

Analysis: The Specialist Chambers and Specialist Prosecutor in Kosovo

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By: James Hendry

On June 28, 2017, the Specialist Chambers of the Constitutional Court of Kosovo (SCCC), a court composed entirely of non-nationals of Kosovo, delivered a decision under the Constitution of Kosovo at The Hague. The SCCC decided that the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules) that would govern the prosecution of war crimes, crimes against humanity and other crimes against the law that applied in Kosovo during the conflict and current Kosovo offences against the administration of justice before the SC, offences against public order and corruption and abuse of official authority[1], complied with the Constitution of Kosovo.[2] None of the judges of the Chamber were Kosovar; they were from Ireland, Italy and the Netherlands; and the decision was rendered at The Hague in the Netherlands. The SCCC determined that the Plenary of the Judges of the Kosovo Specialist Chambers had adequately corrected some problems in the Rules that the SCCC had earlier found contrary to the Constitution.[3] How and why was a Constitutional Court presided over by non-nationals, authorized to deliver a decision on the Constitution of Kosovo in another country?

The History of the Kosovo Specialist Chambers

Much of the story of the establishing of the Specialist Chambers (SC) and the Specialist Prosecutor's Office (SPO) is told in Resolution 1782 of the Parliamentary Assembly of the Council of Europe

adopted in 2011.[4]

The former Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) wrote in her memoirs that serious crimes had been committed during the conflict in Kosovo but were going uninvestigated and unpunished. The crimes included the harvesting of human organs for trafficking. She wrote that the crimes had been committed by members of the Kosovo Liberation Army (KLA) and that these crimes had been committed by leading commanders of the KLA.

The Parliamentary Assembly of the Council of Europe resolved that these allegations should be investigated and the Committee on Legal Affairs and Human Rights appointed Dick Marty as Rapporteur. The evidence he gathered and evidence in criminal investigations in his Report[5] (the Marty Report) confirmed to the Assembly that Serbians and Kosovo Albanians had been secretly held by the KLA at sites in northern Albania and inhumanely treated before disappearing. The chaos following hostilities shrouded some trafficking in human organs as well as organized crime. The Parliamentary Assembly was convinced that in this chaos, international organizations attempting to restore law and order, the Kosovo Force (KFOR) and the United Nations Interim Administration Mission in Kosovo (UNMIK) were trying to cope with major institutional problems and could not carry out these investigations fully. The international organizations tended to ally themselves pragmatically with the KLA who were in *de facto* power. The ICTY had commenced investigations into organ trafficking but dropped it, losing the evidence they had. The evidence found by Marty showed that factional discord and settling scores with collaborators and other political scores continued outside the bounds of legal structures. The European Union Rule of Law Mission in Kosovo (EULEX) took over many of the policing, investigative, prosecutorial and judicial functions of UNMIK in 2008.[6] It did not conduct complete investigations into the allegations that had concerned the Parliamentary Assembly, though it did enough to reveal the existence of KLA detention sites in northern Albania where many were treated inhumanely and murdered. But EULEX did not get the assistance of Albania in its investigations. Despite the fact that the Parliamentary Assembly knew that emotions ran high around the investigations and potential prosecutions based on clan and family secrecy and a popular belief that the KLA were the heroes and Serbs the villains, it reaffirmed that no one should be immune for breaching the human rights of others during the course of and after the conflict. There were more than 6000 disappearances registered with the Red Cross, many of whom had been found alive, many found dead (mostly Kosovo Albanians buried in regions in Serbia, under Serbian control and in Kosovo) and some 1658 are still missing.[7] Kosovo authorities were reluctant to help with investigating these crimes.

The Marty Report revealed a pattern of connections between high KLA leaders and organized crimes and international crimes, but the elimination of witnesses and faltering international will to prosecute former KLA leaders had impeded their prosecution. The Rapporteur emphasized the patterns and co-ordination and overarching strategy that connected the abuses with KLA leadership.[8] He found a network in operation in the detention and maltreatment of persons after the end of the conflict June 12, 1999.[9] He closed with the observation that the management of the investigations by the Kosovo authorities and the loyalty of the people to their leaders allowed the political leaders immunity.[10]

Following the Marty Report, the EU established the Special Investigative Task Force (SITF) located in Brussels to investigate the allegations. The Chief Prosecutor of SITF announced in July 2014 that their investigations would allow SITF to file indictments against senior KLA leaders who bear responsibility for a campaign of persecution directed against ethnic Serb, Roma and other minorities and fellow Kosovo Albanians who were their political foes, after the conflict ended.[11] SITF emphasized the organized nature of the breaches of international human rights standards sanctioned by KLA leadership. SITF anticipated that no indictments would be made until a specialist court was established. Until that point, there was no "viable court" to file indictments with.[12] SITF reported that though ICTY did prosecute some Serbian officials for conduct during the war, the end of the conflict was the limit of that court's jurisdiction, and that the ICTY could not prosecute crimes occurring after the war's end. SITF reported that their post-conflict investigation filled the void left by ICTY jurisdictional limitations and that the reality was that the primary perpetrators during the post-war period were affiliated with the KLA, who should not be entitled to immunity.[13] SITF did not want to be accused of being anti-Kosovar. SITF reported that the intimidation of witnesses was probably the greatest threat to the rule of law in Kosovo.[14]

After the Kosovo conflict, the Kosovo judiciary went through considerable reform.[15] The entire judiciary was re-appointed. However, observers continued to have concerns about its independence in such matters as the physical security of judges, the influence of politicians on them and individual parties, and a public perception that the judiciary was under the influence of political, criminal and family groups.[16]

Setting Up the SC and SPO

The government of Kosovo agreed with the EU to establish a special court for the prosecution of the crimes in the SITF Report. The agreement was made law by Kosovo Law No. 04/L-274.[17] Though the Appendix to the Law which constitutes the agreement between the EU and Kosovo renews the mandate of EULEX, it also states that any indictments flowing from SITF investigation would be sent to a specialist court, where "an environment conducive to the proper administration of justice should be provided," suggesting that EULEX could not provide it. Mathias Holvoet notes that the EU and the US applied considerable pressure to establish a hybrid or international court, which should reinforce the sovereignty of the host country and so enhance the political legitimacy of the court, though the international pressure to create the SC and SPO makes this purpose ironic.[18]

The Kosovo government amended the Constitution of the Republic of Kosovo to add Article 162 that provided for setting up of the SC and SPO as required by the agreement.

The President of the Assembly of the Republic of Kosovo referred the Amendment to the Constitutional Court (CC) which held that it did not breach the constitution and was consistent with the human rights standards in it.[19] The CC held that the new structural elements of the amendment would be established by law, conform to the existing structure of the judicial system of Kosovo, had a specific jurisdiction, would function within the legal framework of the administration of criminal justice and was necessary to comply with Kosovo's international obligations and thus met constitutional standards.[20]

The Assembly of the Republic of Kosovo then passed the Law on Specialist Chambers and Specialist Prosecutor's Office (the Law) that was the subject of the constitutional amendment, establishing the SC and SPO to give effect to the Council of Europe's Resolution based on the Marty Report.

Article 28 of the Law provides that an independent selection panel, composed of three international members, would be given the responsibility of assessing and selecting judges for the Roster of International Judges. The Selection Panel would review their assessments and create a list of persons recommended to be chosen as judges for the SC to be forwarded to the Head of the EU Common Security and Defence Policy Mission (the head of the EULEX) for appointment as judges of the SC. This is the first time that all of the judges of an internationalized criminal institution are international. Unlike other tribunals, the SPO is independent of the SC.

The Plenary of the Specialist Chambers judges adopted Rules of Procedure and Evidence for its hearings pursuant to Art. 19 of the Law. As noted above, the Plenary made Rules which were referred to the SCCC which found them in need of correction. Some of the problems were:

- that the rules that allowed proceedings to continue with 2 of 3 judges remaining on the panel;
- the rules providing for the authorization of special investigative procedures such as interception of private communications that fell short of constitutional safeguards;
- that certain search and seizures could be carried out by the SPO without prior judicial authorization;
- that the search and seizure provisions were not specific enough in applicability and operation;
- that the provisions enabling the SPO to take bodily samples and retain them lacked specific protections for privacy;
- that the provisions that allowed for the continued detention of individuals while awaiting the consent of a third state, even where the SC held detention to be unnecessary, required further consideration; and,
- that a provision allowed the continued detention of an accused found not guilty.

The Plenary then made corrections to the Rules which the SCCC held were constitutional. Though the SCCC found the corrections were constitutional, it noted that some of them were too stringent and might hamper the work of the SPO which had the responsibility to investigate and prosecute crimes falling within the Law.[21]

The SC's Jurisdiction

Under the Law, the SC and the SPO got jurisdiction within the limits of customary international law[22] over specified war crimes, crimes against humanity and other serious crimes under Kosovo law committed by natural persons between January 1, 1998 and December 31, 2000 and commenced or committed in Kosovo.[23]

Crimes Against Humanity

SITF focused on investigating crimes committed by the KLA on a widespread or systematic basis after the Kosovo conflict ended in June 1999 and so beyond the war crimes jurisdiction of the ICTY. SITF also announced in 2014 that there was little evidence that the practice of organ trafficking was more widespread than the handful of cases uncovered in the Marty Report and so there was not enough evidence at the time of its report to file indictments on that issue.[24] Thus, it appears that most of the SC's work will involve crimes against humanity because most of the crimes SITF investigated and for which indictments might be filed took place after the war. The SC will be able to hear cases of crimes against humanity within the definition in Article 13, (which is closely based on the crimes against humanity provision in the Rome State at art. 7, though without the crime of apartheid and with a narrower definition of persecution):

For the purposes of this Law, under customary international law during the temporal jurisdiction of the Specialist Chambers, crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. murder;
2. extermination;
3. enslavement;
4. deportation;
5. imprisonment;
6. torture;
7. rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
8. persecution on political, racial, ethnic or religious grounds;
9. enforced disappearance of persons; and
10. other inhumane acts.

Though an important part of SITF investigations that might lead to indictments, Mathias Holvoet suggests that the crime of enforced disappearance was not clearly accepted as part of customary international law during the 1998-2000 temporal jurisdiction of the SC.[25] Article 12 of the Law provides that the SC shall apply customary international law and Kosovo criminal law in compliance with customary international law, and Art. 7(2) of the European Convention of Human Rights and Fundamental Freedoms and Art. 15(2) of the International Covenant on Civil and Political Rights that enshrine the rule of non-retroactivity. The Kosovo Criminal Code includes enforced disappearance as a crime against humanity, but it came into force in 2013, long after the temporal jurisdiction of the SC. The Rome Statute makes enforced disappearance a crime against humanity and was adopted June 17, 1998, but it arguably did not codify customary international law.[26] Some international tribunals held disappearance was a crime against humanity in the category of "other inhumane acts".[27]Holvoet notes that the theory that an enforced disappearance is a continuing crime, even when it the disappearance took place before before the law made it a crime but continued until the disappearance was acknowledged, might solve the non-retroactivity problem. As the UN Human Rights Council

Working Group on Enforced and Involuntary Disappearances reported in 2010,

Enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.[28]

Article 3(3) provides that the SC can rely on the jurisprudence of the International Criminal Court, the international *ad hoc*tribunals and other criminal courts in determining the state of customary international law during the temporal jurisdiction of the SC. This might be of assistance to the SC given the similarity of the crimes against humanity provisions in both the Law and the Rome Statute. However, as seen above, the Rome Statute was not meant as a codification of customary international law, so the SC will have to verify as have other tribunals, whether the jurisprudence that it relies on is consistent with it.[29]

Conclusion

No indictments have yet been filed with the SC, despite the court's announcement of June 28, 2017 that it was ready to receive them.[30] The President of the SC in her first visit to Kosovo in November, 2017 noted that there were no indictments yet, but assured Kosovars that the SC would be unbiased, perhaps trying to overcome a concern that the leaders of their liberation army would be treated fairly.[31] Whether the SC and SPO will be able to advance the rule of law and pierce the apparent immunity of persons responsible for serious violations of human rights that has lasted for almost 20 years remains to be seen.

The next stage in transitional justice for Kosovo seems to be a Truth and Reconciliation Commission.

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2. KSC-CC-PR-2017-03 at https://www.scp-ks.org/en/documents/judgment-referral-revised-rules-rules-procedure-and-evidence-adopted-plenary-29-may-2017.
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4. See http://www.assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=17942&lang=EN.
5. See “Inhumane Treatment of People and Illicit Trafficking in Human Organs in Kosovo”, at http://www.assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=12608&lang=EN.
6. See for background on UNMIK and EULEX, Joseph Rikhof, “The Notion A History and Typology of International Criminal Institutions” (2017) 1 PKI Global Just J 15.
7. Thanks to Nora Ahmetaj for help with the details for this sentence.
8. Marty Report, paras. 54, 58, 68, 69, 74, 89, 90, 98.
9. Id. Paras. 129, 132, 136, 143, 163.
10. Id. Paras. 170, 172 and 174.
11. See www.balkaninsight.com/en/file/show/Statement_of_the_Chief_Prosecutor_of_the_SITF_EN.pdf, at 1-2 (SITF announcement).
12. Id. at 4.
13. Id.
14. Id. at 5.
15. Organization for Security and Co-operation in Europe Mission in Kosovo, “Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions” (January 2012) at 5-6.
16. Id. at 28.
17. At https://www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20a.pdf.
18. M. Holvoet, “The Continuing Relevance of the Hybrid or Internationalized Justice Model: The Example of the Kosovo Specialist Chambers” (2017), 28 *Criminal Law Forum* 35 at 45-46.
19. Case no. KO 26/15 at http://www.gjk-ks.org/repository/docs/KO26-15_ANG.pdf.
20. Id. para. 68.
21. Law No. 05/L-053 at https://www.scp-ks.org/en/documents/law-specialist-chambers-and-special….
22. Art. 12.
23. Arts. 7-9.

24. SITF announcement, at 3.
25. Holvoet, at 52-56.
26. Id. at 53-54.
27. Id. at 54-55.
28. Annual Report 2010, A/HRC/16/48, January 26, 2011, at 11, para. 1 of the General Comment, online https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/104/45/PDF/G1110445.pdf?OpenElement.
29. Holvoet, at 58.
30. See for example, https://www.reuters.com/article/us-kosovo-court/kosovo-war-crimes-court-ready-for-first-indictments-chief-judge-idUSKBN1DO199?il=0.
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