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A05**In:** KSC-CC-2024-23**(1) Sabit Januzi, (2) Ismet Bahtijari and (3) Haxhi Shala v The Registry of the Kosovo Specialist Chambers****Before:** The President of the Kosovo Specialist Chambers,  
Judge Ekaterina Trendafilova**Registrar:** Fidelma Donlon**Filing Participant:** Specialist Counsel for Sabit Januzi  
Specialist Counsel for Ismet Bahtijari  
Specialist Counsel for Haxhi Shala**Date:** 2 April 2024**Language:** English**Classification:** Public

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Referral by 1) Sabit JANUZI, 2) Ismet BAHTIJARI and 3) Haxhi SHALA to the Specialist Chamber of the Constitutional Court Concerning the Constitutional Validity of KSC-BD-25/Rev1  
(Revised Legal Aid Regulations)

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**Registry**

Dr Fidelma Donlan

**Counsel for Sabit Januzi**Jonathan Elystan Rees KC  
Huw Bowden**Counsel for Ismet Bahtijari**Dr Felicity Gerry KC  
James O'Keefe**Counsel for Haxhi Shala**Toby Cadman  
John Cubbon

## I. INTRODUCTION

1. On 22 February 2024, the Registrar of the Kosovo Specialist Chambers adopted revised Legal Aid Regulations, KSC-BD-25/Rev1 ('2024 Regulations').
2. The Applicants<sup>1</sup> are presently facing proceedings before the Kosovo Specialist Chambers concerning alleged offences relating to the administration of justice. The Applicants 1 and 2 have been detained by the Specialist Chambers since 5 October 2023. Applicant 3 has been detained by the Specialist Chambers since 11 December 2023. The Applicants are indigent and have not yet secured funding for their defence. They await trial, with a date for transmission of the file to the Trial Panel set for 21 June 2024<sup>2</sup>.
3. For the reasons set out below, the Applicants hereby:
  - a. Refer the 2024 Regulations to the Specialist Chamber of the Constitutional Court pursuant to Articles 49(2) and (3) of the Law on Specialist Chambers and Specialist Prosecutor's Office ('Law')<sup>3</sup> and Rules 4(b) and (c) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court ('RPSCC')<sup>4</sup>;
  - b. Request an interim measure, pursuant to Rule 21(1) of the RPSCC, ordering that KSC-BD-25/Rev1 be suspended pending the outcome of the referral;
  - c. Request an order that funding based on KSC-BD-25 is made available subject to eligibility as an interim measure, pursuant to Rule 21(1) of the RPSCC, until (a) proceedings before the KSC against the Applicants are concluded; or (b) the referral is ruled upon, whichever is the earliest; and

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<sup>1</sup> 1) Sabit Januzi, d.o.b. 29.04.1966, Kosovar, Detention Unit of the KSC; 2) Ismet Bahtijari, d.o.b. 27 February 1963, Kosovar National, Detention Unit of the KSC; 3) Haxhi Shala, d.o.b. 17 March 1970, Kosovar National, Detention Unit of the KSC

<sup>2</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>3</sup> Law No.05/L-053

<sup>4</sup> KSC-BD-03/Rev3/2020, *Rules of Procedure and Evidence before the Kosovo Specialist Chambers including Rules of Procedure for the Specialist Chamber of the Constitutional Court, Part II*

- d. Request an order that KSC-BD-25/Rev1 be declared incompatible with the Constitution and that, by reason of such incompatibility, the entire legislative instrument lacks constitutional validity from the date of its entry into force and shall cease to have legal effect, pursuant to Rules 29(1) to (3) of the RPSCCC.

## II. APPLICABLE LAW

4. Article 3 of the Law provides that the Specialist Chamber of the Constitutional Court shall deal *exclusively* with any constitutional referrals relating to the Specialist Chambers.
5. Article 49(2) of the Law provides that the Specialist Chamber of the Constitutional Court shall have jurisdiction over any referral to the Constitutional Court made by persons authorised to make referrals under Article 113 of the Constitution which relates to or directly impacts the work, decisions, orders or judgements of the Specialist Chambers<sup>5</sup>.
6. Persons authorised to make referrals under Article 113 of the Constitution include the accused, where their individual rights and freedoms have been violated by the Specialist Chambers<sup>6</sup>.
7. Where the Constitutional Court Panel finds that a legislative provision(s) falling within its jurisdiction and affecting the mandate, jurisdiction, structure or operations of the Specialist Chambers is incompatible with the Constitution it may declare that, by reason of such incompatibility, the entire legislative instrument lacks constitutional validity<sup>7</sup>.
8. A legislative provision(s) which is declared unconstitutional by the Constitutional Court Panel shall cease to have legal effect from the date of the pronouncement of the

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<sup>5</sup> See also Rule 4(b) of the RPSCCC

<sup>6</sup> See Article 113(7) of the Constitution of the Republic of Kosovo and Rules 4(b) & (c), and 20 of the RPSCCC

<sup>7</sup> Rule 29(1) of the RPSCCC

judgment<sup>8</sup>.

9. Unless otherwise provided in the judgment, where a legislative provision is declared incompatible with the Constitution, the effect of such a finding shall be that the said provision lacked constitutional validity from the date of its entry into force<sup>9</sup>.
10. In accordance with Article 24 of the Law, the Registry, which includes the Defence Office within its structure, is an organ of the Specialist Chambers.
11. Pursuant to Article 34(7) of the Law and Rule 23(6) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ('RPEKSC')<sup>10</sup>, the responsibilities of the Registry and the Defence Office include the administration, on behalf of the Registrar, of a system of legal aid for representation of indigent or partially indigent accused before the Specialist Chambers.
12. The regulations adopted by the Registrar to administer the system of legal aid are adopted pursuant to Article 19(6) of the Law: "The Specialist Chambers shall have the power to adopt internal rules, policies and practice directions that are necessary for its proper functioning, the security or fairness of proceedings or to give effect to the provisions of this Law."
13. In contrast to the Rules of Procedure and Evidence before the Kosovo Specialist Chambers, which do not come into force until seven days after the Specialist Chamber of the Constitutional Court determines pursuant to Article 19(5) of the Law that the Rules comply with Chapter II of the Constitution<sup>11</sup>, the 2024 Regulations are asserted to have come into force on the date upon which they were adopted.
14. The Applicants' constitutional rights include *inter alia* the following:

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<sup>8</sup> Rule 29(2) of the RPSCCC

<sup>9</sup> Rule 29(3) of the RPSCCC

<sup>10</sup> KSC-BD-03/Rev3/2020, *Rules of Procedure and Evidence before the Kosovo Specialist Chambers including Rules of Procedure for the Specialist Chamber of the Constitutional Court, Part I*

<sup>11</sup> Rule 1(3) of the RPEKSC

## a. Article 30 [Rights of the Accused]

“Everyone charged with a criminal offense shall enjoy the following minimum rights: ...

(3) to have adequate time, facilities and remedies for the preparation of his/her defense;

...

(5) to have assistance of legal counsel of his/her choosing, to freely communicate with counsel and if she/he does not have sufficient means, to be provided free counsel<sup>12</sup>.

## b. Article 31 [Right to Fair and Impartial Trial]

6. Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.

15. The rights in Articles 30 and 31 of the Constitution, of course, mirror the right to a fair trial protected by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedom (‘ECHR’)<sup>13</sup>, in particular the ‘legal aid’ provisions in Article 6(3):

Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself ... through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...

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<sup>12</sup> see also Article 21(4)(c), (e), (g) and 21(5) of the Law

<sup>13</sup> Given direct applicability by Article 22(2) of the Constitution

16. In order to meet the requirements of Article 6(3), representation provided by the state must be 'practical and effective' (*Salduz v Turkey*, 49 EHRR 19 at paragraph 51: "the Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective'").
17. The right to a fair trial involves observance of the principle of "equality of arms" under which the defendant in criminal proceedings must have a "reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent" (*Neumeister v Austria*, 1 EHRR 91; and *Delcourt v Belgium*, 1 EHRR 3555).
18. In the context of legal aid, as recognised by the International Criminal Court, the principle of equality of arms requires that the legal aid system must contribute to maintaining a balance between the access to resources and means of the suspect or accused and of the prosecution<sup>14</sup>.
19. The constitutional rights enjoyed by the Applicants also include such rights relating to equality of treatment and due process:
  - a. Article 3 [Equality Before the Law]
    1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.
    2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.

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<sup>14</sup> ICC-ASP/12/3 at paragraph 9; and ICC-ASP/22/9 at paragraph 23

b. Article 24 [Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

c. Article 32 [Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

d. Article 54 [Judicial Protection of Rights]

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

20. Accordingly, where the Applicants enjoy the guarantee of 'practical and effective' representation provided by the state in accordance with his rights under Article 6 ECHR and Articles 30 and 31 of the Constitution, and they are deprived of that guarantee by an administrative decision (such as revision of the legal aid regulations) they are entitled to pursue a legal remedy, such as a referral of the decision to the Constitutional Court.
21. The referral involves consideration not only of the decision itself (i.e. the outcome) but also the process which led to the decision. It is only through good governance that the realization of human rights can be guaranteed: "Good governance is the soil that nourishes all human rights"<sup>15</sup>.
22. According to the UN Office of the High Commissioner for Human Rights, good

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<sup>15</sup> Annex 1 to the Referral

governance adds a normative or evaluative attribute to the process whereby public institutions conduct public affairs, manage public resources and guarantee the realisation of human rights<sup>16</sup>.

23. Without good governance, human rights cannot be respected and protected in a sustainable manner. The implementation of human rights relies on a conducive and enabling environment.
24. The key attributes of good governance from a human rights perspective include transparency, accountability and participation.
25. When led by human rights values, good governance creates avenues for the public to participate in policymaking either through formal institutions or informal consultations, establishes mechanisms for the inclusion of multiple groups in decision-making processes and encourages civil society and communities to formulate and express their positions on issues of importance to them.
26. In the realm of delivering state services to the public, good governance reforms advance human rights when they improve the state's capacity to fulfil its responsibility to provide public goods which are essential for the protection of a number of human rights, and create mechanisms of accountability and transparency, and paths for public participation in decision-making.
27. The 'International Framework: Good Governance in the Public Sector'<sup>17</sup> produced by the Chartered Institute of Public Finance and Accountancy & the International Federation of Accountants identifies that the fundamental function of good governance in the public sector is to ensure that entities achieve their intended outcomes while acting in the public interest at all times. Acting in the public interest requires "Ensuring openness and comprehensive stakeholder engagement".
28. According to the International Framework:

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<sup>16</sup> Annex 2 to the Referral

<sup>17</sup> Annex 3 to the Referral



“As public sector entities are established and run for the public good, their governing bodies should ensure openness in their activities. Clear, trusted channels of communication and consultation should be used to engage effectively with all groups of stakeholders, such as individual citizens and service users, as well as institutional stakeholders.”

29. To demonstrate that they are acting in the public interest at all times, and to maintain public trust and confidence, public sector entities should be as open as possible about all their decisions, actions, plans, resource use, forecasts, outputs, and outcomes.
30. Governing bodies should ensure that they have processes in place to collect and evaluate the views and experiences of people and organizations of all backgrounds. Representative views from, for example, current service users about the suitability and quality of existing services are relevant, as are those of both users and non-users about their future needs.
31. Governing bodies should provide clear reasoning for their decisions. In both their public records of decisions and in explaining them to stakeholders, they should be explicit about the criteria, rationale, and considerations used in their decision making and, in due course, about the impact and consequences of those decisions. They should restrict the provision of information only when the wider public interest clearly demands it.

### III. THE 2020 REGULATIONS

32. On 3 September 2020, the Registrar adopted the legal aid regulations<sup>18</sup> that were in force up to the introduction of the revised 2024 Regulations on 22 February 2024.

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<sup>18</sup> KSC-BD-25 ('2020 Regulations')

33. Regulation 13(1)(d) and Section 2 of Annex C of the 2020 Regulations provided for a table of maximum fees by which the Legal Aid Fee in any proceedings before the Kosovo Specialist Chambers would be determined.
34. In pre-trial, trial and appellate proceedings in relation to *any* indicted charge, the 2020 Regulations provided for the following maximum monthly amounts, depending on whether the case was assessed as complexity level 1, 2 or 3: €26,830, €31,470 or €40,750.
35. Those maximum figures for the Legal Aid Fee were to cover both remuneration of Counsel and his/her Team, and reimbursement of costs incurred (Regulation 14).
36. Section 3 of Annex C further allocated costs which may be incurred and then reimbursed (within the maximum monthly amounts for remuneration and reimbursement of costs):
- Translation and interpretation costs: €1,150 per month
  - Miscellaneous and necessary costs: €500 per month
  - External investigators: €40,000 in total for pre-trial, trial and all appellate proceedings
  - Amounts allotted to support investigations:
    - €10,000 in total for the Pre-Trial Stage
    - €20,000 in total for the Trial Stage
    - €5,000 in total for the 2<sup>nd</sup> Instance Appellate Stage
    - €5,000 in total for the 3<sup>rd</sup> Instance Appellate Stage
37. The figures in Sections 2 and 2 of Annex 3 were maximum figures, subject to verification of work performed and costs actually incurred, ensuring that each case was assessed on a case-by-case basis within the overall framework and the capped amounts.

38. By press release on the same date<sup>19</sup>, the Registrar stated that the 2020 Regulations guaranteed compliance with the fair trial principles enshrined in the Constitution of Kosovo and the Law on Specialist Chambers and Specialist Prosecutor's Office. According to the Registrar, the 2020 Regulations exemplified the best practices in legal aid standards. The 2020 Regulations were, the Registrar stated, "*a cornerstone of the legal aid scheme essential to the rights of the accused*".
39. The President of the KSC, President Ekaterina Trendafilova also lauded the adoption of the 2020 Regulations, noting that they "encapsulate the core principles set forth in our Law and the universal standards in criminal justice, *ensuring the right of an accused to a fair trial, which includes the right to effective counsel*".
40. Although Regulation 3 of the 2020 Regulations provided for the possibility of future amendment, including by the Registrar *proprio motu*, it clearly envisaged amendment proposals to be 'reasoned' and consultation with an Independent Representative Body of Specialist Counsel<sup>20</sup>.
41. Further, regulation 3(2) of the 2020 Regulations required the Registrar to keep a record of any amendment procedure and empowered her to make public the amendment procedure or parts thereof, as appropriate.
42. In the event, no amendment to the 2020 Regulations in fact was made prior to 22 February 2024.
43. As at the date of drafting, the cumulative inflation rate in the Eurozone between 2020 and 2024 has been 18.66%<sup>21</sup>.

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<sup>19</sup> Annex 4 to the Referral

<sup>20</sup> Regulation 3(1) of the 2020 Regulations: "The Registrar may amend these Regulations *proprio motu* or upon amendment proposals. Reasoned amendment proposals may be submitted to the Registrar by the President and the Independent Representative Body of Specialist Counsel. The Registrar may consult with the Independent Representative Body of Specialist Counsel regarding any amendment proposal."

<sup>21</sup> Annex 5 to the Referral

44. In order merely to keep pace with inflation, the maximum figures in Section 2 of Annex C of the 2020 Regulations would have had to have been *increased* by 18.66%, i.e. depending on complexity level 1, 2 or 3: €31,836.48, €37,342.30 or €48,353.95.
45. Simply leaving the figures in Section 2 of Annex C of the 2020 Regulations unaltered amounted to an effective cut in real terms of 18.66%.

#### IV. THE 2024 REGULATIONS

46. On 22 February 2024, without any consultation or notice, the Registrar adopted amendments to the legal aid regulations in KSC-BD-25-Rev1 ('2024 Regulations'). The amendments are limited in number<sup>22</sup> but they are swingeing in scope.
47. In relation to proceedings for offences contrary to Article 15(2) of the Law (herein referred to collectively as 'offences relating to the administration of justice'), a new table of maximum monthly fees for the pre-trial, trial and appellate stages was introduced in Section 2(2) of Annex C which, depending upon complexity level 1, 2 or 3, was restricted as follows: €6,875, €12,675 and €14,850.
48. Those new figures amount to cuts in the *nominal value* of the maximum available amounts of an enormous 74%, 60% and 64% at levels 1, 2 and 3 respectively.
49. In real terms, those cuts are even greater at 79%, 67% and 70% respectively<sup>23</sup>.
50. The figures are intended to provide for an expected team composition at the Pre-Trial, Trial and Appellate Stages as follows:

Complexity level 1    1 Counsel, 1 Co-Counsel, 1 Legal Associate and 1 Support Team Member

<sup>22</sup> See Regulations 6(4)(f), 13(1)(d)-(e), 14(b), 16(3), 17(2)-(3),(5), 28(2), 34(2), 37(1), Annex A: Sections 2(5), 5(1)(g), 11(1); Annex C.

<sup>23</sup> Taking into account inflation across the period, the new table of fees are the equivalent of the following sums in 2020: €5,502.13, €10,309.85 and €12,078.99.

Complexity level 2 1 Counsel, 1 Co-Counsel, 2 Legal Associates and 1 Support Team Member

Complexity level 3 1 Counsel, 1 Co-Counsel, 4 Legal Associates and 1 Support Team Member

51. With an hourly rate of Counsel being €100 and hourly rates for any one co-counsel, legal associate and team member (at least, in the team of Duty Counsel<sup>24</sup>), being €85, €45 and €28, the combined hourly rate for complexity levels 1, 2 and 3 is €258, €303 and €393 respectively.
52. The maximum legal aid fee set out in the original legal aid regulations was clearly calculated on a basis of 104 remunerated team hours in any given month<sup>25</sup>.
53. The maximum legal aid fee set out in Section 2(2) of Annex C to the 2024 Regulations will only permit the team to work a maximum of 27 remunerated hours in any single month at 'full-time' complexity level 1 (41 remunerated hours and 37.8 remunerated hours in any single month in relation to complexity levels 2 and 3 respectively). Of course, if the team incurs reimbursable costs, such as travel, the maximum number of remunerated hours will fall, as the maximum legal aid fees set out in section 2(2) of Annex C covers both remuneration and costs.
54. These figures are wholly unsustainable. No logic in the way in which they have been reached is decipherable, and no logic has otherwise been suggested.
55. Changes were also made to Section 3 of Annex C. In addition to adding that the amount allotted for contracting external investigators included consultants and field assistance, and giving travel as an example of the expenditure described as allotted 'to support investigations', a new Section 3(2) was introduced. According to the amended Regulation 14, costs are now to be allotted 'in accordance with Section 3(1) or Section

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<sup>24</sup> See Section 4 of Annex C

<sup>25</sup> €26,830 ÷ €258 = 104; €31,470 ÷ €303 = 104; and €40,750 ÷ €393 = 104

3(2) of Annex C, as applicable', although neither regulation, or Annex C, actually sets out how to determine which applies in any given case.

56. Under Section 3(2) of Annex C, the allocated costs which may be incurred and then reimbursed (within the maximum monthly amounts for remuneration and reimbursement of costs) are set out as follows:

- Translation and interpretation costs: €1,150 per month
- Miscellaneous and necessary costs: €500 per month
- External investigators/consultants (including field assistance): €10,250 in total for pre-trial, trial and all appellate proceedings
- Amounts allotted to support investigations/consultants (e.g. travel):
  - €2,562 in total for the Pre-Trial Stage
  - €5,125 in total for the Trial Stage
  - €1,281 in total for the 2<sup>nd</sup> Instance Appellate Stage
  - €1,281 in total for the 3<sup>rd</sup> Instance Appellate Stage

57. The figures above represent a 74% cut in *nominal* terms (79% cut in real terms) of the costs allocated for external investigators/consultants in total, and in both pre-trial and trial stage.

58. No press release from the Registrar or the President accompanied the 2024 Regulations.

59. Certainly, the legal aid regulations at the KSC can no longer be said to exemplify the best practices in legal aid standards.

60. In contrast with the 2024 Regulations, the legal aid system of the International Criminal Court<sup>26</sup> was initiated and established on behalf of the Registrar by the Defence Support Section (now incorporated within the Counsel Support Section) after *extensive consultation* with the ad hoc tribunals, special courts, national legal aid schemes and

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<sup>26</sup> In contrast to both the KSC and the ICC, the legal aid system at the IRMCT operates on the simple basis that the amount of work for each case is individually assessed, and remunerated at higher hourly rates than used in the KSC, with no maximum figures irrespective of the offences charged

representatives of the legal profession (Archbold on International Criminal Courts, 5<sup>th</sup> Edition § 20-45, 20-85, 20-94).

61. Unlike the Defence Office of the KSC, the ICC Registry consults with representatives of the defence bar on any issue that may have a bearing on the work of counsel in the execution of their duties before the court, including the establishment and review of the legal aid system of the court, as well as legal aid adjustment initiatives (Archbold on International Criminal Courts, 5<sup>th</sup> Edition § 20-66).
62. Under the 2013 ICC Registry's Single Policy Document on the Court's Legal Aid System, ICC-ASP/12/3, the core team for trial of an offence relating to the administration of justice was entitled to access a base rate of €30,782 per month for the remuneration of team members, with an additional sum in relation to investigations and expenses<sup>27</sup>.
63. Pursuant to Resolution ICC-ASP/21/Res.2, 9 December 2022, paragraph 92 and Annex I paragraph 8: the Assembly of States Parties requested the Court to consider the reform of the legal aid system and to present, based on *further consultations* with States Parties and all relevant stakeholders, another proposal for reform of the legal aid policy for external defence teams. "Full attention" was to be paid to the status of the members of the defence teams, in order to address their conditions of service.
64. During the 22<sup>nd</sup> Session of the Assembly of States Parties held in New York 4-14 December 2023, the Legal Aid Policy of the International Criminal Court, ICC-ASP/22/9, was adopted with effect from 1 January 2024, following distribution of the policy in draft form on 22 November 2023 (2024 ICC Legal Aid Policy).
65. Under the 2024 ICC Legal Aid Policy, a single defence team dealing with proceedings for an offence relating to the administration of justice (the equivalent to an Article 15(2) offence in the KSC), would be entitled to a maximum of €55,635.45 per month in relation to remuneration during the trial stage (with €48,678.50 per month available for

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<sup>27</sup> ICC-ASP/12/3 at paragraphs 38-44, 46, 66-71, 80 and 139

the pre-trial and appellate stages), subject to an application for *additional* funding on an exceptional basis<sup>28</sup>.

66. The nominal best-case scenario for defence legal aid funding relating to an equivalent offence before the KSC is a maximum of €14,850 per month – only *one quarter* of the funding available in the ICC.
67. The nominal worst-case scenario for defence legal aid funding relating to an equivalent offence before the KSC is a maximum of €6,875 per month – *less than 13%* of the funding available in the ICC.
68. In reality, the position in the KSC is far, far worse, as the maximum figures under Section 2(2) of Annex C cover not only remuneration but also the reimbursement of costs.
69. By contrast, funding for the conduct of investigations or missions and the appointment of language assistants and other experts external to the team in the ICC is *additional* to (not covered by) the maximum amounts of team remuneration<sup>29</sup>, as is the provision by the ICC of a monthly living cost lump-sum which is given to team members to assist with the payment of costs incurred for the expenses that are the result of the exercise of their activities as part of a defence team practicing before the court<sup>30</sup>.
70. These extraordinary cuts to the legal aid scheme were introduced when four persons, including the Applicant, were in custody facing allegations contrary to Article 15(2) of the Law.
71. The Registry was well-aware that alternative defence funding had not been secured for any of those four persons when it unilaterally announced these cuts to its legal aid scheme. They remain in custody with no defence funding having been secured.

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<sup>28</sup> ICC-ASP/22/9 at paragraphs 59, 60, 97, 127 to 131, Annex II and tables 6 and 8

<sup>29</sup> ICC-ASP/22/9 at paragraph 77

<sup>30</sup> ICC-ASP/22/9 at paragraph 133



72. Applicants 1, 2 and 3 have now been ordered to apply for legal aid *under the 2024 Regulations* by 12 April 2024, “should they intend to request legal aid before the Registry”<sup>31</sup>.
73. However, the 2024 Regulations no longer guarantee compliance with fair trial principles.
74. Real term cuts of 79%, 67% and 70% to the 2020 Regulations - regulations which were “a cornerstone of the legal aid scheme essential to the rights of the accused - make a mockery of the perfectly proper sentiments expressed in the press release dated 3 September 2020 which accompanied the 2020 Regulations.
75. In the absence of any suggestion of similar swingeing cuts to the budget of the Specialist Prosecutor’s Office, the balance established by the 2020 Regulations between the access to resources and means of the suspect or accused and of the prosecution has not only been disturbed – it has been obliterated.
76. Unlike the 2020 Regulations, the 2024 Regulations do not exemplify the best practices in legal aid standards; instead, they pale in comparison.
77. Further, the 2024 Regulations were adopted following poor governance. No advance notice was provided. No consultation process, whether formal or informal was followed.
78. The Applicant, together with the other three persons presently facing proceedings before the KSC for offences relating to the administration of justice, was – is – an obvious stakeholder in the legal aid system.
79. There was no engagement with stakeholders, whether directly or through a representative body, prior to the adoption of these amendments<sup>32</sup>.

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<sup>31</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(a)

<sup>32</sup> Article 19(4) of the Law and Rule 2(1) and 25(4) of RPEKSC require the existence of single *Independent Representative Body of Specialist Counsel*, recognised as such by the Registry, which represents the interests of Specialist Counsel before the Specialist Chambers. The Registry recognises Mr Nikola Dodevski as

80. No reasoning – let alone clear reasoning – has been provided subsequently for the decision to adopt these huge cuts to the legal aid system.
81. Whereas Regulation 3(2) of the 2020 Regulations required the Registrar to keep a record of the amendment procedure and enables her to make that record public, and whereas Article 41 of the Constitution provides a general right of access to public documents, including documents of public institutions and organs of state authorities such as the Registrar, the Registrar has been requested to make disclosure in relation to the amendment process and has declined with no reason provided..
82. Contrary to the principles of good governance identified by the UN Office of the High Commissioner for Human Rights, the 2024 Regulations were introduced with no transparency, accountability or participation.
83. Whereas good governance is “the soil that nourishes all human rights”, the reverse is also true. Poor governance, as displayed with the adoption of the 2024 Regulations, starves human rights. As the UN Office of the High Commissioner for Human Rights states, without good governance, human rights cannot be respected and protected in a sustainable manner.
84. Accordingly, for the reasons set out above, the 2024 Regulations are incompatible with the constitutional guarantees, in particular Article 30 and 31 of the Constitution and Article 6 of the ECHR, and they should be declared to cease to have legal effect.
85. Thereafter, any further proposal to reform the 2020 Regulations should be undertaken in accordance with good governance principles, including consultation with all relevant stakeholders on proposals.

## V. APPLICATION FOR INTERIM MEASURES

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President of the Independent Representative Body of Specialist Counsel. Mr Dodevski, however, is not contactable on the contact details provided by the Registrar for him.

86. Rule 21 of the RPSCCC provides as follows:

(1) The Constitutional Court Panel or the Presiding Judge of the Constitutional Court Panel, upon a request by an authorised individual, including the accused and victims, may order interim measures where the individual faces a real risk of serious harm if the interim measures were not granted.

(2) A request for interim measures, together with supporting material, shall indicate:

- (a) the relevant facts;
- (b) the reasons for requesting the interim measures;
- (c) the specific measures requested; and
- (d) the reasonably foreseeable consequences of the request being denied.

(3) The Constitutional Court Panel or the Presiding Judge of the Constitutional Court Panel may request additional information, as deemed necessary.

(4) An order granting interim measures shall indicate the reasons therefor and the duration thereof.

...

(6) Unless otherwise directed by the Constitutional Court Panel, interim measures shall cease once the ruling on the referral is rendered.

87. In the present case, the Applicants face ongoing proceedings in relation to alleged offences contrary to the administration of justice. The Pre-Trial Judge has recently set a timetable for the remaining pre-trial stage, with the transmission of the file to the Trial Panel scheduled for 21 June 2024<sup>33</sup>. The Pre-Trial Judge is aware that Applicant 2 needs additional funding for medical evidence.

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<sup>33</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)

88. The Applicants' defence teams continue to act without any funding in place. That is unsustainable and unfair (on both the Applicants and their defence teams). Articles 30 and 31 of the Constitution and Article 6 of the ECHR require the Specialist Chambers to *guarantee* practical and effective representation for the Applicants, and not rely upon the goodwill of counsel and team members.
89. In the circumstances, the Constitutional Court should suspend the 2024 Regulations and require the Registry to apply the 2020 Regulations as an interim measure until (a) proceedings before the KSC against the Applicants are concluded; or (b) the referral is ruled upon, whichever is the earliest.
90. It is a reasonably foreseeable consequence of the request for an interim measure being denied that the Applicants will face an unfair trial in breach of Article 6 of the ECHR with inadequate time and facilities for the preparation of their defences, with no guarantee of effective access to justice and representation, and a huge imbalance between the access to resources and means of the suspect or accused and of the prosecution in breach of the principle of equality of arms, all of which place them at a substantial disadvantage vis-à-vis their opponent, the Specialist Prosecutor's Office.
91. Where, as in the present case, the Applicants face serious allegations with a maximum sentence of 10 years' imprisonment, that amounts to a real risk of serious harm.

## VI. EXHAUSTION OF ALL REMEDIES PROVIDED BY LAW

92. Rule 20(1)(a) of the RPSCCC provides that any individual including the accused, alleging a violation by the Specialist Chambers of their individual rights and freedoms as guaranteed under the Constitution may lodge a referral before the Specialist Chamber of the Constitutional Court if all effective remedies provided by law against the alleged violation have been exhausted.

93. In the present case, a referral to the Specialist Chamber of the Constitutional Court is the only remedy provided by law to challenge the violation of the Applicants' constitutional rights as set out above by the adoption of revised legal aid regulations which lack constitutional validity.
94. There is no other route provided for in law for a suspect or accused to challenge the adoption by the Registrar of a practice direction which is incompatible with his or her constitutional rights.

#### VII. TIME LIMIT FOR REFERRAL

95. Rule 20(1)(b) of the RPSCCC requires that any such referral must be filed within two months from the date of the notification of the final ruling concerning the alleged violation.
96. In the present case, the Applicants received notification by email from the Central Management Unit of the KSC on 22 February 2024 that the Registrar had adopted amendments to the legal aid regulations and were provided with a copy of KSC-BD-25/Rev1. Time for filing of the referral does not expire until 23 April 2024.

#### VIII. CONCLUSION

97. In formulating the applicable legal aid regime at the ICTY, the ICTY did not want to make the mistake of earlier tribunals in which the role of the defence and the fairness of trials were not at the forefront of the founders' minds. It was recognised that the final achievement of the ICTY would be measured by the quality and achievements of the defence, and the fairness of its trials:

“This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials”<sup>34</sup>.

98. The mandate of the Tribunal could only be achieved if there was public confidence and support for its trials and judgments, and this, in turn, could only be realised through a fair justice system where parties are, to the greatest possible extent, equal and the right of an accused to a proper defence is given practical meaning<sup>35</sup>.
99. Likewise, the final achievement of the KSC will not be judged by the number of convictions which it enters, nor by the speed (nor, for that matter, by the parsimony) with which it concludes cases, but by the fairness of its trials. The mandate of the KSC can only be achieved if there is public confidence and support for its trials and judgments, and that, in turn, can only be realised through a fair justice system where the parties are, to the greatest possible extent, equal and the right of an accused to a proper defence is given practical meaning.
100. The editors of Archbold on International Criminal Courts, 5<sup>th</sup> Edition, prior to the adoption of the 2020 Regulations, expressed the expectation that the “KSC Registry will take into account the experience of its predecessor international and internationalised criminal tribunals in determining the parameters and rule governing its legal aid system”<sup>36</sup>.
101. Whereas the 2020 Regulations met that expectation, the 2024 Regulations could not represent a more violent departure.
102. The referral, with interim measures, should be allowed.

## IX. CLASSIFICATION

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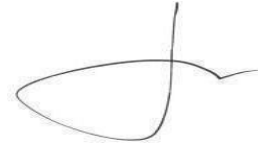
<sup>34</sup> Per J D Hunt in *Prosecutor v Milosevic*, Case No.IT-01-50, AR73.4, *Dissenting Opinion of the Appeals Chamber of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements*, 21 October 2003 at para.22

<sup>35</sup> Archbold on International Criminal Courts, 5<sup>th</sup> Edition § 20-84

<sup>36</sup> Archbold on International Criminal Courts, 5<sup>th</sup> Edition § 20-84

103. This filing is classified as public.

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