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Opinion⁴

Risks for the Republic of Kosovo if Parliament Fails to Establish the Special Court

April 2015

RISKS FOR THE REPUBLIC OF KOSOVO IF PARLIAMENT FAILS TO ESTABLISH THE SPECIAL COURT

Author

Group for Legal and Political Studies

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Introduction

1. The aim of this opinion is simple. It discusses challenges for Kosovo in the event that the special court is not established. The Specialized Chambers and Special Prosecution in the Kosovo Justice System will herein be referred to as the “Special Court”. This opinion, therefore, does not discuss whether the initiative to establish this court is just for Kosovo. To that aim, the opinion, acknowledges that it is essential that the Kosovo Parliament adopts the necessary legal instruments to establish the Specialized Chambers and Special Prosecution in Kosovo in order to honor Kosovo’s international legal obligations, and to preserve Kosovo’s progress in seeking wider recognition of Kosovo’s statehood.¹ The Court will prosecute war crimes that allegedly occurred between January 1998 and December 2000. Failure to adopt the constitutional amendments and the laws to establish the Special Court would only serve to promote the perception of Kosovo as a non-cooperative entity within the international community. Kosovo must take this opportunity to demonstrate that it has the political will and institutional strength to ensure the rule of law, especially in the extremely sensitive area of war crimes and crimes against humanity.

2. Not only will adoption of the necessary legal instruments help to ensure that

¹ A draft law was leaked to the public on 8 January 2015 prior to its finalization. This opinion recognizes that the draft law may have undergone some ‘dramatic’ changes.

Kosovo continues to be respected as a viable state by other international actors that already recognize Kosovo’s statehood, but will also provide the opportunity for Kosovo to show that it is committed to the rule of law and European Union (EU) integration. Kosovo has worked closely with EU representatives in Brussels, Belgium, in order to negotiate the formation of the Special Court. Honoring its legal obligations will strengthen Kosovo’s image in the international community and ensure progress on the path to EU integration. Commitment to establishing the Special Court will likely enable Kosovo to garner recognition from additional United Nations (UN) and EU Member States. Furthermore, Kosovo’s proactive stance on this matter would prevent states that currently refuse to recognize Kosovo from gaining international support and using the failure to establish this Court as a demonstration of Kosovo’s inability to meet international obligations. Creation of the Special Court is essential to Kosovo’s image and future membership in international organizations, in particular the Council of Europe, including EU and UN specialized agencies.

3. In the first section of the opinion the possible structure of the Special Court and its importance within the context of Kosovo’s rule of law will be discussed, followed by possible scenarios in the event that the Court is not established. Kosovo’s duty to form the Special Court is discussed within the framework of EU integration and Kosovo’s international law obligations. Creation of the Special Court will

demonstrate Kosovo's commitment to international responsibilities, and will protect the progress made with regard to Kosovo's statehood. The Special Court will play a significant role in Kosovo's partnership with its international allies.

- The Special Court Structure

4. The Special Chambers would operate alongside Kosovo's existing justice system, and a Special Prosecutor's office will adjudicate serious crimes that were allegedly committed both during and after the war in Kosovo. The Court structure and the draft law on the creation of the Court are the result of cooperation between Kosovo and international actors. The Court will have jurisdiction over the crimes alleged in Dick Marty's Report to the Council of Europe, dated January 7, 2011. However, the Court's scope will be broader than the crimes in the Report, and will encompass an array of war crimes and crimes against humanity. The Special Court will focus on crimes that have been the focus of investigations carried out by the Special Investigative Task Force ("SITF") of the Special Prosecutor of the Republic

of Kosovo ("Special Prosecution").²

5. The Special Court will try crimes committed between January 1, 1998 and December 31, 2000. While the Court would essentially function as an international court, Kosovo laws and legal procedure would apply, to the extent that they do not conflict with international human rights norms.³ Special Prosecution and Chambers for the Special Court will be located outside of Kosovo, while the headquarters will be within Kosovo and will operate separately from the local court structure. Such an arrangement will help to ensure witness protection and general security. Although the location of these Chambers is the subject of speculation, it is likely to be seated in the Netherlands.

6. Given the major issues that have occasionally prevented the prosecution of the alleged crimes committed both during and after the Kosovo war (including the failure of UNMIK and EULEX) it is necessary for an additional mechanism to be created in order to address these allegations of heinous crimes. The Special Court would resolve the alleged occurrence of war crimes and organized criminal activities that have been the center of much speculation. According to Amnesty International it will also incentivize the normalization of relations between Kosovo and Serbia.⁴ Given these challenges, however, it is important that the Special Court be created as an entirely new mechanism to address serious allegations of war crimes.

7. There is a heated debate within Kosovo regarding whether it is fair or necessary for such a judicial mechanism to be established, but it is important to

understand that Kosovo has already made an international commitment to the founding of this Court, and is a necessary step on the path towards EU integration. The EU high representative for foreign affairs and security policy, Federica Mogherini, has routinely called for passing the amendments that would make the Special Court operational, and the failure to fulfill this obligation would hinder Kosovo's fight for state recognition if it refuses to fulfill these commitments in line with EU integration policies.

- Legal Obligation to Create the Special Court

8. In order to support its arguments for recognition, to continue its international partnerships and cooperation, and to fulfill its international agreements, Kosovo must do everything within its power to make the necessary changes in the law to establish the Special Court. This includes commitments made by the Kosovo Government in signing the draft Stabilization and Association Agreement in July 2014, and the Law no. 04 / L-274 extending EULEX mandate to June 2016.⁵ On 16 December 2014, the Council of the European Union asserted that Kosovo should adopt all of the legal changes arising from the Enlargement and Stabilization and Association Agreement, signed in July 2014.

9. The Council emphasized the importance of establishing a Special Court to investigate the allegations set forth in the Marty Report. The UN Security Council has similarly urged Kosovo to create a Special Court, and the Secretary-General on the UN Interim Administration Mission in Kosovo called upon "Kosovo's political leaders to redouble their efforts in strengthening a broad public understanding and consensus

² Kosovo Assembly (April 2014). Law No. 04/L-274 23, available at: <http://www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20a.pdf>.

³*Id.*

⁴ Amnesty International. "Kosovo: Time for EULEX to Prioritize War Crimes." 2012, available at: http://www.amnesty.eu/content/assets/260412_EULEX_Report.pdf.

⁵ Assembly of Kosovo. "On Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo." Law No. 04 / L-274. 23 April 2014. Available at: <http://www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20a.pdf>.

around this issue, given its importance to Kosovo's future".⁶ In order for Kosovo to continue on the path to EU integration and eventual recognition by additional UN member states, it must pass a draft law to establish the Special Court, in accordance with the commitments outlined in the exchange of letters between President Atifete Jahjaga and EU High Representative Catherine Ashton (referred to as an international agreement between Kosovo and the EU) as incorporated into the Law ratifying the international agreement, no. 04 / L-274.

10. Except that the latter is already an internal obligation for Kosovo institutions, Kosovo is legally obligated under an international agreement to take the steps necessary to establish a Special Court. Under Law no. 04 / L-274, Kosovo assents that it will undertake legal measures to establish a "specialist court" within the Kosovo justice system and a Special Prosecutor's Office. Under this commitment Kosovo confirms the adoption of "any constitutional amendments as needed" and that it will undertake

"to adopt appropriate legislation to allow for the establishment and operation of the dedicated judicial chambers." It is essential for Parliament to pass the necessary laws in a timely manner to establish the Special Court, in order to honor its international legal obligations.⁷

11. Failure to fulfill its legal duties would have serious consequences to Kosovo's future membership and participation in international organizations. Currently, preparations are being finalized to apply for membership in the Council of Europe. Other organizations to which Kosovo will seek membership include the EU and UN specialized agencies. Membership to such organizations is essential for Kosovo's integration into the region, for state recognition, as well as political and economic development. It is essential for Kosovo to demonstrate to the international community its continuing commitment to achieving consistent and predictable application of clearly defined legal standards to all its citizens. By establishing the Special Court, Kosovo will prove to the international community that it is committed to gaining membership in international organizations and pursuing international cooperation.

12. It is of the utmost importance that Kosovo demonstrates its prioritization of rule of law matters, and its commitment to international legal standards. Kosovo must ensure that other states will have confidence that its legal agreements with Kosovo will be respected. Kosovo has already taken important steps towards the

⁷ See Vienna Convention on the Law of Treaties, (23 May 1969), article 27 and 46. Article 27 confirms that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46'. Article 46 further specifies that: '1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 3. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'.

formation of the Special Court. In an extraordinary meeting on 7 March 2015, the Kosovo Government presented two constitutional amendments that would allow for the creation of the Special Court.⁸ To that extent, the Constitutional Court of Kosovo has confirmed that the respective constitutional amendments, if adopted, will '...not diminish human rights and freedoms set forth in Chapter II of the Constitution as well as under Chapter III of the Constitution and its letter and spirit as established in the Court's case law.⁹ Such measures represent significant progress towards the creation of the Special Court, but a timely passage of the draft law on the Special Court is necessary to conclude this process.

- Potential Consequences if Kosovo Fails to Establish the Special Court

13. Throughout the debate surrounding the establishment of the Special Court, several potential scenarios have been presented as threats to Kosovo's independence and stability. Although some politicians have argued the contrary, existing mechanisms, including the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Court (ICC) lack the jurisdiction to hear cases that are the subject of potential SITF indictments. Throughout the Special Court debate, four main consequences have been discussed as possibilities should Kosovo fail to pass the necessary laws to establish the Special Court. The merits of the following claims will be examined. First, the mandate of the ICTY could be extended. Second, the SITF reports regarding crimes committed both during and after the war in Kosovo could be referred by the UN Security Council to the ICC. Third, the UN Security Council would utilize Resolution 1244 as the basis for

⁸ Hajdari, Una. "Kosovo Plans Constitutional Changes for KLA Court." 9 March 2015). Available at: <http://www.balkaninsight.com/en/article/kosovo-approves-constitutional-amendments-for-klacourt>.

⁹ Constitutional Court of Kosovo, Case No. K026/15, Judgment concerning the Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433jD0-318.

⁶ UN Security Council. "Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo." 30 January 2014. S/2015/74. Available at: <http://www.unmikonline.org/SGReports/N1502188.pdf>.

establishing an international tribunal, and such a court could be founded through the UN Mission in Kosovo (UNMIK) and EU coordination. Last, the UN Security Council could use Chapter VII of the UN Charter to establish an international tribunal.

- Scenario 1

14. The ICTY, established on the basis of UN Security Council Chapter VII, is not imparted with the authority to judge organized criminal cases, but solely war crimes committed during the war in the former Yugoslavia.¹⁰ The ICTY was established to try individuals suspected of crimes committed prior to June 1999, thereby lacking the mandate to try accused individuals suspected of committing crimes in the aftermath of the Kosovo war. In contrast, the Special Court's mandate would include crimes committed post-1999, and investigation would extend presumably to KLA members, regardless of whether their activities took place on the territory of Kosovo or Albania.¹¹ Importantly, the ICTY is working toward completion of its mandate,

by focusing its efforts on prosecuting senior leaders. Some cases involving accused officials of lower and mid-level status to the appropriate national courts in the former Yugoslavia.¹² This approach allows the ICTY to move forward in achieving its completion strategy, but also indicates a limited budget, which prevents the Tribunal from prosecuting all but the highest level officials for war crimes and taking new cases.

- Scenario 2

15. Should Kosovo choose not to establish the Special Court internally, some claim that the UN Security Council will refer the allegations of war crimes and organized crimes that occurred in Kosovo to the ICC. The ICC's founding treaty, the Rome Statute, allows the Security Council to refer country situations to the ICC prosecutor under Chapter VII of the UN Charter, if the Council determines that a situation amounts to a threat to international peace and security. However, the ICC's jurisdiction only extends to alleged crimes that occurred after the founding of the ICC in July 2002, and the ICC's temporal jurisdiction does not apply retroactively.¹³ Therefore, the crimes that would be at issue in potential SITF investigations would have occurred outside of the jurisdiction of the ICC. Arguments that Kosovo will be referred to the ICC are inaccurate, as is the claim that the UN Security Council will create an international tribunal on the basis of Resolution 1244.

- Scenario 3

16. Resolution 1244 created the legal basis for the establishment of a UN transitional government over Kosovo. Resolution 1244, paragraph 11, states that the civil presence was to provide "an interim administration for Kosovo...".¹⁴ Although it is possible, but

unlikely, that UN Secretary General through SRSG would succeed in creating a special war crimes chamber(s) using similar legal avenues related to the establishment of EULEX in Kosovo, such an action would seriously damage both Kosovo's statehood and progress in the area of Rule of Law.¹⁵

17. In fact, within this scenario, the application of Resolution 1244 to establish a 'separate tribunal' would require the involvement of both EU and UN Security Council.¹⁶ The involvement of the Security Council can either be direct or through the UN Secretary General.¹⁷ Moreover, unless Security Council decides otherwise,

ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement.

¹⁵ See for more De Wet, E. (2009) 'The governance of Kosovo: Security Council Resolution 1244 and the establishment and functioning of EULEX'. *American Journal of International Law*. Vol. 103, no. 1: 83-96; UN Doc. S/2008/106*, Letter dated 18 February 2008 from the Secretary-General to the President of the Security Council; UN Doc. S/2008/354, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008; and UN Doc. S/2008/458, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo S/2008/458, 15 July 2008.

¹⁶ For more on the opportunities how such a scenario can be coordinated within the Resolution 1244 framework see: Council of the European Union, 6496/08 (Presse 41) Press Release 2851st Council Meeting, General Affairs and External Relations, Brussels, 18 February 2008; Council Joint Action 2008/124/CFSP of 04 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo. *Official Journal of the European Union*, L 42/92; UN Doc. S/2008/106*, Letter dated 18 February 2008 from the Secretary-General to the President of the Security Council; UN Doc. S/2008/354, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008; UN Doc. S/2008/458, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo S/2008/458, 15 July 2008; UN Doc. S/2008/692, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008.

¹⁷ It should be mentioned that, apart from managing the justice system within Kosovo for 8 years, UNMIK has also attempted to create such a tribunal to try lower level officials that the ICTY is unable to try due to limited resources and it attempted to create a tribunal, concerns were expressed including the cost of the court, issues with a separate judiciary system, potentially inflaming ethnic tension, and the possibility the court would be more likely to prosecute Albanians. In 2000, the idea of this court was abandoned. See *The UNMIK Programme*.^{8 April 2015}. Available at: <http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/programme-of-international-judges-in-kosovo/the-unmik-programme.html>.

¹⁰Radziejowska, Maria, and TomaczZornaczuk. "Kosovo: A New Court for Old Accusations." Issue brief No. 54 (649). Polish Institute of International Affairs. 24 April 2014. Accessed at: https://www.pism.pl/files/?id_plik=17118.

¹¹*Id.*

¹² UN ICTY. "About the ICTY." Available at: <http://www.icty.org/sections/AbouttheICTY>.

¹³UN General Assembly. "Rome Statute of the International Criminal Court." Last amended 2010, 17 July 1998, ISBN No. 92-9227-227-6. Available at: <http://www.refworld.org/docid/3ae6b3a84.html>.

¹⁴ UN Security Council, UN Security Council Resolution 1244 (1999), 10 June 1999. Web. 9 March 2015. Available at: <http://daccess-dds->

Resolution 1244 will guide the UN mandate within Kosovo, and since the role of UNMIK as confirmed by the Secretary General of the UN can no longer be performed effectively within Kosovo, the interlocutor role of EU is seminal.¹⁸

18. In general, if agreed, such undertaking is both possible and it would undermine the legitimacy of the existing independent legal regime of Kosovo.

- Scenario 4

19. Last, the UN Security Council may use Chapter VII as the basis for establishing an international tribunal. Chapter VII, Article 39 states that the Security Council may only intervene where it determines that “the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.¹⁹

¹⁸ See UN Doc. S/2008/458, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo S/2008/458, 15 July 2008; UN Doc. S/2008/692, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008

¹⁹ United Nations, “Charter of the United Nations.” 24 October 1945, 1 UNTS XVI. Accessed at:

Importantly, Article 41 concerns measures not involving the use of force, and encompasses measures such as the creation of an international tribunal. However, in any UN Security Council decisions to apply Chapter VII, it must first be determined that a continuation of a situation would threaten international peace and security.²⁰ It is clear that the criminal allegations that are the subject of potential SITF indictments do not present a continuous or ongoing threat. In some instances, the UN has used Chapter VII as the basis to establish an international tribunal where a state requests assistance to prosecute individuals accused of war crimes and crimes against humanity. For example, the government of Lebanon sought the help of the UN in establishing a court to prosecute the attack to assassinate former Prime Minister, Rafic Hariri (as they did with regard to Sierra Leone and Cambodia special tribunals).²¹ In justifying the application of Chapter VII authority, the UN Security Council stated that although this terrorist attack was a single incident, the threat of terrorism constituted an ongoing threat to peace and stability. The Tribunal therefore had jurisdiction to try individuals for crimes connected with the principles of criminal justice and are of a nature and gravity similar to the Hariri attack.²²

20. Kosovo has not requested UN Security Council assistance to establish such a

<http://www.refworld.org/docid/3ae6b3930.html>.

²⁰United Nations. “Consideration of the provisions of chapter vii of the charter UN.” *The Repertoire of the Practice of the Security Council*. Available at: http://www.un.org/en/sc/repertoire/93-95/93-95_11.pdf.

²¹ It should be noted that UN Security Council except Lebanon has already used Chapter VII to (help) establish a war crime tribunal in Sierra Leone. See UN Doc. S/RES/1757 (2007), 30 May 2007, and UN Doc. Resolution 1315 (2000), 14 August 2000. Of course, the case of the Cambodia is yet another example how UN can be involved and establish a war crime tribunal. See Resolution A/RES/57/228 B, adopted by the General Assembly [on the report of the Third Committee (A/57/806) Khmer Rouge trials, 22 May 2003, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/57/228B.

²² Special Tribunal for Lebanon, Article 1, See: http://www.fes.de/international/nahost/pdf/Handbook_Libanon.pdf.

tribunal, but, if permanent members of the Security Council consent, that request can be submitted by either UNMIK or EULEX. Given that the alleged events that are the subject of potential SITF indictments do not constitute a clear and ongoing threat to international peace and security as well as the resistance by key permanent members of the Security Council (including the majority of the EU Members States), the latter is unlikely to use Chapter VII as the basis to establish a new tribunal. However, the refusal by Kosovo to establish the court, solutions involving UNSC are likely to be explored.

- Conclusion

21. It is critical for the Kosovo Parliament to adopt the necessary legal instruments to establish on the Special Court as soon as possible. Although facing strong opposition, the European Union remains an ally to Kosovo, and the majority of the EU’s member states recognize Kosovo’s statehood, except for Cyprus, Greece, Romania, Slovakia and Spain. It is important that Kosovo to create the Special Court in order to honor its legal obligations, and to protect Kosovo’s image in the international community. The failure to adopt the appropriate legal changes in a timely manner will provide fodder for states that currently refuse to recognize Kosovo’s statehood. The Parliament should recognize the threat to Kosovo should it neglect its international commitments and legal obligations. The Kosovo Government must show that is committed to achieving Rule of Law and to prosecute individuals that allegedly have committed heinous crimes. Kosovo’s failure to establish the Special Court will negate positive advancements in the justice arena, and would represent a very serious setback for Kosovo in the international community.

OPINION PUBLICATIONS

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Group for Legal and Political Studies
Address: Rexhep Luci str. 10/5
Prishtina 10 000, Kosovo
Web-site: www.legalpoliticalstudies.org
E-mail: office@legalpoliticalstudies.org
Tel/fax.: +381 38 227 944