Acceptance of International Criminal Justice through Fragmented Domestication

The Case of Kosovo

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Content

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1. Introduction

In recent years, international criminal justice has manifested itself in many forms and shapes, and has been used by national and international actors to pursue different goals, from accountability to reconciliation, while attempting not to disrupt peace processes in post-conflict areas. While the existence of international criminal justice is not questioned, the levels to which countries and their nationals recognise, understand, and support its existence are not entirely clear. The initial assumption is that the acceptance of international criminal justice is dependent on various factors, including the context of the conflict, the mechanisms used as part of any retributive processes, be they national institutions or local, and the time of the evaluation of such acceptance. Taking into consideration the diversity of circumstances and situation countries, one may argue that the acceptance itself differs from one context to the other, and thus the recognition and acceptance of international justice differs from country to country depending on the particular circumstances and the nature of the conflict.

The acceptance of international criminal justice can be looked at from different perspectives with due consideration to the characteristics of the society and the country, on which acceptance depends. While in general, acceptance can be mostly observed and evaluated either through the social context of the recognition of the work of international institutions, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Court (ICC), or through the cooperation and fulfilment of the obligations arising out of international treaties, the case of Kosovo must be looked at from a different perspective. As a newly established state, Kosovo is characterised by a process of state building and establishing an infrastructure of justice. One of the most significant approaches to evaluate the acceptance of international criminal justice is through observing the process of the fragmented domestication of its norms and principles that has taken place as a strong component of the legal infrastructure of justice.

This chapter looks at the legislation adopted in the recent years to evaluate to what extent norms and principles of international criminal justice have been domesticated into national legislation. Although there is no strict definition of acceptance of international criminal justice, this domestication of norms in itself can be considered a segment that indicates its acceptance. Our aim is to understand the dynamics affecting this domestication, the positioning of Kosovo in the international arena, and the reasoning and circumstances for the introduction of such changes or legislation, namely if they were introduced merely as a means of addressing a

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temporary issue or were part of a wider process. Thus, the first part of the paper showcases an existent pattern of legislation which, although not adopted at the same time, indicates a legal recognition and acceptance of international criminal law that has taken place through a process of fragmented domestication of international norms and practices

The chapter will also seek to provide answers on the subjective aspects of such domestication, that being the level of understanding of the importance and implication of such domestication. The starting point of the analysis is the presumption that the majority of the legislative agenda was induced by international bodies. Thus, an important factor in determining the level of acceptance of international criminal justice through the domestication of the legal norms in national legislation is identifying whether there was intention and understanding of the domestication process by the national actors involved. Acceptance as a phenomenon can take place consciously or unconsciously, by means of initial non-resistance, that can be developed in silent recognition to the level of appreciation and intentional recognition or domestication. In the case at hand, the domestication itself can be seen as acceptance. Nevertheless, an analysis of the intentional understanding of such a process would add to the initial stance, and could contribute in determining a stronger level of acceptance.

The second part of the chapter focuses on the policy behind such domestication, and analyses the reasons behind it and the actors who played the major roles in pushing for such domestication. For that purpose, as part of the research activity several interviews were carried out during October 2015 in Kosovo, with some of those involved in the legal drafting processes, as well as representatives of the Government, judges, prosecutors, legal experts assisting the drafting process, Civil Society Organisation (CSO) representatives and individuals from the international community. The chapter offers the perspective of the local authors involved in the drafting of the provisions to demonstrate the level of understanding and acceptance of such norms and the importance of the process and its effects in terms of creating a fragmented pattern of domesticated international criminal justice, and also the level to which the local actors rely on international law to push forward certain issues as a way of acceptance of ICJ.

2. The Domestication of International Criminal Justice Norms as an International Obligation and a National Necessity

The duty for the criminal prosecution of grave violations of the law, that once were considered as the sole responsibility of the country that had jurisdiction where such crimes occurred, has been expanded beyond the borders of national systems. The Nuremberg Tribunal after World War II ended the traditional concept and contributed to expanding the responsibility for such crimes to an international level. It was considered that certain acts occurring within national borders cannot be tolerated and are considered to violate international law (Osofsky, 1997, 194) and add international responsibility to national. As a result of the increase of the recognition that some norms transcend national borders, the level of granting legitimacy of terrible abuses by governments has been limited (Brownlie, 1990, 564-80).

The idea of national and international responsibility emerged into a unified approach to sanction human rights violations. Such efforts can be observed in the work of the UN and the international community in articulating collectively the substantive and procedural requirements for the administration of justice (UNSG, 2004). International criminal justice has

developed throughout the years and has taken many forms and shapes, beginning with the establishment of the International Military Tribunal in Nuremberg and the introducing of the first criminal provisions under international law such as 'crimes against humanity' (Charter of the Nuremberg Tribunal, art. 6.c) and the adjudication of genocide (Van Schaack, 1997, 2259). This development has continued with the drafting of internationally recognised conventions, including, the Geneva Conventions; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the new international criminal law statutes, such as the ICTY, ICC and International Criminal Tribunal for Rwanda (ICTR) Statutes (Ruti 1999, 285-297). Many of the principles enshrined in these conventions have reached the stage of universally binding norms, known as *jus cogens* norms (Clark 1995, 295).

The process of the development of the codification of international criminal norms culminated in the drafting of the Rome Statute and the setting up of the International Criminal Court, which, despite its limited jurisdiction, has made it increasingly difficult for states to avoid their obligations to impose individual accountability for international crimes (Akhavan, 2001, 27). The negotiations on the process of the adoption of the Rome Statute have contributed significantly to the internationalisation of human rights and humanitarian law norms (ibid, 28). Many authors support the view that international treaties and customary law impose a general obligation on the international community to bring perpetrators of war-crimes to justice (Bass, 2005; Othoman, 2005; Shraga 2004). It has been contended that for some obligations, such as the prohibition on genocide, the possibility of derogation through international agreements does not exist; *a fortiori* they may not be set aside by national legislation and countries are obliged to abide by them (IACHR, 1993).

Such consolidation of international norms raises the question of the acceptance of these internationally recognised obligations and the acceptance of international justice more generally. According to John W. Bridge 'the manner of formulation has a direct bearing on the possibility of acceptance' (Bridge, 1964, 1264) and there are three means by which this may be fulfilled. The first being the drafting of a code of international criminal law; second, the use of a number of international conventions enshrining international crimes; or the third, the incorporation of international criminal law into municipal laws (ibid, 1264). When countries are signatories to these treaties the obligation to carry out justice is clearly spelled out, yet the concern is what is to become of justice in the countries that have not ratified. Even 'for states that are not party to such treaties minimally international law imposes a duty on them to prosecute, punish or extradite offenders in respect of certain core universal crimes' (Mugwanya, 1999, 701).

A society's ability to deal with its past is heavily dependent on characteristics and outcomes of any previous conflict, as well as characteristics of the post-conflict society itself (Lie, Binningsbø and Gates, 2007, 8-9). Thus, it is important to understand the contextual background of Kosovo, its legal system, and the historical developments that make Kosovo a post-war country where the impact of international and national justice mechanisms can be evaluated. To evaluate the acceptance of international criminal justice in Kosovo, there are several important historical facts. Following the dissolution of the Federal Socialist Republic of Yugoslavia,[2] Kosovo lost its autonomous status in 1989, and was under the occupation of Serbia (Trbovich, 2008, 233). In

[2] The SFRY was composed of 7 countries, and 2 autonomous regions, Kosovo being one of them.

the years that followed, a slow conflict emerged between Kosovo Albanians and the Serbian regime. The conflict was characterised as an inter-ethnic conflict, which cumulated in armed conflict. As the situation had escalated and the enormous violations of human rights took place, the international response was a campaign led by NATO, known as 'humanitarian war' (Roberts, 1999, 102), intended to halt crimes against humanity, and which resulted in a successful end to the war.

Consequently, in 1999 through a UN Security Council Resolution, Kosovo was put under the administration of a UN mission, which was tasked with the reconstruction of the country, including the building of the judiciary (SC Res 1244). Kosovo unilaterally declared its independence in February 2008. Despite its efforts, Kosovo has yet to enjoy universal recognition in the world, and consequently it is not a member of the majority of the international organisations nor the international treaties and Conventions subject to membership on these international institutions.[3] Therefore, Kosovo is neither a signatory party to any Conventions that fall within the ambit of international criminal justice, nor a signatory party to the Rome Statute. Nevertheless, a significant part of the norms and standards used by ICJ have been indirectly made binding on the judicial authorities in Kosovo, by means of recognition and domestication of these norms. In addition, and despite not being a member of the UN, Kosovo has continuously cooperated with the ICTY, as the main international institution with jurisdiction over the grave violations of human rights that occurred in the Former Yugoslavia. This can be seen by the fact that in 2003 (prior to independence), the Assembly of Kosovo (during the UNMIK Administration) enacted a law on cooperation with the ICTY (Lamont, 150). It is therefore important to emphasize that prior to the Kosovo's declaration of independence; the entire legislation drafting process was officially carried out by the UN administration.

The starting point of this analysis of the domestication of the norms of international criminal justice is the Constitution of Kosovo. The domestication of international criminal law into national law is a means by which states express their willingness to be bound by international criminal law (Bridge, 1964, 1264). In the absence of the possibility to become a contracting party, the Constitution foresees that the rights and obligations arising out of a number of international agreements and instruments are directly applicable in the Republic of Kosovo. Amongst these are the Convention against torture and other cruel, inhumane or degrading treatment or punishment; the Convention abrogating all forms of discrimination; and the European Convention on Human Rights (Article 22). The Constitution, in addition to recognising the superiority over national law of the ratified agreements, also accords such superiority to the legally binding norms of international law (Article 19). Thus, it creates a wide spectrum of norms of international law, for which the citizens of Kosovo can claim direct applicability under the broader interpretation of this provision. An interesting segment of the Constitution is the transitional provision, which amongst others foresees that three international judges at the Constitutional Court are appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights (Article 153).

[3] To date Kosovo is recognised by 111 Countries. Kosovo is a member of handful of organisations such as the IMF, World Bank, EBRD, CoE Development Bank, and regional initiatives as RCC.

Following independence and the new reality created which meant no more *de facto* competencies or UNMIK in Kosovo,[4] as part of the wider status settlement plan it was agreed that the EU would deploy a civilian mission to Kosovo. The deployment of the mission was enabled by an 'Exchange of Letters' between the President of the Republic of Kosovo and the EU High Representative, ratified in Kosovo as an International Agreement (Law No. 04/L-148). According to this agreement and the subsequent legislation, the mission, which included judges and prosecutors appointed by the EU based on a transfer of authority to do so, would have executive powers in the area of war crimes. Such legislation granted the EU mission in Kosovo (EULEX), exclusive competencies on war crimes cases until 2014, when, on modification of the mandate, some competencies were transferred to the local authorities (Law No. 04/L-274).

The borrowing or domestication of international norms can be observed in many laws that include provisions or chapters entirely borrowed from international criminal law, at different times and for different purposes. The most obvious example is the Criminal Code of the Republic of Kosovo that entered into force in 2013. The Code contains an entire chapter on criminal offenses against humanity and values protected by international law. Amongst others it lists crimes as, 'genocide, crimes against humanity, war crimes in grave violation of the Geneva Conventions, war crimes in serious violation of laws and customs applicable in international armed conflict, and war crimes in serious violation of Article 3 common to the Geneva Conventions' (Chapter XV, Articles 148 -177). It includes roughly 30 Articles that are borrowed, often verbatim, from international Conventions. The domestication can also be seen in the provision of the non applicability of statutory limitation for crimes against international law and aggravated murder (Article 111), this being a principle accepted universally by the members of the international community,[5] and mirroring instruments developed and used by the ICTY.

There are also sets of norms that replicate obligations under international law, which reflect recent developments in international criminal law. The Criminal Code contains a set of provisions that refer to actions of the commission of terrorism that are punishable under this Code (Articles 135-145). Less than two years after the Criminal Code came into force, another law was drafted and approved on the subject matter of 'terrorist fighters', but with a focus on foreign fighters. The law extends the scope of the substance by criminalising the mere action of leaving the country with the aim of joining any foreign military or armed groups (Articles 2-3). The practice of enacting such laws is not widespread, but there are countries in the region that have enacted similar laws, such as Bosnia and Herzegovina.[6]

The evolution of international criminal justice has introduced new institutions and procedures mainly focused on guaranteeing a fair trial, but also protecting the victims and witnesses. Kosovo, in its efforts to comply with the international standards, has introduced into the legal system these new practices and programmes, such as the provisions for procedural protection of the witnesses in the Criminal Procedure Code (Articles 131-2) aimed at protection witnesses. Similarly, the 'Law on Preventing and Combating Trafficking in Human Beings and Protecting Victims of Trafficking' reflects in its majority the standards and practices as required by

[4]It should be noted that the UNSC has never enacted a Resolution that would formally terminate the UN mission to Kosovo due to a lack of political backing. The UN office in Prishtina though has very limited competencies, mainly in cooperation with INTERPOL in criminal matters.

[5]The majority of these principles are enshrined in the UN Convention on Non Applicability of Limitations for war crimes.

[6] See: Reuters, 29 April 2014, Bosnia introduces jail terms to curb recruitment for Syria.

international criminal justice. The entire spirit of the law reflects on the principles enshrined within the 'European Convention against Trafficking of Human Beings'.[7]

The Kosovo legislation is also designed to meet the standards of treating grave crimes as extraditable. International practice has shown that there are various ways in which states cooperate in criminal matters, particularly through treaties in the areas of extradition and other forms of rendition, legal assistance, the transfer of criminal proceedings, the transfer of prisoners, the recognition and enforcement of foreign penal judgments, and the seizure and forfeiture of assets deriving from criminal activities (Bassiouni, 1992, 127). Such provisions have been introduced in the 'Law on International Legal Cooperation in legal Matters'. Not only is extradition permissible for violations of law, but the law specifically stipulates that crimes such as 'genocide, crimes against humanity, war crimes, and terrorism' cannot be treated as political crimes and thus fall within the category of extraditable offences (Articles 10 and 14).

International criminal justice has shifted towards a unified and universal approach to the need for prosecution. Although it has taken some time to establish the ICC, it is now set up and 124 countries have signed the Rome Statute. Kosovo is not a signatory member of the Rome Statute. It is nevertheless contractually required to cooperate with the ICC and the ICTY. Kosovo entered into a contractual obligation with the EU through the Stabilisation and Association Agreement.[8] Once the agreement enters into force, Kosovo will not only be required to cooperate with the ICC and the ICTY (Article 3), but is also required to 'abide to the Rome Statute of the International Criminal Court and in this respect to take the necessary steps for its implementation at domestic level' (Article 6). Thus, although the ICC does not have jurisdiction in Kosovo, its jurisdiction is nevertheless indirectly binding as concerns the compliance with the standards set in the Rome Statute.

Consequently, Kosovo although not a member of the UN, or the majority of international organisations and conventions, has not only chosen to abide by international norms, but has chosen to domesticate numerous provisions by either borrowing the exact terminology from the international conventions, or by applying the spirit of the conventions in national legislation. Thus, has it created an entire domestic level of application of international criminal justice norms which, although introduced in different time-frames, now form part of a national system of norms.

3. Policy for the Domestication of International Criminal Justice or Fragmented Acceptance

The domestication practice discussed in the previous section has shown that there is a pattern of international norms domesticated into the national legal system of Kosovo. The domestication of these norms within the Kosovar legal system in itself amounts to the acceptance of international criminal justice. The level of acceptance depends on the scale of a conscious process of domestication. Acceptance could be a mere non-resistance by the actors

[7] The harmonisation and compliance with EU practices has been noted in the EU Second Report on the progress achieved on the implementation of the Visa Liberalisation roadmap, COM(2014) 488 final; Ref. Ares(2014)2454691 - 24/07/2014

[8] The SAA Agreement is an agreement concluded by the European Countries with countries aspiring to join the European Union: Stabilisation and Association Agreement Between Kosovo, Of The One Part, And the European Union And The European Atomic Energy Community, Of The Other Part;

involved, or voluntary recognition and acceptance of these norms with a clear understanding of the importance and the impact of the incorporation of these norms in the legal system. This research focuses on the local stakeholders' acceptance, through interviews conducted with the institutions and individuals involved in the legal drafting processes and others in charge of the enforcement into practice. The results of the interviews show that there is no clear answer, and several aspects must be taken into consideration, such as when the norms were introduced, the actors who initiated such norms, and the response from the local actors involved in the drafting process. There is not one single pattern that would answer the question of the acceptance of international criminal justice, and the rationale for domestication varied for each of the provisions detailed above. The manner in which international criminal law should be formulated and its acceptance by states are naturally germane (Bridge, 1964, 1264), and so the analysis focuses on each piece of legislation separately to find similarities between the actors introducing the norms, the reasoning behind their introduction, and level of conscious acceptance.

The acceptance of international law in the Kosovo context must be analysed with due consideration for the impact of being an autonomous province of the Former Socialist Republic of Yugoslavia, and the heavy presence of the international community and the UN administration in Kosovo for almost 10 years. As the UN report shows, in post-conflict settings, legislative frameworks tend to show accumulated signs of neglect and political distortion and in many cases do not reflect the requirements of international human rights and criminal standards (UNSG, 2004, para 27). The UN has attempted to create mechanisms to act as an efficient response in post conflict societies, including measures to develop transitional codes, guidelines and regulations for intermediate usage (UN Comprehensive Review). Following the war, and after Kosovo was put under UN administration, the UNMIK mission enacted numerous regulations and other legal acts, including in the field of the judiciary,[9] including the drafting of the provisional Criminal Code of Kosovo, which amongst other things contained provisions on the violations for 'criminal offences against international law'.

Looking at the current legal setting of the Kosovo legislation there are many provisions that are domesticated from international norms. In the Criminal Code of the Republic of Kosovo, which has entered into force only in January 2013, the provisions criminalising actions against international law are not a novelty. As most of the responders to the study have contended, these norms were passed on and preserved from the Provisional Criminal Code which was promulgated during the UNMIK administration, at a time when the legal drafting was the response of the international community working within UNMIK.[10] More interestingly though, these provisions were not introduced initially in the Provisional Code, since similar provisions existed in the former Criminal Code of Yugoslavia, more specifically the Penal Law of Kosovo, as being the applicable law in Kosovo until the entrance into force of the Provisional Code. As regards these provisions, when asked for the main reasons and influences of why such provisions were kept in the law, the answer from the responders varied. Some contend that given that these are standards that existed in the law beforehand and it was reasonable that they continue to apply, while others relied on the fact that these are international obligations that must be enshrined in the national legislation. Retaining these provisions in the Criminal

[9] UNMIK Regulations & Administrative Directions, promulgated by the Special Representative of the Secretary General, available at http://www.unmikonline.org/regulations/

[10] Personal Interviews with members of the Working Group on the Drafting of the Criminal Code.

Code is seen as a necessary step, being a set of norms by which Kosovo must abide. The continued application of these norms, although in principle considered as a measure for fulfilling an obligation of Kosovo to adhere to the highest international standards, shows continuation of the acceptance of the positive norms of international law.

The norms incorporated in the prior Yugoslav code were more limited in scope, whereas the provisions in the newly adopted Criminal Code include novelties borrowed from international criminal justice norms, including definitions. Several provisions, such as the ones regarding the chain of responsibility were borrowed from the Statute of the ICTY.[11] The introduction of the new procedural forms and institutions, despite the fact that they may have 'triggered some resistance in the beginning due to a lack of understanding'[12] have been met with greater understanding and acceptance, up to the scale of 'appraisal as being very necessary and useful for the Kosovo setting'.[13] Some of the responders to the interviews had a more positive stance towards the domestication process, by considering the incorporation of such provisions as 'a positive approach and innovative and the first on the region.[14] Amongst these are those that contend that the domestication of such norms has led to the creation of an 'internationalised set of norms within the national system'.[15]

There is a common understanding amongst local and international stakeholders that most of the legal drafting that has been done in the post-war period has been strongly influenced by international stakeholders having had a major impact in the drafting of these laws, including the novelties introduced in the Criminal Code, the Criminal Procedure Code, the Law on Trafficking, the law on International legal Cooperation, Foreign Terrorist Fighters and trafficking of human beings. In other words, the 'legislative agenda has been driven by the international stakeholders present in the country',[16] and in the majority of occasions has faced no resistance by the local actors and has rather been accepted and welcomed by them. What the overall results of the interviews show is that often there has been a significant positive approach towards the application of international standards and the domestication of the norms as being a necessity for any democratic society that aims for membership of the European Union or other international institutions. It is considered that the internalisation of the entire corpus of international law, and particularly of the corpus of norms related to international criminal law, is the result of 'the fragile status of Kosovo in the international arena, and thus such domestication is done with the purpose to fill the gap and create mechanisms that are effective in combating criminality'.[17] Nevertheless, as it is further elaborated below, there have been occasions, where the enactment of such legislation has been guided by the need to find a compromise with the EU and the international community in order to achieve the goal of EU integration, and as a necessity, that would bring the country forward in its claim for international recognition.

[11] Personal Interview with IS, University professor/Member of CCK drafting group, Prishtina October 2015

[12] Personal Interview with BK. Prosecutor/expert on CCK drafting, Prishtina October 2015; It should be noted that responders, local and international, acknowledge that in the beginning when such provisions were introduced, they encountered difficulties due to the lack of knowledge by prosecutors and judges.

[13] Personal Interview with RH, Former Chief Justice/Member of CCK drafting group, Prishtina October 2015

[14] Personal interview with BU, university professor/member of CCK drafting group, Prishtina October 2015.

[15] Personal interview with IS, university professor/member of CCK drafting group, Prishtina October 2015.

[16] Personal interview with AA, KJC Secretariat, Prishtina October 2015; Personal interview with EM, former KPC Secretariat, Prishtina October 2015.

[17] Personal interview with EH, Former CCK President, Prishtina October 2015.

There are practices entirely opposite to the above, in which the international community has had a major impact on the determination of legal norms, as well as on their practical application. A practical example is the direct applicability of a particular set of conventions, and the legally binding norms of international law by virtue of tacit inclusion in the Constitution. The obligation to incorporate such provisions in the Constitution of Kosovo was set out explicitly in the Ahtisari Plan, which was the comprehensive proposal for the Kosovo Status Settlement presented at the UN prior to Kosovo's declaration of independence. Amongst others, the document contained a set of proposed articles to be incorporated in the Constitution of Kosovo, as an obligation for Kosovo to provide that 'the rights and obligations provided in these international instruments and agreements are directly applicable and have priority over the law, and moreover that no amendments shall diminish these rights' (S/2007/168/Add.1). This provision does not require much interpretation or explanation since it is self-explanatory and it was clearly set out as an obligation for the legislative body drafting the Kosovo Constitution, that when the drafting takes place a provision on the direct applicability of the international conventions must be included, including the list of conventions.

There have been other cases where the local actors played a more active role relying on the international criminal law norms, while performing international obligations. As part of the Kosovo-Serbia dialogue facilitated by the EU, the first agreement on the principles of the normalisation of the relations contained an obligation for Kosovo to enact an Amnesty Law, with the purpose of facilitating the reconciliation process. While the need for the law itself did not open much of a debate, the content of the law was subject to disagreement between the parties, as Kosovo was firmly set on the exclusion of certain categories of crimes from possible amnesties. Moreover, the Amnesty Law was subjected to a Constitutional Review process. The Constitutional Court (Case no. KO108/13) held that the Amnesty Law itself did not violate the principles of international law. It did, however, strike out certain provisions that it considered not to be in compliance with international norms and practices. In practical terms, the Constitutional Court, by holding the law as not in compliance with the international norms, has created a domestic practice as to the application of international law regarding amnesties. The Constitutional Court has 'created a standard of the application of the international law, not only in the case of the Law on Amnesty, but also in other cases that related to the application of the international criminal justice, and international human rights norms by the national courts'.[18] Thus, the Constitutional Court has assumed the role of creating secondary legislation in the form of unifying practices in absence of direct applicability of international treaties.

However, the study shows that there are cases in which the initiative is not driven by international but rather by local actors. Some contend that in many cases the need for the incorporation of these norms has been done 'as a necessity for the society and the judiciary',[19] and there have been many initiatives undertaken by 'civil society and other actors claiming justice from the victims',[20] such as the setting up of the 'National Council on Survivors of Sexual

[18] Personal interview with EH, Former CCK President, Prishtina October 2015
[19] Personal interview with RH, Former Chief Justice/member of CCK drafting group, Prishtina October 2015
[20] Personal interview with BB, Civil Society, Prishtina October 2015

Violence during the War', including a sub-group mandated to work on issues concerning the access to justice of the victims of sexual violence during the war.[21]

As observed above, acceptance of international criminal justice in terms of legislation depends on additional factors other than the mere domestication, including the understanding of the legislators. Another component useful in determining the acceptance of ICJ norms is the invoking of such provisions by the practitioners, such as lawyers, judges and prosecutors. Until now, international actors have had exclusive competencies to handle crimes against international law and war crimes[22] so it is rather difficult to accurately analyse the level of acceptance by local stakeholders despite the fact that the international judges and prosecutors do rely heavily on these provisions and the practice of the international criminal courts when rendering their judgments. As it has been elaborated above, the responsibility for prosecuting and trying war crimes until 2014, with the introduction of the new mandate of the EULEX mission, has been the exclusive responsibility of the international missions, thus giving the local stakeholders the 'comfort ability' of the spectators on the process. Given that EULEX still retains such competencies, the time-frame for observing the readiness of the local stakeholders to undertake such competencies has not been expressed. Though it may be too early to analyse this, there is recent willingness of local judges and prosecutors to undertake cases related to war crimes. Through informal discussions, it is understood that for years there has been 'resistance' on part of the judges and the prosecutors to deal with war crimes, mainly due to the social circumstances. In the past year (2015), several developments have taken place, such as the creation of a War Crimes Department within the special prosecution, and the assignment of judges to deal with sexual crimes during war. [23] This is considered to be an evolving process, given that day by day, 'the defence lawyers are relying on standards set out by the international tribunals and international norms, while arguing their cases,[24] thus pushing for a more proactive approach by local judges and prosecutors, an awareness which is slowly increasing.

The process of acceptance is dependent on the actors involved and their understanding of the consequences of their actions. Acceptance can take place in case of expressed consent to an obligation even in the absence of an understanding of the consequences as in the case of the SAA provisions. At times, such acceptance may take place as understanding an obligation that needs to be performed rather than the acceptance of the norm itself. Such is the case of the introduction of Article 6 in the SAA Agreement. Kosovo accepted the text proposed by the EU, imposing an obligation to recognise the jurisdiction of the ICC and the norms of the Rome Statute with no discussion, based solely on the contention of the EU that it is important that such convention be accepted.[25] The practitioners understand the legal consequences of the application in practice of the provisions of the Rome Statute. Kosovo has recently been faced with an example of international pressure, namely approving the legislation for the setting up of the Specialised Chambers and Specialised Prosecutor's office, to try alleged war crimes. Though it may be too early to realistically discuss the acceptance of such a constellation, as it would

[21] The sub-group was set up under the mandate to draft an action plan that will facilitate the ease of access to justice for the victims of sexual violence. See: http://www.president-ksgov.net/?page=2,6,4116#.VkjhsdKrRko

[22] War crimes have been under the competence of the international missions, namely judges and prosecutors of UNMIK, then EULEX, up to 2014 with minor involvement of locals.

[23] As part of the work of the justice institutions, in drafting an Action Plan on Access to Justice for Victims of Sexual Violence, 10 judges were assigned to be trained on issues of sexual crimes, and also the functionalising of the War Crimes Department on the Special Prosecution, staffed with local prosecutors. See supra 14.

[24] Personal interview with TRR, defence lawyer/member of CCK drafting group, Prishtina October 2015.

[25] Correspondence with DSH, member of the technical negotiation team.

require a more in-depth analysis of the entire process, it is interesting to note that despite the major arguments brought forward by the Members of Parliament against the setting up of such type of hybrid Court, the mere obligation to prosecute war crimes was never subject to the discussion. While it is still too early to discuss the acceptance or not of the work of such a court in the future, from the discussion in public and in the Assembly as part of the process of the approval, there are two facts to be emphasised. On one hand, it is interesting to see some of the MPs (former ICTY indictees), objecting to the creation of such a court, relying on statements that they cooperated with the ICTY in the processes against them, as they considered the tribunal legitimate, and believed in the justice it would render. On the other hand, a conclusion drawn from the discussion is that there is a certain resistance towards it for the fact that the court is mandated to try alleged crimes that have been committed by Kosovo Albanians, thus the court is seen by the MPs as lacking legitimacy and being discriminatory.[26] Such discussions support the initial assumption that the acceptance of international law depends on the context of the conflict and the party being tried.

4. Conclusion

The study of the acceptance of international criminal justice norms in a post war society, such as in Kosovo, first shows that this is a very complex issue, and no straightforward answer can be given as to whether international criminal justice is accepted. Such a question is open to the subjective interpretation of the actors involved in the process. As can be seen from other contexts, the 'strength' of the acceptance can vary from a mere non-resistance and recognition to the appreciation of and reliance on international criminal justice. One of the conclusions of this study, considering the view of the consulted experts, is that the level of acceptance differs from one context to another, and may vary at different times, but most importantly can be very subjective depending on the respondents, their background, education, and level of understanding of the international norms. Looking at acceptance from a more legal perspective differs slightly from the more social perspective of acceptance, which requires a higher level of understanding of the norms and their consequences. This result is related to the fact that the actions resulting in legal acceptance are merely undertaken by legal professionals that understand the importance of international criminal justice whereas, social acceptance depends on the level of the awareness of the society at large of these norms and their impact. By underlining the differences between legal and social acceptance it is important to keep in mind that a greater knowledge of international criminal justice does not automatically correlate with a stronger acceptance. Rather, this study shows that actors rather accept norms incorporation for different reasons and also depends on the timing and what is being accepted may also differ in time.

Starting from the initial assumption that the acceptance of international criminal norms can be achieved either through becoming parties to the international conventions or by way of domestication, one can easily conclude that Kosovo has legally accepted international criminal justice norms. That question, though, needs to be complemented with other factors that formed part of this study, such as who were the initiators of such domestication, how much role and

[26] For further understanding the discussion, see the transcripts of the Parliamentary Session http://www.kuvendikosoves.org/common/docs/proc/proc__2015_08_03_23_6096_al.pdf.

impact did the local actors have in the process, and was there an understanding that through the domestication of such laws, a process of acceptance was taking place. The answers to these questions vary. The process of domestication of international criminal law has taken place in a fragmented manner and at different timing, as well as for different reasons. As it has been elaborated above, the provisions that were introduced came into being at different times. Though it is clearly shown that the majority of these provisions were induced by the international actors involved, there is no clear pattern that these legal pieces were crafted with the same goal in mind. Hence, this indicates that even the international actors that pushed for such provisions had in mind the creation of such patterns.

These are crucial factors in determining the level of acceptance and understanding of such norms, which as shown vary from case to case. In certain processes, the local actors were much more involved and guided the processes than in others, where acceptance took place in the form of silence. At other times, although the domestication process initially took place with a lack of understanding, the acceptance increased in parallel to increased understanding. The importance of the understanding of the norms in determining the scale of acceptance has been showcased throughout the research. The degree of support of the process of approving such legislation into the national criminal law was higher in cases where there was belief that this would be beneficial for the country, while there was less enthusiasm for either mechanisms or legislation that were perceived as negative for Kosovar society. Even in such circumstances there has not been great resistance to international justice as such, rather a lack of trust in processes that are considered 'unfair and un-justified'. Some have taken the approach of seeing the benefits of international justice, as contributing in shedding light on the reality of the 'just war' of the Albanian nationals. In addition, it has been noticed that in some cases, adoption of certain legislation introduced and pushed for by international bodies even passed through un-discussed. This takes place in the belief that in return Kosovo will benefit in other areas of international integration as a reward for having undertaken such actions to comply with international standards and render international justice, thus considered 'a sacrifice for the greater good'.

Overall, one can conclude that Kosovo, by domesticating a set of norms into its national legal system, has indeed accepted international criminal justice. Such domestication, regardless of how it came into being, exists now and functions as a system of criminal justice norms within the national legal system. Moreover, the situation was considered by many responders to be even more advanced, beyond the mere recognition and acceptance of international criminal norms.

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