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KOSOVO SPECIALIST COURT: SOVEREIGNTY INFRINGEMENT AND THE RISK OF A NEW PRECEDENT

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Abstract

The Kosovo Specialist Chambers and Specialist Prosecutor's Office, otherwise known as the Kosovo Specialist Court (KSC), was established in 2015, thus presenting the most recent mechanism to adjudicate war crimes and crimes against humanity related to the Kosovo War of 1998-1999. Its formation has led to numerous unresolved questions, particularly in regard to the implications between international courts and national (domestic) courts. Holding the epithet of being a hybrid court in theory, while also showing elements of an international court in reality, has brought doubts that such courts can indeed be established by simply revealing another perception of it.

The paper analyzes, step by step, the historical context and its interrelation with the court formation necessity, followed by the basis of establishment in the respective nature and questions on its legitimacy. It goes into deeper detail concerning substantial issues such as the applicable international law in the case of the Kosovo–Serbia war, particularly in regard to conventional and customary rules; and whether it should be considered a conflict at all and what rules apply in each case. A judiciary comparison is needed to understand the risk of a new precedent, and the article ends with a potential alternative to what could have been done better, legally speaking. Concluding remarks follow, recognizing the support of the international community, but with the silent questions and hopes on what the future of KSC will be.

INTRODUCTION

Transitional justice is widely spread across the world and is certainly one of the main ongoing issues to be dealt with on the international level. It involves several aspects, one of which is justice and its overall system. It is indisputable that the support given to the KSC by the international community has further improved their personality as states in the rebuilding process by successfully complying with the respective laws and regulations for integration and a better future. Nevertheless, such efforts may sometimes be undermined by sovereignty infringements in furtherance of development goals, and as such, create social instability due to the lack of legitimacy. The establishment of the KSC has raised doubts that it might be one of these cases. This transitional justice mechanism is aiming to provide not only justice, but also reconciliation for the past between Kosovars and Serbs, thus enabling them to move towards a peaceful and prosperous future. As a result, Kosovo would be one step closer on their path to integration. However, whether that is possible in the absence of local legitimacy remains questionable. This looks like a visionary idea, but Kosovo's sovereignty has been sufficiently respected by its agreement for this Court.

The contribution given to its establishment shall be appraised, and the duty of Kosovo to prosecute and adjudicate the alleged crimes is indispensable. A court which aims at some form of justice is better than no court at all. Regardless of the issues implicated, serving victims in furtherance of justice weighs more and should be held in high regard.

To provide a thorough understanding of those issues and their respective consequences, this paper will be divided into 5 arguments: (1) Historical Context, in order to give an idea on why a court of this caliber was necessary; (2) Court formation basis and its structure; (3) Applicable law: Conventional v. Customary International Law, which is further divided into two sub-arguments: (a) International obligation to investigate and prosecute: its implications between state parties and non-state parties, and (b) International, non-international conflict, or no conflict; (4) Judiciary Comparison, which focuses on comparison with former courts and tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court of Sierra Leone, and the International Criminal Court (ICC); and (5) A suggested alternative of what could have been done in order to refrain from sovereignty infringement and new precedents.

HISTORICAL CONTEXT

Every time self-determination is mentioned in international law, Kosovo is brought up as an example. Still disputed as a constitutional right, mostly by Serbs, it remains an issue worth discussing, considering its implications with every step in the state-building process of this country. Therefore, I found it necessary to shortly recall a few key facts in the historical background, in order to properly understand the multi-facial problem of retributive justice in Kosovo through the establishment of the Special Court. The chronology will reveal why Kosovo's duty to prosecute war crimes and crimes against humanity is inevitable, but *inter alia*, will allow the reader to create an opinion on whether the Kosovo Liberation Army was a terrorist group while exercising the right of self-defense in their territory. Serbia has tried many times during history to gain control over Kosovo, starting with the Battle of Kosovo[1] and several efforts under the Socialist Federal Republic of Yugoslavia (SFRY). After the Battle of Kosovo, efforts began in 1912 where Serbia regained control of Kosovo from the Turks, which was recognized by the 1913 Treaty of London, and continued through its existence as an autonomous province under Yugoslavia, from 1918 until the end of war in 1999. In 1941, Kosovo became part of Albania, which was itself under the Italian regime. Kosovo again became occupied by Yugoslavia in 1946[2] with the defeat of the Axis powers.[3]

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[1] Wayne S. Vucinich & Thomas A. Emmert, *Kosovo: Legacy of Medieval Battle*, 52 SLAVIC REV. 383, 383 (1993).
[2] *Kosovo profile - Timeline*, BBC NEWS (Nov. 25, 2022), https://www.bbc.com/news/world-europe-18331273.
[3] Axis powers included Germany, Italy, and Japan, originally called the Rome-Berlin Axis as a military coalition that fought in World War II against the Allies. *See* RICHARD G. DAVIS, BOMBING THE EUROPEAN AXIS POWERS, (Carole Arbrush & Sherry C. Terrell eds., 2006).

In 1974, the Yugoslav Constitution recognized the autonomous status of Kosovo, giving the province a de facto self-government. It provided for some powers in autonomous provinces including: having their own Assemblies; delegates in the Federal Assembly and Presidency; deciding on all socio-political and economic issues for their territory and population; passing declarations and resolutions; issuing recommendations on questions falling within their province of work; acting in terms of equality to elect and relieve the office of the SFRY President and Vice-President, Federal Executive Councils and other members, secretaries and officials; elect and relieve judges of Constitutional and Federal Courts, Federal Social Attorney and Federal Public Prosecutor; ratify international treaties; passing Rules of Procedure for Assembly Chambers etc.[4]

All of these constitutional provisions show the independent character and equality that the federation was trying to achieve as a successful union of its constituents. As a result, Albanian symbols were allowed in public life, the Albanian language featured more prominently in public, and the University of Pristina opened with both Serbian and Albanian as languages of instruction, while increasingly more ethnic Albanians were also admitted to public service.[5] However, Serbia, led by Slobodan Milosevic as the President, wanted to regain full control over Kosovo. On March 23, 1989, Kosovo's Assembly was met with a heavy presence of police forces and Serbian politicians who were not members of Kosovo's Assembly; Kosovo's autonomy was terminated and Serbia took direct control of it.[6]

Every following decision made subsequently was not based on the sovereignty of Kosovo as an autonomous province as the Yugoslav Constitution granted. Kosovo tried several times to declare its independence from Serbia. More than 100,000 ethnic Albanian workers, including government employees and media workers, prompted a general strike in 1990, while in 1992 academic Ibrahim Rugova was elected President of the self-proclaimed republic.[7] This brought ethnic tension, and armed conflict escalated for a period of five years. The conflict was brought to a head when an open war resulted in 1998, with KLA rising to protect Kosovo. After Milosevic did not halt the violence as instructed and did not get the signal of the United Nations (UN) Security Council Resolution 1160,[8] which condemned Yugoslavia's excessive use of force and imposed economic sanctions and banned arms sales to Serbia, NATO launched air strikes lasting seventy-eight days.[9] Serbia withdrew troops, while the UN set up a Kosovo Peace Implementation Force (KFOR) and KLA agreed to disarm.

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[4] Constitution of Socialist Federal Republic of Yugoslavia, arts. 284-288 (1974).
[5] Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VANDERBILT J. OF TRANSNATIONAL L. 779, 785-787 (2009).
[6] *Id.* at 787.
[7] *Kosovo profile*, *supra* note 2.
[8] S.C. Res. 1160, (Mar. 31, 1998).
[9] *Kosovo profile*, *supra* note 2.

The history continues with Kosovo being under protectorate of the United Nations Mission in Kosovo (UNMIK),[10] including support by the U.S. through the U.S. Agency for International Development (USAID);[11] EU efforts through the European Union Rule of Law Mission (EULEX);[12] as well as Organization for Security and Co-operation in Europe (OSCE)[13] and many others alike. All of them aimed to implement a state-building process, and grounds for gradual reconciliation and negotiations with Serbia.

The facts as numbered bring to light the needs of reparation for war crimes and crimes against humanity committed during this period. This leads to the necessity of addressing the injustices committed by both parties at the international level, be it in competent International Courts or a Special Court such as the case of Kosovo, due to the circumstances discussed next.

COURT FORMATION BASIS AND ITS STRUCTURE

Being under the international protectorate means that a state should follow a peaceful path for a promising future. Kosovo has cooperated with the UN as well as the EU continuously, following all the necessary steps required for integration in legislative, executive, and judicial branches. Kosovo is one of the countries that share the perspective of a *"European future"* as stated during summits in Thessaloniki (2003), Sofia (2018) and Zagreb (2020), where EU leaders reaffirmed their *"unequivocal support for the European perspective of the western Balkans."*[14] In addition to the Copenhagen criteria, two specific conditions were added for the western Balkan countries following Croatia's accession to the EU: (1) regional cooperation; and (2) good neighborly relations, as a basis for resolving bilateral problems, including the Belgrade–Pristina dispute.[15] Both states have entered into a number of agreements since 2011 with the Brussels Agreement being the most important so far.

It is exactly this agreement that, apart from other political and socio-economic negotiations, provided for the establishment of the Special Court of Kosovo. However, it should be noted that there is not only one specific agreement, rather the Brussels Agreements involve around thirty-three agreements for over ten years. There are about fifty documents, consisting of about 150 pages; twenty-one concluded, ten fully implemented, six largely

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[10] On the Authority of the Interim Administration in Kosovo, UN Mission in Kosovo Reg. 1999/1, § 1, UNMIK/REG/1999/1 (July 25, 1999), available at https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_01.htm [hereinafter UNMIK].

[11] United States Agency for International Development, https://www.usaid.gov/ (last visited Apr. 12, 2023) [hereinafter USAID].

[12] European Union Rule of Law Mission in Kosovo, https://www.eulex-kosovo.eu/ (last visited Apr. 12, 2023) [hereinafter EULEX].

[13] Organization for Security and Co-operation in Europe, https://www.osce.org/mission-in-kosovo (last visited Apr. 12, 2023) [hereinafter OSCE].

[14] Zagreb Declaration at art. 1(May 6, 2020).

[15] BRANISLAV STANICEK, BELGRADE-PRISTINA DIALOGUE 2 (2021).

implemented, four partly implemented, and one not implemented.[16] Establishment of this court got the support of the EU, the U.S., and other friendly countries. Their influence is still present. Their number may have decreased, but their domination took a different curve by turning to substantial indirect control, although Kosovo became an independent and sovereign country in 2008.

Certainly, there should be grounds for the formation of such a court. In the case of Kosovo, those grounds were raised by the report of the former Chief Prosecutor of the ICTY Dick Marty in 2011.[17] This happened after the previous ICTY prosecutor Carla Del Ponte's work on allegations against KLA members were dismissed as fiction.[18] Dick Marty's report provides material alleging that serious crimes had been committed during the conflict in Kosovo, and it created the foundation for the Council of Europe to raise the duty for Kosovo to investigate and prosecute such crimes as international law imposes.

Issues with the establishment of this court started here. For a long time, many of the allegations made in the Marty report have not found a strong basis for judicial proceedings. An ICTY spokesperson confirmed on April 16, 2008, that ICTY and UNMIK investigators had looked into these allegations, but asserted that they could not substantiate them, and had no further basis on which to proceed in relation to the tribunal's jurisdiction.[19] According to two reports[20] the KLA maintained a detention facility in the Albanian town of Kukes, and at least eighteen captives were killed there, including Albanians and Serbs from Kosovo. Still, they were unable to provide conclusive evidence for this and of organ trafficking. On the other hand, EULEX took over the file from UNMIK in 2008, and again failed to uncover any hard evidence to back up organ-harvesting claims.[21]

Matti Raatikainen, head of the war crimes unit of the European Union Rule of Law Mission in Kosovo (EULEX) and the European Law and Justice Mission in Kosovo, said that the fact is that there is no evidence whatsoever in this *case. "I still believe something happened there,"* said a Belgrade source close to the war crimes court, *"but nothing on the scale of what has been suggested... and possibly not even connected to the KLA."*[22] He further

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[16] SHPETIM GASHI & IGOR NOVAKOVIĆ, BRUSSELS AGREEMENTS BETWEEN KOSOVO AND SERBIA 2, 12 (2020).
[17] COUNCIL OF EUR., COMM. ON LEGAL AFF. & HUM. RTS., REP. NP. 12462, INHUMAN TREATMENT OF PEOPLE AND ILLICIT TRAFFICKING OF HUMAN ORGANS IN KOSOVO (2010 [hereinafter Marty Report].
[18] CARLA DEL PONTE, THE HUNT: ME AND THE WAR CRIMINALS (Feltrinelli Editore ed., 2008).
[19] *UPR Submission on Albania*, HUMAN RIGHTS WATCH (Apr. 15, 2009 12:58 PM), https://www.hrw.org/news/2009/04/15/human-rights-watch-upr-submission-albania.
[20] *Id.* (Reports included BBC radio and television in-depth investigative reports corroborated many of the allegations first raised in Carla Del Ponte's book, and Balkan Investigative Reporting Network (BIRN) on additional findings about KLA detention camps in Kosovo and Albania).
[21] *KLA Organ Trafficking: Fact or Fiction*, BALKAN INSIGHT (Jan. 21, 2011 11:41 AM), https://balkaninsight.com/2011/01/21/kla-organ-trafficking-fact-or-fiction/.
[22] *Id.*

stated that this was all done to distract attention from the real work of finding the remains of 1,861 people still missing from the war and its aftermath, and prosecuting their killers - in Serbia, Kosovo, and Albania.[23] In 2014, the Special Investigative Task Force, created by the Council of Europe, released some reports. These reports contained enough evidence to produce the indictments and a proposal that for consideration of these allegations resulted, noting that it was necessary to establish an adequate institution for their investigation, prosecution and judgment.[24] Such claims are still disputed by the KLA members.

In order to express its commitment to address the raised allegations, Kosovo amended its Constitution, by adding Article 162[25] titled, "The Specialist Chambers and the Specialist Prosecutor's Office." The first element noted is that this Article specifically states that Kosovo *may* establish this court. This directly speaks about its right and power as sovereign to make such a decision. It also stipulates its willingness to comply with International Law. It is further stipulated that its establishment will take place *within* the justice system of Kosovo, but the reality shows the opposite; everything about it seems international in character. Thus, it looks like the idea was to call it a mixed court regardless of its international characteristics, to justify the rule that proves that these types of courts are the sole responsibility of a country, when the latter expresses the strong will to comply with its obligations.

The Assembly also approved Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office. Article 3 provides that the adjudication and functioning of the court shall be based on customary international law as given superiority over domestic laws by Article 19(2) of the Constitution.[26] This is the first substantial issue raised as a problem of this court. Such a provision is in deep contradiction with the principle *"nullum crimen sina lege, nullum poena sina lege,"* which asserts that the adjudication should be based on the law that was governing at the time the crimes alleged were committed. Accordingly, KSC's law established two sources of law: (1) Customary International Law and (2) The Substantive Criminal Law of Kosovo, insofar as it is in compliance with customary international law.[27] Nevertheless, it gives priority to CIL[28] based on the constitutional provision of Kosovo that specifies supremacy of international law over domestic laws.[29]

Is this how Kosovo envisioned this court to function? Did it actually mean the CIL as existing and accepted now by the present constitution, or as it was provided under Yugoslavia? This merits some discussion because there is a clashing present constitutional article in relation to the legality of stipulating that punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties

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[23] *Id*.
[24] KOSOVO LAW INSTITUTE, GAME WITH THE SPECIAL COURT 6 (2017).
[25] CONSTITUTION OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 162.
[26] Law on Specialist Chambers and Specialist Prosecutor's Office, No.0.5/L-053, art. 3(d) (Kos.).
[27] *Id*. at art. 12.
[28] *Id*. at art. 3(2)(d).
[29] CONSTITUTION OF THE REPUBLIC OF KOSOVO, *supra* note 25, at art. 19(2).

in a subsequent applicable law are more favorable to the perpetrator.[30] Since the acts were committed years ago, the law of Yugoslavia shall be applied, unless the present penalties are more favorable, which had not been proven to be the case until now. Yugoslavia's Constitution also describes the rule for international law as follows: "International treaties shall be applied as of the day they enter into force, unless otherwise specified by the instrument of ratification or by an agreement concluded on the authority of the competent agency. International treaties which have been promulgated shall be directly applied by the courts."[31] Nowhere does the language of this provision state that international law has supremacy over domestic laws. It only emphasizes that it is directly applied by the courts, meaning that treaties do not need to be ratified through a legislative process before they can be applied.

Therefore, it is the CIL as prescribed in the law of Yugoslavia which shall be applied, where domestic law shall prevail as a superior law while listing the customary international law as a complementary one. This issue is also raised by the Veseli motion before this court in the case of Specialist Prosecutor v. Hashim Thaqi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi.[32]

Secondly, another issue with the Special Court is that, as mentioned above, the grounds of its formation lie exactly on the Marty Report, which includes allegations for crimes committed by the KLA members during wartime. Nonetheless, it looks like the KLA itself is not the target, but individuals who committed serious crimes are. David Schwendiman, chief prosecutor at the new Kosovo Specialist Prosecutor's Office said specifically: *"I am not after organisations, I am not after ethnicities, I am looking at individual responsibility for what was done"* stating further that this court is not pro or anti-Albanian, neither it is pro or anti-Serb.[33] It is hard to see where this court finds the jurisdiction to prosecute *everyone* who has committed crimes, while it was established only after Marty's Report in regard to KLA members' alleged crime against ethnic minorities and political opponents from January 1998 to December 2000.[34] The court has jurisdiction only to the extent that its factual documentary work raises. It is hard to make sense out of this otherwise.

Amongst others, the Report itself seems to have been criticized and lacks a strong basis, for both substantial proofs and against Dick Marty as the person who conducted the investigation. A few years before the report, Gazeta Express in Kosovo published a wiretapping of an alleged member of the Serbian Secret Service trying to buy the services of a

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[30] *Id*. at art. 33(4).
[31] Constitution of the Socialist Federal Republic of Yugoslavia, *supra* note 4, at art. 210.
[32] *See generally* Specialist Prosecutor v. Thaci et al., Case No, KSC-BC-2020-06, Case Information Sheet ¶ 16 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 3, 2021).
[33] Marija Ristic, *Schwendiman: New Kosovo War Court 'Not Anti-Albanian'*, BALKAN TRANSITIONAL JUSTICE (Nov. 16, 2016 6:39 AM), https://balkaninsight.com/2016/11/15/schwendiman-new-kosovo-war-court-not-anti-albanian-11-14-2016/.
[34] DEL PONTE, *supra* note 18.

Kosovo Albanian to testify about an organ harvesting scandal for the same court, which was stopped by the Kosovo police.[35] However, the attempt to buy witnesses is almost always known to be a major problem in establishing truths.

Dennis McShane, a former UK minister of EU, says in an authored text in Open Democracy that Dick Marty's report to the Council of Europe reflects the unfortunate politicization of that body by Russia since accession in 1995; that Marty's judgment is clouded by his anti-American instincts; that Marty fails to link Thaçi, as one of the accused, directly to organ harvesting through the lurid title of his report, and is also known to have opposed Kosovo's Independence.[36] Although these are just a few critical viewpoints, they present a strong indication that there is no widespread consensus on the establishment of this court, which probably should have been the case when justice properly demands something.

Procedurally speaking, there are additional issues. First, the Kosovo Specialist Chambers and the Specialist Prosecutor's Office are described as follows:[37] The court has a seat in The Hague, Netherlands, which is the main seat. Nevertheless, the chambers are attached to the four court instances in Kosovo: The Basic Court, Court of Appeals, Supreme Court, and the Constitutional Court. They are supposed to each have an additional special chamber to deal exclusively with criminal proceedings related to the Council of Europe Assembly Report. However, all the accused until today have been tried in The Hague and not in any of these chambers.

Second, the Specialist Chambers has primacy over all other courts in Kosovo. The Specialist Chambers or the SPO may order the transfer of proceedings within its jurisdiction from any other prosecutor or any other court in the territory of Kosovo to the Specialist Chambers and the SPO at any stage of an investigation or proceedings. The Specialist Chambers and the SPO can order a Kosovo court to hand over any ongoing cases or investigations that are within the jurisdiction and mandate of the Specialist Chambers or SPO.

Third, the SPO is authorized to question victims, witnesses and suspects and record their statements; conduct onsite investigations, collect evidence, undertake expert examinations thereof and conduct such other investigative activities as necessary. It can also seek the assistance of Third States and international organizations or other entities, and undertake investigative measures as laid out in the Rules of Procedure and Evidence. This means that unlike other Kosovo courts, they have the capacity to enter arrangements with states, international organizations, and other entities for the purpose of fulfilling their mandate.[38]

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[35] Arbesa Hoxa-Dobrunaj, *From the ICTY to the Specialized Chambers: The KLA's Journey Through the Courts*, ROBERT LANSING INSTITUTE (Mar. 30, 2021), https://lansinginstitute.org/2021/03/30/from-the-icty-to-the-specialized-chambers-the-klas-journey-through-the-courts/.
[36] *Id.*
[37] *Background*, KOSOVO SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFFICE, https://www.scp-ks.org/en/background, (last visited Apr. 12, 2023).
[38] Law No.0.5/L-053, *supra* note 26, at art. 4.2.

Fourth, the entire staff is international, as are the Judges, the Specialist Prosecutor, and the Registrar. SPO staff, which includes prosecutors, investigators, analysts, security professionals, witness-protection specialists, and support staff, are all citizens of either an EU member state or one of the five non-EU contributing countries: Canada, Norway, Switzerland, Turkey, and the United States. No one from the staff is Kosovar. Further, the Lead Prosecutor is appointed by the head of EULEX as the Specialist Prosecutor, while all other prosecutors and officers of the Specialist Prosecutor's Office are appointed by the head of EULEX upon the recommendation of the Specialist Prosecutor.[39] The Specialist Prosecutor's Office has its own police, which has authority equivalent to that of the Kosovo Police under Kosovo law, including but not limited to Article 70(3) of the Criminal Procedure Code, Law No. 04/L-123.[40] This means that the SPO's police have even greater powers than those of Kosovo's Police, exceeding the competences as provided by the Kosovar law on this field.

On the side of the Specialist Chambers, the problem gets even deeper due to the fact that judges are only appointed upon recommendation of an independent Selection Panel to the Roster of International Judges by the Head of EULEX. This is in contradiction with the appointment as foreseen by the Constitution of Kosovo, to be appointed by the President and follow respective procedures.[41] The Chambers are composed of respective Panels, being attached to and mirroring each level of the court system in Kosovo. Individual judges perform the functions of a Pre-Trial Judge; Trial Panels are composed of three judges (and one reserve Judge); Court of Appeals Panels are composed of three judges; Supreme Court Panels composed of three judges; Constitutional Court Panels composed of three judges; and other individual judges as necessary to perform their respective functions. From the top bodies to those less authoritative, in six departments of the Registry and its fourteen units, there is not a single place for a Kosovar employee.

Fifth, regarding the Rules of Procedure and Evidence, it is worth relating them to the last point concerning international staff. The constitutional amendment provides that the rules are determined on its own by the Specialist Chambers, and then the Specialist Chamber of the Constitutional Court shall review the Rules to ensure compliance with Chapter II of the Constitution.[42] In other words, these Rules are being reviewed by an entirely international staff, and it does not seem to make any difference to offer some legal assurance that Kosovo itself with its own national judges is having a say on them. This part of the provision only reinforces the international nature of this court; not a hybrid one, nor a domestic one.

Sixth, international treaties entered into between KSC and another state on judicial cooperation do not have to be ratified by the Assembly of Kosovo, and the Specialist

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[39] *Id.* at art. 35.6, 35.9.
[40] *Id.* at art. 35.3.
[41] CONSTITUTION OF THE REPUBLIC OF KOSOVO, *supra* note 25, at art. 104.
[42] AMENDMENT OF THE CONSTITUTION OF THE REPUBLIC OF KOSOVO Aug. 3, 2015, Amendment no. 24, No.05-D-129, art. 162, ¶ 6.

Chambers must only seek the agreement of the Government of Kosovo before entering into such a treaty. It is also authorized to utilize mutual legal assistance agreements that were entered into by Kosovo and other states or make requests for assistance based on the principle of reciprocity. Further, the Specialist Chambers may enter into agreements with other states on the immunity and inviolability of their premises, property, funds, assets, archives, records, documents, and the servicing of imprisonment sentences in the territory of such states.[43]

Seventh, the jurisdiction of the Specialist Chambers is not limited by any amnesty that may be granted under the Constitution of Kosovo; neither judgments of the Specialist Chambers are subject to any pardon that may be granted under the Constitution.[44] Nevertheless, since these are grave breaches alleged, there would not be any amnesty allowed domestically either, but the purpose of mentioning this issue is that it is enough to show interference with the state.

Eighth, the budgets of the Specialist Chambers and the Specialist Prosecutor's Office are funded by the European Union rather than Kosovo.[45] Indeed, the two bodies also operate entirely outside of Kosovo's public financial management and accountability system. They are not subject to any audit by the Kosovo Auditor, and they are also not required to comply with Kosovo legislation on public finance. Contrariwise, this Law of the Special Court shall prevail over any and all provisions of the Law on Public Finance and Management.

Ninth, KSC has jurisdiction over natural persons of Kosovo or FRY citizenship, or over persons accused of committing crimes against persons included in these classes. Nevertheless, until now, only accused Kosovar individuals are being tried. Again, if the court was established based on Marty's Report for KLA members, how does the court establish the authority to prosecute those with FRY citizenship? Is this an attempt to soften the societal and political rejection, or does it simply include this categorization in order to extend the authority over those who might arguably justify themselves by not having a Kosovar nationality?

Tenth, reality shows that the court lacks local legitimacy. If we are to think back to a very basic rule, that the legitimacy of the Parliament itself, is acquired by the society's will which on itself evokes sovereignty: is it right to accept an institution which lacks such societal will?

Eleventh, although the court was originally foreseen for five years, being argued to last only until 2020, the court is still proceeding in 2023. There have been discussions regarding the moral equation of crimes committed by the KLA with those of Serb forces. For example, the U.S. Chairman of the Committee on Foreign Affairs, Eliot Engel stated: *"No one is saying that the KLA was somehow perfect and did not commit bad acts of its own, but let's be crystal*

[43] Law No.0.5/L-053, *supra* note 26, at arts. 4.4, 55.2, 56.2, 57.1.
[44] *Id*. at arts. 18, 51.1.
[45] *Id.* at art. 63.

clear… the vast majority of the crimes were committed by the Yugoslav and Serbian security forces. That is a fact. There is no other way to look at what happened."[46]

APPLICABLE LAW: CONVENTIONAL V. CUSTOMARY INTERNATIONAL LAW

International law has strict and clear rules when it comes to grave breaches and serious violations of treaties, as well as customary international law. Consequently, respective measures shall be undertaken, and appropriate restorative mechanisms shall be established in each country faced with such allegations. Hereunder, we should ask ourselves: Where do we find the grounds for such claims against Kosovo? What is the proper way to handle them? Who is authorized to try these cases and on what basis? Is there a uniform accepted strategy or mechanism to address them, or is it instead left to be decided on a case-by-case basis? Is that legal? Does it clash with the existing and ongoing practice of international law? All of these are questions the reader should have in mind while trying to understand the principles used in restorative justice in the international area.

I will start discussion on this issue with two interrelated arguments: (a) If there is an international obligation to investigate and prosecute, upon which states this rule specifically applies to; signatory parties to the conventions or any state whatsoever, and (b) The nature of the armed conflict between Serbs and KLA; international or non-international armed conflict.

a. International obligation to investigate and prosecute: Its implications between state parties and non-state parties

The international obligation to States to search for persons alleged to have committed, or ordered to have committed, grave breaches, and to try or extradite them is found in numerous treaties, starting with all the four Geneva Conventions.[47] It is also found in the Convention on the Prevention and Punishment of the Crime of Genocide;[48] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;[49] Chemical Weapons

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[46] *Kosovo's Wartime Victims: The Quest for Justice: Hearing Before the H. Comm. on Foreign Affairs*, 116th Cong. 116-28 (2019).

[47] Convention on the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[48] Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277.

[49] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.S. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (*entered into force* 26 June 1987), *reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985).

Convention;[50] Amended Protocol II to the Convention on Certain Conventional Weapons;[51] Ottawa Convention;[52] Hague Convention for the Protection of Cultural Property;[53] Second Protocol to The Hague Convention for the Protection of Cultural Property;[54] among multiple others.

The idea that States should implement the obligation to investigate war crimes and prosecute the suspects by providing jurisdiction for such crimes in their national legislation is of crucial importance. It has become a legal obligation towards them, regardless of the approach taken to address such breaches, but not only that, it deeply implies political reasons in order to invoke accountability as a means to further induce negotiations between hostile countries. Maintaining such relations requires proven efforts, so much so that a state shall apply its investigative and prosecutorial powers against its own citizens when needed.

Nevertheless, many analysts find it hard to determine whether this practice comes pursuant to an obligation or merely a right. The above-mentioned treaties are all applicable in regard to the state parties as signatory ones. Out of them, Kosovo has only ratified the Torture Convention so far, and to the extent that it applies, Kosovo can be considered under the duty to act upon it because its Constitution provides that international agreements are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.[55] The language of the Torture Convention is unambiguous and specifically states that the State Party in the territory under whose jurisdiction a person alleged to have committed any offense, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.[56]

This language means that Kosovo's own authorities have jurisdiction to the prosecutorial process in case the person is not extradited. Nowhere in this language do we find wording of giving such authority to another body, instead, it leads to the idea of *nationality*.

One might question how Kosovo falls under the obligations as imposed by other treaties? Can we simply ignore them and refuse their application by insisting on Kosovo's right not to become a participant? Would a sovereignty argument be valid here? The answer is probably not! Such dispositions have already become part of customary international law in

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[50] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (1993).
[51] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996), 1125 U.N.T.S. 609, 19 I.L.M. 1206.
[52] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sep. 18, 1997, 2056 U.N.T.S. 241, 36 I.L.M. 1507 (1997) (entered into force Mar. 1, 1999).
[53] Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.
[54] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflicts, Mar. 26, 1999, 38 I.L.M. 769, 2253 U.N.T.S. 172.
[55] CONSTITUTION OF THE REPUBLIC OF KOSOVO, *supra* note 25, at arts. 17, 19, 22.
[56] Convention against Torture, *supra* note 49, at art. 5-7.

addition to being only part of multilateral treaties or bilateral pacts. Under the Geneva Conventions, all *grave breaches*[57] constitute war crimes, even though not all war crimes are grave breaches. Qualification as a grave breach somehow results in universal jurisdiction, regardless of whether a State is a party or not, considering that every country worldwide has an implied duty to ensure security and peace within their capacity and utmost contribution. Since state parties have applied such norms through multilateral and bilateral agreements, we can say that they have undoubtedly become part of international customary law; especially due to the idea that grave breaches are widely different from other breaches, considering their massive consequences in comparison to others.

Even if the duty to investigate and prosecute arises as part of customary international law, it still falls under the realm of taking such actions within the country's full jurisdiction and authority. The only exception is in cases when countries refuse to do so without proper justification, and therefore, a court of international caliber, existing or *ad hoc*, would be reasonable to emerge.

Even the UN itself makes no exceptions to such a rule. In 1946, in its first session, the UN General Assembly recommended that all States, including those not members of the United Nations, arrest persons who allegedly committed war crimes in the Second World War and send them back for prosecution *to the State where the crimes were committed*.[58] Since then, the UN General Assembly has, on several occasions, stressed the obligation of States to take measures to ensure the investigation of war crimes and crimes against humanity, and the punishment of the perpetrators. Once more, we analyze the language of the disposition and realize that the States themselves are called and asked to take measures in such situations.

On the other hand, the Vienna Convention on the Law on Treaties provides that an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.[59] Precisely because of that, the Rome Statute makes different provisions for state parties and for non-party states on the issue of state co-operation. To state parties, the ICC *''is entitled''* to present *''co-operation requests''* and they are obliged to *''co-operate fully''* with it in ICC investigations and prosecutions of crimes, but as for non-party states, the ICC only *''may invite''* them to *''provide assistance''* on the basis of

[57] Convention for the Amelioration of the Condition of the Wounded and Sick, *supra* note 47, at art. 50 (defining grave breaches as willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly).
[58] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 607 (2005).
[59] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), at art. 35.

an ad hoc arrangement, which shows that this co-operation falls under the *''voluntary nature''* alone.[60]

One might argue that because Kosovo has signed the Brussels Agreement, they are bound by it. No one can dispute the negotiation efforts and reconciliation measures that this agreement offers, but Kosovo only signed so far as to agree for the duty to investigate and prosecute, but not to delegate its whole jurisdiction for such purposes somewhere else. As mentioned in the formation basis argument, this Court of a special nature was not established based on an international agreement or UN Resolution. Whether bound by a treaty or expressly accepting so in writing, all of them call for prosecution by state action within their powers.

Taking a look at the practice of states is reasonable in furtherance of an imposing duty, such as prosecution of war crimes and crimes against humanity. This might also arise by looking at the Military Manuals[61] of many countries worldwide. In addition, an obligation to investigate and prosecute is stated explicitly in a variety of other State practices, such as agreements and official statements.[62] Each describes, one by one, the respective steps taken to address injustice by national legislative, executive, and judicial powers within their pristine sovereignty. This further supports the argument that Kosovo should have had this right within its own jurisdiction. Additionally, we shall not forget that Kosovo's entire legislative system is tailored to implicitly accept all the obligations arising from the international law, in vision of its future integration.

b. International, non-international armed conflict, or none?

Further discussion is needed regarding the state's obligation to investigate and prosecute war crimes. Do the rules apply to international armed conflicts only, or is there an implied obligation for states to respect those provisions in a non-international conflict as well?

It is very important to distinguish between international and non-international armed conflict because rules of the former do not always match the latter; conventional rules do not necessarily become part of customary international law (which mostly covers the breaches in non-international armed conflicts). Thus, it is important to determine which aspects of international humanitarian law apply.

The case of Kosovo has been subject to different opinions on this question, whether it belongs to the first or second category. Such a question was also raised when the ICTY was established. The Appeals Chamber concluded that the conflicts in the former Yugoslavia have

[60] Zhu Wenqi, *On Co-operation by States not Party to the International Criminal Court*, 88 INT'L REV. OF THE RED CROSS, 87, 87–110 (2006).
[61] Henckaerts & Doswald-Beck, *supra* note 58, at 608.
[62] Vidmar, *supra* note 5; CONSTITUTION OF KOSOVO, *supra* note 29.

both internal and international aspects.[63] However, such a decision was taken considering that Yugoslavia had Republics and Autonomous Provinces. This means that the states who seceded from Yugoslavia, and which formerly existed as independent Republics within the federation, had the right to insist that elements of international armed conflict have occurred and therefore the application of conventional law would be undisputed.

The case of Kosovo is different. We are not talking about a Republic which exercised its full sovereignty under Yugoslavia. Rather, the case involves a long history of continuous attempts by Kosovo to gain its independence from Serbia based on the self-determination right under the Yugoslavia Constitution. Article 2 of the First Geneva Convention states that an international armed conflict must involve a declared war or any other armed conflict, which may arise *between two or more of the High Contracting Parties* to the convention.[64] On the other hand, the official commentary on Article 3 of the Geneva Convention regulates internal armed conflicts, and it lists a series of conditions that, although not obligatory, provide some convenient guidelines. First and foremost amongst these guidelines is whether the party in revolt against the de jure government (in this case the KLA), "possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention."[65] Between those factors to be considered, we must ask ourselves whether exercising the constitutional right of self-determination should be considered as an internal conflict or not and should remember that Kosovo was not part of Serbia; it was an autonomous province that had the right to separate from SFRY, just as the Republics did. In order to be an internal conflict, it has to emerge *within* a state, its governance and territorial scope. Comparatively, this is like the example of a state, which wants to exercise its power on a territory and population, over which it does not have any rights at all in the first place. Therefore, there are grounds for us to say that it was neither an international nor an internal conflict.

Since international law sounds silent on such situations, the subsequent possibility is to see it within the option which it has most similarities with. This, in conjunction with the fact that it was in no way an international conflict, leaves us with the option that this might have been an internal conflict. As such, the Special Court's jurisdiction should be fully limited to the rules that govern internal conflicts only. Nonetheless, the Special Court's jurisdiction is still questioned. Apart from its ambiguous and complex structure, there are many other issues involved.

Let us assume, although not conclusively, that this was an internal conflict. The respect for, and application of, the Geneva Conventions are indisputable. KLA was bound by them

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[63] The Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, Int'l Crim. Trib. of the Former Yugoslavia, (Oct. 2, 1995) (decision on the defense motion for interlocutory appeal on jurisdiction) ¶ 77.
[64] Convention for the Amelioration of the Condition of the Wounded and Sick, *supra* note 47, at art. 2.
[65] *Legal Standards in the Kosovo Conflict*, HUMAN RIGHTS WATCH, https://www.hrw.org/reports/2001/kosovo/undword2e.html (last visited, Apr. 13, 2023).

because Yugoslavia at the time was a party to it. Even if this was not the case, KLA was still bound by it, since in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum "humanly treatment for persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause."[66] Also, acts such as violence to life and person (murder of all kinds, mutilation, cruel treatment and torture); taking of hostages; outrages upon personal dignity (humiliating and degrading treatment) are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons.[67]

Clearly shown, the International Community aimed to inclusively protect, at least, the basic rights of some categories regardless of the conflict's character. My argument is that, of course, such atrocities should necessarily be condemned, but the main point is that they must be proven, and as the rules provide, specifically either for persons taking no part in the hostilities or those members of armed forces who have laid down arms or are hors de combat. This means that the prosecution in the Special Court should prove beyond a reasonable doubt that the accused KLA members have actually committed the exact prescribed crimes as part of what the rules for internal conflict provide, and it cannot go further than that to include claims that are only covered by conventional rules for armed conflicts, unless they have become, without a doubt, part of customary international law as well.

On this crucial aspect, it is worth mentioning a case from the ICTY: Prosecutor v. Enver Hadzihasanovic and Amir Kubra The defendants appealed that the Prosecution failed to satisfy the first requirement of the Tadić Jurisdiction Decision by not identifying the rule of international humanitarian law alleged to have been breached, or indicating whether the legal basis for that count was the laws of war (conventional) or customary international law (customs of war)."[68] The Appeals Chamber decided that it was satisfied that the conventional prohibition on attacks on civilian objects in non-international armed conflicts attained the status of customary international law, and that the violations of this provision entailed, in customary international law, the individual criminal responsibility of the person breaching the rule."[69] On this account, even if CIL is to be applied against KLA members, the Special Court should: (a) identify the rule that has been breached; (b) the legal basis for that count as to which category it belongs; and (c) the criminal responsibility resulting from the breach under customary international law.

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[66] Convention for the Amelioration of the Condition of the Wounded and Sick, *supra* note 47, at art. 3(1).
[67] *Id.*
[68] Prosecutor v. Enver Hadzihasanovic and Amir Kubura, Case No. IT-01-47-AR73.3, Decision on Interlocutory Appeal, P 44 ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2005).
[69] *Id*. at ¶ 48.

On the other hand, if this was an internal conflict, then the rule that national courts should deal with investigation and prosecution is further reinforced. Not only national courts but national legislation should be taken in serious regard as well. Although the provisions of the Convention have been accepted, does this mean that they are directly applied? Should their application be subject to constitutional acceptance? The cases have raised the claim of *nullum crimen sine lege, nullum poena sine lege (no punishment without law)* in regard to the domestic law prevalence instead of the customary international law.

The claim that the convictions must be based on a pre-existing written law, excluding this way the direct application of CIL norms that had no corresponding SFRY statutory provision, was also raised by the Veseli motion.[70] Such a claim is pretty risky to be raised, due to the fact that crimes against humanity and war crimes constitute *jus cogens* norms, and as such are *peremptory*. Consequently, KLA members may claim that CIL should be the secondary source of law, but it is indisputably risky to insist on its complete inapplicability and removal as a source of law without having been instructed to do so in a written statute. Giving states the power of deciding such grave breaches that uphold fundamental values, would open the door for them to escape the international responsibility of prosecuting the perpetrators of serious violations of international law. Particularly for lawyers, this should be a concern for the possibility of a precedent in other cases.

That being said, KLA shall have the right to claim for the primacy of the former domestic law, and in case that fails to properly address the legal accountability, CIL shall show up and gradually overtake the role of the applicable law. Some states have even gone so far as to grant amnesty for those who committed war crimes,[71] a practice which undoubtedly is in deep contradiction with the international law, and as such, has been criticized by their own national courts as well as the international community as a whole.[72] However, it serves as an indication of how fanatic states may become, once this part of sovereignty is concerned.

JUDICIARY COMPARISON

How does KSC differ from other courts and/or tribunals that have been established throughout the years, ever since international law came up with the rules and practice to prosecute, adjudicate and even punish the perpetrators? Is the structure or purpose somewhat similar? Is it a type of court that has been seen before and is it common in tackling those crimes, or is it so different that it creates a new precedent in this area? The answer is found in its comparison with ICTY, ICTR, ICC, and the Special Court of Sierra Leone, which are worth discussing, considering the huge role they played on the international level. By

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[70] Specialist Prosecutor v. Thaci et al., *supra* note 32, at ¶ 40(a).
[71] *Rule 158: Prosecution of War Crimes*, INTERNATIONAL HUMANITARIAN LAW DATABASES, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule158#refFn_103666CB_00013 (last visited Apr. 13, 2023).
[72] Henckaerts & Doswald-Beck, *supra* note 58, at 611.

analyzing their basis of formation, we can at least come to a reasonable opinion regarding the nature of KSC and its place among those courts and tribunals.

ICTY v. KSC

The International Criminal Tribunal for the Former Yugoslavia is known to be the first war crimes court created by the United Nations and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. In May 1993, the Tribunal was established by the UN in response to mass atrocities then taking place in the Balkans, Croatia, and Bosnia-Herzegovina (BiH) since January 1991. Reports depicting horrendous crimes, in which thousands of civilians were being killed, wounded, tortured, sexually abused in detention camps, and hundreds of thousands expelled from their homes, caused outrage across the world and spurred the Security Council to act.[73] As it can be seen, this court was established by UN as an ad hoc tribunal due to the grave breaches of international law.

The ICTY and national courts had concurrent jurisdiction over alleged criminals and their inhuman acts. However, ICTY could claim primacy and could take over national investigations and proceedings at any stage if this proved to be in the interest of international justice. If this was the case with a pure international court, how can a hybrid court like KSC not provide for concurrent jurisdiction? Instead, it takes all the authority to conduct prosecution and adjudication, thus completely excluding Kosovo from a very crucial aspect of its sovereignty. The downside is that it does not even recognize national courts' jurisdiction as an international right to conduct such actions in furtherance of justice.

It is further mentioned that ICTY did this at a time when the domestic judicial systems in FRY were not able or willing to do so themselves,[74] while Kosovo is able and willing to go after the accused for prosecution. Might this be one of the reasons why KSC was established as a hybrid court because if it was established as an international one, the rule of concurrent jurisdiction would be inevitable? By relying on the belief that it is indeed a domestic court under Kosovo's jurisdiction, this claim would have no chance to be raised.

In structural comparison, ICTY also had the very same structure: Chambers, Registry and Office of the Prosecutor (OTP). The difference is that KSC goes even deeper by attaching these Chambers to each level of the court system in Kosovo. Regarding the budget, it was financed by ICTY itself.[75] The same goes for KSC since it is not controlled by Kosovo. Here, KSC is perceived as having more of an international character.

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[73] *About the ICTY*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/about (last visited Apr. 13, 2023).
[74] *Completion Strategy*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/about/tribunal/completion-strategy (last visited Apr. 13, 2023).
[75] *The Cost of Justice*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/about/tribunal/the-cost-of-justice (last visited Apr. 13, 2023).

On the other hand, ICTY's collection of evidence and interview of witnesses were tasks usually performed by police in national systems,[76] while this is an exclusive competence for KSC's police. In addition, the Tribunal managed its own Detention Unit, while in a national system, this task would not be part of the Court's core activities but would be done by a government ministry.[77] Such an option is simply nonexistent for KSC. This makes it not an international court, but nor does it make it a national one.

With respect to personnel, ICTY had international staff.[78] As a hybrid court, reason calls for having a mixed staff; at least one Kosovar judge or Registrar member, but this is not the case. Again, this leads the court to be seen as a court that is more international in character.

Finally, if we are to ask why ICTY did not prosecute these cases since it had the jurisdiction to, the answer might very well be that its mandate lasted only until 2017 because of its temporary nature. Only after the Marty Report were the allegations raised against KLA members in 2014. Thus, a three-year period would probably not be enough to bring justice. All the above-mentioned comparisons lead to the conclusion that KSC is neither an international court nor a domestic one. It indisputably has elements of both, so it might be hybrid, but it provides for a new type of hybrid as never seen before.

ICTR v. KSC

The United Nations International Criminal Tribunal for Rwanda (ICTR) is of the same nature as ICTY. It was established by the United Nations Security Council to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between January 1, 1994 and December 31, 1994.[79] In comparison with KSC, we see again that ICTR, same as ICTY, was established by the Security Council as a response to grave breaches of international law, while KSC was simply called to act upon the international duty of prosecuting and trying the alleged criminals. During most of its mandate, the ICTR was operating with three Trial Chambers and one Appeals Chamber, the latter being shared with ICTY.[80] KSC has one chamber in each level of the judiciary, making it different again.

All the judges in ICTR were elected by the United Nations General Assembly from a list submitted by the Security Council, while KSC has judges appointed by the head of EULEX. The Office of the Prosecutor (OTP) is mandated to act independently as a separate organ of the Tribunal and not to seek or receive instructions from any government or from any

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[76] *Id.*
[77] *Id.*
[78] *Organizational Chart*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/about/tribunal/organisational-chart (last visited Apr. 13, 2023).
[79] *The ICTR in Brief*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, https://unictr.irmct.org/en/tribunal (last visited Apr. 13, 2023).
[80] *Chambers*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, https://unictr.irmct.org/en/tribunal/chambers (last visited Apr. 13, 2023).

other source in the execution of its functions.[81] Comparatively, is this not the case with KSC as well? Can we have a legal basis or reasoning to call it a domestic court, while the state has no authority at all to conduct prosecutorial actions? As it can be shown, there are similarities but also crucial differences between the two courts, which removes Kosovo's court once more from the category of the common types of courts known.

Special Court of Sierra Leone v. KSC

Here, we deal with comparison of a hybrid court to see whether in this perspective, KSC can be found of the same or similar nature. Negotiations between the United Nations and the Government of Sierra Leone on the structure of the court and its mandate, produced the world's first "hybrid" international criminal tribunal. At first, it looks like special courts have been established even earlier, and therefore KSC does not present a new precedent. However, there are crucial points for attention.

First, although it is known as a *"special"* and *"hybrid"* court, the Special Court of Sierra Leone was established by its own request towards the UN. They had a say as a sovereign country to call for such a court, while Kosovo never did so. Although Kosovo did establish the KSC through a constitutional amendment and a special law, which might point out its sovereignty power, the international community's pressure and conditions cannot be disregarded.

Secondly, in comparison with ICTY and ICTR with a seat in The Hague, same as KSC has, the Special Court for Sierra Leone was the first modern international tribunal to sit in the country where the crimes took place. This shows that although it had the support of the international community, the sitting place remained within its territory, something which KSC does not offer. Instead, KSC offers a concurrent option by providing for special chambers within the judiciary in each level, but as mentioned earlier has the absolute discretion to take control over the adjudicated cases there. Consequently, there is not much left to say about the national nature of KSC. It simply reinforces the confusing jurisdiction and structure as a hybrid court.

ICC v. KSC

What if we proposed to take these cases to other international courts? Could we refer them to the International Criminal Court (ICC)? Could ICC take this right by itself? The important discussion when it comes to the relation between ICC and KSC rests on whether the ICC could have jurisdiction to prosecute violators of KSC. The ICC is the first and only permanent international court with jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.

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[81] *Office of the Prosecutor*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, https://unictr.irmct.org/en/tribunal/office-prosecutor (last visited Apr. 13, 2023).

Amongst those, the violators in KSC are being accused of two of them: (1) Crimes against humanity and (2) War Crimes. Thus, why not go after them? The ICC is intended to complement existing national judicial systems, and it may exercise its jurisdiction only when national courts are unwilling or unable to prosecute criminals.[82] The ICC lacks universal territorial jurisdiction. The Court may exercise jurisdiction in a situation where those crimes were committed on or after July 1, 2002 and either the crimes were committed by a State Party national, within the territory of a State Party, in a State that has accepted the jurisdiction of the Court; or the crimes were referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under Chapter VII of the UN Charter.[83]

When a situation is not within the Court's jurisdiction, the Security Council can refer it to the ICC. This would be the only way for the ICC to be granted jurisdiction over those alleged crimes in Kosovo, as it has been done in the situations in Darfur (Sudan) and Libya.[84] Again, this would only be able to happen if Kosovo has refused or failed to prosecute and act accordingly, and if they happened on or after July 2002. As a result, all the comparisons with the most relevant and important courts have shown that the KSC presents a new type of court. As such, it should be treated with careful consideration for the risk of a new precedent, which might be followed in other states, especially in the postwar societies where the rule of law is fragile, which creates practical legal loopholes for others to interfere with.

A POTENTIAL ALTERNATIVE

When we think about the reasons why this *"hybrid"* court type was planned and decided for Kosovo, the usual justification is that it was done so for security reasons. It is considered that the judicial system of Kosovo is simply not well-equipped and prepared to take such a huge responsibility on its shoulders, considering the level of corruption reported by NGOs, such as Transparency International.[85] Those are all indisputable facts and although it has been twenty-one years since Kosovo came out of war, the consequences are still present. Corruption is a negative phenomenon present even in most developed countries, let alone the developing ones.

Kosovo was for a long time under the international protectorate, which aimed, *inter alia*, to rebuild the justice system. In 1999, UNMIK took the lead in building Kosovar institutions and oversaw the functioning of the judiciary, and in 2002, the new Kosovo parliament established by UNMIK, chose judges and prosecutors to be appointed by the Special Representative of the UN Secretary-General.[86] When Kosovo declared independence in February 2008, UNMIK ceded most of its judicial responsibilities to Kosovar control, but

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[82] *How the Court Works*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/about/how-the-court-works (last visited Apr. 13, 2023).
[83] *Id.*
[84] *See* Statement, Luis Moreno-Ocampo, ICC Chief, Security Council Refers Situation in Darfur to ICC Prosecutor (Apr. 1, 2005), https://www.icc-cpi.int/news/icc-security-council-refers-situation-darfur-icc-prosecutor.
[85] TRANSPARENCY INTERNATIONAL, https://www.transparency.org/en (last visited Apr. 13, 2023).
[86] TRISTAN DREISBACH, AN EYE ON JUSTICE: MONITORING KOSOVO'S COURTS, 2008-2014 2 (2015).

another international organization stepped in. EULEX brought in judges, prosecutors, and police from European and North American countries who worked parallel to their Kosovar counterparts, applying the same laws but using the mission's own personnel. EULEX could choose to process cases it saw as difficult for Kosovo's nascent institutions to handle, in effect placing a limit on Kosovo's control over its own justice system, focused on cases involving war crimes, corruption, organized crime, and terrorism.[87] Kosovo has evidently been continuously under others' control, although not absolute, but with a very high influence.

Why actions regarding these crimes were not taken is a question still unfortunately unanswered. Nevertheless, their presence has been of a particular achievement in the rule of law goals, whereby Kosovo has cooperated successfully with international actors, but at the same time, its judicial powers have been limited, even after it declared its independence. We might consider giving Kosovo a chance to prove itself on the duty of prosecuting and adjudicating the alleged crimes. This could be a worthy challenge considering the seriousness required, which consequently would prompt the willingness and readiness to show itself in front of the international community. This would be a huge incentive for this country to move forward professionally.

According to the current structure of the court, the Specialist Chambers and the Specialist Prosecutor's Office may have a seat in Kosovo, a seat outside Kosovo, and The Specialist Chambers and the Specialist Prosecutor's Office may perform their functions at either seat or elsewhere, as required. Wasn't the idea of taking the court out of Kosovo for purposes of professionality and witness protection? If *"a seat in Kosovo"* is an option, why can't the Court completely sit there? It's more or less the same risk. Here is a potential alternative which would reduce the risk of sovereignty infringement:

- The Court could have been established in Kosovo, with its principal seat there, but with the option to carry out some of its functions (i.e., investigation somewhere else for witness and victim protection and support);
- The court would have its own national judges and one to two international judges as experts to contribute to decisions related to the grave breaches due to their nature and lack of experience;
- The applicable law would respect "*Nullum crimen sine lege, nullum poena sine lege*";
- The Court would determine its own Rules of Procedure and Evidence;
- The international agreements of this nature would be ratified by the Assembly of Kosovo. Pursuant to them, any persons accused of crimes before the Court may be detained on remand and transferred outside the territory of Kosovo if there is a risk imposed, or even transferred to serve their sentence in a third country if found guilty; and

[87] *Id.*

- The budget could be supported by the international community, considering the purpose.

In this way, Kosovo would have a domestic court, although with some relatively small *"hybrid"* functions, only in regard to investigation and witnesses' protection, and only when needed and asked for. This would allow for lesser possibility of sovereignty infringement and there would be a higher degree of local legitimacy. Also, the presence of international judges within its territory would address the issue of experience and professionalism, and they would even be able to share their expertise with lawyers and other professionals. They could even do so through various training programs and study visits. This is not an unprecedented approach. This suggestion has been seen before in ICTY. With the encouragement of the UN of the Security Council and the support of the international community, specialized mechanisms for war crimes prosecutions and trials have been set up in Bosnia and Herzegovina, Serbia, and Croatia, where among others, ICTY has been providing professional advice in the reform of relevant legislation, especially in areas such as command responsibility and witness protection.[88]

CONCLUSION

This paper has shown, step by step, some of the most crucial issues that concern the legality of KSC. The history stirred the inevitable duty to establish such a court, and this court's unique nature demonstrated that the Special Court of Kosovo involves questions of fact and law; the uncertainty and subsequent implications of the applicable law; and the comparison with other courts and tribunals. This court is indeed an interesting case that may invoke debates on which criteria should we differentiate between international and domestic courts; and where do internationalized domestic courts stand in between them. If not more, the text has provided a thorough analysis and a considerable understanding of the actual state of this judicial body, a court which undoubtedly causes confusion and creates room for questions.

There is only one aspect which strongly talks about Kosovo retaining its sovereignty, even with KSC in place, and that is the Constitution. The country itself has amended the Constitution, and decided to establish such a court, thus legitimating it. However, Kosovo is a new state which is still in the stage of state building, still has a fragile democracy, and is still economically dependent on international aid and support. With a challenging road ahead towards enforcing the rule of law, search of a road to strengthen its international subjectivity should be ensured to take political actions and decisions that raise its faith and image in the international arena. Therefore, a court of this type would offer Kosovo the opportunity to prove itself in front of the international community through proper professional efforts and would include international elements only so far as to ensure accountability and judicial efficiency. As a last point, justice should be served for the victims, hence on this hope, the future of this court is yet to be seen.

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[88] *About the ICTY*, *supra* note 73.