

# SPECIALIST CHAMBERS IN ACTION:

## A Review of Key Developments Relating to the Operation of the Specialist Chambers and Specialist Prosecutor's Office

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## SPECIALIST CHAMBERS IN ACTION: A Review of Key Developments Relating to the Operation of the Specialist Chambers and Specialist Prosecutor's Office

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# SPECIALIST CHAMBERS IN ACTION: A REVIEW OF KEY DEVELOPMENTS RELATING TO THE OPERATION OF THE SPECIALIST CHAMBERS AND SPECIALIST PROSECUTOR'S OFFICE

## Introduction

This Policy Note examines the initial developments relating to the operation of the Specialist Chambers (SCh) and the Specialist Prosecutor's Office (SPO). In addition, it reviews some of the initial steps undertaken by the Division for Coordinating the Process of Legal Protection and Financial Support for Accused Persons in Trials before the Specialist Chambers (the Ministry of Justice Division). It examines the latter from the perspective of its mandate in providing financial means to the potentially accused persons and its overall effect on Kosovo's budget. Issues of lack of transparency that has followed the proceedings of these institutions will be also considered.

## Context

The establishment of the SCh and SPO has been introduced through passing a constitutional amendment<sup>1</sup>, and adoption of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office<sup>2</sup>. The SCh materialized its operation through the adoption of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers<sup>3</sup> (the Rules of Procedure). The adoption of these legal acts – seen from a systemic perspective – fashioned a new chain of operation of these bodies completely disconnected from the regular justice system in Kosovo.<sup>4</sup>

In late 2018, three years after its establishment, the SCh and SPO work finally

became operational. It initiated its first legal invitations by the end of 2018 and the first interviews with 'witnesses' took place in January 2019. Many matters arose due to these interviews pulling attention to the procedures followed. In order to enlighten the work of the SPO, this Note will elaborate on these issues further.

On the other hand, the establishment of the SCh triggered the adoption by the Assembly of the Law No. 05/I -054 on legal protection and financial support for potential accused persons in trials before the Specialist Chambers (hereinafter: Legal Aid Law).<sup>5</sup> It offers legal protection and Kosovo government-financial support to potential accused persons in court proceedings and procedures related to the alleged crimes before the SCh.<sup>6</sup> The legal defense of any person accused before the Chambers and the travelling expenses of its family members will be subject to compensation by Kosovo's budget.<sup>7</sup> Considering the amounts to be spent on this purpose, more attention to the Ministry's disbursement rules must be added.

## The SPO

- **The Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office**

The Law on the SCh and the SPO – as a law regulating an internationalized tribunal<sup>8</sup> with a Constitutional Chamber – has ensured

<sup>1</sup> Amendment No.24 of the Constitution of the Republic of Kosovo, Official Gazette of the Republic of Kosovo, 3 August 2015, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10997>

<sup>2</sup> 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, <http://gzk.rks-gov.net/ActDetail.aspx?ActID=11036>

<sup>3</sup> Kosovo Specialist Chambers, Rules of Procedure of the Specialist Chambers of the Constitutional Court, KSCBD-03/Rev1/2017, 25 August 2017, <https://www.scp-ks.org/en/documents/rules-procedure-and-evidence-kosovo-specialist-chambers-including-rules-procedure>

<sup>4</sup> Rreze Hoxha and Francisco Jose García Martínez, The (Pen-)Ultimate Guide to the Specialist Chambers (II): *Law and*

*Process*, Pristina: Group for Legal and Political Studies, December 2018, <http://www.legalpoliticalstudies.org/wp-content/uploads/2018/12/GLPS-Specialist-Chambers-2.pdf>

<sup>5</sup> Law No. 05/I -054 on legal protection and financial support for potential accused persons in trials before the Specialist Chambers, Official Gazette of the Republic of Kosovo, 31 August 2015, <https://www.kuvendikosoves.org/common/docs/ligjet/05-L-054%20a.pdf>

<sup>6</sup> Ibid. Article 1

<sup>7</sup> Ibid. Article 2

<sup>8</sup> Volkerrechtsblog, International Law and International Legal Thoughts, "*The Kosovo Specialist Chambers – A New Chapter for International Criminal Justice in the Balkans*",

relatively strong basis for the protection of human rights and fundamental freedoms of both, the accused and the victims. Art. 22 of the Constitution of Kosovo gives the European Convention on Human Rights and Fundamental Freedoms (ECHR) direct applicability and direct effect in Kosovo, including the case-law of the European Court of Human Rights (ECtHR). In addition to this Article, Article 3 of the Law on SCh and SPO requires that SCh shall adjudicate and function in accordance with the ECHR and the Constitution of Kosovo. Since Kosovo is not a party to the ECHR and not internationally liable for its non-implementation, Article 3 of the Law on the Chambers and the SPO enables the parties to make referrals to the Constitutional Chamber of the SCh in Hague, relying on ECHR provisions and ECtHR case-law. One must recall that the SCh are considered to be of a hybrid nature and of a high level of complexity when discharging their mandate.<sup>9</sup> On the same note, the Law has well defined that the final authority for the interpretation of Kosovo Constitution related to the subject matter jurisdiction of the SCh is the Constitutional Chamber. Therefore, Article 3 of this law is crucial on ensuring the protection of human rights and fundamental freedoms by this court.

- **The first party referral to the Constitutional Chambers claiming violation of the rights of the accused and the right to a fair and impartial trial**

Three years after its establishment and during the first endeavors of the SCh, a human-rights law case was submitted before the Constitutional Chamber. In discharging its prosecutorial function, on December 2018, the SPO sent an invitation for questioning Mr. Mahir Hasani, the appellant before the SCh Constitutional Chamber. Together with the summon to appear for questioning, the SPO directed a Production

Order to the appellant to produce documents, records and all other sorts of information regarding its physical and geographical location during the period of January 1<sup>st</sup>, 1998 to December 31<sup>st</sup>, 2000. The Order specified that if the documents are not revealed by the appellant, the SPO will consider the act as disobedience to the law and could entail enforcement measures.<sup>10</sup>

On January 2019, calling on Article 30(6) and Article 31 (5) of Kosovo Constitution and Article 6 (2) of the ECHR, the defense submitted a referral to the Constitutional Chamber against the Production Order. The defense claimed violation of the rights of the accused and the right to a fair and impartial trial. Specifically, they argued that the order had violated the rights of Mr. Hasani to not forcedly testify against himself and admit guiltiness. Moreover, the order's request was argued to be against the innocence presumption, a fundamental principal of every criminal procedure. Through this referral, the defense requested the Constitutional Chamber to decide for an interim measure suspending the order until the referral is to be determined. Based on the referral, the Constitutional Chamber approved the requested interim measure and suspended the SPO Order until a final decision on the merits. The Chamber's decision was implicitly read as an act confirming Art. 6 breach by the SPO.

Reflecting on these actions, on February 2019, the SPO withdrew its Order notifying the Constitutional Chamber that the circumstances complained on by the defendant no longer exist and the alleged violation of the petitioners rights had been redressed by the SCh order on the interim measure. In light of this, the Constitutional Chamber found the referral inadmissible missing the chance to rule on its merits.

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*Volkerrechtsblog, International Law and International Legal Thoughts*, 14 March 2018, <https://voelkerrechtsblog.org/the-kosovo-specialist-chambers/>

<sup>9</sup> Francisco Jose García Martínez and Rreze Hoxha, *The (Pen-)Ultimate Guide to the Specialist Chambers (I): Nature, organization and powers*, Pristina: Group for Legal and Political

Studies, December 2018, <http://www.legalpoliticalstudies.org/wp-content/uploads/2018/12/GLPS-Specialist-Chambers-1.pdf>

<sup>10</sup> Kosovo Specialist Chambers, *"The Interim Measure Order upon Mr. Mahiri's Request"*, KSC-CC-2019-05, Hague, Netherlands, 7 February 2019

The aforementioned referral marked the first party referral made to the Constitutional Chamber creating a precedent on how parties can make use of the Constitution and the ECHR standards on protecting and ensuring their human rights and fundamental freedoms. Moreover, it reassured the inevitability of Article 3 of the Law on the SCh and the SPO in the process of adjudicating individual cases.

In addition to the above mentioned case, two months after sending the invitation and order to Mr. Hasani, the SPO has summoned to appear for questioning and had processed the same Production Order to another former KLA member, Mr. Blerim Kuqi.<sup>11</sup> Relying on the previous practice, it is to be expected that Mr. Kuqi's defense team will file before the Constitutional Chamber the same request to make use of the existing precedent. The Constitutional Chamber could go beyond what can be requested and finally rule that every other Production Order containing the same request shall be declared unconstitutional. That conclusion would end the practice followed so far by the SPO.

Being faced by the second SPO attempt to force the defendant to collect documents, records and all other sorts of information, calls for more attention on overseeing SPO's actions are ever increasing. Overcoming the Law and violating the Constitution and the ECHR should not be tolerable in any circumstance. The reasons behind the establishment of the Chambers are already questioned due to the political situation in Kosovo, Serbia and the EU. Any mismanagement, procedural mistake or plain violation of procedural or material rights might raise new doubts on the overall SCh functioning. The hybrid nature of the Chambers and the high level complexity of its

mandate has already raised hypothesis that the Special Chambers was created as a national court not only to address war crimes and prosecute the perpetrators of those crimes, but also to protect international actors from possible legal exposure in connection with their involvement in Kosovo during the time when the alleged crimes were committed.<sup>12</sup> Therefore, the SCh staff must ensure that its mission is to be grounded on the legal documents that created it and not on unsafe hypotheses. In conclusion, acting in accordance to the Law, the Rules of Procedure and guaranteeing the protection of human rights and fundamental freedoms to every person involved with the Chambers is of crucial importance for the credibility and international image of the SCh.

- **Marty's Report and the main political figures mentioned by name**

A second issue raising questions to the SPO's work is the lack of summons to the main political figures mentioned in Marty's report.<sup>13</sup> The Law makes it clear that no official has immunity from prosecution by the SPO. They shall neither be relieved from criminal responsibility nor can they mitigate punishment. Having that in mind, one could expect that subject to the SPO proceedings should also be governmental figures mentioned in Marty's report. It has been observed so far that the SPO invitees are merely low profile figures or non-politically affiliated figures. Marty's report refers by name to the incumbent President of Kosovo, incumbent Prime Minister and many actual MPs. It refers to them as the main key players for the alleged crimes and yet none of them has been summoned by the SPO. The established practice has been interpreted in two ways; first, either the defense lawyers argue that the SPO has no relevant evidence against the '*big fishes*' and is trying to use the

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<sup>11</sup> Klan Kosova, "Kuqi, Specialja vepron sikur me Hasanin (Video)", Klan Kosova, 2 March 2019, [https://klankosova.tv/kuqi-specialja-vepron-sikur-me-hasanin-video/?fbclid=IwAR1wqX-Z1j9BgbJ2RcYyqq0HrJ6HGGCi0oiGK\\_FXyZafB1LYnCc-aZMt\\_Uc](https://klankosova.tv/kuqi-specialja-vepron-sikur-me-hasanin-video/?fbclid=IwAR1wqX-Z1j9BgbJ2RcYyqq0HrJ6HGGCi0oiGK_FXyZafB1LYnCc-aZMt_Uc)

<sup>12</sup> Robert Muharremi, "The Kosovo Specialist Chambers from a Political Realism Perspective1", International Journal of Transitional Justice, 2019, 0, 1–20, doi: 10.1093/ijtj/ijz00

<sup>13</sup> Dick Marty, "Inhuman treatment of people and illicit trafficking in human organs in Kosovo\*", Committee on Legal Affairs and Human Rights – Parliamentary Assembly of the Council of Europe, AS/Jur (2010) 46, 12 December 2010, <http://www.assembly.coe.int/CommitteeDocs/2010/ajdoc462010prov.pdf>



other invitees to cast a line for evidence;<sup>14</sup> or, second, the Chambers will mark yet another failed international attempt to address the alleged war crimes committed in Kosovo.<sup>15</sup> However, none of the interpretations are healthy to the SCh overall claimed mission. Marty's report has already been questioned in many instances as not legitimate due to the lack of evidence offered by the report. Moreover, the failure of the past international rule of law missions in Kosovo to address war crimes has contributed to that opinion. Therefore, the SCh must ensure that its establishment was not based only on the interest of powerful states but also on the necessity to shed light on the alleged crimes and ensure that justice prevails.

### **The Division for Coordinating the Process of Legal Protection and Financial Support for Accused Persons in Trials before the Specialist Chambers (Ministry's Division for Coordinating the Process of Legal Protection)**

- **The Law No. 05/I-054 on legal protection and financial support for potential accused persons in trials before the Specialist Chambers**

In light of the developments leading to the creation of the SCh and the consistent belief that the war led by the Kosovo Liberation Army (KLA) was just and directed to Serbian atrocities and the repressive Serbian rule, the Assembly of Kosovo approved a law guaranteeing legal protection and financial support to all potential accused persons in trials before the SCh.<sup>16</sup> The support was delineated to serve strictly the accused in their personal capacity.<sup>17</sup> Moreover, the law foresaw the right for compensation to all

potentially accused persons who are acquitted by a final decision.

The law has defined the general principles on how legal protection and financial support will be offered. It specified that financial support is to be understood as the right of the accused to request assistance for covering the costs of their defense, comprising of an independent, experienced and competent defense attorney. Sufficient financial support will also be provided to close family members of the accused and expenses related to travel will be included. Nevertheless, Article 3 and 4 of the Law specifies that the technicalities arising from this law shall be regulated by secondary legislation approved by the Ministry of Justice in Kosovo.

- **The missing Secondary Legislation of the Ministry of Justice providing clear criteria on the allocation of the financial means for legal protection of potentially accused persons and their family members**

The Government of Kosovo marked the first step towards the implementation of this Law during 2018. The Regulation GRK – NO.12/2018 on Amending and Supplementing Regulation GRK – NO.31.2013 on the Internal Organization of the Ministry of Justice (the Regulation GRK – NO.12/2018) was adopted. Article 3 of the Regulation foresaw the creation of the Ministry's Division for Coordinating the Process of Legal Protection and Financial Support to persons accused before the Chambers.<sup>18</sup> This division is considered a liaison office tasked with managerial duties to coordinate the process of allocating funds and reviewing the admissibility of applicant requests. According to Article 24/B, the Division's main function includes the coordination of the family members visits, the

<sup>14</sup> Artan Qerkini (Attorney at Law), Sejdiu and Qerkini Law Firm, Pristina, 22 February 2018

<sup>15</sup> Alan Crosby and Amra Zejneli, "Explainer: New Hague Tribunal Looks To Avoid Mistakes Of Past Kosovar Prosecutions", *Radio Free Europe*, 18 January 2019, <https://www.rferl.org/a/explainer-new-hague-tribunal-looks-to-avoid-mistakes-of-past-kosovo-prosecutions/29718149.html>

<sup>16</sup> Law No. 05/I-054 on legal protection and financial support for potential accused persons in trials before the Specialist Chambers, Official Gazette of the Republic of Kosovo, 31

August 2015, Article 1, <https://www.kuvendikosoves.org/common/docs/ligjet/05-L-054%20a.pdf>

<sup>17</sup> Ibid. Article 2

<sup>18</sup> Regulation GRK – No.12/2018 on Amending and Supplementing Regulation GRK – No.31/2013 on the Internal Organization of the Ministry of Justice, 5 September 2019, Article 3, <https://md.rks-gov.net/desk/inc/media/C9444161-1189-4794-AEEA-A69FD0181A19.pdf>

travel costs and the arrangement of travel tickets and hotel rooms. Moreover, the division will decide on the disbursement of payments, manage the contracts for legal protection services, keep the register of the accused persons and the list of their family members, and manage the compensation process for persons acquitted by a final decision. In addition to specifying the appointment process of the staff and their reporting system, this regulation does not provide any information on how the division's mode of operation shall be. That said, as long as the Ministry of Justice has not adopted the Regulation setting the specific terms for the financial package that accused persons will benefit, and procedure to get access to that fund, this process remains vague, not transparent and seems at odds with its legality.

- **The financial means dedicated to the legal protection and financial support to potentially accused persons before the SCh as defined in the Republic of Kosovo 2019 Budget**

The Assembly of Kosovo dedicated an amount of one million and a half EUR for the legal aid services for SCh accused in the Law on Budget for 2019. It estimated the same amount for 2020 and 2021.<sup>19</sup> By April 2019, media reported that up to 400 thousand euros are expected to be paid to international law firms for legal counselling and presenting Kosovo's legal position to the Specialist Chambers.<sup>20</sup> The Ministry of Justice has confirmed that it has contracted one American and one British law firm to offer legal aid to SCh defendants. All in all, it was maintained that the role of the foreign law firms is to ensure that Kosovo's history and its future are fairly represented and protected.<sup>21</sup>

Currently, there are many undetermined matters regarding the Law on legal protection and financial support to all potential accused persons in trials before the SCh and the Ministry's Division approach. First, the law does not specify in which stage of the criminal proceeding will one be subject to the financial means provided by Kosovo's budget. The term '*potentially accused persons*' does not *per se* define if the funds will be provided to someone in the investigation stage or in the indictment stage. The investigation stage is initiated by a decision of the SPO and from that moment, a person is considered a suspect. It is very important to clarify if the ones already invited by the SPO are subject to the law. So far, none of them has been invited as a person under investigation and all of them were invited on a witness questioning ground. Considering that the decisions of the SPO to initiate an investigation stage are not accessible to the public, they play a determinate role in deciding when someone is subject to the Law on legal protection and financial support.

Taking into consideration all of the above, the hiring of the two international law firms by the Ministry of Justice leaves room for speculation in the way the Ministry is managing with this Fund. First, the law provides that in order to be eligible for the funds, one must be subject to a criminal proceeding before the SCh or it must be a family member of the defendant. Based on this interpretation, one can conclude that the Fund provided by the Government of Kosovo will be distributed to the persons subject to a criminal proceeding and their family members for visits. Second, if all the invitees are being questioned as witnesses, one can assume that still they are not eligible for benefiting from the Fund.

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<sup>19</sup> Law No. 06/L-133 on the Budget Appropriations of the Republic of Kosovo for Year 2019 – Tables of Budget for Year 2019, 14 February 2019, Table 3.1, page 39, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18554>

<sup>20</sup> Balkan Transitional Justice, "Kosovo hires US, UK Law Firms for Hague War Court Cases", *Balkan Transitional Justice*, 7

February 2019, <https://balkaninsight.com/2019/02/07/kosovo-engages-law-firms-for-hague-war-court-cases-02-06-2019/>

<sup>21</sup> Ibid.



There are two main violations of the law observed so far. The mere act of the Government and the Ministry of Justice to hire an international law firm without first there being specific indictment processes is a breach of the principle established in the law. There is a huge difference between the status of a witness and the status of someone subject to a criminal proceeding. Amongst others, due to the right for a due process, right to fair trial and the right to not forcedly testify against himself and admit guilt, the testimonies gathered from the witnesses cannot be used to hold the witnesses accountable for any alleged crimes committed. This is a basic right under the ECtHR case-law. Moreover, because the law specifies that the Fund covers merely the expenses of those subject to criminal proceedings before the Chamber, the Ministry's Division did not have any authority to start with any disbursement from the Fund.

The Law moreover defines that the Fund may merely be used to compensate legal representation of the accused persons and not for the representation of Kosovo as a state. Let us recall that the SCh subject matter jurisdiction are the alleged crimes identified in Marty's report referring to individual criminal responsibility and not state responsibility. Therefore, the actual practice of using the Fund is illegal.

To summarize, one can conclude that the Ministry of Justice has fallen short in properly and transparently implementing the Law on the legal protection and financial support to all potential accused persons in trials before the Chambers. Considering the Law's request for secondary legislation to be approved and criteria specified on the procedures to be followed, the Ministry of Justice should have regulated this pillar already now. Moreover, given the mandate of the Ministry's Division for Coordinating the Process of Legal Protection and the fact that Kosovar taxpayer money is to be spent, the Ministry should be more accountable to its legal obligations when fulfilling its mandate in this field.

## Conclusion

The establishment of the SCh as the final step in the international reaction post-war crimes in Kosovo has marked yet another distinctive way in addressing such alleged crimes by a hybrid internationalized court. Due to its international significance, it is of crucial importance that rules of procedure are followed and respected.

The first endeavors of the SPO have proven to be irresponsible and have made indispensable the role of the Constitutional Chamber. The Constitutional Chamber as the final authority in interpreting the constitutionality of the rules of procedure plays also a legitimacy effect. On the other hand, taking into account the unsatisfactory results of past international missions on trying alleged war crimes in Kosovo, the SCh must ensure it will not fail. Any mistake like those presented in this Note lead into that direction. The public in Kosovo has started to lose their patience. The same will be said years after for the international community.

In addition, the Government of Kosovo must ensure that the fund foreseen to cover the expenses of the legal protection of the potentially accused and other expenses related to the trial will be strictly used for its purpose as defined in the law; any abuse of it will have a high political cost. The following secondary legislation setting down clear criteria on the management and coordination of the financial means should be adopted as a matter of urgency. The ambiguity on the clear mandate of Ministry's Division for Coordinating the Process of Legal Protection should be removed and the Fund should be used consistently with clear criteria.

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