

The EU-engineered *hybrid* and *international* specialist court in Kosovo: How ‘special’ is it?

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INTRODUCTION

General overview

Established in a special political and legal context of simultaneous international support and pressure, the Special Court in Kosovo is the most recent hybrid tribunal¹ for war crimes in the world.² Although it serves Kosovo as an independent state, the European External Action Service³ designed the court to hold a specifically international law outlook. Its structures and jurisdiction thus

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¹The International Crimes Database provides a more comprehensive explanation on the design and meaning of hybrid tribunals. It notes that ‘[h]ybrid, internationalized or mixed criminal tribunals are those tribunals which are half national, half international in nature. This can be discerned from: (1) the way they were established (e.g. agreement between the host state and the UN); (2) their subject matter-jurisdiction (both international crimes and national crimes); and (3) their staff (both local judges/prosecutors and international staff).’ See The International Crimes Database, <www.internationalcrimesdatabase.org/Courts/Hybrid>, visited 3 October 2016. The Special Court’s consideration on basis of these criteria is examined extensively in the main text below.

²Other hybrid courts include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Serious Crimes Panel, Dili, the Bosnia War Crimes Chamber and the Special Tribunal for Lebanon.

³The European External Action Service is the EU’s diplomatic service. Besides the EU Rule of Law Mission in Kosovo (EULEX), the EU implements policy in Kosovo through the EU Office, an office staffed by the European External Action Service and directed by the Commissioner of Directorate-General for Neighbourhood and Enlargement Negotiations.

most resemble an international war crimes tribunal. In serving both a domestic constitutional and international legal function, this specialist court in Kosovo breaks new ground covering the role of international tribunals. This uniquely hybrid model will generate important scholarship and discussion among observers and international court engineers on the issue of jurisdiction for war crimes.⁴

The Republic of Kosovo – before independence, a territory administered by the Security Council-mandated administration,⁵ the United Nations Mission in Kosovo⁶ – has been subject to several international and hybrid war crimes courts and jurisdictions.⁷ Since the war in 1999, Kosovo has been subject to the Hague-based International Criminal Tribunal for the former Yugoslavia,⁸ a status that will continue until that Tribunal's closure.⁹ The United Nations Mission in Kosovo courts¹⁰—a hybrid model of UN-mandated courts system operating in Kosovo under the authority of Resolution 1244 and authorisation by the UN Secretary General—operated an intensive war crimes jurisdiction until 2008, when Kosovo declared independence.¹¹ From 17 February 2008, United Nations

⁴ See generally, C. P. R. Romano et al. (eds.) *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004).

⁵ On the functioning of UN mandated territorial administration systems, see C. Stahn, *The Law and Practice of International Territorial Administration: From Versailles To Iraq and Beyond* (Cambridge University Press 2008).

⁶ United Nations Mission in Kosovo is the UN-mandated civilian mission established in 1999 in Kosovo under the UN Security Council Resolution 1244. Until the declaration of independence, it acted as a *de facto* government for Kosovo with broad powers in the institutional sphere. Formally, it still exists under UN Security Council Resolution 1244, but has modest powers.

⁷ See on this point, A. Fichtelberg, *Hybrid Tribunals: A Comparative Examination* (Springer 2015); L. A. Dickinson, 'The Relationship between Hybrid Courts and International Courts: The Case of Kosovo', 37(4) *New England Law Review* (2003).

⁸ Not technically a hybrid tribunal, the International Criminal Tribunal for the former Yugoslavia was established in 1993 under UN auspices. It has jurisdiction to hear cases of alleged crimes committed in the territory of the former Yugoslavia. Being a former Yugoslav territory, alleged crimes committed in Kosovo became subject to the jurisdiction of the International Criminal Tribunal for the former Yugoslavia after the termination of war. See, for this purpose, the statement issued by the Prosecutor, 10 March 1998 <www.icty.org/en/press/prosecutors-statement-regarding-tribunals-jurisdiction-over-kosovo>, visited 3 October 2016.

⁹ See the Completion Strategy for the International Criminal Tribunal for the former Yugoslavia, <www.icty.org/sid/10016>, visited 3 October 2016.

¹⁰ On the post-conflict courts system operating in Kosovo, see W. S. Betts et al., 'The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law', 22 *Michigan Journal of International Law* (2000-2001) p. 371; C. Stahn, 'Justice under Transitional Administration: Contours and Critique of a Paradigm', 27 *Houston Journal of International Law* (2004-2005) p. 311; E. A. Baylis, 'Parallel Courts in Post-Conflict Kosovo', 32 *Yale Journal of International Law* (2007) p. 1.

¹¹ See generally J. Cerone and C. Baldwin, 'Explaining and Evaluating the UNMIK Court System', in C.P.R. Romano et al. (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor,*

Mission in Kosovo courts were dissolved, replaced by Republic of Kosovo courts. These courts were supplemented with an EU-mandated judicial presence, the EU Rule of Law Mission in Kosovo (EULEX), based on a Joint Action of the Council of the EU. As part of Republic of Kosovo's judicial and prosecutorial system, EULEX judges and prosecutors have operated almost independently and have delivered a demanding jurisdiction on war crimes. EULEX originally had an exclusive mandate to prosecute war crimes under the Ahtisaari Plan – the plan determining the final status for Kosovo¹² – a status later incorporated into the Constitution of Kosovo. EULEX does not have a court system operating parallel to Kosovo's. Instead, its judges and prosecutors operate within existing prosecutorial units and courts, but with discretion over case selection and decisions. Local officials cannot interfere in cases chosen for investigation by EULEX. Eventually, the EULEX presence¹³ started dropping off in 2012 for financial and operational reasons. Today, EULEX has transferred much of its exclusive mandate on war crimes to the Republic of Kosovo courts and prosecutors.¹⁴ Despite legitimate doubts about its performance with regard to the fight against serious crime and corruption, EULEX still remains in Kosovo¹⁵ but operates under a 'no-new-case policy'. The Special Court in Kosovo will operate with independent institutional, staffing, financial and decision-making framework, separate from EULEX.

Setting the scene for EU involvement in the establishment of the Special Court

The Special Court for Kosovo¹⁶ became an international issue two years after Kosovo's declaration of independence, due to the report of Swiss member of the Parliamentary Assembly of the Council of Europe, Dick Marty. In his role as

Kosovo, and Cambodia (Oxford University Press 2004); R. F. Carolan, 'An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Case of Kosovo', 17 *Transnational Law and Contemporary Problems* (2008) p. 9.

¹² *Comprehensive Proposal for the Kosovo Status Settlement*, 2 February 2007, <www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>, visited 3 October 2016.

¹³ On the EULEX scope of authority within the framework of the justice system, see generally D. Doli and F. Korenica 'How powerful are Eulex judges and prosecutors in Kosovo', 14 *Revista General de Derecho Penal* (2010).

¹⁴ See generally 'EULEX – Towards an integrated exit strategy – Strengthening the rule of law through EU integration', A Policy Report by GLPS and DPC No. 05 (April 2014).

¹⁵ On the failures of EULEX Kosovo, see J.-P. Jacque, 'Review of the EULEX Kosovo Mission's Implementation of the Mandate with a Particular Focus on the Handling of Recent Allegations', 31 March 2015, Report drafted under the auspices of the European External Action Service, <eeas.europa.eu/statements-eeas/docs/150331_jacque-report_en.pdf>, visited 3 October 2016.

¹⁶ We use 'Special Court' or 'Specialist Chambers' interchangeably in this article, as they both connote the same institution. We insist that, as opposed to the formal name of 'Specialist

special rapporteur for the Parliamentary Assembly of the Council of Europe, Marty submitted a report entitled 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo',¹⁷ on 12 December 2010 to the Committee on Legal Affairs and Human Rights. In its explanatory memorandum, the report alleged that human rights violations, including trafficking in human beings, had been committed by high-level members of the former Kosovar Albanian guerilla group, the Kosovo Liberation Army, during the war between Kosovo and Serbia. The report was attached to a resolution by the Parliamentary Assembly of the Council of Europe¹⁸ calling on the EU to allocate resources through EULEX to investigate the allegations and protect witnesses.¹⁹ EULEX responded by establishing the Special Investigative Task Force, a special prosecutorial unit based in Brussels to pursue the investigation. However, EULEX and the Special Investigative Task Force only pursued the allegations sporadically and were perceived as failing to complete their missions.²⁰

With such problems in the early investigation, the EU and the US tabled the idea of establishing a special court seated outside Kosovo and operating as an international court. The idea gained political momentum as the US encouraged the establishment of a court²¹ and the EU tied the court to Kosovo's European integration agenda.²² Eventually, the EU and US officially requested Kosovo to accept the establishment of a hybrid international court to investigate Marty's report.²³ While willing to keep the Special Court within the formal legal bounds of the Republic of Kosovo's constitution, both sponsors requested the EU be granted full operational and jurisdictional command.²⁴ They also requested that

Chambers', the term 'Special(ist) Court' more substantively reflects the self-contained nature of this institution. For this reason, the label 'Special(ist) Court' has been used throughout the article.

¹⁷ <www.assembly.coe.int/CommitteeDocs/2010/20101218_ajdoc462010provamended.pdf>, visited 5 October 2016.

¹⁸ <www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17942&lang=en>, visited 5 October 2016.

¹⁹ Under Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO. See Art. 3, point (d) EULEX KOSOVO shall *inter alia* 'ensure that cases of war crimes ... are properly investigated, prosecuted, adjudicated and enforced'.

²⁰ <www.euobserver.com/opinion/128343>, visited 5 October 2016.

²¹ Several high US State Department officials visited Kosovo in the meantime, encouraging local institutions on the prospects of the creation of the court. See <www.top-channel.tv/lajme/artikull.php?id=304039&ref=ngj>, visited 5 October 2016.

²² In the EU-Western Balkans Summit (Thessaloniki 2003) Kosovo was promised a European future, though it has become tied to the Special Court.

²³ See e.g. 'The truth beyond any doubt (10/04/2014)', statement by Samuel Žbogar, Head of the EU Office in Kosovo and EU Special Representative, <eeas.europa.eu/archives/delegations/kosovo/documents/statements/140410_the_truth_beyond_any_doubt_en.doc>, visited 17 October 2016.

²⁴ Cf. C. E. Carroll, 'Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State' (2013). Student Scholarship, Paper 90,

the court's seat, all witness protection and all detention of suspects – including those convicted and serving their sentences – be outside Kosovo.²⁵ These modalities were to be engineered²⁶ by the European External Action Service²⁷ and packaged within the constitutional amendment allowing for the Special Court and the law on specialised chambers to be adopted by the Assembly of the Republic of Kosovo.²⁸

The request set off an intense diplomatic exchange between EU officials and Kosovo's institutions. Letters exchanged in April 2014 between the EU High Representative for Foreign Affairs and Security Policy and the President of the Republic of Kosovo revealed EU involvement.²⁹ The EU's chief diplomat, Lady Ashton, assured the EU's commitment to establishing a special court able to judge the indictments deriving from the Special Investigative Task Force. Subsequently, the Assembly of Kosovo ratified this exchange of letters as an international agreement, committing Kosovo to establishing the Special Court. The European Commission incorporated the same obligation for Kosovo in its Enlargement Strategy 2014-2015,³⁰ making the Special Court's establishment an enlargement criterion for Kosovo as well. Finally, the Council of the EU, on 16 December 2014, called on Kosovo to respect this commitment and establish the Special Court.³¹

In January 2015, the President of Kosovo mandated a technical team to build a common framework with EU officials to accommodate the new regime entailed

<scholarship.shu.edu/cgi/viewcontent.cgi?article=1090&context=student_scholarship>, visited 17 October 2016, p. 8 ('Proponents of *ad hoc* tribunals suggest they lead to more consistent treatment of international crimes, as opposed to a criminal body that incorporated more domestic law that would, by definition, vary from state to state. However, this goal of consistency has not been demonstrated by the [International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda]').

²⁵ Cf. Carroll, *supra* n. 24, p. 6, who argues that international tribunals are usually seated away from the 'epicentre of the crime' and 'are subjected to foreign standards'.

²⁶ The Special Court is to date not yet made fully operational. It will be seated outside Kosovo, but will also have one of its offices in Kosovo. The seat outside Kosovo had been a problematic issue, since an international agreement had to be negotiated and concluded with a third country (Netherlands).

²⁷ The European External Action Service has been opaque with regard to the negotiation of the special court package, making its duties unclear.

²⁸ The establishment of the Special Court for Kosovo has been engineered in Brussels. The EU both drafted and sponsored the law on the establishment of the Special Court for Kosovo and will financially support it as well.

²⁹ <www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20a.pdf>, visited 5 October 2016.

³⁰ <www.ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-strategy-paper_en.pdf>, visited 5 October 2016.

³¹ Council Conclusions on Enlargement and Stabilisation and Association Process General Affairs, Council meeting Brussels, 16 December 2014, para. 57.

by the Brussels machinery for the Special Court.³² Though the involvement of local stakeholders was formally guaranteed in the process of reviewing this framework, the package of legislation establishing the Special Court, including the proposed amendment to the Constitution, was prepared in Brussels and forced through the Assembly in its final version in June 2015.³³ Modest local participation in the process earned harsh criticism from the parliamentary opposition.³⁴ They argued that the unity of the constitutional order established by the Constitution would be compromised if an international 'hybrid' court was established. The parliamentary opposition sought an annulment of the decision to establish the Special Court before the Constitutional Court, but the Court rejected their claim.³⁵ On 3 August 2015, in a plenary session the Assembly of Kosovo adopted both the constitutional amendment for the Special Court and the Law on Specialist Chambers and Specialist Prosecutor's Office.³⁶ The Special Court will be a parallel system of courts composed of four judicial instances (three regular plus the constitutional one) external to the current judicial system of the Republic of Kosovo, composed of international judges and prosecutors appointed and financed by the EU, seated and operating in an EU member state.³⁷

After passing the constitutional amendment and the Law on Specialist Chambers, the EU now controls its establishment and operation. To that end, the Netherlands has concluded with Kosovo an international agreement to host the

³² See <www.president-ksgov.net/?page=2,6,3702#.VlzPnHarTIU>, visited 3 October 2016.

³³ Press statement by the Ministry of Justice of Kosovo declaring that the Law on Specialist Chambers was drafted by the EU and was later translated into Albanian and Serbian, both being official languages in Kosovo. See press statement in Albanian, <www.md-ks.net/?page=1,8,1627>, visited 5 October 2016.

³⁴ The parliamentary opposition argued that the Special Court will lead to the demise of Kosovo's sovereignty, it will be unaccountable to the democratic institutions of the country, and it will be a selective system of justice against those who fought for the freedom of Kosovo: see 'Vetëvendosje në mbështetje të protestës kundër Gjykatës Speciale', *Telegrafi*, 16 June 2015, www.telegrafi.com/vetevendosje-ne-mbeshtetje-te-protestes-kunder-gjykates-speciale/, visited 5 October 2016.

³⁵ See the resolution on inadmissibility in English at <www.gjk-ks.org/repository/docs/gjk_ko_107_15_ang.pdf>, visited 5 October 2016.

³⁶ The English version of the Law on Specialist Chambers and Specialist Prosecutor's Office is available at <www.assembly-kosova.org/common/docs/ligjet/05-L-053%20a.pdf>, visited 5 October 2016. See Assembly's decision No. 05-V-139 of 3 August 2015 and decision of the Assembly to enact Law 05/L-053 of the same date.

³⁷ The Law on Specialist Chambers establishes that the Special Court will have a seat in the Republic of Kosovo and one in the host state (Netherlands). However, the seat in Kosovo will be a ceremonial one, considering that all operations of the Special Court will be run in the Netherlands. The call for applications for judges and prosecutors for the Special Court (which are referred below) prove that judges and prosecutors will be based merely in Hague. That also proves that the seat of the Special Court in Kosovo has a purely ceremonial status.

seat of the Special Court,³⁸ and the EU has already accorded financial support for it (an estimated €300 million)³⁹ and has begun its staffing.⁴⁰

The structure of the article

This article will examine the design, jurisdiction and peculiar characteristics of the Special Court, showing not only where it differs from other international tribunals, but also where they coincide. The article first discusses the legal basis for establishing the court, given the lack of clear origin for its mandate and uncertainty over the law it will apply. The article then discusses the structure of the special court, especially its novel organisation. Afterwards, the article examines the *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae* jurisdiction of the Special Court, as well as the limits and sources of such jurisdiction. Drawing upon the special features of the court, the next section discusses the troubled compliance of the administration of evidence before the Special Court with the European Convention on Human Rights standards. The article concludes by maintaining that the specialist court will be a novel hybrid model of international court originating in a national constitutional mandate.

LEGAL BASIS AND REGULATION: WHO GUARDS THE GUARDIAN?

Kosovo's constitutional and legal basis for the Special Court

In the judicial system, the Kosovo Constitution sets an integral and unitary system of courts. The Supreme Court holds the highest judicial authority, with the Court of Appeals and seven basic courts of general jurisdiction subordinate to it. The Constitution tasks the Constitutional Court with the authority to rule on the constitutionality of abstract acts, but also on specific decisions issued by public authorities. The Constitution allows the establishment of courts with specialised jurisdiction, but it does not formally allow parallel judicial structures such as the

³⁸ Government of Netherlands, 'Kosovo court to be established in The Hague', 15 January 2016, www.government.nl/latest/news/2016/01/15/kosovo-court-to-be-established-in-the-hague, visited 5 October 2016.

³⁹ Balkan Transitional Justice, 'Kosovo's New War Court: Major Challenges Ahead', <www.balkaninsight.com/en/article/kosovo-s-new-war-court-major-challenges-ahead-08-11-2015>, visited 5 October 2016.

⁴⁰ European External Action Service, 'Call for Nominations for the President of the Kosovo Specialist Chambers', <[eeas.europa.eu/csdp/opportunities/2016/eulex_kosovo/annex_1_-_job_descriptions_\(update\)_15.07.2016.pdf](http://eeas.europa.eu/csdp/opportunities/2016/eulex_kosovo/annex_1_-_job_descriptions_(update)_15.07.2016.pdf)>, visited 5 October 2016. *See also* European External Action Service, 'Call for Nominations for the Judge on Roster of International Judges of the Kosovo Specialist Chambers', <[eeas.europa.eu/csdp/opportunities/2016/eulex_kosovo/annex_2_-_job_descriptions_\(update\)_15.07.2016.pdf](http://eeas.europa.eu/csdp/opportunities/2016/eulex_kosovo/annex_2_-_job_descriptions_(update)_15.07.2016.pdf)>, visited 5 October 2016.

Special Court. This limit, prescribed by Article 4(5) of the Constitution, raises the most contentious constitutional question with the Special Court. The adoption of any constitutional amendment to establish the legal basis for the Special Court must be passed by a double majority of two-thirds of all MPs in the parliament (80 of 120 total) and two-thirds of MPs representing minorities (14 of 20 total).

If the Special Court were to comply with the formal limits of the Constitution,⁴¹ the designers of its legal basis and regulation had to reconcile two competing aims: on the one hand, ensuring that the establishment of the court lay within the *pouvoir constituant* of the Assembly of Kosovo, and, on the other hand, guaranteeing it self-referential and operational autonomy.⁴² Without constitutional amendment, the Assembly would have no power to establish an autonomous court, as doing so would break the constitutionally defined unity of Kosovo's justice system. Without autonomy, the court would not meet the standards demanded by the EU and US. The designers thus faced contradictory goals that could not be achieved without constitutional amendment. The Kosovo Assembly cleared this obstacle by passing amendment 24, now Article 162 of the Constitution over the protests of heavy opposition.⁴³ The amendment reads 'Notwithstanding any provision in this constitution: [...] the Republic of Kosovo may establish [the Special Court] [...] the organization, functioning and jurisdiction [of which] shall be regulated by this article and by a specific law [*Law on Specialist Chambers*].'⁴⁴ This *ad hoc* change to the Kosovo judicial system thus provides part of the legal basis for the Special Court.

The Constitutional Court reviewed the constitutionality of the then draft constitutional amendment for the Special Court. It mistakenly referred to the European Court of Human Rights' *Fruni v Slovakia* ruling, maintaining that Article 6.1 of the European Convention on Human Rights does not prohibit the establishment of special criminal courts if they are based in law. The Court further argued that Kosovo made an international commitment to establish the Special Court (referring to the exchange of letters), making the Special

⁴¹ On the Kosovo's constitution, see D. Doli and F. Korenica, 'Calling Kosovo's Constitution: a Legal Review', 22 *Denning Law Journal* (2010) p. 51-85.

⁴² On the importance of independence of international courts like the ICC, see e.g. E. Posner and J.C. Yoo, 'Judicial Independence in International Tribunals', 93(1) *California Law Review* (2005) p. 68 ff; R. Mackenzie and P. Sands 'International Courts and Tribunals and the Independence of the International Judge', 44(1) *Harvard International Law Journal* (2003) p. 271, at p. 271 ('Judicial independence is recognized to be a significant factor in maintaining the credibility and legitimacy of international courts and tribunals').

⁴³ Certain political parties and former Kosovo Liberation Army-affiliated organisations have vocally opposed the Special Court. See 'Kosovo Opposition Challenges War Crimes Court Vote', *Balkan Insight Magazine*, available at <www.balkaninsight.com/en/article/kosovo-s-opposition-parties-seek-invalidity-of-the-special-court-08-11-2015>, visited 5 October 2016.

⁴⁴ Emphasis added.

Court constitutional.⁴⁵ In making these arguments, the Constitutional Court ruled upon whether establishing the Special Court complies with human rights law, but not whether it interferes with the unity of the constitutional order and justice system of Kosovo. The Court avoided the substantive constitutional question of how far a special court may interfere in the unity of the justice system and the constitutional order of Kosovo. The Court found the Special Court to be constitutional, but did not settle the actual controversy over its constitutional basis.

Article 162 is a ‘notwithstanding norm’⁴⁶ and establishes an autonomous source of authority that derogates all other norms of the Constitution. The authorisation of the Special Court supersedes other constitutional norms and their meaning. Although the norm is part of the constitution, it installs a parallel self-contained⁴⁷ regime within the Constitution whose authority is independent of the rest of the Constitution. The Special Court is formally an expression of the *pouvoir constituant* of the Republic of Kosovo, grounded in the Constitution. However, the Special Court remains a hybrid international court due to its extra-constitutional, international operation and autonomous governance.

The Assembly complemented Article 162 of the Constitution with a *lex specialis*, the Law on Specialist Chambers. The Law on Specialist Chambers exercises the authority granted by Article 162 by establishing the parallel regime to operate the Special Court in its Article 3(2). With Article 162 of the Constitution, the Law on Specialist Chambers provides the full legal basis for the Special Court to exist. The Law on Specialist Chambers also explicitly states which laws are to be used in adjudication by the Special Court. Only laws acknowledged by the Law on Specialist Chambers are to be used in the Special Court. Thus, while the Law on Specialist Chambers authorises customary international law and international human rights law (especially the European Convention on Human Rights and the International Covenant on Civil and Political Rights), any Kosovo laws not acknowledged in the Law on Specialist Chambers are not applicable to the Special

⁴⁵ Case no. K026/15, CC Kosovo, decision of 15 April 2015, para. 47 ff.

⁴⁶ The concept of ‘notwithstanding norm’ was first introduced in an editorial in *EuConst*, written by L. Besselink et al., ‘A Constitutional moment: Acceding to the ECHR (or not)’, 11(1) *EuConst* (2015) p. 2-12. The article argued that by inserting the ‘notwithstanding norm’ in the EU Treaties the EU accession to the European Convention on Human Rights is still possible, despite the negative Opinion 2/13 of the ECJ. Although this term is not applied in the same context here, it still connotes an almost identical legal outcome. One could also find a similar ‘notwithstanding norm’ in Art. 151 of the Cyprus constitution. In the Cyprus case, nevertheless, the nature of the norm is not absolutely exclusive, unlike Kosovo’s constitutional amendment on the Special Court.

⁴⁷ An excellent account of self-contained regimes in international law can be found in B. Simma and D. Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’, 17(3) *EJIL* (2006) p. 483.

Court. This requirement grounds the mandate and source of law for the Special Court in a parallel system of law stemming from the Article 162 and concretised by Law on Specialist Chambers.

Article 4(1) of the Law on Specialist Chambers establishes a unique external shape for the Special Court. It says that the Special Court 'shall have full legal and juridical personality.' The latter personality does not describe the legal independence of the Special Court within Kosovo's legal order, but rather exhibits its implicitly envisioned international personality that could seem comparable to other international treaty-based tribunals, such as the Special Court for Sierra Leone.⁴⁸ Article 4(2) supports this argument, stating that the Special Court:

[m]ay enter into *arrangements with States, international organisations and other entities* for the purpose of fulfilling their mandate or in furtherance of their operations in accordance with [Law on Specialist Chambers], in particular with regard to co-operation, judicial assistance and the service of sentence.⁴⁹

Implicitly, these 'arrangements' refer to international agreements to which the Special Court shall agree on its own international legal standing. Article 4(4) supports this reading, directing the Special Court to seek permission from the government of Kosovo before 'entering into any *international treaty* with a third state relating to judicial cooperation which would otherwise require ratification under Article 18 of the Constitution'.⁵⁰ This means that agreements made by the Special Court will not require ratification by Kosovo's Assembly, as set by Article 18 of the Constitution. This capacity to undertake international obligations, however, will be limited to the Special Court's functional scope. Article 4 thus further fortifies the independent legal regime under which the Special Court

⁴⁸ One has to note that, according to Schabas (*infra* n. 70), there is a difference with regard to the international personality between UN-based tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) and treaty-based international tribunals (Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia). The former are considered subsidiary organs of the UN, and exhibit the personality of the organisation to which they belong (Art. 7(2), Art. 8 and Art 29 UN Charter), whereas the latter have a distinct personality under international law: *see* Schabas, *supra* n. 70, p. 587).

⁴⁹ Emphasis added.

⁵⁰ Emphasis added. In view of this authorisation, contrasted with the principles of the Vienna Convention on the Law of Treaties, the Special Court shall have full powers to negotiate agreements in view of Art. 7 Vienna Convention on the Law of Treaties, and to adopt and authenticate in view of Art. 9 and 10 of that Convention. However, the authority to express the consent to be bound by an international agreement, in view of Art. 11 of the Vienna Convention on the Law of Treaties, is conditional on the Special Court having first sought the permission of the government of Kosovo.

operates, by giving it an external legal personality that authorises the Special Court to enter into international lawmaking commitments as if it were an international tribunal mandated by the UN.

The Special Court's international legal personality may be limited, however, as its legal regime exists solely in Kosovo. Without endorsement elsewhere in international law, any expressions it makes may be limited in impact to Kosovo. The Special Court thus acts in the international landscape as a branch of the government of Kosovo. Article 5 of the Law on Specialist Chambers endorses this reading, by stating that the obligations that the Special Court may establish under international law shall be undertaken solely on behalf of Kosovo's international legal capacity within the purview of Article 6 of the Vienna Convention on the Law of Treaties.

An additional limit on the Special Court's legal personality is its inability to compel cooperation from third states. Tribunals established by UN Security Council resolutions have the ability to force state cooperation.⁵¹ This capacity is an essential feature of these tribunals. The duty to cooperate forms a fundamental principle in international criminal law. This principle takes its authority from the legal maxim *aut dedere aut judicare*, which in its classical form calls states to either extradite or prosecute perpetrators of international crimes. However, a contemporary reading of the principle is not limited to extradition and prosecution only. For example, Article 29 of the International Criminal Tribunal for the former Yugoslavia Statute obliges states to cooperate in, among other duties, the production of evidence, the taking of testimony and the arrest and/or detention of persons. The Law on Specialist Chambers lacks any mandatory cooperation provision. Given its grounding in Kosovo's Constitution, the Special Court's inability to compel other international legal actors to cooperate is unsurprising and reflects its unique hybrid status as an international legal personality grounded in domestic law. However, its ability to enter into special international arrangements within the scope of its activity and extant legal agreements between Kosovo and other states may allow forms of bilateral cooperation.⁵²

Who guards the guardian?

A brief method for answering this would be to separate the question into two parts: first, who guards the Special Court rulings, and, second, who may revoke the Special Court? With regard to the first question, since the Constitution and Law

⁵¹ One has to note that only UN-mandated tribunals enjoy the capacity to force state cooperation (see e.g. the International Criminal Tribunal for the former Yugoslavia case, *Prosecutor v Blaskic* (Case No. IT-95-14), Judgment, para. 26). On the contrary, treaty-based tribunals (such as the Special Court for Sierra Leone) cannot force state cooperation: see Schabas, *infra* n. 70, p. 58.

⁵² One has to note that, as long as the EU is directly involved in the operation of the Special Court, it will play a role in convincing states to cooperate with the Special Court.

on Specialist Chambers make the Special Court parallel to Kosovo's judicial system, its decisions are not reviewable by Kosovo institutions outside of its structure. This includes the *Kompetenz-Kompetenz*, an attribute of the constitutional instance of the Special Court. In addition, as long as Kosovo does not accede to the Council of Europe and the European Convention on Human Rights, the Special Court's decisions remain uncontrolled by the European Court of Human Rights. Thus, decisions by the Special Court will be made without any reviewability from an outside authority.

On the second question, Article 162(13) of the Constitution gives the Special Court a five-year mandate. However, Article 162(14) conditions termination on an official notification from the EU. No objective legal basis exists to compel the EU to present notification. Without notification from the EU, the Special Court may operate for more than five years. The Republic of Kosovo may not revoke the Special Court's mandate, which gives the EU sole power over when the proceedings of the Special Court end.

Structure

Article 3(1) of the Law on Specialist Chambers establishes that:

Specialist Chambers shall be attached to each level of the court system in Kosovo: the Basic Court of Pristina, the Court of Appeals, the Supreme Court and the Constitutional Court. The Specialist Chamber of the Constitutional Court shall deal exclusively with any constitutional referrals relating to the Specialist Chambers and Specialist Prosecutor's Office. The Specialist Chambers shall be independent in the exercise of their functions.

This structure imitates the legal basis explained above: it is a vertically integrated court system into the current skeleton of the judicial system, with its own parallel standing and independent from the existing court levels. To this extent, Article 24(1) of the Law on Specialist Chambers establishes the following: (a) the Basic Specialist Chamber attached to the Basic Court of Prishtina as the first instance court; (b) the Appeal Specialist Chamber attached to the Appeal Court of Kosovo as the second instance court; (c) the Supreme Court Specialist Chamber attached to the Supreme Court of Kosovo as the instance for extraordinary legal remedy; and (d) the Constitutional Court Specialist Chamber attached to the Constitutional Court of Kosovo as the subsidiary instance for abstract, but also individual, constitutional control.

All chambers will have one or three-judge panels according to Article 25 of the Law on Specialist Chambers. This structure includes the Constitutional Court Specialist Chamber. This provision thus allows a three-judge panel to interpret the

Constitution on behalf of the entire Constitutional Court without any domestic review. Constitutional Court Specialist Chamber rulings thus may not only affect the ‘notwithstanding norm,’ but other aspects of the Constitution as well. This broad power is asymmetric to the specific capacity of the Special Court.

In view of Article 26(1) of the Law on Specialist Chambers, a Roster of International Judges will serve as judges for Special Court. No national judges may join the Roster. Article 28 regulates Roster appointments. An independent three-person Selection Panel⁵³ creates a shortlist of judges for the Roster and the position of President and Vice-President of the Special Court. The Selection Panel will then forward the list to the appointing authority, i.e. the head of EULEX, in accordance with Article 28(3).⁵⁴ The latter will then appoint those candidates as judges for the Special Court and place them in the Roster. The President of the Special Court assigns judges to Special Court panels from the Roster (Article 26(2)). A judge may be dismissed for disciplinary reasons, but only by a decision of all judges serving on Special Court panels (Article 31(5)).

As the head of EULEX, the appointing authority’s mission stems from an EU legal basis.⁵⁵ An external mechanism mandated under EU law thus appoints the judges for the Special Court, a domestic enterprise. Therefore, two coordinated legal bases for the appointment of judges exist: the Constitution of Kosovo and the EU legal act establishing EULEX. The appointment of judges is thus a hybrid mechanism: it follows a procedure written by Kosovo authorities, but will be executed by an EU-appointed official.⁵⁶

The President of the Special Court – aside from having the exclusive authority to assign judges from the Roster to Special Court panels – will also have judicial and administrative competences to manage the Special Court (Article 32, paragraph 3). The President of the Special Court thus holds sole authority to manage Special Court functions and evaluate its judicial administration. From a

⁵³ Two members must be judges with international legal backgrounds.

⁵⁴ *Cf.* the Council of Europe Committee of Ministers, in its Recommendation (94)12, has pointed out that: ‘The authority taking the decision on the selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority itself decides on its procedural rules. However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above’. The model of appointing judges for the Roster, as established by the Law on Specialist Chambers, does not seem compliant with the above standard.

⁵⁵ Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO.

⁵⁶ The EU takes on a new role by directly managing appointments. Other international tribunals have been managed by the UN, but the EU will control the Special Court’s functions.

Kosovo constitutional perspective, concentrating this authority in the person of the President of the Special Court is problematic. A single person controlling judicial assignments, running the daily management of the Special Court and evaluating administration could compromise judicial independence.

Aside from the panels, the Special Court will have its own Specialist Prosecutor's Office, Registry, Victims Participation Office, Witness Protection Office, Detention Management Office and Ombudsperson.⁵⁷ The Specialist Prosecutor's Office (former Special Investigative Task Force) will be the exclusive prosecutorial body authorised to investigate and file indictments in cases under the Special Court's jurisdiction. The Specialist Prosecutor, appointed by the appointing authority, shall be the chief of the Office. Just as with the vesting of so much authority in the President of the Special Court, giving appointment power of both the judges and the prosecutor to a single actor may be problematic. Venice Commission standards and European Court of Human Rights case law clearly prescribe the independence of judicial institutions. If the head of EULEX is the sole appointing authority, the appointment of prosecutors and judges will not be independent, which contaminates their separate mandates to investigate and adjudicate respectively.

JURISDICTION

The Special Court is subject to two broad restrictions on its jurisdiction. First, under Article 10 of the Law on Specialist Chambers, the Special Court may face concurrent jurisdiction with national tribunals. According to Cryer, the relationship between an international tribunal and a national court is a vertical one, and is governed by the 'primacy principle' under which national jurisdictions are called upon to give up their jurisdiction in favour of international tribunals. Similar provisions have been inserted into both Statutes, namely the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, which empowered the respective international tribunals to formally request to defer in favour of their jurisdiction.⁵⁸ In comparison, being formally a national jurisdiction, the Special Court shall have primacy only with respect to the courts of Kosovo. The Special Court's jurisdiction thus may not exclude parallel jurisdiction by other international tribunals. However, it does not face this problem with national authorities. According to Article 10, the Special Court may order any national court or prosecutor to give them all files pertaining to a case of interest.

⁵⁷ This ombudsperson will be independent of the Republic of Kosovo by Art. 24, para. 1.

⁵⁸ R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) p. 127.

In spite of this broad authority, there is a second broad restriction on the Special Court's jurisdiction in that the Law on Specialist Chambers does not contain any provision for the 'principle of complementarity'. In brief, the 'principle of complementarity' establishes the framework for dialogue between national criminal jurisdictions and the International Criminal Court, including modalities on how and when the International Criminal Court Prosecutor may interfere to serve the interests of justice. Article 1 of the Rome Statute embeds this clause in the following terms: the 'International Criminal Court ... shall be complementary to national criminal jurisdictions'.⁵⁹ Article 17 of the International Criminal Court Statute establishes, however, that the International Criminal Court may overrule national jurisdictions if they are 'unwilling and unable genuinely to carry out the investigation of prosecution'. In the words of Stiger, the rationale behind the introduction of this jurisdictional clause in international criminal law was to respond to the culture of impunity which prevailed in most post-conflict settings.⁶⁰ The Law on Specialist Chambers does not provide this clause.

Thus, the Special Court has international legal personality, but does not have exclusive jurisdiction over cases that may be considered by other international courts. It also has the ability to take cases from Kosovo authorities, but has no explicit method or standards for deciding when and how it may exercise this power. In addition to these broad restrictions on its jurisdictional authority, the Special Court faces limits on its jurisdiction over time, material, persons and territory.

Ratione temporis jurisdiction

The Special Court will have a *ratione temporis* jurisdiction for crimes committed between 1 January 1998 and 31 December 2000 (Article 7 of the Law on Specialist Chambers). The Special Court's temporal jurisdiction thus covers both the war period and up until almost 18 months after its conclusion.⁶¹ This time period addresses concerns from Marty's report, which alleged that violations occurred during and after the end of hostilities in June 1999. However, such a long period after the cessation of hostilities is an extraordinary grant of power for a tribunal meant to adjudicate war crimes. International criminal jurisprudence⁶² clearly indicates that war crimes' scope covers wartime

⁵⁹ Rome Statute of the International Criminal Court, <www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf>, visited 3 October 2016.

⁶⁰ J. Stiger, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Brill 2008) p. 1.

⁶¹ The exact date of the end of NATO's active intervention remains contested.

⁶² To read a simplified version of this argument, see e.g. E. Founds, *Risks for the Republic of Kosovo if Parliament Fails to Establish the Special Court*, GLPS Opinion, 24 April 2015,

and the period *immediately* after its end. The case from the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Dusko Tadić* clarifies the principle of when combatants must follow international humanitarian law. The Court wrote:⁶³

On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. *International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.* Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁶⁴

Assuming that the 1998-99 conflict in Kosovo was an internal armed conflict due to the combatants being the government of the Federative Republic of Yugoslavia and the Kosovo Liberation Army, the Geneva Convention regime should only have applied until a peaceful settlement was achieved. Once the Kumanovo Peace Agreement was reached in June 1999, hostilities were over.⁶⁵ Serbia officially agreed to an immediate withdrawal of its troops, to be replaced by NATO forces.⁶⁶ The Kumanovo Peace Agreement ended Serbian control over the territory and allowed NATO to restore peace to Kosovo. In considering crimes occurring in the 18 months following the end of hostilities, the Special Court goes far beyond the temporal jurisdiction of a restricted war crimes tribunal.

Thus, with a *ratione temporis* jurisdiction of the Special Court to 18 months after the conflict, the Special Court cannot be considered solely a war crimes tribunal meant to consider violations of international humanitarian law during hostilities. If it were solely meant to consider war crimes, it would contradict the jurisprudence of the *Tadić* case, which restricts the time period to before the conclusion of a peaceful settlement. The Law on Specialist Chambers's

<www.legalpoliticalstudies.org/wp-content/uploads/2015/05/Riks-for-the-Republic-of-Kosovo-if-the-Parliament-Fails-to-Establish-the-Special-Court1.pdf>, visited 3 October 2016.

⁶³ Decision of 2 October 1995 *Prosecutor v Dusko Tadic*, ICTY Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, para. 67.

⁶⁴ *Ibid.* para. 70 (emphasis added).

⁶⁵ The Kumanovo Peace Agreement constitutes a Status of Forces Agreement.

⁶⁶ The Military Technical Agreement between the International Security Force and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (commonly known as the Military Technical Agreement or Kumanovo Agreement) was an agreement concluded on 9 June 1999 in Kumanovo, Macedonia, which formally allowed NATO troop deployment in Kosovo and brought the hostilities to an end.

extension of *ratione temporis* jurisdiction beyond the war period suggests the Special Court is a tribunal meant to investigate and adjudicate normal, peacetime crimes of a political nature as well as war crimes. To this extent, the Special Court is not only a war crimes tribunal but also a court of general criminal jurisdiction. The Law on Specialist Chambers may limit the Special Court's temporal jurisdiction to a select time period, but by selecting the time period it did, it created a judicial body meant to handle both war crimes and general politically-motivated crimes, making its jurisdiction far broader than that of an international war crimes tribunal.

Ratione materiae jurisdiction

Article 6 of Law on Specialist Chambers establishes two criteria for the subject-matter under the Special Court's jurisdiction: first, crimes described in Articles 12-14, namely crimes against humanity and war crimes under international law which relate to the Marty Report; second, crimes 'under Chapter XXXII, Articles 384-386, 388, 390-407, Chapter XXXIII, Articles 409-411, 415, 417, 419, 421, and Chapter XXXIV, Articles 423-424 of the Kosovo Criminal Code 2012, Law 04/L-082 (where they relate to its official proceedings and officials). Of the allegations in the Parliamentary Assembly of the Council of Europe report, the most specific come from Article 12:

The team of international prosecutors and investigators within EULEX which is responsible for investigating allegations of inhuman treatment, including those relating to possible organ trafficking, has made progress, particularly in respect of proving the existence of secret [Kosovo Liberation Army] places of detention in northern Albania where inhuman treatment and even murders are said to have been committed.

This article identifies three specific crimes for investigation: inhuman treatment; trafficking in organs; and murder. This material jurisdiction is supplemented with several chapters of Kosovo's Criminal Code. Crimes from these chapters include, *inter alia*: (a) criminal offences against the administration of justice and public administration; (b) criminal offences against public order; and (c) official corruption and criminal offences against official duty. The inclusion of these chapters was essential, to give the Special Court necessary and sufficient legal basis to judge and punish those who may jeopardise the proper administration of justice by the Special Court. The Special Court may thus hear cases both in regard to allegations with regard to the crimes noted in the Parliamentary Assembly of the Council of Europe report, but also those individuals who may misuse their official duty to illegally supporting the accused, as well as anybody who may attempt to intimidate witnesses or tamper with legal proceedings.

Article 12 of the Law on Specialist Chambers provides for a *mélange* of laws to govern adjudication of these crimes, with sources both in customary international law and in Kosovo's material criminal law. However, it creates a hierarchy, as Kosovo material criminal law may only be used so long as it does not conflict with international customary law. Article 12 also establishes that the material law in question should be considered in the light of Article 7(2) ECHR and Article 15(2) of the International Covenant on Civil and Political Rights, two provisions with substantively identical implications.⁶⁷ According to Article 7(2) ECHR:

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 7(2) thus provides an exception from the European Convention on Human Rights injunction against prosecuting individuals for a criminal offence not already prescribed by law when it was committed. By integrating Article 7(2) ECHR into the Law on Specialist Chambers, the Special Court has greater material jurisdictional freedom. Its material jurisdiction includes not only cases under the scope of applicable law, but also to those laws not inscribed where and when the crime was committed but were prescribed by the law of 'civilised nations'. This rule expands the jurisdiction of the Special Court beyond Kosovo's material criminal law, assigning the discretion to the Special Court to qualify as applicable law any source that may seem to it as falling under the reach of Article 7(2) ECHR. Thus, while initially restricted to the crimes alleged by the Parliamentary Assembly of the Council of Europe Report, the Special Court's material jurisdiction includes crimes obstructing its investigation and judgment of cases, and gives the Special Court broad discretion to incorporate general principles of law that may not have existed in the Federative Republic of Yugoslavia at the time, but existed broadly in the international community.

Ratione personae jurisdiction

The Law on Specialist Chambers establishes a two-tier test for assertion of personal jurisdiction. First, pursuant to Article 9(2) of the Law, the Special Court 'shall have jurisdiction over persons of Kosovo/Federative Republic of Yugoslavia citizenship.' This formulation fits with the well-established active personality principle of international criminal law. This mode of assertion of jurisdiction places

⁶⁷Therefore, the two latter bases are supplemental sources of law in addition to those specified in Art. 6 of the Law on Specialist Chambers.

the perpetrator at the centre of attention, where the Special Court would be trying persons holding certain type of citizenship. Under this principle the Special Court shall have personal jurisdiction over two categories of citizens: citizens of Kosovo and (former) Federative Republic of Yugoslavia citizens. The latter category of persons was included so the Special Court's *ratione personae* jurisdiction covered persons residing in Kosovo under United Nations Mission in Kosovo administration. This designation bears a sound rationale. It aims at filling the gap in the attribution of criminal responsibility owing to *lacunae* in the law governing citizenship existing at that time, where a great number of persons of Federative Republic of Yugoslavia citizenship not necessarily holding the citizenship of Kosovo today would have been left outside the scope of *ratione personae* jurisdiction, whereas the situation of holders of Kosovo citizenship is clear-cut and embraces the category of persons who are current holders of Kosovo citizenship.⁶⁸ Thus, there exists no ambiguity as to whether the personal jurisdiction of the Special Court extends to those individuals who previously held Federative Republic of Yugoslavia citizenship, but then opted for Kosovo citizenship. Any person holding Kosovo citizenship or who previously held Federative Republic of Yugoslavia citizenship thus falls under the Special Court's personal jurisdiction. Anyone who committed violations but cannot be proved to hold either citizenship falls outside the scope of Special Court's *ratione personae* jurisdiction under this criterion.

In addition to the active personality jurisdiction, the legislator included the passive personality principle as a mode of asserting its jurisdiction, stating, 'the Specialist Chambers shall have jurisdiction...over persons who committed crimes within its subject matter jurisdiction *against persons of Kosovo/Federative Republic of Yugoslavia citizenship* wherever those crimes were committed'.⁶⁹ This provision places emphasis on the citizenship of the victim in order for the Special Court to assert its *ratione personae* jurisdiction, fitting the passive personality principle. This principle was included to address allegations by the Parliamentary Assembly of the Council of Europe Report that crimes were committed abroad, including the alleged use of detention camps in Albania. Thus, the Special Court's *ratione personae* jurisdiction extends to crimes committed both by and against individuals holding Kosovo/Federative Republic of Yugoslavia citizenship during the period under investigation. The only limit on its jurisdiction is the exclusion of any crimes perpetrated by individuals not proved to hold Kosovo/Federative Republic of Yugoslavia citizenship against individuals not proved to hold Kosovo/Federative Republic of Yugoslavia citizenship.

⁶⁸ Law on Citizenship of Kosovo 2013, available in English, <www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20Citizenship%20of%20Kosovo.pdf>, visited 5 October 2016.

⁶⁹ Emphasis added.

Territorial jurisdiction

Formally a court within the Republic of Kosovo, the Special Court would normally only be able to exercise its jurisdiction within Kosovo's territory.⁷⁰ Article 8 of the Law on Specialist Chambers gives the broadest possible definition of this jurisdiction, reading:

Consistent with the territorial jurisdiction of Kosovo courts under applicable criminal laws in force between 1 January 1998 and 31 December 2000, the Specialist Chambers shall have jurisdiction over crimes within its subject matter jurisdiction which were either *commenced* or *committed* in Kosovo.⁷¹

Defining Kosovo's territory is the least problematic part of the definition. Kosovo had an administrative border within the Federative Republic of Yugoslavia before June 1999. Afterwards, Kosovo territory became subject to UNSC Resolution 1244 and the Kumanovo Agreement, the latter defining the border for the purpose of this article. Therefore, when deciding territorial jurisdiction, the Special Court can base its decision on the applicable territorial regime based on when the alleged crime occurred, namely the current state borders of Kosovo inherited from the Kumanovo Agreement.⁷²

More problematic are the other two criteria established by Article 8 of the Law on Specialist Chambers with regard to territorial jurisdiction. The Special Court has jurisdiction over both crimes alleged to have been committed in Kosovo, and those that commenced in Kosovo but were committed elsewhere.⁷³ This criterion satisfies the requirement of the Parliamentary Assembly of the Council of Europe Report to investigate crimes allegedly committed by persons from Kosovo in the territory of third states. The Special Court may thus have jurisdiction in third states – i.e. extraterritorial jurisdiction – under the condition that the crimes committed were commenced in Kosovo.

The Special Court may have difficulty making the link between the 'commence' and 'commit', however. Unlike the International Criminal Tribunal for Rwanda Statute, which explicitly extended its jurisdiction over Rwanda and neighbouring states such as the Democratic Republic of Congo,

⁷⁰W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) p. 129.

⁷¹Emphasis added.

⁷²See Appendix A to the Kumanovo Agreement.

⁷³This provision mirrors the 'principle of ubiquity' (*Ubiquitätsprinzip*) of the German Criminal Code. One must note that the 'principle of ubiquity' in the German perspective is broader and includes also criminal acts which are entirely committed in the territory of another state but whose effects are measurable and affect interests in the state of the forum. Art. 8 of the Law on Specialist Chambers therefore reflects a restricted form of *Ubiquitätsprinzip*.

Uganda, Tanzania, Burundi and, potentially, Kenya,⁷⁴ the Law on Specialist Chambers only mentions Kosovo. However, by including the principle of ‘ubiquity’,⁷⁵ the Law on Specialist Chambers allows the Special Court to exercise jurisdiction over persons who committed certain acts or omissions on other states’ territory if the crimes within its material competence were commenced in the outside territory and committed in Kosovo or vice versa; in such cases territorial jurisdiction shall be deemed as established.

THE ADMINISTRATION OF EVIDENCE BEFORE THE SPECIAL COURT: AN EXEMPTION FROM THE STANDARDS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

The Law on Specialist Chambers provides a very broad standard for the admission of evidence, possibly noncompliant with European Convention of Human Rights standards. Article 37(1) of the Law reads:

Evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the [Special Court] prior to its establishment by any national or international law enforcement or criminal investigation authority or agency including the Kosovo State Prosecutor, any police authority in Kosovo, the [International Criminal Tribunal for the former Yugoslavia], EULEX Kosovo or by the [Special Investigative Task Force] may be admissible before the [Special Court].

Article 37(2) adds that evidence should be administered ‘in the presence of the accused with a view to adversarial argument.’ Exceptions to the latter are permissible, however. The same article establishes that the Rules of Procedure and Evidence may prescribe cases when evidence may be administered without the presence of the accused, under the condition that such administration complies with human rights.⁷⁶ Specifically, evidence collected by other authorities may be administered without the chance for an adversarial procedure for the accused to challenge that evidence. The legislator wished to allow testimony from previous

⁷⁴ Schabas, *supra* n. 70, p. 130.

⁷⁵ See e.g. C. L. Blakesley, ‘Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, The Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law’, 24(1) *Vanderbilt Journal of Transnational Law* (1991) p. 15 (‘In the United States parallel to the German concept of ubiquity is the combination of the objective territoriality or effects theory and the subjective territoriality theory in which a constituent element of the offense occurs in the United States’).

⁷⁶ See generally on the position of witnesses in the context of the administration of evidence by international tribunals, S. N. Ngane, *The Position of Witnesses Before the International Criminal Court* (Brill 2015) p. 127 ff.

judicial, prosecutorial or police proceedings from 1999 forward to be administered as evidence if witnesses were deceased or changed their declarations.

According to Article 37(3) of the Law on Specialist Chambers, acceptable forms of evidence include:

- a. transcripts of testimony of witnesses given before the [International Criminal Tribunal for the former Yugoslavia] and records of depositions of witnesses made before the [International Criminal Tribunal for the former Yugoslavia] [...];
- b. transcripts of testimony of witnesses given before a Kosovo court, including pre-trial testimony or testimony preserved as part of a Special Investigative Opportunity under any criminal procedure code applicable in Kosovo at the relevant time [...] regardless of whether the judges sitting on the Panel heard the original testimony;
- c. original documents, certified copies, certified electronic copies and copies authenticated as unaltered in comparison to their originals and forensic evidence collected by any authority [...]; and
- d. the report or statement of an expert witness admitted into evidence at the [International Criminal Tribunal for the former Yugoslavia] or the testimony of an expert before the [International Criminal Tribunal for the former Yugoslavia] ... whether or not the expert attends to give oral evidence before the [Special Courts].

The scope for acceptable evidence and the criteria for rejecting the adversarial standard are thus broad. Administering evidence against the accused from absent witnesses is thus a real possibility. The evidence itself is problematic. In the last 16 years the United Nations Mission in Kosovo courts, EULEX and the ICTY have collected thousands of pages of evidence that was either refused or did not comply with standards for administration. The Law on Specialist Chambers may allow the administration of this questionable evidence to the Special Court under the above exemptions. Thus, it may not comply with Article 6 ECHR.

The European Convention on Human Rights provides no specific rules for the administration of evidence. It does, however, include general standards for the process of a fair trial.⁷⁷ Specifically, Article 6(3d) ECHR establishes that the accused has the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.' This rule forbids the types of evidence authorised by the Law on Specialist Chambers above. The European Court of Human Rights ruled as such in *Lucà v Italy*, stating '[t]he evidence must normally be produced at a public hearing, in the presence of the accused, with a view to

⁷⁷ ECtHR 11 July 2006, Case No. 54810/00, *Jalloh v Germany*, para. 94; see also ECtHR 16 November 2010, Case No. 926/05, *Taxquet v Belgium*.

adversarial argument.⁷⁸ The same court further argued in *Al-Khawaja and Tahery v UK* that the defendant should both have an ‘effective opportunity’ to question the evidence presented against him orally in his presence and ‘know the identity of his accusers’.⁷⁹ Commenting on the tolerability of absent witnesses, the European Court of Human Rights in *Kostovski v Netherlands* finally added that the ‘[t]estimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author’s reliability or cast doubt on his credibility.’⁸⁰

The European Court of Human Rights has not stated whether the standard of defendant’s examination of evidence by the accused is absolute. However, it did hold in *Al-Khawaja and Tahery v UK* that ‘where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny.’⁸¹ Special procedural safeguards must thus be applied in such cases. With such lax standards for administering evidence, the Law on Specialist Chambers does not place the sufficient safeguards required by the European Court of Human Rights and thus falls far outside its standards unless it puts special safeguards on absent witnesses. One should note that some of these witnesses could have stood trial before the International Criminal Tribunal for the former Yugoslavia or United Nations Mission in Kosovo courts,⁸² therefore their reliability and trustworthiness may have been reviewed before. The issue is, however, whether their testimony in other cases bears relevance in the case before the Special Court. Judges will have a wide discretion in deciding on this relevance. A second major concern in this regard is that as long as Kosovo is not a contracting party to the European Convention on Human Rights – as a consequence of which the judgments of the Special Court will not be subject to the scrutiny of the European Court of Human Rights – this wide standard on acceptance of evidence remains not only unreviewable but also subject to potential abuse.

CONCLUSION

The Special Court for Kosovo is the newest international hybrid tribunal for war crimes established under a domestic constitutional regime. It exhibits the

⁷⁸ ECtHR 27 February 2001, Case No. 33354/96, *Lucà v Italy*, para. 39.

⁷⁹ ECtHR 15 December 2011, Case Nos. 26766/05 and 22228/06, *Al-Khawaja and Tahery v UK*, para. 127.

⁸⁰ ECtHR 29 March 1990, Series A No. 166, *Kostovski v Netherlands*, para. 42.

⁸¹ *Supra* n. 79, para. 147.

⁸² As established by United Nations Mission in Kosovo Regulations 2000/6 and 2000/64, a UN-administered transitory court system that drew to a close upon Kosovo declaring independence in February 2008.

insistence of the international community to respond to allegations of war crimes by establishing independent tribunals of an international nature instead of repeating the failed practices of strengthening the domestic courts to handle this job. Many call this insistence partial and selective,⁸³ leaving aside another huge gap of war crimes allegations never prosecuted substantively by the International Criminal Tribunal for the former Yugoslavia. Yet, being situated in a rather specific legal context, the Kosovo's Special Court mirrors Cassese's comments on the increasing trend of the 'criminalization of international law',⁸⁴ therefore adhering to the trend of the expansion of international criminal jurisdictions. This article therefore concludes that the Special Court – although initiated, designed and operated by the EU – still demonstrates the commitment of the Republic of Kosovo to international law and the international rule of law on the one hand, and on the other, the effectiveness of EU's foreign policy with states in transition like Kosovo in accommodating, at the domestic level, justice institutions of an international character like the Special Court. The Special Court is therefore an outcome of the EU foreign policy of soft-power rule of law intervention in potential 'enlargement' countries that have had a conflicting past, appearing for the first time, such as Kosovo.

The Special Court has both positive and negative implications to administer justice to the allegations presented by the Parliamentary Assembly of the Council of Europe. On the positive side, it has much of the functional independence to investigate cases that Kosovo's outside sponsors in the EU and the US desired. It will not be subject to review by other courts; it will have its own investigative power; judges will be international, not subject to national political factors; and its continued existence will be determined by the EU and thus will not be subject to the Kosovo political environment. It has broad territorial and personal jurisdiction, allowing it to investigate and prosecute all individuals involved in the alleged crimes from the 1998-2000 period. It has broad temporal domain, allowing it to investigate not only crimes that were alleged to occur during the war, but afterwards as well. The Special Court also has the ability to act autonomously to reach agreements necessary for it to fulfill its task, allowing it to work with international partners to administer justice.

Negatively, the Special Court system, too, systematically concentrates authority. The President of the Special Court has wide, unchecked discretion over the management of the courts. The appointing authority's dual control over

⁸³ 'Bringing the truth to light – Kosovo parliament votes to set up special court', DW Report, <www.dw.com/en/bringing-the-truth-to-light-kosovo-parliament-votes-to-set-up-special-court/a-18628067>, visited 5 October 2016.

⁸⁴ A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9(1) *EJIL* (1998) p. 2 at p. 16.

the appointment of judges and prosecutors has problematic implications for the independence of the prosecution and adjudication processes. The broad exceptions for the administration of evidence that cannot be challenged by the accused probably violate the European Convention on Human Rights and could allow a miscarriage of justice. The broad powers given to the Constitutional Court Specialist Chamber could allow it to interpret constitutional law outside of Article 162 allowing the establishment of the Special Court. Since Kosovo remains outside of the Council of Europe, any decisions made by the Special Court will not be subject to outside review. These shortcomings must be taken seriously.

Beside its implications for justice, the Special Court provides a novel forum for the administration of international law. Its placement within the Kosovo legal system makes it a unique international tribunal that exists both within and outside a state's legal institutional architecture. It will be important to watch the Special Court moving forward to see how its cases and rulings fit both within international law, where it has no clear status, and within Kosovo law, where its existence required modification of the Constitution to become legal. With such a unique status, the Special Court could have important implications for the practice of creating international tribunals in the future.

The article therefore concludes that the Special Court will be an example demonstrating a model for interlocking international and constitutional law within one, single purview of war crimes tribunals. To this extent, the Special Court's design and operational model will shed light on a new form of hybrid international tribunals that originate from national constitutional law. Whether this model of tribunal will be shown to be more effective than those mandated directly by the UN remains to be seen.

