

² Ian Brownlie, *Principles of Public International Law*, (Oxford University Press 2008) p. 13.

³*Id.*

⁴International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, (Cambridge University Press 2009) p. xxxviii.

⁵*Id.*

⁶*Id.*, p. xli.

⁷Brownlie, *supra* note 2, p. 13.

⁸International Committee of the Red Cross, *supra* note 4, p. xlix.

⁹*Id.*

¹⁰Brownlie, *supra* note 2, p. 13.

¹¹*Id.*, p. 15.

¹²Francisco F. Martin et al, *International Human Rights and Humanitarian Law*, (Cambridge University Press 2006), p. 34-35.

community of states as a whole, as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law with the same character.¹³

a) International Humanitarian Law

The branch of international law that applies in times of armed conflicts is international humanitarian law (*jus in bello*), also known as the rules of war.¹⁴ The same list of sources applies in international humanitarian law as well, where for instance, customary international law applicable in armed conflicts is generally known as ‘customary international humanitarian law.’ The purpose of international humanitarian law is that for humanitarian reasons, the effects of armed conflicts are limited, means and methods of warfare are restricted, and those who do not or no longer participate in hostilities are protected.¹⁵ These rules of war have been around for a very long time, way before modern international humanitarian law came to be.¹⁶ There is little resemblance however between the old rules of war existing since ancient times and the ones we have in modern times.¹⁷ Just to give a general depiction, here are a few examples: Sumerians guaranteed immunity to the enemy negotiators, the Code of Hammurabi provided that hostages be released when ransom is paid, and at the time of wars between Alexander the Great and the Persians, the life and personal dignity of war victims was respected as a prime principle.¹⁸ The codification and development of the rules of war began only in the 19th century,¹⁹ a time when a number of major international treaties were adopted²⁰ such as the Geneva Conventions and Hague Conventions.

A major part of international humanitarian law is provided in the Geneva Conventions²¹ which have been adopted by almost all states around the world. These conventions provide rules to safeguard the wounded, sick or shipwrecked combatants and to safeguard civilians, prisoners of war and medical personnel, among others.²² On the other hand, the Hague Conventions provide laws and customs of war on land such as rules for the treatment of prisoners and the wounded, prohibit the use of bullets which can easily expand or change their form, prohibit the discharge of projectiles and explosives from balloons and established a mechanism for pacific settlement of international disputes, among others.²³ It is important to note that although Kosovo is not a signatory state to the Geneva Conventions, these conventions are directly applicable because they have become part of customary international law, and hence are binding upon all states.²⁴ In addition to these, the Hague Conventions have also been recognized as customary law, hence binding upon those beyond the contracting parties.²⁵ Moreover, the Geneva Conventions applied throughout the territory of the Former Yugoslavia during the period of armed

¹³ Vienna Convention on the Law of Treaties, Article 53.

¹⁴ Michael Bothe, *The Handbook of International Humanitarian Law*, (Oxford University Press 2013) p. 43.

¹⁵ American Red Cross, *Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, (Dec. 25 2020) https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_Summary_GenevaConv.pdf, p. 1.

¹⁶ Bothe, *supra* note 14, p. 16.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*, p. 20.

²¹ American Red Cross, *supra* note 15, p. 1.

²² *Id.*

²³ Hague Convention (II) on the Laws and Customs of War on Land; Hague Declaration (IV.3) concerning Expanding Bullets; Hague Declaration (XIV) on Explosives from Balloons, (25 Dec. 2020) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByDate.xsp>.

²⁴ Bothe, *supra* note 14, p. 26.

²⁵ *Id.*, p. 27.

conflicts as a matter of treaty obligation.²⁶ Albeit the list of conventions and customary rules applicable to armed conflicts is long, with each rule being important to comment on, for the purpose of this policy analysis only those most relevant to the subject have been elaborated below.

War crimes, crimes against humanity and genocide are named as 'crimes under international law,' a definition found in a number of international instruments. In relation to this, in 1946, the General Assembly of the United Nations adopted a resolution affirming the principles of international law recognized by the Nuremberg Tribunal, which acted upon a charter that required the punishment of individuals for war crimes, crimes against humanity and crimes against peace.²⁷ It was commonly agreed that, as stated by then Secretary-General "[i]n the interests of peace, and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were employed in the Nürnberg trials made a permanent part of the body of international law as quickly as possible."²⁸ Hence, the formulation of the principles of international law was entrusted to the International Law Commission²⁹ with instructions to include the Nuremberg principles as well as a plan for general codification of offences against the peace and security of mankind.^{30 31} The Principles of International Humanitarian Law are as follows:

- I. "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.
- II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
- III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
- IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
- V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.
- VI. The crimes hereinafter set out are punishable as crimes under international law:
 - a. Crimes against peace:
 - (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
 - (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

²⁶William J. Fenrick, *The application of the Geneva Conventions by the International Criminal Tribunal for the former Yugoslavia*, (25 Dec. 2020). <https://www.icrc.org/en/doc/resources/documents/article/other/57jptx.htm#:~:text=In%20any%20event%2C%20the%20Geneva,a%20matter%20of%20treaty%20obligation.&text=For%20example%2C%20it%20is%20difficult,part%20of%20an%20international%20conflict.>

²⁷General Assembly Resolution 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal, (25 Dec. 2020) <https://www.refworld.org/docid/3b00f1ee0.html>.

²⁸*Id.*

²⁹The International Law Commission was established by the General Assembly of the United Nations in 1947 to "initiate studies and make recommendations for the purpose of... encouraging the progressive development of international law and its codification." (25 Dec. 2020) <https://legal.un.org/ilc/>.

³⁰*Id.*

³¹International Law Commission, (25 Dec. 2020) [Codification and Progressive Development of International Law \(un.org\)](https://www.un.org/law/codification/).

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.”³²

Article 1 of the Genocide Convention on the other hand provides that “genocide, whether committed in time of peace or in time of war, is a crime under international law.” In light of this and the above, war crimes, crimes against humanity and genocide are ‘crimes under international law.’ And according to the principles of international law, any person who commits such crimes is “responsible therefore and liable to punishment.” It is also provided by the principles of international humanitarian law that although domestic law may not impose a penalty for these crimes, this does not relieve the person from responsibility under international law, and that the fact that the perpetrator might be a head of state or government is of no importance. Hence, an agreement to amnesty war crimes and other crimes under international law contradicts *inter alia* the principles of international humanitarian law.

The definition of crimes under international law is also provided in the Rome Statute where it is stated that the following constitute the most serious crimes of concern to the international community as a whole: (a) the crime of genocide, (b) crimes against humanity, (c) war crimes, and (d) the crime of aggression.³³ War crimes are defined by Article 8 paragraph 2(a) and (b) of the Rome Statute as: “(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages. (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii)

³² Yearbook of the International Law Commission, (25 Dec. 2020) [Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 \(A/1316\)](#), Vol. II, p. 374-378.

³³Rome Statute of the International Criminal Court, Article 5.

Intentionally directing attacks against civilian objects, that is, objects which are not military Objectives...”

On the other hand, Article 8, paragraph 2 (c), (d), (e) and (f) of the Rome Statute deals with the standards that apply in armed conflicts that are not of an international character and provides that: “(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against 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: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages... (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law... (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions... (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand...”

Also, crimes against humanity are defined by Article 7 of the Rome Statute as: “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

Whereas, genocide is defined by Article 6 of the Rome Statute as: “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (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.”

Considering the definitions above, during the war in Kosovo more than 10,000 civilians were killed or are considered disappeared,³⁴ approximately 863,000 civilians were forced to

³⁴Independent International Commission of Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, (Oxford University Press 2000), (25 Dec. 2020) <https://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf>, p. 2.

seek refuge outside Kosovo, 590,000 were internally displaced,³⁵ and it is estimated that 20,000 victims were sexually abused.³⁶ An agreement between Kosovo and Serbia to amnesty these heinous crimes would contradict international law and should never be brought to the table of the dialogue between the two states.

II. AMNESTY OF WAR CRIMES AND OTHER CRIMES UNDER INTERNATIONAL LAW CONTRADICTS INTERNATIONAL LAW

Amnesty of war crimes and other crimes under international law contradicts international conventions, international customs, general principles recognized by civilized nations, judicial decisions and the teachings of the most highly qualified. States have a positive obligation to secure human rights and a negative obligation to refrain from violating them.³⁷ Amnesty of crimes under international law violates these fundamental human rights. It denies the victims' rights of access to justice, the rights to an effective remedy, the rights to reparations, and violates the states' obligation to prosecute these crimes.

With respect to the permissibility of amnesties under international law, the Office of the United Nations High Commissioner for Human Rights has stipulated that "[u]nder various sources of international law and under United Nations policy, amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) Interfere with victims' right to an effective remedy, including reparation; or (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law. Moreover, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations."³⁸ Also, it has been stipulated that amnesties preventing prosecution of crimes under international law are inconsistent with the state's obligations under various sources of international law.³⁹ And that the rights of the victims to an effective remedy and reparations may not be restricted, as well as the right of victims and societies to know the truth about such gross violations.⁴⁰ It has also been noted by the Office of the United Nations High Commissioner for Human Rights that the fact that "impunity invites further abuse" was recognized a long time ago by international law, according to which states are required to *inter alia* investigate gross violations of human rights and war crimes, initiate criminal proceedings against them, impose appropriate punishments, and to provide adequate and effective remedies to the victims.⁴¹ Also, according to the United Nations Human Rights Committee "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not

³⁵*Id.*

³⁶Amnesty International, "Wounds that Burn our Souls" Compensation for Kosovo's Wartime Rape Survivors, but Still No Justice, (25 Dec. 2020) <https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF?fbclid=IwAROX2wz5jfl6-WWF8apHK3M-m7idL1MtC4OKSM5dE1R701nDTkgyh7GhoWo>, p. 14.

³⁷ D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Law of the European Convention on Human Rights*, (Oxford University Press 2014), p. 21-22.

³⁸ Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States, Amnesties*, (New York and Geneva 2009), p. 11.

³⁹*Id.*, Foreword.

⁴⁰*Id.*

⁴¹*Id.*, p. 1.

deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”⁴²

On the other hand, with respect to customary law applicable to armed conflicts, according to the comprehensive study of the International Committee of the Red Cross,⁴³ there are 161 rules of customary international humanitarian law. To name a few, these rules include the following: (1) the principle of distinction between civilians and combatants,⁴⁴ (2) distinction between civilian and military objects,⁴⁵ (3) prohibition of indiscriminate attacks,⁴⁶ (4) prohibition of starvation and access to humanitarian relief,⁴⁷ (5) general principles of the use of weapons, such as prohibition to use expanding bullets,⁴⁸ (6) fundamental guarantees such as obligation of humane treatment;⁴⁹ (7) fundamental guarantees such as prohibition of: torture,⁵⁰ rape,⁵¹ mutilation,⁵² slavery,⁵³ hostage-taking,⁵⁴ human shields,⁵⁵ enforced disappearance,⁵⁶ (8) obligation to return the remains and personal effects of the dead,⁵⁷ (9) duty of accounting for missing persons,⁵⁸ and (10) command responsibility for orders to commit war crimes, and for failure to prevent, repress or report war crimes.⁵⁹ These rules and many others are generally recognized to reflect mandatory rules, namely customary international law rules, supported by international conventions, international case law, general principles of law recognized by civilized nations, and teachings of the most highly qualified publicists of various nations. In this respect, the International Court of Justice has applied international customary law in many cases, including the *Fisheries Jurisdiction* case, the *Nicaragua* case and the *Gabickovo-Nagymaros Project* case.⁶⁰ In the *Nicaragua* case for instance, the International Court of Justice held that Article 3 common to the Geneva Conventions reflected “elementary considerations for humanity” and constituted a “minimum yardstick” applicable to all armed conflicts.⁶¹ Whereas, in the *Nuclear Weapons* case, the International Court of Justice found that the great majority of the provisions of the Geneva Conventions represent international customary law.⁶²

An important rule of customary international humanitarian law is the rule that “[a]t the end of hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.”⁶³ This rule is provided in Article 6(5) of Protocol II to the Geneva Conventions which stipulates that “[a]t the end of hostilities, the authorities in power

⁴² UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, (25 Dec. 2020) <https://www.refworld.org/docid/453883fb0.html>, Point 15.

⁴³ International Committee of the Red Cross, *supra* note 4, p. xxv. This study of customary international humanitarian law was concluded with the help of a large number of experts from all corners of the world, all of whom contributed in *inter alia* research, drafting, reviewing, and fact-checking.

⁴⁴ International Committee of the Red Cross, *supra* note 4, Rules 1-6, p. 3-19.

⁴⁵ *Id.*, Rules 7-10, p. 25-34.

⁴⁶ *Id.*, Rules 11-13, p. 37-43.

⁴⁷ *Id.*, Rules 53-56, p. 186-200.

⁴⁸ *Id.*, Rules 70-86, p. 237-292.

⁴⁹ *Id.*, Rule 87, p. 306.

⁵⁰ *Id.*, Rule 90, p. 315.

⁵¹ *Id.*, Rule 93, p. 323.

⁵² *Id.*, Rule 92, p. 320.

⁵³ *Id.*, Rule 94, p. 327.

⁵⁴ *Id.*, Rule 96, p. 334.

⁵⁵ *Id.*, Rule 97, p. 337.

⁵⁶ *Id.*, Rule 98, p. 340.

⁵⁷ *Id.*, Rule 114, p. 411.

⁵⁸ *Id.*, Rule 117, p. 421.

⁵⁹ *Id.*, Rules 152 and 153, p. 556-558.

⁶⁰ *Id.*, p. xxxviii- xxxix.

⁶¹ *Id.*, p. I.

⁶² *Id.*

⁶³ *Id.*, p. 661.

shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” Unfortunately, this article has been misinterpreted by some as suggesting states to amnesty crimes under international law; but this is not what the article intends.⁶⁴ The purpose here was to contribute to establishing normal relations within a divided state and to encourage reconciliation,⁶⁵ hence it merely encourages a form of release at the end of hostilities for those detained or punished and does not aim to suggest amnesty for those who violated international law.⁶⁶ This means that the states may grant rebels amnesty for rebellion or treason, but states may not grant amnesty when these rebels commit war crimes.⁶⁷

Also, the customary law rule provides in the last part that the request of providing amnesties at the end of hostilities in non-international conflicts does not apply to “persons suspected of, accused of or sentenced for war crimes.” This is further confirmed by the fact that when Article 6(5) of Protocol II to the Geneva Conventions was adopted, the USSR stated that the provision could not be construed to allow war criminals and those responsible for crimes against humanity escape punishment.⁶⁸ In this respect, many amnesties have excluded from their scope persons suspected to have committed crimes under international law, such as the Statute of the Special Court for Sierra Leone.⁶⁹ Also, for instance in Resolution on human rights in the world and Community human rights policy for the years 1991/1992 in relation to the former Yugoslavia, the European Parliament stated that amnesties may not cover war crimes.⁷⁰ On the other hand, an example of amnesties considered in line with international law are the cases when the UN General Assembly adopted resolutions encouraging the granting of amnesties in Kosovo and Afghanistan.⁷¹ In the Kosovo case for instance, the UN General Assembly called upon the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) to “abide by the principle that no person will be prosecuted in state courts for crimes related to the conflict in Kosovo, except for crimes against humanity, war crimes and other crimes covered by international law,” to “allow 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 and its forensic experts complete, unimpeded access to Kosovo to examine the recently alleged atrocities against civilians” and to “mitigate the punishments of and where appropriate to amnesty the ethnic Albanians in Kosovo sentenced for criminal offences motivated by political aims.”⁷² In this respect, as recognized by the Secretary-General of the UN “carefully crafted amnesties can help in the return and reintegration of displaced persons and former fighters in the aftermath of armed conflict and should be encouraged,” but “these can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights.”⁷³

Despite of the above, there have been instances where amnesties were provided for crimes under international law because of different political motivations.⁷⁴ Although these

⁶⁴Mahnouch H. Arsanjani, *The International Criminal Court and National Amnesty Laws*, (Cambridge University Press 2017), p. 65.

⁶⁵*Id.*

⁶⁶ Office of the United Nations High Commissioner for Human Rights, *supra* note 38, p. 16.

⁶⁷*Id.*

⁶⁸International Committee of the Red Cross, *supra* note 4, p. 612.

⁶⁹*Id.*

⁷⁰*Id.*, p. 613.

⁷¹*Id.*, p. 612.

⁷²UN General Assembly Resolution 53/164, (25 Dec. 2020) <https://www.refworld.org/docid/3b00f52e8.html>, Point 14(b), (c) and (d).

⁷³Office of the United Nations High Commissioner for Human Rights, *supra* note 38, p. 26.

⁷⁴Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, (25 Dec. 2020) <https://academic.oup.com/ejil/article/9/1/2/427225>, p. 6.

amnesties occurred in times when states were transitioning, for instance when the power was handed from a military regime to a democratic government,⁷⁵ according to an author, the creation of an international criminal prosecution system provides a general presumption of illegality of amnesties.⁷⁶ Hence, amnesty of war crimes and other crimes under international law constitutes a breach of a great number of international conventions and customary international law.⁷⁷ In relation to this, Judge Antonio Cassese, the first President of the International Criminal Tribunal for the Former Yugoslavia, stipulated that the prohibition of grave breaches of international humanitarian law, as well as the obligation of states to prosecute and punish them should be considered as a compelling norm of international law (*jus cogens*),⁷⁸ and therefore international agreements between states or national legislation that forego punishment for such crimes should not be allowed.⁷⁹ Also, Judge Cassese notes that an agreement to amnesty war crimes between states does not preclude their prosecution by international criminal tribunals.⁸⁰

Many international mechanisms have been created to punish the atrocities committed under the guise of war such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court, for which Ban Ki Moon famously announced in 2010 that “the age of impunity is over, and the age of accountability has begun.”⁸¹ A clear example of how amnesty of crimes under international law contradicts international law is the case of Sierra Leone. The government of Sierra Leone and the Revolutionary United Front signed a peace agreement in 1999 to calm a decade long civil war, which included *inter alia* a blanket amnesty to all participants in the conflict.⁸² The Appeals Chamber of the Special Court for Sierra Leone however – an *ad hoc* criminal tribunal established by an agreement with the UN – ruled that when an amnesty is provided, this does not bar the prosecution of international crimes before international or foreign courts.⁸³ This decision was the first decision from an international criminal tribunal ruling unequivocally that domestic amnesties do not bar prosecution by international tribunals. In its reasoning, the tribunal provided that “[a] State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.”⁸⁴ The court decided that the amnesties provided in Sierra Leone, cannot cover crimes under international law because first, they are subject to universal jurisdiction, and second because the obligation to protect human dignity is a mandatory norm which has assumed an *erga omnes* applicability.⁸⁵ Therefore, according to this case and many others, the grant of amnesty is not only considered as a breach of international law, but it is also a breach of the state towards the international community as a whole.⁸⁶

Also, the fact that international law prohibits amnesty is confirmed by the case of *Prosecutor v. Furundzija* as well, where the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia held that amnesties for torture are null and void and will not receive

⁷⁵YasminNaqvi, *Amnesty for war crimes: Defining the limits of international recognition*, p. 586.

⁷⁶*Id.*, p. 587.

⁷⁷ Office of the United Nations High Commissioner for Human Rights, *supra* note 38, p. 14.

⁷⁸ Cassese, *supra* note 74, p. 6.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹ Ban Ki-moon, *The age of accountability*, (25 Dec. 2020) <https://www.un.org/sg/en/content/sg/articles/2010-05-27/age-accountability>.

⁸² Simon M. Meisenberg, *Legality of amnesties in international humanitarian law The Lomé Amnesty Decision of the Special Court for Sierra Leone*, (25 Dec. 2020) https://international-review.icrc.org/sites/default/files/irrc_856_5.pdf, p. 839.

⁸³*Id.*, p. 837.

⁸⁴*Id.*, p. 842

⁸⁵*Id.*

⁸⁶*Id.*

foreign recognition.⁸⁷ Namely, it expressed that a domestic amnesty for a *jus cogens* norm, or a norm which cannot be set aside, would not be recognized internationally.⁸⁸ Therefore, even if the states grant amnesty of war crimes, this does not prevent the prosecution of them conducted by international criminal courts.⁸⁹ Moreover, in domestic cases such as the *Videla* case in Chile, *Mengistu and Others* case in Ethiopia and *Cavallo* case in Argentina, the courts held that grave breaches were unable to be amnestied and that it is well established that crimes under international law cannot be amnestied.⁹⁰

On the other hand, in a number of cases the European Court of Human Rights has provided that amnesty of crimes under international law is incompatible with international law. For instance in *Dujardin v. France*, the Commission stated that an amnesty for murder is not a breach of Article 2 (right to life) of the European Convention on Human Rights “unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes.”⁹¹ This means that if an amnesty to murder is seen as a general practice aimed to prevent the prosecution of the perpetrators of such crimes, then it is a breach of the right to life, a fundamental right and freedom of the people. This case further proved the move of public international law towards bringing persons guilty of war crimes, genocide and crimes against humanity to justice, rather than to approve amnesty in situations after armed conflicts.⁹² Also, in the *Ould Dah* case, the court stated that “an amnesty is generally incompatible with the duty incumbent on the states to investigate acts of torture.”⁹³

In light of the above, international conventions, international customs, general principles recognized by civilized nations, judicial decisions and teachings of the most highly qualified prohibit amnesty of war crimes and other crimes under international law. Hence, there is no place for amnesty of war crimes in today’s international order.⁹⁴ This fact is further supported by the Rome Statute where it is stipulated that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,”⁹⁵ and that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”⁹⁶ Also, according to the Office of the United Nations High Commissioner for Human Rights “[a]n amnesty that prevented prosecution of grave breaches would be plainly incompatible with States’ obligations under the Geneva Conventions and Additional Protocol I to search for persons allegedly responsible for grave breaches and to ensure that they are prosecuted.”⁹⁷ Moreover, the Declaration on the Protection of all Persons from Forced Disappearance provides that perpetrators “shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.”⁹⁸ And, according to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, no statutory limitation shall apply to war crimes, crimes against humanity or genocide.⁹⁹

⁸⁷John Dugard, *Dealing with Crimes of the Past Regime. Is Amnesty Still an Option?*, (Cambridge University Press 2004), p. 1002.

⁸⁸Office of the United Nations High Commissioner for Human Rights, *supra* note 38, p. 29.

⁸⁹*Id.*

⁹⁰International Committee of the Red Cross, *supra* note 4, p. 613.

⁹¹Harris, *supra* note 37, p. 205.

⁹²*Id.*

⁹³*Id.*, p. 206.

⁹⁴Dugard, *supra* note 87, p. 1002.

⁹⁵Rome Statute of the International Criminal Court, Preamble.

⁹⁶*Id.*

⁹⁷Office of the United Nations High Commissioner for Human Rights, *supra* note 38, p. 14.

⁹⁸Declaration on the Protection of all Persons from Forced Disappearance, Article 18.

⁹⁹Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Article 1.

In light of the above, amnesty of war crimes and other crimes under international law should never be brought to the table of the Kosovo-Serbia dialogue. Instead, Kosovo and Serbia should act in line with the customary international humanitarian law rule stipulating that “states should make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects.”¹⁰⁰ Hence, instead of including talks on amnesty in the dialogue table, Kosovo and Serbia should cooperate in facilitating the investigation of crimes under international law that have occurred during the war in Kosovo and their subsequent prosecution.

a) Amnesty of crimes under international law is a violation of fundamental human rights

Under international law, states have an obligation to respect and refrain from violating fundamental human rights such as the victims’ rights to effective remedies and reparations for crimes under international law.

The obligation of states to respect human rights has its origins in many sources of international human rights law. Although international human rights law and international humanitarian law are two separate branches of international law, they are well interlinked and reinforce each other. The foundational document of international human rights law – the Universal Declaration of Human Rights – provides that states have pledged to achieve “the promotion of universal respect for and observance of human rights and fundamental freedoms,”¹⁰¹ that every individual and organ of society shall strive “by progressive measures, national and international, to secure their universal and effective recognition and observance,”¹⁰² and that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration.”¹⁰³ On the other hand, the International Covenant on Civil and Political Rights, provides that each state undertakes to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”¹⁰⁴ to “take the necessary steps... [and] to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant,”¹⁰⁵ and that “[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.”¹⁰⁶ Moreover, the European Convention on Human Rights provides that states “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention,”¹⁰⁷ a provision which has been interpreted to impose both negative and positive obligations upon states.¹⁰⁸ A negative obligation is to refrain from a certain action such as torture, whereas in a positive obligation, a state must take actions to secure human rights.¹⁰⁹ In general, the European Court of Human Rights has reasoned its findings on positive obligations of the states as necessary on making the fundamental human rights guaranteed by the European Convention on Human Rights effective.¹¹⁰ In this respect, as it has been elaborated below, amnesty of war crimes and other crimes under international law is a violation of fundamental

¹⁰⁰International Committee of the Red Cross, *supra* note 4, Rule 161, p. 618.

¹⁰¹Universal Declaration of Human Rights, Preamble.

¹⁰²*Id.*

¹⁰³*Id.*, Article 1.

¹⁰⁴International Covenant on Civil and Political Rights, Article 2.

¹⁰⁵*Id.*

¹⁰⁶*Id.*, Article 5.

¹⁰⁷European Convention on Human Rights, Article 1.

¹⁰⁸Harris, *supra* note 37, p. 21.

¹⁰⁹*Id.*, p. 21-22.

¹¹⁰*Id.*

human rights protected by these conventions and others. It should also be noted that these cornerstone conventions are directly applicable in Kosovo, and according to the Constitution of the Republic of Kosovo, they have ultimate priority in case of conflicts with laws or other acts of domestic public institutions.¹¹¹

The Universal Declaration of Human Rights provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights,”¹¹² and that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”¹¹³ On the other hand, the International Covenant on Civil and Political Rights provides that states undertake to ensure that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity” and that “any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.”¹¹⁴ Moreover, the European Convention on Human Rights provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law,”¹¹⁵ and that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”¹¹⁶ In light of the aforementioned provisions, amnesty of crimes under international law denies the victims’ fundamental right to an effective remedy. This act constitutes a violation of the obligation of states to respect fundamental human rights, and hence contradicts international law.

On the other hand, victims of crimes under international law also have the right to reparations and adequate compensation, including the means for full rehabilitation. An agreement to amnesty war crimes and other crimes under international law would violate this fundamental right. In this regard, the European Convention on Human Rights provides that “[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”¹¹⁷ Also, the Convention against Torture provides that each state shall “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”¹¹⁸ Also, the Convention against Torture provides that each state shall “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”¹¹⁹ Also, in the commentary of this convention, the United Nations

¹¹¹Constitution of the Republic of Kosovo, Article 22(1).

¹¹²Universal Declaration of Human Rights, Article 8.

¹¹³*Id.*, Article 10.

¹¹⁴International Covenant on Civil and Political Rights, Article 2.

¹¹⁵European Convention on Human Rights, Article 6.

¹¹⁶*Id.*, Article 13.

¹¹⁷*Id.*, Article 41.

¹¹⁸Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13.

¹¹⁹*Id.*, Article 14.

Human Rights Committee provided that “[s]tates may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”¹²⁰ Whereas, the Rome Statute provides that “[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation...”¹²¹ Furthermore, the Declaration on the Protection from Forced Disappearance provides that “[t]he victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.”¹²²

In addition to the above, the ‘obligation to make full reparations to victims,’¹²³ is a customary international humanitarian law rule according to which a “[s]tate responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.”¹²⁴ In this regard, the Permanent Court of International Justice provided in the *Chorzow Factory* case that “[i]t is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation... Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.”¹²⁵ This customary rule is provided, among others, in Geneva Convention I,¹²⁶ Geneva Convention II,¹²⁷ Geneva Convention III,¹²⁸ and Geneva Convention IV.¹²⁹¹³⁰ Furthermore, it is provided in the Draft Articles on State Responsibility, according to which “the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act,”¹³¹ that “full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation or satisfaction, either singly or in combination,”¹³² and that the state responsible for an internationally wrongful act is obligated to “give satisfaction for the injury caused by the act insofar as its obligation cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality...”¹³³

Also, for instance in Resolution 48/153 of the UN General Assembly on the situation of violations of human rights in the territory of the former Yugoslavia – while “[g]ravelly concerned at the human rights situation in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), and in particular at the continuing, odious practice of “ethnic cleansing,” which is the direct cause of the vast majority of human rights violations there and whose principal victims are the Muslim population threatened with virtual extermination” – the General Assembly reaffirmed that “[s]tates are to be held accountable for violations of human rights which their agents commit on their own territory or on the territory of another

¹²⁰ UN Human Rights Committee, *supra* note 42, Point 15.

¹²¹ Rome Statute of the International Criminal Court, Article 75.

¹²² Declaration on the Protection of all Persons from Forced Disappearance, Article 19.

¹²³ International Committee of the Red Cross, *supra* note 4, Rule 150, p. 537.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51.

¹²⁷ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 52.

¹²⁸ Geneva Convention relative to the Treatment of Prisoners of War, Article 131.

¹²⁹ Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 148.

¹³⁰ International Committee of the Red Cross, *supra* note 4, p. 537.

¹³¹ Draft articles on Responsibility of States for Internationally Wrongful Acts, Article 31.

¹³² *Id.*, Article 34.

¹³³ *Id.*, Article 37.

State”¹³⁴ and expressed “its complete support for the victims of those violations, reaffirms the right of all persons to return to their homes in safety and dignity, considers invalid all acts made under duress affecting ownership of property and other related questions, recognizes the right of victims of “ethnic cleansing” to receive just reparation for their losses, and urges all parties to fulfil their agreements to this end.”¹³⁵¹³⁶ Also, the right to reparation is provided in a number of international case-law, where for instance in the *Akdivar* and *Others v. Turkey*, the European Court of Human Rights stated that there is an obligation to “make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.”¹³⁷ Also, another example of the enforcement of the right to reparation was the UNMIK Regulation No. 2000/60 which provided that compensation must be made to persons who lost their property rights as a result of discrimination in Kosovo between 23 March 1989 and 13 October 1999.¹³⁸¹³⁹

In light of the above, everyone has a fundamental right to an effective remedy and to reparation, and the provision of amnesty to perpetrators for crimes under international law denies these fundamental rights. Hence, amnesty of war crimes and other crimes under international law contradicts international law.

b) Amnesty of crimes under international law is a violation of the States’ obligation to prosecute

In addition to the aforementioned obligations, under international and customary law, states have an obligation to prosecute crimes under international law. A provision of amnesty for crimes under international law contradicts this obligation to prosecute, and hence contradicts international law.

The Geneva Conventions provide an unequivocal obligation to prosecute crimes under international law, conventions which are also part of international customary law.¹⁴⁰ ¹⁴¹ ¹⁴² According to Geneva Convention I, state “[p]arties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention,”¹⁴³ and that each state “shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ‘prima facie’ case.” This same obligation is provided by Geneva Convention II,¹⁴⁴ Geneva Convention III,¹⁴⁵ and Geneva Convention IV.¹⁴⁶ Also, the obligation to prosecute grave breaches of the Geneva Conventions – or crimes under international law – is also foreseen by Protocol I to the Geneva Conventions according to which, “[i]n order to avoid any

¹³⁴Resolution 48/153 of the UN General Assembly, (25 Dec. 2020) <https://www.refworld.org/docid/3b00f2b9b.html>, Point 12.

¹³⁵*Id.*, Point 13.

¹³⁶International Committee of the Red Cross, *supra* note 4, p. 541.

¹³⁷*Id.*, p. 547.

¹³⁸*Id.*, p. 548.

¹³⁹UNMIK Regulation 2000/60, (25 Dec. 2020), <http://kpaonline.org/hpd/old/Legal%20Framework%20in%20PDF/Full%20print.pdf>, Section 2(2).

¹⁴⁰Bothe, *supra* note 14, p. 22.

¹⁴¹Cassese, *supra* note 74, p. 5.

¹⁴²Naqvi, *supra* note 75, p. 596.

¹⁴³Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 49.

¹⁴⁴Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 50.

¹⁴⁵Geneva Convention relative to the Treatment of Prisoners of War, Article 129.

¹⁴⁶Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 146.

doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply: (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law..."¹⁴⁷ Hence, Geneva Conventions provide universal criminal jurisdiction to all state parties for crimes under international law, which means that all state parties have criminal jurisdiction over those suspected for grave breaches of international humanitarian law, notwithstanding their nationality or the place where the crime was committed.¹⁴⁸

Also, universal jurisdiction for crimes under international law is recognized as a customary international humanitarian law rule according to which "[s]tates have the right to vest universal jurisdiction in their national courts over war crimes."¹⁴⁹ This is based on, among others, national legislation of many states around the world, the Genocide Convention,¹⁵⁰ several military manuals, Geneva Convention I,¹⁵¹ Geneva Convention II,¹⁵² Geneva Convention III,¹⁵³ Geneva Convention IV,¹⁵⁴ Protocol I to the Geneva Conventions,¹⁵⁵ and the Convention against Torture.¹⁵⁶¹⁵⁷ Hence, an agreement to amnesty war crimes between states such as Kosovo and Serbia does not preclude their prosecution by international criminal tribunals.

Further, it is interesting to note that while arguing why it is better to have international crimes prosecuted by international criminal courts, Judge Cassese provided that the following are the major merits of prosecution and punishment by international criminal courts: (a) it focuses in the individual criminal responsibility, rather than blaming an entire people for crimes committed by certain individuals, which may in turn have a healing effect; (b) can serve to fill the vacuum left by the national legislation on amnesty, and do justice where states are unable to, to restore confidence in the rule of law and the legal order; (c) the punishment of war criminals by an independent tribunal composed of impartial judges, can serve to blunt the hatred and desire for revenge of the victims; (d) can create the conditions for peaceful relations and build an impartial record of events; and (e) most importantly, it shows the will of the international community to break with the past through punishing those acting against acceptable standards of human behavior.¹⁵⁸ Also, according to Judge Cassese, in delivering punishment the international community's purpose is not so much retribution as stigmatization of the deviant behavior.¹⁵⁹

Additionally, the obligation to investigate and prosecute¹⁶⁰ is also a customary international humanitarian law rule according to which "[s]tates must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."¹⁶¹ This rule is based on *inter alia* the Geneva Conventions, where the Geneva Convention I,¹⁶² Geneva Convention II,¹⁶³ Geneva

¹⁴⁷Protocol I to the Geneva Conventions, Article 75(7).

¹⁴⁸ Cassese, *supra* note 74, p. 5.

¹⁴⁹International Committee of the Red Cross, *supra* note 4, Rule 157 p. 604.

¹⁵⁰Convention on the Prevention and Punishment of the Crime of Genocide, Article VI.

¹⁵¹Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 49.

¹⁵²Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 50.

¹⁵³Geneva Convention relative to the Treatment of Prisoners of War, Article 129.

¹⁵⁴Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 146.

¹⁵⁵Protocol I to the Geneva Conventions, Article 85.

¹⁵⁶Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 5.

¹⁵⁷International Committee of the Red Cross, *supra* note 4, p. 604-607.

¹⁵⁸ Cassese, *supra* note 74, p. 9-10.

¹⁵⁹ Cassese, *supra* note 74, p. 10.

¹⁶⁰International Committee of the Red Cross, *supra* note 4, Rule 158, p. 607.

¹⁶¹*Id.*, p. 608.

¹⁶²Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 49.

Convention III¹⁶⁴ and Geneva Convention IV¹⁶⁵ require for states “to search for persons alleged to have committed, or ordered to have committed, grave breaches and to try or extradite them.” Also, the obligation to prosecute is provided in other treaties such as Genocide Convention,¹⁶⁶ Convention against Torture,¹⁶⁷ and the Chemical Weapons Convention,¹⁶⁸ numerous military manuals, several resolutions of the UN Security Council, and for instance in the UN Resolution 2002/79, where the UN Commission on Human Rights recognized that perpetrators of war crimes should be prosecuted or extradited.¹⁶⁹

Moreover, with respect to prosecution and punishment of crimes under international law, the Rome Statute provides that “[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”¹⁷⁰ In addition, the Convention against Torture, provides that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” and that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁷¹ Also, according to the Convention against Torture “[t]he State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”¹⁷² As noted above, when interpreting this article, the United Nations Human Rights Committee provided that “[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”¹⁷³ Also, the Convention against Torture provides that “[t]he offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties...” and “[s]uch offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction...”¹⁷⁴ This is another unequivocal stipulation of universal jurisdiction for crimes under international law. In relation to this, in *Aydin v. Turkey* and *Keenan v. United Kingdom*, the European Court of Human Rights held that in cases where there are alleged acts of torture and arbitrary killings, the states have an obligation to investigate that can lead to the identification and punishment of those responsible. Whereas, in *Association 21 December 1989 and Others v. Romania*, the court found that the obligation of Article 2 to investigate the death of a person who had been killed in anti-government demonstrations was violated.¹⁷⁵

¹⁶³Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 50.

¹⁶⁴Geneva Convention relative to the Treatment of Prisoners of War, Article 129.

¹⁶⁵Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 146.

¹⁶⁶Convention on the Prevention and Punishment of the Crime of Genocide, Article VI.

¹⁶⁷Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7.

¹⁶⁸Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Article VII(1).

¹⁶⁹International Committee of the Red Cross, *supra* note 4, p. 608-611.

¹⁷⁰Rome Statute of the International Criminal Court, Preamble.

¹⁷¹Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2.

¹⁷²*Id.*, Article 7.

¹⁷³UN Human Rights Committee, *supra* note 42.

¹⁷⁴Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 8.

¹⁷⁵Harris, *supra* note 37, p. 206.

The Declaration on the Protection from Forced Disappearance on the other hand provides that “[t]he right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances...”¹⁷⁶ Whereas, the Genocide Convention provides that states undertake to “prevent and to punish [Genocide],”¹⁷⁷ that “[p]ersons committing genocide... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals,”¹⁷⁸ and that states undertake to enact “the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide....”¹⁷⁹ Also, the Genocide Convention provides that “[g]enocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”¹⁸⁰ Because the principles underlying the Genocide Convention reflect customary international law, an amnesty to prevent prosecution of genocide is a direct violation of the state’s obligations under customary law.¹⁸¹

In light of the abovementioned provisions, states have an obligation to prosecute crimes under international law, and in cases when they cannot do so, they are obligated to extradite the alleged perpetrators. Hence, the provision of amnesty of war crimes other and crimes under international law would contradict international law in this respect as well.

Moreover, it is important to note that in addition to the obligations set by the international conventions above, states have a customary obligation to respect and ensure the respect of international humanitarian law, a rule that originates from the general principle of state’s obligation to comply with international law.¹⁸² Namely, each party to a conflict “must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.”¹⁸³ State practice around the world provides that this rule applies in international and non-international conflicts.¹⁸⁴ On the other hand, customary international humanitarian law also provides that a state “is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces; (b) violations committed by persons or entities it empowered to exercise elements of governmental authority; (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.”¹⁸⁵ This is a long-standing rule of customary international law provided in *inter alia* the Hague Conventions and the Geneva Conventions.¹⁸⁶

In light of all of the above, amnesty of war crimes and other crimes under international law contradicts all sources of international law, namely it contradicts cornerstone conventions adopted by almost all states around the world; it contradicts international customary law applicable upon all states (Kosovo included); it contradicts general principles recognized by civilized nations, international case-law and the teachings of the most qualified. Therefore, talks

¹⁷⁶Declaration on the Protection of all Persons from Forced Disappearance, Article 9.

¹⁷⁷Convention on the Prevention and Punishment of the Crime of Genocide, Article 1.

¹⁷⁸*Id.*, Article 4.

¹⁷⁹*Id.*, Article 5.

¹⁸⁰*Id.*, Article 7.

¹⁸¹Office of the United Nations High Commissioner for Human Rights, *supra* note 38, p. 12.

¹⁸²International Committee of the Red Cross, *supra* note 4, p. 495.

¹⁸³*Id.*, Rule 139, p. 495.

¹⁸⁴*Id.*, p. 495-496.

¹⁸⁵*Id.*, p. 530.

¹⁸⁶*Id.*, p. 531.

on amnesty of war crimes should never be brought to the Kosovo-Serbia dialogue table, and much less be included in the final agreement between the two states.

III. Amnesty of War Crimes and other Crimes under International Law contradicts Kosovo Domestic Law

In addition to contradicting international law, amnesty of war crimes and other crimes under international law contradicts Kosovo domestic law as well. The Constitution of the Republic of Kosovo provides that Kosovo “shall respect international law”¹⁸⁷ and that “legally binding norms of international law have superiority over the laws of the Republic of Kosovo.”¹⁸⁸ This means that the aforementioned rules have superiority over the laws of Kosovo and are directly applicable in Kosovo. On the other hand, the Constitution of the Republic of Kosovo also provides that human rights and fundamental freedoms guaranteed by a number of international agreements, are also guaranteed by the Constitution, are directly applicable and have priority over domestic provisions.¹⁸⁹ These international agreements directly applicable in Kosovo through expressed recognition include: (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; and (4) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As it has been elaborated above, amnesty of war crimes and other crimes under international law contradicts these 4 conventions, among other sources of international law. Therefore, because these conventions form part of Kosovo domestic law, their breach constitutes also a breach of Kosovo domestic law.

Moreover, according to the Constitution of the Republic of Kosovo, human rights and fundamental freedoms guaranteed by the constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.¹⁹⁰ Hence, all of the decisions/judgments of the European Court of Human Rights interpreting human rights are directly applicable in Kosovo as well, many of which provide that amnesty of crimes under international law contradicts international law. Also, Kosovo has a domestic law on amnesties which explicitly forbids amnesty of crimes under international law. Namely, the domestic law provides that an amnesty cannot be applied for “acts that constitute serious violations of international humanitarian law, including those offenses provided in Chapter XV of the Criminal Code of the Republic of Kosovo...”¹⁹¹ a chapter which defines crimes such as genocide, crimes against humanity and war crimes.

In light of the above, amnesty of war crimes and other crimes under international law contradicts Kosovo domestic law. Namely, it contradicts the cornerstone international conventions which are part of Kosovo domestic law, it contradicts the decisions/judgments of the European Court of Human Rights which are an obligatory means for interpreting human rights in Kosovo’s judicial system, and lastly, it contradicts the domestic law on amnesties explicitly forbidding amnesty for crimes under international law.

¹⁸⁷Constitution of the Republic of Kosovo, Article 16.

¹⁸⁸*Id.*, Article 19.

¹⁸⁹*Id.*, Article 22.

¹⁹⁰*Id.*, Article 53.

¹⁹¹Law No. 04/L-209 on Amnesty, Article 4.

IV. Conclusion

On the basis of the rules elaborated above, amnesty of war crimes and other crimes under international law contradicts international law and Kosovo domestic law. Namely, it contradicts international conventions, international customs, general principles recognized by civilized nations, judicial decisions and teachings of the most highly qualified. Providing amnesty for these heinous crimes would deny and therefore violate the victims' fundamental rights to effective remedies and reparations. Also, amnesty would violate the obligation of states under international law to prosecute crimes under international law. On the other hand, amnesty of war crimes and other crimes under international law would also contradict Kosovo domestic law which explicitly provides that amnesty cannot be given for acts constituting serious violations of international humanitarian law, including war crimes, crimes against humanity and genocide. Therefore, talks on amnesty of war crimes and crimes under international law should never be brought to the table of the Kosovo-Serbia dialogue, and much less be put in the final agreement between the two. It is a red line that should not be crossed, and according to international and domestic law, it cannot be crossed.

Contrary to including talks on amnesty in the dialogue table, Kosovo and Serbia should act in compliance with customary international humanitarian law and hence "should make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects,"¹⁹² a rule applicable to both international and non-international armed conflicts. In this light, the dialogue between Kosovo and Serbia should include discussions on how to cooperate to facilitate the investigation of crimes under international law and their prosecution that have occurred during the war in Kosovo, and in the end, the two states should reach an agreement that complies with international law.

¹⁹²International Committee of the Red Cross, *supra* note 4, Rule 161, p. 618.

Policy Analysis

Policy Analysis in general is a policy advice paper which particularly aims to influence the key means through which policy decisions are made in both local and central levels of government. The purpose of Policy Analysis is to address, more in-depth, a particular problem, to examine the arguments related to a concerned policy, and to analyze the implementation of the policy. Through Policy Analysis, Group for Legal and Political studies seeks to stimulate wider comprehensive debate on the given issue via presenting informed policy-relevant choices and recommendations to the key stakeholders and parties of interest.



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