

## Student Feature – Spotlight on Kosovo's "Special Court"

Written by Aidan Hehir

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AIDAN HEHIR, AUG 10 2019

### Purpose and History

When the Socialist Federal Republic of Yugoslavia began to fracture along nationalist lines in the early 1990s, the Kosovo Albanians – constituting some 90% of the population of Kosovo – sought to achieve independence for Kosovo – then a province within Serbia – through a strategy of peaceful resistance. Paradoxically, the *lack* of violence in Kosovo meant that attention was focused elsewhere. As a result, Kosovo's status, and the rights of its Albanian majority, were ignored at the 1995 Dayton negotiations, leading many Kosovo Albanians to abandon pacifism and support the Kosovo Liberation Army (KLA).

By 1998 the KLA had grown in size, and a full-scale civil war raged; the conflict degenerated further in early 1999, and following failed negotiations brokered by the international community, NATO launched airstrikes against the forces of the then Federal Republic of Yugoslavia on the 24<sup>th</sup> March 1999. The military campaign lasted some 78 days and culminated in an agreement which mandated the removal of all Serbian military and police forces from Kosovo, and the establishment of a UN-administration in Kosovo.

In the course of the civil war many atrocities were committed by Serbian forces; NATO's intervention led to a dramatic rise in the scale of the oppression and over 90% of Kosovo Albanians were forced to flee their homes. NATO and the KLA thus presented themselves as engaged in a 'just war' to halt oppression and violence; however, before, during and after NATO's intervention, many reputable human rights organisations accused the KLA of engaging in crimes against humanity. In particular, it was alleged that the KLA had targeted Serbian civilians in Kosovo, as well as "moderate" Albanians who did not support their tactics. In the aftermath of NATO's intervention some 200,000 Serbs left Kosovo, as a result of what some alleged was ethnically cleansed perpetrated by the KLA.

(Warning: video contains graphic content)

In 2008 former Chief Prosecutor of International Criminal Tribunal for the Former Yugoslavia (ICTY) Carla del Ponte alleged that the KLA had engaged in war crimes, including organ harvesting. An investigation was launched by the Council of Europe (CoE), and in 2011 the findings were published in what has come to be known as the "Marty Report." The report essentially endorsed del Ponte's allegations and accused senior Kosovo Albanian politicians of having been involved in the criminality.

Following the CoE report, the EU and the US established the "Special Investigative Task Force" (SITF) to determine whether there was sufficient grounds for criminal investigations. In July 2014 the SITF reported that organ harvesting had taken place "on a very limited scale," but noted that there was sufficient evidence of, "a campaign of persecution that was directed at the ethnic Serb, Roma, and other minority populations of Kosovo and towards fellow Kosovo Albanians." The report alleged these acts "were conducted in an organised fashion and were sanctioned by certain individuals in the top levels of the KLA leadership."

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There followed an international campaign to persuade the Government of Kosovo to establish a special court; supporters of the court demanded it be based outside Kosovo and staffed by non-Kosovars to facilitate witness protection and guard against corruption and political interference. These attempts were initially resisted by the Kosovo Assembly, but international pressure was increased, and the “Kosovo Specialist Chambers and Specialist Prosecutors Office” (hereafter “the Special Court”) was finally established by the Kosovo Assembly on 3<sup>rd</sup> August 2015.

### **Institutional Features**

The Special Court is composed of two bodies: The Specialist Chambers and The Specialist Prosecutor’s Office. The Specialist Chambers comprises two organs, the Chambers and the Registry. The Specialist Prosecutor’s Office is an independent office for the investigation and prosecution of the crimes within the jurisdiction of the Specialist Chambers. The Specialist Prosecutor’s Office also has its own police, which have the same authority and responsibility to exercise powers as those given to Kosovo Police under Kosovo law.

The legal basis for the court stems from an Exchange of Letters in 2014 between the President of Kosovo and the High Representative of the European Union for Foreign Affairs and Security Policy. This was followed by the adoption by the Kosovo Assembly of Article 162 of the Kosovo Constitution and the Law on Specialist Chambers and Specialist Prosecutor’s Office, in August 2015. In this respect, the court is *not* an international court/tribunal in the way the ICTY or the International Criminal Tribunal for Rwanda were, given that both were established by the UN Security Council and based on international rather than domestic law. Rather, the Special Court was formally created by Kosovo’s domestic political bodies and is linked to each level of the court system in Kosovo. Thus, the Special Court is a ‘hybrid’ court because, although established by the Assembly of Kosovo and based on Kosovo’s constitution and laws, it is staffed exclusively with international judges, prosecutors and officers, and located in The Hague. The court is also funded externally, primarily by EU but also Canada, Norway, Switzerland, Turkey, and the US; the EU agreed a budget of €86,250,000 for the period from 15 June 2018 to 14 June 2020.

The Special Court has very specific jurisdiction, namely “grave trans-boundary and international crimes” alleged in the “Marty Report” that occurred between January 1 1998 and December 31 2000. The alleged crimes must have either commenced, or have been committed, in Kosovo. The court also has formal superiority over all other courts in Kosovo.

The Special Court became fully operational in 2017; although it has yet to issue any indictments, a number of former KLA members have been invited to The Hague for interviews. Most notably, in July 2019 Kosovo’s Prime Minister Ramush Haradinaj resigned following an invitation to attend an interview.

### **Controversies and Importance in IR**

When created, the court was heralded as a means by which Kosovo could provide justice for victims of past crimes. It was also, however, cited as an integral part of a broader strategy to promote reconciliation between Serbs and Albanians within Kosovo, and between the governments of Serbia and Kosovo, which would facilitate peace, stability and prosperity throughout the region and facilitate progress along “Kosovo’s European path.” Indicatively, a joint statement by the US and EU noted, “By dealing with its past and ensuring justice for the victims, Kosovo can achieve reconciliation and build a better future.” Additionally, some argued that the court would remove criminal elites from Kosovo’s political scene and enable a new generation of “clean” politicians to emerge.

Yet, many have warned that the court may be either unable to function, or worse, cause political and social unrest. These warnings stem from three main concerns, each dealt with in turn below.

#### *Who Will Testify?*

The crimes under investigation happened some twenty years ago; this would pose a challenge to any court seeking

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to gather evidence – especially witness testimony – but this is particularly salient in the case of Kosovo. A number of ICTY cases involving alleged crimes committed by the KLA collapsed due to witness intimidation, and this also hampered the proceedings of the EU's judicial mechanism in Kosovo, EULEX. Many of those allegedly involved in the KLA's crimes are today extremely powerful political figures who since 1999 have essentially captured Kosovo's state apparatus. Those implicated in KLA criminality have proven adept at exploiting the fact that the Kosovo Albanian community is relatively small and close knit; as a result, they have been able to exert pressure on potential witness not to testify. In the twenty years since the crimes were committed, many have warned that guilty parties will have had ample time to approach and silence witnesses.

### *Local Legitimacy?*

The court was only established as a result of sustained international pressure and it has little local legitimacy or public support. Many of the Kosovo politicians who voted for its establishment openly stated they were doing so only because they felt threatened by external sponsors, particularly the US and the EU. Indicatively, the then Prime Minister Hashim Thaci supported the creation of the court, yet simultaneously described it as "the biggest injustice and insult which could be done to Kosovo and its people." He subsequently declared he only supported the court because he was "under great pressure from the international community." In December 2017, a group of MPs from within Kosovo's governing coalition attempted to formally revoke the court. The initiative met with immediate condemnation from external actors, with "the Quint" – the US, UK, France, Germany and Italy – issuing a statement declaring that anyone who supported the initiative, "...will be rejecting Kosovo's partnership with our countries" and would face "severe negative consequences."

The Special Court is not well understood in Kosovo – by either Serbs or Albanians – and a number of myths about its mandate and remit persist. This, coupled with the court's lack of local legitimacy, is potentially of major importance as judgements issued by courts which operate without local legitimacy are invariably rejected by the public, as was particularly the case in respect to the ICTY. Thus, the transformative societal and political benefits cited by the Special Court's supporters will not occur so long as it is seen as remote and a foreign imposition.

### *A Biased Court that Slanders the "Heroes"?*

Amongst the Kosovo Albanian community there is a perception that the Special Court's focus is unfairly biased against them. They believe – with good reason – that those most responsible for violence and oppression during the civil war were the Serbian security forces. Many believe that neither the ICTY nor Serbia have done enough to bring perpetrators of these crimes to justice, and thus they are angry that a court has been established to prosecute Albanians who were in fact overwhelmingly the victims of Serbian aggression.

All major political parties in Kosovo celebrate the KLA, who are widely regarded by Kosovo Albanians as heroes who fought a just war against a more powerful foe. The Special Court, by definition, challenges this national narrative and it has thus been accused by some of slandering the KLA's image. Additionally, in previous ICTY trials involving KLA commanders, those accused have seen their domestic popularity rise, as they have portrayed themselves as victims of an international plot to discredit the national cause. As such, the fear is that those summoned by the new court will similarly portray themselves as nationalist martyrs and thereby precipitate a *rise* in support for the more militant, exclusionary movements within Kosovo.

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Though a small, land-locked country lacking significant natural resources, Kosovo remains vitally important to regional security. The optimism amongst the Albanian community, which greeted Serbia's retreat in 1999 and Kosovo's declaration of independence in 2008, has largely dissipated. Kosovo suffers from high unemployment, widespread political corruption, poor infrastructure and mass emigration. Kosovo's status remains contested, its prospects of joining the EU look remote, and its people continue to have to apply for visas when travelling to Europe. All of which has created widespread societal anger. Given the lack of public support for the Special Court, the

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underlying societal anger, and the fact that the court will by definition challenge the image of the “heroic” KLA, the proceedings of the Special Court could well prove destabilising, not just for Kosovo, but for the surrounding region.

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### About the author:

**Dr Aidan Hehir** is a Reader in International Relations at the University of Westminster. His research interests include humanitarian intervention, statebuilding in Kosovo, and the laws governing the use of force. He is the author/editor of ten books, the most recent being *Hollow Norms and the Responsibility to Protect* (Palgrave Macmillan). He has published widely in a number of academic journals including *International Security*, *The Journal of Peace Research*, *Ethics and International Affairs*, and *Cooperation and Conflict*. He is co-editor of the Routledge Intervention and Statebuilding book series.