



Kosovo Law Institute

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GAME WITH THE SPECIAL COURT

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Kosovo Law Institute (KLI)

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ABOUT KLI

Kosovo Law Institute (KLI), is non-governmental organization and non-profit of public policy, and specialized ideal in the justice sector.

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I. Executive summary

Kosovo Law Institute (KLI) reacts to the recent initiative of certain deputies of the Assembly of the Republic of Kosovo, as well as to the support this initiative by high state representatives and certain political parties regarding the amendment of the Law on Specialized Chambers and the Specialized Prosecutor Office.

The Republic of Kosovo and its institutions, the Government, the Assembly and the President of the Republic, during the years 2015 and 2016, as a result of the negotiations in Brussels and with the consent and support of the European Union, the United States of America and other friendly countries agreed to establish the Special Court. This step of the Assembly of Kosovo, at the time was undertaken with the justification that it goes for the benefit of Kosovo and its path towards consolidating statehood and strengthening state sovereignty.

During the time of the negotiations and at the time when the decision on the establishment of the Special Court was to be decided by Kosovo institutions, international diplomats, representatives of the European Union, US, Quint countries and friends of the State of Kosovo, had requested and advised the people of Kosovo that the best solution to address the claims of the Swiss senator in the report presented to the General Assembly of the Council of Europe on war crimes assumptions during 1998-2000 was the establishment of a Court Special Court from the Assembly of Kosovo.

International representatives, including representatives from the friendly states that had contributed to the liberation of Kosovo, the declaration of independence, state building, recognition of Kosovo by more than 100 UN states, Kosovo's accession to international organizations, openly declared that the lack of the will of the institutions and political leaders to establish such a court would pave the way for this court to be established by the United Nations, where countries such as Russia, Serbia and other states that oppose independence and statehood of Kosovo would also have an impact.

Regarding the establishment and functioning of this mechanism, Kosovo institutions had concluded contractual agreements with the European Union, the Netherlands and had guaranteed to friendly states that Kosovo would fully meet its international obligations in relation to this court. All these steps were taken in the wake of the implementation of the constitutional amendment no. 24, which paved the way for the establishment of this court: by amendment the sovereign speak as a whole, by law only a part of it. Kosovo unanimously and as Sovereign spoke with the above constitutional amendment in August 2015 when it decided to open the way for the establishment of this court.

The KLI estimates that the initiative for the dissolution of the Special Court seriously violates Kosovo's international obligations conflicts with international values and principles regarding the rule of law for which Kosovo is pledged and strongly contests the international legal status of the State of Kosovo because it presents a serious concern the weakening of the international subjectivity of the country: this step, being realized, finally shows that Kosovo lacks the ability to enter into contractual relations with states and international organizations as a result of the non-implementation of the same international agreements for which it has pledged to implement them solemnly and in writing.

This step, if realized, represents a serious violation of international law, something that Kosovo does not dare and should not allow itself if we consider the unconsolidated status of Kosovo's statehood. Moreover, such an approach of Kosovo in relation to the international community contradicts the basic principle of the state's responsibility in international law, which clearly states that any state that violates an international obligation should be held responsible for its acts of delinquency: it is the responsibility of the state that does not respect international obligations to immediately stop such actions or, on the contrary, face the consequences. These consequences in the case of Kosovo would be irreparable.

Kosovo as a new state, which is still in the stage of state building, with fragile democracy, economically and financially dependent on international aid and support, with a very low level of rule of law in search of a road to strengthen its international subjectivity should be ensured to take political actions and decisions that raise its faith and image in the international arena.

Any omission of this path or attempt by the institutions of the Republic of Kosovo to cope with international obligations, as is the case with the Special Court, would endanger its statehood. What is even more important, with this step, Kosovo could lose the trust and support of its traditional partners, such as the United States, the European Union, Great Britain, Germany etc.

Faced with such situation, the KLI calls on the Assembly of Kosovo, leaders of state institutions and political leaders to continue to meet constitutional, international and legal obligations in relation with Special Court, and not to take actions that damage international subjectivity of the Republic of Kosovo, which endanger the future and the Euro-Atlantic perspective of the people of Kosovo.

II. Background

In January 2011, the General Assembly of the Council of Europe adopted the report of Council of Europe Special Rapporteur Dick Marty. This report has raised suspicions about the commission of war crimes between the period from 1 January 1998 to 31 December 2000.

According to the approved report, among other things, it is said that "[...] high ranking ex-KLA, who are now leading Kosovo's policy, can soon end up as wanted by international justice. They and others are being investigated for liquidation, for other crimes against humanity, organ trafficking and drugs, oil and weapons".

Following the release of this report, in September 2011, the European Union formed Special Investigative Task Force, for conducting an independent investigation into allegations raised in the report and other crimes related to them.

In 2014, the Task Force had come up with reports that there was enough evidence that could end with the indictments and came up with a proposal that for the consideration of these allegations, it was necessary to establish an adequate institution for their investigation, prosecution and judgment.

Between Kosovo and the international factor, negotiations were conducted regarding the implementation of such recommendation. During 2014 and 2015, negotiations between Kosovo and Brussels were conducted with the involvement of the US to find a modality regarding the establishment of a mechanism that would investigate, prosecute and judge allegations from Senator Dick Marty's report.

As a result of these negotiations, on 3 August, 2015, the Assembly of Kosovo adopted the constitutional amendment, namely the new Article 162 of the Constitution of Kosovo, with two-thirds (2/3) of the votes of the Assembly of Kosovo's deputies, as well as the Law for Specialized Chambers and the Specialized Prosecution Office, with 71 votes of Kosovo's deputies.

The Republic of Kosovo also exchanged letters through the President of Kosovo, Ms. Atifete Jahjaga, and High Representative of the European Union for Foreign Affairs and Security, Baroness Catherine Ashton, in 2014 regarding the establishment of this court.

Kosovo and the Netherlands in February 2016 had reached an Agreement on the placement of a Specialized Kosovo Displaced Judiciary Institution in the Netherlands.

During 2016 and 2017, the Special Court had undertaken a number of activities related to its functioning, including the recruitment of judges, prosecutors, assistants, the adoption of secondary legislation and finally the last action to fully functionalize this court through the application process of for licensing defense attorney to serve in this court as a defense counsel for suspects and victims of crime. This process is still under development.

Technically, the Special Court without the licensing of defense counsels cannot make requests for arrest of accused persons, since in such a situation, the arrested persons would not have the basic right to have defense counsel regarding possible appeals regarding their arrest and

detention measure. Without the licensing of defense lawyers, above all, the Court's action would seriously affect the European Convention on Human Rights, which in Kosovo has the status of a constitutional norm.

III. Binding character of international agreements

Kosovo has entered into agreements and contractual obligations regarding the establishment of the Special Court with the European Union and the Kingdom of the Netherlands. Kosovo has ratified agreements with the Kingdom of the Netherlands regarding the displacement of the Special Court in this country. Kosovo also through international letters exchanged between the President of the Republic and the EU High Representative has taken international obligations in relation to the establishment and functioning of this court.

According to the Kosovo Constitution and the Law on International Agreements adopted by the Assembly of Kosovo, the international agreements of the Republic of Kosovo that have entered into force are mandatory in the Republic of Kosovo. The international agreements of the Republic of Kosovo under the Constitution may be withdrawn and their implementation may be suspended only on the basis of the provisions of international agreements, customary international norms and on the basis of the same procedure established by the Law on International Agreements.

The decision on withdrawal from an international agreement of the Republic of Kosovo or the suspension of its implementation on the basis of universal norms of international law, is taken by the Assembly of the Republic of Kosovo by two thirds (2/3) of the votes after the recommendation of The President, at his own initiative or after a proposal by the Government.

IV. Legislative initiative for amending the Law on Specialized Chambers

The Law on Specialized Chambers as a separate law adopted by the Kosovo Assembly aims to implement Article 162 of the Kosovo Constitution, which article stipulates that the Republic of Kosovo may establish specialized chambers and a specialized prosecutor's office in within the justice system of Kosovo and that the organization, functioning and jurisdiction of Specialized Chambers and of the Specialized Prosecutor's Office are regulated by this Article and **by special law**.

The Constitution has also established that the Specialized Chambers and the Specialized Prosecutor's Office may have their residences in Kosovo and residences outside Kosovo. Specialized Chambers and the Specialized Prosecutor's Office may exercise their functions in either headquarters or elsewhere, as appropriate.¹

The Assembly of Kosovo for the purpose of implementing Article 162 of the Kosovo Constitution has adopted a special law on the establishment of specialized chambers. The Law on Specialized Chambers as a separate law has determined that the tribunal will be in The Hague of the Netherlands. Furthermore, under this law and the constitutional amendment (Article 162), Kosovo has also signed international agreements with the Kingdom of the Netherlands regarding the displacement of this court to this country and has exchanged letters with the European Union on the establishment and functioning of this court.

The Assembly of Kosovo with the Constitution has the legal power to approve laws, resolutions and other general acts.² In principle, all laws in the Assembly of Kosovo are approved by a majority of members present in the Assembly and participating in the vote.³ Laws in Kosovo are in principle initiated by the initiative of the President of Kosovo, Government; the initiative of Assembly deputies; and on the initiative of at least ten thousand (10,000) citizens.

The initiative of 43 deputies of Kosovo for amending the Law on Specialized Chambers, respectively the abrogation of this law, does not enter within the laws of vital interest for the Republic of Kosovo. In this regard, the abrogation of this law by supplementing the amendment requires only the majority of the deputies present in the Assembly of Kosovo and who participate in the voting. However, this is a specific case, because this law constitutes the implementing legislation of a constitutional obligation of Kosovo, which constitutional obligation was taken over Kosovo's shoulders with two-thirds (2/3) votes of all Kosovo's deputies. Except this,

¹ Article 162, paragraph 7 of the Constitution. Constitution of the Republic of Kosovo.

² Article 65, paragraph 1 of the Constitution. Constitution of the Republic of Kosovo.

³ Article 80, paragraph 1 of the Constitution. Constitution of the Republic of Kosovo.

this constitutional obligation has been put into effect through the conclusion of a special agreement, which has been ratified by the competent constitutional body of Kosovo, the President of the Republic. Any ratified international agreement, according to Article 19.1 of the Constitution, has the greater power than ordinary law and lower than the Constitution.

This means that abrogate of any law that breaks an international obligation of Kosovo should follow the same procedure and not by any indirect illegal means. This initiative, moreover, aims to annul any legal consequence that has been created so far by getting Kosovo from this constitutional and international obligation. Adoption of such a law, in other words, will have legal effect in derogating the current Law on Specialized Chambers. This in practice would mean that any action or decision taken so far regarding the establishment and functioning of Specialized Chambers in The Hague was declared null and void, respectively. This is because this law defines the establishment, organization, functions and jurisdiction of the Specialized Chambers and the Specialized Prosecutor's Office.⁴ There is no mention of the abolition of a law but of the abolition of a constitutional and international obligation of Kosovo, based on the Constitution and customary international law.

V. International Agreements between Kosovo and the European Union and the Netherlands regarding the Special Court

The Assembly of Kosovo in 2014 adopted the Law on Ratification of an International Agreement between Kosovo and the European Union regarding the European Union Rule of Law Mission in Kosovo. Part of this law was also the exchange of letters between the President of the Republic of Kosovo, Atifete Jahjaga and the High Representative of the European Union for Foreign Affairs and Security Policy, Baroness Catherine Ashton.

Part of this law was also the international obligation of Kosovo regarding the work of the Special Investigative Task Force until Kosovo was notified by the Council of the European Union as to whether investigations or criminal proceedings have been completed.

Kosovo in 2016 had concluded international agreements with the Netherlands regarding the displacement of the Special Court in The Hague of the Netherlands.

According to the Kosovo Constitution and the Law on International Agreements adopted by the Assembly of Kosovo, the international agreements of the Republic of Kosovo that have entered into force are mandatory in the Republic of Kosovo. International agreements of the Republic of Kosovo may be withdrawn and their implementation can be suspended only on the basis of the provisions

⁴ Article 1 of the Law on Specialized Chambers and the Specialized Prosecutor Office. Assembly of the Republic of Kosovo.

of international agreements, international law norms and based on the procedure established by the Law on International Agreements.⁵

The conclusion or withdrawal and suspension of the international agreement under the Vienna Convention on the Law of Tractates has determined that it may take place in accordance with the provisions of the Agreement and at any time upon the consent of all the parties after consultation between the Contracting States.⁶

International practice has proved that the purpose of Article 54 of the Vienna Convention is to define a clear rule that the conclusion of an international agreement or the withdrawal from an international agreement can only be achieved with the consent of the parties and in the agreed form between the parties. Article 54 of the Vienna Convention also serves as a reminder of the rule *pacts sun servante* in international law affirming that this rule applies to the provisions of the agreement regulating the conclusion or withdrawal of States from international agreements. The same rules apply to cases of suspension of international agreements.

The practice of international law has stipulated that even in cases where circumstances of substantial changes occur as to what were at the time the agreement was concluded and which circumstances are not foreseen by the signatory parties, the agreement cannot be revoked unless the existence of these circumstances constitute a fundamental basis to give the consent of the parties to take the obligation to implement such an agreement and if the effect of changing circumstances radically transforms the obligations that must be fulfilled under the agreement. Which essential circumstances have changed in Kosovo since the day of receiving this international obligation from the competent Kosovo authorities?

There is no substantive or routine change of circumstances since the time of this obligation, and as such it has to be implemented according to the standards of customary international law. Otherwise, Kosovo proves incompetent to fill the basic element of being a state: having the ability to enter into contractual relations and implement international obligations.

The Law on International Agreements adopted by the Assembly of Kosovo has defined that the conclusion of international agreements in Kosovo should be made in accordance with the rules and principles of international law codified in the Vienna Convention of 23 May 1969 on the Law of Treaties and the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organizations or between International Organizations.

Initiating the amendment to the Law on the Special Court and the request for the abrogation of this law in practice would have the effect that Kosovo would automatically terminate or withdraw from international agreements related to the European Union and the Netherlands. The conclusion and the withdrawal of Kosovo from these agreements would be contrary to international customary law, respectively contrary to the Vienna Convention of 23 May 1969 on the Law of Treaties and the Vienna Convention of 21 March 1986 on the Right to Treaties between States and International Organizations or between International Organizations.

⁵ Article 18 of the Law on International Agreements. Assembly of the Republic of Kosovo.

⁶ Articles 54 and 57 of the Vienna Convention of 23 May 1969 on the Law of Treaties.

VI. Special Court established by the Kosovo Assembly or Special Court established by the United Nations Security Council

During 2015, when the Kosovo Assembly debated regarding the establishment of the Special Court and the hesitation of the political parties and deputies of Kosovo regarding the adoption of the constitutional amendment and the law on specialized chambers, international representatives stated that if Pristina fails to establish The Special Court, according to them, such a thing will be transferred to the competence of the United Nations.

American Ambassador in Kosovo, Tracey Ann Jacobson, at that time stated that the Special Court did not intend to judge the war and the history of Kosovo. Jacobson stated that if the establishment of this court fails, then the competencies will pass to the UN, and according to her, that for Kosovo would be a second Hague.

Ambassador of the Great Britain in Kosovo Ian Cliff had at that time emphasized that if the Kosovo Assembly fails to vote on the creation of the Special Court for issues raised in Dick Marty's report, it will inevitably refer to UN Security Council, under Resolution 1244. "There will be no great pressure to create a court by UN, since the permanent members of the Security Council, including ourselves, will have no reason to refuse such a thing."⁷

Ambassador of Germany in Kosovo, Angelika Viets, has told the media that the EU and Kosovo have jointly taken a decision on the establishment of the Court, where, according to her, there was an EU correspondence with Kosovo. "The establishment of the Court is good for Kosovo, because it is important not to intend the re-negotiation of the Special Court agreement. The current discussion is dangerous for Kosovo's image as a serious partner. "Also, Ambassador Viets mentioned the fact that if Kosovo does not establish the Court, this will be done by the UN Security Council and according to her, this would be a return to Kosovo's efforts to strengthen sovereignty.

⁷ Ian Cliff, Ambassador of the United Kingdom, interviewed Kosovoinfo newspaper.

The Ambassador of the Netherlands in Kosovo, Robert Bosch, stated that if the Special Court is rejected, this will be very bad for Kosovo, because in that case Kosovo will have a United Nations Court. "To refuse the court will be very bad for the country, because then it will go to the United Nations Court and you will have that Court. At least you will have a court that is not a United Nations Court, as there are countries that are not good friends with you and have great influence," Ambassador Bosch expressed during a lecture to students of the University of Pristina, "Hasan Prishtina".

Also a member of the House of Representatives of the United States Congress, Eliot Engel, was declared for the establishment of the Special Court in Kosovo, during his speech to the deputies of the Kosovo Assembly. "I do not believe the United Nations is particularly correct when it comes to Kosovo. I believe there will be an alternative to the Special Court if it is not approved. I think it will be the UN court and this will be a big problem for Kosovo."

All these statements of Kosovo's friends were real and sincere concerns because they signaled the risk of slipping of Kosovo towards the bad road that would prove what Russia and its allies want: demonstration that Kosovo and its leadership are not capable to enforce international commitments and to play its constitutional role.

These statements, in other words, proved about signaling the risk of disintegration of Kosovo's statehood in the international arena because putting or returning Kosovo under UNSC clauses definitely implies a loss of Kosovo's legal and international subjectivity.

VII. Recommendation

State institutions, such as the President of Kosovo, the Assembly and the Government, within the constitutional powers and responsibilities, should undertake the fulfillment of international obligations deriving from the Constitution of Kosovo, the Law on Specialized Chambers and international obligations in relation to the European Union, the United States, the Netherlands and other friendly states.

The Assembly of Kosovo and political leaders should not undertake actions that risk the international subjectivity of the Republic of Kosovo and that may undermine the confidence and support of the international factor in relation to the Republic of Kosovo.

Institutions of the Republic of Kosovo should provide the United States, the European Union and the states of Quint in Kosovo, that Kosovo will undertake concrete actions to restore the confidence of its citizens to a state with fully independent judicial and prosecutorial institutions that promote and secure the rule of law in Kosovo.