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By: James Hendry

Recently, in a pre-hearing Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, a pre-trial judge of the Kosovo Specialist Chambers clarified a number of issues bearing on the charges filed against Kosovo's ex-President Hashim Thaçi, Kadri Veseli, former leader of the Democratic Party of Kosovo, Rexhep Selimi, a former Parliamentary leader of the Self-Determination

Movement, and Jakup Krasniqi, a former acting President of Kosovo. The pre-trial judge had earlier confirmed (here) their indictments *ex parte* alleging the crimes against humanity of persecution (Count 1), imprisonment (Count 2), other inhumane acts (Count 4), torture (count 6), murder (count 8) and enforced disappearance of persons (count 10). He also confirmed the charges of the war crimes of illegal or arbitrary arrest and detention (count 3), cruel treatment (count 5), torture (count 7) and murder (count 9). On receiving notice of the confirmation and the indictments, the accused then challenged the jurisdiction of the Specialist Chambers on various legal grounds, including its reliance on customary international law and on the legal basis of certain charges and modes of liability. Interestingly, they also challenged the Specialist Chamber's jurisdiction on the basis that some charges were not covered by the investigative report written by Rapporteur Dick Marty (Marty Report) that had resulted in an agreement between the EU and Kosovo to establish the Specialist Chambers as a domestic court in the Constitution of Kosovo and to pass a Law on Specialist Chambers and Specialist Prosecutor's Office (Specialist Chambers Law) by the Kosovo Parliament in 2015.

The jurisdictional challenges raised by the four accused are very interesting because they focus on the source and scope of the law the Specialist Chambers was to apply to crimes allegedly committed two decades ago as well as exploring the way the Marty Report could be used to limit its jurisdiction.

The role of customary international law

The pre-trial judge first rejected a defence argument that the Specialist Chambers had no jurisdiction over charges in the Specialist Chambers Law based on customary international law, but could apply only those offences incorporated in domestic law at the time of the Kosovo conflict (according to the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY) and written in the 1976 SFRY Criminal Code). The defence challenged the jurisdiction of the Specialist Chambers to apply offences drawn from customary international law based on an argument that under Kosovo constitutional law, international law did not have the direct effect of enabling domestic courts - which included the Specialist Chambers which are part of Kosovo's domestic legal system - to enforce customary international law (Vesili motion paras. 41-3). At the heart of this challenge was the issue of the retroactive application of the Specialist Chambers Law which created the crimes and modes of liability applicable to the charges against the accused.

The pre-trial judge began his reasoning by identifying the applicable body of law against which the retroactivity, or more precisely, the legality principle is to be assessed (para. 88). He identified the Specialist Chambers Law as the principal legal text creating the mandate and function of the Specialist Chambers subject to the safeguards in the Constitution. He noted that article 3(2) of the Specialist Chambers Law provided that that body shall adjudicate and function in accord with the Constitution, the Specialist Chambers Law as l*ex specialis*, the laws of Kosovo incorporated in it, customary international law as given superiority over domestic laws by article 19(2) of the Kosovo Constitution, and international human rights law as given superiority over domestic laws by article 22 of that Constitution (para. 89).

The pre-trial judge focused on the claims made by the defence about the issue of the retroactivity of the offences in the Specialist Chambers Law to the conduct of the accused in 1998-99 based on the rules against retroactivity in article 33 of the Constitution, article 7 of the European Convention on Human Rights (ECHR) and article 15 of the International Covenant on Civil and Political Rights that applied by article 19(2) of the Constitution. He observed that article 12 of the Specialist Chambers Law established the centrality of customary international law in its mandate, including its primacy over domestic Kosovo law. Article 22 of the Constitution required the Specialist Chambers Law to be consistent with the ECHR which the pre-trial judge interpreted to mean that article 7 of the ECHR governed the assessment by the Specialist Chambers of the legality principle. He held that article 7, which reads "no one shall be held guilty of any criminal offence…which did not constitute a criminal offence under national or international law at the time it was committed…" recognised customary international law as a permissible criminalising source of law (para. 94). He noted article 7 closely resembles article 33(1) of the Constitution. The pre-trial judge concluded that Kosovo's legislators had the authority to pass domestic legislation creating offences that already existed in customary international law during the temporal jurisdiction of the Specialist Chambers (1998-99) and to mandate the prosecution of them to fulfil Kosovo's international obligation to deal with the conduct revealed in the Marty Report (para. 98). He held that the legislator had the power to create the Specialist Chambers and to provide them with a legal basis in international customary law to carry out Kosovo's international obligations that overrode the need for domestic written law to avoid the retroactivity problem. This meant that the legislator could pass laws providing for international crimes which existed even before they were legislated in domestic written law. He wrote "[i]n such cases, there is actually no issue of retroactivity: the legislator is simply transposing (into its own domestic written legislation) crimes that were already part of the legal order, and that were binding on individuals, according to international law, at the time of the alleged commission of the charged crimes" (para. 101).

The pre-trial judge then dealt with the accessibility and foreseeability aspects of the legality principle by finding that the accused were high-ranking, knowledgeable leaders with vast access to legal and political materials that would have made the potential criminality and attendant responsibility of the crimes in the Specialist Chambers Law known to them at the time they engaged in the crimes (paras. 103-4).

The Council of Europe Report

The pre-trial judge dismissed the novel jurisdictional argument that the Specialist Chambers could deal only with charges that were referred to in the Marty Report. That report had been commissioned to investigate allegations of organ trafficking and inhumane treatment at detention camps in Albania, but had gone on to examine the fallout of the 1998-99 conflict more generally including the activities of organised crime (see here for a discussion of its role in the history of the Specialist Chambers).

Article 6(1) of the Specialist Chambers Law provides that the Chambers "shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Report".

The pre-trial judge held that this meant that there had to be a correlation between the charges against an accused and the Report, though they were not confined to allegations specifically made in the Report (para. 108). He reasoned that the jurisdictional provisions of the Specialist Chambers Law were not limited by its terms. Further, the Specialist Chambers Law would be ineffective if were limited by the specific concerns of organ trafficking and detentions in Albania that had triggered the Report (para. 110). To make sense of article 6(1), charges brought under Specialist Chambers Law must be sufficiently connected to the Report. Factors establishing the connection might include a combination of the identity of the perpetrators, their victims, location, time frame, *modus operandi*, nature of the impugned conduct and its context (para. 111).

The pre-trial judge's conclusion on this novel objection to jurisdiction makes a great deal of sense because the Marty Report is not a policy document setting out specific norms for adjudication but an investigative one and contains comments such as: "Our task was not to conduct a criminal investigation – we are not empowered to do so, and above all we lack the necessary resources – let alone to pronounce judgments of guilt or innocence" (Marty Report para. 175). "The acts with which we are presently concerned are alleged to have occurred for the most part from the summer of 1999 onwards, against a background of great confusion throughout the region" (Marty Report para. 4). The Report confirmed many of the allegations that formed the parameters of its remit but did so years after the events and after trying to wrest information about the misdeeds of Kosovo's liberators from a traditional society not used to giving up its secrets.

The defence also alleged other limits on jurisdiction of the court based on the mandate of the Marty Report. For example, the defence argued that the Marty Report spoke of the activities of organised crime and arbitrary detention in Albania and that these concepts constituted limits on its jurisdiction. The pre-trial judge noted that the concepts in the Report could not confine the Specialist Chambers' jurisdiction to organised criminal activity and arbitrary detention. It described the commission of various international crimes and used the vocabulary of crimes against humanity in describing much of the activity of organised crime groups within the Kosovo Liberation Army, often without connection to criminal activity (paras. 125-27). The pre-trial judge held that sufficient connection to the any allegations in the Report could still legitimately place crimes before a judge to determine whether war crimes or crimes against humanity had been committed (para. 128).

The pre-trial judge also held that the strict territorial limits to Albania in the Report's mandate did not confine the Specialist Chambers' jurisdiction because many of the people identified had been taken from Kosovo to Albania where they might be found by the Specialist Chambers as victims of the same international crime within the same international criminal context. Thus, crimes committed in Albania could not necessarily be separated from initiating events in Kosovo. The Report also referred to crimes committed solely in Kosovo (paras. 132, 133). The pre-trial judge also held that jurisdiction of the Specialist Chambers was not limited to individuals named in the Report because the Report was not always specific and often could not identify all the members of some Kosovo Liberation Army units and sub-units. The Report did not have a criminal investigatory mandate and the conduct described a

wide variety of crimes and perpetrators. The Report was often limited to generalised language about the conduct and perpetrators (para. 137).

In conclusion, the pre-trial judge held that the relevant factors for determining sufficiency of connection with the Report had been made out in the Confirmation decision.

Arbitrary Detention

The pre-trial judge's determination that the Specialist Chambers was to apply customary international law and Kosovo law only to the extent that it did not conflict with it, formed the basis for assessing the legality of some of the offences and modes of liability.

The pre-trial judge rejected the defence argument that the charge of the war crime of arbitrary detention had no legal basis in article 14(1)(c) of the Specialist Chambers Law. This involved determining that arbitrary detention constituted a serious violation of international humanitarian law including common article 3 of the Geneva Conventions in a non-international armed conflict and that it was an offence in customary international law at the time of the alleged offence (para. 147).

Though arbitrary detention is not an enumerated offence under article 14(1)(c) of the Specialist Chambers Law, the pre-trial judge noted that that article uses open-ended language by "including" unenumerated war crimes that were crimes at customary international law at the time of their commission (para. 145). The pre-trial judge found that there was no legal basis at international humanitarian law in a non-international armed conflict during the temporal jurisdiction of the Specialist Chambers for detention, so any such detention was arbitrary (para. 152). If a person was already in the hands of the detaining party during that time, the principle of humane treatment, a key feature of common article 3 and more broadly, customary international humanitarian law, required the person, where possible as with an organization such as the Kosovo Liberation Army, be provided with basic procedural guarantees, such as being informed of the reason for detention, being brought before a judicial authority where the detention resulted from a crime and the opportunity to challenge the legality of the detention, without which, the detention was arbitrary (paras. 153-5). Thus, at the time of the charges, arbitrary detention constituted a serious violation of international humanitarian law and was properly criminalised by article 14(1)(c) (para. 156).

Interestingly, the pre-trial judge also rejected the defence's challenge to a source of customary international humanitarian law that questioned the reliability of the Red Cross' Study of Customary International Humanitarian Law for the purposes of determining the state of customary international law at the time of the alleged crimes. His ruling was based on the grounds that it was an authoritative reference for state practice and *opinio juris* and had been used by many tribunals for this purpose. Moreover, it was in harmony with the law of many states that could apply to conduct in non-international armed conflict including many of the former Yugoslav jurisdictions that currently recognise arbitrary detention as a war crime (paras. 157-161). The pre-trial judge also noted that state practice and *opinio juris* expressed in national legislation and sovereign expression though

international organizations justified accepting it as customary criminal law (paras. 164, 166).

Also, with respect to the legality of the charge of arbitrary detention, the pre-trial judge held that the accused were sufficiently highly placed to have had access to knowledge that would enable them to foresee that it was a war crime in a non-international armed conflict at the relevant time (para. 166).

Enforced disappearance

The pre-trial judge then rejected a challenge to the legality of the crime against humanity of enforced disappearance, which the legislators expressly provided for in article 13 of the Specialist Chambers Law, on the grounds that it was not customary international law in 1998-99.

Though the defence argued that only two international conventions recognised the crime at the time and so the rule had not reached the status of customary international law, the pre-trial judge found that state practice and *opinio juris* had been developing consistently for decades in domestic and regional law and in international condemnation (through UN official reports and resolutions and the work of the International Law Commission in its Draft Code of Crimes 1996) resulting in it being customary international law at the time of the alleged crimes (paras. 168-169). Some tribunals had accepted that it was a customary crime well before that time (para. 170). It was also included in the Rome Statute in 1998 showing a widespread recognition of this crime. The pre-trial judge was satisfied that it was a customary crime at the relevant time (para. 172).

Also, on the issue of legality, the pre-trial judge held that the accused were sufficiently highly placed in their organisation to have had access to knowledge of the state of national and international law, including repeated condemnations by the UN Security Council and General Assembly during the armed conflicts in Yugoslavia, that would have enabled them to foresee that enforced disappearance might give rise to individual criminal responsibility (para. 173).

Modes of Liability

Joint Criminal Enterprise

The pre-trial judge rejected the argument that the joint criminal enterprise mode of criminal liability does not apply to crimes under the Special Chambers Law on the grounds that it was not part of written Kosovo law at the time of the alleged crimes. The decision on this point is very interesting because this mode of liability has come under a great deal of criticism which the pre-trial judges notes but finds insufficient to overturn the overwhelming acceptance of the concept by international criminal tribunals (para. 188). (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 mode of liability for being part of a joint criminal enterprise was set out by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Tadi? para. 220* which

identified three types of enterprise that could lead to individual liability. The first type occurs where the co-perpetrators in a common design possess the same criminal intent to commit a crime and one or more commit the crime with intent (JCE I). The second type occurs where perpetrators, for example as staff at a concentration camp, have knowledge of the system of mistreatment of detainees and have the intent to further the common design of mistreatment (JCE II). The third type is where persons intend to jointly form a criminal enterprise requiring the commission of crimes to achieve its criminal purposes and recklessly foresee the possible commission of other crimes by those actually carrying out the intended crimes and take that risk anyway (JCE III).

Only the first and third type of the joint criminal enterprise were in issue in this case.

The pre-trial judge noted that he had earlier held that the Special Chambers Law provides that the Special Chambers are to apply customary international law as an autonomous regime of crimes and modes of liability and to apply Kosovo law only insofar as it does not conflict with it. He found that article 16(1)(a) of the Specialist Chambers Law which reads: “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” for offences enumerated in articles 13 and 14, was virtually identical with the modes of liability in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These tribunals applied both of these types of the joint criminal enterprise mode of liability as customary international law (para.177).

The question before him was then whether joint criminal enterprise liability was part of customary international law at the time of the alleged crimes. The pre-trial judge noted that the customary nature of joint criminal enterprise had been reviewed and confirmed by all contemporary international tribunals, except for the Extraordinary Chambers in the Courts of Cambodia which rejected only the third form (para. 181). To the defence argument that the Nuremberg Charter did not support the theory of joint criminal enterprise, the pre-trial judge responded by saying that documents leading to its adoption clearly stated that the law providing criminal liability for participating in a common enterprise was contemporaneous to the crimes involved in that case (para. 183). He noted that the theory of joint criminal enterprise was systematized in its three forms in the Tadi? Appeals Chamber of the ICTY in July 1999 recognising it as customary international law. The repeated confirmation of the theory of joint criminal enterprise in its three forms was evidence that it was customary international law by 1998-99 (paras. 185-186).

The pre-trial judge dismissed arguments that liability for participating in a joint criminal enterprise failed the elements of legality requiring clarity, foreseeability and accessibility. To the argument that this mode of liability was unclear, the pre-trial judge referred to European Court of Human Rights (ECtHR) cases pursuant to article 21 of the Kosovo Constitution that mandated consistency between the Special Chambers Law and with its rulings. These cases included Vasiliauskas v. Lithuania, para. 154 which held that an accused need only be able to know from the wording of the provision with the assistance of the courts’ interpretation and with informed legal advice that his actions are criminal

(para. 193). Simply put, the accused must have been able to know their conduct was criminal in the general sense, without reference to a specific provision (para. 193). To the argument that *Tadi?* came out only in July 1999, late in the temporal jurisdiction of the Specialist Chambers, the pre-trial judge noted an earlier ICTY judgment that referred to the joint criminal enterprise and that he had already ruled on this point. In any event, the fact that the accused held highly placed positions in the Kosovo Liberation Army, the post-War general legal framework and the ongoing ICTY prosecutions made it foreseeable that the accused could be subject to individual criminal liability under the concept of joint criminal enterprise (para. 194). Further, the pre-trial judge noted provisions of the SFRY Criminal Code that should have made it clear that there was criminal liability for persons participating in an association aimed at criminal acts, including foreseeable acts (paras. 195-201).

The pre-trial judge did agree with the defence that the third form of the joint enterprise liability involving liability for reckless foreseeability of an unexpected crime should not be available for crimes requiring special intent such as persecution or torture because liability should be premised on the intent of the accused to commit the crimes required by the common purpose of the enterprise and not on the possibility that unexpected crimes might be committed. For example, he thought it would be wrong to attribute liability to a participant in a joint criminal enterprise involving arbitrary detention and cruel treatment when it was only reasonably foreseeable that the actual perpetrators committed the special intent crimes such as persecution or torture being committed (para. 208). He ordered the indictments to be amended so they did not attribute liability for crimes committed by those engaged in crimes contemplated by the common purpose where it involved imputing special intent to an accused based on foreseeability alone.

Superior responsibility

The pre-trial judge rejected the argument of the defence that the Specialist Chambers had no jurisdiction over crimes involving superior responsibility. But article 16(1)(c) 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”. He found that the notion had been known and applied since WW II and so was customary international law at the relevant time.

Conclusion

These rulings of the pre-trial judge show a determination to apply customary international law in the way mandated by Kosovo’s Parliamentary Assembly to achieve the legislators’ objective of carrying out its international obligation to right the wrongs identified in the Marty Report even though they were committed by Kosovo’s recent ruling elite. The Specialist Chambers were established by amendment to the Constitution as a specialist court under article 103(7). The Specialist Chambers Law reduced international crimes to legislation and mandated the Chambers to apply customary international law.

Professor Lacheazar Yanev has asked (here) whether article 12 of the Specialist Chambers Law is sufficient to empower the Specialist Chambers to apply customary international law according to the constitutionally established regime for applying such law that had existed in Kosovo's legal system which required it be reduced to legislation. The answer seems fairly clear. The Kosovo Constitution was properly amended to create an international court within Kosovo's domestic legal system according to an international agreement to prosecute the matters in the Marty Report. The Constitutional Court upheld the constitutionality of an amendment to create the Special Chambers where the amendment anticipated the passage of the Specialist Chambers Law to establish its jurisdiction and mandate (see para. 23). Article 53 of the Kosovo Constitution provides that the rights in it shall be interpreted consistently with the cases of the ECtHR, which as we have seen, does not require the laws be written to meet the test of legality. This was the heart of the dispute raised by the defence on the issue of the application of customary international law. It seems appropriate for Kosovo's Constitutional legal order to engage with responsibility for the matters revealed in the Marty Report to be dealt with in the way its institutions have decided.

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