

Kosovo Specialist Chambers sets the first date for a trial

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By: James Hendry

The Kosovo Specialist Chambers (KSC) recently set The Prosecutor v. Salih Mustafa as its first case for trial to commence on September 15, 2021. The accused is charged with the four war crimes of arbitrary detention, cruel treatment, torture and murder alleged to have been committed in April 1999 during the 1998-99 Kosovo War (here). The indictment was confirmed by Pre-Trial Judge (PTJ) October 5, 2020 (here).

The Specialist Chambers was established by the *Law on Specialist Chambers and Specialist Prosecutor's Office* (here) passed by the Kosovo Parliament in 2015 (Law). The KSC had announced that it was ready to receive indictments as of June 28, 2017 (see here for a short review of the history of the KSC). The Specialist Prosecutor's Office (SPO) announced the first indictments in June of 2020. Among them were charges against the President of Kosovo, Hashim Thaçi - a Kosovo Liberation Army leader during the Kosovo War - and others, involving nearly 100 murders, disappearances, persecution and torture. The filing of these indictments and now the setting of a first date for trial of some of them has commenced the process of dealing with war crimes and crimes against humanity and other crimes against Kosovo law committed during the 1998-99 Kosovo War.

This article will focus on the confirmation decision as an overview of the process of this international tribunal established more than a decade after the ICC.

The Prosecutor v. Salih Mustafa

Like the other ad hoc international criminal tribunals and unlike the ICC, the submissions of the SPO at the Confirmation hearing shows the detailed nature of the proceedings commenced in a strictly confidential and ex parte indictment and the evidentiary material needed to establish the required well-grounded suspicion of what must be proven at trial before the PTJ allows it to proceed to that stage, pursuant to article 39 of the Law and Rule 86 (Rules of Procedure and Evidence before the Kosovo Specialist Chambers).

The confirmation hearing was a process for examining the charges and modes of liability relied on by the SPO. In particular, the PTJ asked for submissions on the jurisdiction of the KSC over the war crime of arbitrary detention under article 14(1)(c) of the Law as pleaded or under the Criminal Code of the Socialist Federal Republic of Yugoslavia 1976. The SPO alleged individual liability for arbitrary detention, cruel treatment, and torture under article 16(1)(a) for physically committing, ordering and/or instigating the crimes. The SPO also alleged Mustafa was liable through a joint criminal enterprise and/or aiding and abetting all four crimes, including murder. Alternatively, the SPO alleged Mustafa was individually liable as the superior for all four crimes. The SPO also alleged he was liable for the war crimes under articles 15 and 16 of the Law in conjunction with Yugoslav and Kosovo criminal law. Because security for witnesses and victims is so important in these proceedings - the accused are heroes of Kosovo independence for many and war criminals to others - the SPO also sought non-disclosure of the indictment and related documents as well as other detailed measures to ensure the identities of witnesses and victims were not disclosed until protective measures were in place. Importantly, the PTC may provide for the protection of witnesses and victims under article 39(11) which may be extended on motion by the parties before the trial panel under Rule 105. While Rule 88 provides the indictment be made public on confirmation, this may be delayed until the accused' first appearance in exceptional circumstances.

Sources of law

The Law also provides in article 2(d) that in addition to the Constitution and law already referred to, the KSC shall apply customary international law (CIL) at the time the crimes were committed, allowing it to refer to the law developed by the ad hoc tribunals and the ICC and other criminal courts (para. 13). Article 14 provides that the relevant CIL is that existing during the temporal jurisdiction of the KSC (1998-2000).

Legality of the charge of the war crime of arbitrary detention

The PTJ had to determine a question of KSC jurisdiction over the offence of the war crime of arbitrary detention which is not explicitly listed as a war crime in article 14(1)(c). While noting that article 14 is not exclusive, he determined that a war crime in this armed conflict not of an international nature includes serious violations of Common Article 3 (here) and further be prohibited by CIL at the time of its alleged commission (para. 23). He held that deprivation of liberty without legal basis or basic safeguards is not compatible with the humane treatment required by Common Article 3 and thus was prohibited by CIL at the time of its alleged commission by the accused. The law was sufficiently clear and foreseeable at the national and international level at that time to meet the requirements of legality. Accordingly, he ruled he had jurisdiction over this crime (para. 28).

The burden of proof

Rule 86 provides that the *ex parte* confirmation process requires the PTJ to find that there is a "well-grounded suspicion" that the accused committed the crime alleged in the indictment from the material filed by the SPO on each of the charges. The PTJ noted that this burden of proof was not defined in the Law and so proceeded to do so. He reviewed the levels of proof in the Law as well as Kosovo criminal law. He concluded that the burden must be higher than the civil standard of being more likely than not that he committed the offence (para. 36). Rather, he decided that a PTJ had to be convinced holistically on concrete material based on solid reasoning and beyond a theory or suspicion that: (i) the contextual elements of the crime are present (ii) the acts underlying the crimes have occurred (iii) the accused committed or participated in the commission of the alleged crime according to the alleged mode of liability (para. 37).

Contextual elements

The PTJ then reviewed the elements of war crimes in the Law in the context of an armed conflict of certain intensity in the territory of a state between organs of authority and organised armed groups or between such groups with a nexus between the underlying offence and the armed conflict and knowledge of the existence of the armed conflict for the purposes of Article 14(2) of the Law. Article 14(2) provides that such a conflict had to be "protracted" and defines "organs of authority" to include a state's armed forces, police or authorities of a similar nature including armed groups and militias incorporated in armed forces. It also defined "organised armed groups" as groups that were sufficiently organised to confront each other with military means (paras. 40-3). The PTJ's interpretations of these and other matters such as the focus on the intensity of the conflict drew on the jurisprudence of the ad

hoc tribunals, the ICC and Geneva Conventions. The same was true of the discussion of the sufficiency of the nexus with the armed conflict (it need not have been causal, but at least have a substantial role in the crime, the perpetrator's knowledge of the circumstances establishing the conflict not of an international character and the non-hostile status of the victim) (paras. 46-8).

The PTJ then reviewed the elements of the crimes charged, once again relying on existing jurisprudence to define the crimes set out in article 14.

Modes of liability

It may be interesting to consider the PTJ's review of the modes of liability in the Indictment based on article 16 of the Law. The SPO alleged not only individual liability, both for direct perpetration of a crime, but also collective responsibility through the controversial Joint Criminal Exercise (JCE). The SPO alleged liability for perpetration of a crime by JCE based on the same article 16(1)(a) as individual responsibility: "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime". He drew largely from the jurisprudence of the ICTY (para. 66ff) (see the discussion in RJ Currie, Dr J Rikhof, *International & Transnational Criminal Law*, Irwin, 3d., 2020, pp. 723-30) and D. Robinson, *Justice in Extreme Cases*, Cambridge, 2020, pp. 34-5,212,249-56). The PTJ reviewed the three forms of JCE: (I) – the perpetrators act together on a common criminal purpose (II)-the perpetrators act within an organised systemic purpose such as a concentration camp (III)- a co-perpetrator may be liable for acts that go beyond the specific common plan but where they were a foreseeable consequence of the execution of the plan (para. 66). Thus, there must be a number of persons who act pursuant to a common purpose, the common purpose must be or involve the commission of the crime and the perpetrator must participate in furthering the common plan (para. 67). Again, the jurisprudence of the ad hoc tribunals filled in the details. Notably, the PTJ held that the accused's contribution does not have to have been "necessary or substantial" or even criminal in itself but should at least have been "a significant contribution to the crimes for which he or she was found liable" (para. 71). In considering the subjective element of the crimes, the PTJ spent most of his time on the foreseeability requirement for JCE III. The perpetrator is responsible for crimes committed by others beyond the common purpose if he intended to participate in and contribute to the common purpose, that it was foreseeable that the "extended crime" might be perpetrated by one of the persons actually committing the acts constituting the crimes and that he willingly took the risk that the "extended crime" might occur. "Foreseeability occurs when the perpetrator was aware that the deviatory crime was a possible consequence in the execution of that common purpose. The perpetrator willingly takes the risk when, with the awareness that such a crime was a possible consequence of the implementation of the enterprise, the perpetrator decides to participate in that enterprise" (para. 75). The PTJ then reviewed factors applied by the ad hoc tribunals to determine foreseeability (para. 76). The SPO also alleged alternative liability for aiding and abetting.

The PTJ then considered the elements of the crimes of "ordering" and "instigating" and "aiding and abetting" (where the perpetrator assists, encourages or lends moral support to the commission of the

crime that has “substantial effect” on its perpetration) under article 16 of the Law.

The PTJ also reviewed the charge of superior responsibility under article 16(1)(c) which reads: “the fact that any of the acts or omissions were committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”. This requires objective proof of the existence of a superior-subordinate relationship as well as the superior’s failure to take necessary and reasonable measures to prevent the crimes of his subordinates or punish the perpetrators of them (“effective control”). There is no requirement of causality between the superior’s failure to prevent and the occurrence of the crime under article 16 (para. 83). The superior must have je jure or de facto authority and that authority may be civilian or military. The superior must have had material ability to prevent (actual knowledge or reason to know according to article 16(1)(c)) or punish the subordinate at the time of the commission of the crime. In reviewing the nature of superior liability, the PTJ noted the superior has two distinct duties: the duty to prevent future crimes that attaches the moment he “has reason to know” a crime is about to be committed by a subordinate under his effective control and the duty to punish after the crime was committed. Though the superior may be held liable for either duty, failure to prevent cannot be cured by punishment after the fact (para. 85). Once again, details would be filled in by ad hoc tribunal jurisprudence.

The charges against Mustafa

Context

The PTJ found on the materials before him that the KLA was engaged in hostilities with Serbian forces which included the armed forces of the Federation of Yugoslavia, Serbia and other armed groups supporting them on the territory of Kosovo during the time relevant to the indictment. Serbian forces were acting as organs of authority of Yugoslavia and the KLA was an organised entity with a command structure, with operational capacity, weaponry and territorial control including the BIA Guerilla Unit (BIA) of which Mustafa was a commander as part of its organisational structure operating in various parts of Kosovo including Zllash/Zlaš where the acts described in the indictment took place. There was intense fighting supported by heavy weapons. Many persons were displaced. The PTJ concluded that there was a well-grounded suspicion that a non-international armed conflict was occurring (paras. 89-93).

Arbitrary detention

The PTJ was satisfied that there was a well-grounded suspicion that the war crime of arbitrary detention contrary to article 14(1)(c) was committed at Zllash/Zlaš Detention Compound under the command of Mustafa. The evidence showed that at least six civilians were held there after being captured by KLA without justification ostensibly based on security concerns or criminal proceedings, but in fact because of their association with Serbs, wealth and political sympathies (para. 96).

Mustafa's intent was shown by the "deliberate manner" of the detention, and the lack of any indication he was going to release them or provide basic process guarantees, until the Serbs closed the camp. The material suggested that Mustafa and his men knew of the armed conflict and the role of their BIA unit in it and Mustafa's role as commander.

Cruel treatment

The PTJ was also satisfied that there was a well-grounded suspicion that Mustafa and his BIA unit members committed the war crime of cruel treatment contrary to article 14 against these six detainees. They were subjected to serious physical and psychological injury and lived in horrendous conditions. Mustafa engaged in the beatings himself and ordered his followers to do likewise (para. 106). The failure to provide humane conditions, the deliberate mistreatment, the horrific types of instruments used and the way they were used showed that Mustafa meant to cause serious physical and mental harm.

Torture

The PTJ also found a well-grounded suspicion that Mustafa and his unit engaged in torture of the six detainees contrary to article 14. Mustafa himself interrogated some detainees about such matters as their collaboration with Serbs and their spying for Serbs, beating the detainees and making threats to kill them. The deliberate nature of the beatings, the horrific instruments used and the way they were used, the severity of the injuries inflicted and the use of death threats showed that the pain was inflicted to obtain information, confessions, punishment intimidation and coercion (para. 113).

Murder

Finally, the PTJ found that there was a well-founded suspicion that Mustafa and his KLA subordinates committed the war crime of murder contrary to article 14. The victim had been subjected to especially severe physical harm. The deliberate manner in which he was physically abused then shot showed the intention to kill or at least bodily harm they should have reasonably known would lead to death.

Modes of liability

The PTJ had a well-grounded suspicion that Mustafa directly committed arbitrary detention, cruel treatment and torture based on the materials under article 16(1)(a) above.

JCE

The PTJ also found a well-grounded suspicion that Mustafa committed all four war crimes as part of a JCE I contrary to article 16(1)(a). As already noted, that article does not mention the JCE mode, but only individual liability. The ad hoc tribunals had developed the concept of JCE making the individual charged personally liable for crimes committed by other perpetrators carrying out the crimes flowing from the purpose of the JCE. Accordingly, the PTJ found that a plurality of persons, Mustafa, some

other KLA members, police and guards were involved in the operation of the Zllash/Zlaš Detention Compound and the mistreatment of detainees there and that they shared a common purpose to carry out the acts of mistreatment underlying the charged war crimes. Mustafa's significant contribution was his command of the camp, his participation in the mistreatment, his ordering the others to do likewise, and acquiescing and supporting the crimes by his presence (para. 127). Mustafa demonstrated he shared the necessary subjective intent for these war crimes by his participation, by refraining from releasing or providing the detainees with basic procedural guarantees.

The PTJ considered the charge of murder alternatively under JCE III and found a well-grounded suspicion that Mustafa was liable according to that mode. He found that the severity of the physical mistreatment "made the death an objectively foreseeable consequence of the implementation of the JCE's common purpose" to commit the first three crimes" (para. 131). The subjective element of JCE III was satisfied by the way the materials showed "Mustafa's willingness to take the risk that …might be killed can be inferred from the deliberate manner in which the victim was mistreated, as well as conditions" at the camp (para. 132).

Ordering and instigating

The PTJ found a well-grounded suspicion that Mustafa, as commander of the BIA Unit, responsible to the General Staff and commander of the camp, had a direct and substantial effect on the commission of the first three crimes by ordering KLA members to mistreat the detainees contrary to article 16(1)(a). The fact he commanded the group and participated directly showed that he intended or was aware that the crimes would be committed according to his orders. The same material also showed he instigated the war crimes contrary to article 16(1)(a).

Aiding and abetting

Alternatively, the PTJ found a well-grounded suspicion that Mustafa aided and abetted in all four war crimes contrary to article 16(1(a). The material shows he gave practical assistance, encouragement or moral support with substantial effect on the commission of the crimes (para. 143). In particular, his commands and participation and the degree of violence perpetrated on the detainees substantially contributed to the crimes (para. 143). His deliberate involvement in the crimes showed he had the subjective awareness that he was assisting other KLA members in committing the crimes.

Superior responsibility

Again alternatively, the PTJ found a well-grounded suspicion that Mustafa was responsible as a superior for all four war crimes under article 16(1)(c). As already noted, Mustafa had the material ability as commander of the BIA Unit with a deputy to assist him to exercise authority over the KLA soldiers under him including discipline (para. 147). Thus, there was a superior-subordinate relationship at the camp. He had the material ability to prevent his subordinates from committing the crimes and to punish them. To his knowledge, his subordinates were obeying his orders and following his example in mistreating the detainees. He was thus also on notice to make further inquiries. He knew or had

reason to know the crimes were being committed. Though he had the duty to prevent the crimes and punish subordinates, he failed to take any steps to carry out his duty. When he was informed of the crimes, there was no material to suggest that he took any measures to prevent or punish, release the detainees or provide them with due process.

Protection for victims and witnesses

The PTJ also dealt with procedural protections for witnesses and victims. He found Mustafa had the incentive, means and opportunity to interfere with victims and witnesses (which had been the case in trial proceedings against Mustafa's direct superior) (para. 157). There was evidence that he had bragged about the execution of Serbs demonstrating he might resort to violence against witnesses and victims (para. 158). The PTJ then invoked Rule 88(2) allowing temporary non-disclosure of the indictment as confirmed (except to the accused) and Rule 105(1) withholding the names of victims and witnesses (until protective measures were in place). The SPO was at liberty to disclose the confirmed indictment to other authorities for continuing investigation under Rule 88(3).

Getting ready for trial

In the decision setting the date for trial (here), the Trial Panel noted that the parties were not ready to go to trial and needed more time to complete the investigation of their evidence, something that should be done before the trial commenced to avoid delays. Interestingly, time was needed to coordinate meetings between Victim's Counsel and those victims who were also SPO witnesses who were being protected from possible intimidation and violence – an important feature in this highly political type of trial (revolutionary hero v. war criminal) (para. 16). The Panel varied time limits in the Rules to fit their assessment of readiness and then set dates for completing filing documents and set September 15 and 16 for the opening of the trial and also set length of opening statement.

Conclusion

With these decisions, the process for bringing the perpetrators of war crimes and crimes against humanity in the Kosovo to justice, twenty years after the war ended. The length of time in gestation still shows that the international community is extending the reach of justice despite the circuitous path that the development of the KSC has taken. The indictments have extended to the highest levels of the Kosovo government.

It will be interesting to see the development of the legal principles at issue, particularly the JCE.

Also important to watch will be the way the KSC works to protect the witnesses and victims from a very heated political situation where one person's revolutionary hero is another's criminal perpetrator.

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