

The Kosovo Specialist Chambers and Specialist Prosecutor's Office

*Robert Muharremi**

Abstract	967
I. Introduction	968
II. Development of the Specialist Chambers and Special Prosecutor's Office	970
III. Organizational Structure of the Specialist Chambers and Specialist Prosecutor's Office	977
1. Legal Base	977
2. Composition	981
a) Specialist Chambers	981
b) Specialist Prosecutor's Office	982
c) Registry	982
3. Applicable Law	983
4. Jurisdiction	984
5. Other Characteristic Features	985
a) Legal Personality and International Relations	986
b) Seat	986
c) Amnesty and Pardon	987
d) Funding	987
e) Immunities	987
f) Archives and Public Access to Documents	988
IV. The Specialist Chambers as a Hybrid Court	988

Abstract

In August 2015, the Parliament of Kosovo established the Kosovo Specialist Chambers and the Specialist Prosecutor's Office to deal with certain international crimes which were committed in Kosovo during and after the conflict which ended in 1999. The Specialist Chambers presents a new form of so called "hybrid tribunals" because it is exclusively staffed with international judges and personnel and without any Kosovo judges included. In this aspect it differs from other known hybrid tribunals, whether in form of internationalized domestic courts or international tribunals with a national component, which is usually the involvement of local judges. The key argument is that the legal base for the establishment of the Specialist Chambers, which is Kosovo law, is less important for determining if the Specialist

* Dr., Assistant Professor for International Relations and International Law at the Rochester Institute of Technology in Prishtina/Kosovo.

Chambers is an international tribunal or an internationalized domestic court as long as in substance the international elements prevail and local judges are excluded from involvement in its functioning. The exclusive control by international judges and personnel makes the Specialist Chambers an international tribunal although it is established by Kosovo law. This is further reinforced by the process by which the legislation on the Specialist Chambers was adopted. The paper intends to show that the Specialist Chambers was imposed on Kosovo primarily by the EU using Kosovo's stabilization and association process with the EU as a political instrument to accept the creation of the Specialist Chambers.

I. Introduction

On 3.8.2015, the Assembly of Kosovo changed the Constitution of the Republic of Kosovo¹ to pave the way for the establishment of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office.² In two consecutive extraordinary sessions held on the same day, the Assembly of Kosovo adopted the Law on the Specialist Chambers and the Specialist Prosecutor's Office. According to this Law, the Specialist Chambers and the Specialist Prosecutor's Office are responsible for investigating, prosecuting and trying

“international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 (“The Council of Europe Assembly Report”) and which have been the subject of criminal investigation by the Special Investigative Task Force (SITF) of the Special Prosecution Office of the Republic of Kosovo (SPRK)”³.

The purpose of this paper is to discuss the origins and the process leading to the establishment of the Specialist Chambers and the Specialist Prosecutor's Office and the role which especially the EU played in making the Kosovo authorities accept their establishment despite their limited political will to do so. The paper will also outline the organizational structure, jurisdic-

¹ Amendment to the Constitution of the Republic of Kosovo No. 05-D-139 of 3.8.2015, available at: <<http://gzk.rks-gov.net>> (last accessed on 20.9.2015).

² See also *H. Hobbs*, Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy, in: *Chi. J. Int'l L.* 16 (2016), 484; *S. Williams*, The Specialist Chambers of Kosovo: The Limits of Internationalization, in: *Journal of International Criminal Justice* 14 (2016), 25 et seq.

³ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, Art. 1 (2), available at: <<http://gzk.rks-gov.net>> (last accessed on 20.9.2015).

tion, composition and other relevant features of the Specialist Chambers and the Specialist Prosecutor's Office, in order to compare them with other judicial institutions which are commonly referred to as hybrid courts. The paper will show that the Specialist Chambers, as a hybrid court, is only formally a Kosovo court and that it is in substance an international tribunal. Hybrid courts are, in very general terms, courts of mixed composition and jurisdiction, which include national and international elements, and which usually operate within the jurisdiction where the crimes occurred.⁴ The judicial institutions which are most commonly referred to as hybrid courts are the Special Panels for Serious Crimes in East Timor, the "Regulation 64" Panels in the courts of Kosovo under the United Nations Interim Administration of Kosovo (UNMIK), the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber of Bosnia and Herzegovina, the Special Court for Sierra Leone, and the Special Tribunal for Lebanon.⁵ Hybrid courts were designed as a response to "tribunal fatigue" at the United Nations which reflected the United Nation's dissatisfaction with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as ad-hoc international criminal tribunals.⁶ There was increasing criticism about the duration of proceedings and high costs⁷ but also about a lack of domestic legitimacy and ownership of the trials⁸. As the United Nations was not willing to create new international criminal tribunals, it shifted the focus to hybrid courts as "a model similar in form, substance, and international legitimacy to the ad hoc tribunals, but one which respects a nation's vision of justice, its choice of means of bringing it about, and its ownership, at least in part, of the judicial process".⁹ Such hybrid courts would "combine the strengths of the ad hoc tribunals with the benefits of local prosecutions".¹⁰ The expectation was that these hybrid courts would "provide an international quality of

⁴ Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States – Maximizing the Legacy of Hybrid Courts*, 2008, 1.

⁵ *F. Donlon*, *Hybrid Tribunals*, in: W. A. Schabas/N. Bernaz, *Routledge Handbook of International Criminal Law*, 2011, 85; see also Public International Law & Policy Group, *Hybrid Tribunals: Core Elements*, 2013, 1 et seq.

⁶ *K. Gibson*, *An Uneasy Co-existence: The Relationship Between Internationalised Criminal Courts and Their Domestic Counterparts*, in: *IntCrimLRev* 9 (2000), 275.

⁷ *C. Reiger*, *Hybrid and Internationalized Tribunals*, in: C. Giorgetti (ed.), *International Litigation in Practice, Volume 4: Practice and Jurisprudence of International Courts and Tribunals*, 2012, 283.

⁸ *S. Nouwen*, "Hybrid Courts" – The Hybrid Category of a New Type of International Crimes Courts, in: *Utrecht Law Review* 2 (2006), 191.

⁹ *F. Donlon* (note 5), 85.

¹⁰ *S. Nouwen* (note 8), 190.

justice through the involvement of international expertise and laws to fill the gaps in national systems” and that they would have “the potential of a broader legacy of rebuilding respect for the rule of law in the country concerned, both through demonstrating that justice is possible, and by contributing to building the capacity of the national system to respond to similar situations in future”.¹¹

It seemed for a while that the “popularity of hybrid criminal tribunals as an avenue for transitional criminal justice has declined dramatically” since their foundation in 2000 as six such tribunals were created in the first half of the decade and none thereafter¹². This observation does not seem to reflect current developments. In 2012, the Republic of Senegal and the African Union signed an agreement to create a tribunal, i.e. the Extraordinary African Chambers, within the Senegalese judicial system to prosecute the perpetrators of international law violations in Chad between 1982 and 1990.¹³ In September 2015, the Office of the United Nations High Commissioner for Human Rights proposed the establishment of a hybrid court to try war crimes and crimes against humanity allegedly committed by all parties to the armed conflict in Sri Lanka.¹⁴ One month earlier, Kosovo changed its Constitution to establish the Specialist Chambers, which, as this paper intends to show, is a hybrid court but one which differs significantly from other hybrid courts and which may add further complexity to the already complex legal landscape of hybrid courts.

II. Development of the Specialist Chambers and Special Prosecutor’s Office

The origins of the Specialist Chambers and the Special Prosecutor’s Office lie in a report on “Inhuman treatment of people and illicit trafficking in human organs in Kosovo” prepared by the Special Rapporteur for the Committee on Legal Affairs of the Parliamentary Assembly of the Council

¹¹ C. Reiger (note 7), 285.

¹² P. McAuliffe, Hybrid Tribunals at Ten – How International Criminal Justice’s Golden Child became an Orphan, in: *Journal of International Law and International Relations* 7 (2011), 1.

¹³ R. Adjovi, Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers, in: *ILM* 52 (2013), 1020.

¹⁴ Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka (A/HRC/30/61) of 28.9.2015.

of Europe, *Dick Marty*, in December 2010 (the “*Marty Report*”).¹⁵ The Parliamentary Assembly of the Council of Europe approved the Report in January 2011 expressing concerns about allegations “that serious crimes had been committed during the conflict in Kosovo, including trafficking in human organs”.¹⁶ Similar allegations were already made by the former Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), *Carla Del Ponte*.¹⁷

The Parliamentary Assembly stated that the alleged crimes were committed by members of the Kosovo Liberation Army (KLA) against Serbian nationals who had remained in Kosovo at the end of the armed conflict and been taken prisoner.¹⁸ According to the Parliamentary Assembly, numerous indications would confirm that Serbs and Kosovo Albanians were held prisoner in secret places of detention under KLA control in northern Albania and were subjected to inhuman and degrading treatment, before ultimately disappearing.¹⁹ There would also be numerous indications that during the period immediately after the end of the armed conflict organs were removed from some prisoners at a clinic on Albanian territory and taken abroad for transplantation.²⁰

The Parliamentary Assembly criticized that the alleged crimes had gone unpunished so far and had not been the subject of any serious investigation.²¹ It therefore called upon the member states of the European Union and the European Union Rule of Law Mission in Kosovo (EULEX) to conduct an impartial investigation.²² In reaction to the *Marty Report*, EU-

¹⁵ Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, AS/Jur (2010) 46 of 12.12.2010.

¹⁶ Resolution 1782 (2011) of 25.1.2011 of the Parliamentary Assembly of the Council of Europe, para. 1.

¹⁷ *C. Del Ponte/C. Sudetic*, Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity, 2008.

¹⁸ Resolution 1782 (note 16), para. 2. The armed conflict referred to is the conflict between the Kosovo Liberation Army (KLA) and the Serbian government between 1997 and 1999, which led to the massive displacement of the Kosovo civilian population and which led to the humanitarian intervention by NATO in 1999 and the establishment of the United Nations Interim Administration Mission in Kosovo in the same year; see *J. Mertus*, Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo, in: William & Mary Law Review 41 (2000), 1743 et seq.; *A. Hehir*, NATO's “Humanitarian Intervention” in Kosovo: Legal Precedent or Aberration?, in: Journal of Human Rights 8 (2009), 245 et seq.; *N. Rodley/B. Cali*, Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law, in: HRLR 7 (2007), 275 et seq.

¹⁹ *S. Nouwen* (note 8), para. 3.

²⁰ *S. Nouwen* (note 8), para. 4.

²¹ *S. Nouwen* (note 8), para. 1.

²² *S. Nouwen* (note 8), para. 19. EULEX was established in 2008 as the so far largest European Union mission in the area of European Security and Defense Policy with the mandate

LLEX initiated preliminary investigations²³ and established a Special Investigative Task Force (SITF) to conduct the investigations²⁴. The SITF derived its legal authority directly from the European Union Council Decision establishing the European Union Rule of Law Mission in Kosovo (“EULEX Kosovo”) and not from Kosovo law. On 17.10.2011, *Clint Williamson* of the United States of America assumed the functions of the SITF lead prosecutor and announced that the investigations would include, in addition to allegations of organ trafficking, also allegations of possible abductions, detentions, mistreatment and killings as well as any other crimes related to the *Marty* Report.²⁵

In September 2012, Kosovo became fully independent as the arrangements for its internationally supervised independence came to an end. In a letter dated 4.9.2008, the President of the Republic of Kosovo invited the High Representative of the European Union for Foreign Affairs and Security Policy (EU High Representative) to continue the presence of EULEX in Kosovo even after Kosovo had gained full independence.²⁶ The invitation also formally recognized and legitimized the existence and operations of the SITF.²⁷ The EU High Representative’s positive response dated 4.9.2008 was ratified by the Assembly of Kosovo as an international agreement between the Republic of Kosovo and the European Union.²⁸ The law ratifying the exchange of letters formally endorsed the extension of the mandate of EULEX and preserved for the SITF a special status within Kosovo’s prosecutorial system outside the authority and control of Kosovo.²⁹

In view of the expiry of EULEX’ mandate in June 2014, the President of the Republic of Kosovo sent a new invitation to the EU High Representative requesting an extension of EULEX’ mandate until June 2016.³⁰ But in addition to that, the invitation also stated that if the SITF investigation cul-

to exercise functions in Kosovo’s legal and judicial system following Kosovo’s declaration of independence in 2008.

²³ Report (S/2011/281) of the Secretary-General to the Security Council of 3.5.2011, para. 9.

²⁴ Report (S/2011/514) of the Secretary-General to the Security Council of 12.8.2011, para. 6.

²⁵ Report (S/2012/72) of the Secretary-General to the Security Council of 31.1.2012, Annex I (Report of the European Union High Representative for Foreign Affairs and Security Policy to the Secretary-General on the Activities of the European Union Rule of Law Mission in Kosovo), 15.

²⁶ Report (S/2011/514) (note 24), 12.

²⁷ Report (S/2011/514) (note 24), 4.

²⁸ Report (S/2011/514) (note 24), 12.

²⁹ Law No. 04/L-148, Art. 1, para. 2 (a).

³⁰ Letter of the President of the Republic of Kosovo dated 14.4.2014; Report (S/2014/305) of the Secretary-General to the Security Council of 29.4.2014, 3.

minated in an indictment and trial proceedings, a specialist court within the Kosovo court system and a specialist prosecutor's office would be used for such trial and appellate proceedings.³¹ The President's letter contained an almost detailed outline of how the specialist court and the specialist prosecutor's office would be organized. In her response dated 14.4.2014, the High Representative accepted the invitation and confirmed that

“the work of EULEX KOSOVO's Special Investigative Task Force (“SITF”) and any judicial proceedings deriving from it shall continue until such time as the Council of the European Union notifies Kosovo that the investigation and these proceedings have been concluded”.³²

This means that the European Union controlled the duration of the proceedings and that Kosovo could not unilaterally terminate them. This exchange of letters was, like the first exchange of letters in 2012, ratified by the Kosovo Assembly as an international agreement.³³

In the following, discussions began on a new law on the specialist court and the specialist prosecutor's office. The Council of the European Union explicitly mandated EULEX to “support re-located judicial proceedings within an EU member state in order to prosecute and adjudicate criminal charges arising from the investigation into the allegations” which were raised in the *Marty* Report.³⁴ The role of EULEX and of the EU was, however, more than just to support. As reported by the UN Secretary-General, the discussions on the establishment of the specialist court and the specialist prosecutor's office efforts were led directly by the EU.³⁵ Further to that, the Council of the European Union required, as a prerequisite for the signing of the Stabilization and Association Agreement with Kosovo, the “priority completion of the steps necessary for establishing a specialist court in the context of the investigation by the EULEX SITF into the war crime and organized crime allegations” contained in the *Marty* Report.³⁶

In the meantime, in July 2014, the SITF Lead Prosecutor presented the general findings of the SITF investigation. The Lead Prosecutor concluded

³¹ Letter of the President of the Republic of Kosovo (note 30).

³² Letter of High Representative of the European Union, *Catherine Ashton*, dated 14.4.2014 (document available and on file with the author).

³³ Law No. 04/L-274 on the Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo dated 15.5.2014.

³⁴ Report (S/2014/773) of the Secretary-General to the Security Council of 31.10.2014, 13.

³⁵ Report (S/2014/558) of the Secretary-General to the Security Council of 1.8.2014, 13.

³⁶ Report (S/2015/74) of the Secretary-General to the Security Council of 30.1.2015, 2.

that the SITF “would be in a position to file an indictment against certain senior officials of the former KLA”³⁷ as

“these individuals bear responsibility for a campaign of persecution that was directed at the ethnic Serb, Roma and other minority populations of Kosovo and towards fellow Kosovo Albanians who they labeled either as collaborators with the Serbs, or, more commonly, as having simply been political opponents of the KLA leadership”.³⁸

The SITF would have indications that

“certain KLA elements intentionally targeted the minority populations with 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, the forced displacement of individuals from their homes and communities, and the desecration and destruction of churches and other religious sites”.³⁹

The SITF would also have found that “certain KLA elements engaged in a sustained campaign of violence and intimidation in 1998 and 1999 directed at Kosovo Albanian political opponents, which also included acts of extrajudicial killings, illegal detentions and inhumane treatment”.⁴⁰ These findings would justify prosecution for crimes against humanity, war crimes and certain violations of domestic Kosovo law, and that such charges could be filed against several senior officials of the former KLA.⁴¹

The allegations concerning organ harvesting and trafficking were significantly diluted. While the trafficking of human organs taken from Serb prisoners was among the key allegations in the *Marty Report*⁴², the SITF Lead Prosecutor admitted that the level of evidence necessary to prosecute such charges was not secured.⁴³ According to the Lead Prosecutor, there would be “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”.⁴⁴ There would be no indications “that this practice was more widespread than that and certainly no indica-

³⁷ Kosovo Liberation Army.

³⁸ Report (S/2014/558) (note 35), 18.

³⁹ Report (S/2014/558) (note 35), 18.

⁴⁰ Report (S/2014/558) (note 35), 19.

⁴¹ Report (S/2014/558) (note 35), 19.

⁴² Public International Law & Policy Group (note 5), 1.

⁴³ Draft i Gjykates Speciale merr verejtje dhe mospajtime (The Draft on the Special Court Receives Comments and Disapprovals), in: “Kosovapress” dated 18.2.2015, available at: <<http://www.kosovapress.com>> (last accessed on 29.12.2015), 20.

⁴⁴ Draft i Gjykates Speciale merr verejtje dhe mospajtime (note 43).

tion that a significant portion of the ethnic minorities who went missing or were killed were victims of this practice".⁴⁵ Accordingly, statements that hundreds of people were killed for the purpose of organ trafficking would be totally unsupported.⁴⁶

The Lead Prosecutor recalled that the International Tribunal for the Former Yugoslavia (ICTY) "had the jurisdiction to address crimes occurring during the period of armed conflict" until mid-June 1999 but that it had no jurisdiction to prosecute crimes in the post-war period.⁴⁷ Pursuant to its jurisdiction, the ICTY had "brought a number of prosecutions against senior Serbian officials for crimes against humanity and war crimes during this period for acts directed at Kosovo Albanian victims". Thus, according to the Lead Prosecutor, "crimes committed in Kosovo in the pre-war period and during the war itself have largely been dealt with by the Tribunal (ICTY)" with the majority of them involving Serb perpetrators.⁴⁸ The purpose of the SITF investigation and of the Specialist Chambers was therefore "to fill the void left by the Tribunal's (ICTY) jurisdictional limitations".⁴⁹ The reality, so the Lead Prosecutor,

"is that the primary perpetrators during the post-war period were certain individuals affiliated with KLA, but this is not singling them out for harsher treatment than others; it is only subjecting them to the same sort of international justice processes that have already been followed in relation to Serb perpetrators".⁵⁰

In other words, the SITF and the Specialist Chambers were construed as an extension of the ICTY dedicated to prosecuting and indicting former Kosovo Albanian KLA members only.

The establishment of the Specialist Chambers was resisted by the Kosovo Albanian political parties. It was already in early January 2015 when the then Minister of Justice of Kosovo publicly stated that the establishment of the Specialist Chambers was a political compromise to prevent Russia from raising the prosecution of the allegations made in the *Marty* Report in the UN Security Council.⁵¹ The President of Kosovo established a technical expert group led by the Minister of Justice to discuss with the EU the draft

⁴⁵ Draft i Gjykates Speciale merr verejtje dhe mospajtime (note 43).

⁴⁶ Draft i Gjykates Speciale merr verejtje dhe mospajtime (note 43).

⁴⁷ Draft i Gjykates Speciale merr verejtje dhe mospajtime (note 43), 21.

⁴⁸ Draft i Gjykates Speciale merr verejtje dhe mospajtime (note 43), 21.

⁴⁹ Draft i Gjykates Speciale merr verejtje dhe mospajtime (note 43), 21.

⁵⁰ Draft i Gjykates Speciale merr verejtje dhe mospajtime (note 43), 21.

⁵¹ *H. Kuçi*, Gjykata Speciale rezultat i politikës nderkombetare, (*H. Kuçi*, Special Court as a Result of International Politics), in: "Telegrafi", dated 21.1.2015, available at: <<http://www.telegrafi.com>> (last accessed on 29.12.2015).

legislation on the establishment of the Specialist Chambers and the Specialist Prosecutor's Office but the draft documents were held confidential and were not shared with the public.⁵² The Minister of Justice publicly justified the confidential treatment of the draft legislation with the argument that the documents were documents of the European Commission and not of the Ministry of Justice.⁵³

The Government adopted in March 2015 the amendments to the Constitution which were necessary to create the constitutional law basis for the Assembly to pass the law on the Specialist Chambers. In a judgment of April 2015, the Constitutional Court ruled that the amendments of the Constitution were "constitutional" as they would not "diminish" human rights and freedoms as guaranteed by the Constitution.⁵⁴ This paved the way for the adoption of the amendments to the Constitution and the law on the Specialist Chambers and the Specialist Prosecutor's Office by the Assembly of Kosovo.

The ensuing legislative process was fraught with political and legal difficulties. The Minister of Justice admitted publicly that the European Union had prepared the draft legislation on the Specialist Chambers and the Specialist Prosecutor's Office and had submitted it to the Kosovo government institutions which did not have any power to make changes.⁵⁵ The members of the Assembly of Kosovo could only vote for or against the law but not make any changes to it.⁵⁶ The opposition parties and a number of members of the governing coalition rejected both the amendments to the Constitution and the law not only because of the "take-it-or-leave-it" approach but also because they considered them to be a violation of the sovereignty of the Republic of Kosovo and a significant interference with Kosovo's judicial system.⁵⁷ As a result, in June 2015 the Assembly did not get the necessary two-thirds majority required for the adoption of the amendments of the Constitution.⁵⁸

⁵² Draft i Gjykates Speciale merr verejtje dhe mospajtime (note 43).

⁵³ Draft i Gjykates Speciale merr verejtje dhe mospajtime (note 43).

⁵⁴ Judgment of the Constitutional Court of the Republic of Kosovo in Case No. KO26/15 of 15.4.2015.

⁵⁵ *H. Kuçi*, Gjykata Speciale, Rekomandimet erdhen nga BE, (*H. Kuçi*, Special Court, the Recommendations Came from the EU), in: "Informatat", dated 27.4.2015, available at: <<http://www.informatat.com>> (last accessed on 29.12.2015).

⁵⁶ *H. Kuçi* (note 55).

⁵⁷ *H. Kuçi* (note 55).

⁵⁸ Report (S/2015/579) of the Secretary-General to the Security Council of 30.7.2015, 2 and 16.

As a consequence, international pressure increased from both the EU and the US.⁵⁹ The political signals were that failure to approve the constitutional amendments and the draft law as proposed by the EU would eventually damage Kosovo's EU integration process, and most notably delay the conclusion of a Stabilization and Association Agreement with the EU and an expected visa liberalization regime, both of them high political priorities of the Kosovo government.⁶⁰ As a result of this political arm twisting, the Assembly of Kosovo approved on 3.8.2015 the amendments to the Constitution and the Law on the Specialist Chamber and the Specialist Prosecutor's Office.⁶¹

III. Organizational Structure of the Specialist Chambers and Specialist Prosecutor's Office

1. Legal Base

The key legal documents which are related to the establishment of the Specialist Chambers and Specialist Prosecutor's Office are the Constitution of the Republic of Kosovo, the Law on the Specialist Chambers and Specialist Prosecutor's Office and the exchange of letters between the President of the Republic of Kosovo and the EU High Representative of 14.4.2014, ratified by Kosovo as an international agreement between the Republic of Kosovo and the European Union.⁶² The Constitutional Court of Kosovo concluded that the amendments to the Constitution would derive from this international agreement between Kosovo and the EU.⁶³

It may be questioned if the exchange of letters between the President of the Republic of Kosovo and the EU High Representative constitutes an international treaty between Kosovo and the EU. While the President of Kosovo has the power to conclude international treaties which are legally binding on Kosovo, the EU High Representative has no such power in re-

⁵⁹ Nderkombetaret Kosoves, Gjykata Speciale nje realitet i pashmangshem (Internationals to Kosovo, The Special Court Is an Inevitable Reality), in: Deutsche Welle, dated 21.7.2015, available at: <<http://www.dw.com>> (last accessed on 29.12.2015).

⁶⁰ Kosovoalive of 6.6.2015, available at: <<http://www.kosovalive360.com>> (last accessed on 12.8.2015).

⁶¹ Report (S/2015/833) of the Secretary-General to the Security Council of 3.11.2015, 12.

⁶² Law No. 04/L-274 (note 33). On a discussion of the legal basis of the Specialist Chambers see also *S. Williams* (note 2), 26 et seq.

⁶³ Judgment Constitutional Court in Case No. KO26/(note 54), 37.

spect of the EU.⁶⁴ It is the Council which concludes international treaties for the EU, and not the High Representative.⁶⁵

To the extent that the Vienna Convention on the Law of Treaties (1969), Article 7, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), Article 7, reflect customary international law, the EU High Representative would have had to produce full powers and be authorized by the Council. However, parties to a bilateral international treaty may dispense with the production of full powers.⁶⁶ It is assumed that this is the case when the parties do not request the production of full powers and in practice, when an international treaty is concluded through exchanges of notes, they are not requested.⁶⁷ It could therefore be argued that the requirement for the EU High Representatives to produce full powers was dispensed by Kosovo by virtue of entering into the agreement by an exchange of letters.

According to Article 8 of the Vienna Convention on the Law of Treaties (1969),

“an act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State”.

A similar rule is in Article 8 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), which provides that

“an act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization”.

The ratification of an international treaty usually implies such confirmation, as well as subsequent state conduct which implies acceptance of the treaty as legally binding.⁶⁸ Kosovo ratified the exchange of letters as an international agreement and published it explicitly as an international agreement between Kosovo and the EU. It may therefore be considered a subsequent confirmation of the agreement even if the EU High Representative did not have full powers to act on behalf of the EU.

⁶⁴ *M. Reichard*, *The EU-NATO Relationship – A Legal and Political Perspective*, 2013, 299.

⁶⁵ *T. Hartley*, *The Foundations of European Union Law*, 2010, 188.

⁶⁶ *A. Aust*, *Modern Treaty Law and Practice*, 2014, 73.

⁶⁷ *A. Aust* (note 66).

⁶⁸ *A. Aust* (note 66).

As for the EU, the point could be made that the EU High Representative has acted *ultra vires* and without authorization by the Council. The exchange of letters was also not subsequently “confirmed” by the Council nor was the exchange of letters published in the EU as an international treaty with Kosovo. However, Article 46.2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) provides that

“an international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance”.

Although the EU is not a signatory of this Convention, the European Court of Justice has ruled that the provisions of this Convention, which reflect customary international law, are also binding on the EU.⁶⁹ It is a matter of interpretation if the violation of the EU's internal rules would be manifest and concern a rule of fundamental importance, as set out in Article 46.3 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986). In relation to Kosovo, the EU High Representative has signed two letters which constituted twice an exchange of letters between Kosovo and the EU and which were ratified by Kosovo as an international treaty. The EU has never objected to this and it was not raised as an issue during the conclusion of the Stabilization and Association Agreement entered into between Kosovo and the EU. It could therefore be argued that the EU would be, taking into account the principle of good faith, estopped from invoking an eventual *ultra vires* conduct of the EU High Representative.

The question could also be raised if the political pressure which the EU has exerted on Kosovo's authorities to adopt the Constitutional amendments and the law on the establishment of the Specialist Chambers and the Specialist Prosecutor's Office would allow Kosovo to void the exchange of letters pursuant to Articles 51 and 52 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) for coercion of a state representative or coercion of a state by the threat or use of force. According to *Aust*, threats must affect the representative as an individual, and not as the representative of the state.⁷⁰ Further to that, a threat or use of force does not include eco-

⁶⁹ Judgment of the Court of 16.6.1998, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, para. 24; see also *A. Aust* (note 66), 274.

⁷⁰ *A. Aust* (note 66), 277.

nomic or political pressure.⁷¹ In the absence of evidence that individual members of government or assembly were threatened in their personal capacity, it would therefore be very difficult to establish a legal base for voiding the exchange of letters on these grounds. In view of this, it could be concluded that there is an international treaty between Kosovo and the EU under which Kosovo has the obligation to establish the Specialist Chambers and the Specialist Prosecutor's Office.

However, the next question is if the exchange of letters as an international treaty is constitutive for the establishment of the Specialist Chambers and the Specialist Prosecutor's Office. In this respect, the Constitutional Court of Kosovo determined that the Specialist Chambers would be established "within the unique and independent judicial power that is exercised by courts based on the Constitution" and that the structure, scope of jurisdiction and functioning of the Specialist Chambers would be regulated by further laws in compliance with the Constitution.⁷² For the Constitutional Court, the legal base for the functioning of the Specialist Chambers is therefore the Constitution of the Republic of Kosovo and subsequent legislation and not directly the exchange of letters. Although the exchange of letters contains most of the key features of the Specialist Chambers and the Specialist Prosecutor's Office it may not be considered to be self-executive. The President's letter explicitly states that

"all legal measures undertaken by Kosovo to establish a specialist court within the Kosovo court system and a specialist prosecutor's office in connection with SITF, as outlined above, including any constitutional amendments as needed, will be adopted in accordance with Kosovo law and subject to Constitutional Court review".⁷³

The exchange of letters only creates an international obligation for Kosovo to establish the Specialist Chambers and the Specialist Prosecutor's Office but the amendment to the Constitution and the adoption of the Law on the Specialist Chambers and the Specialist Prosecutor's Office is constitutive for their establishment. There was no objection to this in the EU High Representative's response.

⁷¹ A. Aust (note 66), 277.

⁷² Judgment Constitutional Court in Case No. KO26/(note 54), para. 60.

⁷³ Law No. 04/L-274 (note 33).

2. Composition

The Specialist Chambers consist of the judicial Chambers and the Registry as two separate organs, while the Specialist Prosecutor's Office is independent of the Specialist Chambers.⁷⁴

a) Specialist Chambers

The Specialist Chambers are attached to every level of the court system in Kosovo, which includes the Basic Court, the Court of Appeals, the Supreme Court and the Constitutional Court.⁷⁵ There is therefore a Basic Court Chamber, a Court of Appeals Chamber, a Supreme Court Chamber and a Constitutional Court Chamber.⁷⁶ The Chamber at the Basic Court is composed of three judges and one reserve judge, while the Chambers at the Court of Appeals, the Supreme Court and the Constitutional Court have each three judges.⁷⁷ As set out in the exchange of letters between the President of Kosovo and the EU High Representative dated 14.4.2014, the Specialist Chambers and the Specialist Prosecutor's Office will be staffed with and operated by EULEX international staff only.⁷⁸ This means that no Kosovo judges will serve on the Specialist Chambers and that judges will be exclusively international judges.

Judges who are to serve in the Specialist Chambers will be included in a "Roster of International Judges" and will only be present at the seat of the Specialist Chambers as necessary and when requested by the President of the Specialist Chambers.⁷⁹ An independent "Selection Panel", composed of three international members, is responsible for the assessment of judicial candidates and their selection for the Roster of International Judges.⁸⁰ However, the law is silent as to which authority appoints the members of the Selection Panel. Following an assessment of candidates, the Selection Panel submits a list with the names of the candidates it recommends for the position of a judge to the Head of EULEX, which is the "Appointing Authority" for the judges of the Specialist Chambers and their inclusion in the

⁷⁴ Law No. 05/L-053 (note 3), Art. 24.

⁷⁵ Law No. 05/L-053 (note 3), Art. 3.1.

⁷⁶ Law No. 05/L-053 (note 3), Art. 24.1 (a).

⁷⁷ Law No. 05/L-053 (note 3), Art. 25.1.

⁷⁸ Law No. 04/L-274 (note 33); see also *S. Williams* (note 2), 35.

⁷⁹ Law No. 05/L-053 (note 3), Arts. 26.1 and 26.2.

⁸⁰ Law No. 05/L-053 (note 3), Arts. 28.1 and 28.2.

Roster of International Judges.⁸¹ The Head of EULEX also appoints a President and a Vice-President of the Specialist Chambers from among the judges.⁸² The President of the Specialist Chambers is primarily responsible for the judicial administration of the Specialist Chambers and for the appointment of judges to Specialist Chamber panels.⁸³

b) Specialist Prosecutor's Office

The Specialist Prosecutor's Office is independent from the Specialist Chambers and other prosecution authorities in Kosovo.⁸⁴ It is responsible for the investigation and prosecution of persons responsible for crimes falling under the jurisdiction of the Specialist Chambers.⁸⁵ The Specialist Prosecutor's Office takes over the mandate and personnel of the SITF and the Lead Prosecutor of the SITF is appointed by the Head of EULEX as the Specialist Prosecutor.⁸⁶ The SITF is thus transferred from a function within the Special Prosecutor's Office of the Republic of Kosovo to the Specialist Prosecutor's Office.⁸⁷ 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.⁸⁸ The Specialist Prosecutor's Office has its own police which has authority and responsibility equivalent to that of the Kosovo Police under Kosovo law.⁸⁹

c) Registry

The Registry is responsible for the administration and servicing of the Specialist Chambers and all other necessary and affiliated functions.⁹⁰ The Registrar is appointed by the Head of EULEX and is responsible for the administration of the Specialist Chambers and the issuance of rules and instructions for that purpose.⁹¹ The Registry includes a Victim's Participation

⁸¹ Law No. 05/L-053 (note 3), Arts. 28.3 and 28.4.

⁸² Law No. 05/L-053 (note 3), Arts. 32.1 and 32.4.

⁸³ Law No. 05/L-053 (note 3), Arts. 32.3 and 33.

⁸⁴ Law No. 05/L-053 (note 3), Art. 35.5.

⁸⁵ Law No. 05/L-053 (note 3), Art. 35.1.

⁸⁶ Law No. 05/L-053 (note 3), Arts. 24.2 and 35.6.

⁸⁷ Law No. 05/L-053 (note 3), Art. 35.10.

⁸⁸ Law No. 05/L-053 (note 3), Art. 35.9.

⁸⁹ Law No. 05/L-053 (note 3), Art. 35.3.

⁹⁰ Law No. 05/L-053 (note 3), Art. 34.1.

⁹¹ Law No. 05/L-053 (note 3), Art. 34.3.

Office, a Defense Office, a Witness Protection and Support Office, an Ombudsperson Office, with the Ombudsperson being appointed by the Head of EULEX.⁹² The Registry is also responsible for the management of the detention function and facilities of the Specialist Chambers.⁹³ The Registry has its own court officers who are vested with powers equal to those of the Kosovo Police and correction officers who have the powers given to Kosovo Correctional Officers under Kosovo law.⁹⁴

3. Applicable Law

The Law on the Specialist Chambers and the Specialist Prosecutor's Office explicitly determines the sources of law and the hierarchy of norms to be applied by the Specialist Chambers. The Specialist Chambers adjudicates and functions first of all in accordance with (i) the Constitution of the Republic of Kosovo, (ii) then, second in rank, with customary international law and international human rights instruments "which set criminal justice standards, including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights", (iii) then with the Law on the Specialist Chambers and the Specialist Prosecutor's Office, and (iv) lastly, with any other provisions of Kosovo law expressly incorporated and applied by the Law on the Specialist Chambers and the Specialist Prosecutor's Office.⁹⁵

The reference to international customary law is very broad and covers all criminal offences under international customary law as may be related to crimes referred to in the *Marty* Report and as applicable at the time the crimes were committed.⁹⁶ The explicit mentioning of crimes against humanity and war crimes under customary international law in the law⁹⁷ is only a non-exhaustive list of crimes under customary international law and serves only definitional purposes. For the purpose of determining the customary international law at the time the crimes were committed, the Specialist Chambers may refer to sources of international law, including subsidiary sources such as the jurisprudence from the international ad hoc tribunals, the International Criminal Court and other criminal courts.⁹⁸

⁹² Law No. 05/L-053 (note 3), Arts. 34.6 to 34.9.

⁹³ Law No. 05/L-053 (note 3), Art. 34.12.

⁹⁴ Law No. 05/L-053 (note 3), Arts. 34.10 and 34.12.

⁹⁵ Law No. 05/L-053 (note 3), Art. 3.2.

⁹⁶ Law No. 05/L-053 (note 3), Art. 12.

⁹⁷ Law No. 05/L-053 (note 3), Arts. 13 and 14.

⁹⁸ Law No. 05/L-053 (note 3), Art. 3.3.

The application of any Kosovo law, other than Law on the Specialist Chambers and the Specialist Prosecutor's Office, is ruled out unless it is explicitly incorporated in the Law on the Specialist Chambers and the Specialist Prosecutor's Office.⁹⁹ In any event, the Law on the Specialist Chambers and the Specialist Prosecutor's Office prevails over any other Kosovo law. Thus, the Law on the Specialist Chambers and the Specialist Prosecutor's Office may be considered a self-contained legal regime which is independent of Kosovo law other than the Constitution of Kosovo.

The substantive Kosovo criminal law which is applicable pursuant to the Law on the Specialist Chambers and the Specialist Prosecutor's Office is (i) the Criminal Code of the Socialist Federal Republic of Yugoslavia of 1976, (ii) the Criminal Law of the Socialist Autonomous Province of Kosovo of 1977 and (iii) any more lenient substantive criminal law in force between "1989 and July 1999/27 October 2000".¹⁰⁰ The Kosovo Criminal Code of 2012 is only applicable to a certain extent for criminal offenses applicable to official proceedings and officials of the Specialist Chambers and the Specialist Prosecutor's Office.¹⁰¹

4. Jurisdiction

The Specialist Chambers have subject-matter jurisdiction over crimes against humanity and war crimes under international law and crimes under Kosovo law to the extent that they relate to the *Marty* Report and its allegations of "grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo" and "which have been the subject of criminal investigation by the SITF".¹⁰² The Specialist Chambers also have jurisdiction over certain offences under the Kosovo Criminal Code related to its official proceedings and officials.¹⁰³

⁹⁹ Law No. 05/L-053 (note 3), Art. 3.4.

¹⁰⁰ Law No. 05/L-053 (note 3), Art. 15.1.

¹⁰¹ Law No. 05/L-053 (note 3), Art. 15.2.

¹⁰² Law No. 05/L-053 (note 3), Arts. 1.2, 6.1, 13, 14 and 15.

¹⁰³ Law No. 05/L-053 (note 3), Art. 6.2. These Criminal Offenses applicable to Specialist Chamber Procedures and Officials Under Kosovo Criminal Code 2012 (Law No. 04/L-082) include the following: Failure to Report Preparation of Criminal Offenses (Art. 385); Failure to Report Criminal Offenses or Perpetrators (Art. 386); Providing Assistance to Perpetrators After the Commission of Criminal Offenses (Art. 388); False Report or Charge (Art. 390); False Statement Under Oath (Art. 391); False Statements (Art. 392); False Statements of Co-operative Witnesses (Art. 393); Obstruction of Evidence or Official Proceedings (Art. 394); Intimidation During Criminal Proceedings (Art. 395); Retaliation (Art. 396); Tampering With Evidence (Art. 397); Falsifying Documents (Art. 398); Special Cases of Falsifying Documents

Temporal jurisdiction of the Specialist Chambers covers crimes within its subject matter jurisdiction which occurred between 1.1.1998 and 31.12.2000.¹⁰⁴ In terms of territorial jurisdiction, the Specialist Chambers has jurisdiction over crimes within its subject-matter jurisdiction which were either commenced or committed in Kosovo.¹⁰⁵ The personal jurisdiction of the Specialist Chambers covers natural persons of “Kosovo/FRY” citizenship and any other persons who committed crimes against persons of “Kosovo/FRY” citizenship within the subject-matter jurisdiction of the Specialist Chambers.¹⁰⁶

As regards concurrent jurisdiction with other Kosovo courts, the Specialist Chambers have, within their jurisdiction, primacy over all other courts in Kosovo.¹⁰⁷ The Specialist Chambers and the Specialist Prosecutor have the authority to 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 Specialist Prosecutor.¹⁰⁸ On the other hand, all Kosovo courts and prosecutors are required to notify the Specialist Chambers and the Specialist Prosecutor's Office if they are aware of a case or criminal proceedings which are within the jurisdiction of the Specialist Chambers.¹⁰⁹

5. Other Characteristic Features

There are a number of other features which may be relevant for assessing the legal nature of the Specialist Chambers and the Specialist Prosecutor's Office.

(Art. 399); Violating Secrecy of Proceedings (Art. 400); Contempt of Court (Art. 401); Failure to Execute Court Decisions (Art. 402); Legalization of False Content (Art. 403); Uprising of the Persons Deprived of Liberty (Art. 404); Escape of Persons Deprived of Liberty (Art. 405); Facilitating the Escape of Persons Deprived of Liberty (Art. 406); Unlawful Release of Persons Deprived of Liberty (Art. 407); Obstructing Official Persons in Performing Official Duties (Art. 409); Attacking Official Persons Performing Official Duties (Art. 410); Call to Resistance (Art. 411); Taking or Destroying Official Stamps or Official Documents (Art. 415); Impersonating an Official (Art. 417); Unlawful Provision of Legal Assistance (Art. 419); Damaging Graves or Corpses (Art. 421); Misusing Official Information (Art. 423); Conflict of Interest (Art. 424).

¹⁰⁴ Law No. 05/L-053 (note 3), Art. 7.

¹⁰⁵ Law No. 05/L-053 (note 3), Art. 8.

¹⁰⁶ Law No. 05/L-053 (note 3), Art. 9.

¹⁰⁷ Law No. 05/L-053 (note 3), Art. 10.1.

¹⁰⁸ Law No. 05/L-053 (note 3), Art. 10.2.

¹⁰⁹ Law No. 05/L-053 (note 3), Art. 11.

a) Legal Personality and International Relations

The Specialist Chambers and the Specialist Prosecutor's Office have full domestic legal personality.¹¹⁰ In addition, both by Constitution and law the Specialist Chambers and the Specialist Prosecutor's Office have the capacity "to enter into arrangements with states, international organizations and other entities for the purpose of fulfilling their mandate".¹¹¹ International treaties entered into between the Specialist Chambers and the Specialist Prosecutor's Office with a third state on judicial cooperation do not have to be ratified by the Assembly of Kosovo, and the Specialist Chambers must only seek the agreement of the Government of Kosovo before entering into such a treaty.¹¹² The Specialist Chambers, the Registry and the Specialist Prosecutor's Office are also authorized to utilize any mutual legal assistance agreements which were entered into by Kosovo and another state, or make requests for assistance based on the principle of reciprocity.¹¹³ Further to that, the Specialist Chambers may enter into agreements with other states on the immunity and inviolability of their premises, property, funds, assets, archives, records and documents¹¹⁴ and the servicing of imprisonment sentences in the territory of such states¹¹⁵.

b) Seat

The Specialist Chambers have a seat in Kosovo and may also have a seat outside Kosovo subject to a host state agreement between Kosovo and such state.¹¹⁶ The arrangements for the Specialist Prosecutor's Office are the opposite, as the Specialist Prosecutor's Office has its seat in "the host state" but may also have a seat in Kosovo.¹¹⁷

¹¹⁰ Law No. 05/L-053 (note 3), Art. 4.1.

¹¹¹ Law No. 05/L-053 (note 3), Art. 4.2.

¹¹² Law No. 05/L-053 (note 3), Art. 4.4.

¹¹³ Law No. 05/L-053 (note 3), Art. 55.2.

¹¹⁴ Law No. 05/L-053 (note 3), Art. 56.2.

¹¹⁵ Law No. 05/L-053 (note 3), Art. 57.1.

¹¹⁶ Law No. 05/L-053 (note 3), Art. 3.6.

¹¹⁷ Law No. 05/L-053 (note 3), Art. 3.7.

c) Amnesty and Pardon

The jurisdiction of the Specialist Chambers is not limited by any amnesty that may be granted under the Constitution of Kosovo.¹¹⁸ Any amnesty already granted to any person for an international crime, a crime that resulted in grievous bodily injury or death, or a crime defined by the Law on the Specialist Chambers and the Specialist Prosecutor's Office as a crime related to the official proceedings and officials of the Specialist Chambers, the Registry and the Specialist Prosecutor's Office is also not recognized as bar to the Specialist Chambers jurisdiction.¹¹⁹ In addition, the judgments of the Specialist Chambers are not subject to any pardon that may be granted under the Constitution, and no person convicted by the Specialist Chambers is eligible for pardon.¹²⁰

d) Funding

The Specialist Chambers and the Specialist Prosecutor's Office have their own budget but they are not funded from the Kosovo budget.¹²¹ The understanding is that the Specialist Chambers and the Specialist Prosecutor's Office will be funded by the European Union with no financial implications for Kosovo.¹²² The Specialist Chambers and the Specialist Prosecutor's Office 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.¹²³

e) Immunities

The premises, property, papers and personnel, including counsels, experts, witnesses and any other persons performing functions for the Specialist Chambers or the Specialist Prosecutor's Office enjoy privileges and immunities which are accorded by Kosovo law to the offices and personnel of

¹¹⁸ Law No. 05/L-053 (note 3), Art. 18.

¹¹⁹ Law No. 05/L-053 (note 3).

¹²⁰ Law No. 05/L-053 (note 3), Art. 51.1.

¹²¹ Law No. 05/L-053 (note 3), Art. 63.1.

¹²² Balkan Transitional Justice, Kosovo's New War Court: How Will it Work?, of 6.8.2015 at: <<http://www.balkaninsight.com>> (last accessed on 2.1.2016).

¹²³ Law No. 05/L-053 (note 3), Arts. 63.3 and 63.4.

EULEX.¹²⁴ The premises, property, funds, assets, archives and records of the Specialist Chambers and the Specialist Prosecutor's Office are inviolable and immune from any form of search, confiscation or other interference by Kosovo authorities.¹²⁵

f) Archives and Public Access to Documents

The archives of the Specialist Chambers, the Registry and the Specialist Prosecutor's Office are the property of the Specialist Chambers and the Specialist Prosecutor's Office and are maintained in a dedicated repository outside Kosovo.¹²⁶ All papers, records and archives of the Specialist Chambers, the Registry and the Specialist Prosecutor's Office are explicitly not considered to be public documents of Kosovo due to security and privacy considerations.¹²⁷ There is no general right of access to the records or archives of the Specialist Chambers, including the Registry, and the Specialist Prosecutor's Office.¹²⁸

IV. The Specialist Chambers as a Hybrid Court

There is general understanding in literature that there is no uniform model of how a hybrid court should look like and how the ratio, or blend¹²⁹, between international and national elements should look like.¹³⁰ According to *Reiger*, hybrid courts combine in various ways the application of international crimes and international personnel, while retaining significant national features.¹³¹ Some would be national courts which receive substantial international assistance, while there would also be instances where the court would resemble an international tribunal located in-country.¹³² Some would be judicial bodies whose mandate lies in a treaty between the UN and the

¹²⁴ Law No. 05/L-053 (note 3), Art. 52.1.

¹²⁵ Law No. 05/L-053 (note 3), Art. 52.2.

¹²⁶ Law No. 05/L-053 (note 3), Art. 61.1.

¹²⁷ Law No. 05/L-053 (note 3), Art. 62.1.

¹²⁸ Law No. 05/L-053 (note 3).

¹²⁹ *L. Dickinson*, The Promise of Hybrid Courts, in: AJIL 97 (2003), 295.

¹³⁰ Public International Law & Policy Group (note 5), 1; *P. McAuliffe* (note 12), 4; *N. Jain*, Conceptualizing Internationalization in Hybrid Criminal Courts, in: Singapore Year Book of International Law 12 (2008), 81 et seq.

¹³¹ *C. Reiger* (note 7), 284.

¹³² *C. Reiger* (note 7), 284.

national government, while others would depend on national legislation for their authority. The composition of the blend would depend on the political and legal exigencies of the state and the court in question.¹³³ In view of this, one could distinguish between two types of hybrid courts. One type would consist of “internationalized” domestic courts which are part of the domestic judicial system, such as the Special Panels for Serious Crimes in East Timor, the “Regulation 64” Panels in Kosovo under UNMIK, the Extraordinary Chambers in the Courts of Cambodia and the War Crimes Chamber of Bosnia and Herzegovina. The other type would include international ad hoc tribunals which have national elements, such as the Special Court for Sierra Leone and the Special Tribunal for Lebanon. The question is therefore if the Specialist Chambers in Kosovo is a hybrid court, and if yes, if it is an “internationalized” domestic court or an international tribunal with domestic elements.

Some authors try to define hybrid courts by listing certain essential elements which need to be in place in order to consider a court a hybrid court based on an analysis of existing hybrid courts. According to *Donlon*, the common defining features of hybrid courts would be their application of a mix of national and international law, a mixed staff composition where international judges, prosecutors, and experts work with their national counterparts, and their location in the country where the atrocities were committed.¹³⁴ For *Dickinson*, the defining features of a hybrid court are that foreign judges would sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries and that the judges would apply domestic law that has been reformed to accord to international standards.¹³⁵ The law applied by hybrid courts would be a mix of international criminal law modeled on definitions contained in the Rome Statute and domestic law reformed to include international standards.¹³⁶ The seat of the tribunal could alternate between the *locus delicti* state and a neutral location, but it would usually be located in the former.¹³⁷

The approach to deduce the characteristics of hybrid courts from the elements which current hybrid courts have in common is criticized as not being adequate. According to *Nouwen*, many of the perceived common elements, such as the mixture of domestic and international staff and laws,

¹³³ P. McAuliffe (note 12), 151.

¹³⁴ F. Donlon (note 5), 85; see also Public International Law & Policy Group (note 5), 1.

¹³⁵ L. Dickinson (note 129), 295.

¹³⁶ P. McAuliffe (note 12), 151.

¹³⁷ P. McAuliffe (note 12), 151.

would not be as common as they appear.¹³⁸ *Nouwen* concludes that the model of hybrid courts appears to have panels composed of both domestic and international judges as the only defining commonality.¹³⁹ It would also be difficult to define hybrid courts based on features of existing hybrid courts because new courts might emerge that partly share the characteristics of existing hybrid courts.¹⁴⁰

The attempt to define hybrid courts is further criticized by *Jain* who considers the search for a definition of hybrid tribunals to be a “hopeless quest”.¹⁴¹ While the determination whether a court is hybrid, or international, or national in character, could have important implications for its jurisdiction and competence, the applicable law, and its status in international and domestic law¹⁴² there would be too much variation in the institutional structures of courts that have been classed as “hybrid”¹⁴³. For this reason, *Jain* suggests to abandon the search for a “dictionary-style” definition of a hybrid court that relies on isolating essential conditions, that is, necessary and sufficient features that must form part of an institution before it can be considered hybrid.¹⁴⁴ An alternative approach would be to consider a standard or paradigm case of hybrid courts, and then analyze how close the court in question is to this paradigm case by applying a process of analogical reasoning.¹⁴⁵ In assessing whether a newly established court is hybrid or not, the test would be whether the new court has more in common with these paradigmatic cases, than with an admittedly domestic or purely international court.¹⁴⁶ Unfortunately, *Jain* does not develop a paradigm case of a hybrid court against which other courts could be compared.

A different approach, labeled here as the normative approach, looks at the legal nature of the founding instruments, i.e. whether the court is ‘a creature of international law’ or of domestic law.¹⁴⁷ This implies that courts which combine certain international and national elements and which are created by international law, i.e. international treaties or UN Security Council Resolutions, such as in the case of the Special Court for Sierra Leone¹⁴⁸ and the Special Tribunal for Lebanon¹⁴⁹ would be considered interna-

¹³⁸ *S. Nouwen* (note 8), 192 et seq.

¹³⁹ *S. Nouwen* (note 8), 192 et seq.

¹⁴⁰ *S. Nouwen* (note 8), 192 et seq.

¹⁴¹ *N. Jain* (note 130), 91 et seq.

¹⁴² *N. Jain* (note 130), 81 et seq.

¹⁴³ *N. Jain* (note 130), 81 et seq.

¹⁴⁴ *N. Jain* (note 130), 81 et seq.

¹⁴⁵ *N. Jain* (note 130), 81 et seq.

¹⁴⁶ *N. Jain* (note 130), 81 et seq.

¹⁴⁷ *F. Donlon* (note 5), 94.

¹⁴⁸ *F. Donlon* (note 5), 94.

tional tribunals and not “internationalized” domestic courts. By implication, courts which combine international and domestic elements and where national legislation is constitutive for their establishment would then have to be considered internationalized domestic courts.

The various opinions of what hybrid courts actually are shows that there is uncertainty in identifying generally acceptable criteria for determining if a court is a hybrid court. When comparing the Specialist Chambers with existing courts, which are commonly referred to as hybrid courts, it becomes evident that the Specialist Chambers adds to the existing complexity and difficulty in determining what hybrid courts are.

The comparative analysis undertaken by *Nowwen* to identify the definitional elements of a hybrid court is used as a point of departure for the assessment if the Specialist Chambers is a internationalized domestic court or an international tribunal. Pursuant to this “definitional” approach, the only defining common feature of the current hybrid courts is the mixed composition of panels of international and local judges.¹⁵⁰ This is not the case with the Specialist Chambers, which is staffed with international personnel only and with no local judges or prosecutors being involved. The absence of local judges and prosecutors would therefore make the Specialist Chambers an international tribunal rather than an internationalized domestic court.

From a “normative” approach, the Specialist Chambers would be an internationalized domestic court. The Specialist Chambers is established based on the Constitution of Kosovo and domestic law, although an international agreement between Kosovo and the EU is also involved, though not constitutively. The Constitution of Kosovo explicitly states that the Specialist Chambers and the Specialist Prosecutor's Office are established within the justice system of Kosovo.¹⁵¹ The Constitutional Court of Kosovo also determined that the establishment of the Specialist Chambers and the Specialist Prosecutor's Office would be in accordance with the Constitution of Kosovo.¹⁵²

If one follows the “paradigm-case” approach, an assessment of the “national” and “international” elements which characterize the Specialist Chambers would determine the legal nature of the Specialist Chambers. The only “national” element of the Specialist Chambers is that it is established by national law rather than by international law. However, the Constitutional provisions and the Law establishing the Specialist Chambers and the

¹⁴⁹ C. Reiger (note 7), 316.

¹⁵⁰ S. Nowwen (note 8), 213.

¹⁵¹ Constitution of the Republic of Kosovo, Art. 162.1.

¹⁵² Judgment Constitutional Court in Case No. KO26/(note 54), para. 58-60.

Specialist Prosecutor's Office created a self-contained regime which is in substance independent and separate from Kosovo's court system, including the Constitutional Court. The individual chambers are only formally attached to the Kosovo courts at the various instances and have otherwise no connection or interaction with the domestic courts. The Law on the Specialist Chambers and the Specialist Prosecutor's Office prevails over all other Kosovo laws, which apply only if so permitted by this law. This means that none of the Kosovo laws on the appointment of judges and prosecutors, the court administration and legal remedies against judges and prosecutors are applicable. The appointment and dismissal of judges, prosecutors and staff of the Specialist Chambers and the Specialist Prosecutor's Office, including all administrative and financial arrangements and disciplinary proceedings is entirely in the hands of EULEX. The financing of the Specialist Chambers and the Specialist Prosecutor's Office is also "international" as Kosovo has no legal obligations to fund them and the EU is expected to provide the funding. The seat of the Specialist Chambers and the Specialist Prosecutor's Office is primarily outside of Kosovo and all documents and archives of the Specialist Chambers and the Specialist Prosecutor's Office do not belong to Kosovo. The Specialist Chambers and the Specialist Prosecutor's Office may conclude international agreements, and they and their staff enjoy immunities and privileges in Kosovo equivalent to those accorded to EULEX. In substance, the Specialist Chambers thus resemble an international tribunal rather than an internationalized domestic court. In addition, the international pressure, primarily from the EU, on the Kosovo Government and Assembly to establish the Specialist Chambers and the Specialist Prosecutor's Office and the reluctance of Kosovo's political institutions to comply shows that political ownership of the Specialist Chambers and the Specialist Prosecutor's Office is "international" rather than "local".

How does all of this affect the legal nature of the Specialist Chambers? In matters of legal form, the Specialist Chambers is a domestic court; in substance, however, it is an international tribunal. Is the domestic legal form sufficient to qualify a court as an internationalized domestic court when all its other substantial elements are international? What does prevail, substance over form, or form over substance? The Specialist Chambers and the Specialist Prosecutor's Office thus present an interesting case which may reignite the debate on which criteria should be used to differentiate between international tribunals and internationalized domestic courts. In view of the recent resurgence of ideas to establish new hybrid courts, such as the Special Criminal Court in the Central African Republic or the proposed hybrid court for Sri Lanka, this may not be of theoretical importance only.