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Kosovo Specialist Chambers As A New Hybrid Court In The International Judicary

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Abstract

After years of armed conflict and talks with international organisations, the Kosovo authorities agreed to establish an independent judicial body to prosecute the perpetrators of international crimes that took place during the liberation of Kosovo between 1998 and 2000. The Kosovo Specialist Chambers and Specialist Prosecutor's Office, with its jurisdiction over crimes against humanity, war crimes, and other crimes under Kosovo law is one of the newest judicial bodies operating in the international arena. Despite several years of activity of this body, it is not clear whether Kosovo Specialist Chambers is an international court or a hybrid court in its pure form. Outlining the characteristics of a typical hybrid court, followed by an analysis of the legal framework and functioning of the Kosovo Specialist Chambers will allow for a determination of whether this court is a hybrid court or a completely new type of.

I. Introduction

Hybrid courts, otherwise known as mixed courts, have been gaining popularity in the international judiciary in recent years and are often an appropriate

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solution to problems related to the settlement and adjudication of international crimes committed during armed conflicts of a regional nature, i.e., conflicts taking place within the borders of a particular state. The popularity of such courts may be rooted, inter alia, in the lack of a universally accepted international criminal court, as despite the formal existence of the International Criminal Court in The Hague, certain disputes and conflicts remain unresolved due to the failure of major international powers to sign the Rome Statute. The reluctance of some states to submit to the authority of this Court has significantly reduced its effectiveness and left a gap in the international judiciary.

At the same time, the creation of hybrid institutions was influenced by the various conflicts taking place throughout the 1990s. Due to the regional nature of the conflicts, the creation of hybrid institutions classified as the third generation of international criminal tribunals became an appropriate solution. However, the structure of the functioning of hybrid courts should not be overlooked. It has been pointed out that hybrid courts are the only ones among the judicial bodies that combine mechanisms of national and international law in a way that allows the inhabitants of post-conflict areas to build a relationship with the institution while controlling local authorities and administering justice. The issues identified above may also answer the question of why there has been an expansion of this type of judicial body.

The third generation of international criminal tribunals includes, inter alia, the Special Panel on Serious Crimes of the District Court of Dili in East Timor, the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia, and the War Crimes Chambers of the State Court of Bosnia and Herzegovina.[1] It is specified that this generation of international criminal tribunals is characterized by hybridity of functioning, i.e., the combination of mechanisms derived from national law and mechanisms of international law. For this reason, these bodies are often called hybrid courts. Considering the concept of hybridity when analysing the specificity and framework of functioning of the Kosovo Specialist Chambers and Specialist Prosecutor's Office,[2] it seems possible to demonstrate their belonging to this generation of international criminal tribunals. While indicating which features are typical of a hybrid court and which are

1 The typology of international criminal courts adopted in the doctrine of international law is not uniform. Some representatives of the doctrine distinguish even eight generations of international criminal courts; in this division the Kosovo Specialist Chambers has been classified as a fifth-generation international criminal court.
See J Rikhof, 'The Notion: A History and Typology of International Criminal Institutions' (2017) 1 *PKI Global Just J* 15 <https://www.kirschinstitute.ca/history-typology-international-criminal-institutions/> accessed 11 April 2022.

2 In this article, only the Kosovo Specialist Chambers will be analysed without analysing the separate and independent body that is the Office of the Prosecutor.
For the purposes of the article, the author will use the names: Kosovo Specialist Chambers (KSC) and the Specialist Chambers (the Chambers).

innovative solutions, enriching their existing model of functioning, it will become easier to assess the impact of the chambers on the development of the concept of hybrid court and international judiciary as a whole.

An analysis of the significance and specificity of Kosovo Specialist Chambers as a new hybrid judicial body and its potential impact on the development of international criminal justice cannot be carried out without first giving an overview of the history and background of the creation of the Specialist Chambers, together with highlighting the role of the European Union (EU) and the Council of Europe in their creation. In order to understand the uniqueness of this instrument in comparison with other organs of international judiciary, it is also necessary to bring closer the specificity of the subgroup of organs, which are the hybrid courts, together with distinguishing their characteristic features and then correlating them with Kosovo Specialist Chambers.

Presenting an analysis of the functional framework and the basis of functioning of Kosovo Specialist Chambers, and then comparing this body to the typical model of a hybrid court will allow us to conclude whether this relatively new legal instrument can be included in one of the subgroups of international criminal justice already distinguished in the doctrine (the previously mentioned third generation of international criminal tribunals), or whether it is a completely new hybrid court, the framework of whose functioning will affect the definition of a hybrid court existing so far in the doctrine of international law.

II. Historical and political background of establishing the Kosovo Specialist Chambers

2.1. Historical and political background

The establishment of Kosovo Specialist Chambers is intricately linked to the 1998–2000 armed conflict in the territory of Kosovo.[3] The international community was not indifferent to these events. A first sign of involvement in the conflict was the UN Security Council resolution[4] establishing a UN mission in the territory of the conflict[5]. The mission's mandate primarily covered

3 The armed conflict over Kosovo's independence between Serbs and Kosovo Albanians in the last years of the 20th century. It is estimated that the greatest intensity and development of the conflict occurred between 1998 and 2000 as a result of the start of activities by the armed guerrilla organisation, the Kosovo Liberation Army (Ushtria Çlirimtare e Kosovës).

4 The United Nations Interim Administration Mission in Kosovo (UNMIK).

5 See United Nations Security Council (UNSC) Res 1244 (10 June 1999): <https://digitallibrary.un.org/record/274488> accessed 11 April 2022.

administrative and humanitarian issues. Furthermore, the UN mission has been busy setting up its administrative structures, which have been and continue to be commissioned with trying to help Kosovo's citizens consolidate their autonomy and self-governance, coordinating humanitarian aid to the conflict area and providing assistance. The aforementioned resolution also defines the powers of KFOR[6] and stresses the need to put an end to the violence and repression taking place in the territory of Kosovo.

2.2. The process of establishing the Kosovo Specialist Chambers

The responsibilities of the UN mission were partly taken over by the EU by establishing the European Union Rule of Law Mission in Kosovo mission[7] in Kosovo. This was the result of the steps taken in the 1990s and the official expression of the EU's readiness to be the main international institution supporting the building of stability and the restoration of democracy in this country.[8] Among the tasks of the mission as defined in the act issued by the Council are monitoring selected criminal and civil cases and processes in Kosovo's justice institutions, providing operational support to the EU-supported dialogue, and ensuring that public order and security are maintained and promoted.[9] Over the years, EULEX has been extended by later Council decisions in this regard. On 3 June 2021, in view of the prolonged COVID-19 pandemic, the mission's mandate was extended until 14 June 2023.[10]

Of particular relevance in the context of the subsequent establishment of the Chambers appears to be the report of the Parliamentary Assembly of the Council of Europe on 'Inhuman treatment and trafficking in human organs in Kosovo'[11] and Article 3a added to the EULEX Act in 2014.[12] The Parliamentary Assembly's report confirmed already pre-existing, numerous and concrete suspicions

6 Despite Kosovo's official proclamation of independence on 17 February 2008 and the recognition of the country by many UN members, UNMIK continues its work in Kosovo.

7 The Kosovo Force was a NATO international peacekeeping force, a mission created to restore security in the territory of Kosovo.

8 The mission was established by Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (OJ L 42, 16.2.2008) [92–98].

9 ibid section 3.

10 Council Decision (CFSP) 2021/904 amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo (OJ L 197/114, 03.06.2021), section 1(3).

11 Inhuman treatment of people and illicit trafficking in human organs in Kosovo (Council of Europe's report), (Doc. 12462 07 January 2011) <https://www.scp-ks.org/sites/default/files/public/coe.pdf> accessed 11 April 2022.

12 Provision added by Section 1(1) of Decision No 2014/685/CFSP (OJ L 284/51, 29.09.2014) amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO.

regarding the secret imprisonment and detention of Serb and Albanian Kosovars in unknown facilities by the Kosovo Liberation Army. It also drew attention to the high probability of the possibility of forced transplants abroad on some detainees located in a clinic located in Albanian territory near Fushë-Krujë. While pointing to the need for a thorough investigation and examination of these circumstances, the authors of the report at the same time criticized international organizations operating in Kosovo for taking an overly political approach to holding the perpetrators of the crimes accountable and unequivocally expressed their belief that such an approach runs counter to the principles of fairness and justice.[13]

In September 2011, following up on the report, the Council of Europe issued a resolution[14] that triggered a joint investigation by the Council, the EU, and the Serbian, Albanian, and Kosovar authorities under EULEX Kosovo. In order to integrate the international mission into the national system, the Kosovo Parliament granted executive powers to EULEX Kosovo to incorporate judges and prosecutors into the national judicial system, with judges working on an equal footing with national judges, exercising their powers independently or jointly. The provisions of the resolution created the Special Investigative Task Force,[15] tasked with conducting an in-depth investigation of the alleged crimes described in the report within the existing structures of EULEX Kosovo. After three years of work, SITF issued a statement that the evidence in its possession could form the basis of an indictment and that an appropriate body should be set up to carry out judicial proceedings. The Kosovo authorities have not remained inactive. In 2015, after discussions with the High Representative of the Union for Foreign Affairs and Security Policy, the Kosovo Parliament adopted an amendment to its Constitution, Article 162,[16] which created a framework for the functioning of the Kosovo Specialist Chambers. The Constitution of Kosovo (particularly aforementioned Article 162) and the Law on Kosovo Specialist Chambers and Specialist's Prosecutor's Office[17] gave rise to the Chambers.

13 Council of Europe's report, section 1.

14 Council of Europe, Parliamentary Assembly Resolution 1782, Res. 1782 [2011].

15 Special Investigative Task Force (SITF).

16 Section 162 of the Kosovo Constitution added by Kosovo Parliament's amendment of 3 August 2015 (No.05 -D-139,3 August 2015).

17 Law on Specialist Chambers and Specialist Prosecutor's Office (Law No.05/L-053). Hereinafter referred to as the Statute.

III. Hybrid courts: definition and characteristics

3.1. Hybrid courts definition

The judicature and jurisprudence of public international law have not yet developed a unified hybrid court that considers all the specificities of this peculiar subtype of international tribunals. Moreover, the characteristics of these courts are interpreted from the connecting elements of current hybrid courts.[18] Over the last years of the development of the international criminal process, a place has been found for this type of body in the array of several types of judicial bodies. However, due to the particular combination of attributes characteristic of both the national law of individual states and attributes attributed to international law, it is not possible to put an equal sign between the concept of a traditional international court and the concept of a hybrid court. At the same time, the multiplicity and diversity of internationalised courts as institutions has not allowed the doctrine to develop a single, yet rigid definition of a hybrid court. As a result, hybrid courts, as products of the practice of the international community, have not been included in a strict legislative framework and, consequently, a legal definition of this type of organ of international law has not been written down. The most precise analysis, bringing the doctrine closer to working out a clear and at the same time comprehensive definition of hybrid courts seems to be the analysis of the elements characteristic of this type of organ made by Luigi Condorelli and Theo Boutruche, who considered as internationalised courts judicial bodies in whose specificity it is possible to distinguish 'three common features of internationalised criminal tribunals: the exercise of judicial functions, the fact that they are characterised by a genuine element of international law intertwined with an element of domestic law, and their ad hoc nature.'[19] This understanding of the institution of internationalised courts is also consistent with another prominent doctrinal voice. According to Antonio Cassese,[20] hybrid courts are encompassing judicial bodies of mixed composition, consisting of both international judges and judges with the nationality of the state where the hearings take place. There can be two versions of these courts and tribunals. First, they may be organs of a particular state, being part of that state's judiciary. Alternatively, the courts may be international in

18 Sarah MH Nouwen, 'Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts' [2006] 2(2) Utrecht Law Review 192.

19 Luigi Condorelli and Theo Boutruche, 'Internationalized Criminal Courts: Are They Necessary?' in CPR Romano, A Nollkaemper, and Kleffner (eds), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford 2004) 428–430.

20 Antonio Cassese; Italian lawyer, first President of the International Criminal Tribunal for the former Yugoslavia and first President of the Special Tribunal for Lebanon.

nature and character; they may be created by an international agreement and not be part of the national judicial system.[21]

Following the definition indicated above, it is necessary to stress that since hybrid courts are established in the territory of states affected by armed conflicts, civil wars, or dictatorships and are created to adjudicate on various violations of *ius cogens* norms and national norms governing the most serious crimes and human rights violations, they are criminal courts.[22] It is often impossible to come to terms with the past after such traumatic events within national structures, due to their complete breakdown and the lack of trust in public institutions in the countries affected by conflicts. Sometimes, during wars and conflicts, so-called elites are also exterminated or flee en masse, who could take the lead in rebuilding democratic structures in each country and launch an investigation to bring those responsible for crimes to justice. Therefore, the attempts to establish bodies that are not an extension of yet existing public institutions, which are often corrupt or an active instrument of oppression during armed conflicts, are not unexpected.

Another reason justifying the establishment of internationalised courts to try crimes in these kinds of circumstances is the fear and apprehension of national judges to act against individuals suspected of genocide, war crimes, and other atrocities because of their own safety and the lack of adequate protection against the criminals.[23] For example, the history of the International Criminal Tribunal for the Former Yugoslavia and its activity proves that it is extremally difficult for witnesses and victims to face their perpetrators because of their continuous attempts to intimidate others.[24]

In view of the above, it is believed that justice should be sought in international law by establishing appropriate mechanisms of international law, while at the same time making efficient use of domestic law mechanisms to ensure that the process of holding perpetrators accountable for their crimes is fully legitimate and effective.

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21 Antonio Cassese, *International Criminal Law* (OUP 2003) 343.

22 ibid.

23 Antonio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Romano, A Nollkaemper, and Kleffner (eds), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford 2004) 10.

24 In the case *Haradinaj et al. (IT-04-84)*, the Prosecution appealed before International Criminal Tribunal for the former Yugoslavia and sought the defendant's conviction for witness intimidation. In addition, the Prosecution accused the defendant of creating an unprecedented atmosphere of widespread and serious obstruction of the investigation.

3.2. Hybrid courts' characteristics

Focusing on the international mechanisms used in the creation of such bodies, it is first necessary to mention the legal basis constituting these bodies. Past practice indicates that the impetus for the creation of hybrid courts was the reactions of the international community to various major conflicts taking place in the world. As part of the activities undertaken by the international community, acts were created that introduced appropriate changes and modifications to the local justice systems by establishing bodies that combine international and national elements. Such acts include, for example, the resolutions of the UN Security Council,[25] the only international body with unquestionable legitimacy for ensuring global security, preventing violations of the prohibition on the use of force, and restoring peace. In other situations, the creation of a hybrid court may be preceded by a specific agreement reached by national authorities with an international organisation to obtain external assistance. This is what happened in the case of the Special Court for Sierra Leone, where the national authorities entered into an agreement[26] with the UN with a view to establishing peace and stability in the country and conducting a fair criminal trial. Therefore, it will not be an abuse to say that, as a rule, the framework within which hybrid courts operate is set by international treaties concluded by national governments with international organisations.[27]

Another international element may or may not be the law applied by hybrid courts, both substantive and procedural. After all, some violations of *ius cogens* norms such as the crime of genocide, torture, and war crimes, are also considered crimes in national legal orders, and consequently, within the national judiciary, there are specific norms of criminal procedural law that may apply in cases of this gravity. In this connection, it should be stressed that it does not appear that in the new era of international justice there would be a hybrid court that would rule solely on the basis of the norms of international law. As a matter of principle, it would not be in the nature of such courts to base their judgements exclusively on international law. Consequently, the internationalisation of the law applied to the

25 Security Council resolutions have created, e.g., the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

26 Agreement between the UN and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone, (Volume 2178, 1-38342), (16 January 2002) <http://www.rscsl.org/Documents/scsl-agreement.pdf> accessed 4 April 2022.

27 Dorota Heidrich, 'Przyszłość międzynarodowych trybunałów karnych ad hoc: strategie zakończenia oraz rozwiązania rezydualne, ze szczególnym uwzględnieniem Międzynarodowego Trybunału Karnego dla byłej Jugosławii' ['The Future of International Criminal Ad Hoc Tribunals: Completion Strategies and Residual Solutions, with Special Attention to the International Criminal Tribunal for the Former Yugoslavia'] Studia Europejskie [2013] 160.

procedures and actions would depend only on the entities forming the court in question. Thus, the scope of international law applied by hybrid courts may be limited to a small number of international law rules[28] and draw mostly on domestic law regulations, such as in the case of the Extraordinary Chambers of the Courts of Cambodia. However, there are also hybrid courts that base their decisions exclusively on non-national norms, such as the Special Court for Sierra Leone, which identifies as procedural law in its statute the principles relevant to the conduct of proceedings expressed in the Statute of the International Criminal Tribunal for Rwanda.[29]

When examining the substantive law applied by hybrid courts, it cannot be overlooked that the subject matter jurisdiction of hybrid tribunals, like the tribunals themselves, is not uniform. Moreover, it is based on a peculiar mixture of the domestic law of the state concerned and the rules of public international law. The scope of acts to be judged by judges of internationalised tribunals is determined by laws or conventions of the states and international organisations constituting the court. Due to the universal acceptance by the international community of certain norms as norms whose violation is inadmissible (norms *ius cogens*), the scope of substantive jurisdiction of hybrid courts covers the most serious crimes of international and national law such as genocide, mass cleansing of selected ethnic or religious groups, or severe violations of the laws of war. Undoubtedly, the compilation of international law together with national law influences the proceedings in hybrid courts. It may happen that national law insufficiently covers the scope of crimes committed during an armed conflict, leading to some perpetrators escaping the reach of justice. The norms of international law, in particular the norms of *ius cogens*, incorporated into the statutes of hybrid courts compensate for the deficiencies of national law through their universality.

The personal aspect of the structures of internationalised tribunals consists of both judges and staff from the countries on whose territory the international crimes took place and international staff. The shape of the personnel working within the hybrid courts is primarily influenced by the reasons for the establishment of such bodies. As already mentioned, hybrid courts are set up in post-conflict circumstances, i.e., in situations where state structures are often completely

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28 According to of the Law on the Establishment of the Extraordinary Chambers of the Courts of Cambodia (NS/RKM/1004/006), the Extraordinary Chambers shall apply Cambodian law when taking procedural actions. In case this law does not address a specific issue: there is ambiguity on how to interpret or apply a norm of Cambodian law, or there is inconsistency of the law with international standards. Then the solution should be sought at the level of international law standards <https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> accessed 4 April 2022.

29 Statute of the Special Court for Sierra Leone, Volume 2178, 1-38342 [16 January 2002] 149 <http://www.rscsl.org/Documents/scsl-statute.pdf> accessed 4 April 2022.

disintegrated or where there are only a handful of judges in the territory and, in addition, they do not have the experience to try serious crimes. In most cases, therefore, it has not been possible to set up bodies composed exclusively of citizens of the country in which the judicial body is being established. It also appears that the creation of purely international judgeships has been abandoned. This is mostly due to the possibility of insufficient legitimisation of personnel with only international roots in the eyes of the local community. After all, it may happen that international staff will not be able to fully understand and adapt their actions to the specificity of the community they will have to deal with.[30]

As a result of the above, and many other circumstances, the composition of hybrid courts is usually a mixed composition. Presumably, the international organisations that are one of the entities creating hybrid tribunals would insist on appointing only foreign judges, given the greater experience of such judges and the greater likelihood of respecting the norms of international law underlying the functioning of the body. However, the mixed composition of staff is not an accidental solution chosen when creating hybrid courts. Their specificity does not allow the composition of the judiciary to be devoid of both a local and an internationalised element. As Cesare Romano points out, 'local judges and staff are essential to instil in the local community a sense of ownership of the justice sought on their behalf'[31] and 'local judges provide foreign judges with an understanding of local customs, legal or social.'[32] Conversely, international judges, in addition to their extensive experience in the application and interpretation of international law, bring to the proceedings a certain distance and a broader view of the crimes committed, which helps to reduce the risk of certain local prejudices rooted in the experience of past events. In addition, the presence of judges of foreign origin gives the situation of internal conflict greater importance and elevates it above borders, rendering it an international affair.[33]

When defining the nature of hybrid courts, the issue of their ad hoc nature cannot be overlooked. This is a feature that distinguishes them from distinct types of permanent bodies of international criminal law. The hybrid courts are not established to function permanently, as their purpose is not to replace the International Criminal Court. In the literature, the term ad hoc courts[34] is often used as a synonym for hybrid courts. This is quite a conflictual issue from the

30 Romano, 'The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals' in Romano, A Nollkaemper, and Kleffner (eds.),*Internationalized Criminal Courts*, (Oxford 2004), 240.

31 ibid.

32 ibid.

33 ibid.

34 An ad hoc court is a court set up to deal with a specific dispute.

point of view of the linguistic understanding of the ad hoc and temporary nature of hybrid courts and the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) already functioning in international law. These tribunals, due to their temporary and ad hoc nature, are classified as a subgroup of ad hoc courts.[35] Thus, a certain contradiction and understatement appears, which may be misleading. However, this problem has been signalled in the doctrine and, as Sarah M.H. Nouwen points out, both the hybrid tribunals and the international criminal tribunals for Yugoslavia and for Rwanda are characterised by their ad hoc nature, so in order to distinguish these subgroups it is possible to refer to the ICTY and the ICTR as the courts of Chapter VII of the UN Charter.[36] This is a reference to the origins and circumstances of the creation of these bodies, as they were created by Security Council resolutions taken precisely on the basis of the provisions of this chapter. However, the proposal of nomenclature indicated above has not yet been universally accepted by the doctrine and, consequently, a collective distinction between internationalised and ad hoc courts is lacking. Consequently, the ad hoc nature of hybrid courts should be examined on a case-by-case basis, considering the circumstances of their creation and the period for which they were created.

IV. Kosovo Specialist Chambers legal nature

4.1. Grounds for validity and position

The establishment of the Kosovo Specialist Chambers would not have been possible without the continuous support of the Republic of Kosovo by the EU in the democratisation of the state and the reconstruction of structures. Discussions and conversations between the Kosovo authorities and representatives of the EU structures have been taking place for a long time to strengthen and achieve as fully as possible the objectives set by EULEX. The establishment of a separate judicial authority was achieved through the adoption by the Kosovo Parliament of the Law on the Ratification of the International Agreement between the Republic of Kosovo and the EU on the European Union Rule of Law Mission in Kosovo.[37] This act extended the mandate of the EULEX mission and guaranteed

35 ibid.

36 Nouwen (n 18) 211.

37 Agreement between the EU and the United States of America on the participation of the United States of America in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (EULEX KOSOVO 2008), (OJ L 292, 25.10.2008, 33–38).

the independence of SITF[38] and its mandate. The agreement also stated the contractual delegation of authority for the EULEX mission to appoint international judges and prosecutors in accordance with the Constitution of the Republic of Kosovo and to create the institutional framework for an international judicial body.[39] In addition, immunity and privileges were guaranteed to EULEX mission staff and mission offices in accordance with Law No. 03/L-033 on the Status, Immunities and Privileges of Diplomatic and Consular Missions and Personnel in Republic of Kosova, and of the International Military Presence and Its Personnel.[40] The international agreement, which was an act undertaken between Kosovo and the EU, led to the amendment of the Kosovo Constitution in 2015[41] and the adoption of the Law on the Kosovo Specialist Chambers and Special Prosecutor's Office, which is still the statute of this body today.

Kosovo Specialist Chambers, together with the Special Prosecutor's Office, have legal capacity under Kosovo law and fully exercise its rights. The legal framework for the KSC legal personality derives from the constitutional regulations and the Statute of the Chambers, which established, inter alia, the competence to enter into agreements with other states, international organisations, or other entities.[42] However, it should be made specific that this competence can only be exercised to the extent to which it furthers the objectives for which Specialist Chambers have been established.[43] For the Chambers to undertake the agreements in question, it is not necessary for the Kosovo Parliament to ratify such an agreement, but only to approve it. This makes it much easier for Kosovo Specialist Chambers to enter into agreements with other subjects of international law. The rule expressed in Article 18(1) of the Constitution of Kosovo is the obligation to obtain an absolute majority in parliament in the situation of ratification of an international agreement concerning, inter alia, political, military, fundamental rights, and freedoms of citizens.[44] Consequently, in a situation where KSC accedes to an agreement within the scope expressed in the above-mentioned article, there is no ratification of the agreement by an absolute majority of Kosovo MPs expressed in the law. Given the concept of state sovereignty already well-

38 Special Investigative Task Forces.

39 EULEX KOSOVO 2008, section 1(2) point 1-2.

40 Law Nr 03/L-033: the Status, Immunities and Privileges of Diplomatic and Consular Missions and Personnel in Republic of Kosova, and of the International Military Presence and Its Personnel, (Law Nr 03/L-033 20 February 2008).

41 Amendment of the Constitution of the Republic of Kosovo (No 05-D-139 3 August 2015).

42 Statute, section 4(1).

43 ibid section 4(2).

44 Constitution of Republic of Kosovo, s 18(1), June 2008 <https://www.refworld.org/docid/5b43009f4.html> accessed 11 April 2022.

established in the doctrine of international law, the above-mentioned solution may be questionable, given that the Specialised Chambers are part of the Kosovo judiciary. By creating such a mechanism, the position of the Chambers has been significantly strengthened and Kosovo's legislative power in this regard has been weakened.

4.2. Law applicable

When analysing the hybridity of Kosovo Specialist Chambers, it is important to look at the law applicable by this court. The sources of law under which the Chambers operate and adjudicate are the Constitution of Kosovo, customary international law, international instruments protecting human rights, including, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, the Statute of KSC, and any provisions of Kosovo law[45] explicitly incorporated and applied in accordance with the aforementioned Statute.

Listing the Constitution of Kosovo as the most important source of law applied by the Chambers may have been inspired by the provision adopted by the Extraordinary Chambers of the Judiciary in Cambodia.[46] However, unlike the aforementioned hybrid court, international law is not a specific addition to domestic law for the Specialist Chambers. The sources of international law indicated in the Statute are extremely broad and include acts that are the most important achievements of the international community in the protection of human rights. Moreover, when referring to customary law in force at the time of the crimes, the Specialised Chambers may refer to complementary sources of international law such as the case law of hybrid courts, the International Court of Justice, and other criminal courts.[47] The scope of substantive law applied by the Specialised Chambers may be extended to include regulations of national law when directly incorporated into the Statute. For example, the Chambers' substantive jurisdiction has been extended in this way. However, in other situations, the Statute of the Chamber prevails over any conflicting provisions of any other laws or regulations of Kosovo law.[48]

The procedural matter concerning the manner in which the Chamber conducts its proceedings has been largely covered by a separate act, the Procedural and Evidentiary Rules before the Kosovo Specialised Chambers. This act specifies

45 Statute, section 3(2).

46 In the statute of this hybrid court, mainly Cambodian law supplemented by international law is indicated as the law applicable.

47 Statute, section 3(3).

48 ibid section 3(4).

the scheme of conduct of proceedings, among other things, the rights of the accused, the process of making arrests and detentions. Passed by the judges of the Chambers under Article 19(1) of the Statute, it codifies the procedural rules applied by the Specialised Chambers (both the Trial Chambers and the Office of the Prosecutor). The Rules of Procedure and Evidence before the Specialised Chambers in Kosovo is an act that supplements the Statute with important practical issues, while remaining respectful of the provisions of the Statute. It was the intention of the judges to embody, both in the Statute and in the aforementioned Act, the highest standards of international human rights developed both within the Council of Europe and the UN. In particular, it should be presumed that the injunction to observe the highest standards of international human rights in Article 19(1) of the Statute is inspired by, among others, the already famous Article 6 of the European Convention on Human Rights, which set the standard of a fair trial.

4.3. The scope of jurisdiction

The scope of temporal and territorial jurisdiction is limited to crimes initiated and committed on the territory of Kosovo between 1 January 1998 and 31 December 2000.[49] The substantive jurisdiction of the Specialised Jurisdiction Chambers is based on the reports of the Parliamentary Assembly of the Council of Europe and extends to crimes against humanity and war crimes.[50] However, these crimes are understood in accordance with their definitions established by the UN Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions of 1949.[51] Article 6(2) of the Statute successively cites the various regulations of the Kosovo Criminal Code extending jurisdiction. The KSC's jurisdiction extended to crimes related to the function of a public official, such as failure to report the commission of acts that are both crimes under Kosovo and international law, aiding perpetrators, falsification of reports, obstruction of evidence, abuse of position, and others.[52] Thus, it can be concluded that the extension of the Chambers' subject matter jurisdiction to crimes under Kosovo law was made due to the lack of existence of a codified law in international law covering such a wide range of serious crimes committed by public officials. This kind of solution seems to be an interesting remedy to the continuing problem

49 Statute, section 7-8.

50 ibid section 1.

51 ibid section 13-14.

52 ibid section 6(2).

of adjudicating serious crimes of international law committed by state officials by detailing a number of contexts and forms in which these crimes are committed.

The personal jurisdiction of the Specialised Chambers is limited to natural persons holding Kosovar citizenship, or as stated precisely in the Statute, persons holding citizenship of the Federal Republic of Yugoslavia.[53] The scope of personal jurisdiction also includes persons of other nationalities who have committed crimes within the Chambers' jurisdiction against citizens of Kosovo/the Federal Republic of Yugoslavia. This particular scope of personal jurisdiction is immanently linked to the historical political system of Kosovo, as well as to the ethnic diversity of the citizens of the Federal Republic of Yugoslavia. The broader scope of personal jurisdiction is presumably intended to enable the Specialised Chambers to carry out its mission to the fullest extent possible, and thus to bring justice to all perpetrators of crimes within the Chambers' jurisdiction.

Still remaining with the jurisdiction of the Chamber, it is worth pointing out the provision in the Statute of the Special Chambers that it is not possible to invoke immunity *rationae materiae*[54] of individuals holding important state functions during the period covered by the jurisdiction. This provision refers, however, only to situations in which such persons are accused of crimes against humanity or war crimes.[55] This is not an innovative solution, as such a provision has already appeared, for example, in the Statute of the Special Court for Sierra Leone.[56] Nonetheless, the aforementioned provision should be viewed positively, in view of the ongoing discussion in the doctrine of international law concerning the appropriateness of waiving the immunity of heads of state and other state officials in relation to the most serious international crimes they have committed.[57] Such provisions reproduced in the statutes of the new judicial bodies may contribute to the entrenchment of the practice in this regard, and thus the formation of a new customary law. Moreover, Article 18 of the Statute of the Chambers explicitly indicates that the jurisdiction of the Specialised Chambers may not be limited by any amnesties issued under the Constitution of Kosovo.

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53 Statute, section 9.

54 Immunity *rationae materiae* is a functional immunity that relieves state officials from liability for acts performed in the exercise of their official functions.

55 Statute, section 16.

56 The Residual Special Court for Sierra Leone Agreement (Ratification) Act, s 6, (Vol CXLIII, No 6, 9 February 2012) <https://www.lrcsl.gov.sl/sites/default/files/2019-08/the-residual-special-court-for-sierra-leone-agreement-ratification-act-2011-01.pdf> accessed 11 April 2022.

57 The latest reflections in this regard are included in Eighth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur <https://undocs.org/pdf?symbol=en/A/CN.4/739> accessed 11 April 2022.

An important aspect in the context of the subject matter jurisdiction of the Kosovo Specialist Chambers is their superiority over any other Kosovo court.[58] This arrangement has a significant impact on the activities of other Kosovo courts, as the Kosovo Specialist Chambers and the Specialist Prosecutor are given the power to order the transfer of proceedings within their jurisdiction from any other prosecutor or any other court within Kosovo to the Kosovo Specialist Chambers and the Special Prosecutor. In addition, an obligation arose on the part of law enforcement agencies and Kosovo courts to notify the Chambers of any cases or proceedings within the Chambers' jurisdiction.[59] By constructing a statutory duty to cooperate, the influence of the KSC was undoubtedly increased and the process of bringing justice to the perpetrators of crimes committed was made more dynamic.

The concept of shaping the jurisdiction of the Chambers in the described manner seems to use the most prominent solutions contained in the statutes of the already existing hybrid courts. Particularly noteworthy is the extension of the Chambers' jurisdiction to crimes committed by state officials in the line of duty and the lack of entitlement of these persons to invoke immunity for their defence in proceedings before the Chambers. Bearing in mind the long-standing reflections of the doctrine of international law on the immunity of the state (including the highest state officials) in the field of international crimes, it should be pointed out that every attempt to legally regulate this problem contributes to strengthening the practice of the subjects of international law. It is not unlikely that the shaping of the scope of subject matter jurisdiction in this way will in the future become a universal model for a new generation of judicial bodies.

4.4. Organisational structure and staff

Turning to the organisational structure of the Kosovo Specialist Chambers, it is necessary to indicate that the Kosovo Specialist Chambers are composed of the following chambers: the Ordinary Trial Chamber, the Appeals Chamber, the Supreme Court Chamber, and the Constitutional Court Chamber.[60] In addition to the adjudicatory chambers, within the Specialised Chambers there is also the Registry,[61] which deals with the administrative service of the court and performs other tasks needed for the smooth implementation of the proceedings taking place

58 Statute, section 10(1).

59 ibid section 11.

60 ibid section 4(1).

61 ibid section 3(5).

within the Chambers.[62] The Kosovo Specialist Chambers operate both in Kosovo and abroad. Currently, the foreign seat of the Chambers is The Hague. This arrangement has been allowed for in the Statute[63] by establishing the possibility for Kosovo and the host country to conclude an agreement and offer to establish a seat on its territory.

Judges appointed to serve as a judge to one of the Chambers are selected from the official Roster of International Judges. This list is compiled by an independent Qualification Commission composed of three members of international origin, including two judges with experience in international criminal law.[64] The decisions of the Qualification Committee are taken by majority vote and the list created by the Committee with the proposed judges is then forwarded to the EULEX Head of Mission. The EULEX Head of Mission appoints the judges to the Roster of International Judges on the basis of previous recommendations of the Commission. It should also be noted that the President and Vice-President of the Specialised Chambers are appointed on the recommendation of the Commission by the EULEX Head of Mission. Having a ready-made Roster of International Judges, the President of the Chambers appoints judges from the list to individual cases when needed.[65] According to the Statute, the number of judges on the Roster of International Judges should be maintained at a level that ensures the smooth and efficient functioning of the KSC.[66] There are currently twenty-two judges on the roster. The vast majority are judges of European origin. The Statute of the Kosovo Specialised Chambers also determines the number of judges sitting in each Chamber. The model of a three-judge panel in each Chamber has been adopted, with the exception of the Ordinary Chamber, which consists of three judges and one reserve judge.[67] Each judge is appointed for a four-year term, with the possibility of the term being shortened if the activities for which the judge was appointed end earlier.[68]

A positive aspect of the structure of the Kosovo Specialist Chambers thus adopted is, primarily, the authority of the Chambers to move their seat. It is usually suggested in the literature that the majority of judicial bodies of this type have their seat on the territory of former conflicts, which favourably influences the active participation of injured parties in the process of restoring state structures

62 Statute, section 34.

63 ibid section 3(6).

64 ibid section 28(2).

65 ibid section 26(2).

66 ibid section 29.

67 ibid section 25 (1).

68 ibid section 30(3).

and the realisation of judicial proceedings. The disadvantage of this solution may be the high probability of influence of potential perpetrators on the course of proceedings. In connection with this, the possibility of transferring the seat to another country seems reasonable, since protecting the independence of judges and the efficient course of proceedings should be a priority for every judicial body.

While the complete exclusion of local judges from the Roster of International Judges is incomprehensible, in jurisprudence, the inclusion of local judges in the structures of hybrid courts is assessed positively due to the previously mentioned sense of wielding justice that is administered to criminals. Consequently, the lack of judges of Kosovar origin may in the future affect the legitimacy of this judicial body and hinder the procedure in further legal proceedings.

V. Kosovo Specialist Chambers as a new hybrid court – typical and atypical features

Contemplating the hybridity in the international judiciary and the structures of the Kosovo Specialist Chambers, it should be concluded that this body is a hybrid court in its most modern variant. This thesis is supported by the fact that it is not easy to integrate KSC into the already well-established doctrinal standards to which earlier hybrid courts usually conformed. In particular, the Kosovo Specialist Chambers go beyond the formed patterns already at the level of the founding instruments. The establishment of the Chambers on the basis of the Constitution of Kosovo and domestic law (taking into account the agreement between Kosovo and the EU) leads some scholars to claim that they are an internationalised national court.[69] However, although the Constitution of Kosovo clearly states that the Kosovo Specialist Chambers and the Specialist Prosecutor's Office are established within the judiciary of Kosovo, the attribution to this body of a broadly defined legal personality and the ability to conclude international agreements as part of its functions determines the considerable internationalisation of the Chambers. Moreover, it should be pointed out that the attachment of KSC to the Kosovo judiciary appears to be only a formal and superficial attachment due to the superiority of the Chambers over other national bodies in terms of their jurisdiction. Consequently, it is impossible to agree with the voices depriving the Kosovo Specialist Chambers of their hybridity.

69 Robert Muharremi, 'The Kosovo Specialist Chambers and Specialist Prosecutor's Office' (2016) 76 HJIL 991 <https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf> accessed 11 April 2022.

The hybridity of the Kosovo Specialist Chambers is also reflected in the jurisdiction of this body, which is a compilation of crimes that are the most serious crimes of international and domestic law. The scope of subject matter jurisdiction shaped in this way corresponds to the already formed model of jurisdiction of hybrid courts. Consider the narrow temporal and territorial scope of the KSC jurisdiction, which is limited to the armed conflict taking place in the territory of present-day Kosovo in 1998–2000; as a result, the construction of the KSC mandate does not differ from that of hybrid courts established in the past.

Some doubts about the hybrid nature of the Kosovo Specialist Chambers may be raised by the placement of the Constitution of Kosovo at the top of the list of sources of law under which the judges rule. However, the elevation of the Constitution of Kosovo to a pedestal does not limit the influence of wider international law on the decisions taken by the judges of the Chambers. Thus, judges are also obliged to rule on the basis of international custom, which should be interpreted as a broad reference to past developments in international criminal and human rights law. One cannot fail to mention the inclusion in the basis for judgements of the most eminent judicial bodies such as the International Court of Justice, which argues against the concept of a local judicial body ruling solely on the basis of national sources of law. Moreover, as indicated in the Statute, it takes precedence over all other national laws. Other provisions of national law apply only where this is permitted by the Statute of the Chambers.

The hybrid nature of the Kosovo Specialist Chambers may also be undermined by the staffing of this body exclusively with judges from outside Kosovo. The rejection of the concept of mixed composition of judges stands in opposition to the existing standards already in place in the structures of most hybrid courts, where national judges sit alongside judges of international origin. Although the Statute does not indicate the motives behind the adoption of such a solution, it seems that the circumstances under which the Chambers were established and the likely shortcomings in the personnel sphere (lack of judges of Kosovan origin with relevant experience) support the validity of the solution adopted within the Kosovo Specialist Chambers.

Furthermore, the location of the Chambers' headquarters outside Kosovo slightly detracts from the hybrid nature of this body. Nevertheless, the circumstances of the choice of Hague as the seat of the Chambers justify this choice. Choosing Hague as the seat was possible because of the Statute's provisions regarding the possibility of locating the Chambers in another country[70] through an agreement between Kosovo and the host country.[71] It is usually the case that such an

70 Statute, section 3(6).

71 The transfer to The Hague was made pursuant to Sections 2 and 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands (February 2016) <https://

arrangement does not strengthen the hybridity of the body by significantly reducing local influence on the justice process and ongoing proceedings. However, in the case of the Kosovo Specialist Chambers, the relocation of the headquarters of the Chambers was crucial for the fulfilment of the tasks of these bodies, as there was a high risk of obstruction and attempts by potential perpetrators to interfere with the activities of the bodies.[72] The individuals against whom proceedings are taken have, up until recently, not infrequently held high positions in state bodies and have unlimited influence in the country. Taking these circumstances into account, it seems that such a solution favours the unfettered activity of the body and supports its development by eliminating the disadvantageous aspects of locating the seat of the hybrid court in the territory of the former armed conflict.

Turning to the last component that characterises hybrid courts, i.e., their ad hoc nature, it should be pointed out that the distinctive nature of the operation of the KSC argues for a strong rejection of the thesis that it is exclusively a national court and favours its classification into the subgroup of hybrid courts. The Statute does not strictly distinguish the period of time for which the Chambers were established. It can therefore be presumed that the Chambers' mandate was established for the duration of the proceedings and activities related to the Chambers' statutory tasks. Consequently, the Chambers will be dissolved after the fulfilment of their statutory objectives.[73] The lack of appropriate regulation of this matter does not, however, prejudge the permanence of this body. The ad hoc nature of a body such as the Kosovo Specialist Chambers should be determined by the mandate assigned to it. The limitation of the Chambers' jurisdiction to the trial of crimes that took place in the territory of Kosovo in the years 1998–2000 makes it possible to conclude that this body will cease its activities once it has achieved its objective.

VI. Conclusion

Summarising the considerations, the Kosovo Specialist Chambers should not be perceived as a national court, as well as an international court, as the specificity of shaping the framework of the functioning of this body does not justify it. Therefore, it will be appropriate to include this court in the new

www.scp-ks.org/sites/default/files/public/bwbv0006581-geldend_van_15-02-2016_tm_heden_zichtdatum_30-11-2016.pdf> accessed 11 April 2022.

72 In the past, Kosovo elites have made several attempts to discredit the Chambers and have intimidated witnesses. Read more in an article by Hajdari Una, 'Welcome to Kosovo's Judicial Battleground,' <https://www.justiceinfo.net/en/45786-welcome-to-kosovo-judicial-battleground.html> accessed 11 April 2022.

73 Statute, section 1(2).

generation of hybrid courts, drawing the best from the achievements of the hybrid courts already established, while eliminating and limiting solutions that did not function properly in the past.

In theory, the solutions adopted in shaping the framework for the operation of the Chambers should, in the long term, lead to the strengthening of transitional justice procedures and restore structures on the ground in Kosovo that were destroyed during the conflict. However, as with many hybrid courts, the Kosovo Specialist Chambers face a great deal of judgement. Criticisms of the Chamber's activities have been voiced from Pristina. The main criticisms directed at the Chambers are the questionable legitimacy to act, according to some, and the lack of, or insufficient action.[74]

The problem of the legitimacy of hybrid courts is not something foreign to the doctrine of international law. Due to the particular suspension between tribunals operating solely on international law mechanisms and national and local courts, hybrid courts will always be confronted with high expectations of the local community on the one hand and will be obliged to submit to the requirements of independence and autonomy on the other. Despite the need and desire to restore justice to victims, dissenting voices have also resounded, accusing the Chambers of wanting to diminish the role of defendants in the liberation of Kosovo.[75] However, it is worth noting the Specialist Prosecutor's opening statement of the indictment against Salih Mustafa, (former commander of one of the guerrilla units operating within the Kosovo Liberation Army), which states that 'The charges against the accused in this case relate to his individual participation in the detention, mistreatment and torture of Kosovo residents.'[76]

Among other things, the KSC is also accused of taking too long to proceed without spectacular results, given that it has been operating since 2015. Currently, the Chambers have issued four indictments against prominent figures associated with the Kosovo Liberation Army,[77] and in the second half of 2021, the first court proceedings began (file references KSC-BC-2020-05 and KSC-BC-2020-07). Due to the identity of the perpetrators and their frequent, active participation in the liberation of Kosovo, as well as their ongoing influence in the territory of Kosovo, the conduct of these proceedings has been extremely difficult. Refusal

74 Transitional justice refers to procedures implemented in response to massive human rights violations in post-conflict regions.

75 Problems with the legitimacy of the Kosovo Specialist Chambers are addressed, among others, by Hehir Aidan in 'Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and Its Implications' [2019] Human Rights Review, 20. 10.1007/s12142-019-00564-y, 269.

76 Stephanie Van Den Berg, 'Kosovo Chambers: Battle for Legitimacy at the Opening of First Trial' (2021) <https://www.justiceinfo.net/en/82240-kosovo-chambers-battle-legitimacy-opening-first-trial.html> accessed 11 April 2022.

77 Kosovo Liberation Army.

to appear for hearings, a disrespectful attitude towards judges and intimidation of witnesses prolongs the proceedings of cases.[78]

Both of the above-mentioned issues will have an impact on the position of the Kosovo Specialist Chambers in the broader international judiciary (including hybrid courts). Given the proceedings already undertaken, it will be necessary to wait and closely monitor further activities to fully assess the results of the Chambers' activities and their impact on the development of international judicial mechanisms.

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