

# The Specialist Court for Kosovo: continuity or departure from the hybrid courts model?

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## Abstract

The issue of whether to establish Specialist Chambers within the Kosovo justice system for alleged war crimes committed in Kosovo has been, arguably, one of the most heated debates not only from a political and social point of view, but also from a legal one. While the required amendments in the Constitution and several laws of Kosovo necessary to establish the Specialist Chambers in furtherance of the agreement dated 14 April 2014 between the Republic of Kosovo and the European Union on the Mission of the European Union Rule of Law Mission in Kosovo (“EULEX”)<sup>1</sup> will certainly create heated debates in the political level, one may argue that the legal issues that are expected to be encountered when the Specialist Chambers will be operational, may be even more pressing. This is in consideration of the peculiar nature of the Specialist Chambers, which are meant to have their basis within the laws of Kosovo, but at the same time, be independent from them and from control of Kosovo authorities. The purpose of this article is to delineate the possible legal issues that might confront the Specialist Chambers of Kosovo. Its main argument is that, while the Specialist Chambers seem to follow the experience of other hybrid internationalised courts, it still differs from them in some aspects. The challenges that the new Specialist Chambers may need to tackle deal with its jurisdiction and position within the Kosovo Judicial system, and its legitimacy and legal basis.

**Keywords:** Kosovo Specialist Chambers; international criminal law; jurisdiction; hybrid tribunals; Marty Report

## Introduction

The establishment of Specialist Chambers within the Kosovo judicial system will certainly be a major challenge from both a political and legal perspective. Nevertheless, the focus of this article will rely on the latter, that is, the legal issues that may be encountered during the establishment and work the Specialist Chambers. The process of setting up *ad hoc* international or internationalised courts or tribunals is certainly not new in the practice of post-conflict societies. However, this article argues that, despite having elements in common with these previous practices, the new Specialist Chambers will be a departure from the model followed by hybrid courts, because

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<sup>1</sup> Law no. 2014/04-L-274, passed in Parliament on 23.04.2014, and promulgated with Presidential Decree of the President of the Republic of Kosovo no. DL-022-2014, dated 07.05.2014.

the Specialist Chambers will apply mostly domestic law and will be incorporated in the domestic judicial system, despite the fact that it will remain independent from the Kosovo judiciary. Additionally, the article raises doubts as to the jurisdiction of the Specialist Chambers, whether they would have they would need their own legal personality in order to operate such independently from the Kosovo judicial system and its authorities. The first part will deal with the experience of other sibling hybrid courts in other countries, by underlining the similarities and differences in order to benefit from best practice experiences abroad. The second part will examine the proposal for a specialist court to investigate and prosecute allegations raised in the report of Senator Dick Marty. The last part will focus on the jurisdiction of the Specialist Court vis-à-vis Kosovo's domestic law and international law.

### **Previous experiences of hybrid internationalised courts.**

#### *Generations of the International Criminal Courts and Tribunals*

The debate over the proliferation of international or internationalised (hybrid) courts and tribunals is not at all new within international law scholars, and in particular, international criminal law scholars.<sup>2</sup> In international criminal law, hybrid courts and tribunals are classified as third generation of tribunals which are mandated to try international crimes such as genocide, war crimes, and crimes against humanity.

Briefly speaking, the first generation consists of courts established by the Allied Powers<sup>3</sup> immediately after the end of WWII, in order investigate and prosecute politicians and high ranking Nazi officials for their role in the commission of crimes by the Nazis during the war period. Keeping into consideration the previous failures of the international community to prosecute and convict persons responsible for the commission of war crimes during WWI, the Allied Powers decided to establish, in 1945 the International Military Tribunal in Nuremberg, (for Nazi war criminals) and the International Military Tribunal for the Far East (IMTFE) in Tokyo (for the Japanese ones). The jurisdiction given to these *ad hoc* tribunals by international treaty was to try three types of international

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<sup>2</sup> Since 15 years ago, the NYU Journal of International Law and Politics devoted a special issue (Vol 31, no. 4, 1999) debating possible benefits and consequences of the increase of the number of international courts and tribunals, not only in international criminal law, but also on the law of the sea, or international trade law, (such as the International Tribunal for the Law of the Sea, or the Dispute Settlement Board of the World Trade Organization (WTO)), which reminds the concept of fragmentation in international law, with self-contained regimes that have their own special principles and rules, applicable only to certain specific fields in international law.

<sup>3</sup> United States, France, the Soviet Union, and the United Kingdom.

crimes: crimes against peace,<sup>4</sup> war crimes,<sup>5</sup> and crimes against humanity<sup>6</sup> (the term genocide was unknown at the time. It was only later coined by Polish-Jewish lawyer Raphael Lemkin). Although the experience of these military tribunals marked a clear turn against the impunity of crimes of an international character, by giving a strong signal that the international community will not stand indifferent to these events, they were ultimately still seen (probably also due to the lack of a proper due process) as a victor's justice, thus reducing their legitimacy.

The second generation of international criminal tribunals were established almost fifty years after, where following the end of the Cold War, the UN Security Council established, based on Chapter VII of the UN Charter, the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, as a response of the international community for the war crimes, crimes against humanity and genocides committed in the Balkans during the Bosnian conflicts and in Rwanda, where the "Hutu" majority exterminated within a three months period over half a million "Tutsi" civilians. As the international military tribunals of the aftermath of WWII, the UN international criminal tribunals were of an *ad hoc* character, thus limited in time and in relation to a specific event, in a specific time and place. However, unlike the international military tribunals, that were considered as a 'victor's justice', the ICTY and ICTY have by now created a rich jurisprudence on various issues of international criminal law and international humanitarian law, by establishing a high standard of due process of law, in full respect of the rights of the accused,<sup>7</sup> despite the fact that these tribunals are not, per se, obliged to follow the jurisprudence of human rights courts, such as the European Court of Human Rights, or the Inter-American Court of Human Rights. Moreover, one may assert that this goal to maintain the highest standard for a fair trial may have been a factor in the prolonged duration of these trials for several years, by creating a perception in the public of a slow justice. As for their legitimacy, it may be worth here to explain two concepts: the legal one with regard the legal basis of their establishment; and the one concerning public perception, especially from the affected communities in the conflicts.

With regard to the legal legitimacy of the legal source of the creation of these international criminal tribunals, the first debates were focused on whether, the UN

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<sup>4</sup> Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

<sup>5</sup> Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity

<sup>6</sup> Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

<sup>7</sup> Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights', 8 Northwestern Journal of International Human Rights (2009).

Security Council, as a clearly political organ, was competent to establish judicial organs to investigate and try the most highly responsible persons in the commission of international crimes. This issue was tackled by the ICTY in its first case, *Prosecutor v. Duško Tadić*.<sup>8</sup> In an interlocutory decision, the Appeals Chamber explained – in simple words – that since the UN Security Council was competent to authorise armed intervention according to article 42 of the UN Charter, then there was nothing to suggest that the Council could not, acting on the basis of Chapter VII of the Charter (resolution binding to all UN members states), to also establish judicial organs, and action that, per se, could be classified in those of the envisaged by article 41 of the UN Charter.

However, in relation to the ‘public’s legitimacy’, these tribunals suffered from the fact that their seats were located far away from the “crime scene” (the ICTY is located in the Hague, Netherlands, while the ICTY in Arusha, Tanzania); their staff and judges are internationally recruited; and the applicable law is international law. These features, coupled with the fact that trials were slow, (in fact because of the complexity of the cases), created the perception of a “foreign” court to local communities, both to war victims and to those communities that were considered as ‘aggressors’ and that always considered the tribunals as victor’s justice.

As for the International Criminal Court (ICC), it can be classified at the same category with the *ad hoc* tribunals for the fact that it is a court entirely with international elements, with jurisdiction to investigate and try international crimes (committed after the date of the entry into force of its constituent instrument, the Rome Treaty) and for crimes committed within its member states or *ratione personae* by persons having the nationality of its member states; and in special cases, when a third state accepts the jurisdiction of the Court,<sup>9</sup> or when the situation is referred by the UN Security Council.<sup>10</sup>

The Court International Criminal undoubtedly constitutes the future of international criminal law, since it the only permanent court with the treaty basis and not related to the UN. However, the International Criminal Court suffers from the same critiques that were directed to the ad hoc tribunals due to the distance in location from the countries where the case or situation is being investigated, as well as the tendency (certainly not because of the Court’s fault) to start investigations only for crimes committed in African countries.

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<sup>8</sup> *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-A, 2 October 1995.

<sup>9</sup> For example, the situations in Mali and Ivory Coast, accessible in [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0112/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Pages/situation%20index.aspx) and <http://www.icc-cpi.int/NR/rdonlyres/FF9939C2-8E97-4463-934C-BC8F351BA013/279779/ICDE1.pdf>.

<sup>10</sup> For example, situations in Libya or Darfur, Sudan.

The third generation of international criminal courts and tribunals, composed by hybrid tribunals, were conceived precisely to overcome the abovementioned drawbacks. Thus, a common element of hybrid courts and tribunals, is the mix of the high standard and impartiality of international resources, coupled with the specificities and local considerations of the state where the crimes have occurred. The aim is twofold here. On the one hand, the focus is on increasing the legitimacy of the court or tribunal for the affected communities by including local judges in the judicial panels and by applying the domestic legislation in parallel with international law. On the other hand, it avoids sham trials from the “victorious” party, and increases the guarantees for impartiality in the process of adjudication from judges who have no personal interest or conflict of interest in the relevant case.

### *Special Court for Sierra Leone*

The Special Court for Sierra Leone (SCSL) was established in 2002 as a result of an international agreement between the UN and the government of Sierra Leone, following a request from the latter. The SCSL may be considered as the first hybrid court of a national and international character, set up by a bilateral agreement between a state and an international organization as the UN, by creating a separate international organization, with its own legal personality, that is the SCSL. According to its Statute (nowadays in the process of closing with the Residual Mechanism of the SCSL), the SCSL had the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996 (following the failure of the Lomé Agreement). The SCSL was composed of local and international judges, the latter being a majority. As with regard to the Office of the Prosecutor, the Statute stipulated that the Prosecutor would be an international official, while the Deputy Prosecutor would be local. In the meanwhile, the seat of the court was located in Sierra Leone and in the Netherlands, for more sensitive and important cases, as for example the one concerning the former President of Liberia, Charles Taylor.

### *The Extraordinary Chambers in the Courts of Cambodia (ECCC)*

As with Sierra Leone’s case, the Extraordinary Chambers in the Courts of Cambodia were established as a consequence of an international agreement between the government of Cambodia and the UN, represented by the Secretary General (mandated by the UN Security Council to negotiate the agreement). The ECCC’s mandate is to investigate the persons responsible for the genocide, murders and tortures caused by the Kmer Rouge regime from 17 April 1975 until 6 January 1979 where at least 1.7 million people are believed to have died from starvation, torture, execution and forced labour. Although initially the UN expert group mandated with the task of setting up

such a court recommended that the court be under international control, this was rejected by Cambodian authorities,<sup>11</sup> arguing that the newly court must remain within the Cambodian judicial system. Thus, just like the SCSL, the ECCC is to be considered as a hybrid court due to the composition of its judicial panels, the office of the prosecutor and the court's staff, the seat of the court, and because of the application of domestic criminal law, mixed with international law elements. Unlike the SCSL, the ECCC is an integral part of the Cambodian judicial system, and the participation of the international staff is only considered as an 'assistance' of the international community from a logistic, financial and international standards of fair trials aspect.

### *Special Tribunal for Lebanon (STL)*

The Special Tribunal for Lebanon (STL) is a unique case in the family of international hybrid courts, because it was set up as a consequence of the even of 14 February 2005 in which a powerful explosion in central Beirut took the lives of 23 people, including former Lebanese Prime Minister, Rafik Hariri. Following a request of the Lebanese government, the UN Security Council mandated the UN Secretary General to negotiate the establishment of an independent court to investigate and prosecute the terrorist act of 14 February 2005, following the example of the Special Court of Sierra Leone. Such an agreement between the Lebanese government and the UN was signed on 23 January 2007. However, due to internal political strife, this agreement was not ratified by the Lebanese Parliament. Thus, in an almost unprecedented move, the Security Council, acting under Chapter VII of the UN Charter, passed Resolution 1757 (2007),<sup>12</sup> deciding to give legal effect to the contents of the annex to the agreement containing the Statute of the Special Tribunal Lebanon. This action did not pass without debate not only in the doctrine, but also at the Special Tribunal itself by the defense in the case of *Ayyash et al*, who opposed the jurisdiction and legality of the Tribunal. As expected, the Trial Chamber dismissed the challenge of the Defence by a decision on 27 July 2012<sup>13</sup> holding that (i) the only legal basis for the establishment of the Special Tribunal in Lebanon was Resolution 1757 (2007) and not the agreement dated 23 January 2007, which was never ratified; and that (ii) the Trial Chamber did not have the authority to assess the "legality" of a Security Council decision-making. This holding was upheld by the Appeals Chamber,<sup>14</sup> which re-confirmed that

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<sup>11</sup> Suzannah Linton, "Cambodia, East Timor And Sierra Leone: Experiments In International Justice", 12 Criminal Law Forum, 185-246, 2001

<sup>12</sup> Security Council, S/RES/1757 (2007).

<sup>13</sup> STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/TC, "Decision On The Defence Challenges To The Jurisdiction And Legality Of The Tribunal" 27 July 2012.

<sup>14</sup> STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC/AR90.1, "Decision on the Defence Appeal Against the Trial Chamber's "Decision On The Defence Challenges To The Jurisdiction And Legality Of The Tribunal", 24 October 2012.

Beyond that notion of self-restraint, however, here is nothing in the [UN] Charter that gives any of the other organs of the United Nations the power to review the Security Council's actions. Attempts to introduce such powers of review for the ICJ-the principal judicial organ of the United Nations at the time the United Nations Charter was drafted were defeated. Indeed, the ICJ has categorically stated that it "does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned". [...]In any event, this Tribunal's authority as an independent institution created by the Security Council outside of the United Nations system must necessarily be much more limited than that of the ICJ.<sup>15</sup>

As for the structure of the STL, it is similar to other sibling international courts and tribunals. Its Chambers, be it Trial or Appellate, are composed by both international and Lebanese judges (with a majority of international judges); and with staff of the Office of the Prosecutor, the Registrar, and of the Defence composed by international and Lebanese staff. Considering the type of crime for which the Tribunal has been established, the applicable law is international law, mixed with domestic legislation.

### **The Specialist Court for Kosovo. Continuation of Hybrid Courts?**

#### *The aim of establishing an ad hoc court*

It may be superfluous to say that the sole aim of establishing a special court for Kosovo came as a result of the findings of the report of the Parliamentary Assembly of the Council of Europe, prepared by Senator Dick Marty in January 2011,<sup>16</sup> which alleged the commitment of war crimes and organized crime by former KLA fighters, and especially trafficking of organs of Serbian soldiers in the territory of Kosovo and Albania. Although these allegations were not new, because were already mentioned by the former Prosecutor of the ICRT in her autobiography book,<sup>17</sup> but rejected by the International Criminal Tribunal for the Former Yugoslavia itself,<sup>18</sup> it was nevertheless decided by EULEX to give priority to the case, by creating the Special Investigative Task Force (SITF) in September 2011, a unit which was composed by EULEX international staff only.

After nearly three years of investigation, on 29 July 2014, the Chief Prosecutor of SITF, Mr. Clint Williamson issued a statement confirming, to some extent the consistency of the findings of senator Marty's report, with the exception of claims of organ trafficking,

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<sup>15</sup> Id, para 39.

<sup>16</sup> Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights Inhuman treatment of people and illicit trafficking in human organs in Kosovo, AS/Jur (2010) 46.

<sup>17</sup> Carla del Ponte, *La Caccia: Io e i Criminali di Guerra*, Feltrinelli, (2008).

<sup>18</sup> ICTY press release, 16 April 2008: "The Tribunal is aware of very serious allegations of human organ trafficking raised by the former Prosecutor, Carla Del Ponte, in a book recently published in Italian under her name. *No evidence in support of such allegations was ever brought before the Tribunal's judges*. As I said, the allegations are extremely grave. It is up to the Prosecution to determine what information they may provide on this matter". (accessible at <http://www.icty.org/sid/9858>)

which, according to the Chief Prosecutor 'in order to prosecute such offences, however, it requires a level of evidence that we have not yet secured'.<sup>19</sup> Nevertheless, Williamson left open the possibility to file an indictment for such crimes, should other evidence be found. In any case, even if such practices had been true, they were - contrary to what the Serbian authorities had claimed- on a very limited basis. According to the Chief Prosecutor Williamson:

*I can say at this point, that there are compelling indications that this practice did occur on a very limited scale and that a small number of individuals were killed for the purpose of extracting and trafficking their organs. This conclusion is consistent with what was stated in the Marty Report, namely that a "handful" of individuals were subjected to this crime. The use of the word "handful" by Senator Marty was intentional and it was meant literally. There is no indication at this point that this practice was widespread than that and certainly no indication that a significant portion of the ethnic minorities who went missing or were killed were victims of this practice. Statements that have been made by some implying that hundreds of people were killed for the purpose of organ trafficking are totally unsupported by the information we have and that Dick Marty had.*<sup>20</sup>

In the meanwhile, with regard to the claims of crimes against humanity, the statement indicated that an indictment would be filed only after a specialist court would be established in the coming year. If that would have happened, then it was likely that the new Specialist prosecutor would file indictment for some former high officials of the KLA for acts of persecution that included unlawful killings, abductions, enforced disappearances, illegal detentions in camps in Kosovo and Albania, sexual violence, other forms of inhumane treatment, forced displacement, etc, which, according to SIFT, resulted in 'the ethnic cleansing of large portions of the Serb and Roma populations from those areas in Kosovo south or the Ibar River, with the exception of a few scattered minority enclaves'.<sup>21</sup>

Without entering the merits of these accusations, the reliability of which will be decided by judicial authorities, it is worth to worthy to dwell somewhat on the consequences that are expected by the creation of a specialist court in the Kosovo and international communities, irrespective of whether the persons to be indicted will eventually be found guilty or not for war crimes or crimes against humanity. In fact, the creation of specialist court that will try former KLA members would be the first time where an *ad hoc* court would try only the (alleged) crimes of the party which was the "victim" in an armed conflict. For example, in the case of Rwanda, although there were enough evidence that the Tutsi rebels had committed war crimes and crimes against humanity after they gained control of the country, following the genocide from

<sup>19</sup> Statement of the Chief Prosecutor of the Special Investigative Task Force 29 July 2014, at 3 (accessible at [http://siftf.eu/images/Statement/Statement\\_of\\_the\\_Chief\\_Prosecutor\\_of\\_the\\_SITF\\_EN.pdf](http://siftf.eu/images/Statement/Statement_of_the_Chief_Prosecutor_of_the_SITF_EN.pdf))

<sup>20</sup> *Ibid*, at 3.

<sup>21</sup> *Ibid*. at 2.

the Hutu communities,<sup>22</sup> the International Criminal Tribunal for Rwanda never indicted any Tutsi official. This was maybe not for pure legal reasons, and maybe due to socio-political reasons, in order not to allow the moral 'equity' between aggressors and victims, or a possible generalization holding that both parties had "equally" committed international crimes. Likewise, the almost total bombing of Dresden, Germany from allied forces during WWII could easily be classified as a war crime, but no one was eventually accused for this fact. Of course, it is not my intention to justify any kind of war crime or crime against humanity that may have been committed by any KLA member. Ultimately, crimes are the same irrespective of political or nationality basis, and is equally heinous. Thus, whoever anyone that has committed crimes against humanity must be condemned without the slightest hesitation. But what might be problematic in the case of the Specialist court for Kosovo is the continuity of establishing an ad hoc tribunal especially for one party in the conflict (in case not the aggressor, but the victim) and the risk of putting KLA members in a similar position in the eyes of the general public international public with the murderous regime of Milosevic.

In order to avoid the abovementioned risk, the new court should be very careful in emphasizing that criminal responsibility is individual and not of an entire organization. According to authors such as Damaska, in international criminal law, the concept of "individualization" of the sentence is somewhat different from that understood by domestic criminal law system. If for the latter, the individualization is linked to the idea that punishment should be proportional to the individual responsibility, in international criminal law, individualization has the sole purpose to avoid collective responsibility.<sup>23</sup> This is based on the assumption that the conviction of some responsible persons will promote in the future the reconciliation between the affected communities, while their impunity will create the perception that all the relevant population, ethnic or religious group is responsible.<sup>24</sup> In any case, it is questionable whether in practice the establishment of a specialist court for the events of the post 1999 war would avoid stigmatization of KLA by the international opinion, or whether will assist in the reconciliation between the states of Kosovo and Serbia. Experience has shown that such an important target has been nearly impossible for the UN ad hoc tribunals. The object of the judicial process is not to find historical truths, but only the find the individual criminal responsibility of the accused. Although the facts proven in a judicial processes are in itself, objective, and can be taken into consideration by historians, this still cannot be considered as the absolute truth, because the "procedural truth" always differs from the "real truth". Perhaps it would have been more useful for the

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<sup>22</sup> The Guardian, 'Genocide tribunal 'ignoring Tutsi crimes'', 13 January 2005, (accessible in <http://www.theguardian.com/world/2005/jan/13/rwanda.rorycarroll>).

<sup>23</sup> Mirjan R. Damaska, 'What is the Point of International Criminal Justice?', 83 Chicago Kent Law Review, (2008), at 332.

<sup>24</sup> Ibid, note 5.

upcoming court to avoid the considerable expectations that might be asked of her, and to focus simply in trying the accused.

## The jurisdiction of the Specialist Court

### *The legal basis of the Specialist Court: International agreement or national law?*

One of the first problems of the specialist court has to do with its jurisdiction. As admitted by the Chief Prosecutor of SITF Clint Williamson, this was the first time in international criminal law of a special prosecutor's office with a mandate to investigate the events during the war and post-war but without the existence of a court where to file the indictment.<sup>25</sup>

Williamson was correct in stating that the ICTY could not investigate or prosecute the allegations of senator Dick Marty because the temporal jurisdiction of this Tribunal was exclusively for international crimes occurred during an armed conflict, that in Kosovo started by the end of May 1998 and ended in the middle of June 1999.<sup>26</sup> In senator Marty's report, the majority of these crimes belong to the post-war period, and therefore beyond the mandate of the ICTY. Moreover, one must not forget that the ICTY is closing its activities now and cannot accept new cases and that the International Criminal Court has jurisdiction only for international crimes occurred after 2002. For these reasons, the only solution was to have recourse to the legal authority of Kosovo itself.

In the agreement (exchange of letters) of 14 April 2014 between the Republic of Kosovo and EULEX, is stipulated that is the investigation of the Special Investigative Task Force will conclude with an indictment, then the Republic of Kosovo assumes the responsibility of establishing specialist chambers and a special office of the prosecutor within its legal system to investigate and prosecute the findings of SITF. According to the agreement, the court will have its seat in Kosovo, but a special chamber will be set up for sensitive cases, in a host state (which might be the Netherlands). These structures will be administered by their own Statute and Rules of Procedure, including here the provisions for pardon, remand and sentencing outside Kosovo, in case of a guilty verdict.

While in the case of hybrid courts and tribunals, the latter were established with international agreements, in the case of Kosovo, the legal basis of the specialist court will be domestic law, Kosovo's Constitution and its laws. One must not make the mistake of thinking that the Agreement of 14 July 2014 between the Republic of Kosovo and EULEX was the legal basis of the specialist court. What the agreement stipulates, is the unilateral obligation of Kosovo to change its legislation, that in case

<sup>25</sup> Williamson Statement, 4.

<sup>26</sup> *Prosecutor v. Vlastimir Dordevic*, Case No. IT-05-87/1-T, 23.02.2011, page 629, Vol. 1, para. 1579.

of an indictment from SITF to establish specialist chambers inside its judicial system, and to delegate the implementation of these chambers to EULEX representatives. Therefore, the Court will not be established as a result of an international agreement, but unilaterally by the Kosovar authorities. This assertion is further backed by the fact that the host state agreement will not be concluded between the specialist court and the host state, but between Kosovo and the Host state. At this point, it is unknown how the Court may enter into an agreement with another state for the transfer of prisoners in the event of a possible conviction. Also, for the issue of international judicial cooperation, an essential element of international courts and tribunals is that they do not have a police force of their own. Thus such requests might have to pass through the Kosovo authorities, and not through the specialist chambers, which will be formally simply a special chamber within the judicial system of Kosovo, with no power to assume international obligations in the name and for the account of the Republic of Kosovo

### *The Specialist Court as an independent legal regime*

Put briefly, the specialist court will be formally included within the judicial system in Kosovo, but will create a "system" of its own, with the rules and procedures typical of an international court, as well as its Criminal Code (the offenses within the jurisdiction of the court shall be provided in its Statute) and the Code of Criminal Procedure (which will consist of the Rules of Procedure and Evidence). In fact, as outlined above in connection with the cases of other hybrid courts, each of them had their Statute and Rules of Procedure and Evidence of their own separate from those of the respective country in which the conflict occurred. This has come as a necessity of the functioning of a court with international judges and staff who may have different legal education in their countries, and to conduct effectively extremely complex trials. In this regard, the drafters of the Specialist Court will certainly benefit from the best practices of other international courts or internationalized ones, as well as their jurisprudence regarding the forms of liability in international criminal law.

However, *prima facie*, two issues deserve discussion in academic circles. First, it is striking that the Specialist Court will be the first hybrid court (thus included within the Kosovo judicial system), composed entirely of international staff selected from representatives of EULEX. As mentioned above, one of the main reasons for the success of hybrid courts relates to the combination of international and local staff, with local judges in the composition of the judicial panels, and the application both international and domestic law. This is because the presence of local personnel typically increases significantly the legitimacy of the court in the eyes of the concerned communities. While the choice to bypass Kosovar staff may have been justified to reduce the potential for leaking the identity of the protected witnesses, the absence from decision-making of from of Kosovar judges may prejudice the final outcome of

the Court as an independent justice, as well as lower the public confidence in the court.

Secondly, with regard to the status and legitimacy of the delegation of judicial powers to EULEX judges and prosecutors of the specialist court, this will be carried out *mutatis mutandis* pursuant to the procedures of appointment of judges and prosecutors of EULEX, based on Article 20 of the Constitution of the Republic of Kosovo which allows Kosovo to transfer, on the basis of ratified international agreements, certain competences to international organizations. However, the difference in this case is that while EULEX judges are involved and operate under the laws and institutions of Kosovo, in the case of the Specialist Court, the latter will not have any relation with the laws and institutions of Kosovo. Formally the Court will base its legitimacy and legal source on the Constitution and laws of Kosovo, but in practice it will operate outside its framework.

#### *Types of criminal offences and forms of liability*

The Statute of the Specialist Court (whose text was not public at the moment of writing this paper), is expected to provide the Court with competences to investigate and try international crimes (crimes against humanity, war crimes, or genocide), but also domestic law crimes, as envisioned by the Kosovo Criminal Code.<sup>27</sup> Depending on the principle of the more favourable law is to be seen whether the Court will apply the criminal law of the time that was in force in 1999, or that later one, if it turns out more favourable in relation to the applicable law at the time in which the offense was committed. With regard to war crimes, it is easily understandable that jurisdiction *ratione temporis* extends to investigations up to the end of the period of armed conflict, which according to the ICTY, occurred in mid-June 1999.<sup>28</sup> However, the specialist courts will not be obliged to follow the jurisprudence of the ad hoc tribunals and may reach a different conclusion, and may reach a different conclusion regarding the period in which there was an armed conflict between Serbian forces on the one side and NATO forces and KLA's on the other. While the ICTY has also jurisdiction to investigate war crimes during the conflict in the former Yugoslavia, what was missing for the ICTY was the jurisdiction to adjudicate war crimes (allegedly) committed in the territory of Albania. With regard to crimes against humanity, it is worth recalling here that to try these crimes it is not required the presence of an armed conflict, but the existence of a *widespread or systematic attack directed against the civilian population* would suffice.<sup>29</sup>

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<sup>27</sup> It is worth mentioning that international crimes are also provided in much detail in the Criminal Code of the Republic of Kosovo in its Articles 150-153.

<sup>28</sup> *Supra*, note 26.

<sup>29</sup> Article 149 of the Criminal Code of Kosovo.

Finally, it will be interesting what the choice of the Court in connection with the forms of individual criminal responsibility for international crimes will be. Unlike domestic criminal offences, international crimes, especially those against humanity, require to prove at trial the presence of a plan by a group of persons for widespread or systematic attack against the civilian population. Since the purpose for the creation of the Specialist Court is - like the other tribunals and international courts - the investigation of persons with greater responsibility, so the leading KLA members, then the process of proving the criminal responsibility for such persons in high positions will be not an easy task for the prosecution, since none of the accused persons may have personally committed any offense. At this point, the jurisprudence of international criminal tribunals and courts has been different from each other. While each of them has developed its jurisprudence separately from other courts, we can affirm that the two most important theories, in competition between them are: (i) the joint criminal enterprise (JCE - the three forms of it) developed first by the ICTY in the *Tadić* case<sup>30</sup> (this doctrine was accepted, with some modifications by most ad hoc tribunals), and the (ii) indirect co-perpetration, developed lately by the International Criminal Court. It remains to be seen that which of these two doctrines will be "chosen" by the Specialist Court for Kosovo.

## Conclusions

The debate on the establishment of a specialist court to investigate and prosecute allegations raised in the report of the Parliamentary Assembly of Council of Europe, prepared by Senator Dick Marty is obviously in its early days and many other questions remain to be clarified. From a political side, the creation of the Specialist Court may be bad news, but also an opportunity. It is negative, as the stigma which may be created by years of trials of former KLA members can undermine the liberation struggle and sacrifices made for a free and independent Kosovo. But it may also be an opportunity, as it will forever eliminate the shadow of human organ trafficking allegations, and will accelerate Kosovo's path towards European integration. Meanwhile, from a legal point of view, it is not entirely clear under which legal framework the specialist courts will operate; that is if we are dealing with a court based on an international agreement, or a court that operates exclusively within the limits of the judicial system in Kosovo, but also independent from it. In this case, it would be of interest for constitutional lawyers to investigate on how much can the Constitution and laws of Kosovo be changed in order to accommodate such a radical exclusion from the judicial model accepted by Kosovar citizens in the current Constitution. Finally, even if the above problems will be given exhaustive answers, the jurisprudence of the new Court will be essential, which on the one hand, is lucky to borrow the jurisprudence and best practices of

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<sup>30</sup> *Prosecutor v. Dusko Tadić*, Case no IT-94-1-A, 15.07.1999.

other international and hybrid courts and tribunals, but on the other hand has a great responsibility to win the trust of the Kosovar community, by giving unbiased politically judgments, but rely only on the basis of the evidence admitted at trial.

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