Accountability and Impunity:
Afghanistan, Kosovo and Argentina

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# Table of Contents

## INTRODUCTION

I. Accountability and Impunity
   A. Deterrence
   B. Retribution
   C. Marginalization
   D. Incapacitation
   E. Rule of Law
   F. Establishing a Historical Record

II. Accountability in Context: Afghanistan, Kosovo and Argentina

## AFGHANISTAN

I. Background to the Conflict

II. Atrocities Committed, Political Structure and Legal Recourse
   A. Targeting of Civilians
      1. Indiscriminate Bombings by Soviet Forces
      2. Indiscriminate Attacks by Afghan Government and Mujahidin
   B. Violations Towards Prisoners
      1. Capture, Torture and Forced Conscription
      2. Summary Executions
      3. Ethnic Cleansing and Disappearances
   C. Consequences of Indiscriminate Attacks
      1. Destruction of the Rural Economy
      2. Dislocation
   D. Bonn Agreement and Action Plan on Peace, Reconciliation

## KOSOVO

I. Background to the Conflict

II. Atrocities Committed and Legal Recourse
   A. Indiscriminate Killing, Extrajudicial Execution and Mass Murder
   B. Destruction of Civilian Property
   C. Deportation and Forced Expulsion
   D. Fear and Psychological Impact
   E. Gender-Based Violence
   F. Indictments and Legal Recourse

III. Approaches to Accountability
   A. Deterrence
# Table of Contents

B. Retribution. ................................................................. 46  
C. Marginalization and Incapacitation ................................ 48  
D. Establishing Rule of Law ................................................ 59  
E. Establishing a Historical Record ...................................... 53  

# ARGENTINA

I. Background to the Conflict ........................................... 55  
A. Roots in Perón .......................................................... 55  
B. The Dirty War .......................................................... 55  
C. The Democratic Elections of 1983 .................................. 57  
D. Ending Amnesty ......................................................... 57  

II. Atrocities and Amnesties ............................................. 58  
A. Human Rights Violations ............................................. 58  
1.Disappearances ......................................................... 58  
2. Arbitrary Detention and Torture .................................... 59  
3. Extrajudicial Executions ............................................. 59  
4. Psychological Harassment and Intimidation ...................... 60  
B. The Victims ............................................................ 60  
C. The Perpetrators ....................................................... 61  
D. Amnesty and Accountability ......................................... 61  
E. Nullification of Amnesty Laws ...................................... 64  

III. Transitions Towards Accountability ............................... 66  
A. Establishing a Historical Record .................................... 66  
B. Rule of Law ............................................................ 68  
C. Deterrence ............................................................. 69  
D. Retribution ............................................................ 71  
E. Conclusion ............................................................ 73  

# CONCLUSION

I. Final Remarks .......................................................... 80  

# BIBLIOGRAPHY

Introduction ............................................................... 82  
Afghanistan ............................................................... 83  
Kosovo ................................................................. 85  
Argentina ................................................................. 90  
Conclusion .............................................................. 94
INTRODUCTION

“Today’s human rights violations are the causes of tomorrow’s conflicts.”  - Mary Robinson, UN High Commissioner for Human Rights, 1997-2002

In recent decades, international law has emerged advocating accountability in human rights violations as necessary for sustainable progress in post-conflict reconciliation. “It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

Countless conventions and protocols have since emerged intending to address various human rights abuses and in cases of the greatest severity, judicial principles have superseded sovereignty and established universal jurisdiction where no one stands above the law. The International Criminal Court’s 1998 Rome Statute states “jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole: genocide, crimes against humanity, war crimes, and the crime of aggression,” Rome Statute Article 5 declares. Unfortunately, despite growing advocacy for human rights, countless examples of abuse of basic rights exist and facilitate failure of coming to terms with past violations. Inefficiency in addressing past atrocities fertilize breeding grounds for future violations. Based upon this problematic reality we examine the role of accountability in Afghanistan, Kosovo and Argentina respectively.

Accountability and Impunity

Accountability is an obligation, imposed by the legal system, to acknowledge responsibility for one’s actions. Accountability’s principle in response to crimes against humanity obliges the state to “investigate, prosecute and punish the perpetrators; disclose to the victims, their families and society all that can be reliably established about those events; offer victims adequate reparations; and separate known perpetrators from law enforcement bodies and other positions of authority.”

In turn, abiding to these principles, the rights to the individuals and collective members subjected to violations are addressed through the right to “see justice done; know the truth; entitlement to compensation and also non-monetary forms of restitution; and new, organized institutions.”

Central to the debate between impunity and accountability are conceptual contradictions. In transitional justice from conflict to reconciliatory peace, the decision must me made to opt for amnesties, upholding a standard of impunity, or to hold perpetrators accountable for past violations, prioritizing juridical pursuit. Arguments for impunity are often justified in cases where governmental infrastructure is too weak, unstructured, or poorly funded to carry out judicial hearings. Amnesty laws are considered facilitators in the process of rapidly terminating conflict and bringing a level of forgiveness to the transition period’s forefront with the ultimate aim of peace in post-conflict reconstruction. Accountability operationalizes justice in post-

3 Ibid, 1.
5 Ibid, 261.
conflict situations and though it carries legal, political, ethical and practical complexities, accountability is preferred for long-term and more sustainable reconciliation. It legitimizes the governing structure by demonstrating zero-tolerance for such crimes.

Though arguably a more challenging endeavor, a noticeable trend towards universal jurisdiction in international cases of human rights violations has emerged in recent years. Generally agreed is that failure to address crimes committed seriously undermines legitimacy of the subsequent government and fosters instability. In most cases opting for amnesty is considered unacceptable since it fails to judicially pursue perpetrators and overlooks the source of the problem, encouraging further violations. For victims, resorting to amnesty is essentially neglecting reparations and forgiving and forgetting that injustice occurred. Human Rights Watch, among other international organizations, advocates the implementation of essential approaches in favor of accountability within transitional cases. This research focuses on six arguments: deterrence, retribution, marginalization, incapacitation, rule of law and establishing a historical record. The following is an overview defining each approach:

**Deterrence**

Deterrence is a theory behind many modern Western penal systems whereby criminal laws are passed with a specific punishment assigned to a specific crime. Deterrence aims to discourage a potential criminal from committing a crime or past criminals from becoming repeat offenders. The theory contends that a potential perpetrator undertakes a cost-benefit assessment regarding the potential crime and its consequences, and decides whether to commit the crime based on that assessment. Deterrence focuses on influencing that assessment by setting pre-existing legal standards and punishments for violations.

Much controversy is generated around the limited effectiveness of deterrence, and there is limited evidence that suggests deterrence is effective. The lack of obvious evidence leaves many to believe that deterrence is not much of a factor in dissuading human rights violations.

A frequently cited example of this paradox is the use of the death penalty in the United States. The US has one of the highest murder rates in the Western world leading many to question the effectiveness of capital punishment as a means of deterrence. If deterrence were effective, the death penalty would logically dissuade potential perpetrators from committing crimes, which clearly has not been demonstrated. Human rights violations, however, are often committed by large groups and involve indoctrinated populations. In these cases, the threat of punishment has little effect because such violations occur in a climate of fear that outweighs deterrence’s legal recourse. Rwanda in 1994 serves as an example. Once the Rwandan population accepted the government’s incitement to exterminate the Hutus, dissuading incentives due to fear of prosecution had little effect on halting large portions of the Tutsi population from participating in genocide.

In larger scale crimes, deterrence’s impact varies depending on the interests and motivations of parties involved. For government officials, the threat of prosecution is a direct threat to their power, potentially allowing future prosecution to have a greater dissuading effect on sanctioning
human rights abuses. Regarding leaders responsible for incitement, “prevention of elite-induced mass violence can operate through both conscious and unconscious response to punishment. Where leaders engage in some form of rational cost-benefit calculation, the threat of punishment can increase the cost of a policy that is criminal under international law.” In this case, supporting violence out of political calculations alters the threat of punishment versus the benefits of carrying out crimes, raising course of action’s cost. An often-cited example of such implemented deterrence is the ICTY’s issued indictments against Slobodan Milošević and other high-level former Yugoslav government officials for war crimes in Bosnia-Herzegovina. In this case it is possible that tactics used by Yugoslav and Serbian forces in Kosovo in 1999 would have been more severe had the ICTY not been established and employed as an international legal mechanism pursuing accountability. The ICTY prosecution possibly quelled violence from escalating in Macedonia in 2001 and arguably its influence played a role in Serbia’s government forfeiting military action against Kosovo following the recent declaration of independence.

Retribution

Retribution refers to the justice served to perpetrators, balancing victims’ grievances through legal punishment equal to crimes committed. Whereas deterrence focuses on alterations of the perpetrator’s decision making towards future behavior, retribution applies to victims’ reparations for past transgressions. Justice served within the confines of the law acknowledges victims’ suffering pushing perpetrators to take responsibility for their crimes. Intended to end cycles of violence, retribution provides victims with faith in rule of law, potentially limiting revenge killings and other acts of extrajudicial retribution. In the context of human rights, retribution’s aim is to establish an individual account and sense of individual responsibility to avoid collective action and reinforce the peace process by bringing closure to the victims and their families. The 2002 arrest and recent 2008 ICTR-imposed life imprisonment sentence of Rwandan Roman Catholic Priest Athanase Seromba for genocide and extermination demonstrates how international institutions created to pursue accountability support retribution: by overturning the original sentence of 15 years imprisonment to the current life sentence demonstrates that the ICTR has the investigative capacity to correct previously inadequately adjudicated atrocities, and to address victim grievances.

Marginalization

Central to marginalization is the isolation of alleged perpetrators through imposition of sanctions on military goods, financial assets and general travel bans. Though actions such as “black-listing” through ICC indictments marginalize perpetrators to a weak and ineffective position complicating their ability to exert power nationally and regionally, the perpetrators can still remain somewhat active and are not brought to account for crimes. This juxtaposition

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demonstrates an inherent contradiction in this approach and can lead to complications. When marginalized leaders or regimes are desperate and fear indictment, it raises the utility of extreme policies to maintain power often escalating the violations to avoid regime collapse. Such is the case of Zimbabwe’s Robert Mugabe, who, until recently, despite dire economic outlooks, substantial domestic resistance and international pressure, has held on to power through intimidation and patronage. Moreover, when such a perpetrator is still active an ICC indictment can be used as a bargaining chip where the perpetrator threatens further violence to convince the international community to drop charges, such as the case of Northern Uganda’s Lord’s Resistance Army leader Joseph Kony. Once indicted by the ICC, he agreed to a peace process on condition that charges against him be dismissed. Though the international community ruled out this option, it is understandably tempting to Ugandan authorities dealing with the effects of continued internal violence.

A common approach to marginalization is exile. When a leader or public figure responsible for atrocities is no longer within the borders of the country where their power and influence reigned, their ability to continue to cause atrocities is relinquished, generating weakness and collapse of related parties and associations that often cannot function without the central presence. The problem with exile concerns whether the ruler carries enough regional clout because in such cases, exile alone is not enough to limit influence. It is in this way that marginalization overlaps with incapacitation. Marginalization delegitimizes those who committed or sanctioned atrocities, as an approach “...more specifically focused on holding accountable, and discrediting, the individuals responsible for the crimes committed thereby absolving broader social groups and promoting healing.” Once they are no longer protected by their status as a head of state, they can then be arrested and tried. Such was the case of Liberia’s Charles Taylor, who while in exile to Nigeria, was still able to enact regional instability despite his marginalization. He was eventually indicted, arrested and taken to the Hague. The arrest of Theoneste Bagosora is also an example. Once a powerful political leader responsible for architecturing massive ethnic cleansing programs in Rwanda, his arrest and prosecution demonstrated that his human rights violation agenda ultimately led to his personal and political failure. The prosecution relegated him to a marginalized role and stripped him of of power and influence within his region. However, again a paradox is ever-present in this approach, as demonstrated in North Korea where despite marginalization and isolation through international sanctions, Kim Jong Il’s power has not diminished nor has the pursuit of justice or accountability ensued.

**Incapacitation**

Incapacitation is to deprive alleged perpetrators of capacity or political power and is often manifested on an individual level. Isolation makes committing further offenses physically impossible and in turn incapacitates non-imprisoned leaders by forcing them to change or abdicate their positions. In many cases they succumb to isolation where, even if not in prison,

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their positions of power have been compromised. The most important impact of incapacitation is setting a regional precedent that those responsible for mass atrocities will not be pardoned and will not continue to rule in their current manner.

A notable example of a leader accused of human rights violations being incapacitated by both exile and prosecution is Peruvian President Alberto Fujimori. President of Perú from 1990-2000, he fled to Japan, albeit voluntarily, after being overthrown in 2000. Although Peruvian authorities attempted to extradite Fujimori to face criminal charges, Japanese authorities granted him citizenship and would not comply with extradition demands. Five years later, Fujimori returned to Perú intending to run in elections and a Chilean judge ordered his arrest, citing an extradition agreement and Peruvian arrest warrants under charges of corruption and human rights abuses. He was held in Chile until 2007 when the corruption trial began and was sentenced to six years in prison and fined by a Peruvian Supreme Court judge. The human rights abuse trial, as of April 2008, is still pending. Peruvian reaction to the extradition and sentencing has been mixed, implying that his exile alone did not arouse as much sense of justice but that further steps towards full incapacitation might.

Rule of Law

Central to a strong nation-state is establishment of rule of law whereby clear and just laws govern society. Rule of law is essentially a contract between the government and society at large, where cultural norms and values are captured in the constitution and the legal system. Legitimacy to rule of law is granted when credible mechanisms exert justice in ways that reflect the society’s given values. Faith in rule of law brings faith in the functions of the ruling organism and a just governing authority, encouraging legal recourse. Under rule of law, rebuilding state institutions and infrastructure generate capacity building, providing skills needed to drive the country’s legal system both at a government and citizen level.

Rule of law can also be re-established. In countries where rule of law existed prior to hostilities, the reconstruction process necessitates a re-building of faith in the governing organism. The development or re-establishment of rule of law takes time as the legal culture grows from procedures, precedence and national understanding. In opting for approaches of impunity, such as amnesties, rule of law is weakened, leaving the system open to future abuses, deterioration of peace efforts and lack of accountability. It is argued a post conflict culture of justice also legitimizes moral credibility as a valuable political asset for victims, rendering reprisal killings less tempting and more costly.

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http://links.jstor.org/sici?sici=0017811X%28200105%29114%3A7%3C1943%3ADITLIC%3E2.0.CO%3B2-F
12 Fujimori jailed for abusing power. 12 December 2007 report from BBC.
Establishing a Historical Record

Establishing a historical record argues that accountability generates more accurate acknowledgement of past atrocities and that lack of record can lead to plausible deniability by perpetrators, lack of recognition to victims’ suffering and establishment of separate national histories. Failing to record past atrocities complicates the future condemnation of violence. Historical records provide victims a sense of recognition incorporating grievances as part of the country’s historical national narrative and “can help prevent the distortion of facts and misuse of historical examples both domestically and internationally, and provide the related benefit of acknowledging victims of crimes and allowing them to state their experiences publicly.”

Especially in the case of post inter-ethnic conflict environments, “denial has a long half-life, prolonged by the myth of victimization that makes it difficult for people to accept the suffering [their state has] inflicted on others,” writes Victor Peskin, an expert on international tribunals. Setting the record straight helps bring a sense of reconciliation between the individual and the state, leader or group that committed atrocities and the victim.

Post-war Germany is exemplary of establishing such record. The prosecution of crimes helped foster a culture of pacifism and reconciliation, and denial of the Holocaust is now illegal. In contrast, the Turkish government’s continued denial of the Armenian genocide by the Ottomans has led to feelings of distrust between the Armenian population and the Turkish majority and given way to continued tensions and outbreaks of violence.

Accountability in Context: Afghanistan, Kosovo and Argentina

The following case studies demonstrate conceptual operationalization of the aforementioned approaches to accountability. With research and one-on-one interviews we examine the history and atrocities committed and from this we analyze the respective roles of the concepts within each country. While acknowledging and addressing each case’s unique qualities, the central focus is to provide a practical blueprint from which to build a system of accountability.

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AFGHANISTAN

I. Background to the Conflict

Geographically, Afghanistan is strategically placed, providing a corridor connecting the Indian sub-continent to Central Asia and the Middle East. As a result of this geographical placement, Afghanistan, as a unified political entity, emerged out of interactions of various imperial forces that battled for political influence in the region. Eventually, Afghanistan came under British control by treaty in 1893. It is during this period that Kipling’s romantic view of Afghanistan as a land inherently resistant to outsiders and governed by tribal codes first emerged; a land delineated by ethnic affiliations without a frame of reference to Western notions of statehood.

The British marked out Afghanistan as we know it because it provided a buffer zone between British India and the Russian Empire in Central Asia. It was drawn with little regard to the ethnic composition of the population within. Historically, Pashtun tribes have controlled the territory of Afghanistan, but the area also includes many minority groups such as Uzbeks, Tajiks, Hazaras, and Arabs. While the majority of the country is Muslim and almost exclusively Sunni Muslim, Hazaras are Shi’a. And, in order to maintain control of the area, the border dividing British India and Afghanistan went through Pashtun tribal areas, dividing groups that shared common language, culture and identity. Over the years, several rulers have made attempts, with limited success, to consolidate power and to form administrative infrastructures and institutions necessary to a modern state. Its ethnic divisions and lack of a cultural reference point to a western-style nation-state has made its leaders inherently weak. In turn, weak leaders have lacked the political power to exert reforms and bring about modernization required if Afghanistan is to develop the institutions and infrastructure necessary for establishment of rule of law.

It was not until the 1970’s, that some semblance of stability was achieved briefly under President Mohammed Daoud, who came to power with help from the Communist People’s Democratic Party (PDPA). Afghanistan’s educated elite provided the political support for the new government, particularly the more moderate faction of the PDPA, the Parcham. However, limited international interest and aid left Daoud with few resources to enact any of the social change that was hoped for by the Afghan population. This, and his attempts to distance Afghanistan from Soviet influence, led to Daoud’s assassination in 1978. Daoud’s ousting ruptured the balance that had been achieved in distributing resources evenly to the influential elite so as to assure their acquiescence to government authority. With Daoud’s assassination, the communists’ extreme fringe, Khalq, began to pursue land redistribution and secularization policies that had little to do with Afghan culture, which led to mass resistance and a subsequent campaign of repression, torture and summary executions. Those targeted included political

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figures, religious leaders, teachers, students, ethnic minorities, particularly the Shi’a Hazaras and Islamic organizations.

Popular resistance combined with tensions between Khalq and more moderate Parcham set the stage for Soviet invasion in 1979. Revolt soon spread throughout the countryside and began infiltrating the cities. A spontaneous uprising in Herat, accompanied by a mutiny of the Afghan Army precipitated the Soviet’s full military commitment. Soviet planes bombed the city, crushing the uprising, thus highlighting how unraveled the situation had become. It became clear to the Soviet leadership that the Afghan government was teetering due to its extreme policies. On December 24, 1979, the Soviets invaded; the Khalq President Amin was killed and replaced with Parcham leader, Babrak Kamal.

The notion that a fragmented Afghanistan would threaten the USSR’s southern border in Central Asia is largely what compelled the Soviets to intervene. The Soviet occupation force of 115,000 troops continued to repress and terrorize the Afghan population, most notably by constant bombardment and executions in the countryside. The formation of the notorious Khademat-e Etela’at-e Dawlati, or KHAD, modeled after the KGB and responsible for intelligence gathering, aided the Soviet authorities.

Resistance to the Soviets formed around Islamist organizations in Pakistan and Iran, calling themselves Mujahidin – or Warriors in the Way of God. Much has been said regarding the religious zealotry that helped the mujahidin defeat the better equipped Soviet troops. However, this would not have been possible without supply of weapons by the United States and other countries.

Afghanistan became a financial hemorrhage to the Soviet Union. Losses mounted with no end in sight to the military stalemate. Finally, in 1988, negotiations culminated in the Geneva Accords. The Soviet Union agreed to remove all its uniformed troops by the end of the following year. The Soviets and the United States agreed upon a policy of “positive symmetry” whereby both powers would continue to provide weapons to the Afghan government and the mujahidin respectively. Kamal’s successor, Mohammad Najibullah, managed to maintain power for a few more years while the United Nations attempted to establish a transitional government. But fighting continued between various factions and donor fatigue set in, ultimately leading to the failure of the UN attempt at peace and stabilization.

As the Soviets withdrew, the Afghan army collapsed. The Afghan government then began to support various mujahidin groups to act as proxy fighters. Afghanistan was plagued by warlord infighting as various resistance fighters vied for influence as the communist government fell. The mujahidin, often lumped together into one group, were made up of various groups with different ideologies and allegiances. This underlies the difficulty in bringing peace to the area.

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19 Ibid, 20.
20 Human Rights Watch, “Background on Afghanistan: History if the War.”
21 Ibid.
22 Maley, 9.
23 Human Rights Watch, “Background on Afghanistan: History if the War.”
24 Maley, 9.
In 1992 the Tajik leader, Ahmed Shah Massoud of Shura-i Nazar, the Pashtun leader, Rasul Sayyaf of Ittihad-i Islami, and Uzbek leader, Abdul Rashid Dostum of the Jauzjani militias joined forces to form what became known as the Northern Alliance. They, along other non-Pashtun groups previously allied with the government, took control of Kabul by capturing Najibullah. The Northern Alliance then made an agreement in Peshwar, Pakistan to form a transitional government that excluded the Pashtun communist group Hizb-i Islami led by Gulbuddin Hekmatyar and the Hazara group Hizb-i Wahdat. In June 1992 the Tajik leader Burhanuddin Rabbani of Jamiat-I Islami, became president, while Hekmatyar continued to fight the government. Two years later, Dostum defected and joined Hekmatyar in an alliance of convenience.

The country was thus carved up into various factions controlled by former mujahidin turned-warlords. In this context of chaos and lawlessness, the extreme Islamist Pashtun-dominated Taliban emerged in the early 1990’s. They swept across the country with relative ease. Political uncertainty played a major role in the manner in which the Taliban managed to garner so much support despite is extreme Islamic views. There is little doubt that Pakistan played a key role in supplying the movement with support and arms. The fact that elements within Pakistan were Pashtun and that the Taliban was also Pashtun reinforced the idea that the Taliban would be aligned with Pakistan’s interests. The Taliban took the south with relative ease, but encountered resistance in the areas dominated by the Northern Alliance. This status quo held until the 9/11 attacks, which initiated the US-led invasion of Afghanistan in the search for Osama bin Laden, who had been granted asylum in Afghanistan.

Following the fall of the Taliban, in December 2001, the UN sponsored Bonn Agreement proposed a process for forming an interim governing body. In 2002, the Emergency Loya Jirga, or grand council, established the Afghan Interim Authority led by Hamid Karzai. At the same time, foreign peacekeepers arrived under the UN-mandated International Security and Assistance Force (ISAF). In August 2003, NATO took control of ISAF. An expansion from Kabul to the rest of the country followed. The Agreement also provided a process for developing a constitution. In January 2004 another Loya Jirga approved an Islamic constitution and Karzai was elected president in October 2004. The National Assembly and Provincial Councils were elected in September 2005.

Afghanistan’s post-conflict recovery is precarious. The Taliban and other Pashtun groups continue to wage successful insurgency from border regions of Pakistan. Factional interests are taking precedence over national reconstruction. A symbiotic relationship has developed between opium cultivation by the many Afghan farmers who rely on it for survival and the insurgency groups that are funded with drug money. This has created a network, which ties the everyday livelihood of ordinary Afghans to the funding of destabilizing forces within the country. Finally, both Osama bin Laden and Mohammed Omar escaped capture.

26 Maley, 44.
27 International Crisis Group.
II. Atrocities Committed, Political Structure, Legal Recourse

The atrocities committed in Afghanistan since 1978 fall under violations of the laws of war, established in the 1949 Geneva Convention. During the period of the Soviet occupation, the conduct of the parties should be viewed according to the rules set forth in Article 2 of the Convention. They stipulate, “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”28 Since Afghanistan is a signatory of the Convention, under these terms, the rules apply even when one or more of the parties does not recognize the state of war, and encompasses all players involved in the given conflict.

Although the Soviet withdrawal brought the continuing struggle back into the confines of an internal conflict, both the Afghan government and the various mujahidin are still bound by provisions stipulated in Article 3. It states that no person shall be treated inhumanly based on distinctions of, “race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. The following acts are prohibited at any time and in any place…

   a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
   b) The taking of hostages;
   c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
   d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”29

Again it should be stressed the provisions, set forth in Article 3, apply to all parties including those outside recognized governments, thus include the mujahidin and other militias. Article 3 is the only aspect of the Convention that applies to internal conflicts. Due to lack of elaboration, i.e. provisions indicating how to distinguish legitimate from non-legitimate resistance groups within internal conflicts, the Afghan government is not obligated to grant the mujahidin “prisoners of war” status. They may try them as criminals under domestic law as long as it complies with standards set forth by Article 3.30 In addition to this, Article 3 clearly prohibits the inhumane treatment of all parties present, whether participating in the conflict or not.

The Geneva Convention does not explicitly prohibit the targeting of civilians during internal conflicts. However, The Customary Law on Internal Conflict of the Assembly Resolution 2444, Respect for Human Rights in Armed Conflicts adopted in 1969, does prohibit such action. Besides providing a general distinction between combatants and non-combatants and reaffirming the humanity of all parties, Protocol II of the Resolution states, “the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the

29 Ibid.
primary purpose of which is to spread terror among the civilian population, are prohibited."\(^{31}\)
Since the Afghan government has not ratified Protocol II it does not apply specifically to the warring factions involved in the conflict, but does provide international standards by which states should comply while in the midst of internal struggle.\(^{32}\)

**Targeting of Civilians**

a. **Indiscriminate Bombing by Soviet Forces**

By the time of the arrival of the Soviet troops to Afghanistan, large swaths of the population were already in revolt. In urban centers, such as Kabul, resistance was organized into easily identifiable groups, such as student movements, labor unions, political organizations etc. In the countryside such distinctions were much more difficult to discern. Outside city centers, affiliations were delineated along ethnic, tribal, and cultural lines that were utterly alien to the Soviet occupiers, making the identification of targets illusive. Therefore, Soviet response was to bomb entire areas with little thought as to who might live there. The 1984 Human Rights Watch report of the Soviet occupation period states, “In Afghanistan, the most common target is the peasant village: the homes, fields, orchards, and, frequently, the mosque…In some regions – those controlled by resistance but not of major strategic importance – the bombing is random and desultory.”\(^{33}\) With a lack of understanding of the nature of the internal conflict and the structures of Afghan rural society, the Soviet response was to bomb the countryside into submission. The Afghan government itself was strained by policies that contradicted much of the norms of Afghan culture, resulting in repressive policies in order to keep the government intact.

The Soviets had come to Afghanistan within the ideological framework of the Cold War. For young Soviets, the struggle was about bringing freedom to the Afghan people while fighting the US and its imperialistic tendencies.\(^{34}\) When they encountered unexpected resistance, their lack of understanding of the makeup of the country led to a policy of indiscriminate attacks. As time went on, the strategy shifted, where the Soviets would bomb villages, and follow with a ground troops to kill or capture anyone the bombs missed. In such cases, Soviet troops would conduct house-to-house searches, interrogate those they found, arrest them or simply execute them on the spot. An Afghan refugee during this time was quoted, “The Russians bombed us. Then the soldiers came, took all the women and old men, and killed them.”\(^{35}\) Given that “civilian population should not be subject to attack,” these actions are a clear violation of Protocol II of Customary Law as well as the Geneva Convention.

b. **Indiscriminate Attacks by Afghan Government and the Mujahidin**

In many parts of the country, the carpet-bombing of areas during the Soviet occupation declined, most notably in Qandahar, where government troops chose not to respond to resistance attacks in

\(^{31}\) Ibid, 4.

\(^{32}\) Ibid, 4.


\(^{34}\) Human Rights Watch, “Background of Afghanistan: History of the War.”

order to garner support from the war-weary populace. The attacks continued in places where fighting was most intense. Afghan officials protested that most of their targets were military and conducted in areas that were depopulated. Even if this were so, or was the intention, due to the US/Soviet policy of positive symmetry, there was an abundance of weapons used by the Afghan forces, such as Scud-Bs, unguided, long-range, surface-to-surface missiles as well as the short-range version, Frog-7. These were notoriously inaccurate and could not be used for specific targets.

The Afghan troops were not the only parties to enact these tactics. Resistance fighters supported by the Najibullah government also indiscriminately rocketed civilian areas held by government forces. They used Egyptian-made Sakr rockets that disintegrated on impact into flying pieces of shrapnel. This made it difficult to claim that their use could be surgical and accurate. For example, Jalalabad, came under siege by resistance fighters in March 1989. Resistance fighters fired rockets into mud houses and other targets clearly erected for civilian use while government forces responded by unleashing its arsenal indiscriminately. According to the Afghan government, 500 civilians were killed and over 2000 injured in rocket attacks in the first two months.

A particularly grievous period was the 1992-1993 Battle of Kabul. After attempts at forming a unity government collapsed, the various factions were enthralled in a power struggle for control of the capital. In the west part of the city, the predominately Sunni-Pashtun Ittihad-i Islami led by Abdul Rabb al-Rasul Sayyaf, began battling the Shi’a-Hazara Hezb-i Wahdat led by Abdul Ali Mazari. The struggle took place in densely populated areas of the city and inevitably destroyed thousands of homes and killed innocent bystanders. Given the number of factions present in Kabul at the time, the conflict between Ittihad and Wahdat predictably brought in other groups, i.e., the Jamiat forces, further intensifying the struggle. Interviews of Kabul residents conducted during this time by Human Rights Watch reveal the extent of the violence. “From Qargha to Afshar, on the road, I saw many corpses – seventeen, eighteen, I don’t know – all civilians. They were commuters, people riding on the road (i.e., on bicycles), not fighters. Their bodies were swollen up. Also, I saw combatants, Hazaras, tied to trees, shot dead.”

While Ittihad and Wahdat battled over western Kabul, Gulbudin Hekmatyar’s Hezb-i Islami pounded the southern part of the city with rocket attacks in an attempt to dislodge Massoud. Everyday life became impossible and anyone was a possible victim. Shura-i Nazar responded in kind.

Hekmatyar was responsible for an assassination attempt on interim President Sibghatullah Mujaddidi. Hekmatyar attacked Mujaddidi’s plane with rockets as he returned from Islamabad in

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37 Ibid, 6.
38 Ibid, 6.
39 Ibid, 14.
May 1992, another indication of the extent of the violence. During this time, 12-20 rockets were fired into Kabul every day.

**Violations Towards Prisoners**

- **Capture, Torture and Forced Conscription**

Those who were not killed during the Soviets’ sweeps into the countryside were often young men of fighting age. They were imprisoned in detention camps or handed over to the KHAD for interrogation. Torture had been used prior to the Soviet invasion, but after 1979 it became systematic as KGB advisors began assisting the KHAD more closely. Detainees were often subjected to tactics of deprivation; food, water, sleep and most importantly outside contact with family members. Electric shocks, beatings and other forms of physical abuse then followed. Ironically, the detainees that were deemed non-threatening at the end of this process were forced to join the Afghan army, most likely enhancing the armies’ desertion rate. This treatment of detainees was a clear denial of the basic humanity of prisoners and a clear violation of the Geneva Convention. Many of these prisoners were innocent and were not members of the resistance.

- **Summary Executions**

Initially the mujahidin were fighting the Afghan army, but as the power vacuum expanded while the Soviets withdrew, the various factions within the resistance began to fight each other. Some of this fighting was fueled by the enlistment by the Afghan army of former-mujahidin militias to help fight for the Afghan government in exchange for territorial concessions. Most of it, however, was simply a classic power struggle of factions vying for power. Alliances changed according to convenience, making them difficult to discern. The following quote captures the complexity of the conflict:

> There is no one voice or center of power in the Mujahidin. If a soldier surrenders to Gailani, his life is threatened by Mojaddidi’s forces, who will ask, ‘Why did you surrender to Gailani?’ If he surrenders to Jamiat, then he is pursued and killed by Hezb. If he surrenders to Hezb, he is attacked by Khales or Sayyaf… There is no one voice who can declare convincingly that an amnesty for all will mean a safe and secure surrender. So a Kabul soldier who wants to surrender does not know to whom he can surrender and who will be able to protect his life.

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41 Ibid, 5.
44 Ibid, 10.
46 Ibid, 18.
With a static balance of power, fear and intimidation allowed the fighting to continue. Groups retaliated for one attack by killing members of another. The fighting led to multiple massacres in Tarin Kot, Qalat, Torkham and Farkhar to name a few.\(^47\)

c. Ethnic Cleansings and Disappearances

Accounts that emerged of atrocities committed by the Afghan Government prior to Soviet invasion were ominous harbingers of things to come. Examples are the killing of 1,200 people in Kerala, Kunar Province in March of 1979, the burning alive of 300 Hazaras in Kabul in April of 1979, as well as “the drowning of prisoners in cesspools; massive torture and many other offenses.”\(^48\)

Given the level of destruction and misery that accompanies drawn-out conflicts and the already fractured nature of the Afghan state, it is not surprising that indiscriminate killings of ethnic groups took place throughout the conflict. The presence of infidel foreign troops was unifying factor for the majority Muslim nation. Once the Soviets withdrew, however, and the conflict returned to an internal affair, the historical tensions between the various groups returned, exacerbated by the power vacuum left by the Soviets. In spite of this, the parties are still bound by the provision stipulated in Article 3, which prohibits the targeting of victims based on race and religion. The most targeted group was the Persian speaking Hazaras, whose distinctly Asian features and adherence to Shi’a Islam made them anathema to many of the Sunni majority, particularly as the Saudi-influenced Wahabi groups began to emerge and grow in influence. During the power vacuum of the post-Soviet withdrawal, various groups targeted populations along ethnic lines to weaken the opposing ethnically delineated groups that were all vying for power. In this circumstance, members of all groups were potential victims because no one faction controlled enough territory to enact full-blown ethnic cleansing campaigns. However, this changed as the Taliban began to emerge as the dominant military force and started to control large areas of the country, shifting these acts to indiscriminate killings to ethnic cleansings.

One of the most notorious campaigns that took place in Kabul in the early 1990’s was the Afshar Massacre conducted by warring factions during the civil war of the early 1990s. Using Ittihad troops as surrogates, the then Defense Minister Massoud sought to defeat Wahdat forces in the Kabul neighborhood of Afshar, allowing the interim government forces to consolidate western and central Kabul.\(^49\) The campaign began with the usual indiscriminate rocket shelling of the area. As residents began to retreat in terror, many were executed in the streets for simply being residents of the neighborhood. As Ittihad forces began to move into the perimeters of the operation, they raped the women still present in the area, enhancing terror and lawlessness.

One horrific instance was the massacre of Tajik, Uzbek and Hazara civilians in the northern city of Mazar-i Sharif by Taliban forces. The massacre was a response to a previous Taliban attempt at holding the city, which resulted in the Hizb-i Wahdat killing hundreds of Taliban soldiers, creating a need for revenge. Additionally, Hizb-i Wahdat forces had been involved in a campaign

\(^{47}\) Ibid, 18.
\(^{48}\) Ibid, 18.
of rape and murder in order to drive Balkh Pashtun groups from the province of Balkh, of which Mazar is the capital. Many of the targeted Balkh Pashtun were members of the Hekmatyar’s Hizb-i Islami group aligned with Hizb-i Wahdat in the Northern Alliance against the Taliban. Inevitably, these actions drove many Balkh Pashtun to support the Taliban, thus fracturing the alliance.\(^{50}\)

Revenge was taken in August of 1998 as the Taliban took over Mazar, effectively giving them control of every major city in the country. What has been described as a “killing frenzy”, ensued, with both Wahdat forces and ordinary civilians lying in the streets.\(^{51}\) Multiple accounts of random killing emerged as the Taliban swept into the city. One such account states, “At about 4:00 p.m. I saw someone running and another man pulling a cart. A Datsun full of Taliban came down the street, and the soldier inside shot the man who was running and then went after the second man and shot him, too.”\(^{52}\)

Once the city was occupied, the Taliban conducted house-to-house searches looking for Hazaras. This was often done haphazardly with many indiscriminate killings, as described in the following account, “I saw that a young Tajik boy had been killed – the Taliban soldier was still standing there, and the father was crying, ‘Why have you killed my son? We are Tajiks.’ The Talib responded, ‘Why didn’t you say so?’ and the father said, ‘Did you ask that I could answer?’”\(^{53}\) Such accounts reflect both the targeting of the Hazaras, and the indiscriminate ways in which it was carried out.

The massacre at Mazar-i Sarif was the most notorious of such killings, but it was by far not the only incident. In Yakaolang district 170 Hazara men were herded to assembly points around the district and shot by firing squad in January of 2001. Similarly, in May of 2000, 31 bodies were found near the Robatak pass between Baghlan and Samangan provinces. Most of them were identified as civilians Baghlan Province, and many had signs of torture.\(^{54}\)

Women throughout the Afghan population bore much of the brunt during the fighting. This intensified as the Taliban took control of the country. Foreign relief programs, which focused on women were threatened and harassed. In September 1990, a fatwa was released prohibiting women from wearing un-Islamic clothes, makeup and other cosmetics as well as attending school and leaving the house without a male family member.\(^{55}\) Assaults and abductions of women were common. Accounts reported women being removed from camps and villages and held in captivity to be used as sex slaves by Taliban fighters.\(^{56}\) Afghanistan was already a patriarchal society, but under the Taliban, women were stripped of their legal rights entirely, leaving them the most vulnerable group of all.

\(^{51}\) Ibid.
\(^{52}\) Ibid.
\(^{53}\) Ibid.
\(^{56}\) Human Rights Watch, *The Massacre in Mazar-I Sharif*. 

Consequences of Indiscriminate Attacks

a. Destruction of the Rural Economy

The culminating affect of such policies led to the destruction of the Afghan rural economy and further impoverishment of millions of people. Most of the Afghan economy was agriculturally based. As an extension of the Soviet’s policy of terrorizing the population into submission, the Soviets saw the disruption of the rural economy as yet another way to squeeze the resistance by disrupting Afghan society in general. Soviet helicopters randomly gunned down farmers working the fields during the day. Afghan farmers were forced to tend to their fields after dark, disrupting the traditional working day and overall productivity. \(^{57}\) Furthermore, destruction of crops, mainly wheat, on which the majority of Afghans rely on for sustenance, was prevalent. This was done by burning the fields or more systematically by dropping napalm and phosphorus bombs that scattered in mid-air so as to spread over a wide area.

The agricultural infrastructure before the Soviet invasion had been limited. For the parts of the country that did not have nearby access to water, underground pipes known as karez were used to carry water from the source to the fields. These pipes require constant maintenance and collapse easily, making them particularly susceptible to bombings. \(^{58}\) As the Soviet campaign ensued, much of the limited infrastructure, including the karez, began to crumble, leaving the population to starve.

b. Dislocation

This strategy led to a mass exodus of Afghan refugees to Pakistan and Iran. The conflict had drawn little attention from the international community up to this point, but with the refugee crisis spilling over into neighboring countries, foreign governments and other members of the international community began to pay attention. By 1984, there were an estimated four to five million refugees in Pakistan and Iran, amounting to a third of pre-war Afghanistan’s total population. \(^{59}\) The refugees provided account of the atrocities for the press to report since many foreign journalists and NGOs were prevented from entering Afghanistan at the time. Soviet troops then began to target groups seen headed towards the border, forcing them to turn back, or face bombing. \(^{60}\)

The Bonn Agreement and Action Plan on Peace, Reconciliation and Justice versus Amnesty

Following the ousting of the Taliban by US forces, the current political structure was established under the supervision of the United Nations at the Bonn Conference of December 5, 2001. For the first time in years, Afghanistan was provided an opportunity to address the past sufferings of its people and to create a political system able to address the many challenges faced by the country to take its rightful place in the international community. The signatories present at the Conference, including the Northern Alliance and other mujahidin-turned warlord groups,

\(^{58}\) Ibid, 76.
\(^{59}\) Ibid, 25.
\(^{60}\) Ibid, 42.
pledged that they were “determined to end the tragic conflict and promote national reconciliation, lasting peace, stability and respect for human rights in the country.”\(^6^1\) However, given its complicated past, ethnic factions and limited central authority, many contradictions and conflicting interests made these pledges problematic. First, the Bonn Agreement was rushed through in 10 days, leaving key issues of disarmament and demobilization, issues central to the past UN peace agreements in East Timor and Kosovo, unaddressed.\(^6^2\)

Second, the UN was determined to leave a “light footprint” on the process. This process gave Afghans a larger role in developing their government with the aid of UN member states. Certain member nations were to be conferred with “leading status” with respect to certain reforms. These countries were then to help Afghans enact the reforms through technical and financial support. The idea behind this is to nurture capacity building for the Afghans while assigning more specific responsibility to donor countries with respect to particular reforms.

Third and most problematic, Bonn left most of the groups that had been causing much of the destruction since the fall of the Najibullah government still in positions of power, which they had attained following the vacuum left by the Taliban’s retreat. The central problem was the US perception that the invasion of Afghanistan was central to the “war on terror,” simplifying the conflict into pro-Taliban and anti-Taliban groups rather than seeing the conflict as a civil war between many different factions with variegated interests and alliances. According to Barnett Rubin, “Those (Bonn) accords…reflected the distribution of power that resulted from the US strategy. The Shura-y-Nazar whose military, despite earlier promises, had occupied Kabul when the US bombing opened the way, kept control of the most powerful ministries. Resurgent warlords controlled most of the provinces.”\(^6^3\) As a result, the Bonn Agreement legitimized this structure where alleged past human rights violators were allowed to hold power and have an influential say in the structure of the government. It is thus not surprising that attempts to address human rights violations witnessed during the conflict were struck down, while passages lauding the sacrifices of the mujahidin calling them “champions of peace, stability and reconstruction of their beloved homeland,” prevailed.\(^6^4\)

The Bonn Agreement did provide an opportunity for the people of Afghanistan to address their past through the Emergency Loya Jirga, held in June 2002. It was to “decide on the transitional authority, including a broad-based transitional administration to lead Afghanistan until such time as a fully representative government can be elected through free and fair election to be held no later than two years from the date of the convening of the Emergency Loya Jirga.”\(^6^5\) In order to prevent warlords from participating, procedures were established to screen participants by making all attendants sign an affidavit declaring that they had not committed crimes during the war and had no innocent blood on their hands. In spite of this condition, many warlords were invited to observe the proceedings. They were even allowed to bring their armed bodyguards into the tent where the council was held. This created a sense of intimidation for legitimate members

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\(^6^2\) Ibid, 9.

\(^6^3\) Ibid, 9.

\(^6^4\) Ibid, 9.

\(^6^5\) Ibid, 10.
who felt bullied and overshadowed by the presence of those that had caused so much of the suffering over the past decade. As one Kabul academic and delegate stated, “Sayaf took the floor three times, while I never once was given the floor, though I kept requesting a chance to speak.”

With certain warlords playing a central role in the formation of the new government, it is not surprising that the political system that emerged catered disproportionately to their interests. Furthermore, many of the overtures made to these groups were encouraged by the US, since they viewed the Northern Alliance as surrogate troops that could fight the remnants of the Taliban so that US troop commitment could be kept to a limited size.

Simultaneously, international human rights organizations and other members of the international community called for recognition of past violations. Given that so much of the Afghanistan budget comes from abroad, these calls cannot be ignored if Afghanistan wishes to be viewed as full member of the international community. This created an environment where both national and international players failed to develop a coherent plan for national reconciliation. As a result, Afghanistan’s political system is awash with contradictory proposals, which inevitably leads to political deadlock and the upholding of the status quo of impunity.

One of the best outcomes of the Bonn Agreement was the establishment of the Afghan Independent Human Rights Commission (AIHRC). It was responsible for the creation of the Transitional Justice Unit, which oversees establishing an Afghan-devised process for reconciliation. By having a body in charge of human rights and transitional justice there is an official recognition that these issues must be addressed. As a result, much of the best work that has been done to address the past has come from the AIHRC.

The Transitional Justice Unit has focused on two key aspects: a) documenting evidence of abuses and b) undertaking consultations with the public across the country. The consultations attempted to capture how Afghans wished to address the past. They culminated in 2005 report, “A Call for Justice,” where over 4,000 people were interviewed covering 32 of Afghanistan’s 34 provinces, as well as refugee groups in Iran and Pakistan. The Report’s findings showed that, while Afghans vary in their wishes towards transitional justice, commonality can be found in three main points: a) exclude persons responsible for war crimes and crimes against humanity from political office; b) establish mechanisms at the local, regional and/or national level for documentation, investigation of past abuses and c) recognize the suffering of the victims of the war and acknowledge their right to the truth of what happened to them and their loved ones.

In spite of this affirmation by the Afghan people for accountability, the contradictory policies enacted by the Afghan government continue as President Karzai attempts to appease the various interests within and outside the country. However, the first legislative attempt to address the past occurred on December 12, 2005 when the Afghan government approved the Action Plan on

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66 Ibid, 11.
67 Ibid, 3.
68 Ibid, 21.
69 Ibid, 22.
70 The Afghanistan Justice Project, 4.
Peace, Reconciliation and Justice. Reflecting all of the wishes expressed in the consultations with the Afghan population the Action Plan calls for five central steps in order to enact justice.

1) public commemoration of the Afghan people’s suffering over three decades of war;
2) vetting the civil service to keep out serious human rights abusers;
3) documenting the events of the past to establish accountability;
4) promotion of reconciliation and national unity;
5) establishment of a justice and accountability mechanism.

Because there is fear that pursuing the justice called for would threaten the precarious nature of the current Afghan government, the plan has yet to be implemented. Moreover, if these steps were acted on, criminal members of the government would be implicated and have to leave office, which would endanger the government’s very existence. The following are members of the government that are allegedly responsible for human rights violations in the 1990’s.

1) Abdul Rabb al Rasul Sayyaf – leader of the radical Wahabi group *Ittihad-e Islami* is an advisor to President Karzai and has influence over the Afghan judiciary and has many proxies within the government.
2) Abdul Rashid Dostum – leader of the *Junish-e Miili* faction is a senior member within the Ministry of Defense and controls large portions of Northern Afghanistan.
3) Mohammad Qasim Fahim - commander in *Jamiat-e Islami/Shura-e Nazar* and was Defense Minister from 2001-2004.
4) Karim Khalili – a commander in the *Hezb-i Wahdat* group and now one of Karzai’s Vice-Presidents.\(^71\)

The presence of these people and others\(^72\) in the government indicates the precariousness of the Afghan government. Given the level of influence they hold with their groups and within various regions, acquiescence to their presence is necessary for the stability of the government. Ironically, their inclusion of alleged war criminals in the current government plays a role both in increasing the government’s effectiveness by giving clout to important groups and in decreasing the government’s legitimacy with much of the Afghan population. Furthermore, as the conflict continues, many criminal perpetrators outside the government, such as Mullah Omar and Hekmatyar are still active and at large, leaving scant hope of accountability for the time being.

Not surprisingly the trials that have gone forward under the Action Plan have been guided by factional rivalries and personal vendettas more than a search for justice. In February 2006, former PDPA chief of the secret police, Assadullah Sarwari, was convicted and sentenced to death after years in jail, for crimes against humanity and the murder of thousands of prisoners held in the Communist regime’s prisons. Sarwari has called the proceedings politically motivated. Whereas there is little dispute that Sarwari is guilty of his alleged crimes, the trial has been labeled a sham by international human rights organizations. He has had difficulty

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maintaining a lawyer due to pressure not to represent him and the majority of the prosecutor’s evidence was hearsay rather than firsthand accounts.  

The only other trial to have gone forward in Afghanistan is that of Abdullah Shah, a key commander under the warlord Fayadi Sarwar Zardad. He was often referred to as Zardad’s Dog because of the cannibalistic atrocities used on the victims of his attacks, mostly travelers on the road between Jalalabad and Kabul. He was executed by a gunshot to the head outside of Kabul on April 20, 2007. Amnesty International protested his trial, claiming that Shah was denied even the basic standards of fairness and that the “execution may have been an attempt by powerful political players to eliminate a key witness to human rights abuses.” In response to the suspicious nature of the trial, President Karzai had tried to order a review of the case, but enough internal pressure was applied and the execution went ahead because, according to one government spokesman, justice could “be delayed no further.”

International response to ending impunity in Afghanistan has also been weak. Once again, this is rooted in the fact that many believe the situation is currently too tenuous and the time not right to address these issues with so much going on in the country otherwise. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions proposed the set up of a commission of enquiry, which was to be taken up by the UN Human Rights Commission in March 2003, but the proposal was not adopted. This was largely due to the US persuasion not to adopt the proposal, as it saw it against its interests in the “war on terror”. Furthermore, although UNAMA has strengthened its human rights unit recently by placing political affairs officers with a mandate on human rights in many provincial offices, they are not set up to monitor continuing abuses. The UN argues that the focus should be on building the institutions with the capacity to address the violations. Whereas this is true, a strong record of the violation should be maintained so that when the institutions are in place, there is a record of violations for them to address.

Increased use of universal jurisdiction has allowed some trials to go forward. Abdullah Shah’s commander, Fayadi Sarwar Zardad was tried and convicted in England when he fled there after the Taliban took control of Afghanistan. He was sentenced to serve two 20-year terms consecutively for torture in a case that is thought to be the first time a person has been convicted in one country for acts of torture in another. Witnesses were allowed to testify in the courtroom via a video link from the British Embassy in Kabul.

Due to the increase in international pressure to hold alleged war criminals accountable for their acts, the warlords present in the parliament have countered this by sponsoring a bill granting amnesty to those who committed war crimes over the past 30 years. Entitled “Charter on National Reconciliation,” the bill is largely cast as a way to bring all factions into the political

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75 Ibid.
76 Rama Mani, 23.
77 Ibid, 14.
process. But many view it as a self-preservation tool for those warlords that still hold sway in the country. Despite a huge outcry from both local and international NGO’s and organizations, including the conservative Council of Islamic Clerics, which labeled the bill “un-Islamic” because, according to Islam, only victims have the right to forgive their tormentors, the bill passed in February of 2007.\textsuperscript{79}

The bill states that amnesty will apply to those who abide by the Constitution and law of Afghanistan, but “shall not affect individuals’…criminal or civil claims against persons with respect to individual crimes.”\textsuperscript{80} This last statement is open to the interpretation as to whether individual crimes can still be tried, but such a process requires victims to have the courage to bring the cases to court. Given how powerful many of the alleged war criminals still are in the country, the chance that cases will be pursued is minimal. As if to cast aside any doubt as to who holds power in the current Afghanistan government, the leader of a rally in support of the Amnesty bill held in February 2007, Feda Mohammad Mujahid stated, “This is a mujahideen nation. We want the law of Islam, and the government of mujahideen.”\textsuperscript{81} As these statements were made, the vice president, the president’s top security chief, an army chief and an energy minister all waited to take the podium in support of the Amnesty provision.

\textsuperscript{80} Ibid.
III. Positive Peace, Institution Building and Cultural Currency

Afghanistan is a tough challenge to the international community’s deliberations of accountability versus impunity. Having experienced thirty years of war, with multiple factions, each guilty in various degrees of human rights violations and violations of the rules of war, the complexity of the conflict presents a strong argument in favor of pursuing amnesty in the name of peace and stability.

The current situation was brought about by the US response to 9/11. The invasion and subsequent establishment of the Afghan government was carried out largely within the framework of the “war on terror.” The US viewed the Taliban as the enemy and all those that opposed them as allies. As a result, many possible war criminals who made up large parts of the Northern Alliance were included in the political process to form the new government. Inevitably, many of these questionable participants ran for election in the government. While many were defeated, others won seats in parliament and were awarded positions in government ministries. This raises grave questions toward ending impunity in Afghanistan.

The current Afghan government continually performs a balancing act. On one hand, the culture of impunity has to continue in order to maintain short-term stability. On the other hand, if there is ever to be long lasting peace in Afghanistan, the past atrocities must be accounted for. This dichotomy has been described as “positive” peace versus “negative” peace. By including human rights violators in the national government, the international community and the Afghan government have opted to follow “negative” peace, directly inhibiting the prosecution of war criminals, the proper functioning of the security sector and the formation of a viable government. If there is going to be security and stability in Afghanistan, it will require “replacing peace building based on impunity with peace building based on accountability.”

The consequences of pursuing negative peace are already apparent as Afghanistan risks spiraling out of control. Multiple surveys, most notably the AIHRC’s 2005 survey and previously described, have been conducted to determine the local population’s view on transitional justice. They reveal that the majority of Afghans favor accountability, though little has come of this desire.

Afghanistan lacks the strong institutions to pursue transitional justice. First, impunity has become entrenched in the political system. Commanders such as Sayyaf and Dostum, both included in the power-sharing government, have been able to pursue their own factional interests with little regard for the people they “represent” and the Afghan government as a whole. Consequently, human rights violations continue and are committed by the same actors present in

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82 Rama Mani, 1.
83 Ibid, 1.
84 Interview with Barnett Rubin, April 9, 2008.
www.aihrc.org (accessed April, 2008)
the 1990’s. Now, however, they officially represent the Afghan government. This de-legitimizes the nascent government and weakens its authority.\textsuperscript{86}

Secondly, security institutions require urgent reform. The building of the Afghan National Army (ANA) and the Afghan National Police (ANP), along with the disarmament, demobilization and reintegration (DDR) of various militias is most pressing. Efforts on all three of these interrelated reforms have been stymied due to decisions made during the Bonn Agreement where warlords were allowed \textit{de facto} to continue control of the areas they held as the Taliban withdrew. These rival warlords control the police stations in their various territories as well as the multiple militias still at their behest. The most serious instance of this is Defense Minister Qasim Fahim’s refusal to disband his militia, revealing glaring contradictions of the current political arrangement. This has led to an institutionalization of rival factions using state apparatuses to pursue private interests, often with odds to those of the state.\textsuperscript{87}

Thirdly, efforts by the Judicial Reform Commission established at the Bonn Agreement have also been undermined. Once again, the control warlords hold over their respective territories has led to their control of local courts through intimidation of centrally appointed judges and lawyers. Moreover, corruption and incompetence is pervasive. Warlords have appointed unqualified personnel as court officials who are loyal to their respective factions and not to the state. The most glaring example is \textit{Ittihad-I Islami} member Fazal Hadi Shinwari being reconfirmed as Afghan Supreme Court Chief Justice at the \textit{Loya Jirga}. This allows him to use the Supreme Court as a tool to advance the interests of his faction and its leader Abdul Rasul Sayyaf.\textsuperscript{88} Furthermore, financial support from UNDP has been sluggish, inhibiting development of these needed institutions and a declared goal of the UN in Afghanistan.\textsuperscript{89}

As stated above, the AIHRC survey findings revealed that the majority of Afghans support an official statement recognizing their suffering during the many years of war. In light of this, one of the first steps to take in the establishment of legitimate government should be recognition of the suffering of the Afghan people. Official acknowledgment of past atrocities brings the question of accountability back to the forefront. Due to the presence of war criminals in the government, the discussion has become taboo.\textsuperscript{90} Adding insult to injury, the constitution hails the role of the mujahidin in the liberation of the country while minimally acknowledging the suffering of the Afghan people, an injustice that did not contribute to the stability.

A national discussion should take place so Afghan people can begin to address the atrocities: first, by acknowledging their occurrence and then, by discussing how to address them. This is most important given the current lack of political will both nationally and internationally to address the past. By making the atrocities part of a historical record and the official narrative of the country, there can be no denial of any of the events or claims that the atrocities occurred too

\textsuperscript{86} Rama Mani, 2.
\textsuperscript{87} Ibid, 2.
\textsuperscript{88} Ibid, 2.
\textsuperscript{90} Rama Mani. 3.
long ago to assure an accurate account at that time when the institutions needed are built up to a level where they have the capacity to begin a process of accountability.

The institution most necessary for a system of accountability is a trusted legal system or rule of law. Afghanistan has never been a fully functioning state. Its institutions had limited jurisdiction even when they were at their full capacity with most Afghans allotting legal and political authority to ethnic and tribal entities. Further, after so many years of conflict, the limited capacity that had been established in the early 1970s has since been ravaged by war, continuing to delineate these ethnic divisions and engender distrust in the state and any form of central authority. This has left Afghanistan’s political and social fabric fragmented and unable to move forward.

This leaves establishing rule of law as the most fundamental aspect to pursue in order to rebuild what little legal culture had been established prior to the Soviet invasion as well as to expand it to encompass elements never reached in Afghanistan’s history. First and foremost are the practical aspects of establishing rule of law. Running legal institutions requires personnel; judges, lawyers, administrators, police, security and maintenance. These positions provide employment for a portion of the unemployed, giving people a stake in the establishment of the state. Of course, judges and lawyers require a certain level of expertise, in which case, the Afghan diaspora, which returned after the fall of the Taliban, and international aid workers have a key role to play in transferring knowledge to other local players so as to begin capacity building.

On a more abstract level, and fundamental to the development of a functioning nation-state, rule of law is the center from which all other legal concepts evolve. In other words, without rule of law there is no base from which to argue deterrence whereby, when certain laws are violated, there is a credible threat of punishment. Similarly, central to the idea of retribution, in order for laws to balance the severity of the crimes with its retribution, there has to be viable underlying rule of law, and so on and so forth. With this in mind, a possible way to bring fragmented Afghan society together is to establish a unifying rule of law under which all are equal and thus providing a central tenet around which the state can be built.

This is, however, more easily said than done. Afghanistan has had little experience with western-style jurisprudence and thus, has a limited frame of reference on which to base the nascent system. Historically, most legal disputes have been mediated through tribal councils based on codes entirely independent of Western legal frameworks. Italy has been assigned leading nation status by the UN with regard to Judicial Reform but has yet to develop a strategy by which to begin to build rule of law. Donor funds are limited. The US is the largest donor providing only $10 million for rule of law versus $110 million for police training.91

For a credible legal system to exist it has to incorporate these tribal legal elements as well as elements that give international legitimacy to the Constitution. In theory, much has already been done with the establishment of the Afghan Constitution through the *Loya Jirga* in January, 2004. Furthermore, as stipulated in the Bonn Agreement, many elements of the Afghan population, including refugees and ex-patriots, were consulted so as to give it as much credibility as possible.

91 Laurel Miller and Robert Perito, 5.
Practically, however, there have been problems. Firstly, the fact that Afghanistan is still in a state of war limits the central government’s jurisdiction to certain areas with the rest controlled by the continuing warring factions. The limited security has prevented the capacity building necessary for the law written on paper to be practiced in real life. Limited legal personal as well as functioning courts are still an ongoing problem. Exacerbating these limitations is the fact that much of the foreign aid is used for security purposes and thus not used for reconstruction, including that of the legal system. Insecurity breeds other problems like corruption, which in turn undermines the credibility of the courts and in turn, rule of law.

An element contributing to Afghanistan’s disunity is that for much of its history various regional leaders have exercised the law. These leaders are an amalgam of tribal leaders, militiamen, warlords, and provincial governors, who have been allowed to manipulate the law for their own benefit. Along with this, many areas rely on customary law in order to mediate disputes. Given the wide array of ethnic groups and tribal identities, it is not surprising that there is no one system, with different ethnic groups relying on different customs and practices from which to mediate justice. While this has been a continuing problem in establishment of rule of law within Afghanistan, there may be elements within customary law that can be incorporated in the national law so as to provide some level of currency to which the established law will apply. In fact, according to a special report by the United States Institute of Peace, “Some also believe it will be important to design connections between the formal and informal systems, perhaps by crafting procedures for courts to confirm results of customary dispute settlements. In rural areas for the foreseeable future, fostering the informal system will be both more realistic and more sensible in the cultural context then trying to push the formal justice system into remote areas.”

The most notorious of these customary codes is the Pashtun tribal code known as Pashtunwali. Through this code Afghanistan became a unified state under Ahmed Shah Durrani in 1747. Thus, it has played a role in forming Afghanistan’s legal culture. Whereas Shari’a scholars point to grave contradictions between Pashtunwali practices and those of general Shari’a law, for Pashtuns they are often the same. Given the preeminent role Pashtunwali plays in many rural Afghan identity and way of life, it must be considered when devising Afghanistan’s response to human rights abuses. This is particularly so, since much of the lasting insurgency are remnants of the Taliban and Hizb-I Islami, which are Pashtun-dominated, and since Pashtun groups over the border in Pakistan have gained influence and risk further destabilizing the Afghan government. As a United States Institute for Peace report states, “If the political situation in Afghanistan stabilizes and the Pashtuns believe they have a stake in the system...it will make it much harder to exploit cross-border religious or ethnic sentiments.” If these fighters are to be brought into the political fold, there has to be a system that looks to address their needs and trust.

In fact, we can see Pashtunwali playing a role in various contexts of modern Afghanistan already. On a political front the PDPA’s two main factions, the extreme Khalq, which drew its strength from rural groups, and the more moderate Parcham, which drew its strength from the

92 Ibid, 10.
urban elite, have similar counterparts within a *Pashtunwali* frame of reference. There are two main socio-economic groups within *Pashtunwali* framework: the *qalang*, or tax group, which is composed of urban Afghans and the landowner class and the *nang* or chivalrous group, which is composed of rural Afghans and nomadic groups. Given the role these political groups within the PDPA played in Afghanistan’s conflict, it is not presumptuous to extend these ideas within legal framework to address the past.

Within a legal context elements of *Pashtunwali* have already been exerted in order to form Afghanistan’s current legal system. A central tenet of *Pashtunwali* is the *jirga*, or council, which mediates legal and political disputes. As already discussed, the current Afghan constitution was developed through such a council, demonstrating how customary law can be used to form Afghanistan’s modern legal and political system.

First, with regard to arguments in support of human rights, a strong element of chivalry inherent in the *Pashtunwali* code relating to a just practice during conflict includes not attacking civilians. For the *nang*, which has a more egalitarian view of society, all warriors who fight justly are considered honorable. Conversely, for the *qalang*, honor is dispersed equally regardless of class, where the warlords conducting the attacks are considered as honorable as the *nang* who actually participate in the fighting. With such being the case, we can assume a warlord is as equally guilty of war crimes as are the warriors under his command, i.e., those who physically perpetrate the atrocities.

Second, with regard to arguments in support of accountability there are aspects of the *Pashtunwali* code that can help us understand how these notions are transferable into Afghan terms. To address the concepts already discussed, there is an element that can be viewed as rule of law in *Pashtunwali* called *Itbar*. *Itbar*, meaning trust, refers to the guaranteed assurance of the functions of society. This notion generally refers to business transactions, but it is plausible to extend it to incorporate other legal disputes. Traditionally, these laws are mediated verbally with agreements witnessed by tribal elders so as to guarantee compliance. A violation of *Itbar* is considered dishonorable and violators are shunned from society. Once again, this is not too alien to Western modes of mediating legal contracts, where witnesses are necessary when signing legal agreements and business contracts between parties. When one party fails to comply or violates an agreement, by virtue of the marketplace other entities stray from doing business with that party. There is thus a strong argument to be made that these concepts can be used to harness support for the establishment of rule of law in a more modern sense within Afghanistan.

The most pertinent concept within *Pashtunwali* in terms of accountability is retribution, as central to Pashtun identity is honor. When this honor is violated, one is allowed to exert *badal*, or revenge as stated by the code, “for every man killed the code demands compensatory *badal*.“ Whereas in *Pashtunwali* one is permitted to exert revenge extra-judicially, if rule of law can be established, and enough people accept its authority, perhaps these concepts can be converted into

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95 Palwasha Kakar, 3.
96 Ibid, 3.
97 Ibid, 3.
98 *Pashtunwali*, Afghanland.com/culture/pashtunwali.html. (accessed March, 28)
99 Palwasha Kakar, 4.
a functioning legal system. One way to give currency to the legal system for everyday people is by incorporating these customary concepts within national legal norms. Furthermore, there are some who argue the concept of *badal* has a deterrent effect, demonstrating overlapping element between international law and Afghan customary law.\(^1\)

*Pashtunwali* provides further evidence of overlap between Western judicial norms and Afghan customary law. Within *Pashtunwali* there is an element of retribution – *Saz* – that does not resort to “an eye for an eye” mode of thinking. This can bring hope that an end to the killing can prevail. *Saz* is the monetary compensation for a death to the family of the victim in question. Once again, the *Jirga* mediates the negotiation with the aim to end enmity between the families.\(^2\) It is not a huge leap to assume that some form of national *Saz* can be employed so that the grievances of many of the victims are at least minimally addressed, possibly garnering faith in the new government.

Third, with regard to arguments in support of marginalization, this is also contained within *Pashtunwali* and points to the limitation in marginalization addressed at the beginning of the study. *Ghundi* is derived from the Pashto word *Ghund*, which means political party, but is used in this case, to mean alliance.\(^3\) It refers to alliances made between tribes to fight a common enemy or aggressor and assure mutual defense harnessed by the alliance’s collective means. This, in essence, is marginalization of the nefarious actor and relies on the support of enough of the surrounding parties so that marginalization is actually effective. Given the symbiotic relationship between impoverished poppy farmers and the Taliban insurgency, there is little evidence that marginalization can be effective in Afghanistan. This is particularly so because sides are not defined as government and non-government, but as players that are on both sides of the conflict and wield power through complex networks of warlords, insurgents, drug traffickers and politicians. In order for marginalization to occur, there has to be eradication of the poppy trade. This requires economic development that offers viable alternatives for the sector workers, which in turn requires a certain level of security which cannot be attained due to the opium funded insurgency. Effective military measures need to be employed so that security is provided to foster economic development that offers a strong enough base not to be dependent on the drug trade. In addition, the power that many alleged war criminals hold through political office or social networks has prevented any attempts at marginalizing those that may have been responsible for atrocities in the past. The most significant manifestation of this, is the before mentioned reconfirmation of *Ittihad* member Fazal Hadi Shinwari to head the Supreme Court and his use of the office to block attempts at establishing rule of law. He has added several additional Supreme Court judges despite the constitution calling for no more than nine and has made decisions with no reference to the written law and limited access by defendants to legal representation.\(^4\) This demonstrates the lack of marginalization of alleged war criminals in the justice system and its affect on continuing a system of impunity. In light of this, it is not surprising that the Amnesty law passed in 2007 is seen by many to “offer a measure of self-

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\(^1\) Ibid, 4.
\(^2\) *Pashtunwali*, Afghanland.com/culture/pashtunwali.html
\(^3\) Ibid.
\(^4\) Miller and Perito, 5.
preservation. The momentum for warlord amnesty in Afghanistan began after the execution of former Iraqi leader Saddam Hussein, a one-time US ally.\textsuperscript{104}

It is by no means easy to motivate people who have exercised justice a certain way to change, particularly within the context of conflict and the insecurity it entails. During such times, people tend to gravitate towards groups - tribal, ethnic, and religious – where they feel protected. Such situations do not lend themselves to forming a unified nation. In fact, many of the contradictions in the current state of the Afghan government is encapsulated on the first page of its constitution.

With faith in God Almighty and relying on His lawful mercy, and believing in the Sacred religion of Islam, realizing the injustice and shortcoming of the past, and numerous troubles imposed on our county, while acknowledging the sacrifices and historic struggles, rightful Jihad and just resistance of all people of Afghanistan, and respecting the high position of the martyrs for the freedom of Afghanistan…have adopted this constitution in compliance with historical, cultural and social requirements of the era through elected representatives in the \textit{Loya Jirga} dated 14 Jaddi 1382 in the city of Kabul.\textsuperscript{105}

Within these lines attempts at balancing are evident between the suffering of the Afghan people, and the sacrifices of the Jihadis, or \textit{Mujahidin}, all while taking account of cultural and societal norms. Acknowledging the suffering of the Afghan people and paying tribute to the \textit{Mujahidin} is contradictory, as one excludes the other in terms of human rights violations. However, it is not theoretically inconsistent to believe that a way exists to develop a legal system that incorporates international norms with customary, traditional practices in order for laws to have domestic currency. Like most human beings, Afghans want peace and believe that in order for peace to exist, justice for the crimes committed during its tumultuous history, must be served.

\textsuperscript{104} Mark Sappenfield.

KOSOVO

I. Background to the Conflict

As Bill Clinton and Slobodan Milošević signed the Dayton Peace Accords in 1995, refrigerated trucks stood ready. The Milošević regime would later use these trucks to transport the bodies of Kosovo Albanian victims of the regime’s sanctioned massacres in Kosovo to mass graves in Serbia. Since 1988, when Yugoslavia revoked Kosovo’s autonomous status, tension in Kosovo had been growing.\(^{106}\) In 1995, Serbian police and Yugoslav soldiers had committed nearly 2,400 arbitrary arrests (many of which turned into long detentions), raids of civilian homes without search warrants, widespread police brutality, and had murdered eleven civilians aged between ten and sixty.\(^{107}\) Yet, the ICTY did not push for investigators to be sent to Kosovo until widespread violence had broken out.\(^{108}\) Years of growing repression of Kosovo Albanian autonomy and self-determination rights in Kosovo on part of the government of Yugoslavia prompted Kosovo Albanian nationalists to form the Kosovo Liberation Army (KLA), opposition to Kosovo President Ibrahim Rugova’s moderate and nonviolent League for Democratic Kosovo (LDK).\(^{109}\) In 1998, the Security Council adopted Resolution 1160, condemning Serbian government use of excessive force against civilians. The international community finally recognized this situation was a crisis. The Yugoslav government’s punitive measures became increasingly repressive and indiscriminate of civilians and militants. In the weeks approaching the NATO-led air strikes that began in April 1999, refugees were pouring out of Kosovo at a rate of 4,000 per hour,\(^{110}\) and thousands had already been indiscriminately executed and buried in mass graves. By one third of the entire population had been expelled and fled to neighboring countries.\(^{111}\) Estimates say more than 10,000 civilians were killed in mass murders and 1,200 civilians and as many as 5,000 security forces were killed by NATO.\(^{112}\)


\(^{111}\) Case No. IT-99-37, Indictment by the Prosecutor of the Tribunal charging Slobodan Milosevic et. al. with Crimes Against Humanity and Violations Against the Laws or Customs of War. International Criminal Tribunal for the Former Yugoslavia, [http://www.un.org/icty/indictment/english/mil-ii990524e.htm](http://www.un.org/icty/indictment/english/mil-ii990524e.htm) (accessed February 15, 2008). There are other estimates of the total number of people displaced during the conflict, which will be addressed later in this report.

Kosovo bounced like a tennis ball between empires throughout history, eventually being drawn into the borders of the former Yugoslavia. Constitutional reforms in the 1960s and 1970s facilitated advances in Kosovo Albanian education, and Tito granted the region autonomy in 1974. After Tito’s death in 1980, Kosovo began to deteriorate. The Yugoslavian government began to limit Albanian education, and fired and expelled Kosovo Albanian professors and students. Socioeconomic frustration also grew. Kosovo Serbs protested in 1987, alleging discrimination on part of Kosovo Albanians, and wanted closer ties to Belgrade, prompting a visit by Milošević. In 1988 the Serbian government revoked Kosovo and Vojvodina’s autonomy. Kosovo Albanians were largely forbidden to serve in government posts and practice law. Belgrade took direct control of the police, courts, civil defense, and economic, social and educational policy. Almost all Kosovo Albanian judges and prosecutors were dismissed from their posts, as well as hundreds of thousands of Kosovo Albanian government employees and employees of state-run enterprises under centralized discriminatory laws. A report on events of this era describes how “…Throughout 1990, the government closed most of the Albanian-language schools and, in January 1991, stopped paying most Albanian high school teachers.” Serb officials refused to allow the CSCE observer mission to operate long-term in Kosovo, isolating Serbia and Kosovo from international observation. The KLA started with 300 people as a breakaway faction of the LDK in 1993, but grew to between 20,000 and 30,000 by 1998, largely due to military aggression against civilians. Political and financial isolation continued, as the EU banned investment in Serbia, revoking this ban following Milošević’s electoral defeat in 2000. Failure to address the urgency of the situation in Kosovo let it escalate through the late 1990s, mounting from Western calls for a negotiated solution. Milošević and US Assistant Secretary of State Richard Holbrooke agreed that 2,000 OSCE human rights monitors would be sent to Kosovo in October, 1998. Yet, Milošević refused to grant monitors visa-free entry and access to all areas. Kosovo hit a boiling point, and Western actors realized that quelling the violence taking place outweighed not tarnishing Milošević for his role in Dayton. Only after Serbian and Yugoslav forces were driven from Kosovo did investigators have unlimited access to work in Kosovo.

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113 IBID., Randle. The term “decade of resistance,” began when 3,000 Kosovo Albanian miners protested in 1988 when constitutional changes limiting Kosovo Albanian autonomy were first proposed. This was the beginning of a decade of nonviolent resistance movements.

114 Ibid., Krieger. xxv


120 Ibid., Peskin, 50-57

121 Ibid., Peskin, 50-57
NATO Military Intervention

March 1999 negotiations between the Yugoslav government and Kosovo Albanian officials and between Holbrooke and Milošević failed. Serbian representatives refused to allow any foreign military presence in or around Kosovo. The Kosovo Verification Mission, whose responsibility had been to verify attacks on Kosovo Albanian civilians, left. Air strikes on military targets in Kosovo and Serbia began on March 24, 1999, destroying government buildings and electrical grids. Throughout April, May, and early June 1999, the Serbian government made concessions, however still would not agree to a political solution. Air strikes continued, as did the flow of refugees. On June 8, 1999, G8 leaders and Russia reached an agreement on an international security presence in Kosovo, which the following day Yugoslav Army representatives and KFOR (NATO-led Kosovo forces) signed.

The Post-Conflict Period

The next day, NATO confirmed Yugoslav troops were withdrawing, and sent Military Technical Agreement to the UN Security Council for verification. It was later adopted as Resolution 1244, establishing an internationally-run civilian administration of Kosovo under the UN Mission in Kosovo (UNMIK). UNHCR was in charge of humanitarian operations, the OSCE for institution building, the EU for reconstruction, and KFOR troops for security. Refugees totaled 862,979;122 90% of Kosovo Albanians who fled returned by August while over 230,000 Kosovan Serbs and Roma fled later.123 KFOR reported finding 526 mass graves containing over 4,000 bodies.124 Mass graves were also found in Serbia, containing the bodies of the previously referenced Kosovo Albanian massacre and execution victims driven there in refrigerated trucks. Three such mass graves were found in Serbia in 2002, containing between 400 and 500 bodies, two of which were on police property.125 1,613 people remain missing.126

Conclusion

Many who took part in these atrocities live in impunity. There has been a “Failure to deliver justice for victims of some of the gravest human rights violations in Europe in the last decade,” which “has left a legacy of impunity.”127 Impunity of those who committed atrocities continues to be a source of tension and an obstacle in the search for peace and reconciliation for victims.

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122 Ibid., Krieger, xxv
II. Atrocities Committed and Legal Recourse

On the evening of March 24, 1999, the North Atlantic Treaty Organization (NATO) began bombing the Federal Republic of Yugoslavia. As Serbian police and Yugoslav Army forces continued brutal attacks on civilians, more than 800,000 ethnic Albanian refugees poured out of Kosovo, mostly into Albania and Macedonia. Exhausted and traumatized, they carried what few belongings they could grab before fleeing or being expelled. They also brought eyewitness accounts of atrocities committed against ethnic Albanian civilians inside Kosovo by Yugoslav soldiers, Serbian police, and paramilitaries. Witnesses and victims told of summary executions, mass murders, destruction of civilian property, and other war crimes. In more hushed tones, refugees also spoke of rapes of ethnic Albanian women.  

The largest scale atrocities took place between January, 1998 and June, 1999. In January and March, 1999, Serbian police attacked villages in the Drenica Region in central Kosovo, reputed as a KLA stronghold and home to KLA reputed leader Adem Jashari. The Drenica massacres in a way represent the point where the atrocities committed towards civilians became rampant. An excerpt from a report during this time states that the “…events in Drenica, in which eighty-three people died, including at least twenty-four women and children, were the turning point in the Kosovo crisis. Although it is unknown precisely how large the KLA was up to that point and what its exact structure was, there is no question that the brutal and indiscriminate attacks on women and children greatly radicalized the ethnic Albanian population and swelled the ranks of the KLA. Whether Milošević thought he could crush the KLA in Drenica, or whether he intended for the KLA to grow and become overly confident and more aggressive is a question for debate.”  

As described in the excerpt above, as well as documents and reports addressed in the first section of this case study, the atrocities that took place in Kosovo included extrajudicial executions, mass murders, and the destruction of civilian property, the forced expulsion of over one third of Kosovo’s ethnic Albanian population, and sexual violence against women, including assault and rape. Many of these victims were buried in mass graves, many of which were created in Kosovo, as well as those in Serbia, where it was documented that bodies of murder victims were transported in refrigerated trucks. The investigations and resulting indictments handed down by the International Tribunal for the Former Yugoslavia (ICTY) against high officials in both the Yugoslav government and the KLA were key steps in the pursuit of accountability for these atrocities; however, hundreds, possibly thousands of lesser-known people who committed

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131 Ibid., IWPR, “Serbia: New Mass Graves Found.”
atrocities are still at large.\textsuperscript{132} Although no official amnesties were granted for atrocities committed in Kosovo, information from several non-governmental organizations shows that there was failure to investigate atrocities fully, and pursue those responsible for several incidents, such as the previously mentioned mass graves in Kosovo and Serbia, and those responsible for organizing the murders and transporting the victims’ bodies to Serbia in refrigerated trucks. This shows a lack of action both on part of the Serbian government and the UN-installed Kosovo Justice System.

**Indiscriminate Killing, Extrajudicial Execution, and Mass Murder**

“I cannot hide my shame to discover that, for the first time in our history, we, Kosovo Albanians, are also capable of monstrous acts.” – Veton Surroi, late 1999\textsuperscript{133}

This sparked the beginning of the tensions that led to the violence that occurred throughout 1998 and 1999. The following short excerpt from a 2001 report describes how even ten years prior to the NATO-led military campaign in Kosovo and Serbia, Yugoslav and then FRY forces committed indiscriminate murder:

On March 28, 1989, riot police opened fire on a protesting crowd, killing at least twenty-four persons. Although government forces may have come under attack, the state's response was indiscriminate and excessive. A joint report by Helsinki Watch and the International Helsinki Federation for Human Rights at the time found that there was "no justification for firing with automatic weapons on the assembled crowds."\textsuperscript{134}

Such incidents continued through the mid 1990s. As demand for a return to greater autonomy grew among Kosovo’s ethnic Albanian population through the 1990s, especially following the break-up of the Former Yugoslavia into five separate countries, clashes between Yugoslav and then FRY forces escalated. In 1998, Milošević appointed a new head of Serbian state security and a new chief of staff of the Yugoslav National Army, likely as preparations for an offensive in Kosovo.\textsuperscript{135} This report also details that in early 1999, not only did the Yugoslav Army implement a massive build-up in Kosovo, but began to arm Kosovo Serb civilians as well. Throughout the 1990s, non-violent protest of the firings of Kosovo Albanian teachers and public officials provoked the FRY government to continue this military build-up, which prompted more widespread support for the KLA, which began to retaliate against repressive measures by Serbian security forces by attacking police stations and vehicles, which, at this point, had been put under exclusive control of the Serbian minority. It was in early 1998 that Serbian police attacked and murdered over 80 people, including civilian women and children, in the Drenica region of

\textsuperscript{134} Ibid., HRW, “Under Orders: War Crimes in Kosovo, 2001.”
\textsuperscript{135} Ibid., HRW, “Under Orders: War Crimes in Kosovo, 2001.”
Kosovo, when the indiscriminately conducted massacres of the 1998-1999 conflict began, starting a vicious circle of reprisals and retaliations. A March 1999 report commissioned by several prominent NGOs details that through a study involving 3,353 interviewees in refugee camps in various countries and villages where refugees had recently returned, approximately 10,500 civilians were killed between March and June of 1999 alone. A later study by the same organizations concluded that from February 1998 through June 1999, approximately 12,000 civilians had died in the conflict, with a confidence interval of 5,500 to 18,300. Human Rights Watch’s report documented only 3,453 killings of Kosovo Albanian civilians by Serbian or Yugoslav security forces, yet in the report Under Orders this discrepancy is addressed as due to its being based on only 577 interviews (and these interviews were not randomly sampled to allow for extrapolation of data to all of Kosovo). Moreover, this figure does not include Kosovo Serb and other minority civilians, nor security forces killed, as are contained in the previously mentioned figures listed in the ICTY indictments. Amnesty International reports give similar details to the massacres in Drenica, as well as detailed accounts of those, which took place in the municipalities of Kladernica/Klodernica,* Izbica, and Kastriot. Typically, Serb or Yugoslav security forces would enter a small village, and women were ordered to leave, who mostly took refuge in other nearby villages or even forests. Men were lined up and shot, either outside or in buildings, which were later burned. In some cases elderly males and male children were separated from those who were killed, and in some cases they were not. In the villages of Ćuška/Qyshk, Zahac/Zahaq, and Pavljan/Pavlan, in Western Kosovo near the city of Peć/Peja, Serbian forces killed families after approaching their homes, demanding sums of money, and if the money was not surrendered, female members of the family were often raped and then killed, and all male members were almost always shot, even children. Specifically targeted opposition figures, often lawyers, politicians, and other intellectuals, were frequently the targets of extrajudicial executions. This pattern of killings by Serbian and Yugoslav security forces, KLA, and civilians of one ethnic group against the other, continued throughout the NATO campaign until the last of the Belgrade-sponsored security forces withdrew.

*Most municipalities in Kosovo have a Serbian and Albanian spelling. In this case, when a municipality is referenced, the Serbian and Albanian spelling are both listed, e.g. Kladernica/Klodernica.

In March 2004, nineteen people were killed, and 900 injured, in riots in the Northern Kosovo city of Mitrovica. Kosovo Serbs in Mitrovica were accused of drowning three Albanian children in the Ibar River. Although these allegations were never substantially proven, and it was later proven that the children jumped into the river, accounts given from the one surviving boy indicated that a group of Serbs were chasing them and had unleashed a dog after the group of boys as well. This story was not proven to be true, but resulted in the above-mentioned riots, in which crowds of Kosovo Albanians and Serbs threw stones at each other. Human Rights Watch blames inadequate KFOR staffing in the region and inadequate training for those deployed in dealing with combat, for the escalation of the violence. Locally given accounts from summer, 2007, strongly stated that KFOR troops were present but took no action to prevent the riots from worsening at their inception.

**Destruction of Civilian Property**

Destruction of civilian property was a widespread and serious problem when the dust settled after the end of the 1999 conflict. Many villages and cities had suffered from violent outbreaks of looting and burning, especially in western Kosovo, in an around Peć/Peja, due to the area’s reputation as having a population with high numbers of members in or supporters of the KLA. Peć/Peja was a “completely ruined town,” many of whose of 31 mosques were destroyed. Throughout Kosovo, forty percent of residential homes were damaged or destroyed, in Peć/Peja and the surrounding municipalities; this number was as high as eighty percent. A UNHCR report from September, 2000 indicates that over 120,000 homes in Kosovo had suffered “significant wartime damage.” The United Nations findings list 20% of Kosovo’s 649 schools as being badly damaged after the conflict, of which 60% were completely destroyed. Mosques and Orthodox churches and monasteries were also targets of destruction and many were badly damaged throughout Kosovo, not only in the Peć/Peja region.

**Deportation and Forced Expulsion**

This is perhaps the most blatant and widespread type of atrocity that took place in Kosovo. The following excerpt from the ICTY indictment handed to Slobodan Milošević et al., details a method of operation that Serb and Yugoslav forces used against villages in Kosovo, especially after the NATO-led military campaign commenced on March 24, 1999:

> On the morning of 25 March 1999, forces of the FRY and Serbia surrounded the village of Celina/Celinë with tanks and armoured vehicles. After shelling the village, forces of the FRY

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and Serbia entered the village and systematically looted and pillaged everything of value from the houses, set houses and shops on fire and destroyed the old mosque. Most of the Kosovo Albanian villagers had fled to a nearby forest before the army and police arrived. On 28 March 1999, forces of the FRY and Serbia forced the thousands of people hiding in the forest to come out. After marching the civilians to a nearby village, the men were separated from the women and were beaten, robbed, and all of their identity documents were taken from them. The men were then marched to Prizren and eventually forced to go to Albania. 148

The vast majority of homes of those who were expelled were either burned or very badly damaged. The UNHCR claims to have helped over 850,000 Kosovo Albanian refugees to resettle in Kosovo after the end of the conflict. 149 An August, 1999 report by the United Nations indicates that during the NATO-led military campaign, some 130,000 non-Albanians (mostly Serb and Roma) fled Kosovo to neighboring Serbia proper and Montenegro, joining approximately 50,000 who had fled during the increased tensions following the Drenica massacre in March, 1998. 150 However, a May, 2006 report by UNHCR indicates that at that time, as many as 220,000 remained displaced in Serbia and Montenegro, and a further 20,000, also mostly Serb and Roma, remained displaced within Kosovo. 151

Fear and Psychological Impact

While following excerpt is related directly to the expulsion and deportation previously addressed, it is necessary to consider the phenomenon of the non-Albanian minorities, mainly Serb and Roma, fleeing Kosovo. This was largely due to fear of reprisal attacks, which have occurred since the end of the 1999 conflict. The environment of fear that has been created, due to the cycle of killings and ethnic cleansing and then revenge sought in response thereof, has held a firm grip on Kosovo since the end of the conflict, and shows little sign of receding. This is largely due to inadequate minority protection by KFOR troops, distrust of police, and people who committed atrocities living in impunity. 152

“Elements of the KLA are also responsible for post-conflict attacks on Serbs, Roma, and other non-Albanians, as well as ethnic Albanian political rivals. Immediately following NATO's arrival in Kosovo, there was widespread and systematic burning and looting of homes belonging to Serbs, Roma, and other minorities and the destruction of Orthodox churches and monasteries. This destruction was combined with harassment and intimidation designed to force people from their homes and communities. By late-2000 more than 210,000 Serbs had fled the province; most of them left in the first six weeks of

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149 Ibid., UNHCR, “Humanitarian Issues Working Group: Update on the Situation in Kosovo.” Other estimates vary, as the ICTY indictment lists the number of people expelled from Kosovo as being approximately 800,000, while the International Crisis Group’s Reality Demands report listed the number as 862,000. 149
152 Ibid., HRW, “A Human Rights Agenda for a New Kosovo.” 4
the NATO deployment. Those who remained were increasingly concentrated in mono-
ethnic enclaves, such as Northern Mitrovica, Kosovo Polje, or Gracanica.”

Of the 245,300 Kosovo Serbs and Roma who were displaced in the second flight in 1999 in fear
of or response to reprisal attacks, 227,000 still remain displaced, the majority of whom are in
Serbia and Montenegro, and are unwilling to return due to fear of what treatment they will face if
they do.

The lingering effect of this phenomenon is that non-Albanians in Kosovo live, with the exception
of the very north of the country, in isolated enclaves throughout the country. These enclaves can
sometimes be as small as a single block of flats. Minorities are afraid to leave these KFOR-
guarded areas, and feel disconnected from all political life. For those expelled during the 1999
NATO campaign, often, before crossing out of Kosovo, Kosovo Albanians had their official
identity documents confiscated, in a way instilling fear that they had lost their identity and
citizenship, and would be treated as such if they ever returned. Kosovo Serbs and Albanians
fled Kosovo in 1998 and 1999 due to being accused or fearing being accused of somehow
capitulating, supplying help to the KLA or Serbian or Yugoslav forces, respectively. Serbs who
would not take up arms when the Yugoslav Army attempted to arm the civilian population or
would not be coerced into participating in atrocities on part of the Yugoslav Army faced torment
and possible legal penalties, even imprisonment. Kosovo Albanians who the KLA suspected of
cooperating with Serb or Yugoslav forces were subject to similar torment and, often, expulsion
from their homes and villages. This was a large part of the accusations against KLA leaders later
indicted by the ICTY.

Gender-based Violence

Rape and the threat of rape were used prolifically on part of Serb and Yugoslav security forces
against Kosovo Albanian women. Rape was used not only as a means of instilling fear, causing
flight and facilitating ethnic cleansing, but also as a means of extortion. Often, Serb or Yugoslav
forces would demand a sum of money from a family, and if this sum of money could not be
supplied, female family members were raped. Male and child family members of women who
were raped were often subjected to witnessing their relatives being raped or assaulted, either in
their presence or in nearby rooms in an occupied house. Human Rights Watch conducted
interviews with approximately 700 people in June 1999, and found that not only was rape a
widely used means of fear and extortion, but also “were not rare and isolated acts committed by

154 Internal Displacement Monitoring Centre, “Serbia: Final Status for Kosovo – Towards Durable Solutions or New
Document&count=10000 (accessed May 6, 2008)
155 Albert Musliu, Executive Director, Association for Democratic Initiatives, headquartered in Macedonia with
offices and projects in Kosovo, Albania, and Bosnia-Herzegovina. Interview held on 20 April 2008
March 3, 2008)
individual Serbian or Yugoslav forces, but rather were used deliberately as an instrument to terrorize the civilian population, extort money from families, and push people to flee their homes. Rape furthered the goal of forcing ethnic Albanians from Kosovo. The implications of sexual violence, especially rape, were far-reaching. Many Kosovo Albanians are Muslim, and live in predominantly Muslim villages, where there are cultural and religious notions that the rape of a woman is not only the woman’s fault, but also that a woman who is raped is unmarriageable and generally shunned from the community. The result of this was that many women who had become pregnant faced danger, as they sought to have secretive abortions, often from poorly-qualified doctors in unsanitary conditions, to avoid the rape being discovered. The cultural and religious ideas of rape and pre-marital sexual contact also kept many female sexual violence victims from coming forward with their stories and helping to identify the perpetrators responsible for many sex crimes. Fortunately, many women did find the courage to speak about the sexual crimes committed against them, and also found compassion and support among family members. Still, the ICTY’s efforts to prosecute gender-based violence have been minimal, handing down only 27 indictments involving gender-based violence by 2004. However, in February 2001, the ICTY convicted Dragoljub Kunarać, Radomir Kovać, and Zoran Vuković for charges of rape, torture, and enslavement. Human Rights Watch found they “…were sentenced to twenty-eight, twenty, and twelve years, respectively. These cases marked the first time in history that an international tribunal had indicted individuals solely for crimes of sexual violence against women. The ICTY ruled that rape and enslavement were crimes against humanity, another international precedent.”

**Indictments and Legal Recourse**

A 2004 report describes how the ICTY set precedent for prosecution of rape cases:

“In one landmark case, in February 2001, the ICTY convicted Dragoljub Kunarać, Radomir Kovać, and Zoran Vuković for rape, torture, and enslavement. The three received sentences of twenty-eight, twenty, and twelve years, respectively. These cases marked the first time in history that an international tribunal had indicted individuals solely for crimes of sexual violence against women. The ICTY ruled that rape and enslavement were crimes against humanity, another international precedent. The tribunal found that the defendants had enslaved six of the women. Most important, although two of the women were sold as chattel by Radomir Kovać, the ICTY found that enslavement of the women did not necessarily require the buying or selling of a human being. Such jurisprudence is the exception, not the rule.”

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161 Ibid., HRW, “In War as in Peace: Sexual Violence and Women’s Status.”
Indictments were handed down by the ICTY against Slobodan Milošević and four others in high position of authority in the Yugoslav government (ICTY case IT-99-37), and follow-up indictments on members of his inner circle, Milan Milutinović et al. and Nebojša Pavković et al., were ultimately merged with indictments against Nikola Sainović, Dragolj Ojdanić, and Vlajko Stjoljković. Milošević died in custody in 2006, having been tried but never actually convicted for the counts of crimes against humanity and violations of the laws or customs of war for which he was indicted. Former KLA Commander and Prime Minister Ramush Haradinaj, a Kosovo Albanian, was indicted and recently acquitted for crimes against humanity and violations of the laws or customs of war, while others were tried in domestic UNMIK and Serbian courts. In ICTY indictment IT-03-66, Fatmir Limaj, another alleged KLA commander and two others were indicted for the same two crimes, however only one, Haradin Bala, was convicted. In the Haradinaj et al. case, while Haradinaj and Idriz Balaj were acquitted, Lahi Brahimaj was convicted of two counts of violations of the laws or custom of war and sentenced to six years in prison. While the ICTY made valuable contributions in officially documenting the atrocities of the conflicts in Kosovo and Bosnia-Herzegovina, the institution fell short of its founders’ original expectations. The governments who sponsored its creation were reluctant to criticize the institution, and its overseer, gave the institution “far too little guidance and way too much latitude.”

In Serbian domestic courts, war crimes trials in Serbia are being held before the War Crimes Trials Chamber of the Belgrade District Court founded in July 2003. In addition, two members of the Ministry of the Interior of the Republic of Serbia (MUP Serbia) are being tried before the District Court in Požarevac for war crimes committed in Kosovo (the Orahovac Case). The Niš District Court brought a first instance decision in the trial of two members of MUP Serbia for a murder committed during the armed conflict in Kosovo (the Emini Case), while in the Pakšec Case the Novi Sad District Court brought a first instance decision for the criminal offences of murder and rape.

As of June 2007, the Serbian Belgrade War Crimes Chamber had completed three trials, had three more underway, and held 32-35 in investigative stages, including cases from both Kosovo and Bosnia-Herzegovina and Croatia. While the court has made “significant progress” since its inception in 2003, the Serbian government must increase its support to the chamber. The chief prosecutor and institution are also hindered in their work by a lack of political support for the institution, including open hostility in Serbian parliament from the Serbian Radical Party. The Humanitarian Law Center, based in Belgrade, is a not-for-profit organization that provides legal support to victims and witnesses of atrocities in the Former Yugoslavia in domestic trials in Kosovo and Serbia. Civil society has shown perhaps the strongest legal response to the events of the conflict. The Humanitarian Law Center is the only nongovernmental organization monitoring trials of war crimes and ethnically motivated criminal offenses in Kosovo, and publishes reports

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on these trials on a yearly basis. So far, the HLC has aided the War Crimes Chamber by providing the following services:

- 9 Serbian war crimes trials in which HLC represented over 2,000 victims of war crimes
- 9 Serbian war crimes trials in which HLC secured the participation of 39 victim-witnesses
- 6 victims of the Scorpions crime were identified by HLC
- 9 Serbian war crimes trials in which HLC brought 125 victims and their families to see justice done
- 60 HLC-produced witness statements provided to the Bosnia and Herzegovina and Serbian War Crimes Chamber in cases Đurković and Suva Reka
- 450 HLC-produced ICTY trial transcripts in B/C/S provided to the Bosnia and Herzegovina’s war crimes chambers
- 2 functionaries of the Ministry of Interior of Serbia removed from their positions as a result of HLC vetting initiatives
- 115 reparation claims for 715 people forcibly conscripted refugees represented in court
- 33 regional war-crimes trials monitored
- 94 torture victims represented in court

As quoted, “In 2007, HLC-Kosovo monitored 117 main hearings in 21 cases before municipal and district courts, as well as four cases before the Supreme Court of Kosovo. The persons examined in these [monitored] cases included 119 witnesses (two of whom were protected witnesses) and five ballistic experts and neuropsychiatrists.” The HLC is an example of human rights being realized in the form of civil society, an example which could serve as helpful for the domestic courts of Serbia and Kosovo in the years to come, as these institutions grow in the face of closer cooperation with the EU.

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166 Ibid., HLC, “Justice and Institutional Reform.”
167 Ibid.
168 Ibid.
III. Approaches to Accountability

“It is often said in the Balkans that one man’s hero is another man’s war criminal.”169

-Stacy Sullivan, Senior Editor, IWPR

Deterrence

Deterrence is difficult, if not entirely impossible to prove, unless an accused criminal, on trial or in questioning, openly admits that existing laws or previous convictions for specific crimes were an influential factor in his/her not committing more serious and/or large-scale crimes. However, there is a regional precedent of the establishment of legal mechanisms that addressed and adjudicated war crimes committed in the Former Yugoslavia in the early and mid-1990s, namely the ICTY and in some cases the confederation court system in Bosnia-Herzegovina. The ICTY is one of few international tribunals to exist in history. It is plausible that the establishment of these mechanisms and their handing indictments against and convicting accused war criminals involved in this conflict influenced those in high-level government positions in Belgrade in 1999, when planning attacks against the militant KLA as well as Kosovo Albanian civilians. It is too early in post-conflict history to gauge the long-term effect on peace and reconciliation in the region from the adjudications of the Kosovo domestic courts and the Belgrade War Crimes Chamber.

In a cost-benefit calculation, punishment of past leaders who conspired to or were party to past unlawful actions presents a “credible threat” of punishment that could be directed towards leaders who repeat these actions. This is one way in which justice manifests deterrence, which may prevent conflicts from starting and prevent resumption in post-conflict situations.170 Most reports’ estimates put the total number of casualties resulting from the conflict in Bosnia-Herzegovina and Croatia at around 100,000171, with 10,000 civilians killed in Kosovo in 1998 and 1999, and an additional 1,200 civilians being killed by NATO.172 In regard to displaced people resulting from the respective conflicts, 1.2 million people sought refuge abroad by the end of the 1992-1995 conflict in Bosnia-Herzegovina and Croatia, while over one million remained internally displaced.173 In 1998 and 1999, over 860,000 Kosovo Albanians had fled Kosovo, and estimates of as high as 180,000 Kosovo Serb and Roma fled to nearby countries as well.174 A

171 Human Rights Watch, “Background of War Crimes prosecutions in Bosnia-Herzegovina and Croatia,” HRW, http://www.hrw.org/reports/2006/bosnia0306/2.htm (accessed March 20, 2008). As noted in the report, earlier reports estimated that the number was closer to 200,000, but for the purposes of this report, comparing the total number of fatalities resulting from the Kosovo conflict in 1998-1999,
174 Ibid., UN, “Complete UN Kosovo Coverage Peace Report.” As previously mentioned, the number of people forced into expulsion was estimated as higher by different sources, such as the International Crisis Group and as listed in the ICTY indictments against Milosevic et al.
later report indicates that this number increased to 210,000 by the end of 2000, most likely from reaction to and fear of more revenge attacks.  

Addressing the discrepancy in total displacement and casualties between the two conflicts is not to suggest the lower number of resultant deaths and displaced people from the Kosovo conflict in relation to that in Bosnia-Herzegovina somehow makes these crimes less serious or worthy of prosecution, rather, that there is a statistical discrepancy between the numbers of displaced people in Bosnia-Herzegovina and Kosovo, and an even higher statistical discrepancy in the number of deaths, proportionally speaking. The establishment of the ICTY and independent prosecutorial mechanisms in Bosnia-Herzegovina may show that the existence of such international legal systems for the purpose of war crimes prosecution kept the death toll in Kosovo lower than it would have been had these mechanisms not been in place.  

Establishing the ICTY initially pacified growing repugnance toward and condemnation of Western European and American authorities for failing to address the ethnic cleansing taking place in the former Yugoslavia in the 1990s. Possibly, if the institution were not established, this would have fostered a culture of revenge rather than a precedent of accountability. The same could be said for the ICTY adjudicating cases of well-known alleged war criminals from the Kosovo conflict. Recently, the ICTY case against Haradinaj et al. closed with Haradinaj and Idriz Balaj being found not guilty, while Lahi Brahimaj was found guilty of two counts of war crimes and sentenced to six years in prison. Even with the result of a not guilty verdict, the fact that Haradinaj, the former prime minister of Kosovo prior to his indictment, stood trial and was removed from politics is significant. Not only was this the first time a former Kosovo Albanian leader of such political stature faced criminal charges under the ICTY, but this also drove home the message to the Kosovo Albanian government, UNMIK, and the international community that one’s being from the perceived victim’s side in a conflict does not translate to impunity when war crimes are prosecuted and adjudicated. Haradinaj remains a popular figure within the Kosovo Albanian community for his role in taking on Serb aggression and within the United Nations for his ability to foster an ease of tensions between Kosovo Serb and Albanian communities in the early post-conflict period. However, the indictment and adjudication of the case against Haradinaj et al. also showed that the prosecution was conducted in a very circumspect way, as evidence was considered in a stronger regard than was the refusal of several key witnesses to testify. ICTY former Chief Prosecutor Carla Del Ponte’s open hostility towards Haradinaj and those within the ICTY and UNMIK who sympathized with him; the key factor in Haradinaj’s acquittal was the lack of evidence showing his forming and taking part in joint criminal enterprise. In the case of Idriz Balaj, one judge dissented, believing Balaj should have been found guilty. Besides showing that the ICTY is functioning strongly late in its life, the issuance of these indictments and circumspect nature of the examination of evidence against high-profile leaders, especially on the historically perceived victim side of the conflict, speaks

177 Ibid., Peskin, 38.
179 Ibid, Peskin, 3-4.
180 Ibid.
towards future deterrence. Ultimately, while the ICTY did not seek to prosecute the many lesser-known participants in atrocities still living in impunity, the indictment of Slobodan Milošević, who was seen by many as the architect of Belgrade’s plan to ethnically cleanse Kosovo, did “marginally discourage anti-Serb vengeance attacks by the KLA.” The indictments and trials also had a deterrent role in subsequent tensions between Albanian minorities and national authorities in Serbia’s Preshevo Valley, and in the 2001 Albanian separatist movement in Macedonia. The legal precedent set likely minimized what could have been more severe state reaction to the separatist movement, i.e. of the level of Serbian aggression towards ethnic Albanian civilians in the time between 1997 and 1999. The guarantee that oppressive regimes and their leaders would not go without being held accountable also likely held the leaders of the Albanian separatist movement in less likelihood to stage attacks against ethnic Macedonian civilians to the extent of the reprisals in Kosovo in 1999 and 2000.

Retribution

The justice system in place in Kosovo under post-conflict UNMIK control conducted an insufficient, and often non-existent, administration of justice. This included inadequately staffing courts with experienced prosecutors, judges (both domestic and international), and lawyers, failing to properly investigate ethnically motivated hate crimes, and failing to facilitate fair trials when such crimes were actually prosecuted. Consider the following excerpt from a 2004 report:

In the four years since the end of the war, only four people have been found guilty of war crimes against Kosovo Albanians by a final judgment delivered by the Kosovo courts, three of them Kosovo Serbs and the other an ethnic Albanian. A dozen other Serbs have been prosecuted on war crimes charges in cases with Albanian prosecutors and investigating judges, and tried by trial panels consisting of Albanian judges alone—or sometimes with an international judge in the minority. Monitors from the Organization for Cooperation and Security in Europe (OSCE) and human rights organizations reported serious due process violations, as well as apparent or actual bias on the part of Kosovo Albanian judges and prosecutors. Most of these trials resulted in guilty verdicts, but the Kosovo Supreme Court, with an international-majority panel eventually quashed the verdicts. By June 2003 Kosovo courts had still not brought a single indictment for war crimes committed against ethnic Serbs.

The unwillingness of Serbian authorities to bring to justice those responsible for war crimes committed in 1998 and 1999 in Kosovo also has impeded the return of Kosovo Serbs. Since 2000, Serbian courts have tried only four Kosovo-related war crimes cases, only one of which dealt with mass killings of Kosovo Albanians. There has been no investigation into the killings in Gornje Obrinje, Racak, Suva Reka, Mala Krusa, Cuska, Dubrava prison, Izbica,

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181 Victor Peskin, interview held on April 3, 2008.
182 Ibid., Helsinki Committee for Human Rights in Serbia. “Carla Depart, Finally.”
183 Ibid., Akhavan, 9
184 Ibid., Musliu.
Slatina, Meja, Vucitrn, and Bela Crkva, each involving dozens of victims. In the eyes of Kosovo Albanians, the failure to prosecute betrays a continuing disrespect for Albanian victims and Serbs’ refusal to confront the past. As a result prospects for reconciliation remain dim and the return of minority Serbs to Kosovo has been indirectly hampered.\footnote{Ibid., HRW, “World Report 2004: Legacy of War: Minority Returns in the Balkans.”}

Still, accountability of those responsible for atrocities committed against oneself and/or loved ones is a key component in personal healing, as well as a key step towards reconciliation between nationalities. Retribution, like deterrence, is very difficult, if not impossible, to measure. In absolute terms, retribution amounts to punishment for a given crime being equal to the crime that itself was committed. However, there are moral and logistical obstacles to this, and often, such exact retribution does not achieve its ultimately desired result of providing a sense of peace and justice to the person or people against whom the given crime was committed, or, in the case of their death, their family or friends. Another approach to retribution calls for punishment for a crime not to match the crime itself but for the penalty to match the social dangerousness, or severity, of the crime. UNMIK courts were to a large extent ineffective in administering prosecutions that would have aided therein, but the ICTY demonstrated effectiveness in indicting and prosecuting war criminals in high levels of command during the conflict. This led to an increased sense of justice for those who the atrocities affected, and drew a higher level of international publicity and attention to the events and perpetrators as well. In terms of retribution, this amounts to a higher level of effectiveness than the UNMIK courts were able to reach, even though the ICTY does not have enough investigators necessary to single-handedly pursue accountability for all the lesser-known war criminals from this conflict. A 2006 report states:

An evolving ICTY emphasis on fairness, and more specifically on deterrence in determining dispositions, was articulated by a panel of ICTY judges as it drew on two prior cases in sentencing the Croat commander Tihomir Blaskić. The determination of a "fair" sentence, that is to say a sentence consonant with the interests of justice, depends on the objectives sought. The Trial Chamber hearing the Celebici case noted four parameters to be taken into account in fixing the length of the sentence: retribution, protection of society, rehabilitation and deterrence.\footnote{Sanja Kutnjak Ivkovic and John Hagan. Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)Justice, The, \textit{Law & Society Review}, \textit{June 2006}, accessed through findarticles.com \url{http://findarticles.com/p/articles/mi_qa3757/is_200606/ai_n17176957/pg_15} (accessed March 22, 2008)}

The text of interviews conducted in Prishtina at the onset of Slobodan Milošević’s trial shows that the reaction to his being held accountable brought comfort to those who were displaced by Yugoslav and Serbian forces in 1998 and 1999, despite the fact that many of the lesser-known people who committed atrocities remained unpunished.\footnote{Ibid., Helsinki Committee for Human Rights in Serbia report on the Hague Tribunal, “Carla Departs, Finally.”} In an interview with a BBC reporter, a Kosovo Albanian stated:

\begin{quote}
I never thought Milosevic would face international justice. Even when he was arrested in Belgrade, I did not believe he would be transferred to The Hague, but now I am sure that
\end{quote}
he and his colleagues will definitely face charges for everything they have done to us, and to Bosnia and Croatia. And for all they have done against humanity.  

As much as lesser-known criminals have not been found and held accountable for their actions and the more widely-known figures have, in either case it has been the ICTY that has shown more aggressive pursuit of justice, in both the Bosnia-Herzegovina and Kosovo conflicts, and helped the people of the former Yugoslavia to regard many of the principal architects of the most horrific crimes of the 1990s as held accountable. In this sense, the ICTY’s convictions of these war criminals have been a form of retribution.

**Marginalization and Incapacitation**

The ICTY indictments against Serbian government officials, Milošević et al., Milan Milutinović et al. and Nebojša Pavković et al. and Kosovo Albanians Ramush Haradinaj and Fatmir Limaj, et al., did effectively remove these well-known figures in the Serbian and Kosovo government and KLA, respectively, from their positions of power and influence. However, the ICTY did not accomplish this under conventional means of arrest, for the two highest profile of this group. Milošević, no longer president at the time of his arrest following the election of Vojislav Koštunica, was the first former head of state to be sent to The Hague. However, there had to be a federal decree for his surrender to international authorities, through transfer by helicopter at the United Nations Peacekeeping Air Base in Tuzla, Bosnia-Herzegovina, as well as significant international pressure on the Serbian government in the time leading up to Milošević’s arrest. This was largely due to the Koštunica administration and many Serbian people’s wish to see Milošević tried in Serbian courts for the crimes that devastated their country, as well as a sense of isolation as a reaction to NATO bombardment. The United States government had threatened to withhold a $50 million aid package earmarked for Yugoslavia if Milošević was not surrendered by March 21, 2001, and an international donor conference scheduled for June 2001 also held the promise of $1.2 billion in aid for Milošević’s surrender.

Milošević’s legal demise was rooted in both internal and external factors. On one hand, he had deceived the Serbian people, using many of them as pawns of war to pursue his own personal ends in the ethnic wars of the former Yugoslavia, ultimately making many Serbs the victims of their own violence. This corruption and the poor economic times of his regime ultimately led to massive demonstrations and protests against Milošević and his regime, and his loss at the ballot. While there was disagreement within Serbia as to whether Milošević should be tried in domestic courts or in The Hague, the insistence on accountability for his actions led to his being seen as an illegitimate and powerless by the Serbian people, which was a key step to bring the already marginalized former leader, who once wielded strong influence throughout Eastern Europe, to be incapacitated. The ICTY indictment represented external, internationalized exclusion of

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193 Ibid.
Milošević and his regime.\textsuperscript{194} This marginalization and electoral defeat set the framework for Milošević’s incapacitation; his transfer to ICTY custody physically terminated any possible influence he could have in the former Yugoslavia.

Ramush Haradinaj, a former KLA and League for a Democratic Kosovo leader, was elected prime minister by the Kosovo assembly in December 2004. In March 2005, the ICTY indicted Haradinaj on the charges of 17 counts of crimes against humanity and 20 counts of violations of the laws of the customs of war.\textsuperscript{195} Haradinaj voluntarily resigned from his post and traveled to The Hague to surrender. He was acquitted along with Idriz Balaj, but will always have the indictment and trial on his record, possibly sidelining him from taking part in Kosovo politics in the future.

In a gesture to strengthen ties with Serbia, the European Union lifted economic sanctions against Serbia and approved a two million Euro aid package for Serbia. However, the EU kept the earlier-imposed travel ban against Milošević and nearly 600 of his close associates in force.\textsuperscript{196} The travel ban against him and his associates, as well as the withholding of financial aid to the country, are both examples of marginalization against Milošević and his associates. These were tangible legal tools of marginalization, which led up to the handing down of the ICTY indictment and ultimate arrest and turnover of Milošević, even after the calls to try him domestically. The initial marginalization steps, such measures as travel bans and sanctions, although not the strongest measures that could have been taken against alleged war criminals help incapacitation of war criminals by lowering their perceived status, power, and popularity. Once these war criminals were actually in ICTY custody, the sense of relief among those who were personally affected by the crimes they committed was surely great. This also might have served as an example to other leaders who could potentially instigate or sanction such atrocities, a deterrent effect, highlighting the interconnected nature of the approaches to accountability. In this regard, the ICTY and its role in pursuing justice and accountability for those who were responsible for and took part in the atrocities in the former Yugoslavia in the 1990s has marginalized political and military leaders who have the ability to instigate ethnically-motivated violence and reprisals against such incidents,\textsuperscript{197} “sidelining” even those who are at large but not in power.\textsuperscript{198}

\textsuperscript{194} Ibid., Akhavan, 9
\textsuperscript{197} Ibid., Akhavan, 9
\textsuperscript{198} Ibid., Meernik
Establishing Rule of Law

It is difficult to argue that establishing rule of law is a key facet in promoting accountability for war criminals in a region where rule of law existed prior to such devastating atrocities. To complicate matters, there are three legal regimes working towards return to rule of law being respected in theory and in practice in relation to this case study. First are institutions of the Serbian government, namely the Belgrade War Crimes Chamber and courts in several other cities, which are structurally different institutions than the former Yugoslavian government that also held jurisdiction over the now independent states of Montenegro and Kosovo, and the Kosovo interim administration domestic courts, under control of the UNMIK but now in transition to a post-independence administration that will receive financial and technical assistance from the EU. The latter administration aims to gradually bring internal control, stability, and transparency to Kosovo’s internal affairs, and a generally more effective administration of justice in the newly independent country. A report from March 2008, details that the most important factor in the EU-led mission will be greater scrutiny of its human rights record, and to close the “accountability gap.” This gap refers to a general “lack of accountability of members of UNMIK’s International Judiciary and Prosecutors Program, including the absence of an independent regulatory body competent to investigate allegations of professional misconduct.”

The Organization for Security and Cooperation in Europe, the Council of Europe and the UN Human Rights Committee criticized the UNMIK for “the limited remedies available to those who allege violations of their rights by UNMIK.”

As an example, the Centre for Peace in the Balkans (CPB) describes an incident where a bus carrying Serb passengers between Serbia and Kosovo was blown up by a group of radical Kosovo Albanians in 2001. According to the CPB, NATO security forces (KFOR) and UNMIK police and prosecutors did not cooperate, and in the case of this bombing, and once authorities arrested suspects, gave no information to prosecutors to aid in investigation or prosecution.

Similarly, in Serbia, in 2003 and 2004 the OSCE instituted a series of measures in cooperation with the OSCE missions in Bosnia-Herzegovina and Croatia, to aid in conducting war crimes trials as a tool for reconciliation, as well as creating instruments of witness protection.

Even with the OSCE’s booster shot into the blood of the Serbian judicial system, the root of the problem, the basic unwillingness among employees in law enforcement to investigate on a large scale in the judicial system, remains. This is likely due to the threat of becoming involved in investigating a colleague or superior who himself/herself has links to a crime. A recent report indicated:

Investigators in the War Crimes Detection Unit were initially openly unwilling to do more than the minimum they were ordered to do directly by the prosecutor. At OSCE War Crimes

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200 Ibid., HRW, “Human Rights News: Kosovo: EU should Ensure International Mission is Accountable.” This report mentions this view is mirrored by Amnesty International and the Norwegian Helsinki Committee.


Coordination meetings in 2005, two former heads of the War Crimes Detection Unit admitted that they did not act on their own initiative in these cases. Rather their policy was to wait for specific instructions from the prosecutor. Even then they were slow to respond. Because the police have been so inactive, prosecutors have had to rely more heavily on ICTY or NGO investigations to further their cases. One reason the War Crimes Detection Unit is weak is its lack of leadership. Senior police qualified to lead the unit are often themselves implicated in crimes or have relationships with others implicated in crimes.\textsuperscript{203}

In order to promote rule of law, accountability therefore must become a priority in all levels of investigation and prosecution, both in Serbia and Kosovo, in order to work towards reconciliation from the atrocities committed during the conflict in 1998 and 1999, as well as the Mitrovica riots of 2004. There is little sense of closure, little faith in the current legal system, and little belief that this can change, in Kosovo and Serbia. Pursuing full accountability for war crimes will cut through the first layer of difficulty in achieving regional peace and reconciliation. Once faith in the judicial systems is established, the sense that crimes committed against oneself or loved ones are perceived to be taken seriously, i.e., prosecuted, credibility will grow and inspire residents to respect the rule of law of the legal systems in place and not commit war crimes in the future.

Crucial to rule of law fostering accountability are cooperation between legal bodies, and the political will and support of the population to facilitate this. These are the two biggest factors that impede the establishment, or re-establishment of rule of law, trust in the legal system in Kosovo, and to a certain extent in the former Yugoslavia. There are three reasons for this. First, no former Yugoslav states have extradition treaties with one another; if someone committed a war crime in a given former Yugoslav country and then fled to another one, there is no domestic or local recourse to prosecution. This results in an "immunity gap," which can only be closed by strong legislative efforts, for which the required political will does not exist.\textsuperscript{204} Second, there is inadequate cooperation between domestic the domestic Serbian and Kosovo-UNMIK courts in cases being adjudicated within these courts but requiring cooperation between both systems. This stems most importantly from there being no established legal framework for cooperation between the two institutions, except to return ethnic Albanians incarcerated in Serbia to serve their sentences in Kosovo. Both legal systems contend that each has given the other adequate cooperation, chances to interview and subpoena witnesses, and evidence necessary to adjudicate their cases, but that the other has not cooperated in return.\textsuperscript{205} Third, Serbian authorities refuse to recognize the jurisdiction of courts not under direct control of Serbian government authorities. This leads to a quagmire: in order for people in Kosovo and Serbia order to achieve full trust in both legal systems in the post-conflict environment, a pre-requisite for rule of law and full accountability, both countries’ legal institutions must be recognized and respected domestically, internationally, and by each other. Yet, Kosovo Serbs and the Serbian government refuse to recognize Kosovo as an independent country and therefore the legitimacy and authority of Kosovo legal institutions. Full legal cooperation, in order to achieve rule of law, would require


\textsuperscript{204} Ibid., UN, “Address by former ICTY Chief Prosecutor Carle Del Ponte to OSCE Permanent Council, 7 September 2006.”

\textsuperscript{205} Ibid., HRW, “Backgrounder, Unfinished Business: Serbia’s War Crimes Chamber June, 2007.”
this recognition on part of Serbian legal authorities. However, if Serbian authorities gave the full recognition and respect to Kosovo authorities required to achieve full cooperation and rule of law, this would hurt the chances of the Kosovo Serb population trusting even the Serbian legal system, let alone that of Kosovo. For the time being, there is an impasse.

Kosovo minority’s acceptance of the Ahtisaari Plan, supported by President Hashim Thaçi, adopted by Kosovo parliament and set as a key platform in the development of post-independence Kosovo with a focus on minority rights, is essential to build rule of law. Without the trust of the population, rule of law is not a reality. Kosovo Serbs must choose whether it is through this platform that they realize their rights and powers within Kosovo, or to realize their rights and power by completely rejecting the Ahtisaari Plan and the new political reality of an independent Kosovo, and derive empowerment from local Serbian politicians who only hold links to Belgrade.  

Here, accountability presents a paradox in the frame of rule of law. The Belgrade War Crimes chamber suffers from a lack of political support, as they view supporting holding Serbs accountable for atrocities as a step that will cost them votes, thereby placing accountability in a position where it actually prevents rule of law from taking shape since it does not garner public support. For accountability to foster rule of law in Kosovo, Kosovo Serb politicians must encourage support both of Kosovo’s legal institutions and cooperation between court systems in Kosovo and Serbia in order to aid in investigations and protect witnesses. While Kosovo’s ethnic Albanian majority supports this, most of the ethnic Serb minority does not. This is where the critical issue of enclaves comes into importance.

While the largest single group of Kosovo Serbs lives north of the Ibar River, the majority of Kosovo Serbs live in small enclaves in southern Kosovo. These Kosovo Serbs are in effect stuck there for their own protection. Even though KFOR ensures military protection of the Serbian enclaves and the rate of interethnic violence is lower than in most parts of Southeastern Europe, the feeling of insecurity within this enclaves is high, as it is not very pleasant to live surrounded by army, regardless of the fact that it is for humanitarian purposes. Thus, local Serb politicians become the only voice of the Kosovo Serbs, and the possibility of expressing the majority’s opinion becomes “hijacked” by local Serb politicians and criminal groups which reap huge benefits from controlling “legal black holes” which are not under Kosovo legal authority but under Serbian authority but within the Kosovo territory. This enables the politicians to work with Kosovo Albanian criminal groups in smuggling large amounts of goods, and more importantly gives amnesty to Kosovo Albanian politicians from taking responsibility for what happens in these enclaves, because they are under the control and protection of KFOR and UNMIK and only see legal connections to Belgrade. None of them is genuinely interested in bringing up the issue of existence of enclaves, which sparks personal insecurity of the Kosovo Serb minority. Instead of working on the issue of securing personal security and, freedom of movement for Kosovo Serbs, they behave as if the issue is solved only by the military protection.

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206 Ibid., Musliu.
208 Ibid., Musliu.
209 Ibid.
mechanisms around enclaves. This prevents people and politicians of different ethnic groups from holding the necessary dialogue to begin to build the political rapport to facilitate even the possibility of a strong rule of law.210

Full accountability to not only alleged war crimes, but corruption among Kosovo politicians (both Albanian and Serb) is a prerequisite for rule of law to develop. Rule of law requires trust and legitimacy in the population, and this takes time and example to grow. Rule of law is the only way in which the trust and stability required for the enclave situation to be reconciled can develop. The corruption that exists in Kosovo makes it profitable for politicians to not pursue accountability. However, if this cycle continues, no trust will develop between Kosovo Serbs and Albanians, and Kosovo Serb politicians will continue to profit from smuggled goods while answering legally only to Belgrade, undermining a common rule of law over Kosovo. Therefore, the Kosovo justice system is the best hope. A strong court system, which would hold politicians accountable for illegal actions, would not only eradicate the corruption that keeps the above mentioned cycles and the enclave issue from being resolved, but also would set examples to the population showing that politicians who engage in corrupt behavior and perpetuate the Kosovo Serbs’ isolation will be brought to justice.

Establishing Historical Record

Establishment of historical record is crucial in order to help victims of this conflict heal, and to help future generations understand the conflict and the region. Moreover, establishing historical record fosters accountability of actions by those responsible, and takes away collective guilt and blame.211 This is one area in which the instruments of accountability in place, especially the ICTY indictments against ethnic Serb and Albanian war criminals, has led to progress towards accountability. The previous section of this case study and appendices at the end of this report show some text of the ICTY indictments against the war criminals responsible for the most large-scale atrocities. The indictments mention not only the specific incidents that took place during the atrocities, but also mention the exact amount of people against whom the atrocities were committed. The indictment text and published testimony given to prominent international non-governmental organizations also include personal accounts. While it would be very difficult to mention the name of every person forcibly expelled or killed in a massacre, the published testimonies and indictment texts mention the names of many possible war criminals that were under the orders of the indicted. The ICTY also instituted an instrument of plea agreement, which, combined with the ad hoc nature of the prosecutions and presentation of evidence, helps the historical record of these atrocities by providing victims with a chance for their individual stories to be heard.212

In this light, the ICTY’s creation, adjudication of war crimes, and convictions of those deemed responsible provides a “powerful historical record”213 for victims and the future generations of the former Yugoslavia, and serves as an example of international justice the world over. ICTY

210 Ibid., Musliu.
213 Ibid., Meernik
indictments and trials add the historical value of recognizing that Kosovo Albanian military retaliation against Serbian forces held legitimacy. Still, the ICTY fell short of its original expectations and obligations, largely due to poor guidance and extra leeway given by its designated overseer, the Security Council. Ensuring that trials comply with international modern legal standards resulted in lengthy pre-trial detentions, hearings, and trials, and an extension of the indictment process for over ten years following originally indicted hostilities. The ICTY has been hindered by not pursuing those who committed atrocities on a micro level:

As the ICTY deliberately chose to focus on high-level culpability and not actual "shooters," the indictments have generated intense controversy. This is due in large part to the fact that throughout the Balkans, the command structure on paper was radically different than that in actual practice. Determining true "command responsibility" in these situations is at times very difficult and certainly controversial. Dealing with this fundamental conflict between the need for closure and quick justice and meeting correct legal standards was never really addressed and it needs to be. Certainly not nearly enough thought was given to the impact that the ICTY procedures was having on the region it was supposed to be helping.

As much as the report detailing this information blames the Security Council and sponsoring states, it also assigns blame to former Chief Prosecutor Carla Del Ponte for not taking enough personal interest and responsibility, noting that the United States and EU’s actions resulted in the indicted going to The Hague, not her individual actions, whose behavior as Chief Prosecutor was seen by some as irresponsible and as having placed a shadow over the ICTY. Still, the ICTY was able to set a historical record by being the first institution to indict and try a former head of state. Although Milošević’s March 2006 death prevented a verdict, the trial “uncovered a substantial amount of documentary evidence and witness testimony that now forms part of the public record.”

It is critical that Kosovo and Serbia’s domestic court systems continue to work towards a higher level of cooperation, internally and with each other, to thoroughly and effectively establish a culture and process of accountability as standard legal recourse in these two countries. More than working as individual components of accountability, the six addressed here coalesce to form links in a chain of accountability, which could ultimately bring peace and reconciliation to Kosovo. The more effectively cases of alleged war crimes are adjudicated, the more this will reinforce the strength of the judicial systems necessary to foster trust and legitimacy. This will allow the manifestation of all of the approaches discussed; rule of law gained from trust and legitimacy, the historical record to publicly acknowledge the atrocities committed, the sense of retribution that justice being served gives victims of such atrocities, and, although difficult to measure, these all setting examples of the consequences that face regimes and their leaders who are responsible for such atrocities, in hopes of future deterrence.

214 Ibid., Musliu.
216 Ibid.
217 Ibid.
218 Ibid., Musliu.
219 International Center for Transitional Justice, “Report on Activities in the Former Yugoslavia.” ICTJ, 
ARGENTINA

En algo andará, no te metas

From 1976 to 1983, Ford Falcons disappeared thousands of “subversives,” enemies of Argentina’s ruling junta. The Dirty War’s ideological plight against presumed dissent of the military’s National Reorganization Process dismembered democratic ideals and basic human rights, justifying countless violations. Thirty years since the coup and proactive steps towards accountability have only recently begun.

Roots in Perón

Juan Perón emerged from a 1943 coup as Argentina’s populist leader. Only later were his controversial ambitions uncovered with his extraction of large portions of Argentina’s financial surplus and his creation of a police state facilitated by informers and torturers, possibly setting the stage for the subsequent Dirty War crimes. Eventually unsettling to the junta’s rule, Perón was arrested and imprisoned without charge. Mass protests led to his eventual release and victory in presidential elections of 1946. A 1955 coup resulted in Perón’s twenty-year exile to Spain.

Political and civil unrest characterized 1955 to 1973. Left wing guerilla groups, notably the Montoneros and Ejército Revolucionario del Pueblo (ERP) awaited Perón hoping he would reunite Argentina under a socialist agenda. Upon return, Perón’s ideology shifted to the Right. He expelled the Leftist Montoneros from his Partido Justicialista in 1974 and in retaliation, militant groups initiated a campaign of destabilization, kidnapping and executed former dictator Pedro Aramburu (1955–1958) and others accused of collaborating with him. The guerilla groups were responsible for the execution of executives from General Motors, Ford and Chrysler. As guerrilla operations intensified, fear gripped the Argentine population, particularly the middle class, and military action was sought. The Right’s Alianza Anticomunista Argentina, “Triple A,” began kidnapping and executing Montoneros, members of ERP and other “dissidents.”

After Perón’s return and subsequent death in 1974, his widow, Isabella Martinez de Perón, was named successor. She was overthrown in 1976, marking the sixth time since 1930 that the military had interrupted Argentina’s democratic structure. Three generals: Jorge Videla, Emilio Massera and Ramon Agostí subsequently assumed power.

The Dirty War

The Dirty War (1976-1983) was among the most oppressive periods in recent Argentine history. To end left wing guerilla activity, the military created the Proceso de Reorganización Nacional, and Operacion Cóndor to carry out its ideological war focused on ridding the country of its Left,

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220 Translated as “something is going to happen, don’t get involved.”
particularly militant groups, middle class students, intellectuals, labor organizers and all “subversives.” Though leftist guerilla groups had stirred fear in the Argentine population, threat was highly overestimated, unbalanced against the military and exploited. It has become known that many kidnappings and executions had been carried out by the military and blamed on leftist rebels.\footnote{222}{Interview with Juan Méndez, April 23, 2008.}

The Proceso’s statute established a three-part junta as sole political power and declared executive, legislative and judicial branches in all provinces void.\footnote{223}{Inter-American Commission on Human Rights, “Chapter 1: The Political and Legal System In Argentina,” Inter-American Commission on Human Rights, \url{http://www.cidh.oas.org/countryrep/Argentina80eng/chap.1.htm} (accessed February 2, 2008).} The statute claimed concern for “restoring values essential to the State, emphasizing morality and efficiency indispensable to rebuilding the Nation, eradicating subversion and promoting economic development based in responsible participation of different sectors to ensure restoration of a representative and federal democratic republic.”\footnote{224}{María Laura San Martino de Dromi. \textit{Historia Política Argentina 1955-1988} (Buenos Aires: Editorial Astrea, 1988), 193. Translated by Laetitia Pactat.} In reality, the 1976 Statute had little to do with progress and much to do with physically eradicating dissent. Countless human rights violations defined the subsequent seven years. The United States government reinforced the Proceso’s objectives with Henry Kissinger’s approval statement to Admiral Augusto Guzzetti,

> Look, our basic attitude is that we would like you to succeed. I have an old-fashioned view that friends ought to be supported. What is not understood in the United States is that you have a civil war. We read about human rights problems but not the context. The quicker you succeed the better… We want a stable situation. We won't cause you unnecessary difficulties. If you can finish before Congress gets back, the better. Whatever freedoms you could restore would help.\footnote{225}{The National Security Archive, “Kissinger To Argentines On Dirty War: ‘The Quicker You Succeed The Better,’” The George Washington University, \url{http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB104/index.htm} (accessed February 12, 2008).}

The desaparecidos, literally “disappeared,” were central to Operación Condór’s eradication of subversion. People began disappearing in great numbers. Estimates vary widely; the 1984 \textit{Comisión Nacional sobre la Desaparición de Personas}, CONADEP, report gathered proof for 8,960\footnote{226}{CONADEP, \textit{Nunca Mas; Report of the Argentine National Commission of the Disappeared}, (New York: Farrar Straus Giroux, 1986), 284.} victims though present estimates reach 30,000. CONADEP describes victims “swept off the street, or from their homes in the middle of the night, by squads in plain clothes, and bundled in the trunks of the Ford Falcons with no license plates…most were never seen again.”\footnote{227}{Ibid, xiii.} Secret detention, physical and psychological torture, rape, forced births and execution followed. Victims were then disposed of through infamous Death Flights, throwing dissidents into the Atlantic Ocean or Rio de la Plata.
Activist groups such as the *Madres de Plaza de Mayo* sought family members through inquiries to uncooperative police and military officials. Court actions were dismissed, judges remained loyal to the junta. By the end of the 1970s, the regime’s goal of suppressing opposition proved successful by creating a plague of fear.

**The Democratic Elections of 1983**

Argentina’s defeat by the U.K. in the *Islas Malvinas/Falkland Islands War*, serious economic problems, mounting charges of corruption and a growing record of human rights abuses led to the regime’s collapse in 1983. Prior to retiring from power, the military took a final precaution by adopting a generalized amnesty, “to immunize every member of the military from prosecution from any crimes he had committed during the so-called war against subversion.” Raúl Alfonsín was declared president. Prosecution of military officials was a primary concern demonstrated in his support of CONADEP. Despite the 1984 report *Nunca Mas*, in an effort to subdue threat of military rebellion, president Alfonsín legalized amnesty through two laws: Law 23,492, Full Stop Law, and Law 23,521, Due Obedience Law. Alfonsín’s successor Carlos Menem further hindered accountability by granting pardons to the previously convicted commanding officers.

**Ending Amnesty**

A 2001 investigation of child kidnapping led the Lower and Upper Houses of Parliament to declare amnesty laws unconstitutional in 2003, subsequently upheld by the Supreme Court in 2005. International law and treaty obligations took precedence over domestic law. Since the reopening of trials in 2005, Presidents Nestor Kirchner and Cristina Fernandez de Kirchner have made addressing human rights violations a central tenet. The United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was ratified, giving precedence to treaty positions over national laws. Human rights activists worldwide applauded “the lifting of the extradition band,” allowing the trial process towards accountability to begin.

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228 The organization began with the title *Madres* (Mothers) but are now recognized as *Abuelas* (Grandmothers). Throughout this paper they will be referred to under their present title.
230 Ibid, xv.
II. Atrocities and Amnesties

The 1976 military coup’s modus operandi subjected Argentines to legalized state terrorism. Constitutional guarantees and basic rights—life, security, trial and not being subjected to inhumane methods of detention, justice or summary execution—were all violated, and rather various methods of psychological and physical torture shadowed by murder were carried out for the Dirty War’s duration. Strong military presence and 1983’s National Peace Law, known as the junta’s self imposed amnesty, complicated accountability at the dictatorship’s dismemberment. It was not until the 2005 Supreme Court ruling ending impunity and fueling the wave of trials that Argentines would justly face their past.

Human Rights Violations

Junta atrocities were methodical and subjected the population to fear of becoming desaparecidos for suspicion of subversive thought. Terror tactics included harassment, intimidation, kidnapping, torture and execution. The following is an examination of the gross human rights violations that occurred during Argentina’s Dirty War:

a. Disappearances

In a non-exhaustive list, CONADEP, the National Commission on the Disappearance of Persons, 1984 report Nunca Mas gathered evidence for 8,960 desaparecidos, a broad measure including kidnapping, detention and death. Of the 8,960 disappeared, 70 percent were men and 30 percent women (10 percent disappeared women were pregnant) and the primary targets by age ranged from 16 to 35 years, accounting for 81.39 percent of the disappeared.

...Involv[ing] the open deployment of military personnel, who were given a free hand by the local police stations. When a victim was sought out in his or her home at night, armed units would surround the block and force their way in, terrorizing parents and children, who were often gagged and forced to watch. They would seize the persons they had come for and beat them mercilessly, hood them, then drag them to their cars or trucks, while the rest of the unit invariably ransacked the house or looted everything that could be carried.

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234 CONADEP, 2.
235 Translated as “disappeared.”
236 Anonymous interview.
237 CONADEP, 284.
5 Ibid, 3.
Establishing total estimates of the disappeared after the Dirty War was complicated by numerous factors including the population’s fear of seeking out help from authorities, unfilled depositions, mistakes in calculations and destroyed evidence. Supported by CELS, *Centro de Estudios Legales y Sociales*, Juan Méndez attributes more recent complications of total estimates to lack of centralization of information coupled with three decades past since the onset of the crimes. Other human rights organizations’ estimates of *desaparecidos* reach 30,000. These higher estimates are an extension of the CONADEP victim calculation, though because of incomplete records, lack of coordination and unclear categorical definitions, the larger figure is perhaps less accurate, though possible.

b. Arbitrary Detention and Torture

CONADEP estimated 1,300 people were arbitrarily detained in secret detention centers prior to their ultimate disappearance. Many of these individuals underwent intense torture sessions throughout their detentions which facilitated a) accessing information through interrogation, primarily names, with the intent of making more arrests, b) damaging the victim’s psychological and physical person to deter further association with presumed subversion, c) punishing and humiliating prisoners and d) instilling fear in the people directly involved.

Severe physical beatings, electrocution, often utilizing household appliances such as ventilators and electrical cords, burnings, bodily mutilations, sexual mutilations, rape, often utilizing objects emitting electric shock, isolation, deprivation of food, water and basic eliminatory needs; blindfolds and limitations in mobility by being tied in confined spaces were all common and used repeatedly. Torture sessions occurred in approximately 340 clandestine detention centers throughout Argentina. Most infamous were the Navy Mechanics School, known as ESMA, Olimpo, La Perla, El Banco, Mar de Plata military air and naval bases, the various police headquarters of Buenos Aires, Mar de Plata, Tucumán and Mendoza; and Posadas Hospital.

c. Extrajudicial Executions

Victims subjected to torture often received medical attention only to be returned for another torture session. This cyclical abuse led to total physical incapacitation and often unconsciousness. To carry out the *Proceso* and *Operación Condór*’s objective, four principle tactics were used: “Death Flights,” firing squads, incineration and mass graves.

Death Flights consisted of taking unconscious victims to airplanes, undressing them, and expelling them from hatches into either the Atlantic Ocean or Río de la Plata. Ex-Army officer Adolfo Scilingo estimated 1,500 to 2,000 people disappeared in this manner from his base alone. Executions by firing squads were also efficient and justified as defense in an armed

240 Interview with Juan Méndez, April 23, 2008.
241 CONADEP, 284.
242 Ibid, 51.
shoot-out or an escape attempt. Since Death Flights left little in terms of recoverable bodily remains, incineration and mass graves supplemented ridding of evidence. In-detention torture sessions and firing squad victims were piled in mass graves and “bulldozers were sent plowing through the plots, churning up a jumble of bones and teeth and bullet fragments.” Incineration was carried out on large grills and greatly diminished potential physical evidence. Recalling the incomplete records, poor organizations and categorization of evidence of kidnapping, detention, torture, execution, survival and exile estimates, concrete figures and ratios are in the process of being established. Juan Méndez’s insight regarding the complication of time passed and poor coordination of information is applicable to this problem as well.

d. Psychological Harassment and Intimidation

CONADEP’s depositions and testimonies provide valuable insight into methodical acquisition, detention and subsequent violations that occurred in detention. Harassment and intimidation tactics reinforced physical torture. Prior to kidnapping and detainment, death threats and accusation of government opposition were common. In one case a victim recalled his torture momentarily halted. His blindfold was removed and he was presented with a bloodstained rag. Asked if he recognized it, he was unable to, to which the perpetrators replied that it was his wife’s undergarments. In his account the torture resumed after having purposefully subjected him to the psychological torture of the thought of his wife’s detention, and similar methods were common.

The Victims

Though the Proceso’s intention was persecution of all subversion, particularly leftist guerilla groups such as the Montoneros and ERP, targets also included the general population’s physically able, children, pregnant women, the sick and disabled. Politically influential citizens who condemned the repression, such as members of clergy, conscripts, journalists, trade unionists, agrarian labor representatives, lawyers, politicians, diplomats, and professors were also targeted. As the Dirty War years ensued, human rights organizations and activist groups such as Abuelas de Plaza de Mayo, who had been protesting since 1977 were also subjected to repression and disappearances, including the kidnapping and Death Flight executions of Azucena Villaflor de Vicenti, who had co-founded group, along with 11 others.

244 CONADEP, 215.
246 In correspondence with Memoria Abierta, the problem of lack of more recent quantifiable data was addressed and supported Mr. Méndez’s position. Memoria Abierta is in the process of collecting data from Asamblea Permanente por los Derechos Humanos (ADPH), Centro de Estudios Legales y Sociales, Fundación Memoria Histórica y Social Argentina, Abuelas de Plaza de Mayo - Línea Fundadora and Servicio Paz y Justicia, with the intention of organizing information for accessible archival use.
The Perpetrators

Though the Dirty War is often associated with Jorge Videla’s command, the list of high-ranking officers is more extensive concerning six generals in particular: Jorge Videla, Emilio Massera, Ramon Agosti, Roberto Eduardo Viola, Leopoldo Galtieri and Reynaldo Bignone. Other perpetrators included clergy, nurses and citizens who supported the Proceso, but it was the Argentine military, military doctors and police officers who were most accountable for crimes.

To carry out the abuses the military developed task forces “drawing men from all the services, whose job was to capture and interrogate known members of “subversive organizations,” their sympathizers, associates, relatives or anyone perceived as a possible government opponent.”248 The organized task forces functioned on three levels: Intelligence, Operations and Logistics. Intelligence gathered information from torture sessions and examined any paper documentation on the victim’s person at the time of kidnapping. Intelligence task forces included navy officers, prefecture and police and non-commissioned officers. The operations task force was in charge of abductions and similarly staffed as the intelligence unit though supplemented by federal police and retired navy and army officers. Logistics concentrated on “maintenance and repair of task force property and its financial administration.”249 Essentially comprised of navy officers and non-commissioned officers, logistics managed administrative duties.

Amnesty and Accountability

With military command coming to a close in 1983, foreseen repercussions of crimes committed led to the junta’s self-imposed amnesty law 22,924 entitled Ley De Pacificacion Nacional, the National Peace Law. Article 1 of the amnesty law blocked prosecution of those who committed any terrorist or subversive crimes as well as any criminal acts stemming from efforts to prevent or stop terrorist or subversive activity between May 25, 1973 and June 17, 1982. The law applied to originators, participants and accomplices who helped hide or conceal activity connected to military crimes. Article 2 stated that the amnesty law did not protect members of illicit terrorist or subversive organizations. Notably, Article 5 stated that no person could be interrogated, investigated, summoned to appear, etc., on suspicion of having committed or participated in one of the above-mentioned terrorist activities or on suspicion of knowing about them.251 For obvious reasons, amnesty law 22,924’s legality and applicability was of primary contestation in the subsequent democratic elections.

249 CONADEP, 123.
250 Translated by Laetitia Pactat.
The 1983 election of Raúl Alfonsín as president attempted to open the door towards accountability. Law 23,049 resolved jurisdiction of initial trials by stating that all prosecutions of the military for alleged crimes were to be tried first by the Armed Forces Supreme Council and if cases were not completed within six months through the new Council the Federal Chamber could either send the case back for more time or assume original jurisdiction. The statute also included criminal responsibility, declaring anyone “without decision-making capacity” would have carried out crimes under assumption that orders given were legal and legitimate. This was important as it excluded high-ranking officers making such a defense. Kidnappings, undertaken primarily by junior officers in the task forces were included in this statute leading to their immunity from punishment if only related to abduction. Rape, torture, robbery and executions were considered atrocities and any junior officer who had claimed obedience to orders in such cases was not excused from trials.

Coupling the 1984 CONADEP report with evidence from exhumed remains by the government’s team of forensic anthropologists, Alfonsín promoted the prosecution of those who organized and commanded the execution the human rights violations, giving way to 1985’s initial trials. Though the military’s Supreme Tribunal was unwilling to try top military commanders, nine top members were sent to trial in civilian courts. Though capital punishment was permitted, the prosecution asked for life imprisonment for only five of the nine defendants, fifteen year sentences for two of them and twelve and ten-year for the remaining two. General Videla was sentenced to life imprisonment and Navy commander Emilio Massera was given the same sentence as Videla. Roberto Viola, Videla’s successor, was sentenced to seventeen years, and Armando Lambruschini to eight. The Air Force’s Ramón Agosti was sentenced to four years and four months. Leopoldo Galtieri, Jorge Anaya, Omar Graffigna and Basilio Lami Dozo were acquitted.

The results disappointed the Argentine’s initial cautious optimism. The court published a comprehensive document detailing the reasoning behind the various sentencing, claiming it followed due process rather than political vengeance. The justification, it stated, lay in the fact that the commanders themselves did not carry out the abductions or tortures therefore their charges reflected their responsibility in command but not as having handled the crimes in their own person. Argentina’s citizens were left with the sentiment of an incomplete process, for if the top commanders did not carry out the acts themselves and the task forces were merely following orders, who could be held accountable?

The initial accountability attempts against the convicted perpetrators did not endure, as the military reaction was vigorous and swift. Faced with threat of military rebellion in 1986 and 1987, partial amnesty laws were reintroduced. Alfonsín rebuked his initial stance, halting
possibility for prosecutions and subsequently, along with the legislative branch, passed two amnesty laws: the 1986 Full Stop Law, No. 23,492 which set a 60-day deadline for the initiation of new prosecutions, and the 1987 Due Obedience Law No. 23,521 which granted immunity to all ranking colonels and below on the assumption that they were following orders.\textsuperscript{257}

Succeeding Aflonsín, Carlos Menem’s presidential victory led to further halts in accountability. Pardons were issued to general military personnel, resulting in the prison release of the few that had been convicted.\textsuperscript{258} Still, concerted efforts to bring about justice through trials, on behalf of \textit{Abuelas de Plaza de Mayo} and other human rights organizations including CELS and the Ministry of the Interior’s Human Rights Office, continued. Buenos Aires’ Federal Appeals Court was under intense pressure to subpoena people to further judicial investigations. The inefficiency of the subpoenas lay in Alfonsín’s partial amnesty Full Stop and Due Obedience Laws because the courts could not legally convict or charge accused perpetrators, making the amassed testimonies only act as a form of documentation. Proceeding with prosecutions and convictions began with investigations into kidnappings of infants and illegal adoption rings.

Previously mentioned, ten percent of the women were pregnant at the time of detention. Prior to the execution of the mother, many women underwent forced births and the infants were subsequently transferred for illegal adoption to military families. Child theft was not covered in the clauses of Full Stop nor Due Obedience Laws, thus prosecution was legal, even if the perpetrators were not subject to conviction for murder of the parents. The trial process began and the testimonies acquired led to further arrests of those previously pardoned by president Menem.

During this time, countries whose citizenry has also been victimized in human rights atrocities, including Spain, France, Sweden, Italy and Germany, began demanding extraditions for trials of those responsible or affiliated with kidnappings and disappearances of their citizens. Though Argentina forfeited legality of \textit{in absentia} trials, countries proceeded with their hearings despite the lack of defense testimony. In 1999 Spanish judge Baltazar Garzón filed charges against 98 Argentine armed forces members for genocide and state terrorism.\textsuperscript{259} Though then-president Fernando de la Rúa upheld the position that Argentina did not recognize trials \textit{in absentia}, his position was weakened by domestic turmoil.

Argentina’s 2001 economic crisis forced president de la Rúa to resign. Prior to stepping down he signed Presidential Decree 1581 as a formal refusal for extradition and trials of Argentine citizens abroad. Because of the lack of consistency in prosecution attempts, many accused perpetrators and indicted persons still lived freely in Argentina until 2001.

\textsuperscript{257} Rebecca Lichtenfeld.
\textsuperscript{258} Ibid.
\textsuperscript{259} Ibid.
Nullification of Amnesty Laws

Federal Judge Gabriel Cavallo’s 2001 ruling in a trial regarding a child’s kidnapping subsequently led to nullification of Alfonsín’s partial amnesty laws. Cavallo declared that international law and treaty obligations took precedence over domestic law and subsequently the Supreme Court upheld the initial 2003 decision of the Upper and Lower Houses of Parliament in a 7 to 1 rule on June 12, 2005. Under Nestor Kirchner’s presidency, the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was ratified, opening the advancement in addressing accountability of human rights abuses during the Dirty War.

Numerous cases are demonstrative of Argentina’s efforts towards accountability since 2001. In 2006, a Buenos Aires federal court sentenced former police official Julio Héctor Simón to 25 years in prison for the illegal arrest and torture of the Chilean-Argentine couple who disappeared in November 1978. Former police official Miguel Osvaldo Etchecolatz was also sentenced to life imprisonment for illegal arrest, torture and homicide in connection with six disappearances in a case demonstrative of the judicial system’s transformation after the 2001 ruling. He had previously been sentenced in 1986 but was released under Due Obedience Law. Since 2005, president Menem’s previous pardons have not been recognized. In September 2006, “the Cassation Court upheld a ruling that the pardon of General Santiago Omar Riveros, a former military commander in Buenos Aires, was unconstitutional.”

In December of 2007, nine of the junta’s retired military officers, seven colonels, one general and one captain, were convicted: Luis Jorge Duval, Carlos Gustavo Fontana, Santiago Manuel Hoya (who died two days after sentencing), Juan Carlos Gualco, Pascual Guerrieri, Waldo Roldán, Pascual Oscar, General Cristino Nicolaides and Captain Enrique José Berthier. Privately prosecuted by CELS, they were found guilty of involvement and illegal privation of liberty in a plan known as Batallón 601. Berthier was the most recent condemnation and his prosecution specifically related to kidnapping minors. CELS credits the case to the work of Abuelas de Plaza de Mayo. Currently, in the Corrientes Province, Captain Juan Carlos Demarchi and Colonels Horacio Losito and Rafael Manuel Barreiro are undergoing trials.

These are but a few cases subjected to the recent trend towards accountability of Dirty War crimes. Numerous civil servants and security forces trials have also condemned those involved. Other high-ranking officials are still awaiting trial and others sentencing. Of the most famous, Jorge Videla is currently under house arrest and intended for trial for Operación Condór. Reynaldo Bignone is also serving house arrest for crimes committed in the clandestine detention

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260 Ibid.
261 The Convention dates from 1968 and was approved by the Argentine congress in 1995.
263 Information from CELS Programa Memoria y Lucha contra la Impunidad del Terrorismo de Estado, memoria@cels.org.ar. For more information concerning the events unfolding in trials of Demarchi, Losito and Barreiro see http://ri9.cpdhcorrientes.com.ar
center *Campo de Mayo*. Both generals are also under investigation for involvement in systematic disappearances. Leopoldo Galtieri died without trial in 2003, as did Roberto Viola.

Accountability in Argentina has taken shape as “justice for human rights crimes has become an article of faith.”264 Various organizations and legal initiatives have begun to reap the fruit of their justice-seeking efforts as Argentine sentiment holds that if human rights abuses cannot be settled, many other societal complications will remain unresolved, making dealing with the past violations a prerequisite for progress in the country. Trials and military confessions feed the civil society’s appetite for accountability as they have begun not only addressing Argentina’s violated past but also have set precedent for other debates of amnesty and impunity laws worldwide.

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264 Juan Méndez interview, April 23, 2008.
III. Transitions Towards Accountability

The evolution of accountability in Argentina, despite certain weaknesses in implementation, is demonstrative of justice’s potential to materialize when truth, reparations, reconciliation and juridical measures are brought to the forefront. Despite thirty years passed since the Dirty War’s onset, the 2005 Supreme Court nullification of amnesty law is relatively recent, making the outcomes complicated and premature. Only recently has a sense of relief in acknowledgement and accountability of those implicated in the crimes resonated among victims, and sentiments regarding reparations continue to evolve. Still, the reparations that have occurred since 2005 in contrast to initial steps towards accountability under president Alfonsín’s government in 1983 are far more concrete and proactive. Hard-line measures have directed victims closer to justice than would have been possible in the two decades following the Dirty War. Argentina’s developments against impunity and towards accountability are considered great progress and applauded by human rights activists worldwide. This section examines applicability and interconnectedness of four arguments for Argentina’s case: establishing a historical record, rule of law, deterrence and retribution.

Establishing a Historical Record

The 2001 re-opening of trials countered the initial periods under Alfonsín and Menem, where moving beyond the past was prioritized for progress. More than demonstrative of a firm and just governing structure, the present legal re-awakening and acknowledgment of Dirty War crimes concretizes the necessity to address the past, allowing for reparations to victims and families. This section examines establishment of historical record beyond the prosecution process to include social and civil acts that have emerged establishing the past occurrences as quotidian reminders.

Directly following the Dirty War, the most important actions implemented to establish a historical record were the CONADEP report and the dictators’ trials. Information gathered provided vital evidence ruling out plausible deniability of the recent atrocities. During the trials, a newspaper entitled “Diario de Juicio” circulated for six months with the sole purpose of informing Argentine society of occurrences in the courts. Though “Diario de Juicio” did not exceed publications of major dailies, it was widely read. Together, initially, the CONADEP report and the newspaper vigorously and undeniably established and published the facts, making potential revisionism more difficult.

The current transformation of the notorious Navy Mechanics School (ESMA), the largest secret detention and torture center, into a “museum of memory,” is a powerful work in progress. Though no opening date has been set for the museum, plans to equip the school’s entrance building with multimedia displays detailing the history of Argentine state terrorism and to make

\[265\] For the purposes of this analysis, subsequent usage of the term “reparations” is to be understood more broadly as non-financial compensation.
other buildings accessible to the public as places of reflection are underway. "It's not simply a museum to tell what happened in these buildings, but instead it will give the whole story of state terrorism, including its antecedents and its consequences," the director of the institute overseeing the museum stated in 2007. Apart from major landmarks, many monuments and commemorative plaques, both spontaneous and official, are scattered throughout Argentina. Occasionally, post-mortem diplomas are symbolically awarded as part of the recognition process.

President Cristina de Kirchner took part in the inauguration of Parque de la Memoria’s monument to victims of state terrorism. More than symbolic of the government’s involvement in addressing the past, the memorial’s strategic placement in the Buenos Aires Park lies along the Río de la Plata estuary, where thousands of victims met their fate in the Death Flights. Prior to the end of his presidency, Nestor Kirchner also signed the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the United Nations in 2006, giving Argentina a chance to play a central role in the creation of the Convention. In 2003, Kirchner’s presidential Decree 1259 created the “National Memory Archive.” Autonomous and independent from the National Archive, the Memory Archive’s fundamental purpose is to “obtain, analyze, classify, duplicate, digitalize and archive information, testimonies and documents about the loss of human rights and fundamental liberties [making it] the Argentine government’s responsibility to provide social and institutional answers to the aforementioned violations." This is an important step in compiling and recording information since scattered documentation and the 30 year time lag have been problematic.

Though there are individuals who believe some degree of crimes committed were justified and some who contend estimates of quantity and severity are exaggerated by anti-military sentiment, evidence of the 8,960 victims exists, and likelihood of reaching 30,000 is possible. More importantly, continued active involvement has fostered remembrance and concrete outcomes. Estela Carlotto, president of Abuelas de Plaza de Mayo, has both observed and participated in the transformation of truth and justice in Argentine society. In an interview she recalled subjection to the regime. “We got used to living with the dictatorship,” as she described her realization at the onset of the junta that silence and fear would not bring about justice. Having lost her own daughter to the junta’s operatives, Carlotto fought to end the atrocities and injustices and today continues with 88 individuals born in the adoption rings, with newly discovered identities, facilitating the reparations process and recording uncovered histories in personal archives”.

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267 Interview with Juan Méndez, April 23, 2008.
270 CONADEP, 284.
271 Estela Carlotto, Abuelas de Plaza de Mayo, conference “Latin American Opposition to Neo-Liberalism,” April 11, 2008 in NYC.
272 Ibid.
273 For more information see Simone Duarte’s documentary Archivo de La Identidad.
To this day, weekly demonstrations are held in front of Videla’s home where he remains confined to house arrest awaiting trial. Continued work of organizations such as Centro de Estudios Legales y Sociales, Abuelas de Plaza de Mayo, Secretaría de Estado de Derechos Humanos, Servicio Paz y Justicia and Memoria Abierta establish historical records of the past for future benefit and demonstrate that crimes were committed and that such atrocities will Never Again, to use the English title of the 1984 CONADEP report, be tolerated.

**Rule of Law**

Central to a strong nation-state is existence or establishment of rule of law providing citizens faith in the governing structure’s functions. For Argentina, despite its previous governing structure, re-definition of rule of law is a very powerful argument. During the dictatorship, rule of law and its various implementing institutions failed the Argentine people dramatically because of weakness and corruption by the military. As Dirty War crimes escalated, faith central to proper functioning of rule of law dissipated as atrocities became more apparent, deliberate and widespread. Though 1983’s democratic elections somewhat re-established rule of law, obstacles presented by amnesties and pardons created major setbacks.

Juan Méndez said he believes the re-establishment and fortification of Argentina’s rule of law should have happened during the initial trials of the dictators by a “clear democratic leadership with some spine on it.” Though he said he recognizes this is easier to conclude in retrospect, he still believes time complicated steps towards accountability because of lack of persistence and consistency in re-establishing the country’s governing structure. Méndez said he views Full Stop and Due Obedience laws as major hindrances and considers Menem’s subsequent pardons “shameful manipulations of an issue of justice for short-term political gain.”

The twenty-five years that have passed since the Dirty War’s end and the inconsistencies of rule of law’s present effectiveness are most notable in the evolution of, or lack thereof, trials. The trials are complicated because they are emerging in different parts of the country without guidance from an overall strategic plan. The executive branch or extra-governmental institutions could have organized the trials, but regardless, the lack of methodology in undertaking trials has complicated the present juridical state of affairs. Organizing such a plan, Méndez explains, is difficult to enforce now because it could be perceived as judiciary manipulation by giving the impression that the government actively directs the judiciary. The result is informal competition between judges and courts to try potential perpetrators first, leading to lack of coordination and unorganized witness protection, spreading witnesses between different trials and placing them at risk. Moreover, the complicated nature of the trials aggravates this lack of coordination and organization. Since each crime must be linked to specific orders, both implicitly and explicitly given by the person being prosecuted, meticulous attention to detail is vital to avoid real or perceived violations of due process. Since the cases are numerous, and each must be carefully reconstructed, delays have become inevitable.

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274 Interview with Juan Méndez, April 23, 2008.
275 Ibid.
Still, since re-opening of the trials and nullification of amnesty laws, major amends have commenced, rebuilding necessary trust between citizens and the government. Méndez believes and general sentiment concurs that the Argentine population trusts its ruling institutions more presently because of their active involvement in prosecutions of past crimes. People seek out the judiciary with the hope that “eventually the right thing will be done” and would not do so if they thought the judiciary would turn a blind eye. Méndez perceives the benefit of proactively dealing with the past through prosecution, truth telling, victim reparations and institutional reform as major participants in the strengthened and re-established rule of law in Argentina.

Deterrence

The twentieth century proved Argentina no stranger to countless coups involving re-creation and re-formation of the government. In such context, if deterrence had been implicated as law it would have had little or no effect because even though atrocities were committed, they were carried out with some semblance of legality; more specifically, atrocities were committed and justified through the statute of the Proceso, giving ultimate governing power to the junta. Any potential adversary in the judicial system was quickly expelled, demonstrated by Congress’ dismissal at the onset of the coup, replaced by a junta-appointed Supreme Court. Despite awareness of severity and abuse in the atrocities, ushering in the use of various tactics to destroy evidence, crimes continued as neither deterring legal recourse nor domestic judicial threat was initially present. Within this historical context and prior to the human rights movement that gained international momentum from the 1980’s onward, deterrence had no position as discouragement to violations in Argentina.

What has evolved since the junta’s dismemberment plays a more convincing role in deterrence’s effectiveness. A more clear understanding necessitates examination of two periods: 1) Alfonsín’s ambitions post-1983 and 2) re-opening the court case questioning the validity of partial-amnesties in 2001, subsequently strengthened by Nestor Kirchner’s firm position on accountability, the 2003 Upper and Lower Houses of Parliament ruling and the 2005 Supreme Court ruling declaring amnesty laws unconstitutional.

Alfonsín’s establishment of the CONADEP truth report and his support for trials appeared genuine in seeking justice for Dirty War victims. As high-ranking junta members underwent trials, Argentines rediscovered faith in a system that would punish those who had masterminded their years of pain and torment, though it would prove short lived. Military threats led him to acquiesce to the Full Stop and Due Obedience Laws, essentially redefining the initial junta-imposed blanket amnesties prior to its end in rule. Following Alfonsín, President Menem further swayed from accountability and, in certain cases involving high officers such as Jorge Videla, who had been convicted to life imprisonment, granted pardons. It quickly became evident that Alfonsín and Menem’s plans had less to do with addressing accountability and implementing deterring legal consequences and more to do with restoring democratic authority. The first period’s emphasis on deterrence was left in the margins and the initial steps towards justice through accountability failed.

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276 Interview with Juan Méndez, April 23, 2008
Marked changes were brought about following Federal Judge Gabriel Cavallo’s reopening of the 2001 case. Exemplary of this change was President Nestor Kirchner’s statement at an Army Day ceremony as he addressed his own soldiers stating, “As president of Argentina I have no fear. I do not fear you.” His firm position on the importance of trials of those implicated in the atrocities from 1976 to 1983 brought accountability to the forefront. The 2001 trial later positioned itself in the 2005 Supreme Court’s nullification of the amnesty laws. With concerted efforts from human rights advocates groups such as Abuelas de Plaza de Mayo, Centro de Estudios Legales y Sociales, victims, families, the growing consciousness of the Argentine government and international pressure, a more cohesive effort towards accountability and judicial solution matured. Prosecution of war criminals, comprehensive reparation mechanisms for victims and their families, and reforms of the military and police forces began.

Though Argentina’s current trend towards accountability could regressing to its historic tendencies of pardons, this seems unlikely as this time deterrence lies in the wake of its change. There are three primary factors involved: the time that has passed, the increasing interconnectedness of the international community’s interest in the upholding basic human rights to all individuals beyond domestic relativism to universal applicability, and the nature of the given post-conflict region in question, in this case, Argentina.

The evolution of awareness of rights and justice may have fortified deterrence of future atrocities in Argentina. Those who carried out the crimes of the National Reorganization Process are undergoing trial and in cases such as former president Isabel Perón’s indictment, have demonstrated that the law applies to all, a dissuading mechanism for ruling powers. In itself, this acts as a deterrent to those who have the potential or intention to commit such crimes in the future. Though somewhat idealistic, it is hoped that in an age of globalization where interconnectedness may surpass domestic politics, understanding that repercussions of a second Dirty War would not be tolerated could act as a deterrent to the country’s governing structure, as consequences domestically and abroad would be most unfavorable. In this sentiment, development of deterrence’s effectiveness acts as a “Panopticon” in its own accountability and has concretized itself in addressing past atrocities.

At the same time, events demonstrating weakness in deterring recourse continue to thrive. Human rights violations, such as severe overcrowding and torture in prisons, police brutality and corruption, and violations of the basic rights of indigenous peoples continue today with little mention in Argentina. According to the Commission Against Torture of Buenos Aires province, 6,000 reported violent incidents in prisons occurred in that province alone over the past year leaving an average of eight inmates dead or seriously injured per month. Though substantial advancements have been made in the fight against amnesty and impunity, overall cohesion of deterring legal consequences in the governing structure’s progress towards justice has inconsistencies.

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278 Juan Mendez, “The Key to the Future is Confronting the Past,” International Center for Transitional Justice,
Another troubling incident reminiscent of the past was the 2006 disappearance of 77-year-old Julio Lopez, key witness in the case of former police investigator Miguel Etchecolatz, for crimes against humanity, genocide, murder and torture. A political prisoner during the Dirty War, Lopez disappeared hours before his final testimony in Etchecolatz’s case. Former political detainee Nilda Eloy attributed his disappearance to the government because “police officers that served under the dictatorship still form part of security forces.” This was the first sentence against a former high-ranking officer for crimes against humanity, and Lopez’ testimony detailed the tortures Etchecolatz had subjected him to during his detention from 1976-1979. To this day Julio Lopez has not been found.

Following Lopez’s disappearance, former political prisoner Luis Gerez was also kidnapped during the Etchecolatz trial. His testimony, like that of his disappeared predecessor, was important because it blocked Etchecolatz’s bid for a seat in congress. At the onset of the disappearance, President Nestor Kirchner made a televised appeal, accusing what he called “paramilitary elements of trying to intimidate and extort Argentine society through fear.” Gerez was released three days later. As the International Center for Transitional Justice reported at the time “the recent disappearances have revived fearful memories of right-wing death squads, widely thought to be a thing of the past in contemporary Argentinean society.”

Difficulty with deterrence in theory and deterrence in implementation is demonstrated above. Still, in the wake of an evolving international human rights movement, solidifying dissuading recourse can be hoped for since committing crimes and getting away without reprimand is increasingly difficult if a country is attempting to keep good international relations. Therefore, if deterrence does not stem out of prescribed punishment for a crime, it may emerge out of the desire to keep up with global standards.

**Retribution**

Though debatable, progress has been demonstrated, particularly in the second period since 2001, post-Alfonsin and Menem pardons, and reparations achieving retributive outcomes are gaining momentum. Uncovering a case where a victim truly believes that justice is of equal punishment to the gravity of the atrocity committed is a near impossibility, for what constitutes justice served is relative. Yet the position stands that a clearer and more transparent movement towards accountability has brought those affected by Dirty War crimes closer to a sense of retribution than was thought possible in the first phase after the 1983 elections.

During Alfonsin and Menem’s presidencies retribution was not prioritized over restoring democratic values and overarching stability. Justice from the trials was one of the major

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setbacks. Those involved in committing atrocities numbered in the thousands. Setting limits on criteria to subpoena those involved at all levels seemed an impossible task. Given the sparse initial prosecutions, “albeit still abbreviated, schedule of indictments, the victims hardly could be satisfied with the punishment aspect of the trials.”283 Under pressure, judicial appeal came second to politics and the initial trials struck “a balance between the population which wanted justice for high crimes and the military which wanted absolution for a well executed defense,”284 ultimately resembling a compromised retributive effort.

Increasing demand for international extraditions and the undertaking of trials in absentia gave retribution new form. The 2001 trial, 2003 and subsequent 2005 nullification placed victim reparations in the forefront. Though many support the trials as a means of achieving justice, their reparative effect is mixed. Horacio Pietragalla Corti, formerly known as Cesar Sebastian Castillo, had been a victim of the junta’s illegal adoption networks and learned his real identity in 2003. He explained his mixed feelings for his adoptive parents, claiming that from one perspective he felt guilty that they were being tried for their role in suppressing his identity but conversely, he stated, “When I think about everything I lost because of them… the balance is redressed.”285 Another case in April 2008 convicted the adoptive parents Osvaldo Rivas and Maria Cristina Gomez of falsifying documents and hiding their daughter's identity, sentencing them to eight and seven years in prison respectively. Maria Eugenia Sampollo had also been a product of the adoptive rings, and though her adoptive parent’s sentences were cut short of the 25 years she requested, the guilty sentence brought a certain sense of relief.286

Juan Méndez argues that retribution should be perceived less as whether or not the victim and families “get what they want”287 because, as he states, “no one, after such crimes, has devised a system to deal with such loss and feel whole.”288 Rather, more emphasis should be placed on whether, under a reasonable and lawful system, victims feel their plight recognized and restored to the best ability. Symbolic actions, such as removing the portraits of former dictators Videla and Bignone from the photo gallery of the Military School’s former directors, reinforce to victims that retribution, both at societal and individual levels, will be addressed. Even though trials have not unfolded in as large of numbers domestically as many had expected and rather more substantially from other countries whose citizenry was victims, they still give the possibility of coming closer to attaining legal retribution for the victims given limited choices. Estela Carlotto of Abuelas de Plaza de Mayo described the trials as “a vindication for their 25-year campaign for justice.”289

284 Ibid.
287 Interview with Juan Méndez, April 23, 2008.
288 Ibid.
Conclusion

As president Nestor Kirchner stated in 2005 at the legislative assembly’s 123rd session of Congress, “Keeping the memory of what happened to us, without anchoring ourselves in the past, the search for truth and justice and the end of impunity are amongst the most valued flags of our society and of our government.”¹²⁹⁰ This signaled the steps towards accountability had begun, this time in a more serious and genuine vein. This period, since 2001, has incorporated human rights in the wake of Argentina’s current change, morphing its democratic ideals, both in principle and in practice, towards a more sustainable and effective legal accountability. This process directly addresses the historical setting from which these necessary changes germinated, emphasizes the just authority of rule of law, aims at dissuading abuse and potential large scale atrocities and brings the country a step closer to victims’ reparations in the acknowledgement of crimes through trials. With Argentines’ demand for truth and justice, the involvement of human rights advocacy groups, the international criminal court’s participation and the ever increasing pressure of upholding “just” standards in a globalized age, to the influence of the generational shift with victims now in positions of power to influence the future, the ideal of attainable justice has the potential to mature. Though outcomes of accountability continue to evolve, the hard-line position associated with Nestor Kirchner and his successor and wife Cristina de Kirchner’s bring long overdue accountability to the forefront with the ultimate ambition to set precedent and protective measures for future stability and respect of human rights both for Argentines and the international community, making it clear that such injustice will no longer be tolerated.

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CONCLUSION

“A universal renunciation of violence requires the commitment of the whole of society. These are not matters of government but matters of State; not only matters for the authorities, but for society in its entirety, including civilian, military, and religious bodies. The mobilization which is urgently needed to effect the transition within two or three years from a culture of war to a culture of peace demands co-operation from everyone. In order to change, the world needs everyone.”

- Federico Mayor, Director-General of UNESCO

The case studies of Afghanistan, Kosovo and Argentina respectively demonstrate a progression towards accountability at three levels. Of the three, Afghanistan is at the most premature point. Insufficient capacity within political and juridical institutions capable of mitigating past human rights transgressions has serious implications for ending a culture of impunity. Administration of justice towards crimes committed in Kosovo in 1998 and 1999 has seen more solid recourse in the high-profile ICTY indictments and cases, however domestic court systems in Kosovo and Serbia still face challenges in working towards a high standard of justice. Argentina’s domestic action taken towards accountability offers the most promising insight into progress towards reversing amnesty and impunity. Despite the international community’s influential role in supporting justice, the fact that many of Argentina’s reforms have evolved domestically and maintained themselves during crisis has greatly aided their accomplishments. The six approaches to accountability addressed in these case studies offer insight into judicial recourse and future lessons.

Present day Afghanistan captures transitional justice complexities and contradictions often found in early post-war situations. On one hand, many actors involved in the 30 year conflict’s human rights violations still hold political power whether directly by holding office or indirectly though networks of patronage and intimidation. Excluding these players from the political process is difficult as it risks alienating them entirely and fueling the already growing insurgency. On the other hand, many of these players stymie attempts to build institutions necessary for a viable state, namely the security sector and the judiciary. As these institutions fail to provide basic security and rule of law respectively, the central government loses legitimacy obtained through elections. The waning of government legitimacy causes people’s loyalty to shift towards local militias, warlords or anyone else who can provide security. This weakens the government, strengthening factional groups and leads to fragile rule of law and a fragmented nation. The state becomes entirely reliant on different groups, both local and international, for political support, reconstruction funds and other resources. This creates a lack of coherence regarding the way forward with respect to transitional justice and accountability since Afghanistan’s government is forced to pander to the needs of both human rights groups and possible human rights violators.

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291 Federico Mayor, Director-General of UNESCO, where sourced
A lack of institutions is a central limitation in Afghanistan’s pursuit of transitional justice, and fundamental to addressing accountability is rule of law. Without strong rule of law, justice has no trusted framework to monitor and mediate. Despite being an established process with clear rules and regulations, rule of law is also a tradition that takes time to develop through precedence, national dialogue and trust. Given the fact that Afghanistan faces a large reconstruction process, the lack of time has hindered the possibility for a coherent and reliable system to emerge. In light of this, the first step necessary to assure justice is the government’s official recognition of past atrocities. This is difficult because many factions would resist such moves given their implication in those atrocities. The government and international community must continue to push, in a coherent and unified manner, for establishment of historical record of atrocities committed. This allows the time needed for institutions to develop so that once capacity is present to begin trials, official record of the crimes exists and plausible deniability by alleged perpetrators is not possible.

One way to encourage development of legal and democratic institutions needed for rule of law is to incorporate cultural relevance into the Afghan legal system. Most important is Shari’a law that can unify the Muslim country, but other customary laws play an important role as well. A closer look at Pashtunwali, for example, reveals overlap between international law and elements of customary law, providing a possible way forward. Most pertinent to customary law is retribution. It is seen both in extreme form in the concept of badal in Pashtunwali and more moderately in saz. Similarly, elements of marginalization are seen in the arrangement of Ghundi. These traditional concepts can be used to harness currency for Afghans to jump-start not only mechanisms that make up rule of law but also the tradition and national culture fundamental to legitimizing rule of law. As rule of law is used to mediate disputes, the state grows in legitimacy and power. If this legitimizing process takes place, factions will begin to lose their loyalty as more people trust state processes and institutions.

International attention paid to developing rule of law has been limited and needs improvement. On one hand the “light footprint” model is important as it encourages Afghans to play a larger role developing their own system rather than relying on foreign orders. However, in this case, Italy has been appointed the leading nation charged with developing legal institutions under UNAMA, and has yet to devise a clear strategy, demonstrating the insufficient domestic weight. Furthermore, funding has been limited as more attention is paid to policing and security, which is necessary in the short-term, but does little in the long-term if the government is not legitimate in the eyes of its people. International attention must be coherent and comprehensive so that contradictions in the way forward are limited, allowing the Afghan government to feel supported when it faces the powers opposed to addressing the past. Only then can accountability begin to set stronger roots and give Afghanistan the legitimacy, institutions and political will necessary to address the past and move towards peace and reconciliation.

Kosovo’s justice system remains the weakest of Kosovo’s institutions nine years after the end of the conflict.\textsuperscript{292} Difficulties in institutional development are largely rooted in “lack of capacity to design, implement, and coordinate public policy.”\textsuperscript{293} This lack of capacity is not entirely due to

\textsuperscript{292} Human Rights Watch, “Kosovo Criminal Justice Scorecard” Human Rights Watch, 20 No. 2(D), March 2008.
lack of will, but rather a lack of time to adapt to technical approach as “components of the legal system in Kosovo originate in different legal traditions and are not necessarily fully coherent: this situation reflects the fact that a variety of different influences and origins (e.g. from UN, EU and various bilateral sources) are represented in the legal framework.” 294 Administrative inconsistency coupled with “lack of political will and insufficient prioritization by international judges and prosecutors, and reluctance on the part of local judges to pursue suspects regarded by many as war heroes, means that few cases have come to trial.” 295 Since 1999, domestic courts have only adjudicated an estimated 24 war crime trials. 296 Furthermore, there is no formal witness protection law in Kosovo, which leaves relocation abroad as the only option for many potential witnesses at risk, a move that most foreign governments do not accommodate. 297 Corruption, political interference and unprofessional courtroom tactics, such as lengthy questioning about irrelevant topics to wear down witnesses, also hinder war crimes trials in Serbian domestic courts. This has taken place recently in the trial of eight police officers accused of orchestrating a massacre in the Kosovo town of Suva Reka/Suharekë, a trial that began in 2006 and as of April 2008 has yet to conclude after reports of witness intimidation and a judge being replaced. 298

A recent ICTJ report describes the situation in Serbia as having “reached a critical juncture in its history. In one direction lies the path of denial, conflict, and isolation; in another, the path of transitional justice, democratic consolidation and European integration. The choices it makes in the next few years will be critical.” 299 Kosovo’s domestic justice system is now in transition from the UNMIK-led courts and judges to an EU-led international mission. Several measures are fundamental to ensure success of this nascent legal system. The EU-led domestic courts must work to close the accountability gap, subject themselves to greater transparency and scrutiny and open and strengthen institutions delayed for years by the UNMIK justice system, such as the Human Rights Advisory Panel and the Ombudsman’s Office. 300 Moreover, Kosovo’s judicial system is under-funded, which hinders its ability to function efficiently and effectively. Inadequate financial resources have resulted in lack of trained support staff, crowded and outdated facilities, little access to technological advances, and inadequate salaries, which have not been augmented since 2002’s five percent raise. This has all contributed to an inability of the domestic court system to attract the best-qualified personnel possible and to recruit non-Albanian

judges and staff. These problems aggravate lack of morale within the domestic legal system and the latter hurts Kosovo’s non-Albanian population’s chances to develop trust in the system. Trust and participation of all ethnic groups in Kosovo’s legal institutions are essential to facilitate rule of law.

Despite the shortcomings that the UNMIK-led justice system in Kosovo led to and the lack of support Serbia’s domestic court system demonstrates, the European Union-led justice system in Kosovo has the legislative support of the newly drafted and ratified Kosovo constitution. One facet of this new constitution is for the newly independent country’s legal system to follow all components of the Ahtisaari plan, the plan for initially supervised Kosovo independence proposed by the UN Secretary-General special envoy. Central to the Ahtisaari Plan are key minority rights and a commitment to legal transparency. The Kosovo Parliament, as part of the new constitution, also invited the European Rule of Law Mission (EULEX) and NATO KFOR security forces to oversee implementation of this legal platform. Intrinsic reforms instituted since 2006 will aid in judicial system capacity building. Since 2004, the judiciary has established the Kosovo Judicial Council (KJC), an independent body within the system that has, with international training, taken over administrative responsibilities. The KJC sets administrative policies, budgets, has responsibility over judicial selection, has implemented special protections for minority candidates and developed a more efficient procedure for hiring and removing judges. The KJC adopted a Judicial Ethics Code in 2006, under which, as of 2007, all judges have been trained. While Kosovo Serbs’ refusal to participate in legislative activities in the new government hurts the chances for the community to develop the trust required to facilitate rule of law, the Helsinki Committee in Serbia has taken initiative to implement a project in which Kosovo Serbs south of the Ibar River, where 70 per cent of Kosovo’s Serbs live (mostly in enclaves), will participate in a dialogue among the community on how to “fully exercise their human, minority, socio-economic and political rights through Kosovo institutions instead of remaining on the margins of Kosovo society and a window-dressing for the official Belgrade’s territorial claims.” If dialogues like this continue and include those within the Kosovo Serb community willing to take advantage of Kosovo institutions’ hopes to include non-Albanians in governance, perhaps with time, open dialogue and participation will rise to a level that could foster rule of law.

It is encouraging that since Kosovo’s declaration of independence, the Serbian government has not conducted any military-led violence in Kosovo nor cut off electrical grids, as threatened. However, the first month following independence saw violence, as Kosovo Serbs in the predominantly-Serb northern part of the country protested, rioted, and destroyed border posts. They held demonstrations in ethnically divided Mitrovica, and broke into and briefly occupied a UNMIK court. Bosnian Serbs held demonstrations in Banja Luka, de-facto capital of the Republika Srpska. The Serbian government took no measures to quell these outbreaks of violence, and possibly supported them, in order to provoke violent Kosovo Albanian-led reprisals and cast negative light on the Kosovo Albanian community in the face of the recent

302 American Bar Association, 
declaration of independence, which the Serbian government vehemently opposes. In order to more effectively hold the possibly thousands of participants in atrocities in Kosovo and Serbia accountable for their actions, there must be massive legislative changes, requiring a surge of political will to achieve. The Serbian government must also increase its support to the Belgrade War Crimes Chamber as well as its cooperation with the Kosovo court system and its investigations.

Encouragingly, with the exception of the few previously mentioned incidents, the former Yugoslavia has remained stable since Kosovo’s declaration of independence in February 2008 and Kosovo Albanians have not committed any violence since independence. It is imperative that Hashim Thaçi and Kosovo Albanian politicians continue their commitment to the aspects of the Ahtisaari Plan, and that all sides refrain from violence. This will help ensure that the legal reforms and measures to guarantee rights for non-Albanian minorities as agreed by Kosovo and international authorities be followed through in order to ensure the best chances of long term peace-building and reconciliation. With this, Serbian government and popular support of the Belgrade War Crimes Chamber, the requisite time for trust to build, the enclave phenomenon and climate of fear therein to be resolved, and unaddressed cases to be built and adjudicated, progress towards peace and reconciliation through accountability could progress to the level Argentina has attained.

Loss of government legitimacy plagued Argentina as a result of the Dirty War. The 1983 democratic elections ushered initial reactionary policy and truth commission investigations. However, because of still highly influential military presence, attempts at accountability were unsustainable and further stalled by Due Obedience Law, Full Stop Law and subsequent pardons. Arguably, domestic and international pressure in the 1990’s pushed accountability of past human rights abuse to the forefront and proved pivotal in bringing about justice. The 2005 ground breaking ruling declaring amnesty laws unconstitutional brought a wave of applause from the tireless and previously largely unrewarded domestic and international human rights groups. Accountability’s progressive success since the turn of the twenty-first century provides insight into its own sustainability and implications for future justice.

Argentina, of the three cases examined, is at the highest stage of development in reversing amnesty and impunity. Though the international community played a prominent role in Argentina’s accountability accomplishments, most of the sustained efforts evolved and continue domestically. This is vital as it allows Argentina’s justice advocates to see their efforts acknowledged and addressed by their own legal system, and for the country as a whole, demonstrates its newly constitutionalized position regarding justice to all implicated in crimes.

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and its Nunca Mas (Never Again) policy. Domestic perseverance re-legitimates the faith in the government lost during the Dirty War and its subsequent years and has re-established rule of law, as the “prosecutions and trials, as long as they are held under strict and fair trial guarantees, are necessary and even desirable ingredient in any serious effort at accountability.” The country’s weakened financial state in the late 1990s and early 2000s, the emergence of a more socially progressive government and the nearly thirty years passed since the onset of the junta have also fueled the marked changes. Working together, these demonstrate that Argentina was to be taken seriously in its endeavors of reform of addressing its present conditions and past crimes and fostering a more ideal breeding ground for change. Reopening cases and re-sentencing of various perpetrators, including high-ranking officers, has strengthened rule of law, gaining favor for both previous and present Kirchner administrations. This change also says much about the new society Argentines are supporting “out of a desire to draw a ‘thick-line’ with the past: [where] there will be no privileged defendants, the plight of victims will not go unrecognized, and the abuse of power will be checked.” In other words, accountability is in the forefront, and most demonstrative of this change are trials subjecting perpetrators to the same juridical criterion as any other. If a faster-paced judicial pursuit and trial pattern is brought about, it would further support rule of law’s strength since the extended waits have aggravated the situation. Continuation of trials will provide great potential for sustained justice and victim reparations.

Deterrence has played an important role in Argentina’s progress, though because human rights abuses such as torture in prisons and occasional kidnappings persist, deterrence as a product of dissuading legal consequences is contestable. There are, however, overarching deterring mechanisms: globalized interconnectedness and a generational shift. Increasing recognition of Argentina’s accomplishments in the international community has led to upholding standards that work favorably for Argentina’s development, regardless of their roots in trade or upholding good standing political relations with neighboring countries. Moreover, many of those in positions of power today are part of a larger generational shift that lived through the Dirty War and are now active in influencing change. Their respective positions create an inadvertent deterrence mechanism to future human rights violations. For Argentina’s future progress, the combination of outside pressure to uphold standards and ameliorating internal weaknesses in implementation, the respect for and application of human rights can be deepened. Torture in prisons and kidnappings must be addressed and consistently legally reprimanded to generate a more sustainable dissuading recourse.

Domestically, both the Argentine citizenry and the government have made tremendous progress recording past’s crimes and incorporating them into contemporary Argentine society and identity. Various monuments, museums, advocacy organizations and analysis that surround the Dirty War past are addressed in the quotidian and support in solidarity the retributive outcomes for victims.

Argentines no longer heed their saying en algo andará, no te metas, as they are supported by strong rule of law, implemented justice and a large domestic and international human rights family. Valiant steps towards accountability in Argentina have tremendously evolved over the past eight years, allowing those subjected to the state terrorism of thirty years prior to finally

309 Juan Méndez, 277
proceed with the possibility of finding resolve and a certain sense of justice. Reaping accountability’s benefits lies in addressing the weaknesses, and if successful, will prove exemplary of sustainable success for the rest of the world and finally bring justice to all entitled.

Final Remarks

Central to this research has been the realization that accountability arguments are highly case-specific. Though broad generalizations regarding overarching effectiveness of concepts towards accountability are difficult in real world examples, they guide justice in the necessary contexts. Each argument is multifaceted and “can be fulfilled separately but should not be seen as alternatives to one another.”

Though amnesty laws facilitate more rapid termination of conflict, they are major hindrances to long-term reconciliation and trust in rule of law, since it is, according to Juan Mendez, “increasingly recognized that making state criminals accountable says something about the democracy that we are trying to establish, and that preserving memory and settling human rights accounts can be a part of the formula for lasting peace, as opposed to a lull in the fighting.”

Our research has demonstrated that accountability varies in each case, with Argentina’s success being the most evident. Despite each transitional case being substantially different from each other - some with ethnic cleansing, some with previously established rule of law, others having never experienced rule of law, one three decades past since onset of the conflict, others enduring their third decade of fighting - in the end they “incorporate the factor of the relative adherence of political leaders to the value of human rights and the rule of law, as well as the ability of the human rights movement (domestic as well as international) to push its agenda onto the national debate,” according to Mendez. Argentina offers hope and insight for both Kosovo and Afghanistan.

The ICTY’s adjudication of crimes committed in the conflict of 1998 and 1999 provide a platform of justice and accountability that has, until now, been lacking in Kosovo and Serbia domestic judicial institutions. As long as the transitional UN and new European Union-led justice system in Kosovo adhere to recommendations given by the international community and recent internally sponsored judicial reforms, the stage will be set for the newly independent country’s legal system to operate efficiently, effectively and, most importantly, transparently. In the long term, this will lead to increased trust of the population in the legal system and between the ethnic groups in Kosovo.

Afghanistan is still in the midst of a post-conflict scenario. There is a vibrant insurgency, and amnesty laws have been an impediment to accountability despite a declared government commitment to human rights and an accountability action plan. Warlords still hold political influence and have stymied development of the institutions needed for rule of law. With time, transparency, and proper international involvement, there may be come a time, as in Argentina,

310 Juan Méndez, 255
311 Ibid, 257
312 Ibid, 272
when the factional interests wane, rule of law becomes paramount and amnesties are reversed, bringing an end to impunity.

It is vital to perceive each argument in favor of accountability less as a result and more as a step in the process of achieving the best possible outcome in the long road towards peace and reconciliation in post-conflict settings. This allows effectiveness of deterrence, retribution, marginalization, incapacitation, rule of law and establishing a historical record to manifest themselves to varying degrees of strength and connectedness in each transitional case. In hand with time, domestic support, international pressure, institutions advocating rule of law and political will, likelihood of a more sustainable blueprint for future justice grows. The success of the process rests on upholding these standards of accountability because advocating truth and justice is necessary and offers the best support for human rights and the realization of democracy and justice.
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