FORCED JUSTICE: THE KOSOVO SPECIALIST CHAMBERS

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The Kosovo Specialist Chambers (KSC), the court created to adjudicate war crimes and crimes against humanity committed in Kosovo at the turn of the century, is the world’s newest hybrid tribunal. The KSC is classified as a hybrid tribunal because it ostensibly blends aspects of international and domestic law and resources. Upon examination, however, the KSC departs in critical ways from the traditional concept of a hybrid tribunal, representing an internationally dominated court with minimal local involvement. By detailing the history of judicial mechanisms employed to prosecute crimes committed during and in the aftermath of the Kosovo War from 1998-1999, this Article examines how the international community has commandeered Kosovo’s justice system, often at the expense of the Kosovar people’s wants and needs. This Article argues that the KSC, the international community’s latest attempt to prosecute these crimes, represents a new breed of overtly internationalized hybrid tribunal that subverts the goals inherent in the hybrid model of prosecution, namely the ability to provide local ownership over proceedings, facilitate legitimacy and capacity building of judicial personnel and infrastructure, and provide transitional justice measures to post-conflict communities.

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I. INTRODUCTION

Since the Kosovo War at the turn of the century, Kosovo has been molded by Western powers. In the last two decades, as it has struggled to prove itself as a globally recognized independent nation, powerful countries such as the United States and organizations like the United Nations (UN) and the European Union (EU) have pressured the fledgling state into operating in ways that promote their own interests. One area in which this external pressure is most evident is achieving justice for war crimes and crimes against humanity committed during and immediately after the 1998–1999 Kosovo War. To date, four different internationally operated judicial mechanisms have worked to investigate and prosecute crimes committed during this period of violence. The most recent, the Kosovo Specialist Chambers (KSC), evidences the extent to which international organizations are driving justice at the expense of the wants and needs of the Kosovar people.

Kosovo, previously an autonomous province within Serbia, has long shared a tenuous relationship with its former sovereign. Throughout the

1. See GÎZIM VISOKA, ASSESSING THE POTENTIAL IMPACT OF THE KOSOVO SPECIALIST COURT 13–16 (2017) (discussing the evolution of criminal justice mechanisms dedicated to the prosecution of crimes committed in the Kosovo War, from the International Criminal Tribunal for the former Yugoslavia; two sets of hybrid courts operated by the UN Interim Administration Mission in Kosovo (UNMIK) and the subsequent EU Rule of Law Mission in Kosovo (EULEX); to, most recently, the KSC).
2. See Todd Carney, Deal or No Deal? International Influence and the Serbia-Kosovo Conflict,
1980s, Kosovo sought greater self-governance measures and recognition as an independent republic, and in the 1990s, with the rise of the Kosovo Liberation Army (KLA), it began resorting to armed violence to achieve independence. In March 1999, the Serbian police and military, under the command of Serbian President Slobodan Milošević, launched a military offensive and campaign of ethnic cleansing against Kosovo’s ethnic Albanian population. The conflict ultimately culminated in a NATO air campaign conducted between March 24 and June 10, 1999, which eventually prompted the conflict’s resolution. By its conclusion, more than 13,535 people were dead, the vast majority of whom were Kosovar Albanians; more than 1.5 million ethnic Albanians—amounting to 90 percent of the Kosovar Albanian population—had been displaced.

Following the conflict, the UN and EU led the charge to prosecute crimes committed during the Kosovo War by establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY), a UN-funded and sourced ad hoc international criminal tribunal, and two subsequent mixed judicial mechanisms that blended Kosovar resources with those provided by the UN Mission in Kosovo (UNMIK) and later the EU Rule of Law Mission in Kosovo (EULEX). Each of these courts encountered similar problems...
including witness tampering, political interference from the Kosovo Government, and a general lack of legitimacy in the eyes of the Kosovar people, causing the courts to achieve fewer tangible results than anticipated.  

In 2015, under significant pressure from the EU and other Western powers, including the United States, the Assembly of Kosovo amended the Kosovo Constitution to create the KSC and its prosecutorial unit, the Specialist Prosecutor’s Office. The Court’s creators intended the KSC, like the courts that came before it, to prosecute and adjudicate “international crimes committed during and in the aftermath of the conflict in Kosovo.” Unlike the predecessor courts, however, the crimes within the KSC’s jurisdiction pertain primarily to post-war crimes committed by the KLA as part of an alleged “campaign of persecution” against Serbs, Serb sympathizers, and others deemed political opponents. In creating the KSC, both the EU and the United States intended for the Court to achieve justice for the KLA’s unpunished crimes, as well as to strengthen the rule of law and promote reconciliation within Kosovo. Yet the Court’s structure and composition present significant concerns as to the possibility of achieving these goals.

The KSC is regularly represented as a hybrid tribunal, meaning that it

9. The respective and collective challenges faced by these three courts will be discussed at length later in this article. See infra Section III.
11. Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 1(2) (Kos.).
combines aspects of international and domestic justice.\textsuperscript{15} Despite the amorphous definition of the term “hybrid tribunal,”\textsuperscript{16} this judicial model generally aims to incorporate involvement of state actors and victims with international oversight to achieve justice for grave crimes and periods of mass violence. To do so, hybrid tribunals typically employ local judges, lawyers, and staff and sit within the state that they are designed to serve.\textsuperscript{17} The KSC lacks many of the typical characteristics that render a court a hybrid tribunal.\textsuperscript{18} While it is a product of and applies—in part—Kosovo law,\textsuperscript{19} it is dominated by international features, with marginal local involvement. Despite its title, the KSC is seated in The Hague, thousands of miles from Kosovo and neighboring Albania, where the crimes within its mandate were committed.\textsuperscript{20} Both the KSC and its prosecutorial unit, the Specialist Prosecutor’s Office, are staffed exclusively with international judges, counsel, and staff,\textsuperscript{21} and the Court is funded primarily by the EU, “with no financial implications for Kosovo.”\textsuperscript{22}

Complementing the excessively internationalized nature of the KSC, the creation of the Court was driven nearly exclusively by international

\begin{itemize}
\item \textsuperscript{16}Higonnet, supra note 15, at 356 (recognizing that the “precise definition” of hybrid tribunals is still evolving); Harry Hobbs, \textit{Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy}, 16 \textit{CHI. J. INT’L L.} 482, 491 (2016) (acknowledging that hybrid courts “defy simple definition”).
\item \textsuperscript{17}Beth Van Schaack, \textit{The Building Blocks of Hybrid Justice}, 44 \textit{DENV. J. INT’L L. & POL’Y} 169, 172 (2016) (recognizing that traditional characteristics of hybrid tribunals include location within the “target state” and a mixed composition of international and domestic personnel).
\item \textsuperscript{18}Carsten Stahn, \textit{Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity}, \textit{EJIL:TALK!} (Sept. 23, 2016), https://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/ (recognizing the KSC as a “variation[] on the theme” of hybrid tribunals).
\item \textsuperscript{19}Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 3(1) (Kos.).
\item \textsuperscript{20}See generally Agreement Between the Kingdom of the Netherlands and the Republic of Kosovo Concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands, Neth.-Kos., Feb. 15, 2016, Trb. 2016, 27 [hereinafter Host Agreement] (agreeing that the Kosovo Specialist Chambers will be hosted in the Netherlands).
\item \textsuperscript{21}See Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 28 (Kos.); Sarah Williams, \textit{The Specialist Chambers of Kosovo: The Limits of Internationalization?}, 14 J. INT’L CRIM. JUST. 25, 35 (2016) (noting that the Specialist Chambers and Specialist Prosecutor’s Office will be “staffed entirely by international personnel, from judges to investigators and interpreters”).
\item \textsuperscript{22}Robert Muharremi, \textit{The Kosovo Specialist Chambers and Specialist Prosecutor’s Office}, 76 \textit{ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [J. FOREIGN PUB. L. & INT’L L.]} 967, 987 (2016) (Ger.).
\end{itemize}
powers.\textsuperscript{23} International actors have long taken a significant interest in Kosovo’s affairs and—having dedicated substantial time, resources, and hundreds of millions of dollars in funds to the country—would now view a failure to achieve comprehensive justice in Kosovo as a political disappointment and a publicity nightmare.\textsuperscript{24} Moreover, as scholar Robert Muharremi has recognized, establishing the KSC as an “internationally controlled ‘national’ court” allows NATO member states like the United States and EU states to dictate the Court’s jurisdictional reach to avoid potential prosecution of NATO crimes committed during the Kosovo War.\textsuperscript{25}

However, the goals of these international powers conflict with those held by the Kosovo Government and the Kosovar people. At the time of the KSC’s creation, the idea for an internationalized court that would primarily prosecute KLA members failed to garner support within Kosovo,\textsuperscript{26} and instead sparked protests.\textsuperscript{27} Many Kosovo Assembly members and other state leaders—some of whom are former KLA members themselves—advocated openly against the creation of the Court and ultimately only consented to the KLA’s creation as a result of “great pressure from the international community.”\textsuperscript{28}

By structuring the KSC to minimize local Kosovar involvement, the KSC’s creators aimed, in part, to minimize the very real threat of political interference and witness tampering—critical issues that have plagued prior courts devoted to prosecuting crimes committed in Kosovo.\textsuperscript{29} Yet, at the same time, the internationalization of the Court cuts the Kosovar people out of the justice process and undermines many of the essential goals of hybrid

\textsuperscript{23} Hehir, The Assumptions, supra note 10, at 26.

\textsuperscript{24} Id. at 23 (explaining that because “the West has invested significant political capital in Kosovo,” “[s]ince 1999 . . . Kosovo’s fate has been linked to Western prestige,” and that “a return to ethnic violence in Kosovo would naturally be widely seen as evidence that the West’s state building efforts ‘failed’”); see also MARTIN RUSSELL, SERBIA-KOSOVO RELATIONS: CONFRONTATION OR NORMALISATION? 2–3 (2019) (detailing the EU’s role in normalizing Serbia-Kosovo relations, and noting that the EU has served as Kosovo’s largest aid donor); European Neighbourhood Policy and Enlargement Negotiations, EUR. COMM’N, https://ec.europa.eu/neighbourhood-enlargement/instruments/funding-by-country/kosovo_en (last visited Jan. 9, 2020) (representing the EU’s allocation of 602.1 million in funds for financial assistance to Kosovo, intended to support a number of “priority sectors” in the nation, including “democracy and governance” and “rule of law and fundamental rights”).

\textsuperscript{25} Robert Muharremi, The Kosovo Specialist Chambers from a Political Realism Perspective, 13 INT’L J. TRANSITIONAL JUST. 290, 303 (2019).

\textsuperscript{26} Hehir, The Assumptions, supra note 10, at 26–27.

\textsuperscript{27} Id. at 21.

\textsuperscript{28} Id. at 27 (quoting Special Court for KLA crimes ‘Cannot be Abolished’ – Thaci, B92 (Feb. 1, 2018, 5:03 PM), https://www.b92.net/eng/news/politics.php?yyyy=2018&mm=02&dd=01&nav_id=103403).

\textsuperscript{29} Hehir, The Assumptions, supra note 10, at 25.
tribunals. The Court has effectively replaced the Kosovar people’s calls for justice with the objectives of the international community. Moreover, the KSC presents a risk of future unfettered internationalization of hybrid tribunals that could undermine state objectives as well as the many goals of hybrid prosecution.

The stakes for the KSC are high, both with regard to the future of Kosovo—a somewhat volatile nation-state—and for the future of international criminal justice. The KSC begins its operations when Kosovo is in the midst of a concerted effort to normalize its relations with its neighbor and previous sovereign, Serbia, in attempts to obtain EU membership. At the same time, the field of international criminal law is only just hesitantly returning to the use of hybrid tribunals to prosecute mass atrocities. This Article argues that permitting powerful states and international organizations to monopolize hybrid tribunals sets a dangerous precedent that threatens the objectives and legitimacy of hybrid courts and jeopardizes the future of the hybrid model of international prosecution.

Part II explains the typical structure and goals of hybrid tribunals and situates them in the landscape of international criminal justice. Part III provides a comprehensive overview of the origins of the KSC while tracing the multiple efforts by the EU, the UN, and the international community at large to investigate and prosecute internationally recognized crimes committed during the Kosovo War. In doing so, it shines particular light on challenges faced by the ad hoc ICTY, as well as the subsequent two internationally-sponsored hybrid courts dedicated exclusively to prosecuting crimes committed in Kosovo: the United Nations Mission in Kosovo (UNMIK) Regulation 64 Panels and the courts established by the European Union Rule of Law Mission in Kosovo (EULEX).

Part IV then explains the circumstances that led to the creation of the KSC and the Specialist Prosecutor’s Office, as well as the KSC’s organization and the characteristics that render it an international court, and decidedly less so a hybrid tribunal. Part V concludes by arguing that creating the KSC as an internationalized hybrid tribunal with minimal local input was improper. The circumstances in Kosovo, a nascent nation approximately


31. See Dakar Guidelines, supra note 15, at 3 (noting that since 2014, the hybrid model has “once again emerged as a popular response to mass atrocities”); Hehir, The Assumptions, supra note 10, at 17–18 (noting that the KSC represented to some a “new appetite” for hybrid tribunals).
twenty years removed from the crimes subject to prosecution, rendered a hybrid tribunal inefficient from the start. Structuring the KSC to preclude local involvement also undermines the widely recognized goals of hybrid tribunals, such as the ability to provide local ownership, capacity building and transitional justice initiatives, and stability within Kosovo and the greater region. Finally, the Article considers the potential consequences the internationalization of the KSC may have on the future of hybrid tribunals and the threat this may pose to the hybrid model moving forward.

II. AN OVERVIEW OF HYBRID TRIBUNALS

While a general preference exists for domestic courts to prosecute crimes committed within their territory or by their nationals, following periods of prolonged violence or human rights abuses, domestic prosecution is often impossible. For one, domestic courts in post-conflict states often lack sufficient capacity—in terms of personnel and infrastructure—to conduct fair or effective trials. Likewise, domestic court judges and personnel may themselves have ties to, or be under the influence of, the regime responsible for some or all of the atrocities committed during the violent period. Accordingly, in post-conflict states, domestic prosecution is oftentimes highly unlikely or altogether impossible. While international courts—such as the ad hoc tribunals and the International Criminal Court (ICC)—were created in part to limit impunity for atrocity crimes that went unpunished by domestic courts, these international courts have often presented their own concerns, including a lack of local involvement, prolonged and lengthy proceedings, and significant budgets. The concept of hybrid courts thus emerged in the late 1990s and early 2000s to address the concerns of the purely international courts, and to offer yet another means for prosecuting crimes that fall outside the jurisdiction or prosecutorial selection of the ICC, as well as those that would otherwise meet impunity as a result of a domestic failure to prosecute.

The hybrid model of prosecution is often referred to as the “third generation” of international criminal courts, following the initial

34. Id.
35. Id.
36. McAuliffe, supra note 3215, at 11; Higonnet, supra note 15, at 347.
37. Higonnet, supra note 15, at 349; Ochs, supra note 32, at 393.
international tribunals at Nuremberg and Tokyo and the subsequent ad hoc criminal tribunals created to prosecute the atrocities in Rwanda and the Former Yugoslavia.38 Through hybrid courts, the international community intended to create a new form of adjudication that would blend elements of local and international legality, so as to foster local ownership and legitimacy and to return proceedings—at least in part—to the affected states.39

Hybrid courts were initially intended to: be located in the state in which the crimes within their mandate had occurred; employ state judges, lawyers, and personnel in addition to their international counterparts; and engage in more effective on-the-ground outreach that could easily be adapted to the circumstances of the affected state.40 These features would theoretically provide the affected state with a new level of ownership over the justice process that was lacking in the previous international courts, and would correspondingly carry greater opportunities for establishing legitimacy among local communities.41 International actors predicted that this legitimacy would fuel additional successes for hybrid courts in post-conflict states insofar as cultivating an appreciation for the rule of law, contributing to capacity building for local legal communities, and fostering reconciliation and stability.42 Essentially, the hybrid model sought to combine the best of both worlds: local ownership and legitimacy with international expertise and oversight.43

41. See Hobbs, supra note 16, at 492; see also Raub, supra note 40, at 1044 (“Involvement by the national judiciary and domestic personnel imparts a sense of local ownership to the tribunal’s work, which usually increases accessibility, accountability, and perceived legitimacy for the local, affected community.”).
42. See Padraig McAuliffe, supra note 32, at 7–8 (explaining that the “mixed nature of hybrid courts offered possibilities which hitherto had not existed,” such as capacity-building and norm penetration); Jennifer Trahan, Views of the Future of the Field of International Justice: A Scenarios Project Based on Expert Consultations, 33 Am. U. Int’l L. Rev. 837, 883 (2018) (listing the “factors cited for supporting the creation of added hybrid tribunals,” many of which are tied to legitimacy).
With these goals in mind, between 2000 and 2007, the international community created a number of hybrid tribunals, including the UNMIK Regulation 64 Panels and EULEX Courts in Kosovo, as well as courts in East Timor, Sierra Leone, Cambodia, Bosnia, and Lebanon. Each of these courts varied significantly in their design and means of establishment and represented a varying balance of national and international interests. Among these initial hybrid tribunals, scholars acknowledge two general categories: the “internationalized domestic courts” and the “international tribunal[s] with domestic elements.” The former category includes courts placed within the domestic judicial system of the target state, such as the Regulation 64 Panels and the Extraordinary Chambers in the Courts of Cambodia, which tend to lean towards the domestic end of the hybrid spectrum, while the latter category refers to highly internationalized courts with minimal domestic connections, such as the Special Tribunal for Lebanon.

Neither category of hybrid court has found itself immune from difficulties. The courts on the domestic end of the hybrid spectrum have encountered common challenges such as political interference in judicial proceedings. Those courts on the internationalized end of the spectrum, however, have lacked a connection to the local population and have been locally perceived as imposing unwanted international objectives on domestic justice. For instance, Lebanese critics of the Special Tribunal for Lebanon—arguably the most internationalized hybrid court prior to the KSC—described the Tribunal as a means for “world powers to play out their

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46. Muharremi, supra note 22, at 989; see also Nielsen, supra note 45, at 325 (recognizing the two ends of the hybrid spectrum as a “domestic system with limited international features” and “a mainly international tribunal with a few national elements”).
47. STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 247 (3d ed. 2009) (noting that the Special Court for Sierra Leone views itself as an “international institution” independent of the Sierra Leonean judicial system).
48. See id. at 253 (explaining that the Cambodian hybrid tribunal suffered from political pressures exerted by the Cambodian government, but that the Special Court for Sierra Leone, which remained removed from the Sierra Leonean legal system “maintained near complete freedom of action”).
49. See Reem Salahi & Bachar El-Halabi, The Limits of The Special Tribunal for Lebanon and What Syrians Can Learn, ATL. COUNCIL (Sept. 16, 2020), https://www.atlanticcouncil.org/blogs/menasource/the-limits-of-the-special-tribunal-for-lebanon-and-what-syrians-can-learn/ (arguing that the Special Tribunal has failed to make notable change within Lebanon by failing to incorporate local involvement or transitional justice into their judicial process).
strategies.\textsuperscript{50}

The challenges faced by both the domesticated and internationalized hybrid courts have produced “decidedly mixed” results for the hybrid model.\textsuperscript{51} The relatively large number of hybrid tribunals created over a short period and their failure to achieve the idealistic goals set led many in the international community to experience a feeling of “tribunal fatigue.”\textsuperscript{52} As a result, for seven years, between 2007 and 2014, the international community did not establish any new hybrid courts.\textsuperscript{53} However, the international community has recently become reenergized about hybrid tribunals, and the creation of the KSC, along with proposals for hybrid courts to prosecute mass atrocities in Syria, Sri Lanka, and Malaysia, demonstrate a cautious return to the hybrid model.\textsuperscript{54}

At a time when a number of high-profile state-sponsored mass atrocities, such as those committed in China and Syria, are falling outside of the jurisdiction of the ICC,\textsuperscript{55} the hybrid model represents a great opportunity to address impunity for these crimes. However, given the past challenges and failings encountered by the hybrid model of prosecution, much hinges on the success of the newly created hybrid courts, including the KSC, to validate the hybrid model as a successful method of prosecuting atrocity crimes.

III. TIMELINE OF JUSTICE IN KOSOVO

This section explores the evolution of justice in Kosovo for crimes committed in the context of the Kosovo War. Specifically, it will trace the background, operations, and legacy of three internationally-created judicial mechanisms designed to investigate and prosecute these crimes: the ICTY, the UNMIK Regulation 64 Panels, and the EULEX Courts.


\textsuperscript{51} Hehir, \textit{The Assumptions}, supra note 10, at 17–18.

\textsuperscript{52} Id. at 18.

\textsuperscript{53} Hobbs, supra note 16, at 485 & n.8 (recognizing this time as a “period of dormancy” for hybrid courts).

\textsuperscript{54} \textit{DAKAR GUIDELINES}, supra note 15, at 1.

\textsuperscript{55} \textit{See} OFF. OF THE PROSECUTOR, INT’L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶¶ 70–76 (2020) (setting forth the International Criminal Court Prosecutor’s decision not to proceed with an investigation into allegations that Chinese officials have committed genocide and crimes against humanity against Uyghur Muslims due to a lack of jurisdiction over these alleged crimes); Milena Sterio, \textit{Sequencing Peace and Justice in Syria}, 24 ILSA J. INT’L & COMP. L. 345, 355–56 (2018) (noting that the ICC would be of “limited utility” in prosecuting atrocities committed in Syria due to jurisdictional complications stemming from Syria’s lack of membership to the Rome Statute).
A. The International Criminal Tribunal for the Former Yugoslavia

The United Nations Security Council established the ICTY under its Article VII powers in 1993 to prosecute egregious crimes committed during the multiple conflicts in the Balkans in the 1990s. The ICTY’s establishment marked the first war crimes tribunal created since the Nuremberg and Tokyo Tribunals, which were established nearly fifty years prior. The Security Council’s goal in creating the ICTY was to put an end to the ongoing crimes in the Balkans and “to contribute to the restoration and maintenance of peace.”

1. The ICTY’s Mandate, Jurisdiction and Proceedings

The ICTY Statute served as the Court’s originating document and granted it jurisdiction over war crimes, crimes against humanity, and genocide committed in the Former Yugoslavia. The Statute specifically bestowed the ICTY with jurisdiction over these crimes committed during and following January 1991, and left its temporal jurisdiction open-ended. While the Statute granted the ICTY and domestic courts concurrent jurisdiction to prosecute crimes within the ICTY’s Mandate, it determined that the ICTY would have primacy over domestic courts, including the power to request that domestic courts transfer a case to the ICTY at any stage of proceedings.

On paper, the ICTY Mandate allowed for the investigation and prosecution of crimes committed during the Kosovo War, and the ICTY Prosecutor issued several press releases as early as March 1998 affirming the Tribunal’s ability to hear these cases. However, Serbian President

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57. Id.
60. Id. art. 8.
61. Id. art. 9.
Slobodan Milošević stridently refused to accept the ICTY’s claim of jurisdiction over events that were taking place in Kosovo in 1998 and early 1999. At his behest, Serbian authorities made the ICTY’s investigations into crimes committed in Kosovo nearly impossible by revoking visas of ICTY members and refusing to allow the ICTY Prosecutor to enter Kosovo. Largely in light of these challenges, in 1999, the ICTY Prosecutor made clear that the ICTY would not serve as “the primary investigative and prosecutorial agency for all criminal acts committed on the territory of Kosovo.” Instead, the Prosecutor declared that the ICTY would only prosecute individuals who held leadership positions during and alleged perpetrators of particularly serious crimes related to the Kosovo War. She further directed that all other crimes related to the Kosovo War should be investigated and prosecuted by UNMIK, the UN’s transitional government in Kosovo.

Despite the Prosecutor’s 1999 statement, the Office of the Prosecutor did pursue two cases involving atrocities committed during the Kosovo War by Kosovar nationals. First, in the Limaj Case, the ICTY Prosecutor filed indictments against three alleged former KLA members: Fatmir Limaj, Haradin Bala, and Isak Musliu. The Prosecutor charged the three men with various war crimes and crimes against humanity, including imprisonment, torture, and murder. These charges stemmed from allegations that they detained, tortured, and killed Kosovar civilians—including both ethnic Serbs and Albanians—who they deemed to be Serbian collaborators at a
prison camp in Kosovo during the Kosovo War.\textsuperscript{71} In 2005, the Trial Chamber found Limaj and Musliu not guilty of all charges.\textsuperscript{72} It convicted the remaining accused, Bala, of the war crimes of torture, cruel treatment, and murder and sentenced him to thirteen years in prison.\textsuperscript{73}

Then, in the \textit{Haradinaj} Case, the ICTY Prosecutor indicted three additional former KLA members for war crimes and crimes against humanity stemming from allegations that the men raped, murdered, and tortured civilians, primarily ethnic Serbs and those deemed Serb sympathizers, while conducting a military operation to drive ethnic Serbs out of villages in the Dukagin Zone of Kosovo.\textsuperscript{74} Following an initial trial and a re-trial, the Trial Chamber found all three men—Ramush Haradinaj, Idris Balaj, and Lahi Brahimaj—not guilty on all counts in the indictment.\textsuperscript{75}

2. The ICTY’s Transition and Legacy

At the conclusion of its mandate, the ICTY had indicted 161 individuals for crimes committed during the Balkan Wars and convicted and sentenced 91.\textsuperscript{76} By the time it closed its doors in 2017, in addition to delivering justice for victims, the ICTY had also made significant contributions to the development of international criminal law.\textsuperscript{77} However, its legacy was blemished by unnecessarily long trials and proceedings, the incurrence of significant expenses that far exceeded the Court’s budget, limited cooperation from state authorities, a failure to involve victims in the justice process, and problems with witness protection, among other
shortcomings. With regard to accountability for crimes committed by Kosovar defendants, the ICTY’s legacy was particularly underwhelming. It had indicted only a handful of KLA defendants and had acquitted almost all of them. Moreover, the majority of people living within the Former Yugoslavia refused to accept the ICTY’s judgments as legitimate, largely due to a lack of ownership in the judicial process, as well as the fact that the Court was “removed physically, culturally, and politically from those who would live most intimately with its success or failure.”

B. The United Nations Interim Administration in Kosovo (UNMIK)

Regulation 64 Panels

In 1999, the UN, by Security Council Resolution 1244, established UNMIK, a temporary transitional government charged with promoting peace, security, stability, and respect for human rights in Kosovo and the greater region. The head of UNMIK interpreted its mandate to provide it with the authority to exercise “all legislative and executive authority with respect to Kosovo.” UN officials further recognized their responsibility to “re-establish the justice sector . . . [and] seek accountability for war crimes and other atrocities committed during and after the conflict.” As UNMIK worked to help rebuild Kosovo, it aided the ICTY with investigations and even transferred cases from Kosovo’s domestic courts to the ICTY. Since the ICTY ultimately chose not to pursue Kosovo cases beyond the Limaj and Haradinaj cases, a domestic program in Kosovo was needed to try the surplus of unprosecuted cases relating to atrocities committed during and after the Kosovo War.

To step into the vacuum the Kosovo War had left in the state’s justice sector, UNMIK initially established an emergency justice system, composed of local judges and prosecutors. However, this system was immediately

78. Visoka, supra note 1, at 14; Ochs, supra note 32, at 358.
79. Filip Rudic et al., Hague Tribunal Closes Down, Leaving Disputed Legacy, BALKAN TRANSITIONAL JUST. (Dec. 21, 2017), https://balkaninsight.com/2017/12/21/hague-tribunal-closes-down-leaving-disputed-legacy-12-20-2017/ (noting that Hajradin Bala was the only KLA member convicted by the ICTY, while key KLA figures Fatmir Limaj and Ramush Haradinaj were acquitted).
80. Hehir, Lessons Learned?, supra note 14, at 273 (internal citations omitted).
82. OPTIONS FOR JUSTICE, supra note 3, at 536 (internal citations omitted).
83. PERRIELLO & WIERDA, supra note 68, at 9.
84. Id. at 29.
85. Id. at 12.
86. OPTIONS FOR JUSTICE, supra note 3, at 537.
plagued by ethnic biases and a general lack of legal capacity to handle war crimes cases. In response, without consulting the local Kosovar population, UNMIK implemented an evolving process to inject international governance and participation into Kosovo’s judicial system and to remove ethnic Serbian and Albanian judges from participating in controversial war crimes cases. The process culminated in UNMIK Regulation 2000/64, passed in December 2000, which permitted the head of UNMIK to establish three-judge panels composed of a majority of international judges to handle these cases, as well as to assign international prosecutors to appear before the panels. The panels became known as the Regulation 64 Panels and could be created either by the head of UNMIK on his own motion, or by request of the prosecutor, defense counsel, or even the accused himself.

1. UNMIK’s Mandate, Jurisdiction and Proceedings

As hybrid panels situated within the Kosovo domestic judicial system but staffed with a mix of international and domestic judges and lawyers, the Regulation 64 Panels applied the same laws as the Kosovar courts. This in itself proved problematic, with ethnic Albanians disputing the applicability of the Former Yugoslavia Serbian law in Kosovo. Ultimately, UNMIK declared the law to be applied by the Regulation 64 Panels to be the law in force in Kosovo prior to March 1989 to the extent that it did not directly conflict with international human rights standards. This provided limitations to the Regulation 64 Panels’ jurisdictional reach. Only war crimes and genocide—not crimes against humanity—were encompassed in pre-1989 domestic law in Kosovo.

The ICTY and Regulation 64 Panels largely operated in parallel fashion during this time, with their relationship often described as “collaborative” or “complementary.” The ICTY maintained concurrent and primary
jurisdiction over national courts concerning atrocity crimes, but the ICTY prosecutors focused primarily on the most senior perpetrators, while the Regulation 64 Panels focused on prosecuting lower-level perpetrators of war crimes.

From the outset, the Panels faced complications. A procedural loophole in the Regulation 64 language allowed local prosecutors to circumvent the Regulation 64 Panels’ jurisdiction by instituting and abandoning cases before domestic courts. While UNMIK eventually passed another regulation closing this loophole, it was insufficient to provide redress in the many cases abandoned prior to its enactment.

2. UNMIK’s Transition and Legacy

UNMIK’s involvement with the Kosovo judiciary ended in December 2008, with the Regulation 64 Panels winding down and transferring the remainder of responsibility, including over one thousand war crimes cases, to UNMIK’s successor, EULEX. While the Regulation 64 Panels opened over a thousand case files during UNMIK’s mandate, they engaged in a relatively minimal amount of prosecutions, and by 2008, had completed only 37 war crimes cases. As of March 2006, only 10 percent of the cases prosecuted by the Regulation 64 Panels involved war crimes; the rest involved violations of domestic Kosovo law. The Regulation 64 Panels faced serious “difficulties in obtaining reliable statistics of war crimes cases . . . due to the number of different authorities and institutions engaged in this area,” and UNMIK itself admitted that the Panels systemically failed to adjudicate war crimes cases.

In addition to its sub-optimal accountability achievements, UNMIK also largely failed to garner public favor in Kosovo. Prior to passing Regulation 64, UNMIK did not explain to the local population—including local judges and attorneys—its reasons for creating the Regulation 64 Panels.

98. Perriello & Wierda, supra note 68, at 29.
100. Id.
102. Williams Testimony, supra note 91, at 9.
103. Perriello & Wierda, supra note 68, at 22.
104. Org. for Sec. and Coop. in Eur., supra note 69, at 6.
which essentially took high-profile war crimes cases out of the hands of local judges and lawyers. As a result, many local judges were resentful of UNMIK and refused to be recruited for the Panels, which had the practical impact of “disenfranchising local judges and prosecutors from the most important criminal cases and replacing them” with international judges and prosecutors.

C. The European Union Rule of Law in Kosovo (EULEX) Courts

As Kosovo officially declared its independence in 2008 and proceeded towards self-governance, EULEX emerged to take over the duties previously performed by UNMIK and to provide assistance in this period of transition. In November 2008, the EU deployed EULEX, and UNMIK officially transferred all control of the judiciary over to EULEX in hopes that it would be able to pick up where the Regulation 64 Panels left off. While UNMIK was all-encompassing and involved in every facet of life and society in Kosovo, EULEX narrowed its scope to focus on the country’s law enforcement and judiciary.

1. EULEX’s Mandate and Jurisdiction

Like UNMIK, EULEX has worked pursuant to UN Security Council Resolution 1244, which provides a framework for authorizing an international civilian and military presence in Kosovo to serve as a transitional administration. In February 2008, the EU specifically bestowed EULEX with a mandate to assist Kosovo judicial authorities and law enforcement agencies and to strengthen “an independent multi-ethnic justice system.” As part of this mandate, EULEX was specifically tasked with:

[E]nsur[ing] that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination

107. de Wet, supra note 101, at 83.
108. Muharemni, supra note 25, at 972.
109. Spernbauer, supra note 101, at 784.
110. O RG. FOR SEC. AND COOP. IN EUR., supra note 69, at 14.
structures between police and prosecution authorities.\footnote{Id. art. 3(d).}

EULEX specifically focused on investigating and prosecuting serious and sensitive crimes.\footnote{Short History of EULEX, EULEX, https://www.eulex-kosovo.eu/?page=2,44,197 (last visited May 10, 2020) (citing Council Joint Action 2008/124/CFSP supra note 111, art. 3(d)).} Similar to its Regulation 64 Panels predecessor, war crimes trials took place in Kosovo’s domestic court system and were heard by mixed panels composed of international EULEX judges and local Kosovar judges and presided over by a EULEX judge.\footnote{Spernbauer, supra note 101, at 792; ORG. FOR SEC. AND COOP. IN EUR., supra note 69, at 14.} These panels, known as EULEX Courts, shared jurisdiction with Kosovo’s Specialist Prosecutor’s Office, which is responsible for investigating and prosecuting the country’s most serious criminal offenses, including terrorism, organized crime, and inter-ethnic violence.\footnote{AMNESTY INT’L, supra note 97, at 24.}

Of the 1,200 cases inherited from UNMIK, EULEX Courts closed or dismissed 500, and by 2013, they had completed only fifteen trials.\footnote{Muharremi, supra note 25, at 298; Bernd Borchardt, EU LEX Press Release, EULEX and War Crimes (June 14, 2013), https://www.eulex-kosovo.eu/?page=2,10,1513.} Most notable of the cases handled by EULEX Courts were the Drenica Group Cases. In 2014, authorities arrested seventeen individuals believed to be members of the Drenica Group, a high-level organization within the KLA.\footnote{U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2014, at 3 (2014).} At the trial court level, the EULEX Court split the case into two trials, with Drenica Group Case I involving seven defendants, and Drenica Group Case II involving ten.\footnote{Press Release, EULEX, Drenica 1 Verdict (May 27, 2015), https://www.eulex-kosovo.eu/?page=2,10,228 [hereinafter Drenica 1 Verdict]; Press Release, EULEX, Drenica 2 Verdict, (May 27, 2015), https://www.eulex-kosovo.eu/?page= 2,10,229 [hereinafter Drenica 2 Verdict].} The charges in both cases related to allegations that the KLA operated a detention center at which the defendants committed various war crimes including torture, humiliating and degrading treatment, and murder in 1998.\footnote{Press Release, EULEX, Drenica 1 Verdict, supra note 119.} Following trial, in May 2014, the EULEX Court convicted two defendants in Drenica Group Case I of war crimes and acquitted the remaining defendants,\footnote{Drenica 1 Verdict, supra note 119.} and convicted all ten defendants of various war crimes in Drenica Group Case II.\footnote{Drenica 2 Verdict, supra note 119.} These convictions were mostly upheld by a EULEX majority-led panel of judges in Kosovo’s Appellate Court, although the appellate panel did modify many of the
criminal sentences. EULEX prosecutors marked these cases as a significant step towards achieving justice for war crimes in Kosovo.

In 2012, EULEX began phasing out its involvement in domestic war crimes prosecutions and began transferring its powers to Kosovo’s domestic judicial system. With the extension of its mandate in 2014, EULEX changed the composition of court panels from a majority of international judges to a majority of Kosovar judges and a minority of international judges. In addition, pursuant to the 2014 mandate extension, EULEX would no longer accept new cases and would begin gradually handing over all judicial competencies to Kosovo’s domestic judiciary.

2. EULEX’s Legacy and Transition

During its wind-down period, EULEX continued to work in the country, transferring much of the power of international EULEX judges back to domestic institutions, while continuing to monitor domestic courts and cases. In June 2018, with the conclusion of most of its executive mandates, EULEX concluded its investigative and prosecutorial responsibilities and ceased providing international judges for the Kosovo justice system. EULEX ultimately transferred most cases involving war crimes and other breaches of international law to the newly created KSC. At the time of publication, EULEX continues to operate in Kosovo pursuant to a narrow mandate that permits EULEX to monitor select criminal and civil cases, mentor and advise the Kosovo Correctional Service, and provide support to the KSC.

123. Marija Ristic, EULEX Denies Drenica Group Verdict Was ‘Political’, Balkan Transitional Just. (June 1, 2015, 12:15 PM), https://balkaninsight.com/2015/06/01/eulex-drenica-group-verdict-was-not-political/.
124. OPTIONS FOR JUSTICE, supra note 3, at 551.
125. EULEX, supra note 113.
126. Id. One exception to this policy was in North Kosovo, EULEX determined that it would “remain in charge of judicial proceedings until the EU Facilitated Dialogue between Pristina and Belgrade brings a solution for the judiciary.” Id.
129. OPTIONS FOR JUSTICE, supra note 3, at 568.
EULEX’s operations were met with a mixed reception within Kosovo. In the opinion of one observer, EULEX failed to substantially improve respect for the rule of law within Kosovo and did not meet expectations “to bring justice to key perpetrators of war crimes and corruption.” Specifically, the EULEX Courts’ decisions in the Drenica Group Cases—which were lauded by EULEX prosecutors as great achievements towards justice—sparked significant public backlash throughout the country. The reactions to the Drenica Group Cases’ verdicts revealed a stark difference in opinion between international actors in the region and locals, with international actors viewing many of the accused as perpetrators of grave breaches of international law and locals supporting the former KLA members as heroic freedom fighters of the Kosovo War. In addition, EULEX’s reputation, both in and outside Kosovo, was hampered by several high-profile corruption allegations made by EULEX judges and prosecutors that EULEX senior staff were accepting bribes and colluding with defendants.

3. Collective Criticisms

Despite their relative successes, the ICTY, Regulation 64 Panels, and EULEX Courts all faced similar criticisms for their failure to achieve goals pertaining to accountability and transitional justice in Kosovo. While these criticisms are fairly extensive, all three judicial mechanisms faced backlash for issues pertaining to broadscale legitimacy challenges stemming from a lack of local involvement, failure to acquire sufficient evidence to complete successful proceedings, and widespread witness and judicial intimidation. This section will address these three criticisms—all of which also threaten the KSC’s work—in turn.

Each of the three internationalized courts created to address Kosovo’s war crimes have encountered significant challenges to their legitimacy. This lack of legitimacy can be traced back to the lack of local involvement in each of the three mechanisms. Of all three courts designed to prosecute
crimes committed during the Kosovo War, the ICTY had the least local
involvement. Kosovo was in no way involved in the Court’s creation or
operations; the ICTY was staffed exclusively by international lawyers,
judges, and personnel, and sat in The Hague.\textsuperscript{136} Moreover, the ICTY’s
outreach programs were largely insufficient to connect with victims in the
Balkans.\textsuperscript{137} The ICTY’s lack of local connection made many in the Balkans,
from all ethnic groups, view the Court and its decisions as “alien” and
“ultimately illegitimate.”\textsuperscript{138}

As previously discussed, despite UNMIK’s inclusion of some local
judges on its Regulation 64 Panels, UNMIK’s judicial operations were also
largely met with opposition and hostility from local lawyers and judges.
In part, because of the failure to incorporate local involvement and ownership
in the Regulation 64 Panels’ creation and operation, scholars recognize that
the Panels, and UNMIK more generally, “fail[ed] to foster respect for legal
institutions and the rule of law.”\textsuperscript{139}

When EULEX took over UNMIK’s judicial work, it inherited the
difficult task of building trust within Kosovo and presenting itself as
politically independent from the Kosovo Government—which was then
composed of many KLA members.\textsuperscript{140} EULEX struggled to find legitimacy
in the eyes of Kosovars, largely due to the lack of transparency in its
operations and decisions and the repeated allegations of corruption and
bribery among EULEX leadership.\textsuperscript{141} Likewise, much of the local Kosovar
population—both ethnic Serbs and ethnic Albanians—viewed EULEX, as a
whole, as ineffective and biased.\textsuperscript{142} A 2015 report conducted by the Kosovar
Centre for Security Studies of public opinion within Kosovo concluded that
54 percent of respondents did not trust EULEX, meaning that the Kosovar

\textsuperscript{136} Ochs, \textit{supra} note 32, at 359.
\textsuperscript{137} Jane E. Stromseth, \textit{Pursuing Accountability for Atrocities After Conflict: What Impact on
L.} 547, 563 (2005) (describing the ICTY’s outreach efforts as “a much-delayed afterthought”).
\textsuperscript{138} Hehir, \textit{Lessons Learned?}, \textit{supra} note 14, at 268.
\textsuperscript{139} Marshall & Inglis, \textit{supra} note 105, at 130.
\textsuperscript{140} Marija Ristic, \textit{Can the New Kosovo Court Keep Witnesses Safe?}, \textit{Balkans Insight} (Jan.
01-20-2016/#gsc.tab=0.
\textsuperscript{141} Naim Rashiti, \textit{Ten Years After Eulex: Key Principles for Future EU Flagship Initiatives on the
Rule of Law} 7 (CEPS Paper in Liberty and Sec. in Eur., No. 2019-07, 2019), https://www.ceps.eu/wp-
\textsuperscript{142} Ewa Mahr, \textit{Differences in the Local Perception of EULEX and KFOR in Their Security-Related
public trusted EULEX less than Kosovo’s domestic judicial system.\textsuperscript{143}

All of the internationalized courts involved in prosecuting crimes committed during the Kosovo War have also encountered well-documented challenges pertaining to witness and judicial tampering and intimidation.\textsuperscript{144} Witness intimidation is a significant challenge in Kosovo, with experts recognizing that such conduct is a “way of life” in the country.\textsuperscript{145} Much of this stems from the “clan mentality” present throughout Kosovo, and the fact that witnesses who testify against their own ethnic group run the risk of being ostracized by their community.\textsuperscript{146} Moreover, Kosovo’s small territory, combined with the fact that many Kosovars know each other makes it extremely difficult for courts to hide witnesses’ identities.\textsuperscript{147}

Beginning with the ICTY, witnesses were often reluctant to testify or provide evidence against KLA members because of fears for their safety.\textsuperscript{148} In the \textit{Haradinaj} Case specifically, witness intimidation proved to be a significant challenge for the prosecution.\textsuperscript{149} The Appeals Chamber granted the Prosecutor’s first appeal of the defendants’ acquittals finding that there existed a context of “serious witness intimidation” at the trial level and that the Trial Chamber “seriously erred in failing to take adequate measures to secure the testimony of certain witnesses.”\textsuperscript{150} A 2016 study conducted by the ICTY’s Victims and Witnesses Section concluded that one in seven witnesses who testified before the ICTY had been “contacted to prevent them from testifying or threatened because of their testimony[.]”\textsuperscript{151}

UNMIK’s Regulation 64 Panels and the EULEX Courts were also

\begin{footnotesize}
\begin{enumerate}
\item KOSOVAR CTR. FOR SEC. STUD., KOSOVO SECURITY BAROMETER 11 (5th ed. 2015), https://perma.cc/72SH-M6QV.
\item Ristic, \textit{supra} note 140; ORG. FOR SEC. AND COOP. IN EUR., WITNESS SECURITY AND PROTECTION IN KOSOVO: ASSESSMENT AND RECOMMENDATIONS 4 (2007).
\item Dean B. Pineles, \textit{Life Beyond the Vermont Trial Bench: Tales from Kosovo}, 43 VT. BAR J. 23, 25 (2017).
\item Ristic, \textit{supra} note 140.
\item Id.
\item Andrew Trotter, \textit{Witness Intimidation in International Trials: Balancing the Need for Protection Against the Rights of the Accused}, 44 GEO. WASH. INT’L L. REV. 521, 526 (2012).
\end{enumerate}
\end{footnotesize}
plagued by witness tampering and judicial intimidation. Local judges seated on the Regulation 64 Panels—who did not receive the same level of security as their international counterparts—reported receiving threats of violence while serving on the Panels, especially when presiding over cases involving high-ranking KLA members.\footnote{152. Org. for Sec. and Coop. in Eur., supra note 69, at 26.} Former ICTY Prosecutor Carla Del Ponte has accused UNMIK officials of giving into this intimidation by disclosing sensitive witness information to defendants.\footnote{153. Ristic, supra note 140.} While UNMIK denied these charges, it did admit to stopping several investigations into high-level KLA perpetrators for “political reasons.”\footnote{154. Id.} Given the pervasiveness of witness and judicial intimidation before all three internationalized courts, one former EULEX judge has predicted that these challenges will continue to plague any court designed to prosecute KLA crimes, regardless of where the court is located.\footnote{155. See Dean B. Pineles, ‘Ghost Court’ Delays Justice for Kosovo War Victims, Balkan Transitional Just. (Mar. 21, 2018, 9:04 AM), https://balkaninsight.com/2018/03/21/ghost-court-delays-justice-for-kosovo-war-victims-03-19-2018/#gsc.tab=0.}

In part because of this extensive witness and judicial intimidation, the Regulation 64 Panels and EULEX Courts faced significant obstacles in obtaining evidence.\footnote{156. Perriello & Wierda, supra note 68, at 22.} Given the unstable environment in Kosovo in the early 2000s, UNMIK failed to prioritize war crimes cases, instead focusing on punishing the daily crime that occurred in the new state.\footnote{157. Org. for Sec. & Coop. in Eur., supra note 69, at 21.} Since war crimes cases were never prioritized, by the time such crimes were ultimately investigated, significant time had passed since the crimes’ commission, presenting considerable concerns regarding the availability of evidence.\footnote{158. Id.} In the time that had passed prior to investigation, many victims and witnesses had passed away or fled the country, while others’ memories had faded.\footnote{159. Id.}

Issues also arose regarding the misplacement and destruction of evidence, as well as a lack of consistent handovers of evidence from the different prosecutorial and judicial actors—such as the ICTY, UNMIK, and EULEX—that had been operating in the country.\footnote{160. Id.} For instance, many of the files turned over from UNMIK to EULEX, including those investigating allegations of war crimes committed by KLA members, were in “deplorable condition,” with “misplaced evidence and witness statements,” and “long time
lapses in following up on incomplete investigative steps.”

IV. THE KOSOVO SPECIALIST CHAMBERS

In April 2008, Carla Del Ponte, the former ICTY Chief Prosecutor, claimed in her memoir that during the Kosovo War, members of the KLA had committed grave human rights violations. Del Ponte specifically accused KLA fighters of kidnapping ethnic Serbs, holding them in prison facilities in Kosovo and Albania, and transferring them to other regions of Albania, where they would “harvest” and traffic human body parts. She further alleged that while the KLA held these detainees in custody, KLA members would subject them to serious abuse, torture, and, in some instances, murder.

Following Del Ponte’s accusations, the Council of Europe’s Committee on Legal Affairs and Human Rights appointed Dick Marty, a Council of Europe rapporteur, to open and complete an investigation into these allegations. The Council of Europe’s Parliamentary Assembly approved the Commission’s 2010 report, issued at the conclusion of the investigation and colloquially named the “Marty Report.” The Marty Report corroborated Del Ponte’s assertions that KLA members had engaged in killings, forced detentions, and, on a much smaller scale, organ trafficking during and following the Kosovo War. The report also noted the presence of ongoing organized crime in Kosovo conducted by the Drenica Group—the same group previously prosecuted by EULEX—which was composed of and run by key former KLA members, many of whom had gone on to become leading political figures, including Hashim Thaçi, Kosovo’s then Prime Minister and later President of Kosovo.

After the Marty Report’s publication, EULEX established a Special Investigative Task Force (SITF) in September 2011 to investigate the alleged crimes referenced in the Marty Report and other related crimes. Following

161. OPTIONS FOR JUSTICE, supra note 3, at 560.
163. Id.
165. MARTY REPORT, supra note 146, at 6.
166. Id. at 1; Muharremi, supra note 22, at 971.
167. Pineles, supra note 164, at 40.
168. MARTY REPORT, supra note 146, at 14–18; Pineles, supra note 164, at 40.
169. Background, KOS. SPECIALIST CHAMBERS AND SPECIALIST PROSECUTOR’S OFF.,
several years of investigation, in 2014, the SITF confirmed that between 1999 and 2000, the KLA engaged in a “campaign of persecution,” seeking revenge against Serbs and other ethnic minority populations for Serbian crimes committed during the Kosovo War, as well as those Kosovar Albanians who the KLA viewed as Serb collaborators or political opponents.\(^{170}\) Within this campaign, which the SITF found was sanctioned by “top levels of the KLA leadership,” KLA members allegedly engaged in forcible displacement of individuals from their homes, abductions, illegal detentions in camps in Kosovo and neighboring Albania, forced disappearances, unlawful killings, sexual violence, and—in certain cases—organ trafficking.\(^{171}\) The SITF ultimately concluded that the evidence obtained was sufficient to support indictments against several senior KLA officials for war crimes and violations of domestic Kosovo law, including murder.\(^{172}\)

A. Creation

Internationalization pervaded the creation of the KSC from the time the SITF commenced its investigation in 2011. From its origination, the SITF derived its legal authority from EULEX, rather than from Kosovo law.\(^{173}\) In mid-2012, partway through the SITF’s investigation, Kosovo became a fully independent nation, and shortly thereafter, the President of Kosovo invited the EU High Representative to continue EULEX’s presence in Kosovo, thereby legitimating the SITF and its investigation.\(^{174}\) This had the added effect of providing the SITF a “special status within Kosovo’s prosecutorial system outside the authority and control of Kosovo.”\(^{175}\)

From that point forward, the EU directly led efforts for the creation of a specialist court and its prosecutor’s office.\(^{176}\) Almost immediately, many Kosovar politicians—especially those from Kosovo Albanian political parties—opposed the creation of a specialist court, and this opposition only grew as the EU continued to express dominance in the Court’s negotiation.\(^{177}\) While the creation of the court ostensibly aimed to involve collaboration


171. Id. at 2–3.
172. Id. at 2.
173. Muharremi, supra note 22, at 972.
174. Id. at 972.
175. Id.
176. Id. at 973.
177. Id. at 975–76.
between Kosovo and the EU, sources later disclosed that the EU alone—without involvement from Kosovar officials—prepared the draft legislation to create the KSC and the Specialist Prosecutor’s Office. Once the EU submitted the proposed legislation to the Kosovo Assembly, the Assembly was permitted only to vote to approve or reject the legislation in whole; it was not entitled to propose modifications to the legislation.

In part because of this lack of power, the Kosovo Assembly did not garner enough support to adopt the constitutional amendments needed to create a legally constitutional specialist chambers. In addition to contentious parliamentary debates, large protests occurred in the streets of Kosovo against the creation of the Court. Despite the lack of parliamentary and public support for the Court, the international community, including the EU and the United States, exerted great political pressure on Kosovo and its leaders to adopt the amendments. As Robert Muharremi notes, the Kosovo Government was informed that a failure to approve the constitutional amendments and draft KSC Law would significantly impair Kosovo’s EU integration process, as well as its other high-profile policy goals pertaining to its recognition by the international community as an independent state. Seemingly left with few other options, on August 3, 2015, the Kosovo Assembly approved the amendment and adopted the Law on the Specialist Chambers and Specialist Prosecutor’s Office (the KSC Law). In September 2016, the SITF’s mandate and staff was transferred from EULEX control to the KSC in The Hague.

B. Mandate, Jurisdiction, and Organizational Structure

The KSC Law functions as the governing legal framework for the Specialist Chambers and its prosecutorial unit. The KSC Law tasks the KSC with adjudicating the crimes identified in the Marty Report and the SITF’s investigation, as well as related crimes. While the KSC Law never

178. Id. at 976.
179. Id.
180. Muharremi, supra note 22, at 976.
182. Id. at 27 (referencing a 2018 statement by Hashim Thaçi saying he only agreed to the amendment because he was “under great pressure from the international community”).
183. Muharremi, supra note 22, at 977.
184. KOS. SPECIALIST CHAMBERS AND SPECIAL PROSECUTOR’S OFF., supra note 169.
185. OPTIONS FOR JUSTICE, supra note 3, at 568.
186. Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 1(2) (Kos.);
OPTIONS FOR JUSTICE, supra note 3, at 568.
187. Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 1(2) (Kos.).
expressly mentions the KLA, it can be inferred from both the Marty Report and the SITF’s investigation that the work of the KSC and the Specialist Prosecutor’s Office will primarily involve the alleged crimes committed by KLA members. 188 The KSC Law further provides that the Specialist Prosecutor’s Office shall take over the SITF’s mandate and personnel and conduct their investigations and prosecutions of the crimes falling within the KSC’s jurisdiction independently of the Chambers’ work. 189

The KSC Law provides the Chambers with jurisdiction over crimes committed between January 1, 1998, and December 31, 2000, “which were either commenced or committed in Kosovo.” 190 The Chambers’ personal jurisdiction is further limited to citizens of Kosovo and the Former Yugoslavia or persons who have committed crimes against persons of Kosovar or Former Yugoslavian citizenship. 191 The KSC’s substantive jurisdiction encompasses crimes under both international and domestic Kosovo law, including crimes against humanity and war crimes recognized under international law, 192 as well as select crimes recognized under Kosovo law. 193 The Chambers’ judges are directed to apply international law, including customary international law and jurisprudence from other international criminal tribunals, 194 but Kosovo law must guide sentencing decisions. 195

The KSC is attached to each level of the Kosovo court system and is composed of a Trial Chamber, Appeals Chamber, Supreme Court Chamber, and Constitutional Court Chamber, 196 with a single judge who performs the functions of a pretrial chamber. 197 A selection panel of three international members, with at least two judges who have significant international criminal law experience, is responsible for creating a roster of international judges recommended for KSC judgeships. 198 The head of EULEX will

189. Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 24(2) (Kos.).
190. Id. arts. 7–8.
191. Id. art. 9.
192. Id. arts. 13–14.
193. Id. art. 15.
194. Id. art. 3, ¶ 2 (noting that the Kosovo Constitution gives customary international law superiority over domestic law); OPTIONS FOR JUSTICE, supra note 3, at 569.
195. Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 44, ¶¶ 2–4 (Kos.).
196. Id. art. 3, ¶ 1.
197. Id. art. 25, ¶ 1.
198. Id. art. 28, ¶¶ 1–2.
officially appoint judges from the roster prepared by the selection panel.\textsuperscript{199} The head of EULEX also appoints the KSC’s President and Vice President from among the KSC judges, based on the selection panel’s recommendation.\textsuperscript{200} While the President serves the KSC on a full-time basis,\textsuperscript{201} all other judges may perform their functions remotely, and need only be present at The Hague when deemed necessary by the President.\textsuperscript{202} In 2017, the head of EULEX appointed nineteen KSC judges, all of whom came from Europe or North America.\textsuperscript{203} Presently, twenty-two judges hold positions on the KSC judge’s roster, all continuing to hail from North America and Europe.\textsuperscript{204}

Despite the KSC’s “attachment” to the national court system, it operates completely independently from Kosovo domestic courts, and in practice, the relationship between the KSC and the national courts is largely “nonexistent.”\textsuperscript{205} In fact, other than the KSC’s positioning within the Kosovo court system, and its application—in part—of Kosovo domestic law, most of its other features are purely international. While the KSC Law provides the Chambers with a seat in Kosovo, it primarily sits in The Hague, and has never publicly stated an intent to sit in Kosovo.\textsuperscript{206} Pursuant to prior agreement between the Kosovo President and the EU, the Chambers must exclusively employ international judges and staff.\textsuperscript{207} Likewise, the Specialist Prosecutor’s Office will also be staffed with international attorneys and personnel.\textsuperscript{208} The KSC is thus the first among hybrid and “internationalized” courts not to employ state or regional staff.\textsuperscript{209}

\begin{footnotes}
\item[199.] Id. art. 28, ¶ 3; OPTIONS FOR JUSTICE, supra note 3, at 571.
\item[200.] Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 32, ¶¶ 1, 4 (Kos.).
\item[201.] Id. art. 32, ¶ 1.
\item[202.] Id. art. 26, ¶ 2.
\item[205.] OPTIONS FOR JUSTICE, supra note 3, at 569. However, it should be noted that the KSC has the power to order that domestic courts transfer cases to the KSC—at any time in proceedings—should the case fall within KSC jurisdiction. Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 10 (Kos.).
\item[206.] Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 3, ¶ 6 (Kos.). See generally Host Agreement, supra note 20 (establishing the Netherlands as a host for the Kosovo Specialist Chambers).
\item[207.] OPTIONS FOR JUSTICE, supra note 3, at 569–70.
\item[208.] Williams, supra note 21, at 35.
\item[209.] OPTIONS FOR JUSTICE, supra note 3, at 569.
\end{footnotes}
In 2020, the Kosovo Specialist Prosecutor’s Office began initiating proceedings. As of the time of publication, the Prosecutor’s Office has indicted eight defendants across four different cases.

V. A NEW BREED OF HYBRID TRIBUNAL

The KSC represents a new breed of hybrid tribunal in that while it is created by and applies domestic Kosovo law and is ostensibly “attached” to the domestic Kosovar judicial system, it is driven and operated almost exclusively by international powers. Stylizing the KSC as an internationalized hybrid court presents significant concerns for the effectiveness of the Court and its limited ability to enact transitional justice within Kosovo, and, more broadly, for the future of the hybrid model of prosecution.

While the crimes within the KSC’s mandate deserve prosecution, using nearly exclusively internationalized entities to prosecute these crimes has proven unsuccessful. Instead, efforts should be made to incorporate local voices, involvement, and ownership over judicial operations. Only by incorporating local ownership into the KSC will many of the idealized goals of the hybrid model of justice—notably legitimacy, capacity building, and transitional justice—be realized.

This section will first analyze why the circumstances present in Kosovo in 2015 did not lend themselves to the effective creation of a hybrid tribunal. It will then examine how the KSC’s internationalized structure and composition will undermine the potential that the Court—as a hybrid tribunal—could provide retributive or transitional justice to the local Kosovar community. This section will then conclude by addressing the potential consequences the operation of the KSC as an internationalized hybrid tribunal can pose to the future of the hybrid model.

A. Flawed Circumstances for a Hybrid Court

A study of previous hybrid courts evidences that despite the vast benefits afforded by the use of hybrid mechanisms, they must be used selectively, as they can only truly succeed in specific circumstances. In

212. Law on Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053, art. 3 (Kos.).
213. Ochs, supra note 32, at 401.
order to achieve success—both in terms of accountability and legitimacy—a hybrid court needs to earn the support of the state it is designed to serve, including both civilian support and the political support of the state’s government.\textsuperscript{214} Moreover, a hybrid court should be utilized to complement the work of domestic courts and the ICC, or to step in to handle prosecutions when either of those systems are improper or inadequate for prosecuting the crimes at issue; a hybrid court should \textit{not} be used to prosecute crimes that could and should have been prosecuted by preceding domestic or international courts, especially when those courts are also hybrid courts.

These requisite circumstances were absent in Kosovo at the time of the KSC’s creation. The citizens and government of Kosovo did not—and still do not—want a new international court to prosecute KLA members.\textsuperscript{215} Moreover, the KSC is now the third attempt at a hybrid court to prosecute the same set of crimes, which not only compromises its potential legitimacy, but also fails to address the most systemic failings of the predecessor courts.

1. Lack of Local & Political Support

From its establishment, the KSC has lacked strong Kosovar support for its mandate. The Dakar Guidelines on the Establishment of Hybrid Courts, intended to provide strategic insight into the methodology of creating hybrid courts, recognize that decisions on whether to establish a hybrid mechanism need to be “responsive to national preferences” as to how the set of crimes at issue should be prosecuted.\textsuperscript{216} The Guidelines further recognize that “any sense of the imposition of justice from the outside, in particular from states not willing to subject their nations to international(ised) justice mechanisms can be counterproductive.”\textsuperscript{217} Moreover, David Crane, the former Chief Prosecutor of the Special Court of Sierra Leone, has stated,

In considering how best to account for an atrocity in a region of the world, the international community needs to ask itself: is the justice we seek the justice they want? A justice not appreciated or understood by victims may not be justice at all, and this can impact how that justice brings peace and stability to a region.\textsuperscript{218}

\textsuperscript{214} Aaron Fichtelberg, \textit{Hybrid Tribunals: A Comparative Examination} 180 (2015).
\textsuperscript{215} Pineles, \textit{supra} note 164, at 42. (describing the harsh reality following the months of negotiating the KSC mandate, which was filled with local street protests and delays due to political opposition); see also Serbeze Haxhiaj, \textit{In Kosovo, Distrust of Hague War Crimes Court Simmers}, \textit{BALKAN TRANSITIONAL JUST.} (May 12, 2020, 8:46 AM), https://balkaninsight.com/2020/05/12/in-kosovo-distrust-of-hague-war-crimes-court-simmers/ (explaining that even years after the adoption of the KSC, Albanians still view the Court as unfair, and Serbians refuse to believe the KSC will actually bring any justice).
\textsuperscript{216} \textit{Dakar Guidelines, supra} note 15, at 9.
\textsuperscript{217} \textit{Id.} at 2.
\textsuperscript{218} David M. Crane, \textit{Transitional Justice: War Crimes Tribunals and Establishing the Rule of Law
Likewise, the political support of the target state in which a hybrid court functions is essential for that court’s success. Without political support, a hybrid court will face resistance and challenges at nearly every stage, from investigations, to arrests, to judicial proceedings.

In line with these principles, several of the hybrid courts to date, including the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, were established through a collaborative process between the target state and the international community in response to the target state’s request for prosecutorial assistance. These processes allowed for a “back and forth dialogue” in which “the national government [could] assert the needs and wants of the victimized society, while allowing the international community to ensure that international standards of justice are met.” While the EU—the international driving force behind the KSC—sought to exemplify the same collaborative process in the KSC’s creation, the reality was far different. The Kosovo Government was given little to no opportunity to modify the legislation drafted by the EU, and therefore had little say in the KSC’s structure, composition, and mandate.


\[219. \text{M. Cherif Bassiouni et al., The Chicago Principles on Post-Conflict Justice 10 (2007)}\]

\[\text{("Meaningful post-conflict justice policies must have a high degree of legitimacy and require substantial political will on the part of leaders inside and outside of the government."); see also Dakar Guidelines, supra note 15, at 10 (identifying that in assessing whether a hybrid tribunal is proper to prosecute mass atrocities, consideration of “whether or not the state in which the crimes were committed is willing and able to engage in the process of setting up a tribunal … is crucial.”).}

\[220. \text{Fichtelberg, supra note 214, at 180.}\]


\[222. \text{Raub, supra note 40, at 1043.}\]

\[223. \text{Muharremi, supra note 22, at 976.}\]
Court—both in the Kosovo Assembly’s initial “no” vote to the constitutional amendment, and later in a 2017 attempt by Assembly members to revoke the KSC224—was stifled by extensive international pressures from the EU and other Western powers, who warned of “severe negative consequences” should Kosovo continue to oppose the Court.225

By creating the KSC over the wishes of the Kosovo Government, the international community imposed significant obstacles to the KSC and the Specialist Prosecutor’s Office in investigating and prosecuting the crimes within its mandate.226 This is especially the case as the KSC’s mandate is unpalatable for many Kosovar citizens, specifically those Kosovar Albanians who view KLA fighters as heroes. The mandate is rendered even more controversial in that it targets sitting heads of state and parliamentary leaders in the Kosovo Government. In June 2020, the Kosovo Specialist Prosecutor’s Office publicly recognized that it had indicted sitting President Hashim Thaçi227 and the head of the Democratic Party of Kosovo, Kadri Veseli, for crimes against humanity and war crimes,228 marking the first time that a hybrid court has indicted a sitting head of state.229 While there is no question that bringing culpable state leaders to justice for murder, persecution, and torture is imperative,230 attempting to do so through a hybrid tribunal, which operates in part through the support of the local state


230. See Kos. Specialist Prosecutor’s Off., supra note 228 (noting that Thaçi and Veseli were indicted for crimes against humanity and war crimes “including murder, enforced disappearance of persons, persecution, and torture”).
government, is extremely difficult, especially when the local population is largely supportive of the indicted head of state. By indicting sitting leaders, the Prosecutor and the Court have rendered the chances of receiving any type of political cooperation in their investigations and prosecutions unlikely.

Moreover, in failing to incorporate political dialogue and input into the creation of the Court, the EU gives the impression of forcing justice on a weak and nascent nation, which accurately reflects how the Kosovar public perceives the Court. In a 2017 public perception study co-conducted by PAX, the Centre for Peace and Tolerance, Impunity Watch, and Integra, 77.6 percent of ethnic Albanians surveyed believed that the Court was created because of international pressure, which they viewed as unfair. Likewise, ethnic Serbs surveyed generally believed that the impetus for the Court was “the need of Kosovo’s international allies to ‘clean the hands’ of political clients who emerged from the KLA and now hold positions of power,” rather than a legitimate desire for justice. About half of those surveyed also predicted that the KSC trials will be unfair since they will be conducted outside of Kosovo by international judges and prosecutors.

Further, the KSC does not intend to provide the type of justice sought by many victims of the Kosovo War. The people of Kosovo seek comprehensive justice “for all victims, regardless of ethnicity,” which the predecessor courts failed to provide. The 2017 public perception study concluded that both ethnic Albanians and Serbs in Kosovo desire justice for crimes committed by all ethnic groups during and in the aftermath of the Kosovo War, rather than just those committed by the KLA. By creating an internationalized court that seeks justice for crimes committed by just one militarized ethnic group, the KSC’s mandate fails to respond to the needs of the Kosovar people and instead presents an appearance of politicized.

232. Id. at 14.
233. VISOKA, supra note 1, at 27.
235. See PUBLIC PERCEPTION STUDY, supra note 231, at 20 (noting that 64.8 percent of Albanians and 53.2 percent of Serbs believe “it is important to deal with all crimes committed”); see also Serbez Haxhijaj, In Kosovo, Distrust of Hague War Crimes Court Simmers, BALKAN TRANSITIONAL JUST. (May 12, 2020, 8:46 AM), https://balkaninsight.com/2020/05/12/in-kosovo-distrust-of-hague-war-crimes-court-simmers/ (expressing one Serb’s opinion that “[a]ll crimes committed against civilians should be punished, whatever their ethnic background.”).
selective justice. 236

In declining to incorporate local involvement in the establishment of the KSC, and essentially cutting Kosovo out of the process of creating the Court, the international community undermined local support and legitimacy from the beginning. Yet, even if the KSC had incorporated local involvement into its creation and operations, witness intimidation, evidence tampering, and the other challenges faced by the previous judicial institutions utilized in Kosovo would still be present, demonstrating yet another reason why the circumstances in Kosovo were not conducive to the KSC’s creation.

2. Multiple Attempts at Justice

The KSC is the international community’s fourth attempt at justice and its third use of a hybrid court to prosecute crimes committed in the Kosovo War. Rather than making a concerted effort to fix the problems afflicting the previous hybrid courts, including the EULEX Courts, the EU chose to start afresh with the creation of a new and costly tribunal that carries a mandate which overlaps significantly with its predecessors. 237 The creation of multiple courts to prosecute the same crimes undermines the legitimacy of international prosecutions. It suggests that the international community—largely the EU—is willing to create as many judicial mechanisms as necessary to achieve its anticipated result, regardless of cost. This perception is reflected in public opinion within Kosovo, with many surveyed believing that the KSC is not fundamentally different from the predecessor courts and was created only because those courts failed to achieve justice. 238 Moreover, because of the KSC’s overlapping mandate with the predecessor courts, it is possible, and even probable, that the Court will investigate and prosecute defendants who have already been prosecuted, and in some cases, acquitted. 239

One of the most problematic concerns in creating a new court to prosecute previously adjudicated crimes is that the KSC remains susceptible

236. VISOKA, supra note 1, at 27.

237. See Pineles, supra note 155 (noting that EULEX’s problems “could have been ameliorated, if not solved, if a concerted effort had been made to do so”).

238. PUBLIC PERCEPTION STUDY, supra note 231, at 15–16.

239. For example, it is probable that the Court will target former Prime Minister Ramush Haradinaj, whom the Specialist Prosecutor’s Office called in for questioning, prompting Haradinaj’s resignation. Haxhiaj, supra note 235; Associated Press, Kosovo Leader Resigns after Being Called to War Crimes Court, N.Y. Times (July 19, 2019), https://www.nytimes.com/2019/07/19/world/europe/kosovo-leader-resigns-after-being-called-to-war-crimes-court.html. This will be the second time that Haradinaj is prosecuted for post-war crimes; he was previously investigated, prosecuted, and acquitted by Carla Del Ponte, the Prosecutor of the ICTY. CARLA DEL PONTE, MADAME PROSECUTOR 294 (2008).
to the systemic challenges that plagued its predecessor courts. The KSC’s international composition and far removed location were specifically chosen to respond to issues of political interference and witness tampering that afflicted the ICTY, the Regulation 64 Panels, and the EULEX Courts. However, the likelihood that the KSC’s deliberate internationalization will successfully fix these problems is far from certain. First, such international composition and far removed location did little to prevent witness tampering before the ICTY. Like the KSC, the ICTY staffed exclusively international actors and sat in The Hague, very close to where the KSC currently stands. Yet, despite these apparent safeguards—which the KSC now replicates—the ICTY endured significant issues pertaining to political interference and witness intimidation and tampering, especially with regard to Kosovar witnesses.

Further, despite still being in the early stages of its work, the KSC has already fallen victim to political interference and witness intimidation. In a June 2020 press statement, the Specialist Prosecutor’s Office broke from policy and publicized its indictments against Hashim Thaçi and Kadri Veseli, recognizing that these defendants had engaged in a “secret campaign to . . . obstruct the work of the Court.” Then, in September 2020, pursuant to warrants issued by the Specialist Prosecutor’s Office, two organizational leaders of the Kosovo Liberation Army War Veterans’ Association were arrested for interference with the administration of justice and witness intimidation. The arrests stemmed from the men’s distribution to the media of confidential and non-public information related to ongoing cases, including the names and personal details of potential witnesses.

241. Id. at 34–35 (noting that “UNMIK and EULEX’s record shows that it . . . cannot be assumed international organ[i]zations—and the staff therein—will be immune to the very issues that undoubtedly afflict Kosovo’s domestic judicial system”).
242. Pineles, supra note 155.
244. Williams, supra note 21, at 36; see also Robert Cryer, Witness Tampering and International Criminal Tribunals, 27 LEIDEN J. INT’L L. 191 (2014) (discussing the ICTY’s multiple incidents of witness tampering and intimidation, including in the Haradinaj case).
Moreover, the Court’s internationalized structure does nothing to counter the “central impediment” that afflicted many of its prior courts: Kosovo’s “ancestral custom . . . of entrenched clan loyalty” that has prevented many witnesses from testifying in the predecessor courts against members of their ethnic groups or extended families.249 Despite the KSC’s efforts to provide witness security and protection,250 local Kosovar opinion reflects an unwavering belief that testifying before the KSC would be dangerous, with 82.1 percent of ethnic Serbs and 48.8 percent of ethnic Albanians surveyed in 2017 believing it is not safe for witnesses to testify before the Court.251 The creators of the KSC erred in thinking that the creation of a new international court would cure the problems of the hybrid courts that came before it; instead, even with its international character, the KSC will likely face similar challenges and new problems, while losing many of the benefits of traditional hybrid courts.

B. Undermining Hybrid Objectives

Like most courts, the KSC’s mandate focuses exclusively on obtaining accountability for crimes.252 However, the Court’s status as a hybrid tribunal carries other implicit goals, especially pertaining to transitional justice initiatives.253 In addition to accountability measures, hybrid courts—due to their structure and local involvement—can provide significant benefits by fostering peace and stability within the post-conflict states in which they sit and within the greater geographical regions,254 facilitating on-the-ground victim support and outreach, and implementing capacity building measures within states’ legal and judicial systems.255
Yet, such goals are only attainable when the tribunal is perceived as legitimate by the state or local community it is designed to serve. The hybrid model’s potential to gain legitimacy with the local population is directly correlated to its incorporation of local involvement in the judicial process. When justice is imposed by international actors from a far-removed court, victims and the impacted society are much more reluctant to accept this as legitimate justice. Without local involvement and the legitimacy that extends therefrom, capacity building of the local judiciary is rendered nearly impossible, and outreach measures to victims are made significantly more difficult. Moreover, without the involvement in the court of the parties or victims to the conflict at issue, chances of promoting stability or reconciliation between feuding groups or territories are also minimized.

By sacrificing local involvement in favor of an internationalized tribunal, the international community has hindered the KSC’s potential legitimacy in Kosovo, a decision that may be devastating to the Court’s effectiveness and legacy. As evidenced by recent public polls within Kosovo, the public at large is heavily skeptical of the Court’s ability to provide impartial justice. This stems in part from the widely held belief among Kosovars that it is impossible for a court operated by international judges and prosecutors outside of Kosovo to provide fair trials for its defendants. Because the KSC is still in the early stages of its proceedings, the authors’ evaluation of the Court’s potential to achieve these goals is

256. Hehir, Lessons Learned?, supra note 14, at 268; Hobbs, supra note 16, at 495 (recognizing that “without legitimacy, the promised benefits of hybrid courts will be lost”); Hehir, The Assumptions, supra note 10, at 31 (noting that tribunals that lack legitimacy will find it difficult for the local population to accept or respect their judicial decisions).

257. See Hobbs, supra note 16, at 487 (arguing that hybrid courts whose judicial benches best reflect their society hold the most potential in terms of legitimacy).

258. Hehir, The Assumptions, supra note 10, at 30; RATNER ET AL., supra note 47, at 229; see also Dustin N. Sharp, Assessing Dilemmas of the Global and the Local in Transitional Justice, 29 EMORY INT’L L. REV. 71, 72 (2014) (recognizing that international intervention pertaining to post-conflict justice when “perceived as being imposed ‘from the outside’ may spark backlash and resentment that undermines both legitimacy and effectiveness”).

259. See Dickinson, supra note 40, at 303 (“[A] purely international process that largely bypasses the local population does little to help build local capacity.”); Cohen, supra note 39, at 6 (noting that outreach becomes much more difficult when justice is obtained “without the participation of nationals of the countries in question”).

260. RATNER ET AL., supra note 47, at 252.

261. PUBLIC PERCEPTION STUDY, supra note 231, at 15 (concluding that 67.4 percent of ethnic Serbs and 42.4 percent of ethnic Albanians believe it is not possible that alleged perpetrators will be given a fair trial).

262. Id. at 15.
purely predictive. However, the Court’s lack of legitimacy stemming from its internationalization significantly undermines the KSC’s potential to achieve the non-retributive goals generally associated with hybrid tribunals, such as facilitating inter-ethnic and inter-state reconciliation, promoting peace and stability, and providing capacity building measures to members of the Kosovar judiciary and legal community.

1. Reconciliation

Despite the two decades that have passed since the Kosovo War, Kosovo remains a divided nation. Deep tensions run between its various ethnic groups, especially between ethnic Albanians and ethnic Serbs. The Court’s primary international supporters, including the EU and the United States, have repeatedly touted the KSC as a means to “achieve reconciliation and build a better future.” However, these statements by international actors reflect a strong disconnect between international perspectives and the strongly-held beliefs of the local Kosovar community.

In fact, rather than promoting the “peace, stability, and prosperity” anticipated by the Court’s proponents, the KSC may exacerbate long-existing tensions between ethnic Albanians and Serbs. As scholar Aiden Hehir recognizes, without legitimacy, courts lack the ability to invoke changes in societal attitudes, and their judicial decisions will not be able to “counter nationalistic narratives regarding the attribution of blame and the designation of ‘heroes’ and ‘villains.’” This was the exact situation encountered by the exclusively international ICTY. As Hehir notes, much of the population of Former Yugoslavian states perceived the ICTY as an “illegitimate ‘alien’ court biased against their particular national group,” and as such, the Court failed to convince Yugoslavs that its convictions of defendants—many of whom were heralded as heroes by their respective ethnic groups—were fair and legitimate. As a result, the ICTY did little to normalize relations among ethnic groups in the Former Yugoslavia; to the

264. U.S. Embassy Pristina, Statement of EU Embassies/Offices, EURS/EU Office and US Embassy in Kosovo on the Adoption of Constitutional Amendment and Law on the Establishment of the Specialist Chambers, U.S. EMBASSY IN KOS. (Aug. 3, 2015), https://xk.usembassy.gov/joint-statement/. See also Hehir, Lessons Learned?, supra note 14, at 2 (recognizing that international parties have touted the KSC as “essential to facilitating transitional justice and societal progress in Kosovo, as well as enabling Kosovo to further integrate into the international system”).
265. Hehir, Lessons Learned?, supra note 14, at 270.
267. Id. at 30.
contrary, in fact, many of the individuals investigated and prosecuted by the ICTY eventually returned to public office and even saw a rise in popularity among their ethnic groups.268

The potential to inflame ethnic tensions is even more prevalent in the KSC. While the ICTY intended to prosecute defendants from all of the feuding groups involved in the Balkan Wars, the KSC was created to primarily target one ethnic group—the Kosovar Albanians who served in the KLA. This limited mandate is especially controversial since, in Kosovo Albanian society, KLA fighters are routinely heralded as heroes who liberated Kosovo from Serbia's autocratic rule.269 The mandate also amplifies allegations of bias against the Court. Indeed, as of 2017, an overwhelming 76.4 percent of ethnic Albanians surveyed believed the KSC was unfair and biased.270 Given this outlook, any decision the Court issues against a KLA fighter will likely not promote reconciliation. Rather, such a decision will validate the widely held view of the Court as a biased institution and deepen the divide between Albanians and their Serb counterparts. In fact, as of 2017, a majority of ethnic Albanians described themselves as willing and ready to protest in response to a number of potential Court actions against KLA members.271 Even more startlingly, 36 percent of ethnic Albanians surveyed admitted they would act to directly interfere with the Court and the Specialist Prosecutor to prevent prosecutions of KLA members.272

As a heavily internationalized court, the KSC will remain physically and intangibly removed from the Kosovar people. As a result—and in stark contrast to its proponents’ claims—the KSC holds a slim chance of normalizing relations between ethnic groups within the state. By not engaging the local population in the establishment of the Court or incorporating local insight in creating the Court’s mandate, the Court is seeking justice different from that desired and needed by the Kosovar people. Thus, rather than promoting peace, the KSC’s decisions carry a greater possibility of entrenching nationalist narratives and increasing tensions within Kosovo.

268. Id. at 30–31.

269. Id. at 31.

270. PUBLIC PERCEPTION STUDY, supra note 231, at 13; see also Visoka, supra note 1, at 27 (recognizing that “the attitude of the general public in Kosovo to the Specialist Court is mainly negative,” in part because of “the lack of local ownership and transparency about the process”).

271. PUBLIC PERCEPTION STUDY, supra note 231, at 16 (reflecting that 64 percent of ethnic Albanians would consider protesting if the Court declared the KLA to be a terrorist organization).

272. Id.
2. Peace & Stability

In addition to fostering reconciliation between ethnic groups, as a hybrid court, the KSC also has the capacity to implement transitional justice measures to foster community involvement and collaboration, facilitate truth sharing, and provide victim support in efforts to promote peace and stability within Kosovo.273 These measures recognize that justice “is not just about sending people to jail, [but] about building the community.”274 Again, however, the lack of local involvement in the KSC precludes transitional justice measures, and instead presents greater threats to peace and stability in Kosovo.

The UN defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”275 Transitional justice can encompass a broad array of mechanisms beyond prosecution, including the creation of investigatory commissions aimed at developing a historical record of the wrongs committed, public apologies, reparations, and lustration, among other things.276 These mechanisms—in whatever form they may take—provide recognition of victims’ suffering and allow a post-conflict state to discover truths within the conflict and face its history.277 They permit a post-conflict state to move beyond its violent past and towards peace, stability, and a stronger appreciation for the rule of law.278 The EU itself recognizes

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273. See Raub, supra note 40, at 1043 (noting the flexibility inherent to the hybrid model).
274. Trahan, supra note 42, at 911.
275. U.N. Secretary-General, Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, at 2 (Mar. 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf [hereinafter U.N. Guidance Note on Transitional Justice]; see also Melissa S. Williams & Rosemary Nagy, Introduction to TRANSITIONAL JUSTICE 1, 20–21 (Melissa S. Williams et al. eds., 2012) (recognizing transitional justice as comprising institutions that help transition a state or society from an authoritarian or “rights-abusing regime” to a “rights-respecting liberal democratic constitutional order.”).
276. See RATNER ET AL., supra note 47, ch. 10 (explaining various non-prosecutorial options to provide victims with transitional justice); U.N. Guidance Note on Transitional Justice, supra note 275, at 2.
277. Dustin N. Sharp, Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique, 14 CHI. J. INT’L L. 165, 175 (2013) (“[T]ransitional justice is often said to be both backward looking, insofar as it is closely associated with justice and accountability for previous human rights violations, and forward looking, insofar as its advocates often claim that justice is essential to prevent recurrence and to lay the groundwork for longer term peace and stability.”); see also Matthew F. Putorti, The International Legal Right to Individual Compensation in Nepal and the Transitional Justice Context, 34 FORDHAM INT’L L.J. 1131, 1146–48 (2011) (enumerating the various backward and forward looking goals of transitional justice).
the importance of transitional justice as an integral part of “state- and peace-building.”

Given Kosovo’s status as a new state birthed from conflict and plagued by lasting inter-state and intra-state tensions, transitional justice measures are especially imperative. Yet, despite this critical need, these measures were significantly lacking in the predecessor courts. Instead, the predecessor courts focused nearly exclusively on accountability measures to the exclusion of transitional justice efforts and victim-oriented processes, such as “truth-seeking, victim support, apologies, reparations[,] and community reconciliation.” This retribution-focused approach has not succeeded in fostering peace between Kosovo and Serbia, nor does it contribute to greater stability within Kosovo.

Supporters of the KSC hoped the Court would not only quell inter-ethnic tensions within Kosovo, but would also aid in normalizing relations between Kosovo and Serbia, paving the way for Kosovo to fully join the international community, and validating the EU and the United States’ long-running financial and logistical support of the country. Despite the nearly twenty years that have passed since the Kosovo War, Serbia refuses to recognize Kosovo as an independent nation. Western-facilitated negotiations between the two countries—in which the EU and the United States have had very heavy involvement—have been ongoing since 2011, and a comprehensive agreement between the two states remains elusive. Kosovo’s advancement towards EU and UN membership is conditional upon its normalization of relations with Serbia, and thus, a bilateral agreement between the nations is critical for Kosovo’s growth and stability. Some of the main impediments to reaching a Serbia-Kosovo agreement have been Serbia’s refusal to apologize for war crimes committed during the Kosovo War or to address the thousands of persons who went missing during the

accountability are essential if traumatized societies are to begin resolving their political, ethnic, racial, and religious conflicts through democratic processes, rather than through torture, rape, and genocide.”.


280. VISOKA, supra note 1, at 16.

281. Id.


285. RUSSELL, supra note 24, at 2.
Because none of the international courts dedicated to prosecuting war crimes, including the KSC, have incorporated elements of truth telling or public apologies into their operations, the Kosovar people have still not received the information or acceptance of responsibility that they so desire from Serbia. In prioritizing the need for international accountability over the Kosovar people’s desire for truth and a clear historical record, the KSC further threatens the potential for Kosovo-Serbia negotiations. By failing to implement local involvement, the creators of the KSC have not modeled the Court to achieve the types of justice that the local communities and people desire, and as a result, threaten the potential to cultivate peace and stability throughout Kosovo.

3. Capacity Building

One of the most significant benefits of hybrid tribunals is their ability to assist in building or rebuilding legal systems and strengthening the rule of law in post-conflict states. The hybrid model, through the incorporation of local judges and attorneys within the court, provides a unique opportunity to train local lawyers, judges, and court personnel to prepare post-conflict domestic judiciaries to enact justice at “an internationally acceptable level,” and to foster appreciation among the national community for the rule of law. Local involvement in hybrid tribunals provides double-sided benefits, in that local legal personnel receive “on the job training,” whereas their international counterparts in the court can “gain greater sensitivity to local issues, local culture, and local approaches to justice,” thereby allowing them to mold their prosecutorial strategies to render culturally competent justice. However, this critical benefit is unattainable in post-conflict courts dominated by international actors. As scholar Laura Dickinson has noted, “[a]n international court staffed by foreigners, or even a local justice system...
operated exclusively by [international actors] . . . will do little to help improve the capacity of the local population to establish its own justice system.”

Modeling the KSC as an internationally staffed court based in The Hague, rather than as a typical hybrid court, deprives it of the potential to train Kosovar lawyers and judges in international legal skills. Without “side by side” collaboration between Kosovar and international lawyers and judges, the KSC is abandoning a critical benefit of its hybrid character and surrendering an opportunity to strengthen the rule of law within Kosovo. And while Kosovo may be several decades removed from the Kosovo War, the nation’s legal system would still greatly benefit from the type of international capacity building inherent in the hybrid model. Serious flaws continue to afflict Kosovo’s legal and judicial systems and hamper the rule of law within the country. Based on a 2016 study conducted by Southeast European Leadership for Development and Integrity and financed by the EU, the court system is recognized by the Kosovar people as the third most corrupt public institution in the country. A 2018 survey also reflects that the vast majority of Kosovar citizens believe that persons with political power or influence are less likely to face legal repercussions. If the KSC fails to successfully prosecute and convict political leaders whom it has already recognized as perpetrators of war crimes, this failure will simply validate these existing perceptions and will further undermine confidence in the rule of law within Kosovo.

C. Dangerous Precedent for Hybrid Tribunals

While the KSC’s excessively international nature poses potential detriments in terms of legitimacy and transitional justice initiatives within Kosovo, it also presents numerous concerns for the future of the hybrid model of prosecuting atrocity crimes. This is a time of uncertainty for the hybrid model. After nearly two decades of hybrid courts, many of which failed to achieve accountability for the crimes set forth in their mandates, as

291. Id. at 304; see also Trahan, supra note 42, at 888 (noting that in an interview with scholar Carsten Stahn, he expressed that when hybrid courts are “fully transplanted” from the targeted state, it is more difficult to create a “spillover effect [of international training and skills] on the domestic system”).

292. Dickinson, supra note 40, at 304.

293. SE. EUR. LEADERSHIP FOR DEV. AND INTEGRITY, ASSESSMENT OF CORRUPTION IN KOSOVO 2016, at 18 (2016), https://seldi.net/fileadmin/public/PDF/Publications/CAR_Kosovo/ASSESSMENT_OF_CORRUPTION-ENG_FINAL__002_.pdf (finding that, on a scale from 1 to 5, respondents consider the “degree of corruption proliferation” in the Kosovo courts to be a 2.64).

294. ROLPIK, http://www.rolpik.org/ (last visited July 9, 2020) (finding that 74.4 percent of Kosovar citizens think that persons with political influence are less likely to be punished).
well as those non-accountability goals expected by the international community, many have become disillusioned with hybrid tribunals.\textsuperscript{295} There have been numerous discussions promoting the creation of future hybrid courts. However, after repeated failures, the willingness of the international community—through the UN and regional establishments like the EU—to move forward in creating courts that follow this model is tenuous at best.\textsuperscript{296} In the event that the KSC fails to achieve its accountability goals, as well as the corresponding peace and stability promised, its legacy could be potentially damning for the future of hybrid courts.

Hybrid tribunals have proven they can obtain justice in areas where purely international or domestic judicial mechanisms cannot; they can also provide benefits beyond mere retribution, such as transitional justice initiatives, which are largely impossible to obtain through other purely domestic or international courts.\textsuperscript{297} However, in order to achieve these goals—both those grounded in accountability and those in transitional justice—hybrid courts must be used selectively. Their use should be limited to situations in which they hold a true possibility of providing impartial and comprehensive justice for widespread crimes or human rights abuses and where there exists political and local support for a hybrid court and its mandate.\textsuperscript{298} Notably, they should not be driven by international objectives unrelated to justice or used as political tools, as was the case with the KSC. Where international objectives diverge significantly from local justice goals, a hybrid court will most likely be unsuccessful. Further, the international community should avoid using hybrid courts to achieve a specific type of justice where numerous other mechanisms have failed. In the event a hybrid tribunal is so used, however, the international community must take great pains to mold the tribunal at issue to avoid encountering the same problems or controversies that plagued its predecessor mechanisms.

In addition to this selective use, hybrid tribunals must also incorporate local involvement and ownership over the judicial process. Largely removing local participation from a hybrid court, such as by locating the court outside of the targeted state or exclusively staffing it with international legal actors—both of which were done in creating the KSC—undermines the

\begin{thebibliography}{99}
\bibitem{295} See, e.g., Hobbs, \textit{supra} note 16, at 488 (noting that hybrid tribunals fell out of favor because they failed to achieve their “lofty goals”); McAuliffe, \textit{supra} note 32, at 1 (explaining that in the decade after hybrid tribunals were created, their popularity declined dramatically).
\bibitem{296} See Stahn, \textit{supra} note 18 (noting the uncertainty of the future of the hybrid model of international adjudication).
\bibitem{297} See Raub, \textit{supra} note 40, at 1017 (explaining how the flexibility inherent in the hybrid model allows creators to mold each hybrid court to the needs of the victims).
\bibitem{298} FICHTELBERG, \textit{supra} note 214, at 180.
\end{thebibliography}
theoretical objectives of the hybrid model. Removing the local element compromises the perceived legitimacy of the court within the state and precludes capacity building or other transitional justice initiatives. By creating a hybrid court under substandard conditions and in a manner that prevents it from achieving many of the theoretical objectives of the hybrid model, the international community has undermined the KSC from the start. Limiting the KSC’s potential to achieve success by stylizing it as an ultra-internationalized domestic court, rather than as a true hybrid that incorporates local objectives and involvement presents serious concern that the international community will decline to utilize the hybrid model to prosecute future mass atrocities.

VI. CONCLUSION

The stated mandate of the KSC is a noble step towards addressing impunity for war crimes. The authors would like to clarify that this paper does not advocate for allowing KLA members responsible for committing grave atrocity crimes to remain in high-ranking positions of national leadership within Kosovo or to escape justice. However, the creation of the KSC as an internationalized domestic tribunal—or in other words, a hybrid tribunal lacking hybridity—gravely impairs the Court’s chances of success, both in terms of its ability to successfully prosecute and convict defendants and its ability to garner respect and legitimacy throughout Kosovo. Moreover, it casts further doubt on the efficiency and effectiveness of the hybrid model, which has long been criticized by scholars and practitioners alike.

The way to achieve justice for crimes and assist Kosovo in facing its traumatic history is not to continue with the problematic prosecutorial methods used in the past or to continue to force justice from the outside. The Kosovar people should be permitted to play a role in the judicial process and, in a democratic manner, lend their voice to how and what type of justice is provided. Rather than an internationally operated court located in countries removed from where the Kosovo War occurred, the international community had several more effective alternatives to consider in providing justice for

299. Daimeon Dean Shanks, From Aspirational to Prescriptive Capacity Building: Post-Conflict States, Rule of Law, and Hybrid International Justice, 90 U. COLO. L. REV. 1195, 1220 (2019) (noting that when a hybrid is internationally dominated, “the local population may not feel they have any ownership of the process, exposing the court to charges of imperialism”).

300. See RATNER ET AL., supra note 47, at 252 (discussing common challenges that afflicted hybrid tribunals); Hobbs, supra note 16, at 488 (noting the argument that while the hybrid model began as a “golden child” of international criminal justice, it eventually became an “orphan,” after hybrid courts failed to achieve their “lofty goals”).
KLA crimes. As Dean Pineles, a former American EULEX judge, has advocated, the EU could have continued to operate the EULEX Courts while incorporating modifications, such as greater international protections, to address their most significant issues of witness intimidation and political interference.\footnote{Pineles, supra note 155.} In doing so, EULEX would have maintained the truly hybrid nature of its composition and structure while at the same time ensuring international oversight. It would also have kept the courts located within the territory of Kosovo, thereby preserving a geographic connection to the local Kosovar population and permitting locals and victims to attend the criminal proceedings.

Alternatively, the EU and the international community could have decided to fund and implement a transitional justice mechanism, such as a truth and reconciliation commission, in Kosovo. Such a mechanism would not have been able to provide criminal retribution for defendants. However, it could have created a comprehensive historical record of the crimes committed during and following the Kosovo War, provided victims with the opportunity to share their stories, and delivered victims clarity on missing relatives. While such an approach may have been unappealing to the international community given its lack of accountability, it would have promoted peace, stability, and reconciliation both within Kosovo as well as between Kosovo and Serbia.

By declining these options and instead moving forward with the creation of an entirely new internationally operated court outside Kosovo, the EU sacrificed the Kosovar population’s needs for justice in favor of international political objectives. In so doing, the international community has threatened the potential for comprehensive and transitional justice within Kosovo, as well as the future of the hybrid model of prosecution.