

WestminsterResearch

<http://www.westminster.ac.uk/westminsterresearch>

**The Assumptions Underlying the Kosovo Specialist Chambers
and their Implications**

Hehir, A.

This is an author's accepted manuscript of an article published in the International Criminal Law Review 20 (1), pp. 17-42 2020. The final definitive version is available online at:

<https://dx.doi.org/10.1163/15718123-02001006>

The WestminsterResearch online digital archive at the University of Westminster aims to make the research output of the University available to a wider audience. Copyright and Moral Rights remain with the authors and/or copyright owners.

Whilst further distribution of specific materials from within this archive is forbidden, you may freely distribute the URL of WestminsterResearch: (<http://westminsterresearch.wmin.ac.uk/>).

In case of abuse or copyright appearing without permission e-mail repository@westminster.ac.uk

The Assumptions Underlying the Kosovo Specialist Chambers and their Implications.

Abstract

Since 1999 international actors have presented Kosovo's problems as stemming exclusively from endogenous factors which locals cannot solve; international oversight is thus a necessary and benign source of order. The KSC is the latest initiative premised on this assumption; this article identifies the key implications of this. The fact that the KSC's creation was driven by external actors has had a negative impact on its legitimacy amongst the general public within Kosovo that will impact on their response to its proceedings. The idea that international oversight is more efficient is questionable given that since 1999 international judicial mechanisms have endured corruption, witness intimidation, and political interference. Those who supported the establishment of the KSC advanced a narrative which implies they were not culpable for the events of 1998-2000; in fact, both UNMIK and KFOR – by virtue of their respective mandates – manifestly failed in their duty to provide security.

Keywords: Specialist Chambers, Kosovo, hybrid tribunals, UNMIK

Introduction

The creation of the Kosovo Specialist Chambers (KSC) in 2015 was regarded by some as evidence of a new appetite for international tribunals, specifically so-called “hybrid” tribunals. While a number of international tribunals – of varying composition – were established in the 1990s amidst great optimism, the record of many has been decidedly mixed. Concerns about the efficacy of such tribunals, as well as their cost and impact on peace and stability, led to a sense of ‘tribunal fatigue’.¹ Thus, for those committed to the expansion of international criminal justice and the basic ideas underpinning both universal jurisdiction and transitional justice, the creation of the KSC appeared as something of a

¹ Carsten Stahn, ‘Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity’, *EJIL Talk*, 23 September, 2016, <https://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/>, accessed 9 February 2019.

welcome counter to the general diminution in support for, and institutional developments in, international tribunals.

In this article, however, I argue that the creation of the KSC and its particular composition, has less to do with a renewed faith in the efficacy of tribunals, and more to do with the particular nature of international engagement with Kosovo since 1999. I argue that the KSC is the latest initiative – launched by external actors engaged with Kosovo – premised on a particular understanding of the relationship between international and local actors. This understanding is based on an assumption – both explicit and at times implicit – which holds that international engagement is necessary, benign and ultimately a source of both order and prosperity. The international actors – in their various guises since 1999 – have repeatedly presented themselves as custodians of the “solution” to problems within Kosovo; these problems are themselves conceptualised as stemming exclusively from endogenous factors which local actors – if left to their own devices – cannot solve. The international engagement is thus presented and legitimised as inherently efficacious and progressive, whereas the local institutions and actors are cast as flawed, incapable of self-correction, and ultimately in need of external support.

In the first two sections of this article, I demonstrate the nature of this underlying premise, how it has manifest in Kosovo since the creation of UNMIK in 1999, and how it informed the composition of the KSC. There are, I argue in the subsequent section, three problems with this; first, the creation of the KSC was driven by external – rather than local actors – and this has had a negative impact on the KSC’s legitimacy amongst the general public within Kosovo. In the absence of local legitimacy, the KSC’s proceedings and judgements are unlikely to command domestic support, thereby imperilling the broader aims set for the KSC by its international sponsors. Second, the idea that international oversight is inherently more efficient is questionable; international engagement with Kosovo since 1999

demonstrates that international judicial mechanisms have become embroiled in corruption, fallen prey to witness intimidation, and political interference. Third, those who pushed for the establishment of the KSC have advanced a narrative of the events under the court's jurisdiction which implies that they were not themselves involved in these events; in fact, I argue that both UNMIK and KFOR – by virtue of their respective mandates – manifestly failed in their duty to provide security for the people of Kosovo, especially ethnic minorities. Additionally, evidence suggests that international actors actively supported certain KLA operatives during this phase in an effort to garner their support for maintaining “order” in Kosovo. The idea, therefore, that the internationals can present themselves as the disinterested “solution” to a problem for which locals are wholly responsible is flawed.

International Engagement with Kosovo

One of the more persistent historical tropes about the Balkans is that it is a region populated by violent people; plagued by “ancient ethnic hatreds” its inhabitants are – so this depiction goes – doomed to live in a state of constant enmity punctuated by the periodic outbreak of war.² The only hope for these ostensibly “backward” people rests, according to this view, on intervention by external powers who will thereafter impose order on the restive natives. Throughout history, many empires – be they the Roman, Byzantine, Russian, Ottoman, or Austro-Hungarian – have legitimised their subjugation of Balkan territory in this way, and portrayed their governance as evidence of their own moral rectitude and capacity to spearhead progress; as Vesna Goldsworthy notes in *Inventing Ruritania* – a detailed historical analysis of the external image of the Balkans – the region has long been conceived of by foreigners as ‘...a dolls house into

² Misha Glenny, *The Balkans* (London: Granta, 2000), p. xxi.

which “grown-up” powers can reach to show the natives how to behave and where to place the furniture’.³

In a modern rendering of this conception, many attributed the implosion of Yugoslavia in the 1990s to the prevalence of these “ancient ethnic hatreds”.⁴ Indicatively, former US Ambassador to Yugoslavia George Kennan claimed that the people there were impelled by ‘deeper traits of character inherited, presumably, from a distant tribal past’.⁵ US President Bill Clinton, reflecting on the violence, likewise claimed, ‘It is no accident that WWI started in this area. There are ancient ethnic hatreds that have consumed people and led to the horrible abuses’.⁶ Of course, the often horrific violence in many parts of the former Yugoslavia during the 1990s very definitely *did* manifest along ethnic lines; yet, rather than examine the factors – endogenous *and* exogenous – which led to the breakdown of pre-existing political communities and the manifestation of conflict along ethnic lines, many chose the more essentialist view described above, and attributed the violence to localised, and ostensibly immutable, character traits.⁷

NATO’s intervention in Kosovo in March 1999 was likewise justified in terms which evoked the spectre of what President Clinton then described as ‘Ancient grievances’ producing ‘ethnic and religious division’.⁸ By definition, launching a “humanitarian intervention” denotes a belief in the necessity of external intervention to redress unacceptable local behaviour. While the idea of humanitarian intervention is thus for many an inherently “colonial” undertaking⁹, NATO’s intervention received widespread support in the West, and

³ Vesna Goldsworthy, *Inventing Ruritania: The Imperialism of the Imagination* (London, Hurst & Co., 2013), p. 11.

⁴ See in particular, Robert Kaplan, *Balkan Ghosts* (New York: St Martins, 1993).

⁵ Maria Todorova, *Imagining the Balkans* (Oxford: Oxford University Press, 1997), p. 185.

⁶ Quoted in, Alex Bellamy, *Kosovo and International Society* (Basingstoke: Palgrave Macmillan, 2002), p. 50.

⁷ Mark Mazower, *The Balkans*, (London: Phoenix, 2000) pp. 14 – 15.

⁸ CNN, ‘Transcript: Clinton addresses nation on Yugoslavia strike’, March 24, 1999, <http://edition.cnn.com/ALLPOLITICS/stories/1999/03/25/clinton.transcript/>, accessed 9 February 2019.

⁹ See, Mohammed Ayoob ‘Humanitarian Intervention and State Sovereignty’, 6(1), *The International Journal of Human Rights*, (2002) p. 85; Phillip Cunliffe (ed.) *Critical Perspectives on the Responsibility to Protect* (London, Routledge, 2011).

was enthusiastically welcomed by the Kosovo Albanian population. In this sense, while the intervention was, by definition, the projection of power by external actors, and also illegal – insofar as it lacked Security Council authorisation – it was widely deemed to be legitimate owing both to the fact that the Albanian population of Kosovo had long suffered systematic oppression at the hands of Slobodan Milošević’s regime, and the majority of people in Kosovo supported NATO’s actions.¹⁰

Immediately after the conclusion of NATO’s intervention, Kosovo was placed under international administration; Security Council Resolution 1244 mandated the establishment of UNMIK then the most ambitious post-conflict reconstruction project ever launched by the UN¹¹; described at the time by Amnesty International as ‘overwhelming in its magnitude’¹² UNMIK’s powers were ‘virtually unlimited’¹³ and Kosovo was placed under its de facto authority. While domestic political institutions were established, their powers were very limited and the composition of these bodies – whether political or judicial – was micro-managed by UNMIK, and the externally drafted constitutions to which they were bound.¹⁴

The extensive, and historically unprecedented powers vested in UNMIK, were justified on the basis that Kosovo could not function without far-reaching international oversight; given that Kosovo had historically been the most neglected region of the former Yugoslavia, and since 1989 – when its autonomous status was revoked by Milošević – had been subjected to wilful misrule and targeted oppression from Belgrade culminating in the devastating war between 1998 and 1999, there was clearly some logic to the proposition that Kosovo needed extensive external help. Yet, though the Kosovo Albanians warmly

¹⁰ Independent International Commission on Kosovo, *Kosovo Report* (Oxford: Oxford University Press, 2000), p. 4.

¹¹ UNMIK, ‘UNMIK at a Glance’, <http://www.unmikonline.org/intro.htm>, accessed 9 February 2019.

¹² Amnesty International, ‘FRY (Kosovo): Setting the Standard UNMIK and KFOR’S Response to Violence in Mitrovica’, 13 March 2000, P. 4.

¹³ Julie Mertus, ‘The Impact of Intervention on Local Human Rights Culture: A Kosovo Case Study’, in Anthony Lang, (ed.) *Just Intervention*, (Washington: Georgetown University Press, 2002), p.162.

¹⁴ Lene Mosegaard Sobjerg, ‘The Kosovo Experiment’, in Tonny Brems Knudsen and Carsten Bagge Laustsen (eds.), *Kosovo Between War and Peace*, (London: Routledge, 2006), p. 67.

welcomed the international administrators in the summer of 1999, frustration with the power wielded by UNMIK soon grew. Rather than being seen as an entity designed to facilitate their quest for independence, UNMIK became, for many Kosovo Albanians, ‘corrupt and indecisive’ and a barrier to achieving independence.¹⁵ A 2002 report by the Ombudsperson Institution in Kosovo noted, ‘UNMIK is not structured according to democratic principles, does not function in accordance with the rule of law, and does not respect important international human rights norms’.¹⁶ Anger at UNMIK’s lack of accountability, complete control over Kosovo’s political, economic and judicial sectors, and unwillingness to address the issue of Kosovo’s final status, boiled over in March 2004 when province-wide riots – orchestrated by disgruntled Kosovo Albanians – erupted.

Thereafter, the West’s approach towards Kosovo changed and greater emphasis was placed on facilitating Kosovo’s independence. Despite the objections of Serbia, and Security Council permanent members Russia and China, Kosovo was encouraged to unilaterally declare independence in February 2008. While Kosovo thus nominally became an independent state – though international recognition of Kosovo was then, and remains, a deeply divisive issue¹⁷ – external governance continued. An International Civilian Office was established to maintain international oversight with extensive powers to directly intervene in Kosovo’s political system.¹⁸ EULEX was also created in 2008 to assist the Kosovo authorities in ‘establishing sustainable and independent rule of law institutions’.¹⁹ Likewise, Kosovo’s 2008 constitution was drafted by internationals who insisted on an array of

¹⁵ International Commission on the Balkans, *The Balkans in Europe’s Future*, 2005, <http://www.balkan-commission.org/activities/Report.pdf>, pgs. 19 & 20, accessed 9 February 2019; see also, Laura Secor, ‘The UN Has Brought Peace and Stability to Kosovo’, *Global Policy Forum*, 6 July, 2003, <https://www.globalpolicy.org/component/content/article/192/38666.html>, accessed 9 February 2019.

¹⁶ Quoted in Simon Chesterman, *You the People: The United Nations, Transnational Administration and State-building* (Oxford: Oxford University Press, 2003), p. 126.

¹⁷ Gezim Visoka, *Acting Like a State? Kosovo and the Everyday Making of Statehood*, (London: Routledge, 2018).

¹⁸ Peter Feith, *State Building and Exit: The International Civilian Office and Kosovo's Supervised Independence 2008-2012*, (Pristina: International Civilian Office, 2013).

¹⁹ EULEX, ‘About EULEX: The Mission’, <http://www.eulex-kosovo.eu/?page=2,60>, accessed 9 February 2019.

provisions – especially in the area of minority rights and representation – which had negligible domestic support.²⁰ External micro-management extended to the design of Kosovo’s flag and its national anthem, while persistent interference in Kosovo’s political system continued, most notably with respects to the designation of Kosovo’s President in 2011.²¹

Thus, since NATO’s intervention in March 1999, international engagement with Kosovo has been characterised by the implementation of a set of highly invasive policies and initiatives; the array of international organisations that have exercised formal control over Kosovo since 1999 – including UNMIK, the OSCE, NATO, ICO and EULEX – is clearly extensive. In addition to the formal means by which international governance has manifest, a number of powerful states have regularly exercised leverage in Kosovo in less formal ways. The US Ambassador in Pristina has routinely engaged directly in Kosovo’s political system, while the EU – which Kosovo’s people and all major political parties desperately seek to join – has likewise pushed the government of Kosovo to adopt various policies internally and externally. This degree of international control has, indeed, generated myriad academic reflections on the side-lining of the “local” in the process of statebuilding²², and within Kosovo itself, catalysed the emergence of Vetëvendosje a political party opposed to international oversight, which became the largest party in the Kosovo Assembly after the 2017 general election.

²⁰ Marc Weller, *Contested Statehood: Kosovo’s Struggle for Independence*, (Oxford: Oxford University Press, 2009), p. 258.

²¹ Erjone Popova and Bekim Muhaxheri (2016) ‘The President Who Did Not Strike Back’ *Prishtina Insight*, 7 April, <https://prishtinainsight.com/president-not-strike-back-mag/>, accessed 9 February 2019; Aidan Hehir, ‘How the West Built a Failed State in Kosovo’, *The National Interest*, 21 August, 2016, <https://nationalinterest.org/feature/how-the-west-built-failed-state-kosovo-17539>, accessed 9 February 2019.

²² Nicholas Lemay-Hebert, ‘The Empty Shell Approach: The set-up process of international administrations in Timor-leste and Kosovo, its consequences and lessons’, 12(2), *International Studies Perspectives*, (2011), pp. 190-211; Elisa Randazzo, *Beyond Liberal Peacebuilding: A Critical Exploration of the Local Turn*, (London: Routledge, 2017); Roger Mac Ginty, ‘Where is the Local? Critical Localism and Peacebuilding’, 36(5) *Third World Quarterly*, (2015), 840-856.

In reflecting on *why* international actors have taken such an interest in Kosovo, the obvious starting point is to determine whether there are material interests involved; as a landlocked country of just 1.7 million people – where a majority of workers are unskilled – with very limited national resources, Kosovo does not stand out as especially valuable. Yet, Kosovo’s importance extends beyond the material to the reputational; the West has invested significant political capital in Kosovo and thus its fate has implications for Western prestige.²³ In this sense, a return to ethnic violence in Kosovo would naturally be widely seen as evidence that the West’s statebuilding efforts “failed”. In an era when ‘the ability of outside powers to provide governance and control the internal behaviour of failed or weak states has become a key component of their national power’²⁴, the importance of Kosovo thus arguably outweighed any tangible domestic resources.²⁵

Since 1999, therefore, Kosovo’s fate has been linked to Western prestige; this has led to a determination amongst Kosovo’s external patrons to ensure that order – narrowly understood – is preserved. The “order” sought has essentially been conceived of as the absence of ethnic violence, and the maintenance of peaceful relations between Kosovo and its neighbours. Since the 2004 riots both have arguably been achieved; while Kosovo’s communities remain segregated – as most obviously manifest in the literal division of the northern city Mitrovica into “Serbian” and “Albanian” areas – there has only been sporadic incidents of low-level ethnic violence. Likewise, while relations between Kosovo and its neighbours – especially Serbia – remain poor, there has been no significant destabilising incidents. Given that following NATO’s intervention many feared Albanian minorities in

²³ Aidan Hehir ‘Hyper-reality and Statebuilding: Baudrillard and the Unwillingness of International Administrations to Cede Control’, 32(6) *Third World Quarterly*, (2011), pp. 1073-1087.

²⁴ Francis Fukuyama (2006) ‘Nation-building and the Failure of International Memory’, in Francis Fukuyama (ed.) *Nation-Building: Beyond Afghanistan and Iraq* (New York: John Hopkins University Press), p. 2.

²⁵ Further reflections on how “great powers” consolidate and improve their international status through cultivating a network of states dependant on their patronage/informal authority, see, William Bain (ed) (2006) *The Empire of Security and the Safety of the People* (London: Routledge); David Chandler (2006) *Empire in Denial* (London: Pluto); Ralph Wilde (2007) ‘Colonialism Redux?’, in Aidan Hehir and Neil Robinson (ed.s) *Statebuilding: Theory and Practice* (London: Routledge)

neighbouring Macedonia, Montenegro and Serbia, would agitate for secession along the lines of the “Kosovo precedent”, the maintenance of regional stability was far from assured when statebuilding began in Kosovo. As such, while ethnic segregation, unemployment, corruption, poor healthcare and a failing education system have been perennial features of Kosovo’s evolution post-1999, these internal issues have been cast as of lesser importance when compared to the maintenance of order. This preference for regional order/stability over the material well-being of people – a policy described as ‘stabilitocracy’²⁶ – has, indeed, been a feature of international engagement with the former Yugoslav states more generally. Indeed, as the west’s power has waned considerably since 1999, its capacity to undertake expansive transformative statebuilding projects has diminished. In this respects, the need for stability rather than progress transformation has become more pressing as western states have increasingly lowered their expectations as to what statebuilding can achieve, and also their own capacity to undertake such exercises.²⁷

Thus, the West’s engagement with Kosovo since 1999 can arguably be situated within a more general trend in international involvement with the Balkans whereby external actors cast themselves as benign, civilised saviours bringing order to unruly people incapable of self-rule. In practical terms, this has manifest in the creation of an array of international mechanisms empowered with formal administrative and governance competencies in Kosovo justified on the basis that, left to their own devices, the people of Kosovo would regress to violence. The impetus for this engagement with Kosovo has stemmed from the importance of Kosovo as a symbol of Western power, with its fate being illustrative of the capacity of the West to undertake benevolent, transformative projects. Central to these narratives and these

²⁶ Srda Pavlovic, ‘West is best: How ‘stabilitocracy’ undermines democracy building in the Balkans’, LSE Blog on South-east Europe, 5 May, 2017, <https://blogs.lse.ac.uk/europpblog/2017/05/05/west-is-best-how-stabilitocracy-undermines-democracy-building-in-the-balkans/>, accessed 9 February 2019.; Florian Bieber ‘The Rise (and Fall) of Balkan Stabilitocracies’, *Horizons*, 10, (2018), accessed 9 February 2019.

²⁷ Oliver Richmond (2014) *Failed Statebuilding* (Yale: Yale University Press)

policies, of course, is the stark binary between the external actors and the behaviour of the locals; in this sense, the “problems” in Kosovo are characterised as wholly endogenous, while their resolution is portrayed as possible only through the intervention of external forces who are ostensibly both impelled by benign motives and in no way implicated in the genesis of the underlying problems they are charged with resolving. In the following section I argue that the KSC is the latest manifestation of this disposition.

Creating the KSC

The origins and composition of the KSC is documented in other articles in this special issue and I will not detail them again here. Of particular relevance to this article, however, is the fact that the court, though nominally a Kosovo court based on Kosovo’s constitution, has been designed to negate local control and oversight in favour of delegating power to international actors. The KSC is a “hybrid”²⁸ court in so far as – unlike the ICTY – it is technically not an international tribunal, but rather one established within the Kosovo constitution, though it is staffed exclusively by non-Kosovars and located in The Hague. In this sense, this nominally national judicial mechanism is controlled by external actors.

The rationale underlying the nature of the court stems from the sense that the pre-existing judicial mechanism within Kosovo would have been unable to deal effectively with investigations into the events under review; according to Ekaterina Trendafilova, President of the KSC, the international dimension of the court ensures the proceedings will be ‘conducted in a more efficient manner’.²⁹ The court’s location and composition were thus designed to guard against those factors – such as political interference, witness intimidation, and a dearth

²⁸ Carsten Stahn, ‘Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity’.

²⁹ Centrum pro lidska prava a demokratizaci, ‘Interview with the President of the Kosovo Specialist Chambers in The Hague, Ekaterina Trendafilova: The Court is Ready for its First Indictments’, 18 January, 2019, <http://www.centrumlidskaprava.cz/interview-president-kosovo-specialist-chambers-hague-ekaterina-trendafilova-court-ready-its-first-in>, accessed 9 February 2019.

of local judicial expertise – that would, ostensibly, have inevitably impacted adversely on the investigations and trials.³⁰

The establishment of the court was characterised by a clash between the wishes of external actors and those of the political parties and general public within Kosovo. While the findings of the Council of Europe’s 2011 report³¹ were widely dismissed by most of the Kosovo Albanian community as either baseless and/or a wild exaggeration – particularly the organ harvesting allegations – the later findings published by the Special Investigative Task Force (SITF)³² were, however, less easily dismissed given the standing of its chief investigator Clint Williamson.³³ Yet, despite the SITF’s findings and recommendations, few within Kosovo supported the establishment of a new court; objections ranged from the fact that many believed a focus solely on the activities of the KLA in this period was unfair, to the view that these issues had been – or could be – dealt with by pre-existing judicial bodies based in Kosovo.³⁴ Many civil society activists, journalists and NGOs did support the establishment of the court, however, and more broadly the move was welcomed by organisations throughout the former Yugoslavia working on transitional justice, reparations and reconciliation.³⁵

³⁰ A similar rationale was advanced for the location – and composition – of the ICTY and the ICC; see, Phil Clark (2018) *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press); Jelena Subotic (2009) *Hijacked Justice* (Ithaca: Cornell University Press)

³¹ Council of Europe Committee on Legal Affairs and Human Rights, ‘Inhuman Treatment of People and Illicit Trafficking of Human Organs in Kosovo’, Report No. 12462, 7 January 2011, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12608&lang=en>, accessed 9 February 2019.

³² Special Investigative Task Force, ‘Statement of the Chief Prosecutor of the Special Investigative Task Force’, 29 July, 2014, http://www.balkaninsight.com/en/file/show/Statement_of_the_Chief_Prosecutor_of_the_SITF_EN.pdf, accessed 9 February 2019.

³³ Clint Williamson previously served as an ICTY trial attorney and took part into the investigation of crimes perpetrated by Slobodon Milošević and Serbian paramilitary groups.

³⁴ See, Gezim Visoka, ‘Assessing the Potential Impact of the Kosovo Specialist Court’, Impunity Watch/PAX, September, 2017, <https://www.paxforpeace.nl/publications/all-publications/assessing-the-potential-impact-of-the-kosovo-specialist-court>, p. 27, accessed 9 February 2019; Aidan Hehir, ‘Kosovo Specialist Chambers: Step Towards Justice or Potential Timebomb?’, *Balkan Investigative Reporting Network*, 13 July, 2018, <http://www.balkaninsight.com/en/file/show/Step%20Towards%20Justice%20or%20Potential%20Timebomb.pdf>, accessed 9 February 2019.

³⁵ For example, the Humanitarian Law Centre in Pristina has spoken of the need for the court; see, Aidan Hehir, ‘It’s a good thing that we don’t know”: An Interview with Bekim Blakaj’, *Justice in Conflict*, September 11,

The impetus for the court was driven, therefore, not by any domestic initiative but by a number of Kosovo's more influential external patrons, particularly the US and the EU. The court could only be established, however, through an amendment to Kosovo's constitution and this required the consent of the Kosovo Assembly; a majority of Assembly members were, however, implacably opposed to the creation of the court and thus attempts to amend the constitution initially failed. Large street protests against the court accompanied the debates in parliament, and there was evidently little public support for the constitutional change.³⁶

Yet, sustained international pressure was brought to bear on Kosovo and eventually the Assembly acceded. Many in the Assembly who supported the establishment of the court, however, noted that they did so only because of the leverage exercised by external actors; the then Prime Minister Hashim Thaci argued in favour of the creation of the court in the Assembly, yet simultaneously described it as 'the biggest injustice and insult which could be done to Kosovo and its people'.³⁷ Thaci subsequently declared he only supported the court because he was 'under great pressure from the international community'.³⁸ Since its establishment, the KSC has – despite launching a concerted outreach campaign³⁹ – failed to garner significant support within Kosovo; none of the major political parties have campaigned meaningfully in support of the court, while a 2017 poll found that 76.4 per cent

2017, <https://justiceinconflict.org/2017/09/11/it-is-a-good-thing-that-we-dont-know-an-interview-with-bekim-blakaj-on-the-travails-of-transitional-justice-in-kosovo/> accessed 6 September 2019

³⁶ Marija Ristic, 'Kosovo's New War Court: How Will it Work?', *Balkan Transitional Justice*, 4 August, 2015, <http://www.balkaninsight.com/en/article/how-will-special-kosovo-court-work--08-05-2015>, accessed 9 February 2019.

³⁷ Edona Peci, 'An End to Suspicions About Kosovo's "Just War"?', *Balkan Transitional Justice*, 13 August, 2014, <http://www.balkaninsight.com/en/article/an-end-to-suspicions-about-kosovo-s-just-war>, accessed 9 February 2019.

³⁸ B92, 'Special Court for KLA "cannot be abolished" – Thaci', 1 February, 2018, https://www.b92.net/eng/news/politics.php?yyyy=2018&mm=02&dd=01&nav_id=103403, accessed 9 February 2019.

³⁹ Kosovo Specialist Chambers and Specialist Prosecutors Office, 'Outreach', 2019, <https://www.scp-ks.org/en/outreach>, accessed 9 February 2019.

of ethnic Albanians within Kosovo believed the court was ‘unfair’.⁴⁰ Following the 2017 general election a “war-wing” coalition of political parties formed a new government in Kosovo; these parties – the PDK, AAK, and NISMA – all have very close links with the KLA and thus unsurprisingly they have not leant government support to bolstering the perceived legitimacy of the KSC amongst the public in Kosovo. In December 2017, a group of MPS from within the coalition attempted to formally revoke the KSC in the Assembly. The initiative met with immediate condemnation from external actors; the US Ambassador to Kosovo warned the court’s revocation, ‘will have profoundly negative implications for Kosovo’s future as part of Europe. It will be considered by the United States as a stab in the back’.⁴¹ The UK Ambassador to Kosovo likewise stated that the move would ‘have grave consequences for Kosovo’.⁴² while, “the Quint”⁴³ later released a statement declaring that anyone who supported the initiative to revoke the KSC, ‘...will be rejecting Kosovo’s partnership with our countries’ and warned there would be ‘severe negative consequences, including for Kosovo’s international and Euro-Atlantic integration, if Kosovo continues on this path’.⁴⁴

The KSC was, therefore, created because of external pressure, rather than domestic support, and has been sustained through the continued leveraging of this pressure and the articulation of threats. As Bekim Blakaj – Director of the Humanitarian Law Centre Kosovo – noted,

The Specialist Chambers are not supported by most of the Albanian community because they consider it to be biased and unfair...It’s not just the general public either; many lawyers, politicians, and academics have spoken against it, particularly about how it was established, and they have spread speculation and

⁴⁰ Gezim Visoka, ‘Assessing the Potential Impact of the Kosovo Specialist Chambers’, p. 27.

⁴¹ Erjone Popova, ‘Kosovo Assembly Fails to Convene for Vote on Revocation of “Special Court”’, *Prishtina Insight*, 22 December, 2017, <https://prishtinainsight.com/kosovo-assembly-fails-convene-vote-revocation-special-court/>, accessed 9 February 2019.

⁴² Ibid.

⁴³ The Quint states are France, Germany, Italy, UK and USA.

⁴⁴ US Embassy in Kosovo, ‘Quint Member States Statement’, 4 January 2018, <https://xk.usembassy.gov/quint-member-states-statement/>, accessed 9 February 2019.

rumours. Of course, we all know that the court could not have been established if it was not for the pressure exercised by the US on the Kosovo parliament.⁴⁵

Thus, while the states exercising the pressure on Kosovo to establish and maintain the court officially consider Kosovo to be an independent sovereign state, their actions and rhetoric demonstrate that they do not accept that Kosovo can or should in fact exercise independence in certain key areas. Thus, Kosovo *had* to establish the KSC and had to do so in a particular way, namely by delegating all power within the judicial body to external actors.

The means by which the KSC was established in the absence of domestic support, and the fact that it is constituted in such a way that local ownership is severely curtailed, contrast sharply with the normative prescriptions advanced by academics and international institutions on how international tribunals and transitional justice mechanisms *should* originate which stress the need for local support and ownership.⁴⁶ The EU, indicatively, advises that any such mechanism can, ‘only reach its goals if the process of its design and implementation is nationally and locally-owned...It is essential that the process is initiated and driven by government authorities and local civil society.’⁴⁷ Despite the fact that the KSC clearly does not meet these goals, the EU strongly pushed for the establishment of the KSC and agreed to finance it.⁴⁸

⁴⁵ Aidan Hehir, ‘It’s a good thing that we don’t know’: An Interview with Bekim Blakaj’, *Justice in Conflict*, September 11, 2017, <https://justiceinconflict.org/2017/09/11/it-is-a-good-thing-that-we-dont-know-an-interview-with-bekim-blakaj-on-the-travails-of-transitional-justice-in-kosovo/> accessed 6 September 2019.

⁴⁶ Dustin Sharp, ‘Transitional Justice and Local Justice’, in *Research Handbook on Transitional Justice* (eds.) Cheryl Lawther, Luke Moffett and Dov Jacobs (Cheltenham: EE Elgar, 2017), p. 412; Kofi Annan, ‘The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General’, (S/2004/616), 23 August, 2004, p. 3, <http://archive.ipu.org/splz-e/unga07/law.pdf>, accessed 9 February 2019; Eric Fletcher and Harvey M. Weinstein, ‘A World unto Itself? The Application of Criminal Justice in the Former Yugoslavia’, in *My Neighbour, My Enemy*, (eds.) Eric Fletcher and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 32-33.

⁴⁷ EU, ‘The EU’s Policy Framework on Support to Transitional Justice’, 16 November, 2015, http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf, p. 8, accessed 9 February 2019.

⁴⁸ The amount earmarked by the EU to support the KSC until June 2020 is €86,250,000; see, Serbeze Haxhial, ‘Kosovo Hires US, UK Law Firms for Hague War Court Cases’, *Balkan Transitional Justice*, 7 February, 2019, <https://balkaninsight.com/2019/02/07/kosovo-hires-us-uk-law-firms-for-hague-war-court-cases/>, accessed 9 February 2019.

Is “International” Always Better?

The means by which the KSC was established, and its hybrid composition, highlight the prevalence of the view that the solution to Kosovo’s problems must come from international rather than domestic actors. There are, I argue, three problems with this view, each of which are dealt with in turn here.

Can the KSC Work Without Local Support?

The need for local ownership and support – widely noted in the relevant literature – is more than a cosmetic exercise. Central to the long-term efficacy of any judicial body like the KSC is its legitimacy amongst the host population. Such a court can, of course, issue judgements *without* local legitimacy once it has been established, but the impact of these judgements – in terms of the broader societal acceptance that those convicted were indeed guilty – will naturally be adversely affected.

In the specific case of the KSC, those who argued in favour of the creation of the court routinely argued that it would do more than just determine criminal guilt; the court was presented as a means by which Kosovo could achieve reconciliation and ultimately move on from its dark past towards a better future. Indicatively, a joint statement by the US and EU supporting the establishment of the KSC noted, ‘By dealing with its past and ensuring justice for the victims, Kosovo can achieve reconciliation and build a better future’.⁴⁹ Yet, while few deny that criminal proceedings such as those proposed by the KSC *can* aid transitional justice and as such facilitate reconciliation, or that Kosovo remains prey to the legacy of its violent past, judicial judgements passed down by bodies that lack popular legitimacy cannot reasonably hope to catalyse a wholesale sea-change in a society’s attitude.

⁴⁹ US Embassy in Kosovo, ‘Statement of EU Embassies/Offices, EUSR/EU Office and US Embassy in Kosovo on the adoption of constitutional amendment and law on the establishment of the Specialist Chambers’, 3 August, 2015, <https://xk.usembassy.gov/joint-statement/>, accessed 9 February 2019.

The impact of the ICTY is illustrative here; despite the assurances offered by many of its more vocal proponents⁵⁰, the judgements issued by the ICTY since its establishment in 1993 neither catalysed a region-wide acknowledgment by the various national groups that wrongs were committed against others in their name, nor improved relations between those groups involved in the bloody wars that accompanied the break-up of the former Yugoslavia. This stems from the fact that the ICTY was invariably portrayed by those subject to its judgement as an illegitimate “alien” court biased against their particular national group. In many cases, those tried at, and even convicted by, the ICTY actually saw their popularity rise among their national cohort. Likewise, the judgements issued by the ICTY – however meticulously investigated and robust – have manifestly failed to convince people in the former Yugoslavia that the particular hyper-nationalist narrative they have been presented with by their leaders was in fact false.⁵¹ By way of illustration, a 2017 public opinion survey in Serbia found, ‘overwhelming public distrust in the ICTY and its findings’, noting, ‘those convicted by the “anti-Serb” ICTY are not guilty in the public’s view’. As a result of the ICTY’s perceived illegitimacy, there has been ‘revisionism...accompanied by the glorification of war criminals and their return to public office’. More generally, the survey concluded, ‘the people in the former Yugoslavia are in fact further away from each other than ever’.⁵² This is not to suggest that the ICTY completely failed, but rather that if such judicial bodies are to have effects beyond just the determination of criminal liability – such as reconciliation – they must be seen as legitimate, otherwise the trials will not counter

⁵⁰ See, Antonio Cassese, ‘The ICTY: A living and vital reality’, 2, *Journal of International Criminal Justice*, (2004), pp. 585-597; Carla Del Ponte, ‘Address by Tribunal Prosecutor Carla Del Ponte to NATO Parliamentary Assembly’, The Hague, 26 October 2007, <http://www.icty.org/sid/8829>, accessed 22 January 2019); Fletcher Forum of International Affairs, ‘Interview with Serge Brammertz, Prosecutor of the ICTY’, 24 June, 2013, <http://www.fletcherforum.org/home/2016/9/7/an-interview-with-serge-brammertz-prosecutor-of-the-international-criminal-tribunal-for-the-former-yugoslavia>, accessed 22 January 2019.

⁵¹ Marko Milanovic, ‘Understanding the ICTY’s Impact in the Former Yugoslavia’, *EJIL Talk*, 11 April, 2016, <https://www.ejiltalk.org/understanding-the-ictys-impact-in-the-former-yugoslavia/>, accessed 9 February 2019.

⁵² Milica Kostić, ‘Public Opinion Survey in Serbia Sheds Light on ICTY Legacy’, *EJIL Talk*, 22 January, 2018, <https://www.ejiltalk.org/public-opinion-survey-in-serbia-sheds-light-on-icty-legacy/>, accessed 9 February 2019.

nationalistic narratives regarding the attribution of blame and the designation of “heroes” and “villains”.⁵³ Indeed, there is a direct precedent from the ICTY which has particular salience for the KSC; the ICTY brought cases against former KLA commanders Ramush Haradinaj and Fatmir Limaj, charging them with crimes – relating to murder and detention without trial – perpetrated against Albanians as well as Serbians. The cases did not, however, negatively impact on either’s political career⁵⁴ as the court’s charges were portrayed within Kosovo as illegitimate.

The plight of the KSC is exacerbated by the fact that it is tasked with dealing with an especially emotive issue; amongst Kosovo’s majority Albanian population the KLA are almost universally regarded as heroes who liberated Kosovo from Serbian oppression. The KSC, however, is mandated to uncover and prosecute wilful violence perpetrated by KLA soldiers against civilians, including against fellow Albanians. When the KSC was established in 2015, the current Prime Minister Ramush Haradinaj declared, ‘By approving this court, we are turning ourselves into a monster...we were not monsters; we were victims’.⁵⁵ The sensitivities involved in any such proceedings are clearly profound, and thus the probity of those making allegations and issuing judgements must be especially high. Given the nature of its genesis and composition, it is difficult to imagine how the KSC can issue judgements, which by definition run counter to the established national narrative, *without* incurring significant societal backlash; withstanding this backlash in the absence of local legitimacy will obviously be extremely difficult.⁵⁶

⁵³ There are a number of perspectives on the nature of legitimacy with respects to the ICTY and international criminal tribunals more generally; see for example, Stuart Ford, ‘A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms (2012) 45 *Vanderbilt J.Transnat’l.L.*405; Marko Milanović, ‘The Impact of the ICTY: An Anticipatory Post-mortem’ (2016) 110(2) *AJIL* 233,

⁵⁴ At the time of writing Haradinaj is the Prime Minister of Kosovo while Limaj is Minister for Trade.

⁵⁵ Dan Bilefsky, ‘Kosovo Parliament Votes to Allow War Crimes Court’, *New York Times*, 4 August, 2015, http://www.nytimes.com/2015/08/05/world/europe/kosovo-parliament-votes-to-allow-war-crimes-court.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0, accessed 9 February 2019.

⁵⁶ It must be noted that the crimes being investigated by the KSC would also pose significant problems for a purely domestic judicial body. While a national court would automatically have significantly more legitimacy

The fact that the KSC suffers from a lack of legitimacy amongst the public in Kosovo thus poses a considerable obstacle to the achievement of the broader societal positives it was claimed it would produce. The paradox is, however, that the KSC only exists because external actors wanted it to be established; thus, from its inception it has lacked local legitimacy yet it was heralded as a means to achieve ends that are in fact dependent upon local legitimacy. It is important to remember, however, that the KSC is a court. In this sense it has a very specific mandate, namely to determine the guilt or innocence of those alleged to have perpetrated crimes under its remit. It is not, therefore, a body designed to foster reconciliation or precipitate a new societal disposition; these are goals others have claimed the KSC will achieve, but in itself the KSC has no constitutional duty to do so. If the KSC does its specific job competently and the broader transformative goals heralded by others are not achieved then this cannot reasonably be cited as evidence of a failure by the KSC itself.

The Efficacy of the “Internationals”

As noted earlier, the KSC’s location and the nationality of its personnel, derives from a belief that these international features of the court are preferable to a traditional national judicial process; specifically, that the KSC will be able to avoid the corruption and witness intimidation that an exclusively national judicial process would inevitably be prey to.⁵⁷ Yet,

than the KSC, this would be no guarantee that its rulings against former KLA fighters would *not* cause a societal backlash. It would, therefore, be wholly unreasonable to imagine that these sensitive cases could be dealt with by any court without leading to social unrest; yet, the composition/location of the KSC and – crucially – its lack of local legitimacy, accentuates this possibility and its likely severity.

⁵⁷ This basic idea – that international criminal tribunals by definition work better than national courts – has been a feature of a number of previously established judicial bodies, and the normative assumptions have been critiqued; see, Christine Schwobel Patel (ed) (2014) *Critical Approaches to International Criminal Law* (London: Routledge); Christine Schwobel Patel (2018) ‘The Rule of Law as Marketing Tool: The International Criminal Court and the Brand of Global Justice’, in Christopher May and Adam Winchester (eds), *Research Handbook on the Rule of Law* (Cheltenham; Edward Elgar)

the record of international judicial bodies tasked with investigating criminality committed within Kosovo does not readily support this view.

Three international judicial bodies have exercised jurisdiction – to varying degrees and with different remits – over Kosovo in relation to the wars of the 1990s; the ICTY, the UNMIK courts and EULEX. It is beyond the scope of this article to present a detailed evaluation of each; nonetheless, it is clear that the problems that would ostensibly have conspired to limit the efficacy of a national judicial process designed to investigate alleged KLA criminality – namely witness intimidation, political interference and corruption – have in fact also characterised these previous international courts.

In terms of witness intimidation, a number of ICTY trials dealing with the activities of the KLA were notably blighted by prosecution witnesses changing their testimony, disappearing or dying in mysterious circumstances prior to, or during, their testimony.⁵⁸ Both the UNMIK courts and EULEX were likewise ‘plagued by problems of intimidation’⁵⁹ and thus witness intimidation is clearly not a phenomenon that uniquely affects Kosovo’s domestic judicial bodies.

With respects to political interference and corruption, many have long alleged that the ICTY was, at various times, pushed to issue indictments or ignore certain cases, by powerful – invariably Western – actors seeking to pursue particular agendas. These allegations have been roundly rejected by ICTY officials, of course, and are difficult to prove; of particular relevance to the KSC, however, were allegations made regarding political interference in the trials of former KLA leaders; former Chief Prosecutor for the International Criminal Tribunal

⁵⁸ Carla del Ponte, *Madame Prosecutor* (New York: Other Press, 2008), pp. 286-7; International Criminal Tribunal for the Former Yugoslavia, ‘Press release: Haradinaj, Balaj, and Brahimaj Acquitted on Retrial’, 29 November, 2012, <http://www.icty.org/en/press/haradinaj-balaj-and-brahimaj-acquitted-retrial>, accessed 9 February 2019.; Marija Ristic, ‘Can the New Kosovo Court Keep Witnesses Safe?’, *Balkan Transitional Justice*, 20 January, 2016, <http://www.balkaninsight.com/en/article/can-the-new-kosovo-court-keep-witnesses-safe--01-20-2016>, accessed 1 June 2019.

⁵⁹ Serbeze Haxhiaj, ‘Hiding in Plain Sight’, *Balkan Transitional Justice*, 14 February, 2017, <http://www.balkaninsight.com/en/article/hiding-in-plain-sight-kosovo-s-protected-witnesses-02-13-2017>, accessed 9 February 2019.

for the former Yugoslavia Carla del Ponte alleged that the ICTY was discouraged by key figures within both the US government and UNMIK from pursuing cases against Kosovo Albanians with the same diligence as cases against other nationalities.⁶⁰ She alleged that crimes committed by the KLA were not pursued as vigorously as others because the Western narrative regarding Kosovo portrayed the Albanians exclusively as victims of Serbian aggression; trials of KLA operatives would naturally compromise this narrative.

In the case of UNMIK and EULEX, both have been widely criticised for their alleged incompetence⁶¹ and corruption.⁶² Neither organisation won the trust of the people in Kosovo owing largely to their involvement in a number of scandals, and the perception that their staff were self-serving and/or corrupt.⁶³ In November 2017 Malcolm Simmons, President of Judges for EULEX, resigned claiming that the organisation was ‘political’ and alleging that he had been dissuaded from pursuing certain high profile figures in Kosovo by others in EULEX.⁶⁴ A number of cases relating to events which took place during the period under the KSC’s purview, taken on by UNMIK and EULEX ultimately faltered. This was due to a combination of factors including witness intimidation but also internal mismanagement of the cases.⁶⁵

Thus, the KSC is clearly not the first judicial body with an international dimension to investigate criminality allegedly perpetrated by the KLA; the idea that it will – by virtue of its

⁶⁰ Carla del Ponte, *Madame Prosecutor*, pp. 280-1.

⁶¹ **Natalia Žaba**, ‘Top EU ‘Judge’ Lacked Credentials to Serve on Kosovo’s Bench’, Coalition on Whistleblower Protection, 16 November, 2017, <https://see-whistleblowing.org/out-of-order-high-ranking-eu-judge-lacked-credentials-to-serve-on-kosovos-bench/>, accessed 9 February 2019.

⁶² Krenar Gashi, ‘War Crimes and Eulex’s Broken Kettle’, *Balkan Insight*, 21 March, 2014, <https://balkaninsight.com/2014/03/21/war-crimes-and-eulex-s-broken-kettle/>, accessed 9 February 2019.

⁶³ Valeria Hopkins, ‘EU Court Trouble with Kosovo Scandal’, *Politico*, 17 November, 2017, <https://www.politico.eu/article/malcolm-simmons-eulex-eu-courts-chaos-with-kosovo-scandal/>, accessed 9 February 2019.

⁶⁴ Par Jean-Baptiste Chastand et Hugo Lemonier ‘Eulex, une mission qui enchaîne les scandales’, *Le Monde*, 16 November, 2017, https://www.lemonde.fr/europe/article/2017/11/16/eulex-une-mission-qui-enchaîne-les-scandales_5215658_3214.html, accessed 9 February 2019.

⁶⁵ Fatos Bytyci, ‘EU Justice Mission Leaves Kosovo Accused of Failing its Mandate’, *Reuters*, 14 June, 2018, <https://www.reuters.com/article/us-kosovo-eu-justice/eu-justice-mission-leaves-kosovo-accused-of-failing-its-mandate-idUSKBN1JA1WH>, accessed 9 February 2019; Ristic, ‘Can the New Kosovo Court Keep Witnesses Safe?’.

composition and location – operate seamlessly according to the highest international standards may be a worthy aim, but the record of previous bodies in Kosovo does not support this view. Reflecting on the normative claims made by the KSC as to its efficacy, a EULEX prosecutor remarked; ‘If *we* couldn’t prevent witness intimidation, with all the international support we had, I don’t understand how people think the special court will be able to’.⁶⁶ Clearly, it cannot be assumed that because UNMIK and EULEX didn’t work as well as they claimed they would, the KSC will suffer a similar fate; yet, UNMIK and EULEX’s record shows that it also cannot be assumed that international organisations – and the staff therein – will be immune to the very issues that undoubtedly afflict Kosovo’s domestic judicial system.⁶⁷

Internationals not Implicated in Events

A final point regarding the composition of the court relates to the underlying assumption that internationals are not culpable for the problems in Kosovo they are tasked with solving. By definition, the nature of the court, and the rhetoric of those international actors who pushed for its establishment, presents the international realm – and the actors therein – as neutral and innocent of any involvement in the crimes under investigation. Central to the narrative underpinning the arguments in favour of the court’s creation, was the claim that what certain KLA operatives did in Kosovo between 1998 and the end of 2000 was unacceptable and

⁶⁶ Interview between author and EULEX Special Prosecutor (on condition of anonymity), Pristina, 20 July, 2017.

⁶⁷ It must be noted that the KSC has put in place a range of measures specifically orientated towards ensuring witness protection, including the location of the court and its international staff. The KSC has also created a ‘Witness Protection and Support Office’ within the Registry. The importance of the issue has also been repeatedly affirmed by senior KSC officials; see, Kosovo Specialist Chambers and Special Prosecutors Office, ‘Press Conference of Dr Donlon’, 15 September, 2015, <https://www.scp-ks.org/en/press-conference-dr-donlon-registrar-specialist-chambers>, accessed 1 June 2019; Centrum pro lidska prave a demokratizaci, ‘Interview with the President of the Kosovo Specialist Chambers in The Hague, Ekaterina Trendafilova: The Court is Ready for its First Indictments’.

could not be allowed to go unpunished. Yet, the nature of what happened in Kosovo after NATO's intervention complicates this seemingly simple presumption.

Prior to NATO's intervention the KLA were known to engage in attacks against Serbian – and also Albanian – civilians; indeed, in February 1998 the US Envoy to the Balkan stated, 'The UCK (KLA) is without any question a terrorist organisation'⁶⁸ and a month later UN Security Council Resolution 1160 condemned 'all acts of terrorism by the Kosovo Liberation Army'.⁶⁹ Yet, evidence now suggests that a number of Western states covertly sent Special Forces into Kosovo in 1998 to train the KLA.⁷⁰ More overtly, during Operation Allied Force NATO coordinated their military strategy with the organisation.⁷¹ After Security Council Resolution 1244 was passed on 10 June 1999 UNMIK assumed formal governance powers in Kosovo; thus, for over half of the three year period under the KSC's remit, it was UNMIK who had responsibility both for governing Kosovo, and – along with NATO-led KFOR – maintaining peace and security there. UNMIK's mandate as per Resolution 1244 included the responsibilities, 'Maintaining civil law and order', and 'Protecting and promoting human rights'.⁷² KFOR, likewise, was established, 'to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo'.⁷³

Yet, it was precisely during the post-intervention period that the vast majority of crimes committed by KLA operatives against Serbs – and "moderate" Albanians – in Kosovo were perpetrated. A 2000 report by Amnesty International noted, 'Since the deployment of

⁶⁸ Larry Craig, 'The Kosovo Liberation Army: Does Clinton Policy Support Group with Terror, Drug Ties?', United State Senate Republican Policy Committee, 31 March, 1999, <http://fas.org/irp/world/para/docs/fr033199.htm>, accessed 9 February 2019.

⁶⁹ UN Security Council Resolution 1160, 31 March, 1998, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/090/23/PDF/N9809023.pdf?OpenElement>, accessed 9 February 2019.

⁷⁰ James Pettifer, *The Kosova Liberation Army* (Hurst & Co.: London, 2012), p. 178.

⁷¹ Council of Europe Committee on Legal Affairs and Human Rights, 'Inhuman Treatment of People and Illicit Trafficking of Human Organs in Kosovo', p. 3.

⁷² UNMIK, 'About UNMIK: UN Security Council Resolution 1244', <http://www.unmikonline.org/Pages/1244.aspx>, accessed 9 February 2019.

⁷³ 'Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia', 9 June, 1999, <file:///C:/Users/User/Downloads/mta.pdf>, accessed 9 February 2019.

UNMIK and KFOR, serious crimes and human rights abuses have continued to be perpetrated at a disturbing rate in Kosovo', and observed there was, 'a climate in which some people in Kosovo believe that they may commit crimes and abuse the human rights of others with impunity'.⁷⁴ In a 2001 report, Human Rights Watch noted that by the end of 2000, some 210,000 Serbs had 'fled' Kosovo with most of them leaving, 'in the first six weeks of the NATO deployment'. Additionally, they note that between the 12 June and the end of 2000, 1,000 Serbs and Roma had been murdered or gone missing.⁷⁵

These crimes were well documented at the time by media outlets and various international organisations on the ground in Kosovo including, Human Rights Watch⁷⁶, Amnesty International⁷⁷, the International Crisis Group⁷⁸ and the OSCE.⁷⁹ By October 1999 over 200,000 Serbs and thousands of Roma had fled Kosovo in what was then described by Carla Del Ponte as, '...as serious as what happened there before [NATO's intervention]'.⁸⁰ This exodus, coupled with the widespread criminal acts perpetrated against minorities in Kosovo, was perpetrated in full view of UNMIK and KFOR who were mandated to maintain peace; in this sense, these organisations evidently failed in their constitutional duty to protect minorities and indeed Albanians targeted by the KLA. Human Rights Watch alleged, 'NATO was largely preoccupied with protecting its own troops rather than defending civilians'.⁸¹ A

⁷⁴ Amnesty International, 'FRY (Kosovo): Setting the Standard UNMIK and KFOR's Response to Violence in Mitrovica', pp. 3-4.

⁷⁵ Human Rights Watch, *Under Orders: War Crimes in Kosovo*, 2001, <https://www.hrw.org/legacy/reports/2001/kosovo/>, p. 14

⁷⁶ Human Rights Watch, 'Federal Republic of Yugoslavia: Abuses against Serbs and Roma in the New Kosovo', August 1999, Volume 11, No. 10 (D), <http://www.hrw.org/reports/1999/kosov2/>, accessed 9 February 2019.

⁷⁷ Amnesty International, 'FRY (Kosovo): Setting the Standard UNMIK and KFOR'S Response to Violence in Mitrovica'.

⁷⁸ International Crisis Group, 'Kosovo Report Card', Balkan Report 100, 28 August 2000, <https://d2071andvip0wj.cloudfront.net/100-kosovo-report-card.pdf>, accessed 4 June 2019.

⁷⁹ OSCE, 'Overview of the Situation of Ethnic Minorities in Kosovo', 3 November 1999, <http://www.osce.org/kosovo/13309?download=true>, p. 1, accessed 9 February 2019.

⁸⁰ Quoted in Gordon Bardos, 'International Policy in Southeast Europe', in Raju Thomas (ed), *Yugoslavia Unravelling* (Oxford: Lexington Books, 2003), p. 150.

⁸¹ Human Rights Watch, *Under Orders: War Crimes in Kosovo*, p. 15; see also, Brocades Zaalberg, *Soldiers and Civil Power: Supporting or Substituting Civil Authorities in Peace Operation During the 1990s* (Amsterdam: In Eigen Beheer, 2005), p. 370-2

report by the International Commission on the Balkans noted succinctly, '[in Kosovo] the international community has clearly failed in its attempts to provide security'.⁸²

The charge that the international community “failed” to stop the violence perpetrated while they were in authority in Kosovo is in itself damning; yet there is additionally evidence that the criminality was in fact tolerated and at times facilitated – albeit unofficially – by the international authorities. When NATO’s military operations ended, Kosovo was, many maintain, subjected to “state capture” by a criminal elite from within the KLA who seized control as Serbian troops and administrative officials pulled out.⁸³ The criminal elite immediately engaged in corruption, nepotism and the large-scale embezzlement of public funds, as well as violence against minorities, and those Albanians opposed to their methods and ideology.

The emergence of this group, however, was not robustly challenged by the international administration which then governed Kosovo. An UNMIK official based in Kosovo at the time noted that they had a choice; tackle the KLA or strike a deal with them. The latter option was chosen because ‘No country was ready to fight the UÇK after having fought against the Serbs. No one!’⁸⁴ Human Rights Watch likewise alleges that in its initial phase, UNMIK and KFOR made two fateful decisions; to tolerate the mass exodus of Serbs and to ignore the criminality perpetrated by sections of the former KLA.⁸⁵ According to a report produced on behalf of the Council of Europe’s Committee on Legal Affairs and Human Rights, the international administration chose to, ‘turn a blind eye to the war crimes of the KLA’, as they

⁸² International Commission on the Balkans, *The Balkans in Europe’s Future*, pgs. 19 & 20.

⁸³ See, Katarina Tadic, ‘State-building and Patronage Networks: how political parties embezzled the bureaucracy in post-war Kosovo’, 18(2), *Journal Southeast European and Black Sea Studies*, 2018, pp. 185-202; Gezim Visoka ‘Three levels of Hybridisation Practices in post-conflict Kosovo’, 7(2), *Peacebuilding and Development*, (2012), 23-36; Andrea Lorenzo Capussela, *State-building in Kosovo: Democracy, Corruption and the EU in the Balkans* (London: I.B. Tauris, 2015), p. xiv.

⁸⁴ Nathalie Duclos ‘The DDR in Kosovo: The DDR in Kosovo: Collision and Collusion among International Administrators and Combatants’, 4(1), *Peacebuilding*, (2016), p. 44.

⁸⁵ Human Rights Watch, ‘Federal Republic of Yugoslavia: Abuses against Serbs and Roma in the New Kosovo’.

believed these figures would bring order to Kosovo; the international administration thus, ‘favoured a pragmatic political approach taking the view that they needed to promote short-term stability at any price’.⁸⁶ This view is endorsed by Human Rights Watch; dismissing the claim that UNMIK and KFOR lacked the capacity to stop the violence against minorities, they alleged the real reason was ‘the lack of political will’ noting,

Senior NATO and U. N. officials know that persons linked to the former KLA, including some of Kosovo’s key political figures, are implicated in violence against minorities and in criminal activities, but they have chosen not to confront them.⁸⁷

Del Ponte likewise alleged that UNMIK officials were particularly keen to cultivate good relations with the newly dominant criminal elite that emerged from within the KLA’s ranks; UNMIK officials, she claims, came to, ‘deceive themselves into believing that they could rely upon former KLA leaders with dubious backgrounds to help develop functioning institutions and the rule of law’.⁸⁸

There was some logic to this of course; any attempt by UNMIK or KFOR to tackle the criminal elements within the KLA immediately after their deployment to Kosovo, would have led to confrontations with an armed guerrilla organisation whose support they certainly needed; indeed, this fear was not unfounded as, ‘members of the UÇK (KLA) threatened to destabilise the peace mission’.⁸⁹ Additionally, the Serb’s exodus was, in purely order-orientated strategic terms, *not* unwelcome; the continued presence of small Serbian communities in isolated villages and in cities with a large Albanian majority – such as Pristina, Peja and Prizren – would have constituted a persistent source of instability, whereas their relocation and concentration in enclaves such as Northern Mitrovica, Orahovac, and

⁸⁶ Council of Europe Committee on Legal Affairs and Human Rights, ‘Inhuman Treatment of People and Illicit Trafficking of Human Organs in Kosovo’, p. 7 & p. 1.

⁸⁷ Human Rights Watch, *Under Orders: War Crimes in Kosovo*, p. 15

⁸⁸ Carla del Ponte, *Madame Prosecutor*, p. 280; Del Ponte also noted that the Head of KFOR General Mini ‘joked about the close relationship between some UNMIK personnel and former KLA leaders’, *ibid*, p. 284.

⁸⁹ Nathalie Duclos, ‘The DDR in Kosovo: Collision and Collusion among International Administrators and Combatants’, p. 47.

Gračanica removed certain ethnic flash points, and made it easier for them to be protected against attack. The lack of robust attempts by UNMIK and KFOR to stop ethnic cleansing and secure the presence of Serbs and other minorities scattered across Kosovo emboldened those intent on driving out the Serbs.⁹⁰ Indicatively, the Serbian community in Prizren were targeted for weeks by armed gangs after the withdrawal of Serbian troops in June 1999, yet neither UNMIK nor KFOR took any substantive action to intercede. Indicatively, German KFOR troops issued reports detailing the security situation in Prizren after their deployment; the violence directed against the Serb community there was so common it soon became effectively routine. A report issued on the 7 July noted, ‘Today was a very quiet day. Lootings and burnings of houses are still going on, especially in northern part of Prizren’.⁹¹ Eventually the entire Serbian population of Prizren left; this perversely meant that there was no more inter-ethnic tension in the city and “order” was restored.

The leader of the KLA at the time of NATO’s intervention was Hashim Thaci; feted by NATO from 1998 on, Thaci eventually became Prime Minister and is currently Kosovo’s President. Thaci, however, has long been accused of being the head of an ‘organized crime network’ – active since 1998 – that committed war crimes, intimidated “moderate” Albanians, and was involved in human trafficking, the sex trade, and heroin distribution.⁹² The Council of Europe’s report alleges that Thaci’s criminal network ‘secured political and diplomatic endorsement from the United States and other Western powers’ and was tacitly supported and protected by the international administration established after NATO’s intervention.⁹³

⁹⁰ Independent International Commission on Kosovo, *Kosovo Report*, p. 109.

⁹¹ Brocades Zaalberg, *Soldiers and Civil Power: Supporting or Substituting Civil Authorities in Peace Operation During the 1990s*, p. 350

⁹² Council of Europe Committee on Legal Affairs and Human Rights, ‘Inhuman Treatment of People and Illicit Trafficking of Human Organs in Kosovo’, p. 14.

⁹³ *Ibid*, p. 14.

Thus, the criminal activity and oppression perpetrated by Albanians in Kosovo between 1998 and 2000 cannot reasonably be portrayed as exclusively the fault of locals; while there is little evidence that either UNMIK or KFOR actively participated in the crimes under investigation by the KSC, there is sufficient evidence to suggest that they cannot claim to be uninvolved, or at least culpable for a dereliction of duty. The international administration which assumed formal governance competencies over Kosovo as per Resolution 1244 was certainly unprepared for the scale of the task facing them; the lack of a functioning judicial system, police force and penal facilities clearly undermined the efficacy of both UNMIK and KFOR in fulfilling their mandate.⁹⁴ Yet, as many reports note, this issue of capacity was not the sole reason for the widespread violence; UNMIK and KFOR both chose to wilfully ignore the criminality perpetrated by former KLA combatants and routinely chose not to prosecute or detain perpetrators.⁹⁵ Illustratively, Human Rights Watch noted, ‘Senior NATO and UN officials are well aware that persons linked to the former KLA...are implicated in violence against minorities, and in criminal activities, but have chosen to do little about it’.⁹⁶

The myriad reports criticising UNMIK and KFOR for their behaviour upon assuming governance competencies in Kosovo in the wake of Resolution 1244, go far beyond just lamenting a lack of preparedness or capacity; while this was undeniably a reality – one which in itself constitutes a major failing – the more serious charge is that these organisations lacked the will to stop the violence. Yet, these charges do not go so far as to allege that UNMIK and KFOR actively colluded with those orchestrating the expulsions and violence; in this respect, there is a difference between the dereliction of duty evidenced in Kosovo and the

⁹⁴ Brocades Zaalberg, *Soldiers and Civil Power: Supporting or Substituting Civil Authorities in Peace Operation During the 1990s*, p. 352-4

⁹⁵ International Crisis Group, ‘Kosovo Report Card’, pp 14-21

⁹⁶ Human Rights Watch, *Under Orders: War Crimes in Kosovo*, p. 467

active participation of Dutch Peacekeeping troops in the Srebrenica massacre in 1995.⁹⁷

Nonetheless, while these critiques of UNMIK and KFOR do not allege active participation in the ethnic cleansing and violence, they are of a sufficient gravity – especially as both organisations occupied positions of formal legal authority in Kosovo – to at the very least warrant that the activities of the internationals form part of the KSC’s investigations. Yet, those states who participated in the military intervention, and were the largest contributors to UNMIK and NATO, are the same states who most forcefully pushed for the establishment of the KSC through the articulation of a narrative that very clearly frames them as uninvolved honest brokers. Of course, formally the KSC has no direct links with UNMIK or KFOR – though only one of the KSC’s 18 judges is *not* from an EU/NATO member state⁹⁸ – yet, it is at the very least paradoxical, that those states who have presented themselves as disinterested actors impelled by benevolent motives to redress crimes committed in Kosovo, are in fact implicated in the commission of these very crimes.⁹⁹

Conclusion

A cursory examination of Balkan history illustrates the extent to which the region has been buffeted by the actions of outside powers. Much of the unrest that has erupted there has been a consequence of policies and events impelled by external actors, rather than purely the result of local shortcomings. Despite this, perceptions of the region continue to orientate around the view that the people there are constitutionally incapable of peaceful co-existence and

⁹⁷ The participation took the form of, ‘facilitating, in July 1995, the separation of male Bosnian Muslim refugees by the Bosnian Serbs in a mini safe area created close to Srebrenica, as well as...evacuating the male refugees from the compound of the Dutch UN battalion (Dutchbat)’. Cedric Ryngaert, ‘Peacekeepers Facilitating Human Rights Violations’, *Netherlands International Law Review*, 64, 2017, pp. 453-535; See also, André Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’, *Journal of International Criminal Justice*, 9(5) 2011, pp. 1143-1157

⁹⁸ Judge Guénaél Mettraux is from Switzerland.

⁹⁹ It must be acknowledged that while the KSC is highly unlikely to put a UNMIK/NATO operative on trial, it is of course possible that in the course of the KSC’s proceedings, testimonies may well bring to light UNMIK/NATO’s failings during the period under consideration.

dependent on external intervention to save themselves from perennial strife. As Mark Mazower notes, while this view has long guided external agents,

...a truer and less jaundiced understanding of the Balkans requires us to try to unravel the ways in which attitudes in the region have been shaped not only by events which took place there but by more sweeping narratives of the development of European identity and civilisation.¹⁰⁰

Adherents to this “jaundiced understanding” are naturally inclined to both dismiss local agency and venerate the capacity of external actors.

It is precisely this binary between local/bad and international/good which has, I argued above, led to the composition of the KSC. This finding is not, however, merely a means by which we can retrospectively explain the genesis of the KSC; it has significant implications for the court’s future efficacy. Given the sensitivities involved in these cases, it is essential that proceedings are seen as legitimate by the people of Kosovo if they are to have a positive impact on inter-community relations, yet the origins of the court and its composition mitigate against this. Likewise, if genuine justice is to be achieved for those victims of the violence perpetrated by the KLA, then investigations must be conducted without underlying normative assumptions about international innocence; ignoring the international community’s involvement in the events under the KSC’s jurisdiction, and the failure of various international judicial bodies to previously deal with these issues, can only negatively impact on any attempt to accurately determine liability for the injustice suffered by victims since 1999.

¹⁰⁰ Mazower, *The Balkans*, pp. 14-15.