

The (Pen-) Ultimate Guide to the Specialist Chambers (II)

Law and process

—

December 2018



GROUP FOR LEGAL
AND POLITICAL
STUDIES



GROUP FOR LEGAL
AND POLITICAL
STUDIES

Group for Legal and Political Studies

is an independent, non-partisan and non-profit public policy organization based in Prishtina, Kosovo.

Our mission is to conduct credible policy research in the fields of politics, law and economics and to push forward policy solutions that address the failures and/or tackle the problems in the said policy fields.

legalpoliticalstudies.org

Policy Analysis 12/2018

The (Pen-) Ultimate Guide to the Specialist Chambers (II) – Law and Process

Author: * Rreze Hoxha, **Francisco Jose Garcia Martinez

December 2018

© Group for Legal and Political Studies, December, 2018.

The opinions expressed in this document do not necessarily reflect those of Group for Legal and Political Studies donors, their staff, associates or Board(s). All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any mean without the permission. Contact the administrative office of the Group for Legal and Political Studies for such requests.

Group for Legal and Political Studies (GLPS)
“Rexhep Luci” str. 16/1
Prishtina 10 000, Kosovo
Website: www.legalpoliticalstudies.org
E-mail: office@legalpoliticalstudies.org
Tel/fax.: +381 38 234 456

* Research Fellow at Group for Legal and Political Studies

** International Research Fellow at Group for Legal and Political Studies



“This publication is published by the support of the Democratic Society Promotion (DSP) – financed by the Swiss Development and Cooperation Office (SDC) and Danish Ministry of Foreign Affairs (DANIDA), and managed by the Kosovo Civil Society Foundation (KCSF). The content of this publication is the sole responsibility of Group for Legal and Political Studies (GLPS) and does not reflect in any way the opinions of SDC, DANIDA or KCSF”

THE (PEN-) ULTIMATE GUIDE TO THE SPECIALIST CHAMBERS (II) – *Law and process*

I. Introduction

The first series of analysis, published as a separate paper, covered the steps that were undertaken by Kosovo after Dick Marty's report. The first step undertaken was the constitutional amendment and the adoption of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office that created the Specialist Chambers, its structure, organs, and staff arrangements.¹ This analysis, the second series, deals with the matters of substantive law and the judicial process within the Chambers. It aims to provide an insight on what to expect once the indictments start, and what will happen after that point. It highlights the most relevant specificities of the process that do not follow common practice in Kosovo as established by the Criminal Procedural Code (CPC), to facilitate comprehension for those familiar with criminal procedures.

Thus, Section II, Substantive Law, introduces the matters of Law that frame processes before the Chambers, including the question of applicable law, respect to fundamental rights, and the different roles of all actors that may be involved in the judicial process. The following sections then delve into the subsequent phases. In particular, Section III (Investigations) reviews the initial stages of a case, from its opening up to the moment an indictment is filed against a person; Section IV (Pre-Trial) covers all steps from the filing of the indictment to the constitution of the Trial Panel; and Section V (Trial) examines all actions leading to a judgement. Section VI (Appeals) further studies the guarantees provided by second and third instances, including extraordinary legal remedies; Section VII (The role of the Constitutional Court), does the same in relation to the possibility of refer questions related to the process to the Specialist Chamber of the Constitutional Court; and Section VIII (Service of sentence) briefly discusses the regime of sanctioning established by the Law. A Conclusions section will serve to sum the main highlights of the report up.

II. Substantive Law

Unsurprisingly, the Law on the Specialist Chambers necessarily had to include some mentions to procedural and substantive questions, due to the hybrid nature of the Chambers and the level of complexity of the cases covered by their mandate. Both issues make the applicability of the Criminal and the Criminal Procedural Codes difficult, and thus a separate legal corpus had to be created to direct proceedings.

1. Applicable Law

Article 3 sets the basic principles for the functioning of the Chambers. According to this, the Chambers will use, as sources of law, a blend of international and domestic legislation. On the one hand, it must respect the Constitution of Kosovo and apply the Law on Special Chambers as *lex specialis*, as well as any other disposition referred to expressly in that Law. On the other hand, international sources are two fold; customary international law and international human rights law. In adjudicating, the Chambers are obliged to respect constitutional principles calling for a due process. Article 3 also invokes the principle of *lex specialis derogat lex generali*. Since this law and the Criminal Code govern the same factual situation (crimes committed in Kosovo), the law governing this specific subject matter overrides the one governing general matters. It specifically

¹ Francisco Jose García Martínez and Reze Hoxha, *The (Pen-)Ultimate Guide to the Specialist Chambers (I): Nature, organization and powers*, Pristina: Group for Legal and Political Studies, December 2018

provides that other provisions of Kosovo's legislation are to be applied when expressly incorporated in the Law. This is justified by the fact that the Law addresses the allegations of grave trans-boundary and international crimes committed during and in the aftermath of the war in Kosovo, which relate to those reported by the Council of Europe.

In relation to that, the law defines precisely the legal corpus applicable by the Chambers in Chapter III, where articles 12 to 15 detail the different norms and dispositions to be used. According to Article 12, the Chambers must apply both customary international law and the substantive criminal law of Kosovo applicable at the time the crimes were committed. Of course, in this case the principle of *nullum crimen sine lege* (the action was typified as a crime when it took place) applies, in accordance to the European Convention on Human Rights. However, through the mention of the International Covenant on Civil and Political Rights, it paves the way to prosecutions based on customary international law, even when the domestic law of the time provided for a convenient loophole.

In this case, the legislator foresaw that when applying international law, the Chambers will rely on the sources of international law, including subsidiary ones such as the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court, and other criminal courts. Thus, when deciding over a case that may involve Crimes against humanity, the Chambers will apply customary international law. These are defined in article 13 in broad terms as an intended, widespread or systematic attack against specific sectors of the population that may involve a wide range of specific actions that would constitute lesser crimes. Thus, customary law serves as the main criterion to differentiate between a crime against humanity and that other lesser crime (i.e. murder, arson, rape, etc.). It is interesting, however, that the Statute of Rome was not invoked specifically.

A similar approach is taken towards War crimes. In this case, Article 14 calls upon the application of both customary and written law, including the Geneva Conventions. However, the main emphasis is once again in custom, as it incorporates as positive law a substantial amount of jurisprudence developed by the different international courts.

In addition, the legislator refers to substantial criminal law of Kosovo. It includes the law applicable at the times were crimes were committed, as disposed by the UNMIK Regulation 2000/59. According to that, the substantial law then was the Criminal Code of the Socialist Province of Kosovo (1977), as well as any more lenient criminal law in force during the period of 1989 and October 2000.

Furthermore, and more interestingly, some chapters of the current Kosovo Criminal Code apply to the official proceedings before the Chambers as well. In particular, those that contain provisions related to criminal offences against the administration of justice and public administration (Chapter XXXII), criminal offenses against the public order (Chapter XXXIII), and official corruption and criminal offenses against official duty (Chapter XXXIV).

2. Fundamental Rights

The Chambers, being to some extent a jurisdictional body of Kosovo, must abide, at the very least, to the core principles of domestic law when fulfilling their functions. Thus, a safeguard clause was introduced by Article 2 of the Law, according to which any limitation on the rights of individuals have to be executed in accordance with Article 55 of the Constitution in relation with its Chapter II and international standards of justice. That means only according to an existing Law, for the purpose defined therein and respecting the principle of proportionality. In fact, overseeing it is precisely the role of the Specialist Chambers of the Constitutional Court.

Thus, pursuant to this article, the body of fundamental rights enshrined in the Constitution is reaffirmed, something that would not be necessary in other circumstances. This acts as an anchor point, guaranteeing a minimum of familiarity with the judicial process for everyone involved.

However, since the 'Constitutional Chamber' is composed entirely of international judges, who may or may not be familiar with Kosovo, its interpretation of the Constitution is bound to differ from that of the Constitutional Court. This was already visible in the decisions regarding the referral of the draft and final Rules of Procedure. Although in both cases the Chamber provided a sound legal reasoning, this was mostly based on the case law of the European Court of Human Rights and on international covenants. Only a few references to substantive Kosovar legislation appeared (the Criminal Code was used as a source of inspiration in several occasions) and no mention whatsoever to Kosovar Constitutional jurisprudence was made.

3. Rights of the participants

Deriving from due respect to Human Rights and the constitutional principles already mentioned, Article 21 of the law establishes unequivocally that all persons shall be equal before the Specialists Chambers. The law and the Rules of Procedure go further in determining in different articles and rules the rights of the persons during investigation, the accused, victims, and witnesses.

a) Rights of the accused

As a basic principle, all persons are entitled to a fair, timely, and public hearing. Anyone is to be presumed innocent until proven guilty beyond reasonable doubt. During the entire process, from the investigative proceedings to the publication of the judgement and its execution, any person shall be informed properly and promptly in a language he or she understands of his or her rights and the nature of any charges against him or her.

The accused shall have the adequate time and facilities to prepare its defence, examine witnesses, have free assistance of an interpreter and not be compelled to testify against himself or admit guilt. Moreover, all the relevant material and evidence shall be made available to him or her before the beginning of the procedure, and only exceptionally when restrictions are strictly necessary to ensure a fair trial during proceedings. More importantly, the Chambers are not entitled to judge someone *in absentia*.

In addition to these rights, the law foresees legal mandatory representation when the accused is on detention on remand or in hearings regarding that situation. Also, a representative is required when the indictment corresponds to a crime punishable by imprisonment for 10 years or, when the accused seeks to enter into a plea agreement and the punishment is imprisonment of 1 year. This regulative framework is concurrent with criminal procedure in Kosovo.

At any moment during the judicial procedure, from the opening of the investigation to the final sentence, a person may be detained on remand if there is a risk of flight, of tampering with evidence or of the commission of a new crime. These requirements, set forth in Article 41(6), are fully coincident with domestic regulation and international practice. The Rules of Procedure develop the conditions, modalities and the process of detention on remand in Section III of Chapter IV (Rules 56 to 60).

According to these, any detained person must be kept in facilities controlled by the Chambers, which are managed by the Registry. To that end, this is expected to publish Rules of Detention, Complaints, and Disciplinary Procedures, which are not public as of the moment of writing these lines.

In exceptional circumstances, and pending transfer, they can be kept in other penitentiary facilities of Kosovo or third states, but in those cases the Panel must remain informed of any condition and request any changes. For those purposes, the appointment of an individual judge is foreseen whenever the Pre-Trial judge has not yet been assigned. In this situation, and unless the

Pre-Trial judge takes over the supervision of the detainee, that person must be released within 1 year.

If the Pre-Trial judge has been appointed, he or she will review the conditions for detention each 2 months, ensuring that the total period of detention is reasonable. If, on the contrary, undue delays are taking place, the detainee shall be released. In addition, any person on detention can request reconsideration from the judge, both based on the factual grounds of the case or on any new findings that appear since the detention. If the judge, after conducting this review, considers that no grounds exist for detention, the suspect will be released. In these cases, the panel may impose conditions. As a general rule, the release will take place in the same country where the suspect was first arrested, unless it is a third state that opposes such a release, in which case it will take place as soon as possible, either in Kosovo or in another country that allows it. All these rules apply during the Trial phase, the only difference being that then the responsibility for these functions lays on the Trial Panel.

At any moment, an interlocutory appeal against the detention on remand lays as of right of the detained person, as per article 45 of the Law. Similarly, the Prosecutor is also entitled to appeal a release decision in the same conditions. In those cases, an Appeal Panel shall be constituted immediately to deal with the motion. These interlocutory action will not have suspensive effect on the detention, but it will suspend the release. The motion must be presented within 10 days from the decision appealed against, and a period of responses and fillings opens. In total, if all time limits have run out, the panel can take up to 20 days to decide. Against a contrary decision, there is still the possibility of requesting extraordinary remedies of protection of legality by a Supreme Court Panel.

b) Rights of Witnesses

According to Article 23, both victims and witnesses have the right to be protected due to their added value to the process. In fact, depending on the situation, they can change status. This article thus defines the protection of victims and witnesses in the sense of ensuring their safety, physical and psychological well-being, dignity and privacy.

The protective measures to be applied by the Chambers are foreseen by articles 222 to 226 of the Criminal Procedure Code of Kosovo. It includes measures to conceal the identity of the person, ordering anonymity from the public, from the defendant, and prohibiting questions that may reveal the identity. It also incorporates measures foreseen in the Law on Witness Protection, which include *in camera* proceedings, the protection of identity and even the presentation of evidence by electronic or other special means.

In addition, the law foresees, as a differentiated category, the protection of vulnerable witnesses, defined as victims of sexual and gender based violence and children. For those cases, Rule 80(c) foresees special protection ranging from their identity to psychological well-being. This goes as far as allowing interrogation by the panel, without the presence of the parties.

c) Rights of victims

In addition to the protective measures already mentioned, the Law enshrines a right of the victims to obtain restitution. Considering the seriousness of the crimes to be tried before the Chambers, the rights of the victims are of huge importance during the proceedings. Thus, Article 22 develops the rights of victims to request to the Chambers some sort of compensation for all their losses and suffering.

This goes beyond current Kosovar legislation. According to the Criminal Code, the aim of punishment is to prevent the perpetrator from committing criminal offenses in the future and to rehabilitate him or her, prevent other persons from committing criminal offenses, provide compensation to victims or the community for losses or damages caused by the criminal conduct,

and express the judgment of society for criminal offenses, increase morality and strengthen the obligation to respect the law. However, restitution mechanisms are only mentioned in passing, with even less detail than in the Law on Specialist Chambers.

A victim is defined as a natural person who has personally suffered harm as a direct result of a crime within the jurisdiction of the Chambers. Their status is not to be considered as a barrier when the necessity to testify before the Chamber arises. In addition, not being listed as a victim before the Chambers does not limit the rights of the person under other laws or reparation procedures. However, Kosovo's Criminal Code does not foresee a systematized status for the victim as it is provided by this law.

The rights of the victim before the Chambers are notification, acknowledgment, and reparation. During the procedures, a participating victim needs mandatory representation. In order to secure it, they can form a group and be assisted by a victim's counsel from the Victim's Participation Office.² The Trial Panel may, *ex officio* or upon request, include a decision on the scope and extent of any damage, loss or injury in respect to the victim.

Furthermore, when the Trial Panels of the first and appeal instances adjudge an accused guilty of a crime, they may even specify the appropriate reparation to the victim. In this case, according to Rule 168, "upon request by Victims' Counsel, the convicted person or *proprio motu*, a Panel may appoint experts to assist in determining the scope of any damage and suggest options" for ensuring an effective reparation, as needed.³

As a last option, the Chambers may refer the victim to civil litigation. For those purposes, they can have a certified copy of the judgement delivered to whichever authority (including those of third states), as well as receiving one themselves, in order to exercise their right to reparation.

III. Process (I): Investigations

1. Introduction

With these principles established, the Law then proceeds to outline the procedure to be followed by the Specialist Prosecutor's Office (SPO) and the Chambers along all case phases, from investigation to the occasional Constitutional referral. However, it left developing and detailing these to the Rules of Procedure, where several chapters were included.

Some of these chapters regulated the rights, powers, and competences of the different actors in a transversal way stretching through the entire process, while others focus on each of the different phases. Thus, they include dispositions regulating the rights of both investigated and accused persons, the roles of the different actors involved (including witnesses, victims, and experts), and deadlines to the different procedural actions.

2. The Role of the Prosecutor

The entire investigative phase leading to an indictment is regulated by Article 38 of the Law, and then by Chapter III of the Rules of Procedure. According to both, any authority within the SPO can initiate an investigation against persons who are suspected of being criminally liable for any crime within the scope of the Chambers.

During the entire investigative procedure, the SPO shall respect the fundamental human rights provided in Chapter II of the Constitution. In any case, if an investigation may infringe the

² More on the structure and functioning of the Chambers can be found in Specialist Chambers (I)

³ Kosovo Specialist Chambers, *Rules of Procedure and Evidence before the Kosovo Specialist Chambers*, KSC-BD-03/Rev1/2017, 25 August 2017, Rule 168

rights called upon this chapter, shall be either authorised by a Panel or ordered by the Specialist Prosecutor, as developed in Rule 31, which also requires any undertaken action to be necessary and proportionate to the goal sought.

During this phase, the prosecutor holds the initiative to start any and all actions that are considered convenient for the success of the investigation. This includes questioning subjects, victims and witnesses, collecting evidence and conducting on-site investigations, which may imply searches and seizures, and even ordering the arrest of people for a period of 48 hours without judicial approval. In the most serious cases, it can even launch special investigative measures beyond these, with the authorisation of a panel or on its own initiative, in which case a judge shall authorise them within 24 hours.

Under Article 123(4) of the CPC, whenever such measures are undertaken, a 'Pre-Trial panel' must be constituted, presided over by the Pre-Trial judge of the case. Furthermore, one of its members must later seat in the Trial Panel if any evidence collected is to be admitted; otherwise it shall be treated as evidence from Pre-Trial testimony. By comparison, the Law on the Specialist Chambers does not establish any differentiated regime, and thus any evidence resulting from these measures has the regular admissibility requirements foreseen in Rule 138.⁴

The Rules of Procedure include specific dispositions for the storage and protection of any collected evidence, as well as procedures for the implementation of searches, interrogations, and seizures. These include the ultimate decision by a panel of destroying evidence that is proven to be irrelevant or that has lost its relevance due to the simple passage of time.

During the investigation, the usual procedural guarantees are in force, and thus the suspect has some substantive rights that must be respected at all instances, as regulated by Rule 42 and subsequents. These include the basic rights to be informed of the suspicions held against him, not to declare against himself, to be assisted by Specialist Counsel and, when necessary, to have the assistance of an interpreter.

As a general rule, the Counsel must be present in any investigative act affecting the suspect, although this can waive such a requirement in written, provided he understands the consequences of such an act.⁵ Barring such a waiver, the Prosecutor must ensure that the Counsel attends any interrogation, search and seizure of property, and oversee that the process is conducted in a manner that scrupulously respects the rights of the suspect.

3. The Role of the Judge

The constant mention of a panel as the ultimate deciding authority at every step poses a complication, since the Law only foresees the nomination of a Pre-Trial judge once the indictment has been produced and the Pre-Trial phase has started. If applied, this would either prevent any judicial oversight on investigations or require the appointment of another specific judge for this phase of the proceedings. The Rules somehow solve the question by explicitly moving forward the appointment to decide on any motion arising from the investigation, specially the requests of the Prosecution. Consequently, a Pre-Trial judge shall be assigned as soon as it is materially possible from the moment of opening an investigation.

During this stage, the Pre-Trial judge can issue orders and warrants that assure the conduct of the investigation and the preparation of a fair and expeditious trial. These include orders for the arrest or transfer of persons to the Chambers and orders pertaining to a special investigation opportunity and special investigative measures. It is also the duty of the Pre-Trial judge to ensure that these rights are respected, guarantee the protection of assets, including any property seized,

⁴ More information on this is provided in the Trial section.

⁵ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 43

and the protection of witnesses and victims that may take part in the proceedings, with the assistance of the respective Office within the Registry. In addition, the judge shall coordinate with the Prosecutor, respond to any motion or request in a prompt manner and oversee the implementation of any actions, summonses and arrest orders that may be required.

Once the Prosecutor is satisfied that sufficient evidence has been gathered to ascertain criminal responsibilities, he or she will file an indictment against the suspect, after which the Pre-Trial phase begins.

IV. Process (II): Pre-Trial

1. Indictment

Unlike in the regular criminal procedure, where the indictment puts an end to Pre-Trial, before the Chambers this phase only begins after that step. Consequently, the Pre-Trial judge still plays a crucial role after the indictment has been filed. Article 39 of the law foresees a duty to ensure that the Specialists Prosecutor has prepared the case properly and expeditiously for trial. It includes the power to review the indictment and rule on any preliminary motions such as those challenging the indictment and the jurisdiction of the Chambers. It is expected that the Pre-Trial judge decides if the indictment establishes a well-grounded suspicion. To facilitate the process, the Pre-Trial judge and the Prosecutor can hold confidential meetings at any moment prior to the confirmation of the indictment.

This decision needs to be taken in written, no later than 6 months from the filing of the indictment. It may either confirm or dismiss the charges. However, the judge may at any point request from the prosecutor any additional evidence, more clarity and even amending the charges. This marks a sharp contrast with the dispositions of the Criminal Procedure Code, according to which the indictment is a prerogative of the prosecutor alone, and the Court just assigns the case to a panel or single judge, depending on the charges brought against the accused. It is worth noting that, according to the CPC, filing an indictment puts an end to the Pre-Trial phase, and thus to the assignment of the Pre-Trial judge.

In any case, the indictment has some classic formal requirements that any expert will recognize. It must clearly include the identity of the persons being accused, the specific charges presented against each one of them, a statement of the facts that create criminal responsibility and a summary of the evidence presented.

At this point, the suspect becomes accused, and can only appeal based on a formal error or contesting the jurisdiction of the Chambers, as well as requesting severance of the charges when several persons are being indicted, according to Rule 97. That shall be done within 30 days of the disclosure of all material to the parties. The judge is then expected to respond within 21 days from the last motion or before the opening statements, whichever arrives first. During this period, and before the trial begins, the Prosecution can amend or withdraw the indictment, with the leave of the panel if the indictment has already been confirmed or as a part of a plea agreement.

2. Intermediate procedural steps

The indictment and supporting material shall then be personally served to the accused in a language he understands. Simultaneously, the Pre-Trial judge will issue a summons or arrest warrant, as required. For that purpose, the Chambers can rely on Kosovar authorities, as per legal requirement, and on foreign authorities through judicial cooperation mechanisms. Except when security reasons prevail, the indictment will always be made available to the public. Similarly, all evidence and material to be employed by the Prosecution and Defence is to be disclosed to the other party at this moment, inasmuch as it does not endanger victims, witnesses, future

investigations or any confidential source of the information that cannot be uncovered. In those cases, the judge can apply a certain discretion establishing limitations to the obligation of disclosure, as foreseen in Rules 102 to 112, with the limit of preserving an effective possibility of cross examination of the information by both parties.

During this period, the Law foresees the execution of unique investigative opportunities that may not be available later on during the trial. These include taking testimony from witnesses, as well as examining, collecting or testing additional evidence. In order to seize this opportunity, any party may request from the Pre-Trial judge actions destined to ensure the preservation of this evidence. Before the confirmation of the indictment, the Pre-Trial judge may initiate such measures ex officio if the Specialist Prosecutor does not request it and it is essential for the Defence. These measures may be initiated only after consulting with the Prosecution and assessing the justification for failing to launch the action. In order to be accepted, any evidence obtained through these measures must fulfill the admissibility criteria set forth in the Rules.

3. Initial appearance of the accused

At this stage, the duties of a Pre-trial judge revolve around ensuring due respect to the process and the rights of the accused. During the initial appearance, regulated in Rule 92 and subsequents, the Pre-Trial judge should make sure the accused is being represented by a defence counsel, he should read the indictment to the accused, make sure he understands it fully, inform him that within 30 days after the initial appearance he or she will be called to admit guilt or plead not guilty and the procedures to be followed in each case, taking into consideration that failing to do so will automatically result in a not guilty plea.⁶

In any case, after the initial appearance, the case will pass to the hands of a Trial Panel. If the accused pleaded not guilty, Trial procedures are bound to start. However, if he or she admitted guilt, the Panel will have to review whether this was done freely and unequivocally, based on a full understanding of the consequences of the act and with an objectively sufficient factual basis. In this case, the Prosecutor may amend the charges filed against the accused or propose a different range of punishment than the one put forward by the Counsel. Furthermore, at any point during the process, but preferably at this stage, the accused and the Prosecution may reach a plea agreement, in which case the Trial Panel will similarly ensure that this was done voluntarily and without any coercion. In both cases, if the Panel is not convinced that these requirements have been met, it will refuse the admission of guilt or the plea agreement and initiate Trial proceedings. In both cases, the decision must be reasoned in written.

4. Handover of the case

In the meantime, the Pre-Trial judge will prepare the handover of the case to the Trial Panel, in accordance to Rules 95 to 98. In order to do that, it coordinates the communication of the parts, decides on any motion still pending (including the preliminary motions of Rule 97 and those related to detention on remand), sets deadlines, and decides on the admissibility of the presented evidence. At the same time, it shall request and compile a Pre-Trial Brief from both sides, listing all factual and legal points that both sides intend to present, including those not in dispute, a summary of the evidence to be presented, including a preliminary list of witnesses and of exhibits. To facilitate communication during this process, the Judge will arrange Status Conferences.

⁶ This marks a substantial deviation from the practice established in the CPC, whose Article 242 mandates the immediate allocation of the case to a Trial Panel that will deal with any subsequent question, including the initial appearance.

Once all these steps have been fulfilled, and in any case within 30 days from the final decision on preliminary motions, the Pre-Trial judge transmits the case file to the Trial Panel. In accordance with Rule 98, this will include the approved indictment (together with any amendment following an agreement or an admission of guilt), all communication that has taken place so far, and a Handover Document. The latter incorporates a summary of the state of the case, a list of the decisions that have been taken, the points of agreement and of dispute between the parties, and their respective arguments, in order to prepare the Panel for Trial.

V. Process (III): Trials

A Trial Panel is constituted when the Pre-Trial judge has determined that the case is ready for trial and the President of the Chambers appoints it, according to Article 40 of the Law. Depending on the seriousness of the crimes prosecuted, it will be composed of three judges or constituted by a single judge. The main duties of the Panel are to insure fair and expeditious proceedings, ensure and respect the rights of the accused, and the protection of the witnesses and victims. As such, if not determined earlier, the Panel must determine the language of the proceedings and shall insure a complete and accurate record of the proceedings. Depending on the modalities of the case, the Panel may change and adopt proceedings as necessary to facilitate the expeditious conduct of the trial proceedings. In addition to assigning the judges of the panel, a reserve judge shall be present at any stage of a trial.

1. Preparatory work

Once the Panel is assigned, and has received the case from the Pre-Trial judge, it shall create a working plan and set deadlines as necessary upon consultation with the parties. In order to do so, it will organize a Trial Preparation Conference, a meeting between the assigned Panel, the Parties, and, when applicable, the Victim's Counsel. During this meeting, the Panel sets time limits for any motions to be made prior to the opening hearing and asks the Defence whether or not it is going to give an opening statement, and when.⁷

Following that, and within 30 days, the Panel will convene a Specialist Prosecutor's Preparation Conference to discuss the case to be presented by the Prosecution. That will serve to review the number of witnesses called, of crime sites or incidents to review and the time available for presenting evidence, etc.⁸ After this meeting is held, the Panel must set the date for the opening of the case within another 30 days.⁹

If the Defence chose to present a case when asked in the Trial Preparation Conference, it must do so, at the latest, by the closing of the SPO's case. In that case, the panel will hold a Defence Preparation Conference in the following 7 days to discuss that case. The Defence case serves to file the list of witnesses with all necessary details, as well as a list of exhibits to present. Then, in the Conference, the Panel determines the number of witnesses the Defence may call, the time available for each testimony, and other such considerations regarding its case. In addition, the Panel sets the date for the opening of the Defence case, which will be within 30 days from the Conference.¹⁰

⁷ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 117

⁸ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 116

⁹ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 118

¹⁰ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 119

2. Trial hearings

As a general rule, all sessions will be open to the public. However, according to Rule 120, in exceptional circumstances, based on security or public order concerns, a Panel may decide to hold closed sessions, in camera or private sessions, in which audio and video feeds are also discontinued.

The Presiding Judge of the Panel has extensive disciplinary powers to guarantee the smooth development of the proceedings, including ordering the restraint or expulsion of attendants. Similarly, he or she can issue any warrants or summons as required to compel recalcitrant witnesses, although the original responsibility lays on the party that called the witness in the first place. If necessary, the process can be temporarily adjourned for up to 21 days while these questions are solved.

The trial will start with the opening of the case, in which the SPO will present the indictment. The Panel must ensure that the accused understand both the charges and his or her rights (including that of silence, not to declare against him or herself and to representation), and give him or her the chance to reaffirm the initial plea. Once this is done, the Opening Statements will take place, starting by the Prosecutor, continuing by the Victim's Counsel, and concluding with the Defence (if it decides to do so). These Statements serve to present an overview of the case and a succinct explanation of the evidence that will be introduced.

Then both parties will introduce the evidence and call witnesses, as agreed before in the Preparation Conferences. First, the SPO will introduce its case, then the Defence, and finally the Panel has the opportunity to request the production of any other evidentiary material it deems necessary. If so, the Prosecution is allowed to complement its evidence in rebuttal, and then the Defence in rejoinder. All evidence must fulfill the requirements on admissibility established by the rules, and both Parties must have the chance to cross-examine any witness by the other, as regulated by the relevant chapter of the Rules.

Once the Prosecution has finished presenting its evidence and has nothing to add, it will close its case. At that point, according to Rule 130, the Defence can notify the Panel of its intention to file a motion for the dismissal of charges, which shall be done within 10 days. The panel, after consulting the Parties and Victims Counsel, will decide orally on the question, dismissing whatever charges considers unsubstantiated by the Prosecutor. The latter can then introduce an interlocutory appeal in 10 days.

Barring this, the process will continue with the presentation of the Defence's evidence, until this is completed, at which point the Defence case will also be considered closed. If the Panel decides not to request that ulterior evidence be produced, or after completing that process, including any rebuttal or rejoinder evidence by the parts, the Panel will close the evidentiary proceedings as per Rule 134.

After that moment, the Panel will provide 30 days for both Parties and the Victim's Counsel to introduce their Final Briefs, which can evaluate and comment on the proceedings thus far, including making notes on the evidence. After receiving those, a new hearing will be scheduled within 21 days. During this, the Briefs will be presented in the same order as the Opening Statements (SPO, Victim's Counsel, and Defence), at which point the case is closed and the Panel will not accept new submissions.

3. Probatory means

a) Material evidence

As a general rule, all evidence that is relevant, authentic, and has a probative value which is not outweighed by its prejudicial effect must be admitted. However, evidence is inadmissible and must

be excluded when there is a substantial doubt on its reliability or when it would be contrary to the integrity of the proceedings, especially if it was obtained under inhuman or degrading treatment.¹¹ In order to ensure a fair conduct of the proceedings, a Panel must assess each piece of evidence in light of the entire body of evidence and should weight them as a whole, not individually. The manner in which the evidence was collected and the effect it might have on the course and fairness of the proceedings must be considered. Subsequently, the Panel may decide to partially admit a piece of evidence as there is no necessity to admit the entire evidence *per se*. Caution is required when addressing circumstantial evidence, specifically when considering its consistency and intrinsic coherence. Similarly, circumstantial evidence can only be used when the case presented is the sole reasonable explanation that can be inferred from the evidence.

In any case, the burden of proof before the Chambers relies on the Specialist Prosecutor, who must prove guilt beyond reasonable doubt, in accordance with the principles already mentioned, to achieve a conviction.¹²

b) Testimonies

All persons of age, capable to understand the importance of testifying and whose judgement has not been impaired can testify before the Chambers. A person who does not fulfill these three conditions may only testify before the Chambers if the Panel considers him or her able to describe the facts and understanding the significance of its testimony.¹³

Some discretion is required, as a conviction neither cannot be based only or to a decisive extent on the statement of a witness whom the Defence had no opportunity to examine, nor to the statement of a witness whose identity was not disclosed to the Defence or the evidence of a minor or a person whose judgement has been impaired and does not understand the meaning of testifying before a court of justice. Moreover, when determining the weight to be given to the testimony of a witness, the Panel should be extra careful on assessing its credibility and reliability. During the testimony, every witness has the right to refrain from self-incrimination or from incriminating a family member. If the witness in question is a co-accused, the Defence may only call him or her to testify with their consent or ask questions through its Specialist Counsel. As common practice goes, the testimony of a witness before the Chambers must be in person, except when the Panel allows the witness to testify by means of video-conference and in written when these means are neither prejudicial nor inconsistent with the rights of the accused.¹⁴

When the witness is testifying in person, the examining Party may ask him or her questions and show him or her any document or other evidence. If they cannot recall the facts, the witness may, with the permission of the Panel, be shown his or her previous statement to refresh his or her memory. If needed, and with leave from the Panel, the Party who called the witness may question him or her about matters relevant to their credibility. Subsequently, cross-examination shall be limited to the subject-matter of the direct examination and matters of the credibility of the witness. In addition, cross-examination is not necessarily limited to the previous testimony, and when asked from a Party, the witness may add more if relevant.

¹¹ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 138

¹² Kosovo Specialist Chambers, *Rules of Procedure*, Rule 140

¹³ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 141

¹⁴ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 141

On the other hand, the Panel may exceptionally authorise witness examination by video-conference upon request by a Party, Victims' Counsel or *proprio motu*. Furthermore, the examination of witnesses away from the Trial Venue may be put in place when a witness is unable to appear due to serious illness or other impediment. In this case, timely informing of the time and place of the examination to the Specialist Prosecutor, the Defence, and Victims' Counsel is required.¹⁵

In addition, the Rules of Procedure provide for the questioning of anonymous witnesses on Rule 147. This procedure may take place upon the request of a Party and the Victims' Counsel whenever there is a risk that, by revealing the identity of the witness, he or she or a person close to the witness may lose his or her life or suffer grave physical or mental harm, and other measures for the protection of witnesses would be insufficient to prevent such a risk. Moreover, such a procedure may take place if imperative national security interests can be jeopardised if the witness's identity or affiliation is revealed.

Moreover, the Rules of Procedure have foreseen special principles to be followed to evidence in cases of alleged sexual Violence. These principles protect the integrity of the victim by determining that consent cannot be inferred if not explicitly provided.¹⁶

As for the experts taking the status of witnesses, a certain procedure shall be followed. In this case, the opposing Party can contest the expert report and request cross-examination. Whenever the opposing party accepts the report or parts thereof, it may be admitted into evidence by the Panel without interrogating the expert. On the contrary, whenever the opposing Party files a motion to cross-examine the expert, he or her will be summoned as a witness.

Exceptionally, the Rules of Procedure allow the admission of written statements and transcripts in lieu of oral testimony in three cases. First, when these prove a matter other than the acts and conducts of the accused. In this case, the written statement must be signed by both the witness or his or her counsel and the person who conducted the questioning, and when applicable, from the Specialist Prosecutor or the Presiding Judge. After hearing the Parties, the Panel can decide to request the witness to appear for cross-examination.¹⁷

Second, Rule 154 allows for such a statement to be admitted and be used to prove the acts of the accused as charged if the witness is present in court, is available for cross-examination, and attests that the written statement reflects his or her declaration.

Third, Rule 155 admits written statements and any other record written or otherwise expressed by a person who has died or can no longer be traced, and is physically or mentally unable to testify orally. In this case, the Panel needs to be convinced that such a reason exists and that the evidence is *prima facie* reliable.

On a different note, the Panel will not require evidence to consider proved any facts agreed between the Parties, unless it considers there is a need for further examination. In addition, all facts of common knowledge shall be considered proven, and the Panel will just take judicial notice of them.

¹⁵ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 147

¹⁶ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 149

¹⁷ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 153

4. Judgement and Sentence

After closing the case, the Panel will hold confidential deliberations in camera, in which it will address each charge based on the admitted evidence. Any finding of guilt will require the agreement of a majority of the Panel, in accordance with Rule 158.

Upon reaching a verdict, the Panel will convene a hearing to publicly pronounce the verdict. This shall be done in 90 days from the date of closing the case, although exceptionally the panel can delay this for 60 more days through a reasoned, public decision. The judgement will pronounce the accused either innocent or guilty, upon which the required arrest warrants or release orders must be issued, as needed. A certified copy will be provided to the accused, and the sentence will be available to the public.

The Panel, at that stage, can either decide on the punishment of the convicted person, opting for a fine or imprisonment, or open the sentencing procedure of Rule 162. In this case, it will open a new round of consults, providing 15 days to the Parties for submissions. Since the Panel has the power to order reparations, the Victims' Counsel is also consulted during this process.

Based on the evidence and written submissions, and considering any mitigating or aggravating circumstance, the Panel will impose whatever period of detention it deems convenient. It is worth noting at this point that no time frame for each particular crime appears in the Law, while the Rules only offer an open list of mitigating and aggravating circumstances, including the admission of guilt by the accused. Thus, the Panel has an almost unlimited leeway to decide, except when the case referred to an applicable clause of the different Criminal Codes.¹⁸ In this case, it is to be expected that the case law of the various international criminal Courts is followed.

The Rules, however, include some minimum rules of determination. Each charge shall be adjudicated separately, and the final sentence must contain the total addition of each conviction. This term will be served concurrently with any other sentence previously dictated by other courts, unless the Panel decides otherwise. Prison for life can only be applied to especially grave crimes, and in no case criminal punishment is foreseen. This Sentencing Judgment must be read within 30 days from the last submission filed by the Parties, with the possibility of extending the deadline for 30 more days in a justified decision.

VI. Process (IV): Appeals

Whenever an appeal is filed against a decision taken in first instance, an Appeal Panel must be constituted by the President. This happens in two cases; to decide on interlocutory appeals, and to contest judgements taken by a Trial Panel. Since the process to file and decide on an interlocutory appeal has already been commented in both the Pre-Trial and Trial sections, in order to avoid repetition this section will develop on the process of appeals against judgements.

1. Second Instance.

An appeal may be filed against any first instance judgment by both the convicted person and the Specialist Prosecutor on the grounds of an error on a question of law invalidating the judgements, an error of fact which has occasioned a miscarriage of justice, and an error in sentencing. These grounds of appeal partly match the dispositions of Article 383 CPC, which also adds the infraction of procedural Law, not included here. On the other hand, the Victims' Counsel can file an appeal

¹⁸ Due to the particularities of the applicable Law before the Chambers, most of the cases will be dealt with under Customary International Law and International Humanitarian Law, neither of which details any sanction whatsoever in the same way as domestic Criminal Law does.

in respect of a Panel's decision regarding Victim Status or a Reparation Order.¹⁹ In Kosovar criminal Law, the victim can only appeal when the case pertains to a crime against body or life, sexual integrity or public traffic, as well as the costs of the proceedings, as regulated by Article 381 CPC. Once an appeal is filed, the procedures in front of the Court of Appeals start and the same rules governing the trial procedure shall apply in this procedure as well.²⁰ The same procedure of judicial oversight for detention on remand that was commented on in the Pre-Trial section applies *mutatis mutandis*.²¹

The first step to be taken by a party following the Judgment is to file a notice of appeal within 30 days of the written Trial Judgment. If the convicted party is seeking to appeal the Trial Judgment or the Sentencing Judgement, or both, he or she shall file the notice of appeal setting forth the grounds of appeal during the 30 days time frame. If the party decides and has good cause to change the grounds of appeal, the court may authorise it.²²

Right after the notice of the appeal has been filed, the Presiding Judge of the Court's Panel may sign one of the Panel members as a Judge Rapporteur to be responsible for the Pre-Trial proceedings such as making sure that the proceedings are not unduly delayed and any other measures he deems necessary to prepare the case.

Once the notice of appeal has been filed, the Presiding Judge or the Judge Rapporteur shall convene a conference to allow any person in custody, pending the appeal, the opportunity to raise issues in relation to the case. The conference shall be convened within 21 days of the notice of the appeal.

In addition to filing the notice of the appeal, the appellant shall file an Appeal Brief stating all the arguments in support of his or her claims within 60 days. If the appeal is limited to sentencing, the Appeal Brief shall be filed within a shorter period, 30 days. Within 30 days of the Appeal Brief filing, the Respondent may file a Brief Response stating his arguments. If the appeal was limited to sentencing, the Respondent has only 15 days. Consequently, the Appellant may file a Brief in Reply within 15 days or when limited to sentencing, within 10 days.

Where the Specialist Prosecutor appeals an acquittal, the acquitted person may, with leave of the Court of Appeals Panel, file a Brief in Rejoinder within ten (10) days or, where the appeal is limited to sentencing, within five (5) days of the decision granting leave. Moreover, the Specialist Prosecutor shall make a declaration on his or her Appeal or Brief that disclosure of material in his or her custody or control has been completed at the time of filing of that brief. Moreover, whenever the Specialist Prosecutor is appealing a Judgement in respect of multiple acquitted or convicted persons, he or she shall file a consolidated appellate brief. Once the time for filing the briefs expires, the Panel, if necessary, sets the date of the hearing.

Any Party, including the Victims' Counsel may apply a motion to present additional evidence and it must be done within 30 days of the Brief in Reply. The opposing party or the co-accused may file a response within 30 days that will be followed by a reply from the party seeking to admit additional evidence in 15 days. In addition to the general criteria, in order for the additional evidence to get admitted, the Panel must find that it was not available at the time of the trial, could not have been discovered with the exercise of due diligence, and is determined that it could have

¹⁹ Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, *Official Gazette of the Republic of Kosovo*, 27/2015, 31 August 2015, Article 46

²⁰ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 173

²¹ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 174

²² Kosovo Specialist Chambers, *Rules of Procedure*, Rule 176

been a decisive factor in the trial decision. If the Panel decides to admit the additional evidence, the opposing Party may apply by motion to present rebuttal material. Consequently, the Panel must consider any additional evidence admitted along with the other evidence. Also, in case of several acquitted or convicted persons, the evidence admitted shall be considered with respect to all of them.²³

Once the parties have filed their submissions, the Panel shall retire to deliberate in camera. The Panel may affirm, reverse, or revise the Judgement by the Trial Panel and when appropriate, may order that the acquitted or convicted person may be retried by the Trial Panel. When only the convicted person has filed an appeal and not the Specialist Prosecutor, the prohibition of *reformatio in peius* shall apply. Consequently, the Judgment may not be reversed or revised to the detriment of that convicted person.²⁴ The panel shall pronounce the Appeal Judgment within 60 days of the last submission from the Parties. When necessary, the time frame can be extended for 30 more days. In order to determine the sentence, the same procedure employed during the trial phase applies.

The Law, in Article 47, and the Rules of Procedure through Rule 186 determine that a convicted person may appeal the Judgement of the Court of Appeals Panel to a Supreme Court Panel only if the Panel has modified an acquittal to conviction or if it involves life imprisonment. This disposition in fact reproduces the text of Article 407 CPC, which has the exact same content. Anyhow, in third instance all rules regulating and determining the process of appeal apply *mutatis mutandis*.

2. Extraordinary Legal Remedies

As a part of the Appeal process, an aggrieved party can request from the Supreme Court to undertake extraordinary measures. The latter include the Reopening of Criminal Proceedings, the Extraordinary Mitigation of Judgement, and the Protection of Legality. Their purpose is not reviewing the legal or factual interpretation of a lesser court, like regular Third instance appeal procedures, but correcting unfair situations caused by an action of the Chambers. In all three cases, the request is made to the President of the Chambers, who will convene a Panel of the Supreme Court to deal with the case. Although the process is somehow similar in all cases, still there are some small differences.

First, the motion to reopen criminal proceedings intends to obtain an order from the Supreme Court to reopen a closed case when any irregularity surrounding the case that might have altered its result, had it been known at the time is noticed. These includes the use of forged documents or false statements, the judgement was built upon a criminal offense during the investigative or trial phases, new facts that were unknown at the time surface or a person has been tried more than once for the same events. Unlike the equivalent figure under the CPC, which must be filled within 2 years from the final judgement or ruling terminating the proceedings, the Law on the Specialist Chambers does not foresee any deadline whatsoever.

Once a Party files this appeal and the Panel is constituted, the opposing Party can file a response within 30 days, which can be countered by a reply of the acting Party within an additional 15 days period. Passed this, the Panel will analyze the merits of the case presented by the requesting Party and issue a decision. If it chooses to reopen the case, the process shall continue in accordance with the procedure already described including any eventual appeal.

²³ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 181

²⁴ Kosovo Specialist Chambers, *Rules of Procedure*, Rule 183

Second, the motion for an Extraordinary Mitigation of Punishment seeks a reduction on the terms imposed by the Chambers due to relevant circumstances that have arisen after the judgment or were unknown at that time and which would have led to less severe punishment. This motion cannot be filed during the last 6 months of conviction, following the same criterion than the CPC. If accepted, it may lead to a modification of the sentence.

Finally, the motion for the Protection of Legality is intended to overturn a decision on detention on remand taken by a lesser instance that is in violation of the relevant criminal or procedural Law. This must be filed within 3 months of the challenged decision. If successful, the Supreme Court Panel will determine such decision contrary to law, but will refrain from dictating new terms.

VII. Process (V): The role of the Constitutional Court

As it was said in the first part of the analysis, the Specialist Chamber of the Constitutional Court is the final authority on interpreting the Constitution regarding the action of the Chambers. Consequently, a Panel will hear about any referral made by someone legitimated to make one according to Article 113 of the Constitution.

Thus, any person whose rights have been violated by the Specialist Chambers, a Pre-Trial judge or panel that doubts the constitutionality of a norm to apply, and the Ombudsperson of the Chambers as well as the Ombudsperson of Kosovo all can submit referrals to this Chamber. It will hear from these referrals according to its own Rules of Procedure, which are adopted exclusively by its judges, and that specify the process to follow in response to each petition.

In every case, the Panel will first review the admissibility of the referral, which follows a unified criterion. Thus, the Panel will dismiss the case if it lacks jurisdiction, another Panel already heard of the case, the referral is not specific enough regarding the ruling or constitutional dispositions that are perceived as breached, it was filed out of time, anonymously or, upon an initial review, it constitutes a clear abuse of process.²⁵

The Panel can request additional information as necessary, and even invite an *amicus curiae* to take part in the proceedings when it deems it convenient. As a general rule, the Panel will convene hearings in a public manner to discuss the merits of the referral, unless it is unnecessary. In the case of referrals filed by individuals, they must be filed within 2 months from the decision challenged, after having exhausted all legal remedies. The referral must specify which actions by the Chambers or the SPO have infringed his or her constitutional rights, identifying those and explaining how such infringement took place. If those are of special seriousness, the individual may request interim measures, which, if granted, will apply until the final decision or a request for modification.

Also a Panel can submit a question of constitutional compatibility when the compliance of an applicable provision with the Constitution is dubious and the sense of its decision depends on the application or not of such a rule. The questioning Panel must specify all three points when raising the question.

Finally, both Ombudspersons can also make a referral to the Specialist Chamber, contesting the constitutionality of any Law or disposition in force. This must be done within 2 months from the publication of such a Law, specifying the specific provisions at fault, the constitutional rights at stake and any potential conflict between them.

The Panel will confidentially deliberate on the issue, and make use of supporting staff as needed. The outcome of such deliberations will be adopted unanimously or by majority, and shall

²⁵ Kosovo Specialist Chambers, *Rules of Procedure of the Specialist Chambers of the Constitutional Court*, KSC-BD-03/Rev1/2017, 25 August 2017, Rule 14

adopt the form of a Decision, Judgement or an Opinion. If the Panel found that any decision, action or piece of legislation was contrary to the relevant dispositions of the Constitution, it may issue orders and directions to the relevant authorities, including the reopening of any proceeding or recommending the payment of compensation to the aggrieved party.

VIII. Process (VI): Service of sentence

The regulation of the service of sentence is minimal in both the Law and the Rules. Article 50 covers the enforcement of imprisonment, and some references to the practicalities of imposing fines or reparations are included in the Rules.

Regarding any prison sentence, as the Law establishes, it must be served in any third state willing to host the convicted person, as decided by the President of the Chambers. In that case, the penitentiary law of that state will apply, with a residual oversight by the Chambers itself. While the necessary arrangements are made, the convicted person shall remain under the jurisdiction of the Registrar. At this time, it has been impossible to determine whether any framework agreement has been reached with any third state, as the Host Agreement with the Netherlands specifically excludes serving of terms in its territory once the trial has finished.

If the sentence includes any kind of fine, it shall be paid to the Registrar in the deadlines determined by the Panel imposing it. Both the instalments and the amount to be paid, must be reasonable and proportionate. In case of failure to pay in due time, the convicted person shall be summoned to provide explanations. After having heard him or her, the Panel will decide whether to extend the deadline, seize property to cover for the missing amount, or converting the fine in imprisonment term. In this case, the term cannot be longer than the punishment foreseen in the Criminal Code of Kosovo for the crime. If the person is already serving a prison sentence ordered by the Chambers, this can be extended up to $\frac{1}{4}$ of the total conviction, with a maximum of five years.

Finally, with regard to the possibility of compensation to the victims, the Panel can either refer them to civil jurisdiction or decide by itself, in which case it can require, *ex officio* or upon request, the assistance of experts to determine fair reparation.

In any case, Article 51 of the Law emphatically excludes anyone convicted by the Court from the pardon possibility foreseen in the Constitution for regular prisoners. In fact, any commutation of sentence can only be decided by the Chambers themselves, in accordance to the Law applicable in the State where the convicted person is serving the sentence.

IX. Conclusion

The process before the Specialist Chambers draws from the experience of previous international courts as much as from Kosovar Laws, and thus it presents plenty of similarities with what Kosovar lawyers are familiar with mingled with some remarkable differences here and there.

Together with the first series published in a separate paper, this analysis has tried to shed light on the nature and particularity of the Specialist Chambers. These constitute the latest example of internationalized criminal justice and an example of hybrid court leaning towards the international component, applying a blend of domestic and international Law, but away from the State where justice is to be served and with a residual domestic component. These philosophical disquisitions were extensively covered in the first series, while this second attempted to portray the more practical aspects of the judicial institution.

Taken together, both documents attempt to review the history, *raison d'être*, structure, and practicalities of the Specialist Chambers, so as to facilitate the understanding of this *sui generis* institution for any interested reader.

To begin with, the Criminal Code and the Criminal Procedure Code are not applied by the Chambers, except for some dispositions of the former, as introduced by the Law. The Chambers, instead, shall adjudicate using a mix of International Customary Law and old Yugoslavian Law in force in the late nineties.

The basic structure of the criminal procedure is easily recognizable. It starts with a Prosecution-led investigation overseen by a Pre-Trial judge. Then, a Trial takes place before a different Panel that decides on the merits of the case built by the Prosecutor. Finally, this picture is completed by different Appeal instances and the possibility of referral to the Constitutional Court (or in this case, to a Specialist Chamber thereof).

The main differences with the Kosovar Criminal Procedure Code, however, lay in the details. During investigation and Pre-Trial, the role of the Pre-Trial judge is reinforced, having here the chance of reviewing, approving, and requesting any changes on the indictment, whereas under ordinary procedure its role is limited to controlling the legality of the investigation. As a consequence, the Pre-Trial phase is extended before the Chambers, while this review takes place. Thus, even the initial appearance of the suspect takes place before the Pre-Trial judge.

During the Trial phase, the process follows a typical structure, with the Prosecution presenting its case before the Defence can refute it. One of the main deviations from Kosovar Law is the inclusion of the victims in the process through the so-called Victims' Counsel, who is tasked with protecting their interests and ensuring due compensation by the court. This formalized status and further developed rules constitute a substantial advance from ordinary procedure, although the outcome is similar; either a reparation order or referral to the Civil courts.

The other difference is the sentencing procedure. Since the Law on the Chambers does not replace a detailed, comprehensive Criminal Code, it only includes general guidelines for punishment. Thus, the Panel is granted a substantially higher leeway to decide, and a specific consultation procedure is introduced to assist it in that task.

The following steps, including any appeal and the referral to the Constitutional Court, are far less detailed and more closely mirror the structure of the equivalent process under ordinary procedure. The grounds for appeal are similar, and so are deadlines and possible motions, including those requesting Extraordinary Legal Remedies.

Finally, the service of sentencing necessarily depends on securing agreements with third countries that allow for the internment of prisoners in their territory, as foreseen by the Law and thus far rejected by The Netherlands, where the Chambers have their seat. Whenever that takes place, the penitentiary Law of the host state will be applicable, with the oversight of the Chambers, which remain the sole authority capable of deciding on sentence commutation. It is worth noting that pardon is strictly forbidden by the Law, a cautionary measure against political interference.

“This grant is financed by the Democratic Society Promotion (DSP) project - funded by the Swiss Agency for Development and Cooperation (SDC) and the Danish Ministry of Foreign Affairs (DANIDA), and managed by the Kosovo Civil Society Foundation (KCSF)”

POLICY ANALYSIS

Policy Analysis in general is a policy advice paper which particularly aims to influence the key means through which policy decisions are made in both local and central levels of government. The purpose of Policy Analysis is to address, more in-depth, a particular problem, to examine the arguments related to a concerned policy, and to analyze the implementation of the policy. Through Policy Analysis, Group for Legal and Political Studies seeks to stimulate wider comprehensive debate on the given issue via presenting informed policy relevant choices and recommendations to the key stakeholders and parties of interest.



**GROUP FOR LEGAL
AND POLITICAL
STUDIES**

legalpoliticalstudies.org