

THE KOSOVO SPECIALIST CHAMBERS, AN INTERNATIONAL TRIBUNAL INSIDE THE NATIONAL JUDICIAL SYSTEM

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Abstract: The necessity to establish the Kosovo Specialist Chambers (KSC), a new hybrid tribunal for the crimes committed in Kosovo during and after the NATO intervention, emerged in 2011, when the 'Marty Report' was published. As reported, the crimes concerned especially organ harvesting committed by mid- and senior level Kosovo Liberation Army (KLA) officers. These allegations reversed the national narrative on the Kosovo Albanian's liberation fight against the Serbs, seen no more as oppressors but as victims of the crimes committed by the KLA. Following the 'Marty Report', the international community asked the Government of Kosovo to establish a special court aiming to prosecute individuals responsible for these war crimes. This Court became fully operational in 2017 and immediately, some Albanian's politicians tried to revoke it in the Kosovo Assembly. On the contrary, it was welcome by the international community. These kinds of courts express what we call "transitional justice", a kind of justice entitled to face with past large-scale abuses, assure conflict prevention and achieve reconciliation. Today, the KSC is a very controversial and contested jurisdiction.

Key words: International criminal justice, transitional justice, hybrid tribunals, Kosovo Specialist Chambers, Kosovo Liberation Army, former Yugoslavia

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1. A NEW TRANSITIONAL JUSTICE MECHANISM

The Kosovo Specialist Chambers (hereinafter 'KSC' or 'Court'), a judicial body with a temporary duration, were promoted by the European Union (hereinafter 'EU') with ambitious expectations, as an instrument to fight the impunity, ensuring justice for victims, promoting state building, national reconciliation and peace in Kosovo and in the whole region. Ultimately, it should be an institution capable to facilitate the Kosovo EU membership. The UN did not play any role in its establishment.²

The idea to create a new court was born when, in 2011, the Council of Europe (hereinafter 'CoE') published the 'Marty Report', that denounced the commission, by the Kosovo Liberation Army (hereinafter 'KLA', known also as 'UCK'), of crimes against humanity and war crimes committed against Serbians and Albanians collaborators before, during and after the North Atlantic Treaty Organization's (hereinafter 'NATO') intervention in Kosovo in 1999.³ The armed conflict in Kosovo caused the massive displacement of the civilian population and the establishment of the United Nations Interim Administration Mission in Kosovo (hereinafter 'UNMIK').⁴

The crimes were reported in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 (hereinafter 'CoE Report') and were the subject of criminal investigation by the Special Investigative Task Force (hereinafter 'SITF')⁵ of the EU Rule of Law Mission in Kosovo (hereinafter 'EULEX')⁶ Special Prosecution Office of the Republic of Kosovo (hereinafter 'SPRK').⁷ In order to permit the creation of the KSC, on 3 August 2015, the Assembly of Kosovo changed the Constitution and in two extraordinary sessions adopted the Law on the Specialist Chambers and the Specialist Prosecutor's Office (hereinafter 'the Law').

The publication of the 'Marty Report' was negatively received among ethnic Albanians and coincided with the victory of KLA-affiliated parties in both national and local elections. In fact, they are the main object of the investigations of the Court and from that time, they contest any allegation that is interpreted as Serbian- and Russian-backed attempts to involve the KLA in international crimes. The aim

² Gazeta Express, 2015.

³ Council of Europe Committee on Legal Affairs and Human Rights. 2011.

⁴ See Mertus Julie, "Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo", in *William & Mary Law Review* 41, 2000, at 1743 ss.; See also Heir Aidan, "NATO's 'Humanitarian Intervention' in Kosovo: Legal Precedent or Aberration?", in *Journal of Human Rights* 8, 2009, at 245 et seq.

⁵ The SITF derived its legality from the European Union Council Decision establishing the EULEX Kosovo and furthermore with the following agreement between the Republic of Kosovo and the EU, on 4 September 2008, it kept a special status within the Kosovo's prosecutorial system outside the authority of Kosovo. This special status was confirmed by Law No. 04/L-148, Art. 1, para 2 (a).

⁶ The EULEX was established in 2008 within the European Union mission in the area of European Security and Defence Policy with the mandate to exercise functions in Kosovo's legal and judicial system following Kosovo's declaration of independence in 2008.

⁷ Law No. 95/L-053.

pursued would be the reversal of Serb historical responsibilities for the Kosovo past conflict with the ultimate intention to undermine the recognition of Kosovo's independence.

It is important to underline that the KSC is based on Kosovo's Constitution because the same Kosovo Assembly voted in favour of its creation, in August 2015, after some failed attempts, in order to investigate and prosecute serious international and transnational crimes allegedly committed by the KLA between January 1, 1998 and December 31, 2000. Thus, the Kosovo Assembly voted expressly for it.

This Court became fully operational in 2017 and immediately, some Albanian's politicians tried to revoke it in the Kosovo Assembly. On the contrary, it was welcome by the international community. These kinds of courts express what we call "transitional justice", a kind of justice entitled to face with past large-scale abuses, assure conflict prevention and achieve reconciliation. It is a justice difficult to enact and with complex results, that one can appreciate sometimes only after many years, when the population affected forgets the angry and becomes capable to critically analyse certain dramatic events of the history of the country.

Today, after the NATO military intervention, Kosovo holds credible and relatively well-administered elections, but its institutions remain weak. The rule of law is inhibited by executive interference in the judiciary, as a consequence justice cannot be completely independent and impartial (Freedom House Report, 2019). This is one important reason supporting the creation of the KSC. After the declaration of independence, on 17 February 2008, Kosovo was recognized as a sovereign State but many countries did not recognize it, such as Serbia, China and Russia, because they believe that Kosovo is the result of the Western interventionism.⁸

2. THE 'MARTY REPORT'

The KSC's specific and sensitive mandate to process only KLA's war criminals is considered in Kosovo as a selective and unfair example of justice that does not contribute to the normalization of the inter-ethnic relations nor to the dialogue between Serbia and Kosovo because only Albanians feel targeted. It is seen as an undemocratic and politicized body that increases the previous resentment against the ICTY, guilty of not having pursued enough prosecutions against Serbs allegedly responsible for war crimes committed against Albanians.

⁸ The declaration of independence by the Kosovo Parliament raised the problem of premature recognition by other States. Premature recognition is discouraged in international law because it is perceived as an interference in the internal affairs and domestic jurisdiction. The independence of Kosovo was suddenly recognised by many countries, such as the United States and several countries of the EU, notwithstanding the Serbian protests since Kosovo was one of its provinces before the NATO intervention in 1999. The Russian Federation did not recognise the independence of Kosovo. Today, Kosovo is a member of the International Monetary Fund and World Bank Group, but it is not a UN member. In 2013, Kosovo stipulated with Serbia in Bruxelles a Treaty on the normalization of their mutual relations so that it can facilitate their admission in EU; see Focarelli, *Diritto internazionale*, Wolters Kluwer, Milan, 2020, at 60.

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Thus, the necessity to establish a hybrid tribunal for the crimes committed in Kosovo emerged in 2011, when the 'Marty Report' was published subsequently to the investigation conducted under the aegis of the CoE. It was based on the work of the Council of Europe's Parliamentary Committee on Legal Affairs and Human Rights, which appointed, in 2008, the Swiss senator Dick Marty as a rapporteur to investigate certain crimes (Council of Europe Parliamentary Assembly, 2010).⁹ Subsequently, the CoE recommended Kosovo to cooperate with the EULEX, in order to seriously and independently investigate and prosecute people responsible for the alleged atrocities (Resolution 1782, 2011).

As emerged, the crimes concerned especially organ harvesting, allegations already formulated, in her memoirs, by the then ICTY Prosecutor Carla del Ponte against mid- and senior level KLA officers, including Ramush and Daut Haradinaj, suspected of international crimes against Serbs and Albanians who had remained in Kosovo at the end of the conflict between the KLA and the Serbian government. The suspected would have been involved in the abduction of hundreds of persons, mainly ethnic Serbs, to the mountains of northern Albania, where some of them were said to have been killed at a Yellow House in Rripë for the extraction of their organs which were to be sold on the black market. The Chairman of the Association for Missing Persons from Kosovo, Ranko Djinović, accused the KLA leaders, including Hashim Thaçi, the former Kosovar President.

These allegations reversed the national narrative on the Kosovo Albanian's liberation fight against the Serbs, seen no more as oppressors but as victims of the crimes committed by the KLA. In fact, prisoners belonging to ethnic minorities, Serbs and Kosovo Albanian collaborators with Serbs or simply political opponent would have been detained in secret centres under KLA control and would have disappeared, after been subjected to inhuman and degrading treatments. Then, after killing, organs would have been removed from some prisoners and taken abroad for transplantation. The 'Marty Report' indicated certain KLA members (mainly from the Drenica region) as authors of these crimes against wartime detainees (before June 1999) and post-war detainees (after June 1999).

Following the 'Marty Report', the international community asked the Government of Kosovo to establish a special court aiming to prosecute individuals responsible for these war crimes, ensure justice for the victims and conduct the country towards a transitional process necessary to guarantee stability.

Following the international investigations, on 4 September 2012, the President of the Republic of Kosovo sent a letter to the EU High Representative, inviting her to continue the presence of EULEX notwithstanding the Kosovo independence (fully achieved in September 2012), formally legitimizing the SITF action. On the same

⁹ Council of Europe Parliamentary Assembly, 2010.

date, the response was ratified by the Assembly of Kosovo as an international agreement with the EU.

Moreover, on 14 April 2014, the President of the Republic of Kosovo, Atifete Jahjaga, before the expiry of the EULEX mission in June 2014, invited again the EU High Representative to extend the EULEX mandate of two more years, until June 2016, expressly asking that a special court within the Kosovo judicial system, described in detail in the letter, would prosecute the accusations emerged from the SITF investigations. On the same 14 April 2014, the High Representative accepted the invitation and confirmed that the SITF would have continued its activity until the end of the investigations.¹⁰

Also this exchange of letter, similarly to the previous once, was ratified by the Kosovo Assembly as an international agreement between Kosovo and EU.¹¹ The exchange of letters was also adopted as a law by the Assembly of Kosovo on 23 April 2014. These two circumstances mark the institutional commitment taken on different occasions by Kosovo to support the establishment of the KSC. There was a formal expression of consent by the Kosovo institutional representatives with the subsequent obligation to respect two different international agreements.

On July, the SITF Lead Prosecutor communicated an indictment against some members of the KLA, responsible for crimes against humanity, war crimes and some violations of the Kosovo law for having targeted Serbs, Roma, collaborators of Serbs, opponents of the KLA and other minority populations in Kosovo. The widespread organ trafficking, the main allegation of the 'Marty Report', was not supported by enough evidence. So, while the ICTY had prosecuted mainly Serbian officials and had not covered the post-war period, the KSC will judge only Kosovo Albanian KLA senior officials. Thus, the President of the Republic of Kosovo invited the EU to assist his country in the institution of a new court within the Kosovo judicial system.¹²

Notwithstanding the opposition of the Kosovo Albanian political parties, in March 2015, the Government amended the Constitution permitting the creation of the KSC by the Assembly. The approval of two constitutional amendments, on 7 March 2015 and the following judgment of the Constitutional Court (promoted by the President of Kosovo for reviewing and avoiding any legal and political uncertainty) affirming that those amendments respected the human rights and fundamental freedoms contained in the same Constitution (and derived from the international agreement between Kosovo and EU)¹³, show the political consent and

¹⁰ Ashton MC, Lee K, de Vries RE. The HEXACO Honesty-Humility, Agreeableness, and Emotionality Factors: A Review of Research and Theory. *Personality and Social Psychology Review*. 2014;18(2):139-152.

¹¹ Law No. 04/L-274, 2014.

¹² Letter of the President of Republic of Kosovo, 2014.

¹³ Case No. KO26/15, 2015.

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the legality supporting the creation of the KSC, even if the internal political debate was intense. Coherently with the legality of the procedure, finally the Kosovo Assembly voted in favour of the Court with a two-thirds majority of the elected representatives.

Finally, the KSC and the Specialist Prosecutor's Office were created by Law No. 05/L-053, adopted on 3 August 2015 by the Assembly of the Republic of Kosovo, enacted on 15 September 2015¹⁴. Thus, this Law on the creation of the KSC was adopted to enable the agreement between EU and Kosovo.¹⁵

On the same date of the adoption, the Assembly approved the Constitutional amendment No. 24, reforming the Kosovo Constitution with a new article, No. 162, authorizing the creation of an *ad hoc* judicial body within the domestic legal system.¹⁶ Thus, the legal base of the new Court is contained in different normative sources: a constitutional one, that is the Constitution of the Republic of Kosovo, more precisely, the new Art. 24; an ordinary one, the Law No. 05/L-053 of 2015 on Specialist Chambers and Specialist Prosecutor's Office; finally, an international one, the international treaty legally binding the Republic of Kosovo and the EU, ratifying twice an exchange of letters between the President of Kosovo and the EU High Representative on date 14 April 2014.¹⁷

3. THE SPECIFIC FEATURES OF THE KSC

In order to fulfil its mandate, the Court has been granted full diplomatic privileges, immunities and facilities in the Netherlands, where is it located according to an agreement signed between the Government of Kosovo and the Kingdom of the Netherlands on 15 February 2016. The location outside Kosovo was necessary primarily because of the international community's fears that criminal trials in Kosovo would not produce meaningful results as the convicted persons are part of Kosovo's establishment and are so influential and powerful that they could hinder justice at a domestic level.

The KSC is attached to the Kosovo judicial system (this is one of the national aspects: the KSC are a Kosovo judicial body), but only international judges serve the KSC. The Head of EULEX is the Appointing Authority for the judges, who are 19 with the President. The Court is staffed entirely by non-Kosovars (this is one of the international aspects of the Court) because of the sensitive nature of the trials, that demand impartiality from the judges. Naturally, also this exclusion of national personnel has provoked heated reactions in Kosovo and increased hostility towards

¹⁴ Available online at: www.kuvendikosoves.org (accessed April 20, 2020).

¹⁵ Law No. 05/L-053, 2015.

¹⁶ Amendment to the Constitution of the Republic of Kosovo No. 05-D-139 of 3.8.2015, available at: <http://gzk.rks-gov.net> (accessed May 11, 2020).

¹⁷ The letters of the President of the Republic of Kosovo were joined to the agreement.

the KSC.

The Specialist Prosecutor is an independent organ and does not receive instructions from any government or any other source. Furthermore, he does not share any information with Kosovo authorities. He is appointed by the Head of EULEX. The KSC has the primacy over all other Kosovo courts and has the authority to order the transfer of proceedings from any other court in Kosovo to them. The same authority has the Specialist Prosecutor. The KSC has full legal personality. It is located outside Kosovo, at The Hague, but has a seat in Kosovo. Amnesty or pardon cannot be called upon the KSC.

The Court has a financial autonomy from the Government of Kosovo, it is financed by the EU, but financial contributions can be provided also by third States. It became operational two years after the Assembly of Kosovo voted for its establishment, in June 2017.

The KSC is a mixed tribunal, more precisely an "internationalized" domestic jurisdiction, because the legal bases are the Constitution of the Republic of Kosovo and the 'Law' issued by the National Assembly, so both domestic law. The neutral location was demanded for security reasons, like in other similar tribunals of the same character, and the external financial support is just one within the international aspects.

The KSC is a new mixed criminal tribunal composed of both domestic (first of all the Court's inclusion in the Kosovo judicial system) and international features (first of all the Court's international legal personality and powers in its relationship with other States in order to fulfil its mandate and the presence of foreign personnel). All the above-mentioned elements prove the existence of a link of proximity between Kosovo and the Court.

4. THE CRITICISMS

The creation of the KSC was accompanied by negative impressions at national level and enthusiastic sentiments at international level. The long-term aim of transitional justice is to conduct post-conflict countries towards reconciliation and restore an effective and more robust domestic judicial system. At the core of this function there are the EU's "essential elements of transitional justice", which are: criminal justice, truth, reparations and guarantees of non-recurrence/institutional reform.¹⁸

Criminal justice is only a part of the transitional process, that needs the support of national authorities and civil society, available to reconciliation. In this sense, national authorities play a crucial role in influencing civil society. A propaganda machine can condition public opinion negatively or positively. Thus, local ownership

¹⁸ See Heir Aidan, 'Step Towards Justice or Potential Time-bomb?', Report Kosovo Specialist Chambers, Balkan Investigative Reporting Network, Robert Bosh Stiftung, at 5.

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for transitional justice mechanisms needs political support in order to enjoy civil society support.

We can observe that the KSC lacks positive popularity because they are still a not well known institution and are at the beginning of their functioning. It will achieve credibility if it works well. That is why it is still too early to stigmatize the Court now, as many political leaders do.

The Court duty is to establish some criminal responsibilities not to give a divergent lecture of the History, this remains primarily in the interpretation of historians, while the function of criminal proceedings remains restricted to determine the personal criminal responsibility of specific individuals for specific facts. The History is not to be questioned but only criminal accountability.

This new transitional justice mechanism can contribute to inaugurate a new age not only in the inter-ethnic reconciliation between Serbs and Albanians within Kosovo, but also in the relations between Serbia and Kosovo, with an evident positive impact on the stability and peace in the whole region. This is the aim of transitional justice for post-conflict areas, whose process of transition and stabilization is activated also through the work of the international/internationalized criminal justice, one of the means to help such transitional process.¹⁹

At the present, the KSC enjoys international support, particularly among EU, that has great expectations about their adequacy and appropriateness to pursue their purposes; on the opposite, they suffer a lack of sufficient domestic support, especially among Kosovo's Albanian community, that perceives them as an illegitimate foreign imposition and a body unfairly focused on Albanians.

Justice needs to be done and must be shown to be done, this is imperative for international criminal justice. A domestic jurisdiction cannot be the best solution because of its fragility about serious allegations. If one combines the fragility of a domestic justice system with a fragile State, like a country after a war, this can justify the preference for international criminal justice. In post-conflict regions, it is sometimes even arduous to investigate and even more to conduct a fair trial. That is why in certain circumstances an *ad hoc* tribunal is the most suitable solution also in order to guarantee the application of the best judicial standards.

The Government's support is fundamental to influence the media that plays an important role, mainly because mass media are very politically polarised in Kosovo.²⁰ The government must mitigate all possible negative impacts and protect

¹⁹ See generally Murphy Coleen, *The Conceptual Foundation of Transitional Justice*, Cambridge University Press, Cambridge, 2017, at 1.

²⁰ For a general overview, see the track record of proceedings in the Press Council of Kosovo: <http://www.presscouncil-ks.org/>. See also the Independent Media Commission: <http://kpm-ks.org/?gjuha=3> and Una Hajdari, 'Kosovo Watchdog Condemns Threat to Journalist', BIRN, 9 July 2015, available at <http://www.balkaninsight.com/en/article/kosovo-journalism-watchdog-condemns-veterans-threat-to-journalist> (accessed June 19, 2020).

the KSC's reputation, explaining to the public the role of the proceedings. In this sense, it can be considered positively the Thaçi's decision to resign, on 5 November 2020, after the confirmations of the charges against him-self, to appear before the Court as a common citizen and not as President. This behaviour recognizes the legitimacy of the KSC.

The political support is the premise for the popular ownership attached to the KSC. This can facilitate reconciliation within intra-community and inter-community relations.

CONCLUSION

Thanks to the national institutional support, the KSC can produce some positive impacts on the Kosovar society: first of all, to bring justice to the victims and end the cycle of impunity; consequently, to condemn the perpetrators for crimes that otherwise would remain unpunished; to make moral recognition and material reparation and restitution to the victims; thus, to combine retributive and reparative transitional justice process; to eliminate the dominant narrative that only Serbs committed war crimes and to create a multiple narrative about victimhood from the Kosovo conflict; finally, to contribute to intra-ethnic and inter-ethnic reconciliation and peaceful coexistence.

Face to the previous debated and controversial results of the ICTY, UNMIK, EULEX and national judicial institutions, the KSC can represent the last attempt to make justice for war crimes documented in the 'Marty Report' and a test for Kosovar society to present itself to the European and international allies as a democratic country respectful of the rule of law. This new Court is also important to enact in Kosovo an inclusive culture of remembrance, where criminal justice is accompanied by truth-telling mechanisms that help in the historical reconstruction of different responsibilities and suffering. A new perspective can avoid the prevalence of a single dominant interpretation. It is important to take into account the voice of all the victims of the war, not just those of one faction because also the minority perspectives need consideration. Multi-memory narratives can contribute to reconciliation. Maybe the KSC marks a change favourable to a more inclusive culture of remembrance.