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By: James Hendry

The Court of Appeal of the Kosovo Specialist Chambers recently denied the appeals brought by ex-President Thaci and his co-accused from an unsuccessful challenge to the jurisdiction of the Specialist Chambers set to hear indictments for war crimes and crimes against humanity they had allegedly committed during the Kosovo conflict from 1998-1999 as leaders of the Kosovo Liberation Army (here). The Pre-Trial Judge had rejected all but one of the challenges made on constitutional and

international law grounds (here, discussed in this Journal here). They had also challenged the Specialist Chamber's jurisdiction on the basis that some charges were not covered by the Council of Europe's investigative report on Kosovo Liberation Army operations written by Rapporteur Dick Marty (Report) entitled "Inhuman treatment of people and illicit trafficking in human organs in Kosovo". The Report led to an agreement between the European Union and Kosovo to establish the Specialist Chambers as a domestic court in the Constitution of Kosovo. The amendment to the Constitution establishing the Specialist Chambers (here) stated that Kosovo might establish the Specialist Chambers to comply with its international obligations and that it and the Special Prosecutor's Office would be regulated by the amended article of the Constitution and by a specific law. The amendment was held to be consistent with the Kosovo Constitution by the Kosovo Constitutional Court (here). The specific Law on Specialist Chambers and Specialist Prosecutor's Office (Specialist Chambers Law) was passed by the Kosovo Parliament in 2015.

Thaci and his co-accused had been leaders of the Kosovo Liberation Army (see Indictment here). He had supported establishing the Specialist Chambers on the basis that it had fought a 'clean' war but later changed his mind to support abolishing it (here). After an initial four-day discussion of the evidence with Specialist Prosecutor's Office, he said to journalists that if they acted professionally, he could easily conclude that they would find he had not committed war crimes (here). The charges were laid on April 24, 2020 (here). The Specialist Prosecutor considered it necessary to issue public notice of the charges because of efforts by Thaci and Veseli to obstruct the Specialist Chambers.

The Specialist Chambers forms part of and mirrors the Kosovo Court structure consisting of a Pre-Trial judge, three-judge Trial Panels, three-judge Court of Appeal Panels, three-judge Supreme Court Panels, and three-judge Constitutional Court Panels. All are international non-Kosovar judges (here).

Although the Court of Appeal agreed with the Pre-Trial Judge on almost all points raised by the accused, it clarified some issues of jurisdiction on constitutional and international law and allowed the Specialist Prosecutor's appeal on an aspect of the joint criminal enterprise mode of liability on which the accused were successful before the Pre-Trial Judge. Ex-president Thaci and his co-accused lost on every point.

Procedure

The Court of Appeals used its discretion to decide the appeals on written submissions alone and refuse an oral hearing based on international practice and after ensuring that all parties had an opportunity to make full submissions (para. 15).

The direct application of customary international criminal law and its primacy over Kosovo law

The Court of Appeal rejected the arguments advanced by the defence that the Pre-Trial Judge's interpretation of Article 12 of the Specialist Chambers Law making customary international criminal law directly applicable by the Specialist Chambers was contrary to the Kosovo Constitution and the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (Yugoslav Constitution) which

required that an international offence be incorporated in domestic legislation before it could be applied.

Article 12 of the Specialist Chambers Law reads: “The Specialist Chambers shall apply customary international law and the substantive criminal law of Kosovo insofar as it is in compliance with customary international law, both as applicable at the time the crimes were committed, in accordance with Article 7(2) of the European Convention of Human Rights and Fundamental Freedoms and Article 15(2) of the International Covenant on Civil and Political Rights, as incorporated and protected by Articles 19(2), 22(2), 22(3) and 33(1) of the Constitution.”

The Court of Appeal agreed with the Pre-Trial Judge that Article 12 of the Specialist Chambers Law required the Specialist Chambers to apply customary international law and gave it primacy over domestic Kosovo criminal law but noted that he had not dealt with the question of whether Article 12 complied with the Kosovo Constitution (para. 22). It first recalled that Article 19(2) of the Kosovo Constitution stating that “legally binding norms of international law have superiority” over Kosovo law included customary international law which was binding based on widespread and consistent state practice and the belief that the practice is obligatory (*opinio juris*). It disagreed with the defence that the “norms” referred only to pre-emptory norms (jus cogens) (para. 23). Thus, Article 12 of the Specialist Chambers Law was consistent with the Kosovo Constitution. Further, requiring the Specialist Chambers to directly apply customary international criminal law meant there was no basis for the defence argument that it must be incorporated in domestic law before being effective. The Court of Appeal relied on authority from the European Court of Human Rights (ECtHR) interpreting Article 7 of the European Convention on Human Rights (ECHR, here) finding no violation of the non-retroactivity rule (legality) that there should be no conviction for an offence unless based on national or international law at the time of commission where domestic courts have convicted individuals for conduct prohibited solely by customary international law at the time of commission (para. 24). The Court of Appeal noted that the Kosovo Constitution that the Specialist Chambers was bound to apply had superseded the Yugoslavia Constitution and decisions of the Kosovo Supreme Court applying it (para. 26). Accordingly, the failure of the Pre-Trial Judge to decide the constitutional question would not have changed his overall conclusion (para. 29).

The Court of Appeal also rejected a more specific defence argument that the Pre-Trial Judge erred by applying Articles 7(1) of the ECHR and Article 15(1) of the International Covenant on Civil and Political Rights which prohibit retroactive charges unless they are found in “national or international law” (ICCPR, here) when he found Article 12 of the Specialist Chambers Law did not violate the principle of retroactivity based on customary international law at the time of commission. The Court of Appeal noted the defence argument that Article 12 of the Specialist Chambers Law refers only to Article 7(2) of the ECHR which referred to “general principles of law recognised by civilised nations” as does Article 15(2) of the ICCPR. The defence argued that this difference meant that the non-retroactivity rule referred only to written domestic law in place when the crime was committed. The Court of Appeal held that the Specialist Chambers was not bound by the “general principles of law recognised by

civilised nations" which was a different source of law introduced to ensure the validity of the Nuremburg Tribunal that had convicted Nazi leaders at the end of the Second World War based on this earlier source of law and to fill gaps in the developing customary international law (paras. 38-9). However, it agreed with the Pre-Trial Judge that Article 7 and 15 applied in their entirety. Article 22 of the Kosovo Constitution provides that the ECHR and ICCPR guide the interpretation of human rights, including legality (para. 36). Further, Kosovo did not adopt the higher standard for retroactivity advocated by the defence requiring the incorporation of international crimes in domestic legislation to give it effect because Article 33 of the Constitution provides for offences foreseeable under "law" and also specifically refers to the offences of genocide, war crimes and crimes against humanity "according to international law" at the time of their commission (para. 37). Thus, Article 12 was constitutional and in accordance with international law.

The jurisdictional constraint of the Report

The Court of Appeal rejected the defence argument that the jurisdiction of the Specialist Chambers was limited to the specific allegations contained in the Report holding that a "mere relation" between the charges and the Report would meet the jurisdictional requirement where the Pre-Trial judge had specified potentially higher burden of "sufficient connection" (para. 66). When referring to the Report, Article 162(1) of the Constitution uses the expression "in relation to" while Article 6(1) of the Specialist Chambers Law says, "relate to". The Court of Appeal reasoned that Kosovo Assembly could have expressly limited the Specialist Chamber's jurisdiction to the allegations in the Report, but chose personal, territorial, geographical and jurisdictional limits that were broader, even after it had heard the public statement of the EU's follow-up Special Investigative Task Force that its investigations were not confined to organ trafficking and inhumane treatment in detention centres in Albania as set out in the Report (paras. 66-7).

The Court of Appeal then rejected the defence's constitutional argument that if the charges against them were not included by findings of the Report but included charges within the general criminal jurisdiction of Kosovo courts or within the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY), then the Specialist Chambers would no longer be a "specialized court" and "necessary," but an "extraordinary court" prohibited by Article 103(7) of the Constitution. But the Constitutional Court had held that the Specialist Chambers complied with the Constitution because of their "specifically defined scope of jurisdiction" (paras. 68, 71). Preventing the possibility of duplicating a conviction by the ICTY had been expressly covered by Article 17(c) of the Specialist Chambers Law (para. 71).

The Court of Appeal agreed with the Pre-Trial Judge that though the focus of the Report was on events that took place in Albania and after mid-1999, the Report had to be considered as a whole and the highly specific "case studies" should not be considered in isolation from the events in Kosovo that were part of the same armed conflict and attack on the civilian population there (para. 80). The Court of Appeal found that the allegations in the Report and the charges shared several crucial common features showing that they were "related" (para. 83).

Arbitrary detention

The Court of Appeal rejected the defence argument that during the period of the temporal jurisdiction of the Specialist Chambers, arbitrary detention was not a crime at customary international law. First, the Court of Appeal agreed with the Pre-trial Judge that the non-exhaustive language of Article 14(c) of the Specialist Chambers Law's could legally include arbitrary detention if it was contrary to customary international criminal law as a war crime in 1998-9 and was serious violation of common Article 3 of the Geneva Conventions (here) in non-international armed conflicts (para. 89). Article 14(c) reads: "In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, including any of the following acts…" Second, though it did not necessarily agree with the Pre-Trial Judge that there was no legal basis for detention in non-international armed conflicts at the time making all such detentions illegal as there might have been other sources for its legality, it agreed with his ultimate conclusion that detention becomes arbitrary and violates Common Article 3 if it breaches its core value of humane treatment (paras. 95, 97). Further, the Court of Appeal agreed that there were certain basic guarantees owed to a detained person to meet the requirements of Common Article 3 in customary international law as properly found by the Pre-Trial Judge drawing on the International Red Cross' study of customary international humanitarian law (here). A definition of the elements of arbitrary detention were not a jurisdictional matter (para. 100). Third, on the central issue of whether arbitrary detention was a part of customary international law at the time of the alleged crimes, the Court of Appeal observed that although state practice recognising arbitrary detention was limited, several states had criminalised arbitrary detention as a war crime in non-international conflicts at the time supporting the conclusion of the Pre-Trial Judge. Subsequent state practice recognising it as a war crime, including Yugoslav states was relevant. The UN resolutions relied on by the Pre-Trial Judge recognized that arbitrary detention was widely condemned as a serious violation of humane treatment and international humanitarian law in non-international conflicts and could trigger criminal liability constituted evidence of *opinio juris* at the relevant time (paras. 106-9).

Enforced disappearance

The Court of Appeal rejected the defence argument that the crime against humanity of enforced disappearance was not customary international law during the temporal jurisdiction of the crimes. It held that the defence was simply repeating its arguments before the Pre-Trial Judge who answered this question in the affirmative and deserved to be denied for that reason (para. 117). But it continued by rejecting the defence argument that the Pre-Trial Judge had erred by relying on non-binding international declarations and conventions as evidence of state practice. The Court of Appeal not only noted that the Pre-Trial Judge had considered other sources such as regional and state instruments, but also noted that the defence was mistaken in arguing that non-binding international instruments could not establish customary international law (para. 119). The fact that enforced disappearance had been criminalised mostly in domestic legislation by 1998 still provided evidence of state practice (para. 120). Its criminalisation as a crime against humanity in the Rome Statute adopted in 1998 (here) was

relevant to show state practice (para. 121). The International Law Commission's codification of it as a crime against humanity in its 1996 Draft Code (here) was relevant as marking its crystallisation as an emergent norm and relevant to the crimes before the Specialist Chambers which allegedly occurred between 1998-9 (paras. 121-3). The fact that enforced disappearance was not criminalised in the statutes of other international criminal tribunals owed to their earlier temporal jurisdiction and context, when their jurisprudence showed that they could constitute crimes against humanity as "other inhumane acts" (para. 124).

Joint criminal enterprise

The Court of Appeal rejected the defence argument that the lack of reference to the joint criminal enterprise mode of liability in Article 16(1)(a) of the Specialist Chambers Law providing that "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" shows that the Kosovo Assembly intended to exclude it. It noted that Article 3(3) provides that Judges may be guided by the ad hoc tribunals which operated under similar framework statutes to the Specialist Chambers Law (para. 137). The Pre-Trial Judge correctly applied joint criminal enterprise as a mode of liability which was generally accepted in customary international law when the crimes were allegedly committed and met the requirements of foreseeability because they could provide the accused with sufficient notice of criminalised behaviour (paras. 138, 142).

The general rules of statutory interpretation also led to the conclusion that it would be inconsistent with the Report to exclude a mode of joint liability because the Specialist Chambers was established to deal with crimes committed individually and jointly and so (para. 139).

The Court of Appeal then rejected the argument that the Pre-Trial Judge erred by not carrying out his own full analysis of the jurisprudence on the joint criminal enterprise mode of liability. In fact, he fully considered the jurisprudence and applied the right standard for finding customary international law based on the decisions of the ad hoc tribunals on statutes identical to Article 16(1)(a) of the Specialist Chambers Law and he was not obliged in any event to set out every step in his reasoning (paras. 153-7).

The Court of Appeal rejected the defence argument that the joint criminal enterprise mode of liability was not a principle of customary international law because the parties to the Rome Statute codified custom by introducing the concept of co-perpetration. It held that neither that treaty's text nor preparatory work supported this argument, and in any event, the Rome Statute was not relevant to this issue because co-perpetration was not meant to codify custom so joint criminal enterprise could exist simultaneously. Article 3(3) of the Specialist Chambers Law allows for guidance by the ad hoc tribunals which have consistently held that "co-perpetration" is not part of customary international law (paras. 167-8).

The Court of Appeal rejected the argument that the third form of joint criminal enterprise liability was not customary international law at the relevant time. It noted that the defence arguments on this point largely repeated the submissions rejected by the Pre-Trial Judge. It noted the consistent practice of *ad hoc* tribunals accepting this mode of liability which differed from the first mode by adding to the *actus reus* of joining and participating in a common plan involving the commission of a crime, a different *mens rea* extending liability beyond intending to join and participate in a joint plan involving a crime to recklessly taking the risk that a crime would be committed in the execution of the common plan that was natural and foreseeable (para. 192). The Supreme Court of Kosovo's had on several occasions found that all forms of joint criminal enterprise were "firmly established" in customary international law contemporaneously with these charges contributing to *opinio juris* supporting this third form's status during the temporal jurisdiction of the Specialist Chambers (para. 193). The fact that the Extraordinary Chambers in the Courts of Cambodia disagreed on this third form did not undermine its customary status because that Chambers dealt with events two decades before these charges in this case which were contemporary with the ICTY which firmly recognised this third form which was ultimately accepted by all other *ad hoc* tribunals (para. 190).

The Court of Appeal also rejected the defence argument that the joint criminal enterprise mode of liability was not foreseeable in March 1998 because the Appeal Judgment of the ICTY recognising the joint criminal enterprise mode of liability was decided in July 1999. The defence also challenged the Pre-Trial Judge's finding that the accused were all high-ranking leaders of the Kosovo Liberation Army with considerable access to information and so should have known that the ICTY would recognise this mode of liability, which should have been a matter for trial. The Court of Appeal noted that the principle of legality in the ECHR and the Kosovo Constitution discussed earlier meant that the offence and mode of liability in law must be foreseeable and accessible to the accused before engaging in the prohibited conduct (para. 211). The Court of Appeal reasoned that the dates of the actual charges before the ICTY Appeals Chamber preceded the dates of the charges against the accused, and in any event, the ICTY was not creating new law but systematising the joint criminal enterprise mode of liability in mostly published post-World War Two law (para. 214). It noted that the principle of legality allows for gradual clarification of the law by judicial interpretation (para. 214). The foreseeability principle was more demanding for those in high leadership positions in government or military who must obtain appropriate legal advice to assess the consequences of their actions (para. 215). Importantly, the Court of Appeal held that the participants in armed conflict are duty-bound to inform themselves about possible criminal liability for their actions (para. 216). Here, the ICTY prosecutions in the same region could hardly have been unknown to the accused (para. 217). The Court of Appeal held that Kosovo criminal law both mirrored common purpose liability and resembled the basic mode of common criminal enterprise liability, that is, where the parties share and contribute substantially to a common plan that involves the commission of a crime and was relevant to whether the law was accessible and foreseeable (para. 220). It held that this basic mode of liability was sufficiently accessible and foreseeable to the accused (para. 221). Kosovo criminal law also mirrored the elements of the third form (para. 222). The Court of Appeal also noted that the Kosovo Supreme Court has found on several occasions that all forms of joint criminal enterprise liability were "firmly

established” in customary international law and noted that the Supreme Court in 2012 interpreted Kosovo criminal law this way based on facts mirroring the third kind of this mode of liability (para. 223).

On the only point decided in favour of the defence by the Pre-Trial Judge, that the third kind of joint criminal enterprise liability did not apply to crimes requiring proof of specific intent, the Court of Appeal decided to the contrary, at least to extent that this was a matter for trial and not a matter of jurisdiction. It relied on post-2005 ICTY rulings (para. 234). Thus, the Special Prosecutor did not have to amend the indictments to implement the Pre-Trial Judge’s decision.

Conclusion

The Specialist Chambers Court of Appeal clarified some important jurisdictional points of constitutional and international law in this case. It placed the Specialist Chambers firmly in the tradition of the ad hoc tribunals by applying their interpretations of similar provisions of their statutes in procedural and substantive matters and as establishing the customary international criminal law that the Chambers was called on by its own statute to apply.

Contrary to the specific wording of Article 12 of the Specialist Chambers Law, it applied the ECtHR’s rulings on non-retroactively applying crimes based on customary international law rather than “general principles of law recognised by civilised nations”. Importantly, the Court of Appeal held that the foreseeability principle was more demanding for those in high leadership positions in government or military who must obtain appropriate legal advice to assess the consequences of their actions. It said that the participants in armed conflict are duty-bound to inform themselves about possible criminal liability for their actions advancing what is expected of military leaders.

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