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## REPORT OF THE OMBUDSPERSON

**Following an Inquiry in the Complaint of Sabit Januzi, Ismet Bahtijari, Haxhi Shala and Isni Kilaj  
Against the Kosovo Specialist Chambers and a Request for the Ombudsperson to exercise his power pursuant to Article 49(5) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") to refer the question of the constitutional validity of KSC-BD-25/Rev1 to the Specialist Chamber of the Constitutional Court.**

Ref. No. OMB-C-2024-02/01  
Issued on 08 May 2024

**PUBLIC**

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The Ombudsperson of the Kosovo Specialist Chambers ('the Ombudsperson') sitting on 08 May 2023,

Having considered the aforementioned complaints introduced pursuant to Article 162(11) of the Kosovo Constitution ('**The Constitution**'), Article 34(9) of the Law on Specialist Chambers and Specialist Prosecutor's Office ('**The Law**') and Rules 28 and 29 of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers ('**The Rules**') on the establishment of the Office of the Ombudsperson and the Office of the Ombudsperson Complaints Procedure adopted by the Ombudsperson on 12 September 2018,

Having deliberated, decides as follows:

### **I. PROCEEDINGS BEFORE THE OMBUDSPERSON**

1. The complaint was registered with the Ombudsperson on 25 April 2024.
2. In support of their complaint, Counsel, on behalf of the complainants (Counsel) submitted the following documents (1) A copy of Sabit Januzi, Ismet Bahtijari and Haxhi Shala's referral of KSC-BD-25-Rev1 to the Specialist Chamber of the Constitutional Court; (2) A copy of Isni Kilaj's Application to join the



aforementioned referral, including (3) Public Annexes 1 and 2, which include a breakdown of legal aid fees under the 2020 and 2024 regulations, as well as The Kosovo Ministry of Justice's secondary legislation for the allocation of funds for the accused before the Specialist Chambers; (4) Confidential Annexes 3 to 5, which include email exchanges between the Registry and Mr. Kilaj's defence counsel; and (5) A Request from the Association of Defence Counsel Practising before the International Courts and Tribunals (ADC-ICT) to appear as *amicus curiae* before the Specialist Chamber of the Constitutional Court.

## II. THE FACTS

3. Having considered the correspondence from the complainants, including the documents submitted to the Ombudsperson, the facts are as follows.
4. The Complainants are presently facing proceedings before the Kosovo Specialist Chambers concerning alleged offences relating to the administration of justice. Mr. Januzi and Mr. Bahtijari have been detained by the Specialist Chambers since 5 October 2023. Mr. Shala has been detained by the Specialist Chambers since 11 December 2023. Mr. Kilaj has been detained since 3 November 2023.
5. Mr. Januzi, Mr. Bahtijari and Mr. Shala await trial, with a date for transmission of the file to the Trial Panel set for 21 June 2024<sup>1</sup>.
6. The Specialist Prosecutor has not yet filed an indictment in Mr. Kilaj's case, he is currently considered a suspect.<sup>2</sup>
7. On 22 February 2024 The Registrar of the Kosovo Specialist Chambers adopted a revision of the Legal Aid Regulations, KSC-BD-25/Rev1 (2024 Regulations).
8. On 2 April 2024, Counsel for Mr. Januzi, Jonathan Elystan Rees KC, Counsel for Mr. Bahtijari, Dr Felicity Gerry KC, and Counsel for Mr. Shala, Mr. Toby Cadman, filed a referral to the Specialist Chamber of the Constitutional Court,

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<sup>1</sup> KSC-BC-2023-10/F00233, *Decision Setting out the Calendar for the Remaining Procedural Steps of the Pre Trial Phase*, Pre-Trial Judge, 27 March 2024, Public at paragraph 30(k)

<sup>2</sup> KSC-CC-2024-23/F00005, Kilaj Application to Join Referral to Specialist Chamber of the Constitutional Court, 21 April 2024, Public at paragraph 9.

concerning the constitutional validity of the 2024 Regulations<sup>3</sup>. Mr. Kilaj sought to Join said referral in an Application filed on 21 April 2024.<sup>4</sup>

9. Counsel complained before the Chamber that the rights afforded to their clients pursuant to Articles 30 and 31 of the Constitution, as well as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) were violated with the adoption by the Registrar of certain amendments to the 2020 Legal Aid Regulations. Furthermore, the Applicants challenged the “constitutional validity” of the 2024 Legal Aid Regulations and requested that the Chamber declare the Regulations incompatible with the Constitution in accordance with Rule 29 of the SCCC Rules.
10. On 24 April 2024, the Specialist Chamber of the Constitutional Court issued its Decision on the Referral made by Mr. Januzi, Mr. Bahtijari and Mr. Shala.
11. The Chamber declared the Referral inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 14(f) of the SCCC Rules as upon a prima facie review, nothing in the referral currently gives rise to the appearance of a violation of the Applicants’ constitutional rights<sup>5</sup>.

### III. THE COMPLAINT AND REQUEST FOR REFERRAL

12. Counsel on behalf of the four applicants allege that:
  - a) The rights afforded to them pursuant to Articles 30 and 31 of the Constitution, as well as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) were violated with the adoption by the Registrar of Revised Legal Aid Regulations in February 2024. This revision of the Legal Aid Regulations contained an amendment to the previous Regulations which made a distinction in the fees allocated for different categories of crimes, allocating less funds for the payment of the defence in cases of alleged crimes against the administration of justice. Counsel for the four complainants argue that this new Legal Aid regime will result in

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<sup>3</sup> KSC-CC-2024-23(1) Sabit Januzi, (2) Ismet Bahtijari and (3) Haxhi Shala v The Registry of the Kosovo Specialist Chambers

<sup>4</sup> KSC-CC-2024-23/F00005, Kilaj Application to Join Referral to Specialist Chamber of the Constitutional Court, public, 21 April 2024

<sup>5</sup> KSC-CC-2024-23/F00006, para 21

insufficient funds being allocated to provide the accused with effective representation, thus violating their fundamental rights;

- b) KSC-BD-25/Rev1 was adopted in the absence of any consultation process. Furthermore, the adoption of KSC-BD-25/Rev1 not only directly impacts upon the effective representation of Mr. Januzi and his co-defendants, Mr. Bahtijari and Mr. Shala, but it also has wider implications going forward in relation to the rights and interests of any future suspects or accused persons brought before the Specialist Chambers in relation to contempt proceedings (including Mr. Kilaj who is already in detention); and
- c) Requests the Ombudsperson to exercise his power pursuant to Article 49(5) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") to refer the question of the constitutional validity of KSC-BD-25/Rev1 to the Specialist Chamber of the Constitutional Court as a matter of urgency given that no defence funding is in place for the complainants and Mr. Januzi and his co-defendants, Mr. Bahtijari and Mr. Shala are awaiting trial, with a date for transmission of the file to the Trial Panel set for 21 June 2024.
- d) In addition, Dr Felicity Gerry, Counsel for Mr. Bahtijari, raised the following additional issues in her submission to the Ombudsperson.
  - (1) She stated that she has not been paid since her appointment on 4 January 2024, that there are over 200 filings and that such a situation is unfair (and stressful) for both her and her client. Dr Gerry complained that there is no mechanism in place for the remuneration of counsel until Legal Aid funding comes through, which she considers should be addressed by the Ombudsperson.
  - (2) She further states that she has written to the Independent Representative Body with no response so requests the consideration by the Ombudsperson of the scope for Counsel's withdrawal in the absence of funding.

#### **IV. THE LAW**

- 13. In accordance with Article 34(9) of the Law, the Ombudsperson shall perform his functions with exclusive responsibility for the Specialist Chambers and the Specialist Prosecutor's Office. The role and function of the Ombudsperson of the Specialist Chambers shall be provided for in the Rules of Procedure and Evidence.

14. Rule 28(2) of the Rules of Procedure and Evidence (RPE) sets out the scope of the Ombudsperson's jurisdiction, which is limited to monitoring, defending and protecting the fundamental rights of persons interacting with the Specialist Chambers and the Specialist Prosecutor's Office.
15. Rule 29(1) of the RPE states that the Ombudsperson shall not intervene in cases or other legal proceedings before the Specialist Chambers, except in instances of unreasonable delay.
16. Pursuant to Rule 29(2)(a) of the RPE, the Ombudsperson may conduct inquiries into complaints received from any person asserting a violation of his or her rights by the Specialist Chambers or the Specialist Prosecutor's Office.
17. In accordance with Rule 29(3) of the RPE, a request to the Ombudsperson may be rejected if:
  - (a) it involves a case or other legal proceeding before the Specialist Chambers other than an allegation of unreasonable delay;
  - (b) it does not demonstrate a violation of human rights by the Specialist Chambers;
  - (c) it is incomplete or a request has not been completed following a reminder from the Ombudsperson;
  - (d) other remedies have not been exhausted, except in cases of inactivity or immediate urgency in order to avoid severe and irreparable prejudice; or it has not been filed within six months of the alleged violation, unless good cause has been shown.
18. Pursuant to Article 49(5) of the Law, the Ombudsperson may make referrals under Article 113(2) of the Constitution of the Republic of Kosovo ('Kosovo Constitution,' or 'Constitution')<sup>6</sup> to the Specialist Chambers of the Constitutional Court.
19. As a matter of substantive law, the Ombudsperson is empowered to apply the human rights instruments as set out in Chapter II of the Kosovo Constitution. Therefore, the ECHR, ICCPR, and Kosovo Constitution are of particular relevance to the work of the Ombudsperson as they set out the minimum

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<sup>6</sup> Constitution of the Republic of Kosovo, June 2008 (with 2020 amendments).

standard for the protection of human rights to be guaranteed by public authorities in a democratic society.

## V. THE OMBUDSPERSON'S ASSESSMENT

- i) Request to the Ombudsperson to exercise his power pursuant to Article 49(5) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") to refer the question of the constitutional validity of KSC-BD-25/Rev1 to the Specialist Chamber of the Constitutional Court.
20. Rule 26 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court requires that any referral by the Ombudsperson of the Specialist Chambers or the Ombudsperson of the Republic of Kosovo pursuant to Article 49(5) of the Law shall be made within two (2) months from the impugned law having entered into force.<sup>7</sup>
21. In the present case, the Registrar adopted amendments to the Legal Aid Regulations on 22 February 2024 and KSC-BD-25/Rev1 entered into force on the same date.
22. The request by the complainants to the Ombudsperson to refer the Regulations to the Specialist Chamber of the Constitutional Court was submitted on 25 April 2024.
23. Given that the time limit for filing of a referral expired on 23 April 2024, the Ombudsperson is unable to consider any request by the complainants to refer the revised Legal Aid Regulations to the Specialist Chambers of the Constitutional Court.
- ii) Alleged violation of the rights afforded to complainants pursuant to Articles 30 and 31 of the Constitution, as well as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention") as a result of the adoption by the Registrar of certain amendments to the 2020 Legal Aid Regulations.

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<sup>7</sup> Chapter 4, Section IV, Rule 26 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court



24. In considering whether a complaint or any part of a complaint will be examined, the Ombudsperson must first conduct a preliminary assessment in accordance with the provisions of Rules 29(1) and 29(3) (a)-(e) of the RPE. The Ombudsperson must be satisfied that he has jurisdiction to consider the complaint at hand.
25. Rule 29(1) of the RPE states that the Ombudsperson shall not intervene in cases or other legal proceedings before the Specialist Chambers, except in instances of unreasonable delay.
26. In accordance with Rule 29(3)(a) of the RPE, a request to the Ombudsperson may be rejected if it involves a case or other legal proceeding before the Specialist Chambers other than an allegation of unreasonable delay.
27. In considering the provisions of Rules 29(1) and 29(3)(a) of the RPE, the Ombudsperson is reminded of the assessment of the Specialist Chambers of the Constitutional Court<sup>8</sup> in its decision on the referral by the complainants:
- “The Chamber further notes that the proceedings against the Applicant are ongoing and that it falls in the first place to the criminal chambers to assess whether there is any merit to the alleged violations and whether this can or should be remedied in the course of the proceedings. In this respect, the Chamber notes that the 2024 Legal Aid Regulations provide for a review mechanism for any decision on legal aid by a competent panel.”*
28. In this regard, the Ombudsperson cannot depart or deviate from the assessment of the Specialist Chamber of the Constitutional Court in respect of the issues at stake in the complaint before him.
29. The Ombudsperson has previously stated that he is not permitted to compete with the legal protection of the courts. The two concepts have a common goal – human rights protection, but they are based on completely different organizational and functional concepts. The Ombudsperson has soft powers to prevent human rights violations and to promote human rights protection, whereas courts have to decide individual cases and can enforce human rights protection.<sup>9</sup> This is reflected in Rules 29(1) and 29(3)(a) of the RPE.

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<sup>8</sup> KSC-CC-2024-23(1) Sabit Januzi, (2) Ismet Bahtijari and (3) Haxhi Shala v The Registry of the Kosovo Specialist Chambers, para 20.

<sup>9</sup> OMB-C-2022-02, Report of The Ombudsperson following an Inquiry in the Complaint of Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi Against the Kosovo Specialist Prosecutor's Office and the Kosovo Specialist Chambers, 20 February 2023 , para 72

33. In this regard, the Ombudsperson notes that proceedings against all four complainants are ongoing before the Specialist Chambers. As stated by the Specialist Chambers of the Constitutional Court, the protection of the fundamental rights guaranteed by Article 30 and 31 of the Kosovo Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms falls in the first place, to the criminal chambers.
34. Therefore, the Ombudsperson must reject the complaint in its entirety pursuant to Rule 29(1) and Rule 29(3)(a) of the RPE as he is prohibited from intervening in cases or other proceedings before the Specialist Chambers.
35. In addition, Dr Felicity Gerry, Counsel for Mr. Bahtijari, raised the following additional issues in her submission to the Ombudsperson.
- (1) She stated that she has not been paid since her appointment on 4 January 2024, that there are over 200 filings and that such a situation is unfair (and stressful) for both her and her client. Dr Gerry complained that there is no mechanism in place for the remuneration of counsel until Legal Aid funding comes through, which she considers should be addressed by the Ombudsperson.
- (2) She further states that she has written to the Independent Representative Body with no response so requests the consideration by the Ombudsperson of the scope for Counsel's withdrawal in the absence of funding.
36. The Ombudsperson notes that that the 2024 Legal Aid Regulations provide for conditional assignment and payment of Counsel as well as Legal Aid.
37. The Ombudsperson recalls that the in the 2024 Legal Aid Regulations, pursuant to Regulation 6 and Regulation 22, after Counsel has submitted all documents as requested, under Regulation 11 the Registrar can conditionally assign Counsel, pending a final decision on Legal Aid.
38. The Ombudsperson is of the view that the issues raised by Dr Gerry are administrative in nature and no argument has been made or submitted to support an assertion that they have resulted in a violation of her client's fundamental rights as set forth in Chapter II of the Constitution.
39. Therefore, the Ombudsperson must reject this element of the complaint pursuant to Rule 29(3)(b) of the RPE.

## VI. CONCLUSION



40. The Ombudsperson has concluded that the request to refer the 2024 Legal Aid Regulations to the Specialist Chambers of the Constitutional Court must be rejected as the time limit for any such referral has expired.
41. The Ombudsperson has concluded that complaints which relate to the alleged violation of rights afforded to the complainants pursuant to Articles 30 and 31 of the Constitution, as well as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) as a result of the adoption by the Registrar of Revised Legal Aid Regulations in February 2024 relate specifically to proceedings before the Court, fall within the jurisdiction criminal Chambers and therefore must be rejected pursuant to Rules 29(1) and 29(3)(a) of the RPE.
42. Finally, the Ombudsperson has concluded that the specific complaint by Dr Gerry in relation to her lack of payment since appointment on 4 January 2024, the assertion that there is no mechanism in place for the remuneration of counsel until Legal Aid funding comes through, and her request that the Ombudsperson give consideration to the of the scope for counsel’s withdrawal in the absence of funding must be rejected pursuant to Rule 29(3)(b) of the RPE as the issues fall outside of his jurisdiction. These are administrative issues and no assertion has been made by Dr Gerry that these amount to a violation of her client’s fundamental rights as set out in Chapter II of the Constitution.



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**PIETRO SPERA**

**Ombudsperson, Kosovo Specialist Chambers**

**Dated the 08 May 2024  
At The Hague, The Netherlands.**



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA