

Kosovo’s President charged with crimes against humanity and war crimes before Kosovo Specialist Chambers

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By: James Hendry

A late June Press Release from the Specialist Prosecutor’s Office (SPO) announced that the President of Kosovo, Hashim Thaçi and others were charged in April with crimes against humanity and war crimes, including nearly 100 murders, enforced disappearance of persons, persecution and torture within the jurisdiction of the Kosovo Specialist Chambers. The broader picture is that the

investigations of the conflict in Kosovo in 1999 leading to the indictment caused Thaçi to retire from talks scheduled for June 27, 2020 at the White House where President Trump was hoping to boost his image as a deal-maker on the world stage by bringing Serbia and Kosovo together. This Journal reported on the creation of the Kosovo Specialist Chambers and the office of the Specialist Prosecutor at https://globaljustice.queenslaw.ca/news/analysis-the-specialist-chambers-and-specialist-prosecutor-in-kosovo. The President of the Specialist Chambers announced that they were ready to receive indictments on June 28, 2017. The SPO did not start filing them until February of 2020.

This article will explore a couple of themes. One is about developments in Kosovo to fight impunity for war crimes and crimes against humanity during and after the Kosovo conflict 1998-1999. This first theme about the long-awaited filing of indictments with the Chamber fits into a broader second theme about systemic imbalances in international criminal law. On the eve of an international political drama President Trump who was hoping to be seen to be improving relations between Kosovo and Serbia which had remained at loggerheads since Serbian forces were forced out of Kosovo by NATO bombing in 1999. The President of Kosovo, which is a small, weak but loyal ally of the US, who was to be an actor in this drama had to forgo his role in it at the last minute. The second American Specialist Prosecutor in charge of the SPO had publicly announced the indictment of Thaçi in the Press Release mentioned above. However, part of this larger context included a letter by the US Secretary of State Michael Pompeo who told the Kosovars to submit to the Specialist Chambers war crimes process so that the US could defend it on the world stage when a short time later, an Executive Order issued by President Trump barred the entry of investigators with the International Criminal Court to the US along with other sanctions if they tried to investigate the situation in Afghanistan involving allegations against US nationals which was recently allowed to proceed (see Afghanistan Appeal).

The Kosovo Specialist Chamber and Prosecutor

To recap briefly, the Parliament of the Council of Europe called for investigation of alleged war crimes and crimes against humanity and crimes under the Kosovo criminal law by the Kosovo Liberation Army (KLA) in Resolution 1782 (2011) entitled “Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo”. This resolution was based on a 2011 Report of the same name by Dick Marty, Rapporteur for the Committee on Legal Affairs and Human Rights (Marty Report). The EU then established a Special Investigative Task Force (SITF) to investigate the allegations in the Report headed by an American Prosecutor who was succeeded by another American, who later became the first Specialist Prosecutor. In 2014, SITF said that it had evidence to indict senior KLA leaders, but that there was no viable court to file them with. The Specialist Chambers was the end product of a complex evolution of the investigation and its problems. It is an international court that is part of the Kosovo court system, operating under Kosovan law, sitting in The Hague. It was created by the Kosovo Parliament by agreement with the EU. Its jurisdiction extends to crimes committed from January 1, 1998 to December 31, 2000 in Kosovo, a window of time during and after the Kosovo conflict, a conflict eventuating in Kosovo’s declaration of independence in 2008.

Kosovo and the International Criminal Tribunal for the former Yugoslavia (ICTY)

The ICTY heard a few cases against KLA members. Carla Del Ponte, the Prosecutor for the ICTY, wrote in her memoirs that the KLA investigations were the most frustrating the ICTY undertook (Madame Prosecutor, Other Press, 2009, p. 278): there were no functioning institutions of government to gather evidence; the Albanians were a very closed society and the few Albanians in Kosovo who would provide evidence required protection and sometimes resettlement for themselves and their families; the Serbs did not allow access to alleged Serb victims; and even judges were afraid of Albanian vengeance (pp. 279-80). There seemed to be no way to build cases against the large number of KLA members who should have been investigated. The intimidation of witnesses was ubiquitous (pp. 286-288).

A ICTY Case Information Sheet reveals that Ramush Haradinaj, former KLA commander of Dukagjin Operational Zone, and elected Prime Minister of Kosovo, was indicted before the ICTY in 2005, charged with individual criminal responsibility for the crime against humanity of persecution (harassment, torture, deportation, murders, rape) and war crimes (cruel treatment, murder, torture, rape). The prosecution also alleged that he and two other KLA members were members of a joint criminal enterprise whose alleged purpose was to consolidate KLA control over the Zone by the unlawful removal and mistreatment of Serbian civilians and those of various ethnicities who were perceived as collaborators. The Chamber granted witness protection to more than a third of the 100 witnesses at the trial (Del Ponte, p. 303). In the end, the Chambers was not convinced beyond a reasonable doubt of the joint criminal enterprise. All three were acquitted by the ICTY in November 2012 here. The Serbs cried foul. Apparently, Thaçi was never on the ICTY lists, despite rumours he was being investigated.

The context

The context of these events is important. The European Union had exerted pressure on Kosovo to establish the Specialist Chambers which was meant to end immunity for war crimes and crimes against humanity committed by members of the Kosovo Liberation Army (KLA). Many of the KLA leaders were potentially subject to being charged – and have been charged – in what is widely regarded in the country as its war for independence. They were considered by many as the Kosovar heroes of the struggle and rose to the top of the current political order. Thus, EU pressure to establish an entirely international court within the Kosovar court system but headquartered at The Hague created to punish KLA war crimes and crimes against humanity met opposing popular pressure not to try Kosovar's heroes.

A Truth and Reconciliation Commission?

In 2017, Thaçi commenced establishing a Truth and Reconciliation Commission to expose the truth about what happened during the conflict and heal the divide among members of the various communities. Thaçi has said that the Commission will support the judiciary in prosecuting war crimes. Kadri Veseli, whose indictment was announced with that of Thaçi recently, has been quoted as saying thousands of victims are awaiting justice for dozens of massacres for which no one has been

convicted. Recent remarks by the US Ambassador to Kosovo at a March 2020 preparatory meeting show its support for an objective process that is victim-centred and inclusive.

An attempt to repeal the Specialist Chambers

In December, 2017, President Thaçi allegedly supported an initiative by more than 40 MPs out of 120 to abolish the Specialist Chambers also and insisted that he would sign any legislation abolishing it here. This was presumably based on the expectation that the findings in the Marty Report in which Thaçi was often named and their acceptance by the European Parliament in the investigation would result in charges. Thaçi had initially supported the Chambers maintaining that they had fought a "clean" war. The US, UK and EU pushed back strongly against the attempt to abolish the Chambers. The US ambassador said that it would be considered by the US as a stab in the back and would amount to a choice by Kosovo of isolation instead of cooperation. The long dormant period also contributed to some loss of the Chamber's credibility. Kosovar Serbs are skeptical of the Chambers being able to right wrongs to the Serb victims in the war, while many Kosovar Albanians think the prosecution of KLA members unequally singles them out from Serbs.

Kosovo local courts

Human Rights Watch reports that by July 2020 the regular Kosovo court system was engaged in prosecution of these offences too. The Basic Court of Pristina ordered Goran Stanisic a former Yugoslav reserve member into custody for participating in forced displacement, robbery, intimidation and murder of Albanian residents of the Kosovo village of Slovinje during a Serbian attack in April of 1999. A former KLA Unit Commander, Remzi Shala, was convicted of kidnapping and death of an Albanian in 1998 by the court in Prizren and sentenced to 14 years. In April, the Court of Appeals in Pristina dismissed an appeal from a six and a half year sentence meted out to a former policeman, Zoran Vukotic for torturing Albanian prisoners in northern Kosovo in May 1999 and ordered a further new trial for attacking civilians at that time.

Indictments at the Specialist Chambers

The SPO started filing indictments in February and filed more in April without naming the accused. By May 2020, more than 150 former KLA members have been summoned for questioning. Observers say that the new SPO is going to focus on large-scale KLA campaigns of murder and persecution as crimes against humanity after the previous SIPF revealed in 2014 that certain elements of the KLA targeted minorities with acts of persecution including killing, expulsions, inhumane treatment, abduction and illegal detention at specific locations in Kosovo and Albania. Much of this was presaged by the Marty Report.

The Press Release of June 24, 2020 announcing the April indictment of President Thaçi and Kadri Veseli, the former speaker of the Kosovo Assembly and head of the Democratic Party of Kosovo and others with a range of crimes against humanity and war crimes, including nearly 100 murders, enforced disappearance of persons, persecution, and torture. The Press Release goes on to say that

the SPO notified the public of these charges because of alleged attempts by the President and Veseli to obstruct the operation of the Kosovo Specialist Chambers.

Under article 39(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office, a Pre-Trial Judge must review an indictment and, if satisfied that a well-grounded suspicion has been established by the SPO, the judge shall confirm the indictment. The Press Release confirms that the SPO believes it can prove the charges beyond a reasonable doubt.

President Thaçi who had been a KLA leader was summoned to The Hague for questioning in relation to the investigation for four days in the week of July 17, 2020 and has said he would step down from the Presidency if put on trial. Afterwards, he announced that he was sure that he felt he would not be charged with war crimes if the SPO acted professionally. Kadri Veseli, Head of the Democratic Party of Kosovo has also been summoned. At the same time, Ali Ahmeti, leader of the Democratic Union for Integration in North Macedonia who served in the KLA was added to the list of top officials summoned to answer questions.

President Thaçi's indictment disrupts Trump political agenda

Ironically, as noted, the announcement of the charges against Thaçi caused him to retire from talks scheduled at the White House where President Trump was hoping to boost his image as a deal-maker on the world stage by bringing Serbia and Kosovo together. Kosovo pulled away from Serbia after the 1999 NATO bombing campaign against Serbia and declared independence in 2008. Serbia does not recognize Kosovo as sovereign. The EU has been pressuring the two states to normalize relations. Both President Vu?i? of Serbia and President Thaçi of Kosovo were to meet on June 27 in Washington for talks to this end. Many observers have expressed concern that the EU was not invited to participate. Observers were also concerned that a quick deal for deal's sake might reinvigorate a land exchange that would swap Serbian inhabited lands for those of Albanian, the dominant ethnic group in Kosovo. This and other aspects of mutual interest to Kosovo and Serbia would have significant repercussions for the EU when one of the goals of both Serbia and Kosovo is EU membership. The geopolitical importance of any agreement is demonstrated by the Guardian's report that Vladimir Putin advised the President of Serbia that any deal should be approved by the UN Security Council.

Pompeo supports Specialist Chambers

To add to the irony, US Secretary of State Mike Pompeo replied to a letter sent late last year from Thaçi asking the US to change the Specialist Chamber's mandate, warning him of consequences to Kosovo if it failed to cooperate in the war crimes process. Pompeo's letter of November 29, 2019 expresses the US' continued support for the Chambers in upholding the rule of law, ensuring justice for victims and addressing the concerns in the Marty Report. He noted that the current Specialist Prosecutor is the third American to lead the investigation of the alleged crimes, showing US commitment to fair process and that he enjoys the full confidence of the US government. Pompeo

recalled that the US and the international community felt compelled to stop the atrocities against the Kosovars in the 1990s at the hands of the Miloševi? regime and that the US supported establishing the ICTY to prosecute mass crimes and that all countries in the western Balkans had mechanisms to address conflict-related crimes and that the perpetrators identified in the Marty Report should not experience impunity because other perpetrators have not yet been dealt with. He acknowledged the support received from Thaçi in setting up the Chambers and expressed the expectation of his abiding commitment. Undermining the work of the Chambers, he wrote, would "seriously damage Kosovo's international credibility and standing." Finally, he wrote that the war crime and crimes against humanity process at the Specialist Chambers was the best way to close this chapter in Kosovo history and "secure the continued ability of the United States to counter the arguments of Kosovo's detractors and champion its further international integration". Thaçi maintained in reply that he did not ask the US for the abolition of the Chambers, but for it to investigate Serb crimes as well as Kosovar crimes. In any event, he was seeking a change to prosecutorial policy which was rooted in article 1 of the Law which describes the scope and purpose of the law to proceed on the allegations made in the Marty Report and the SITF recommendations aimed aimed at the leadership of the KLA who could not have been prosecuted by the ICTY (see for an explanation of these parameters: https://globaljustice.queenslaw.ca/news/analysis-the-specialist-chambers-and-specialist-prosecutor-in-kosovo).

Systematic inequality in international criminal law?

A commentator recently wrote in Just Security that the Rome Statute contains numerous provisions that create systematic inequality between member states particularly impacting them on the ground of race. Though officially a secular state, 95 % of the population of Kosovo are Muslim. However, the American push to ensure the cooperation of senior Kosovars with the Specialist Chambers for their trials on war crimes and crimes against humanity does not seem to be motivated by race or religion. Indeed, Kosovo has been called America's greatest supporter.

However, Pompeo's letter calling for support of the international criminal process for Kosovars is in chilling contrast with President Trump's Executive Order 13928 ordering sanctions against ICC officials, employees, and agents and their immediate family members, based on the President's apprehension that in respect of the Afghanistan situation:

"I therefore determine that any attempt by the ICC to *investigate, arrest, detain, or prosecute* any United States personnel without the consent of the United States, or of personnel of countries that are United States allies and who are not parties to the Rome Statute or have not otherwise consented to ICC jurisdiction, *constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat [emphasis added]*."

When combined with pardon for war crimes of an Army lieutenant convicted of murder, clearing an Army major facing murder charges and reversing the demotion of a SEAL acquitted of murder, but

convicted of lesser offences, and so overruling the military justice system, it appears that geopolitical power dominates the civilian control of the US military and the operation of international criminal justice system within the control of the President. The military, both leadership and military witnesses have attempted to push back against what could undermine discipline in the ranks and open up retaliation against US forces. Former Chair of the Joint Chiefs of Staff General Martin Dempsey Tweeted: “Absent evidence of innocence or injustice the wholesale pardon of US service members accused of war crimes signals our troops and allies that we don’t take the Law of Armed Conflict seriously. Bad message. Bad precedent. Abdication of moral responsibility. Risk to us.”

Just as Kosovars have challenged the prosecution of their President and other leaders who had been heroes of their war for liberation, conservative support in the US for the pardons of US military personnel has been seen as supporting fighters in the war on terror.

In the Hearing Before the Subcommittee on International Relations of the Committee on Foreign Relations, United States Senate July 23, 1998, on the subject of “Is a UN International Criminal Court in the US National Interest?” John Bolton testified: “Our main concern should be for the President, the cabinet officers on the National Security Council, and other senior leaders responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable prosecutor and that is the real problem of universal jurisdiction.”(p. 30) Professor Scharf, Professor of Law, and Director, Center for International Law and Policy, New England School of Law, testified at the Hearing: “And David Scheffer [Ambassador-at-Large for War Crimes Issues and the US negotiator in Rome] should be applauded; because, really, the United States bullied its way into getting the U.S. stamp on almost every single provision in the International Criminal Court statute. It is really a U.S. statute with just a couple of exceptions, a couple of things that we did not get.”(p. 38) Professor Scharf’s statement that the US got 95% of what it wanted in the negotiations was cited in a paper written for ICC President Eboe-Osuji “US Founders respected International Law” after President Trump’s Executive Order (p. 18). However, the Senate Sub-committee expressed a great deal of concern about the possibility that their leaders might be brought before the ICC.

Is the US reaction evidence that international criminal law works?

Perhaps international criminal law is working on a large scale. Somewhere near the heart of the discussion was a concern about the influence of the ICC on the decisions of the President and other political leaders suggesting a deterrence from committing breaches of the Rome Statute. John Bolton made an interesting point at the Hearing noted above in response to a question, at page 41. The question from Senator Grams was “So, my question to you, and again echoing ‘‘not immune,’’ do you believe the existence of this court would have a chilling effect on the decision made by our U.S. senior officials from the President, cabinet members, et cetera, kind of always like looking over their shoulder?”

Bolton’s reply both explained American concerns but also a tribute to the potential of the Court in influencing even the greatest political powers:

“But in the event that we either joined at some point or that a subsequent administration or this administration does not share that analysis, I think these vague, ambiguous, and expansive provisions [of the Rome Statute] could well have a chilling effect on top decisionmakers, and I can guarantee you that the lawyers in the State Department and the Pentagon are going to be reading it very carefully all the time.

If I might read one section of this on—or two sections [sic], individual criminal responsibility. It says in Article 25, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ‘‘orders, solicits, or induces the commission of such a crime.’’ Orders, solicits, or induces. That is what military chains of command do.

You have cited Article 27. I think everybody should read that as well, especially in the Senate, because it also says expressly that members of a government or parliament or elected representative are not immune either. So, if you were to declare war, when aggression finally gets defined at some point down the road and it is determined to be an act of aggression and therefore a criminal element, conceivably Members of Congress who voted to declare war could be liable as well.”

Is this an international law dispute?

The concerns of the US can be defended by arguing that it did not ratify the Rome Treaty and so it should not be bound despite its significant involvement in its drafting. But this is what Myanmar unsuccessfully argued before the International Criminal Court because the Court held that the charge of the deportation of the Rohingya from a non-State Party which was completed on the territory of a State Party engaged the Court’s territorial jurisdiction in the State Party under article 12(2)(a). Later, the Appeals Chamber authorized a broad investigation in the Afghanistan Appeal “‘in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation *and were committed on the territory of other States Parties in the period since 1 July 2002*’ (para. 79 *emphasis* added). Further, it is doubtful that the US can properly make the same international law claim on behalf of its allies that it seeks to shelter under the Executive Order if they are States Party such as the United Kingdom and bound to cooperate with the Court. Additionally, the actual invocation of the Presidential power in the Executive Order quoted above cites national security concerns. Claims about sovereignty are buried in the text.

On the other hand, the US can say that Kosovo leaders must comply with the process of the Specialist Chambers because they established it and show they are a nation under rule of law. However, the external pressure applied to create the Chambers does not really make this a great rule of law argument.

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