

Implementing International Law in Domestic Courts: The Kosovo Case

The UN mission in Kosovo considered establishing a special court that would have linked international and local criminal justice professionals in prosecuting war crimes. Katherine Cocco regrets this missed opportunity.

The United Nations Interim Administration Mission in Kosovo (UNMIK) was established pursuant to Security Council Resolution No. 1244 of 10 June 1999 (1), which allowed the “deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required” in order to “provide transitional administration” and “protecting and promoting human rights”.

Shortly after the establishment of UNMIK in July 1999, a temporary judicial system was established in order to quickly address the issue of prosecuting persons responsible for serious crimes.

That could only be a temporary solution. A need was soon felt for a permanent judiciary composed of a specialised court which could address the needs of a society that had witnessed the violation of basic human rights on a large scale and for an extended period of time.

judicial system, was to be competent to try persons for any of the following crimes committed in Kosovo since January 1998: war crimes; genocide; crimes against humanity; other serious crimes committed on grounds of race, ethnicity, religion, nationality, association with an ethnic minority or political opinion.

The Court was meant to have concurrent jurisdiction with the other regular courts to try the above mentioned crimes. The mechanism provided by the regulation had to assure that all cases falling under the jurisdiction of the Court would pass through the Chief Prosecutor of the Court who would determine if the Court was to hear the case or whether it should remain in the other courts. Moreover, the Court would have primacy over the other courts, which means that the Court, at any stage, could request that a case be deferred to it for adjudication.

The Court, as a court of Kosovo, would have concurrent jurisdiction with the International

The Kosovo War and Ethnic Crimes Court would have been the first criminal court established by the United Nations within a domestic judicial structure, with a composition of both international and local judges to prosecute and punish grave breaches of humanitarian law.

The Technical Advisory Commission on Judiciary and Prosecution Services, a body composed of both Kosovar and international experts, was established by the Special Representative of the Secretary General (SRSG). Its recommendations included the need for creating and establishing a war and ethnic crimes court.

The UNMIK Department of Judicial Affairs (hereinafter the department) was immediately faced with the demands of prosecuting war and ethnically related crimes. Therefore careful consideration was given to implementing this recommendation and work started on a draft regulation on the establishment of a ‘Court for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law and Other Serious Crimes Committed on Political, Ethnic or Religious Grounds’ (hereinafter ‘the Court’ or the ‘Kosovo War and Ethnic Crimes Court’).

The draft regulation for the establishment of the Court contained the statute of the future Court. The Court, an extraordinary court within the Kosovo

Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of The Former Yugoslavia since 1991 (ICTY). The Court was to respect the primacy of ICTY. As such, the Court would defer to the competence of ICTY at any stage of the procedure, if ICTY formally requested deferral in accordance with its statute and its rules of procedure and evidence. If requested, the Court would assist ICTY in the investigation and prosecution of persons accused of committing crimes falling under the jurisdiction of ICTY.

The Court was originally intended to be composed of two trial chambers, an appeals chamber, an office of the prosecutor and a registry. Within the registry, there would be a victims and witnesses protection unit (the ‘unit’). The unit was to provide protective measures, security arrangements and counselling for victims and witnesses who would appear before the Court.

The President and Vice-President of the Court, the Chief Prosecutor and his/her Deputy, the

Registrar and the staff of the unit would all be international. Since the Court was supposed to be a court established within the judicial system of Kosovo, international judges and prosecutors would not replace Kosovar judges and prosecutors but would work together with them to prosecute these difficult cases. The placement of international judges and prosecutors in this Court were also supposed to assist in the training of the Kosovar judiciary.

The outcome

The regulation establishing the Kosovo War and Ethnic Crimes Court never came to be approved by the office of the SRSG. Nevertheless, international judges and prosecutors did start working in Kosovo in the five district courts of the region, and they are currently operating within the five district courts and the Supreme Court of Kosovo. The international judges have the authority to select and take responsibility for new and pending criminal cases within the jurisdiction of the court to which they are appointed. The international prosecutors have the authority to conduct criminal investigations and to take responsibility for new and pending criminal investigations or proceedings within the jurisdiction of the office of the prosecutor to which they are appointed.

The department was often dealing with professionals who had not been active in the judicial field for years, having been systematically excluded from all kind of activities and responsibilities.

The Kosovo War and Ethnic Crimes Court would have been the first criminal court established by the United Nations within a domestic judicial structure, with a composition of both international and local judges to prosecute and punish grave breaches of humanitarian law. It would have been a major step forward in the enforcement of international human rights law, an example that, if successful, could be replicated in similar situations. The United Nations was faced with two different possibilities in order to try persons responsible for very serious crimes: the Court or the deployment of international judges and prosecutors within the district and Supreme Courts. A study of 'lessons learned' is currently being conducted in order to establish whether the model chosen was the most effective possible.

It has been noted that it is common for groups of people who have endured significant human rights violations to develop a 'victim' identity and an attitude that the international community owes them 'everything'. This phenomenon has been particularly observed and studied in Kosovo: the Kosovar population was extremely reluctant to get involved in any kind of project implemented by UNMIK. The mood of the majority of the population was diffident, on 'stand-by', waiting to see how the international community would 'make

up' for all their years of suffering.

This attitude was also present in the field of justice. A strong need for a fair judicial system was felt, for free and fair hearings before a competent judge. The UNMIK Department of Judicial Affairs worked and is still working very hard, together with OSCE, carrying out seminars and training for all the judges and prosecutors who have been operating in the courts of Kosovo since the beginning of the year 2000. However, it soon became evident that academic lessons alone could not compensate for lack of experience. In fact, the department was often dealing with professionals who had not been active in the judicial field for years, having been systematically excluded from all kind of activities and responsibilities. It should also be added that people were, and are, full of anger, and judges and prosecutors were often unable to deal with cases impartially, in particular when dealing with ethnically related crimes. Once established, the Court would have put local and international judges and prosecutors working side by side in order to achieve competence through experience.

As is already well documented, in societies where major human rights abuses have occurred, the sense of guilt is extended to the other ethnic group, or the adversary, as a whole. In order to start an effective process of reconciliation one of the main areas of

activity must be the establishment of a free and fair judiciary, so as to identify and process persons responsible for the crimes and at the same time enable the rest of the demonised group to re-integrate within the society.

The situation in Kosovo can certainly be extended to other countries. Though the project of the Kosovo War and Ethnic Crimes Court did not become a reality, other peacekeeping missions faced with similar problems, notably in Cambodia and in Sierra Leone, have been considering exactly the same solution, i.e. the creation of a domestic special court with the assistance of international legal experts.

What was fascinating with regard to the Kosovo experience is that all the United Nations covenants and conventions for the protection of human rights automatically entered into force in the region the same instant the UN Mission was established in Kosovo. The final details of the Security Council's decision for the non-implementation of the Kosovo War and Ethnic Crimes Court were confidential. Whatever the reasons, the international community missed an opportunity to provide a strong example of enforcing the international law of human rights in domestic courts, the first and natural place for the protection of human rights.

As Conforti has pointed out in *Enforcing International Human Rights in Domestic Courts* there

is still a hiatus between international recognition of human rights and their actual implementation; however, the role of domestic courts is becoming more and more critical and certainly needs to be further strengthened.

Katherine Cocco received a Masters in Human Rights at the University of Carlos III in Madrid and is preparing for the UN National Competitive Recruitment Examination. She has worked on several UN missions, including one year with the Department of Judicial Affairs of the United Nations interim administration mission in Pristina, Kosovo.

References:

United Nations Security Council Resolution 1244, Doc. S/RES/1244(1999).

United Nations S/RES/1315 (2000) 14 August 2000.

Conforti and Francioni (1997) *Enforcing International Human Rights in Domestic Courts*.

Training Issue

The next issue of CJM takes training as its focus. We welcome contributions on all aspects of training in relation to criminal justice, community safety, youth justice, community capacity building etc. Discussion of the training of criminologists, researchers and practitioners are especially welcome.

Articles may relate to professional development, response to particular issues, the relationship between academia and the training issue, the relationship between training and voluntary and private organisations and initiatives, or ways in which communities may receive support and assistance in terms of promoting capacity building.

We are keen to explore the experiences of those who have received initial and in-service training, such as representatives of the police, prison service, and probation service, as well as judges, magistrates, voluntary and charitable sector workers. We would also like to hear from trainers themselves.

Within the context of this issue we hope to address questions such as: 'why training? what is training? who benefits? how is training measured in terms of success and failure? does training work?' If you would like to discuss the issue further please contact Valerie Schloredt at CCJS, 020 7401 2425.

Scarman Centre



Postgraduate Criminology Degrees

Contact

Course Administrator
Scarman Centre
University of Leicester
The Friars
154 Upper New Walk
Leicester LE1 7QA, UK
Tel: +44 (0) 116 252 3946
Fax: +44 (0) 116 252 5788
Email: scarman.centre@le.ac.uk
Website: www.le.ac.uk/scarman/
Please quote ref CJM/07 in all communication



Master of Science/Postgraduate Diploma Courses:

Distance Learning - Commencing September 2001:

- Criminal Justice - (recognised by the Law Society for CPD)

Campus Based - Commencing September 2001:

- Clinical Criminology
- Crime and Criminal Justice
- Criminology
- Applied Criminology

Make your experience count

Scarman Centre Open Day:
17th August 2001



University of
Leicester

Delivering excellence in University teaching and research