Introducing the Special Issue ‘Critical Perspectives on the Law and Politics of the Kosovo Specialist Chambers and the Specialist Prosecutor’s Office’

1 Introduction

The publication of this special issue comes at a critical juncture in time for Kosovo, as the young country awaits the first indictments to be issued by the Specialist Prosecutor’s Office (SPO), the prosecutorial entity that is attached to the Kosovo Specialist Chambers (KSC). The prominence of the SPO and the KSC for Kosovo, and more specifically its impact on domestic politics, came to the fore for the first time in a very prominent way when the incumbent Prime Minister Ramush Haradinaj resigned after being summoned by the SPO to be questioned as a suspect.¹ During the subsequent snap elections held on 6 October 2019, the opposition *Vetëvendosje* party came out as winners right before the other main opposition party, the Democratic League of Kosovo (LDK).²

This special issue brings together perspectives on four distinct matters related to the SPO and the KSC, written by experts coming from different backgrounds and/or disciplines. In his contribution ‘The Assumptions Underlying the Kosovo Specialist Chambers and their Implications’, Aidan Hehir contextualises the KSC within the broad range of international initiatives that have arisen since 1999, which are premised on the assumption that international actors are a benign source of order necessary to overcome Kosovo’s problems. In his piece, Hehir challenges this premise, by positing that the KSC’s creation

1 Blerta Begisholli, ‘Kosovo’s Haradinaj Refuses to Answer War Prosecutor’s Questions’, *Balkan Insight*, balkaninsight.com/2019/07/24/kosovos-haradinaj-refuses-to-answer-war-prosecutors-questions/, accessed 28 December 2019.

2 Jack Robinson, ‘Vetevendosje set for first place in parliamentary elections’, *PrishtinaInsight*, 7 October 2019, prishtinainsight.com/vetevendosje-set-for-first-place-in-parliamentary-elections, accessed 5 January 2020.

by external actors is damaging for its local legitimacy and neglects the international responsibility for crimes under the KSC's jurisdiction.

In his article 'Strategising International Prosecutions: How Might the Work of the Kosovo Specialist Prosecutor's Office Come to be Judged?', Matthew Cross provides an insightful practitioner's perspective on the basis for a successful prosecutorial strategy and draws six preliminary conclusions and observations as to the path which the SPO may adopt in this respect.

In the same vein, Michael Karnavas' contribution, 'The Kosovo Specialist Chambers' Rules of Procedure and Evidence: More of the Same Hybridity with Added Prosecutorial Transparency', looks at the KSC's Rules of Procedure and Evidence from a defence perspective. The most noteworthy aspect of his analysis is his favourable assessment of the provisions of disclosure, which, in his opinion, provide greater protections of fair trial rights for suspects and accused during the confirmation and pre-trial stages when compared to the rules of other international(ised) criminal tribunals.

To conclude, Alison Smith, with her breadth of experience as the No Peace Without Justice (NPWJ)'s legal counsel, offers a civil society perspective on the KSC's nascent Outreach Program in her article entitled 'Outreach and the Kosovo Specialist Chambers: A Civil Society Perspective'. She positively evaluates the first steps of the KSC's Outreach Program but is also realistic as to what it can achieve given the widespread disapproval of the KSC's jurisdictional mandate in Kosovar society.

This editorial aims to critically engage with some of the arguments made by the different authors with regards to the many challenges the SPO and the KSC are and will be facing as well as with the constructive suggestions that are made for both the SPO and the KSC to attain at least some measure of success. The analysis will revolve around four different themes: first, the narrow mandate of the SPO and KSC as being only competent to investigate, prosecute and adjudicate crimes committed by the Kosovo Liberation Army (KLA), given how the scope of the Court has been circumscribed under Article 2(2) of the Law (section 1); the broader purposes some have claimed the SPO and KSC ought to achieve, such as nurturing interethnic reconciliation between Kosovar Albanians and Kosovar Serbs (section 2); the distance between the SPO and the KSC and Kosovo given the SPO and KSC's location in the Hague, its purely international staff and its application of international criminal legal concepts and procedures that are foreign to Kosovan criminal law and procedure (section 3) and, lastly, the mounting criticism the SPO in particular is facing because of the long wait for the issuance of its first indictments (section 4).

2 The Jurisdictional Mandate of the SPO and KSC: Mono-ethnic Justice for the Victors of the Kosovo War?

All authors underscore in their contributions to this special issue the SPO and KSC's extremely challenging mandate, by only having the competence to consider crimes allegedly committed by ex-KLA members during and in the aftermath of the conflict of Kosovo. Indeed, while the KLA is literally not mentioned once in the Law on the Specialist Chambers and Specialist Prosecutor's Office (hereafter: the Law),³ Article 1(2) of the Law effectively restricts the mandate of the SPO and KSC to investigating, prosecuting, and adjudicating KLA crimes. Article 1(2), which delineates the scope and purpose of the SPO and KSC, stipulates that the establishment of both institutions is necessary to ensure criminal proceedings in relation to allegations of crimes reported in the Council of Europe Assembly Report of 2011 (the so-called 'Marty Report')⁴ and the report of the Special Investigative Task Force (SITF).⁵ Both reports have limited themselves to examine KLA criminality during and after the Kosovo war. Furthermore, the labelling of the SPO and the KSC as a 'KLA court' is not a matter of mere framing, but has a basis in reality as the more than 120, and some sources say 200,⁶ individuals who have been summoned for questioning as suspects or witnesses by the SPO are affiliated with the KLA.⁷ Consequently, it is undeniable that the SPO and the KSC are charged with dealing with a very emotional matter for Kosovo Albanians, namely the 'heroic' war fought by the KLA against Serbian oppressors.⁸ As one travels through Kosovo, it becomes clear that the commemorative post-war narrative is dominated by glorifying KLA

3 Assembly of the Republic of Kosovo, Law on Specialist Chambers and Specialist Prosecutor's Office (Law No. 05/L-053), 3 August 2015 (the Law).

4 Council of Europe, 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo', Doc. 12462 (Marty Report), 7 January 2011.

5 SITF, Statement of the Chief Prosecutor of the Special Investigative Task Force', 1, 29 July 2014 (SITF Statement).

6 *Gazeta Express*, 'Over 200 ex-KLA members summoned by Specialist Prosecutor's Office', 28 October 2019, www.gazetaexpress.com/over-200-ex-kla-members-summoned-by-specialist-prosecutors-office/, accessed 15 December 2019.

7 Serbeze Haxhiaj, 'Kosovo Bemused by Long Wait for Hague War Court Trials', *Balkan Insight*, balkaninsight.com/2019/12/04/kosovo-bemused-at-long-wait-for-hague-war-court-trials/, accessed 15 December 2019.

8 Gëzim Visoka, 'Assessing the Potential Impact of the Kosovo Special Court', *Pax for Peace*, 9 October 2017, www.paxforpeace.nl/publications/all-publications/assessing-the-potential-impact-of-the-kosovo-specialist-court, accessed 15 December 2019.

fighters and placing statues in public spaces.⁹ The SPO and KSC will inevitably challenge this narrative by trying to demonstrate that the KLA, or at least certain KLA members, engaged in criminal behaviour against Serbian civilians, fellow Kosovo Albanians and other minorities such as the Roma. The underlying fear among Kosovo Albanians is arguably that the SPO and the KSC will compromise the national narrative.¹⁰ Arguably complicating matters even more is the consensus that seems to exist within Kosovo that crimes committed by the Serbs still enjoy widespread impunity. This sense of frustration of Kosovar Albanians for being unequally treated compared to Serbs when it comes to undergoing justice for crimes committed during the Kosovo war is understandable and to an important degree justified. When it comes to the ICTY's role in dispensing justice for the Serbs' criminality during the Kosovo war, the sentiment among Kosovar Albanians is one of frustration. Though six senior political, military and police Serb officials were convicted by the ICTY,¹¹ the death of Milošević, which prematurely concluded his trial without judgment, was an immense disappointment for Kosovar Albanians.¹² While local courts in Serbia prosecuted and convicted a number of direct Serb perpetrators for crimes against Kosovar Albanian civilians,¹³ the war crimes cases pursued under the auspices of UNMIK and EULEX are regarded in Kosovo as unbalanced because they are seen as having dealt with a disproportionately high number of convictions against Albanians.¹⁴ This sense of frustration among Kosovar Albanians about the imbalanced justice inflicted upon them resulted in 2019 in an unsuccessful proposal of certain Kosovar MPs to establish a 'new international tribunal to prosecute Serbs for alleged genocide in 1998–99'.¹⁵

- 9 Nora Weller, 'War Memorials in Kosovo Don't Tell the Whole Story', *Balkan Insight*, balkaninsight.com/2019/12/03/war-memorials-in-kosovo-dont-tell-the-whole-story/, accessed 15 December 2019.
- 10 Aidan Hehir, 'Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and Its Implications', 20 *Human Rights Review* (2019) 281.
- 11 More specifically army General Vlastimir Đorđević, Yugoslav Deputy Prime Minister Nikola Šainović, Yugoslav Army Chief-of-Staff Dragoljub Ojdanić, Yugoslav army generals Nebojša Pavković and Vladimir Lazarević and Serbian police General Sreten Lukić, see for an account of these trials: Elliott Behar, *Tell it to the World. International Justice and the Secret Campaign to Hide Mass Murder in Kosovo* (Dundurn, Toronto, 2014) pp. 203–209.
- 12 Timothy W. Waters, *The Milosevic Trial: An Autopsy* (Oxford University Press, Oxford, 2014), pp. 220–221.
- 13 See for an account of these local Serb trials: Behar, *supra* note 11, pp. 211–214.
- 14 Serbeze Haxhiaj, 'Kosovo: War Commanders Questioned as Prosecutors Step Up Probes', *Balkan Insight*, balkaninsight.com/2019/12/27/kosovo-war-commanders-questioned-as-prosecutors-step-up-probes, accessed 27 December 2019.
- 15 Serbeze Haxhiaj and Eve-Anne Travers, 'Kosovo's Push for 'Serbian Genocide' Tribunal 'Likely to Fail', *Balkan Insight*, balkaninsight.com/2019/06/04/kosovos-push-for-serbian-genocide-tribunal-likely-to-fail, accessed 28 December 2019.

In addition, the Kosovar Albanians' grievances about the continuing impunity of Serbs for crimes committed during the Kosovo war are further fuelled by the complete unwillingness of Serbia to assume any public and collective responsibility for its numerous crimes committed against the Kosovo Albanian population. As an illustration, most recently, in a reaction to Serbian president Aleksandar Vučić who denied the Rečak massacre, in which Serbian forces killed 45 Albanian civilians in January 1999, Albin Kurti, the party leader of *Vetëvendosje* and Kosovo's likely new prime minister, stated in a Tweet: 'He wants to move into a peaceful future without accepting crimes of the past. But genocide, mass-graves and massacres are Serbia's truth. It's time for Vučić to start dealing with it'.¹⁶

The combination of the one-sidedness of the jurisdiction of the SPO and KSC with the sense of frustration among Kosovo Albanians concerning Serbian impunity and denialism, represents an extremely sensitive and at times hostile context which the SPO and KSC will have to operate in, and Alison Smith is thus certainly correct when she states that the SPO and KSC have a 'particularly hard road ahead of them ...'.¹⁷

I have argued elsewhere that to alleviate these legitimacy concerns, it would have made more sense to appropriate the ICTY with KSC crimes:

... the crimes established in the Marty and SITF reports were not committed during Yugoslav wars and more specifically the armed conflict in Kosovo of 1998–1999, but they are undeniably and inextricably interwoven with it, and many of the crimes were arguably committed out of retaliation for crimes committed by the Serbs against ethnic Albanians during the war.¹⁸

Moreover, I remain convinced that

from the perspective of judicial economy, it appears that the ICTY would have been a well-equipped institution to prosecute post-war KLA crimes,

16 *Gazeta Express*, 'Kurti: Genocide, mass-graves and massacres are Serbia's truth', *Gazeta Express*, www.gazetaexpress.com/kurti-genocide-mass-graves-and-massacres-are-serbias-truth, accessed 15 December 2019.

17 Alison Smith, 'Outreach and the Kosovo Specialist Chambers: A Civil Society Perspective', 20(1) *Int. Crim. Law Rev.* (2020), this issue.

18 Mathias Holvoet, 'The Continuing Relevance of the Hybrid or Internationalized Justice Model. The Example of the Kosovo Specialist Chambers', 28 *Criminal Law Forum* (2017) 44.

given its experience and expertise in prosecuting and adjudicating crimes related to the conflicts in the former Yugoslavia.¹⁹

Be that as it may, Aidan Hehir is on point when he states that the 'KSC is, of course, a reality; as such, rather than just lament its origins, there is a pressing need to bolster its legitimacy to prevent its proceedings impacting negatively on peace and stability in Kosovo'.²⁰ To accomplish this, an effective outreach strategy, which is implemented not only through the KSC's official Outreach Programme but by all the relevant organs within the KSC and the SPO, seems paramount. As Aidan Hehir puts it, there should be a 'holistic strategy which seeks to show that identifying criminality committed by some in the KLA does not constitute an attempt to discredit the struggle for liberation from Milošević's oppression'.²¹ In this respect, it seems commendable that the message conveyed by former Specialist Prosecutor David Schwendiman following his resignation is reiterated frequently by all organs of the KSC, namely the President, the Registrar, the Victims' Participation Office, the Defence Office and the Ombudsperson. In a speech at the Grotius Centre in March 2018, Schwendiman held that:

The work of the Specialist Prosecutor and Specialist Chambers is not an attack on a historical narrative such as the Kosovo independence narrative or the Kosovo Liberation Army veterans' narrative ... none of us are involved in what we are doing to change history, or to attack a narrative, or an organization, or a group, or ethnicity ... If an organization to which an accused belongs, or which he or she controls or directs, or uses for criminal purposes is discredited by what the accused is accountable for, it is the crimes of the accused that are to blame.²²

In addition, to counter the narrative that the SPO and the KSC were established to delegitimise the KLA as an organisation, the various organs should refer to the fairness provided under the legal framework of the KSC and the SPO and more specifically to the KSC's Rules of Procedure and Evidence (RPE), which, in

¹⁹ *Ibid.*, pp. 44–45.

²⁰ Hehir, *supra* note 10, p. 284.

²¹ *Ibid.*

²² Speech by Specialist Prosecutor David Schwendiman, Grotius Centre, Leiden University in The Hague, Thursday, 22 March 2018: 'Reflections on My Time as Specialist Prosecutor and the Challenges Ahead', p. 21, www.scps.org/sites/default/files/public/content/specialist_prosecutor_david_schwendiman_grotius_centre_speech_22_march_2018_0.pdf, accessed 26 December 2019.

Michael Karnavas' words, 'could yield greater fair trial rights results for suspects and accused than what is available in other international(ised) criminal tribunals'.²³ For example, Karnavas positively evaluates the disclosure obligations of the Specialist Prosecutor under Rule 86 of the KSC RPE, which places an obligation on the prosecution to be as transparent in its charging practice as early as possible and to provide a fair amount of specificity to demonstrate a 'well-grounded suspicion' that a suspect committed or participated in the commission of a crime under the jurisdiction of the KSC.²⁴ Similarly, Karnavas praises Rule 95, which imposes, among other things, a duty on the prosecution to reveal its hand and to show how and with what evidence it will meet its burden of proof. These provisions demonstrate that the drafters of the KSC RPE intended to give suspects and accused maximum protection against a powerful prosecution and the KSC judges will not be satisfied with frivolous, guilt by association allegations when deciding about a suspect or accused' criminal responsibility, but will instead require robust, specific and individualised evidence.

To further refute the alleged bias of the KSC and the SPO against Kosovar Albanians, it will be essential that the KSC's Outreach Programme emphasises, in Alison Smith's words, and as echoed in Matthew Cross' piece,²⁵ 'the complementarity nature of the KSC to the existing international criminal justice system and other accountability efforts'.²⁶ I am in full agreement with Smith that a 'narrative on complementarity' should be evoked and that the work of the KSC and SPO 'should not be evaluated 'stand-alone', rather it should be evaluated against the backdrop of the ICTY, EULEX, and war crimes proceedings in Kosovo and Serbia, where both ethnic Albanians and Serbs, along with other ethnic groups, have been prosecuted and convicted'.²⁷

Indeed, the assertion that Kosovar Albanians are disproportionately targeted by international criminal justice initiatives related to Balkan wars rings rather hollow when the KSC and SPO are contextualised within the range

23 Michael G. Karnavas, 'The Kosovo Specialist Chambers' Rules of Procedure and Evidence: More of the Same Hybridity with Added Prosecutorial Transparency', 20(1) *Int. Crim. Law Rev.* (2020), this issue.

24 *Ibid.*

25 Cross argues that the 'limited jurisdiction of the KSC and SPO might be justified on the basis that the ICTY could and did prosecute crimes committed by other parties to the conflict in Kosovo, and that domestic courts in Kosovo (supported initially by UNMIK and then EULEX) also remain able in principle to exercise jurisdiction over such allegations', see Matthew E. Cross, 'Strategising International Prosecutions: How Might the Work of the Kosovo Specialist Prosecutor's Office Come to be Judged?', 20(1) *Int. Crim. Law Rev.* (2020), this issue.

26 Smith, *supra* note 17.

27 *Ibid.*

of institutions that have prosecuted individuals from different ethnic backgrounds such as the ICTY, the Bosnia War Crimes Chamber, the War Crimes Chamber of the Belgrade District Court, domestic courts in Kosovo under the auspices of UNMIK and EULEX and domestic courts outside acting on the basis of the principle of universal jurisdiction.

3 The Broader Purposes of the KSC and the SPO: Could and Should They Achieve Anything beyond Mere Retribution?

As Aidan Hehir describes in his article, arguments are often put forward that the SPO and the KSC are established to do more than just determine criminal guilt. The court is often presented as a means by which Kosovo could achieve reconciliation and move towards a better future.²⁸ Hehir mentions a joint US-EU statement in support of the establishment of the SPO and the KSC which noted that '[b]y dealing with its past and ensuring justice for the victims, Kosovo can achieve reconciliation and build a better future'.²⁹ In her article, Alison Smith subscribes to the view that the SPO and KSC could achieve the broader aim of reconciliation, as she states that 'the potential positive impact of the KSC on domestic reconciliation should not be understated by the KSC Outreach Program and, indeed, attaining reconciliation can be supported through the work of the KSC, as well as its outreach messages and methodologies'.³⁰

In this regard, I fully endorse Hehir's sceptical view as to whether prosecutions by the SPO and trials before the KSC are meant to achieve interethnic reconciliation between Kosovar Albanians and Kosovar Serbs. He refers to the example of the ICTY, and rightly asserts, in my view, that 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 these groups ...'.³¹ One could even take a more pessimistic view and argue that the ICTY judgments caused that ethnicities were pitted even more against each other and that they were used to stoke anger and exacerbate conflict. Illustrative in this regard is the following statement by former Serbian President

28 Aidan Hehir, 'The Assumptions underlying the Kosovo Specialist Chambers and their Implications', 20(1) *Int. Crim. Law Rev.* (2020), this issue.

29 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, xk.usembassy.gov/joint-statement/, accessed 28 December 2019.

30 Smith, *supra* note 17.

31 Hehir, *supra* note 28.

Tomislav Nikolić after the final acquittal of Ramush Haradinaj by the ICTY: 'If somebody wanted to turn us against one another, they have found the right way'.³² One reason that criminal trials cannot be expected to nurture reconciliation is that the acceptance and internalisation of facts are deeply dependent on media or local politics and that the presentation of facts alone does not suffice to foster acceptance of truths.³³ Consequently, even a perfectly run trial does not guarantee in any way that reconciliation will happen between different ethnic groups, since the perception of reality is heavily shaped by emotional or rational factors such as prior beliefs and narratives, which impede engagement with other views.³⁴ Therefore, Hehir is correct to assert that the bottom line of what the SPO and the KSC is and should be about, is retribution. In his words: '... 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'.³⁵

This does not entail that prosecutions by the SPO and criminal trials before the KSC could not have any broader positive side effects. In some specific instances, they could foster interethnic reconciliation. In addition, trials before the KSC might, albeit to a limited extent, contribute to historical clarification as its proceedings may render certain facts less contestable through publicity and testing of evidence.³⁶ Another side effect of prosecutions by the SPO and trials before the KSC might be the delegitimisation of certain political elites within Kosovo. As the Chief Prosecutor of the SITF held in 2014:

In the end, this was solely about certain individuals in the KLA leadership using elements of that organization to perpetrate violence in order to obtain political power and personal wealth for themselves, not about any larger cause. And, it is as individuals that they must bear responsibility for their crimes.³⁷

It is no secret that at least some of the former high-level KLA leaders, who enjoyed impunity for crimes committed during the war, continued, now as member of political parties closely related to the KLA such as PDK, AAK and

³² Behar, *supra* note 11, p. 216.

³³ Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, Cambridge 2019), p. 179.

³⁴ *Ibid.*

³⁵ Hehir, *supra* note 28.

³⁶ Stahn, *supra* note 33, p. 179.

³⁷ SITF, *Statement of the Chief Prosecutor of the Special Investigative Task Force*, 1, 29 July 2014 (SITF Statement), p. 7.

NISMA,³⁸ to be engaged in criminal activities after the end of war by capturing Kosovo state's apparatus and exploiting its resources and institutions for personal and political gain.³⁹ The work of the SPO and KSC might demonstrate that there is a direct link between the crimes committed by certain high-level KLA commanders during the armed conflict in Kosovo and the state organised crimes they subsequently committed while being in political power.⁴⁰ It remains to be seen however whether this could have the effect of delegitimising certain political elites. Scepticism is warranted, when looking at the examples of other prominent defendants coming from former Yugoslavia such as Milošević and Šešelj who continued to be regarded as national heroes despite them being on trial. They used their trials as a stage to portray themselves as martyrs and presented 'Serbs as the ultimate victim group'.⁴¹ It seems entirely plausible that future suspects and accused before the KSC will adopt a similar narrative and portray themselves as the heroes who liberated Kosovo from Serb oppression.

4 The Distance between the SPO, KSC and Kosovo

In his book *Distant Justice*,⁴² Phil Clark argues that the many setbacks the International Criminal Court (ICC) has been facing in Africa fifteen years after opening its first investigation can be traced to the many manifestations of what he calls 'distant justice'. Clark asserts in his book that The Hague's geographical remoteness, the ICC's political and philosophical detachment from African societies as well as the Court's demographic distance in terms of who investigates, prosecutes and judges has produced negative effects both for the ICC and the countries where it intervenes.⁴³ These criticisms levelled against

38 Each PDK (Kadri Veseli), AAK (Ramush Haradinaj) and NISMA (Fatmir Limaj) are led by former KLA commanders.

39 Aidan Hehir, Student Feature-Spotlight on Kosovo's "Special Court", *E-International Relations Students*, 10 August 2019, www.e-ir.info/2019/08/10/student-feature-spotlight-on-kosovos-special-court/, accessed 29 December 2019; Michael Dziedzic, Laura Mercean and Elton Skendaj, 'Kosovo: The Kosovo Liberation Army', in Michael Dziedzic (ed.), *Criminalized Power Structures: The Overlooked Enemies of Peace* (Rowman & Littlefield, London, 2016), p. 344.

40 Henri Decoeur, *Confronting the Shadow State: An International Law Perspective on State Organized Crime*, (Oxford University Press, Oxford, 2018), p. 30.

41 Stahn, *supra* note 33, p. 177.

42 Phil Clark, *Distant Justice* (Cambridge University Press, Cambridge, 2018), 379p.

43 Patryk I. Labuda and Thijs B. Bouwknegt, 'Symposium on Phil Clark's 'Distant Justice'', *OpinioJuris*, opiniojuris.org/2019/09/30/symposium-on-phil-clarks-distant-justice,

the ICC are echoed with regards the distance between the SPO & KSC and Kosovo. Aidan Hehir has argued that '... despite the need for local legitimacy and local ownership being arguably the most widely avowed 'lesson' from previous international courts and tribunals, in this article, I argue that the KSC was established in the absence of both'.⁴⁴ Similarly, Alison Smith notes concerning international courts or tribunals seated outside the country such as the ICTY, the ICC and the KSC that '... it has to work extra hard to make itself known, to make itself relevant and to build the trust required for cooperation, whether of the State authorities, local actors or witnesses'.⁴⁵ Carsten Stahn held that the 'absence of domestic judges has downsides in terms of diversity of expertise and local expertise'.⁴⁶ Albin Kurti expressed similar sentiments when he stated the following during a policy forum: 'We got our special court. I believe what we are missing is not being special, but rather being normal. We need normal courts, we need normal justice'.⁴⁷ While local courts are arguably preferable in terms of domestic legitimacy and perception, the question is whether 'normal courts' in Kosovo could have in any way realistically dealt with the allegations in the Marty and SITF reports, knowing that Kosovo's state institutions have been captured by political elites with very close links to the KLA.⁴⁸ The judiciary in Kosovo has been labelled as 'by far the weakest component of the legal system ...' and the 'perception is that the court system is corrupt, unresponsive to the public, and incapable of indicting well-connected and dangerous political-criminals'.⁴⁹ In fact, one could explain the bleak track record of EULEX regarding high-profile cases involving the adjudication of war crimes and crimes against humanity and its failure to guarantee adequate witness protection⁵⁰ by the fact that it became too deeply ingrained within Kosovar judiciary and society more broadly. As Aidan Hehir describes in his article, 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

accessed 4 January 2020; M. Drumbl, 'Distant Justice Symposium: Some Thoughts on Getting Close', *OpinioJuris*, opiniojuris.org/2019/10/03/distant-justice-symposium-some-thoughts-on-getting-close/, accessed 4 January 2020.

44 Hehir, *supra* note 10, p. 269.

45 Smith, *supra* note 17.

46 Stahn, *supra* note 33, p. 207.

47 Eve-Anne Travers, 'The 'specter' of the Special Court hangs over Kosovo', *Prishtina Insight*, prishtinainsight.com/the-specter-of-the-special-court-hangs-over-kosovo/, accessed 5 January 2020.

48 Dziedzic et al., *supra* note 39, pp. 174, 183.

49 *Ibid.*, p. 194.

50 Holvoet, *supra* note 18, p. 41.

in EULEX.⁵¹ The reason EULEX was refraining to pursue high profile cases was due to outright fear of a violent reaction by the elite⁵² or apparent bribes being paid to judges in order not to proceed with certain cases, leading some commentators to conclude: 'Instead of Europeanizing Kosovo, we have Balkanized EULEX'.⁵³ Thus, it seems that the *lack* of geographical, philosophical, political and demographic distance of EULEX from Kosovo is the reason for the failure of the mission to investigate and prosecute individuals with a KLA affiliation, some of them having become influential politicians. Bearing this in mind, the 'distant' character of the SPO and KSC, in terms of location, composition, structure and the law it will apply is justifiable exactly to guard against the factors, most notably political interference and witness intimidation, that impacted adversely on EULEX's attempts to pursue high-profile war crimes and crimes against humanity cases.⁵⁴ Aidan Hehir is right to argue that it cannot be assumed that the SPO and the KSC will not face a similar fate as EULEX; indeed it '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'.⁵⁵ Nonetheless, the probability of the SPO and the KSC to be implicated in domestic political machinations seems less likely due to their distance from Kosovar society and early appraisals of the work of the SPO and KSC, especially in relation to witness protection, have been positive.⁵⁶ However, while distance between the SPO and the KSC on the one hand and Kosovo on the other hand is to an important extent inevitable and even advisable, it should not be equated with detachment and disinterest. Multiple actions can be thought of that would make the KSC and SPO visible, open to communicate and fully and correctly informed about the complex, volatile and sensitive environment they must operate in. These could include establishing field offices in both Kosovo and Serbia, hiring staff with field experience in Kosovo, engaging region experts as consultants, trainers and witnesses and engaging local staff to assist with translations and language issues, which often

51 Hehir, *supra* note 28.

52 Dziedzic et al., *supra* note 39, p. 181.

53 Valerie Hopkins, 'EU courts trouble with Kosovo scandal', *Politico*, 21 November 2017, www.politico.eu/article/malcolm-simmons-eulex-eu-courts-chaos-with-kosovo-scandal/, accessed 5 January 2020.

54 Hehir, *supra* note 28.

55 *Ibid.*

56 Serbeze Haxhijaj, 'Kosovo War Court Shields Fearful Witnesses against Intimidation', *Balkan Insight*, balkaninsight.com/2019/03/04/kosovo-war-court-shields-fearful-witnesses-against-intimidation, accessed 5 January 2020.

facilitates, *inter alia*, advice on custom and cultural sensitivities and systematically monitoring local conventional and social media.⁵⁷

5 Waiting for Indictments: Are the SPO and KSC Becoming Ghost Institutions?

More than four years after adoption of the law instituting the SPO and the KSC, the first indictment remains to be filed. Due to this perceived lack of activity, both Kosovar Albanians and Kosovar Serbs have grown increasingly dismissive about the SPO and the KSC.⁵⁸ It is understandable that such questions are raised, especially because Clint Williamson already declared in 2014 that '... we believe that SITF will be in a position to file an indictment against certain senior officials of the Kosovo Liberation Army'.⁵⁹

Nonetheless, any concern or criticism about the delay in issuing indictments by the SPO seems premature for various reasons. The SPO is a different entity than the SITF, and as Matthew Cross notes, it 'may have taken a further hard look at the case(s) identified, and the supporting evidence, before taking further action' and it is not an option to '... put criticality aside ...'.⁶⁰ Further, Cross is right to underline the unusually difficult task the SPO is mandated with. Just as the ICTY and EULEX, which attempted to prosecute KLA defendants, the SPO and KSC may be confronted with substantial barriers to their work.⁶¹ Clint Williamson already described his investigation encountering 'significant challenges' including a 'climate of witness intimidation' and 'active efforts to undermine' the investigation 'by interfering with witnesses'.⁶² There are no indications that the task is any less challenging for the SPO after it took over the work of the SITF in 2016, especially given the unpopularity of the SPO and the KSC within Kosovo. In his speech after leaving as Specialist Prosecutor, David Schendiman held that '[g]athering documentation, locating witnesses, finding other material that may have evidentiary value is more fraught in our

57 Xabier Agirre Aranburu, 'Distant Justice Symposium: Measuring Distances – A Response to the Book "Distant Justice" by Phil Clark', *OpinioJuris*, opiniojuris.org/2019/10/02/distant-justice-symposium-measuring-distances-a-response-to-the-book-distant-justice-by-phil-clark/, accessed 5 January 2020; Hehir, *supra* note 10, p. 284; Smith, *supra* note 17.

58 Haxhijaj, *supra* note 7.

59 SITF, 'Statement of the Chief Prosecutor of the Special Investigative Task Force', 1, 29 July 2014 (SITF Statement), p. 1.

60 Cross, *supra* note 25.

61 *Ibid.*

62 SITF, *supra* note 59, p. 5.

case, requiring patience and perseverance as well as diplomacy,' and he further stressed that '[i]t will take more time to do it all and do it well'.⁶³ In this respect, it is important to stress that the SPO 'will have to provide the entire case against a suspect and disclose all the potentially exculpatory evidence to the defendant almost from the beginning'.⁶⁴ As Michael Karnavas' article analyses in depth, contrary to other RPES of other international(ised) criminal tribunals, the KSC RPE imposes an obligation to the SPO at the confirmation stage and at the pre-trial stage to demonstrate with sufficient specificity how the evidence it is relying on in charging and prosecuting the accused links to each crime and each mode of liability alleged in the indictment.⁶⁵ Thus, the KSC RPE puts a significant weight on the shoulders of the SPO in terms of burden of proof. The SPO only became aware of these prosecutorial obligations at the end of March 2017, which is when the Plenary Meeting of Judges of the Kosovo Specialist Chambers adopted the KSC RPE.⁶⁶ These factors make it definitely more understandable that in early January 2020, the time of writing of this editorial, the first indictment remains to be filed by the SPO. Nonetheless, while patience is advisable, Matthew Cross is right to assert that 'the SPO must be careful not to miss its moment, and earn in the nickname of a 'ghost court''.⁶⁷

The fact that over 200 ex-KLA members have been summoned by the SPO has also been met with a certain degree of suspicion and scepticism. Aidan Hehir for instance has held that the main reason behind the summons is to 'serve as a reminder of the court's existence'.⁶⁸ Nonetheless, it seems more reasonable to assume that the reason behind the summons is also the obligation of the SPO under the KSC RPE to compile the indictment with a great degree of specificity, for example with regards to the alleged mode of liability in relation to the crime(s) charged and the evidentiary material relied upon to substantiate the allegations. A plausible explanation behind the summons of ex-KLA members as witnesses could be the aspiration of the SPO to establish

63 Speech by Specialist Prosecutor David Schwendiman, *supra* note 22, 19–20.

64 Stephanie van den Bergh and Amra Zejneli, 'Kosovo Specialist Chambers: Gearing up for Uncomfortable Truths', *Justiceinfo.net*, 12 July 2019, www.justiceinfo.net/en/tribunals/mixed-tribunals/41921-kosovo-specialist-chambers-gearing-up-for-uncomfortable-truths.html, accessed 4 January 2020.

65 Karnavas, *supra* note 23.

66 KSC&SPO, 'Judges Adopt Rules of Procedure and Evidence', 28 March 2017, www.scp-ks.org/en/judges-adopt-rules-procedure-and-evidence, accessed 4 January 2020.

67 Cross, *supra* note 25.

68 Plator Gashi and Eve-Anne Travers, 'Two former KLA members summoned by the Special Prosecutor's Office', *Prishtina Insight*, prishtinainsight.com/two-former-kla-members-summoned-by-the-special-prosecutors-office/, 11 December 2018, accessed 4 January 2020.

the KLA's organisational structure and chain of command. The experience of the ICTY with prosecuting KLA accused has demonstrated that it is essential to get a detailed overview of the KLA's chain of command to establish the criminal responsibility of former KLA members beyond reasonable doubt. More specifically, the ICTY acquitted former KLA commanders Ramush Haradinaj and Fatmir Limaj because the ICTY prosecution failed to prove beyond reasonable doubt the chain of command which would have allowed the judges to connect the accused commanders of the zones and units of the KLA with the direct perpetrators of crimes against Albanian, Serbian and Roma civilians.⁶⁹

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69 SENSE – Transitional Justice Center, 'The Kosovo Case, 1998–1999. How the Crimes in Kosovo Were Investigated, Reconstructed and Prosecuted', kosovo.sense-agency.com, accessed 4 January 2020.