



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** KSC-BC-2020-06/IA013

**Before:** **A Panel of the Court of Appeals Chamber**  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Kai Ambos

**Registrar:** Fidelma Donlon

**Date:** 20 May 2022

**Original language:** English

**Classification:** Public

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**Decision on Defence Appeals Against Decision on Motions Challenging the  
Legality of the Specialist Chambers and the Specialist Prosecutor's Office and  
Alleging Violations of Certain Constitutional Rights of the Accused**

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**THE PANEL OF THE COURT OF APPEALS CHAMBER** of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)<sup>1</sup> acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of appeals filed on 15 November 2021 (“Appeals”) by Hashim Thaçi (“Thaçi”)<sup>2</sup> and Kadri Veseli (“Veseli”)<sup>3</sup> (collectively, “Accused”) against the “Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused” (“Impugned Decision”).<sup>4</sup> The Specialist Prosecutor’s Office (“SPO”) responded to the Appeals on 6 December 2021.<sup>5</sup> The Accused replied on 16 December 2021.<sup>6</sup>

## I. BACKGROUND

1. On 26 October 2020, the Pre-Trial Judge confirmed the indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi.<sup>7</sup> On 30 October 2020,

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<sup>1</sup> F00001, Decision Assigning a Court of Appeals Panel, 26 October 2021.

<sup>2</sup> F00004, Thaçi Defence Appeal against the ‘Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused’, 15 November 2021 (“Thaçi Appeal”).

<sup>3</sup> F00005, Veseli Defence Appeal Against Decision on Motions Challenging Violations of Certain Constitutional Rights of the Accused (F00450), 15 November 2021 (“Veseli Appeal”). See also F00003, Decision on Thaçi’s Request for Variation of Time Limit, 1 November 2021.

<sup>4</sup> F00450, Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, 31 August 2021 (“Impugned Decision”).

<sup>5</sup> F00006, Prosecution Response to Veseli Defence Appeal Against Decision on Motions Challenging Constitutional Rights Violations, 6 December 2021 (“Response to Veseli Appeal”); F00007, Prosecution Response to Thaçi Defence Appeal Against Decision KSC-BC-2020-06/F00450, 6 December 2021 (“Response to Thaçi Appeal”) (collectively, “Responses”).

<sup>6</sup> F00010, Thaçi Defence Reply to ‘Prosecution response to Thaçi Defence appeal against decision KSC-BC-2020-06/F00450’, 16 December 2021 (“Thaçi Reply”); F00011, Veseli Defence Reply to Prosecution Response to Veseli Defence Appeal Against Decision on Motions Challenging Constitutional Rights Violations, 16 December 2021 (“Veseli Reply”) (collectively, “Replies”). See also F00009, Decision on Thaçi’s Request for Variation of Word Limit, 10 December 2021.

<sup>7</sup> F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020).

the SPO submitted the confirmed indictment.<sup>8</sup> On 3 September 2021, the SPO submitted a corrected Indictment (“Indictment”).<sup>9</sup> On 29 April 2022, the SPO submitted an amended Indictment.<sup>10</sup>

2. On 5 November 2020, pursuant to arrest warrants issued by the Pre-Trial Judge,<sup>11</sup> the Accused were arrested<sup>12</sup> and transferred to the detention facilities of the Specialist Chambers in The Hague, the Netherlands.<sup>13</sup>

3. On 12 March 2021, Thaçi filed a motion seeking to dismiss the Indictment due to lack of jurisdiction<sup>14</sup> and a further motion challenging, *inter alia*, the legality of the Specialist Chambers as well as alleging certain violations of his rights.<sup>15</sup>

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<sup>8</sup> F00034/A01, Indictment, 30 October 2020 (strictly confidential and *ex parte*); F00045/A03, Further Redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020).

<sup>9</sup> F00455/RED/A01, Public Redacted Version of ‘Submission of corrected Indictment and request to amend pursuant to Rule 90(1)(b)’, KSC-BC-2020-06/F00455, dated 3 September 2021, 8 September 2021 (strictly confidential and *ex parte* version filed on 3 September 2021; confidential redacted version filed on 8 September 2021) (“Indictment”). A confidential lesser redacted version of the corrected indictment was filed on 17 January 2022. See F00647/A01, Confidential Lesser Redacted Version of ‘Indictment’, KSC-BC-2020-06/F00455/A01, dated 3 September 2021, 17 January 2022 (confidential).

<sup>10</sup> See F00789, Submission of amended Indictment and related documents with strictly confidential and *ex parte* Annex 1, confidential Annexes 2-4, and public Annexes 5-7, 29 April 2022.

<sup>11</sup> F00027/A01/RED, Public Redacted Version of Arrest Warrant for Hashim Thaçi, 11 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020); F00027/A03/RED, Public Redacted Version of Arrest Warrant for Kadri Veseli, 5 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020). See also F00027/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, 26 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020).

<sup>12</sup> F00050, Notification of Arrest of Kadri Veseli Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020); F00051, Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020).

<sup>13</sup> F00053, Notification of Reception of Hashim Thaçi in the Detention Facilities of the Specialist Chambers and Appointment of Counsel, 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020); F00054, Notification of Reception of Kadri Veseli in the Detention Facilities of the Specialist Chambers and Appointment of Counsel, 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020).

<sup>14</sup> F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021.

<sup>15</sup> F00217, Motion Challenging Jurisdiction on the Basis of Violation of Fundamental Rights Enshrined in the Constitution, 12 March 2021 (“Thaçi Motion”).

4. On 15 March 2021, Veseli and Selimi filed motions challenging, *inter alia*, the legality of the Specialist Chambers and alleging certain violations of their constitutional rights.<sup>16</sup>
5. On 23 April 2021, in line with the deadline set by the Pre-Trial Judge,<sup>17</sup> the SPO submitted two separate consolidated responses to these motions concerning, *inter alia*, the legality of the Specialist Chambers and the allegations of violations of certain rights put forward by Thaçi, Veseli and Selimi.<sup>18</sup>
6. On 14 and 17 May 2021, in line with the respective deadlines set by the Pre-Trial Judge,<sup>19</sup> Thaçi,<sup>20</sup> Veseli<sup>21</sup> and Selimi<sup>22</sup> filed their replies.
7. On 31 August 2021, the Pre-Trial Judge issued the Impugned Decision, wherein the Pre-Trial Judge *inter alia*: (i) dismissed challenges in relation to the temporal mandate of the Specialist Chambers; and (ii) found no violation of the Accused's constitutional rights and, accordingly, no basis for setting aside the Specialist Chambers' jurisdiction.<sup>23</sup>

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<sup>16</sup> F00224, Preliminary Motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the Basis of Violations of the Constitution, 15 March 2021 ("Veseli Motion"); F00219, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction – Discrimination, 15 March 2021.

<sup>17</sup> Transcript, 24 March 2021, p. 391, lines 11-19.

<sup>18</sup> F00259, Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigative Deadline, and Temporal Mandate, 23 April 2021; F00260, Prosecution Response to Preliminary Motions Concerning the Status of the Kosovo Specialist Chambers and Allegations of Rights Violations, 23 April 2021.

<sup>19</sup> F00296, Decision on Veseli Defence Request for a Time Limit Variation, 14 May 2021.

<sup>20</sup> F00304, Thaçi Defence Reply to "Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate", 14 May 2021; F00305, Thaçi Defence Reply to "Prosecution Response to Preliminary Motions Concerning the Status of the Kosovo Specialist Chambers and Allegations of Rights Violations", 14 May 2021.

<sup>21</sup> F00308, Veseli Defence Reply to Prosecution Response to Preliminary Motion Challenging Jurisdiction on the Basis of Violations of the Constitution, 17 May 2021.

<sup>22</sup> F00307, Selimi Defence Reply to "Prosecution Response to Preliminary Motions Concerning the Status of the Kosovo Specialist Chambers and Allegations of Rights Violations", 14 May 2021.

<sup>23</sup> Impugned Decision, paras 68, 88, 111, 115, 130, 142-143, 146.

8. On 17 September 2021, having been granted an extension of time,<sup>24</sup> Thaçi and Veseli submitted applications seeking certification to appeal issues in relation to the Impugned Decision.<sup>25</sup>

9. On 6 October 2021, having been granted an extension of time,<sup>26</sup> the SPO submitted its responses to the Thaçi Certification Application<sup>27</sup> and the Veseli Certification Application.<sup>28</sup>

10. On 18 October 2021, Thaçi and Veseli replied.<sup>29</sup>

11. On 25 October 2021, the Pre-Trial Judge issued the “Decision on Applications for Leave to Appeal ‘Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused’” (“Certification Decision”), granting the Veseli Certification Application and, in part, the Thaçi Certification Application in relation to the following issues (“Certified Issues”):<sup>30</sup>

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<sup>24</sup> F00458, Consolidated Decision on Requests for Extension of Time, 6 September 2021.

<sup>25</sup> F00473, Thaçi Defence Request for Certification to Appeal the “Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused”, 17 September 2021 (“Thaçi Certification Application”); F00474, Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on the Basis of Violations of the Constitution (KSC-BC-2020-06/F00450), 17 September 2021. See also F00474/COR, Corrected Version of Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on the Basis of Violations of the Constitution (KSC-BC-2020-06/F00450) (F00474 dated 17 September 2021), 18 October 2021 (“Veseli Certification Application”).

<sup>26</sup> F00490, Decision on Prosecution Request for Extension of Time Limit to Respond to Leave to Appeal Requests on Decision KSC-BC-2020-06/F00450, 24 September 2021.

<sup>27</sup> F00506, Prosecution response to Hashim Thaçi’s request for certification to appeal the ‘Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused’, 6 October 2021.

<sup>28</sup> F00507, Prosecution response to ‘Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on Basis of Violations of the Constitution’, 6 October 2021.

<sup>29</sup> F00532, Thaçi Defence Reply to “Prosecution response to Hashim Thaçi’s request for certification to appeal the ‘Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused’”, 18 October 2021; F00530, Veseli Defence Reply to SPO Response to Filing KSC-BC-2020-06/F00474, 18 October 2021 (“Veseli Certification Reply”).

<sup>30</sup> F00546, Decision on Applications for Leave to Appeal “Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused”, 25 October 2021 (“Certification Decision”), paras 21, 28, 33, 37, 42, 47, 53, 60, 66-68.



- (a) Whether the Pre-Trial Judge erred in concluding that the question of the Specialist Chambers' temporal mandate had been "decided upon by the Specialist Chamber of the Constitutional Court ("SCCC")" in the absence of any or sufficient reasoning, and in a manner inconsistent with Articles 113(7) and 144(3) of the Constitution of Kosovo ("Constitution"), which the Pre-Trial Judge failed to consider ("Second Thaçi Issue");
- (b) Whether the Pre-Trial Judge erred by failing to consider that, taken cumulatively, the features of the Specialist Chambers raised by the Thaçi Defence lead to the conclusion that the Specialist Chambers structurally fail to satisfy Article 6(1) of the European Convention on Human Rights ("ECHR") ("Fifth Thaçi Issue");
- (c) As regards the right to be tried within a reasonable time, whether the Pre-Trial Judge erred in finding that the relevant period began only on 17 November 2019, having adopted a mistakenly restrictive interpretation of the relevant European Court of Human Rights ("ECtHR") case law ("Seventh Thaçi Issue");
- (d) Whether the Pre-Trial Judge erred in finding that the inclusion of the Report on "Inhuman treatment of people and illicit trafficking in human organs in Kosovo", issued by the Parliamentary Assembly of the Council of Europe on 7 January 2011 ("Council of Europe Report") among the "Foundational Documents" of the Specialist Chambers did not violate Thaçi's presumption of innocence ("Eighth Thaçi Issue"); and
- (e) Whether the Pre-Trial Judge erred by failing to consider whether the Specialist Chambers' substantive legal regime gives rise to inequality under the law in violation of Articles 3 and 24 of the Constitution, rendering the Court "unlawful" for the purposes of Article 103(7) of the Constitution ("Veseli Issue").

## II. STANDARD OF REVIEW

12. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.<sup>31</sup>

## III. PRELIMINARY MATTER

13. Veseli requests that the Appeal be heard together with the “Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”,<sup>32</sup> before the same panel of the Court of Appeals Chamber, “given the close connection” between the issues in contention in the two appeals.<sup>33</sup> The SPO responds that Veseli does not have standing for such request, since the President of the Specialist Chambers has already decided for separate benches to consider the two appeals and there is no legal basis for a change to these benches.<sup>34</sup>

14. The Panel recalls its decision disposing of the Veseli Jurisdictional Appeal,<sup>35</sup> which renders the request to consider the two appeals together before the same panel moot. In any event, the Panel observes that the issues raised in the two appeals are different and, as such, no prejudice is caused to Veseli by the separate adjudication of these appeals.<sup>36</sup>

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<sup>31</sup> KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also e.g. IA010/F00008/RED, Public Redacted Version of Decision on Hashim Thaçi’s Appeal Against Decision on Review of Detention, 27 October 2021 (confidential version filed on 27 October 2021), para. 6.

<sup>32</sup> See IA009/F00010, Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021 (“Veseli Jurisdictional Appeal”).

<sup>33</sup> Veseli Appeal, paras 6, 50.

<sup>34</sup> Response to Veseli Appeal, paras 42-43.

<sup>35</sup> IA009/F00030, Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”, 23 December 2021 (“Appeal Decision on Jurisdiction”).

<sup>36</sup> See Veseli Appeal, para. 28 (wherein Veseli submits that the issues of the two appeals, albeit “intimately connected”, are distinct); Veseli Reply, para. 7.



#### IV. DISCUSSION

##### A. ALLEGED ERRORS REGARDING THE SPECIALIST CHAMBERS' TEMPORAL MANDATE (SECOND THAÇI ISSUE)

###### 1. Submissions of the Parties

15. Thaçi argues that the Pre-Trial Judge's conclusion that the temporal mandate of the Specialist Chambers and of the SPO did not expire on 3 August 2020 is based on a misunderstanding of the process of constitutional control in Kosovo.<sup>37</sup> Thaçi submits that Article 162(13) of the Constitution sets the maximum temporal mandate of the Specialist Chambers and the SPO to five years after the adoption of constitutional amendment no. 24 and that the relevant part of the judgment of the SCCC on which the Pre-Trial Judge relied to conclude that it had not expired was *obiter dictum*.<sup>38</sup> According to Thaçi, the SCCC Judgment on Referral<sup>39</sup> was a form of abstract control of constitutionality which prevents the Kosovo Constitutional Court from ruling on provisions already in effect, and, therefore, any discussion on such provisions can only be *obiter dictum*.<sup>40</sup> Thaçi argues that the failure to respect the distinction between abstract and concrete constitutional control would not only violate the Constitution but would also deprive a party affected by a violation of the right to seek judicial protection of its constitutional rights.<sup>41</sup> Moreover, Thaçi submits that the Pre-Trial Judge ignored the fact that in the SCCC Judgment on Referral, the SCCC did not refer to its discussion on the Specialist Chambers' temporal mandate when making its finding on the constitutionality of the proposed constitutional amendments nos 26 and 27.<sup>42</sup>

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<sup>37</sup> Thaçi Appeal, para. 33. See also Thaçi Appeal, para. 48.

<sup>38</sup> Thaçi Appeal, paras 34-37, 47. See also Thaçi Appeal, para. 48.

<sup>39</sup> KSC-CC-2020-11, F00015, Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, 26 November 2020 ("SCCC Judgment on Referral").

<sup>40</sup> Thaçi Appeal, paras 38-48. See also Thaçi Reply, paras 18-24.

<sup>41</sup> Thaçi Appeal, para. 46. See also Thaçi Reply, para. 17.

<sup>42</sup> Thaçi Appeal, para. 48. See also Thaçi Appeal, para. 37; Thaçi Reply, para. 18.

16. The SPO submits that, at the outset, there is a disconnect between this ground of appeal on its terms, which relate to the narrow issue of whether the Pre-Trial Judge erroneously relied on the SCCC Judgment on Referral, and the remedy that Thaçi seeks, which relates to the broader issue of whether the mandate of the Specialist Chambers and the SPO has expired, for which the Pre-Trial Judge denied leave to appeal.<sup>43</sup> Further, the SPO submits that the SCCC has explicitly held that, in accordance with Article 162(14) of the Constitution and Law No. 04/L-274 on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo of 23 April 2014 (“Exchange of Letters”), the temporal mandate of the Specialist Chambers and the SPO is not limited to five years, and a different interpretation would be antithetical to the purpose of constitutional amendment no. 24.<sup>44</sup> The SPO also argues that the relevant part of the SCCC Judgment on Referral was not *obiter dictum*, but “central” to the SCCC’s holding<sup>45</sup> and Thaçi does not provide a “single citation” to support his claims regarding the outcomes of the constitutional review model.<sup>46</sup> Finally, the SPO submits that Thaçi’s claims are “untethered from both jurisprudence and logic”, since, firstly, there is no tension in finding a constitutional amendment permissible and at the same time finding particular factual circumstances raised by an individual as violating that provision, and secondly, the Kosovo Constitutional Court will assess not only constitutional and legal provisions already in effect but at times also “the entire letter and spirit of the constitutional order”.<sup>47</sup>

17. Thaçi replies that the SPO fails to explain why it was necessary to include the five-year limitation to the Specialist Chambers’ mandate if the legislative intent was to establish them for an indefinite period and that Article 162(14) of the Constitution

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<sup>43</sup> Response to Thaçi Appeal, paras 17-18.

<sup>44</sup> Response to Thaçi Appeal, paras 16, 19-26, 36.

<sup>45</sup> Response to Thaçi Appeal, paras 27-29.

<sup>46</sup> Response to Thaçi Appeal, para. 30.

<sup>47</sup> Response to Thaçi Appeal, paras 31-35.

regulates the minimum temporal mandate, thereby co-existing without conflict with Article 162(13) of the Constitution which regulates the maximum mandate.<sup>48</sup> According to Thaçi, the SPO's argument that the initial mandate would automatically extend in the absence of a notification pursuant to Article 162(14) of the Constitution enjoys no support in the text of either Article 162(13) or Article 162(14) and can only be achieved through an "unprecedented act of judicial activism".<sup>49</sup>

## 2. Assessment of the Court of Appeals Panel

18. At the outset, the Panel notes that certain arguments raised by Thaçi in this ground of appeal were raised as part of an issue proposed for certification that was rejected by the Pre-Trial Judge for not meeting the test under Rule 77(2) of the Rules.<sup>50</sup> The Panel recalls that the scope of its review lies strictly within the confines of the issues certified by the Pre-Trial Judge<sup>51</sup> and, therefore, declines to consider these arguments. However, the Panel considers that, contrary to the SPO's argument,<sup>52</sup> Thaçi's relief sought is within the scope of the certified issue. The Panel notes that the remedy Thaçi seeks on the basis of this ground of appeal is that the Impugned Decision be invalidated and, as such, if the Panel were to grant this ground of appeal,

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<sup>48</sup> Thaçi Reply, paras 25-26.

<sup>49</sup> Thaçi Reply, para. 27.

<sup>50</sup> Certification Decision, paras 20-21. Compare Certification Decision, paras 6(1), 17-19, referring to Thaçi Certification Application, paras 10, 14 (setting out one of the issues for which Thaçi requested certification as being the Pre-Trial Judge's failure to consider or provide any or sufficient reasoning in relation to *inter alia*: (i) the Assembly's legislative intent; (ii) the proposed constitutional amendment no. 26; and (iii) the notification of Article 162(14) of the Constitution being applicable to the minimum temporal mandate) *with* Thaçi Appeal, para. 35; Thaçi Reply, paras 25-27 (submitting that: (i) the SPO fails to explain why it was necessary to include the five-year limitation to the Specialist Chambers' mandate if the legislative intent was to establish them for an indefinite period; (ii) Article 162(14) of the Constitution regulates the minimum temporal mandate; and (iii) the SPO's argument that the initial mandate would automatically extend in the absence of a notification pursuant to Article 162(14) of the Constitution enjoys no support in the text of either Article 162(13) or Article 162(14)).

<sup>51</sup> KSC-BC-2020-07, IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("Decision on Preliminary Motions"), para. 20; KSC-BC-2020-07, IA005/F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021 (confidential version filed on 29 July 2021) ("Decision on Disclosure"), para. 17.

<sup>52</sup> See Response to Thaçi Appeal, para. 17.

the practical consequence would be the same as the one requested in relation to the issue for which certification was denied, namely a finding that the mandate of the Specialist Chambers and the SPO has expired.<sup>53</sup>

19. Turning to the merits of Thaçi's arguments, the Panel notes that the Pre-Trial Judge dismissed Thaçi's challenges in relation to the temporal mandate of the Specialist Chambers on the basis that the SCCC's assessment of the Specialist Chambers' temporal mandate cannot be considered *obiter dictum*, but rather an essential step in its determination, since the amendments to paragraphs 13 and 14 of Article 162 of the Constitution proposed by the then President Thaçi were based on an alleged ambiguity in relation to the length of the Specialist Chambers' mandate.<sup>54</sup>

20. The Panel considers that the text of the SCCC Judgment on Referral does not support Thaçi's arguments that its finding on the Specialist Chambers' temporal mandate was *obiter dictum*. The SCCC held that:

Article 162(13) and (14) provide that, in case there is no notification by the Council [of the European Union] of completion of the mandate prior to expiry of the initial five-year period, the mandate shall continue beyond the initial five years until the Council notifies Kosovo of completion of the mandate. There has been no notification by the Council of completion of the mandate prior to expiry of the initial five-year period under Article 162(13). Therefore, the mandate of the Specialist Chambers and the SPO has continued and shall continue until the notification by the Council of completion of the mandate pursuant to Article 162(14).<sup>55</sup>

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<sup>53</sup> Compare Thaçi Appeal, paras 48, 49(b) *with* Thaçi Certification Application, para. 14. See Certification Decision, paras 17-21.

<sup>54</sup> Impugned Decision, paras 65-68.

<sup>55</sup> SCCC Judgment on Referral, para. 66. The SCCC also held that the continuation of the mandate of the Specialist Chambers and the SPO is in line with the Exchange of Letters, which is referenced in Article 162(13) and (14) of the Constitution, and provides that the Specialist Chambers and the SPO "shall continue until such time as Kosovo is notified by the Council of the European Union [...] that any proceedings [...] have been concluded". See SCCC Judgment on Referral, para. 67. See also Impugned Decision, para. 65.

21. The Panel observes that these findings are in the section of the judgment specifically discussing “The Proposed Constitutional Amendments” in relation to the duration of the mandate. The Panel also observes that after having analysed the temporal mandate, the SCCC concluded that “[h]ence, the deletion of [the reference to the Exchange of Letters from Article 162(13) and (14) of the Constitution] – as proposed in the amendments No. 26 and No. 27 - would diminish the fundamental rights and freedoms of persons involved in the proceedings”.<sup>56</sup> The Panel recalls that *obiter dictum* is defined as an observation or remark made by a judge that is not necessarily involved in the case or essential to its determination.<sup>57</sup> The Panel notes that, on the contrary, the logical sequence of the reasoning of the judgment demonstrates that the findings on the Specialist Chambers’ temporal mandate relate directly to and support the final conclusion on the non-compatibility of the proposed constitutional amendments with constitutionally guaranteed rights and freedoms.

22. Regarding Thaçi’s claim that the SCCC did not cite the temporal mandate as being relevant to its finding that the proposed amendments were non-compliant,<sup>58</sup> the Panel notes that such claim misrepresents the SCCC Judgment on Referral. In particular, the part to which Thaçi refers concerns another finding of non-compliance than the one for which the temporal mandate is relevant, namely whether consultations with the respective European Union authorities were appropriately made in relation to the proposed constitutional amendments. Further, the SCCC, in its overall conclusion, found that “pursuant to Article 116(1) of the Constitution, *this judgment* is binding on the judiciary and all persons and institutions of Kosovo”.<sup>59</sup> The disposition of the judgment naturally focuses on the court’s conclusion regarding the

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<sup>56</sup> See SCCC Judgment on Referral, para. 69.

<sup>57</sup> “What is Dictum” *The Law Dictionary* <<https://thelawdictionary.org/dictum/>> accessed on 19 May 2022.

<sup>58</sup> See Thaçi Appeal, para. 48, referring to SCCC Judgment on Referral, paras 71-75.

<sup>59</sup> SCCC Judgment on Referral, paras 78-79 (emphasis added). See also Impugned Decision, paras 19, 67.

question of the referral without repeating the considerations that led it to its conclusion. This does not mean that these considerations were not relevant or that they were *obiter dicta*. Authoritatively assessing existing provisions is in line with the scope of assessment under Article 113(9) of the Constitution previously carried out by the Kosovo Constitutional Court.<sup>60</sup> The Panel notes in this regard that in the SCCC Judgment on Referral, assessing the existing provisions was of particular relevance, as the proposed constitutional amendments would have replaced them. Thaçi's arguments on a strict division of two types of constitutional control<sup>61</sup> are, therefore, unsubstantiated, but also raised for the first time on appeal and, as such, will not be considered further.<sup>62</sup>

23. In light of the above, the Panel finds that Thaçi has failed to demonstrate that the Pre-Trial Judge erred in finding that the question of the Specialist Chambers' temporal mandate has already been decided upon by the SCCC. The Court of Appeals Panel, accordingly, dismisses the Second Thaçi Issue.

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<sup>60</sup> See e.g. Kosovo, Constitutional Court, *Confirmation of the proposed constitutional amendment, submitted by the President of the Assembly of the Republic of Kosovo on 24 October 2018, by letter No. 06/2156/DO-1156*, KO 162/18, Judgment, 7 February 2019, paras 35-36 (where the Kosovo Constitutional Court as part of its "Assessment of the constitutionality of proposed amendment [to Article 22 of the Constitution]", held that "in addition to the rights expressly contained in Chapter II, the Court must also assess the compliance of the proposed amendment with Article 22"); Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by fifty five Deputies of the Assembly of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 6 February 2015 by letter No. 05-259/DO-179*, KO 13/15, Judgment, 16 March 2015, paras 34-35 (where the Kosovo Constitutional Court in its "Assessment of the proposed Amendment [to Article 96 of the Constitution]" noted that it needs to consider the proposed amendment in the context of the rights of communities guaranteed by the Constitution, including within the scope of the current Article 96 of the Constitution).

<sup>61</sup> Thaçi Appeal, paras 38-46; Thaçi Reply, paras 17-18, 23-24.

<sup>62</sup> Decision on Preliminary Motions, para. 15.



**B. ALLEGED ERRORS REGARDING THE VIOLATION OF CONSTITUTIONAL RIGHTS****1. Whether the Pre-Trial Judge erred by failing to consider whether the Specialist Chambers' substantive legal regime gives rise to inequality in violation of Articles 3 and 24 of the Constitution, rendering the Court "unlawful" for the purposes of Article 103(7) of the Constitution (Veseli Issue)****(a) Submissions of the Parties**

24. In his first ground of appeal, Veseli argues that the Pre-Trial Judge erred when determining that the Specialist Chambers were established by law by failing to assess the quality of the law with which they were established and specifically whether the Law affords sufficient safeguards against arbitrariness.<sup>63</sup> According to Veseli, ECtHR jurisprudence imports certain qualitative requirements to "law" by implying "that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded".<sup>64</sup> Veseli argues that the Law does not afford sufficient safeguards against arbitrariness for three reasons:<sup>65</sup> (i) applying customary international law ("CIL") via Article 12 of the Law, while ordinary courts of Kosovo apply the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY"), is contrary to the Constitution and to international human rights law;<sup>66</sup> (ii) there is no objective system as to whether a person should be tried at the Specialist Chambers under CIL or domestically under domestic law;<sup>67</sup> and (iii) there is no judicial review to challenge the SPO's decision to try a person at the Specialist Chambers, which is an example of arbitrariness for which the Law does not provide safeguards,

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<sup>63</sup> Veseli Appeal, paras 15, 17-18.

<sup>64</sup> Veseli Appeal, paras 16-17. See also Veseli Reply, paras 10-11(a)-(c).

<sup>65</sup> Veseli Appeal, para. 18.

<sup>66</sup> Veseli Appeal, paras 19-20.

<sup>67</sup> Veseli Appeal, paras 21-22; Veseli Reply, para. 11 (c)-(d). Veseli also submits that: (i) although on a plain reading of the Law only persons suspected of crimes from the Council of Europe Report could be tried, in practice none of the allegations in the Council of Europe Report are being prosecuted at the Specialist Chambers; and (ii) even if the Council of Europe Report was considered an objective criterion, there is no justification for treating the accused of crimes within its scope differently to accused of the same conduct and, therefore, such a criterion would violate the principle of equality and non-discrimination. See Veseli Appeal, paras 22-23.

resulting in violations of Article 6(1) of the ECHR, as well as of the right to equality and the prohibition on non-discrimination as protected by the Constitution and international human rights law.<sup>68</sup> Veseli argues that insofar as the Specialist Chambers apply a different substantive law to the domestic law of Kosovo, they operate as an extraordinary court contrary to Article 103(7) of the Constitution.<sup>69</sup>

25. In his second ground of appeal, Veseli argues that the constitutional amendment no. 24, which was the subject of Case no. KO26/15 before the Kosovo Constitutional Court, predates the Law and, therefore, the Kosovo Constitutional Court in this case did not anticipate that the Specialist Chambers would apply a different substantive law than the ordinary courts in Kosovo.<sup>70</sup> According to Veseli, this feature is “highly relevant” to the assessment of whether the Specialist Chambers are a specialised or an extraordinary court.<sup>71</sup> Veseli submits that, in light of this, the Pre-Trial Judge erred in placing such weight on this case when determining that the Specialist Chambers were compatible with Article 103(7) of the Constitution.<sup>72</sup>

26. In his third ground of appeal, Veseli submits that the Pre-Trial Judge: (i) breached his duty to ensure fairness by failing to address Veseli’s submissions regarding the *indicia* set by the Venice Commission in relation to the definition of specialised or extraordinary courts, one of which is “[w]hether the court is endowed with any special powers or whether it follows specific procedures different to those applied in the existing criminal courts”; and (ii) erred in law by failing to give due weight to this *indicium*.<sup>73</sup> According to Veseli, the Specialist Chambers manifest characteristics of an extraordinary court, which is prohibited by Article 103(7) of the

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<sup>68</sup> Veseli Appeal, paras 24-26; Veseli Reply, para. 11(d)-(e).

<sup>69</sup> Veseli Appeal, paras 27-28.

<sup>70</sup> Veseli Appeal, paras 30-31. See also Veseli Appeal, paras 32-33; Veseli Reply, para. 13.

<sup>71</sup> Veseli Appeal, paras 31, 34.

<sup>72</sup> Veseli Appeal, paras 34-35.

<sup>73</sup> Veseli Appeal, paras 37, 41-42, 46.

Constitution, as well as by other domestic constitutions and international human rights law.<sup>74</sup>

27. The SPO submits that Veseli's approach to present three distinct grounds whereas the Pre-Trial Judge certified a single issue for appeal attempts to circumvent the certification requirements of Rule 170 of the Rules.<sup>75</sup> The SPO argues that if the Panel is disinclined to summarily dismiss the entire Veseli Appeal, at a minimum, any and all submissions exceeding the scope of the certified issue should not be entertained.<sup>76</sup> In particular, the SPO submits that Veseli's first and third grounds of appeal exceed the scope of the Certification Decision, including by re-opening a general challenge to the Specialist Chambers' compatibility with Article 103(7) of the Constitution, which is disconnected from the question of equality.<sup>77</sup> Furthermore, the SPO argues that, like the Veseli Jurisdictional Appeal, the Veseli Appeal is premised on the position that applying CIL renders the Specialist Chambers unconstitutional and that, as the legal framework of the Specialist Chambers is in full conformity with the Constitution, the Appeal must fail.<sup>78</sup>

28. Regarding the merits of Veseli's submissions, the SPO responds that Veseli cites no relevant authority for arbitrariness being a factor in assessing whether a court is "based in law" for the purposes of Article 103(7) of the Constitution<sup>79</sup> or for linking the applicability of CIL with the principle of equality before the law.<sup>80</sup> The SPO also argues that Veseli misrepresents the Impugned Decision, since the Pre-Trial Judge considered: (i) questions of retroactivity and foreseeability arising from the application of CIL, which are relevant to qualitative aspects of the "established by

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<sup>74</sup> Veseli Appeal, paras 36, 38-40, 43-45. See also Veseli Appeal, paras 47-49; Veseli Reply, para. 16.

<sup>75</sup> Response to Veseli Appeal, paras 11-12.

<sup>76</sup> Response to Veseli Appeal, para. 13.

<sup>77</sup> Response to Veseli Appeal, paras 23, 35-36. See also Response to Veseli Appeal, para. 24.

<sup>78</sup> Response to Veseli Appeal, paras 14-22. See also Response to Veseli Appeal, paras 38-40.

<sup>79</sup> Response to Veseli Appeal, para. 24.

<sup>80</sup> Response to Veseli Appeal, para. 35.

law” requirement, as well as the independence and impartiality conferred by the Law;<sup>81</sup> and (ii) the “special powers” of the Specialist Chambers.<sup>82</sup>

29. The SPO also submits, with respect to Veseli’s first ground of appeal in particular, that Veseli’s arguments regarding inequality do not demonstrate arbitrariness, no authority is provided to illustrate this argument, and some of the matters he raises are common features of certain legal systems.<sup>83</sup> The SPO points out that the fact that one court may not have jurisdiction over certain offences does not mean that no crime was committed or that another court is barred from adjudicating such conduct.<sup>84</sup> Furthermore, the SPO submits that the Pre-Trial Judge’s conclusion that the Law was of sufficient quality to ensure the Accused’s human rights when determining that the Specialist Chambers are a specialised court was reasonable.<sup>85</sup> According to the SPO, the jurisdiction is not based on any discriminatory basis and the SPO’s case selection and charging are subject to restrictions imposed by the Law and the Rules, as well as to judicial review.<sup>86</sup>

30. With respect to Veseli’s second ground of appeal, the SPO responds that it includes allegations of abuse of discretion rather than an error of law as Veseli frames it, which is significant since the Pre-Trial Judge’s decision to give weight to a particular consideration is entitled to deference.<sup>87</sup> According to the SPO, it was appropriate for the Pre-Trial Judge to rely upon the Kosovo Constitutional Court’s assessment of the Specialist Chambers’ constitutionality, as this judgment was considered amongst multiple other factors.<sup>88</sup> Moreover, the SPO submits that it was “clearly envisaged” by

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<sup>81</sup> Response to Veseli Appeal, para. 25.

<sup>82</sup> Response to Veseli Appeal, paras 35, 37.

<sup>83</sup> Response to Veseli Appeal, para. 26.

<sup>84</sup> Response to Veseli Appeal, para. 26. See also Response to Veseli Appeal, para. 27.

<sup>85</sup> Response to Veseli Appeal, para. 29. See also Response to Veseli Appeal, para. 40 (submitting that reliance on the statements of certain international stakeholders is unavailing).

<sup>86</sup> Response to Veseli Appeal, paras 27-28.

<sup>87</sup> Response to Veseli Appeal, para. 30.

<sup>88</sup> Response to Veseli Appeal, para. 31.

the Kosovo Constitutional Court that the Specialist Chambers would operate pursuant to a separate specific law, as reflected in the Exchange of Letters.<sup>89</sup>

31. With respect to the third ground of appeal, the SPO argues that the *indicium* referred to by the Venice Commission cannot be dispositive of whether a court is specialised or extraordinary, since that would be contrary to the criteria set out by the Kosovo Constitutional Court for assessing compliance with Article 103(7) of the Constitution.<sup>90</sup> The SPO further submits that Veseli acknowledges that specialised courts can exist if they fulfil the safeguards provided in ordinary courts, which, according to the SPO, the Specialist Chambers do.<sup>91</sup>

32. Veseli replies that none of the grounds go beyond the certified issue, because they are at a minimum intrinsically linked to it.<sup>92</sup> Veseli further replies that the first ground “falls squarely” within the scope of the certified issue, since the quality of the substantive legal regime is necessarily a consideration as to whether the Specialist Chambers are “unlawful” for the purposes of Article 103(7) of the Constitution.<sup>93</sup> Moreover, Veseli submits that the issues in the Veseli Jurisdictional Appeal and the present appeal are not materially the same, since the Veseli Jurisdictional Appeal deals primarily with issues of discrimination and inequality before the law vis-à-vis persons in other successor states to the SFRY, while the present appeal focuses on the difference between the Specialist Chambers’ substantive legal regime and the regime applied by ordinary courts in Kosovo.<sup>94</sup>

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<sup>89</sup> Response to Veseli Appeal, paras 32-33. See also Response to Veseli Appeal, para. 34.

<sup>90</sup> Response to Veseli Appeal, paras 38-39.

<sup>91</sup> Response to Veseli Appeal, para. 39.

<sup>92</sup> Veseli Reply, paras 3-5.

<sup>93</sup> Veseli Reply, para. 9. Veseli also disagrees with the SPO’s contention that the issue was proposed for certification by Thaçi and was rejected.

<sup>94</sup> Veseli Reply, paras 5-8.

33. On the merits, Veseli maintains in reply that his allegations in the second ground of appeal amount to an error of law rather than abuse of discretion.<sup>95</sup> Moreover, Veseli submits with respect to his third ground of appeal that supporting authorities are clearly set out<sup>96</sup> and that the “special powers” which the Pre-Trial Judge failed to consider in his assessment of the Specialist Chambers’ lawfulness is their ability to apply their own substantive legal regime.<sup>97</sup>

(b) Assessment of the Court of Appeals Panel

34. At the outset, the Panel recalls that the scope of its review lies strictly within the confines of the issues certified by the Pre-Trial Judge and, therefore, the Panel may decline to consider arguments of an appellant that go beyond the issue in relation to which certification has been granted.<sup>98</sup> While the Pre-Trial Judge certified only one issue,<sup>99</sup> Veseli submits three grounds of appeal. Nevertheless, the Panel may consider arguments even if they are outside the scope of the appeal as long as they are intrinsically linked to the issue certified for appeal.<sup>100</sup> In this regard, the Panel observes

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<sup>95</sup> Veseli Reply, para. 12.

<sup>96</sup> Veseli Reply, para. 15.

<sup>97</sup> Veseli Reply, para. 17.

<sup>98</sup> Decision on Preliminary Motions, para. 20; Decision on Disclosure, para. 17.

<sup>99</sup> See Certification Decision, paras 7, 66-68: “[w]hether the Pre-Trial Judge erred by failing to consider whether the Court’s substantive legal regime gives rise to inequality under the law in violation of Articles 3 and 24 of the Constitution, rendering the Court ‘unlawful’ for the purposes of Article 103(7)”.

<sup>100</sup> Cf. ICTY, *Prosecutor v. Šešelj*, IT-03-67-AR73.4, Decision on Appeal against the Trial Chamber’s Decision (No.2) on Assignment of Counsel, 8 December 2006, para. 20; ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-98, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”, 2 September 2019, paras 53-56; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1817-Red, Public redacted version of the Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016, 8 March 2017, paras 85-86; ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-744, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 1 November 2016, paras 13-19. See also ICTY, *Prosecutor v. Stanišić and Simatović*, IT-09-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of the Proceedings, 16 May 2008, paras 7-10 (wherein an appeals chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) decided to consider the arguments that “directly related” to the certified issue); ICTY, *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal



that Veseli has explicitly argued in his certification application the second ground of appeal, namely his allegation that the Pre-Trial Judge erroneously relied on the Kosovo Constitutional Court Judgment,<sup>101</sup> but the link between the first and third grounds of appeal and the certified issued is not immediate.

35. With respect to Veseli's first ground of appeal, the Panel notes that although Veseli did not specifically argue in any of his previous submissions that the Pre-Trial Judge failed to consider the quality of the law under Article 6(1) of the ECHR, this argument is linked to the central challenge made by Veseli that by applying CIL, the Law creates two parallel systems in violation of the principle of equality before the law and hence in violation of Article 103(7) of the Constitution.<sup>102</sup> Contrary to the SPO's argument that certification for a similar issue raised by Thaçi was denied,<sup>103</sup> Thaçi's arguments in this regard concerned the guarantees of independence and impartiality,<sup>104</sup> rather than the "quality of law" as such. With respect to Veseli's third ground of appeal, the Panel notes that Veseli submitted in his certification application that the Pre-Trial Judge failed to engage with his submissions regarding the factors used by the Venice Commission for the definition of specialised or extraordinary courts.<sup>105</sup> The Panel also notes that further arguments submitted by Veseli on issues other than the alleged violation of equality<sup>106</sup> relate either to his contention that the

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Concerning Rule 92bis(C), 7 June 2002, para. 7 (wherein an ICTY appeals chamber held that it is within its discretion to determine "other, related, issues, where it considers it appropriate to do so").

<sup>101</sup> See Veseli Certification Application, paras 6-7; Veseli Certification Reply, paras 3, 5, referring to Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo Proposed by the Government of the Republic of Kosovo and Referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318*, KO 26/15, 15 April 2015 ("Kosovo Constitutional Court Judgment"). See also Certification Decision, para. 63.

<sup>102</sup> See Veseli Certification Application, paras 8-14. See Certification Decision, para. 64 (wherein the Pre-Trial Judge acknowledged that the certified issue is directly linked with Veseli's fair trial rights under Article 6(1) of the ECHR).

<sup>103</sup> See Response to Veseli Appeal, para. 23.

<sup>104</sup> See Certification Decision, paras 34-37; Thaçi Certification Application, paras 10, 15, referring to Thaçi Motion, paras 36-43.

<sup>105</sup> Veseli Certification Application, para. 12, referring to Veseli Motion, paras 13-19. See also Certification Decision, para. 61.

<sup>106</sup> See Veseli Appeal, paras 44, 48-49.

Specialist Chambers are unlawful under Article 103(7) of the Constitution or to his central challenge of the Pre-Trial Judge's reliance on the Kosovo Constitutional Court Judgment. The Panel, therefore, finds that these arguments are intrinsically linked to the certified issue and, as such, will consider them.

36. Turning to the merits of the Veseli Appeal, the Panel notes that the Kosovo Constitutional Court defined a specialised court, which is permissible under Article 103(7) of the Constitution, as a court with a specifically defined scope of jurisdiction that remains within the existing framework of the judicial system and operates in compliance with its principles, as opposed to an extraordinary court which would be placed outside the structure of the existing court system and would operate without reference to it.<sup>107</sup> The Panel further observes that the Kosovo Constitutional Court found that the same constitutional provision requires that the specialised court be based upon law and its establishment be necessary.<sup>108</sup> Most importantly, the Kosovo Constitutional Court held that the Specialist Chambers satisfy all these requirements.<sup>109</sup>

37. Furthermore, the Kosovo Constitutional Court has also found that the Specialist Chambers comply with the requirements of an independent and impartial tribunal under Article 6(1) of the ECHR<sup>110</sup> and with the constitutional rights protected by chapters II and III of the Constitution.<sup>111</sup> The Panel observes that while the rule of law and the avoidance of arbitrary power are principles underlying the entire ECHR,<sup>112</sup> in the context of Article 6 of the ECHR, these principles serve specifically "to

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<sup>107</sup> Kosovo Constitutional Court Judgment, paras 42-43.

<sup>108</sup> Kosovo Constitutional Court Judgment, paras 45-48, 50-52.

<sup>109</sup> Kosovo Constitutional Court Judgment, paras 49, 54, 58, 68.

<sup>110</sup> Kosovo Constitutional Court Judgment, paras 47-48, 54. See also below, para. 47.

<sup>111</sup> Kosovo Constitutional Court Judgment, paras 44, 55-57, 59-66, 68.

<sup>112</sup> See Veseli Appeal, para. 17, referring to ECtHR, *Lhermitte v. Belgium*, no. 34238/09, Judgment, 29 November 2016 ("*Lhermitte v. Belgium* Judgment"), paras 67, 69; ECtHR, *Parlov-Tkalčić v. Croatia*, no. 24810/06, Judgment, 22 December 2009 ("*Parlov-Tkalčić v. Croatia* Judgment"), paras 86-89; ECtHR, *Moiseyev v. Russia*, no. 62936/00, Judgment, 9 October 2008 ("*Moiseyev v. Russia* Judgment"), para. 183; ECtHR, *Ramanauskas v. Lithuania*, no. 74420/01, Judgment, 5 February 2008 ("*Ramanauskas v. Lithuania*

foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society”.<sup>113</sup> As the Pre-Trial Judge rightly noted, “the object of the term ‘established by law’ in Article 6 is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament”.<sup>114</sup> In this regard, the Pre-Trial Judge referred to the Kosovo Constitutional Court’s finding that the “established by law” criterion was satisfied by the fact that the proposed constitutional amendment no. 24, now Article 162 of the Constitution, embedded the Specialist Chambers in the justice system of Kosovo, and required the adoption of a specific law by the Assembly of Kosovo, and noted that such law was later adopted and its relevant features were, in general terms, before the Kosovo Constitutional Court at the relevant time through the Exchange of Letters.<sup>115</sup> The Panel, therefore, considers that the aspects of arbitrariness within the context of Article 6(1) of the ECHR were addressed by the Pre-Trial Judge.

38. Further, the Panel notes that while Article 6 of the ECHR aims to protect from procedural defects,<sup>116</sup> Veseli does not substantiate how the Law violates his procedural

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Judgment”), paras 51, 65; Veseli Reply, para. 11, referring to ECtHR, *Haidn v. Germany*, no. 6587/04, Judgment, 13 January 2011, para. 79 (where the ECtHR held that “[q]uality of the law’ [under Article 5 of the ECHR] implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness”).

<sup>113</sup> *Lhermitte v. Belgium* Judgment, para. 67. See also *Parlov-Tkalčić v. Croatia* Judgment, paras 86-89 (where the ECtHR considered aspects of judicial independence as safeguards for the purposes of Article 6(1) of the ECHR); *Moiseyev v. Russia* Judgment, paras 183-185 (wherein a breach of the rule of immutability of court composition was found to be a violation of the independence and impartiality of the trial court under Article 6(1) of the ECHR); *Ramanauskas v. Lithuania* Judgment, paras 51, 65-66 (examining whether special investigative methods infringe fair trial rights under Article 6 of the ECHR).

<sup>114</sup> See Impugned Decision, para. 86, citing Kosovo Constitutional Court Judgment, paras 47-48, referring to ECtHR, *Fruni v. Slovakia*, no. 8014/07, Judgment, 21 June 2011, para. 142; *Erdem v. Germany*, no. 38321/97, Decision, 9 December 1999. See also ECtHR, *Richert v. Poland*, no. 54809/07, Judgment, 25 October 2011, para. 42.

<sup>115</sup> See Impugned Decision, paras 86-88, referring to Kosovo Constitutional Court Judgment, paras 38, 45-53, 55.

<sup>116</sup> See Kosovo Constitutional Court Judgment, para. 80 (“the [Kosovo Constitutional] Court notes that it ensures that the Specialist Chambers and the Specialist Prosecutor’s Office will take full care of all elements of the right to a fair and impartial trial and other procedural guarantees” (emphasis added)). See also e.g. ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, no. 26374/18, Judgment, 1 December 2020

rights. The Panel also considers that Veseli's arguments that certain aspects of the Law violate the principles of equality and non-discrimination<sup>117</sup> do not relate to the "established by law" requirement of Article 6(1) of the ECHR. In any event, the Panel recalls that the applicability and supremacy of CIL do not violate the principles of non-discrimination and equality before the law and that any difference in treatment between accused before the Specialist Chambers and ordinary Kosovo courts is objectively and reasonably justified given the jurisdictional framework established by Articles 6 to 9 of the Law relating to the Council of Europe Report.<sup>118</sup>

39. As for the weight the Pre-Trial Judge placed on the Kosovo Constitutional Court Judgment, the Panel notes that Article 162(1) of the Constitution foresees that: "The organisation, functioning and *jurisdiction* of the Specialist Chambers and Specialist Prosecutor's Office shall be regulated by this Article and by a specific law" (emphasis added). Moreover, the Exchange of Letters, which had already occurred at the time the Kosovo Constitutional Court deliberated and issued its judgment, also refers to the Specialist Chambers being governed by their own statute.<sup>119</sup> In addition, while the exact content of the Law was not known at the time the constitutional judgment was issued, the Kosovo Constitutional Court was aware that the jurisdiction of the Specialist Chambers, and the SPO, would concern specific crimes.<sup>120</sup> In this

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("Ástráðsson v. Iceland Judgment"), para. 247 ("only breaches that relate to the fundamental rules of the *procedure* for appointing judges affect the essence of the right protected by Article 6 of the ECHR and are therefore likely to result in a violation").

<sup>117</sup> See Veseli Appeal, paras 19-26.

<sup>118</sup> See Appeal Decision on Jurisdiction, paras 44-47, 78-84.

<sup>119</sup> SCCC Judgment on Referral, para. 63 ("the autonomous functioning [of the Specialist Chambers and the SPO] is ensured principally through delegation of certain sovereign powers for the duration of the mandate, a corollary of which is also their own established legal framework").

<sup>120</sup> See Kosovo Constitutional Court Judgment, paras 54 ("[the Specialist Chambers are] in compliance with the requirement to be based in law and to come within a specialized scope of jurisdiction"), 59 ("The structure, scope of jurisdiction and functioning of the Specialist Chambers will be regulated by further laws in compliance with the Constitution"), 60 ("The scope of jurisdiction of the Specialist Prosecutor's Office will be for the same specific crimes as for the Specialist Chambers"), 68 ("[the Constitutional Court finds that among the four new structural elements introduced into the Constitution by the Amendment is that they will] have a specific scope of jurisdiction"), 71 ("these new

regard, the Panel notes that the Kosovo Constitutional Court's finding that the Specialist Chambers will "function within the legal framework of criminal justice"<sup>121</sup> refers to the structural integration of the Specialist Chambers within the Kosovo judicial system.<sup>122</sup> Similarly, statements of international stakeholders referred to by Veseli<sup>123</sup> also concern this integration of the Specialist Chambers and its establishment by a Kosovo law, rather than their subject-matter jurisdiction.

40. Regarding the criteria used by the Venice Commission of whether a court has special powers or follows specific procedures different to those applied at the existing criminal courts,<sup>124</sup> the Panel notes that the Venice Commission refers to "several *indicia* from which it *may* be concluded" that a court can in principle be regarded as a specialised court, but ultimately leaves it up to the national constitutional court to decide on the constitutionality of the law.<sup>125</sup> The Panel notes that the Kosovo Constitutional Court did not set such a criterion for determining whether a court qualifies as specialised or extraordinary for the purposes of Article 103(7) of the Constitution. Accordingly, the Panel considers that the fact that the Pre-Trial Judge

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structural elements to the justice system of Kosovo are done by law and for the purpose of fighting specific crimes").

<sup>121</sup> See Veseli Appeal, para. 32, referring to Kosovo Constitutional Court Judgment, para. 68.

<sup>122</sup> See Kosovo Constitutional Court Judgment, paras 36, 68 (wherein the Kosovo Constitutional Court held, in relation to the "established by law" requirement of Article 103(7) of the Constitution, that the four new structural elements introduced into the Constitution by the amendment, which are the establishment of the Specialist Chambers, the SPO, the SCCC and the Ombudsperson of the Specialist Chambers, will "function within the legal framework of criminal justice" and confirmed that their establishment comes within the existing justice system of Kosovo). See also Veseli Appeal, para. 32, referring to Kosovo Constitutional Court Judgment, para. 46, citing Article 21(2) of the Law on Courts No. 03/L-199, which similarly concerns the structural placement of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters within the Supreme Court.

<sup>123</sup> See Veseli Appeal, para. 48.

<sup>124</sup> Venice Commission, no. 896 / 2017, Opinion on the Draft Law on Anti-Corruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (Concerning the Introduction of Mandatory Specialisation of Judges on the Consideration of Corruption and Corruption-Related Offenses), 9 October 2017 ("Venice Commission Opinion"), para. 25.

<sup>125</sup> Venice Commission Opinion, paras 22, 29 (emphasis added). See also Article 112(1) of the Constitution; Article 49(1) of the Law.

did not address this criterion in his reasoning cannot be qualified as an error.<sup>126</sup> The Panel also notes that the case law of the ECtHR and the Human Rights Committee to which Veseli refers does not support his arguments that the applicable legal framework is relevant for such determination.<sup>127</sup>

41. In any event, the law applicable at the Specialist Chambers is in full conformity with the Constitution and, accordingly, the Specialist Chambers do not possess any “special powers” in the manner suggested by Veseli.<sup>128</sup> The Panel also notes, in this regard, the SCCC’s finding that the *raison d’être* of the Specialist Chambers and the SPO and hence their legal regime is actually to realise, in their own specific context, the respective fundamental rights and freedoms in relation to allegations contained in the Council of Europe Report and proceedings arising out of the related Special Investigative Task Force (“SITF”) investigations.<sup>129</sup>

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<sup>126</sup> See Impugned Decision, paras 10, 91 (wherein the Pre-Trial Judge noted Veseli’s arguments on the criterion of “special powers”).

<sup>127</sup> Veseli Appeal, paras 39-40, referring to ECtHR, *Bahaettin Uzan v. Turkey*, no. 30836/07, Judgment, 24 November 2020 (“*Uzan v. Turkey* Judgment”), para. 17; UNHRC, *Kavanagh v. Ireland*, CCPR/C/71/D/819/1998, 26 April 2001 (“*Kavanagh v. Ireland* Decision”), paras 10.2-10.3. Veseli’s references either concern a finding of a national court rather than the ECtHR (see *Uzan v. Turkey* Judgment, para. 17) or do not set a different applicable law as a criterion for the distinction between specialised and extraordinary courts (see *Uzan v. Turkey* Judgment, para. 53 (where the ECtHR held that “the Istanbul 8th Assize Court was not an ‘extraordinary tribunal’ established [...] to deal specifically with the applicant’s case” and considered as characteristics that made the court specialised: the fact that it operated within the existing structure of the Istanbul assize courts, that it was granted jurisdiction to take over trials in respect of all relevant banking offences in the province of Istanbul, was subject to the same rules of procedure as all assize courts, and the judges appointed to it enjoyed the same safeguards and benefits as all assize court judges”); *Kavanagh v. Ireland* Decision, para. 10.2 (where the Human Rights Committee noted that the court in question was problematic because it lacked certain procedures under domestic law and because the law allowed for any other offence to be tried if the competent authority was of the view that the ordinary courts were inadequate to secure the effective administration of justice).

<sup>128</sup> See Appeal Decision on Jurisdiction, paras 29, 40, 47. See also Venice Commission Opinion, paras 23-24 (where the Venice Commission noted that the court in question did not constitute an extraordinary court considering, *inter alia*, that it would be competent for a generally and abstractly defined range of criminal offences and perpetrators).

<sup>129</sup> SCCC Judgment on Referral, para. 56.



42. In light of the above, the Panel finds that Veseli has not shown that the Pre-Trial Judge erred by failing to consider whether the Court's substantive legal regime gives rise to inequality under the law in violation of Articles 3 and 24 of the Constitution, rendering the Court "unlawful" for the purposes of Article 103(7). The Court of Appeals Panel, accordingly, dismisses the Veseli Issue.

**2. Whether the Pre-Trial Judge failed to consider that, taken cumulatively, the features of the Specialist Chambers structurally fail to satisfy Article 6(1) of the ECHR (Fifth Thaçi Issue)**

(a) Submissions of the Parties

43. Thaçi argues that the Pre-Trial Judge erred in considering the features of the Specialist Chambers related to their independence and impartiality individually, rather than cumulatively, in accordance with the practice of the ECtHR.<sup>130</sup> According to Thaçi, these features mean that the Specialist Chambers structurally fail to satisfy Article 6(1) of the ECHR, thereby amounting to an extraordinary court.<sup>131</sup>

44. The SPO responds that Thaçi merely argues that the Pre-Trial Judge erred by not considering the features of the Specialist Chambers raised by Thaçi cumulatively after evaluating them individually, and therefore any error in this regard would be harmless, because Thaçi does not challenge the validity of the final determination and the Specialist Chambers do not violate Article 6(1) of the ECHR.<sup>132</sup> The SPO further submits that since taken individually these features did not violate Article 6(1) of the ECHR, the Pre-Trial Judge was not under an obligation to assess them cumulatively.<sup>133</sup> According to the SPO, the ECtHR jurisprudence referred to by Thaçi does not support

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<sup>130</sup> Thaçi Appeal, paras 7-10. See also Thaçi Reply, paras 2-6.

<sup>131</sup> Thaçi Appeal, para. 6.

<sup>132</sup> Response to Thaçi Appeal, para. 38.

<sup>133</sup> Response to Thaçi Appeal, paras 39, 42-43.

his argument that the Pre-Trial Judge was required to consider these features cumulatively.<sup>134</sup>

(b) Assessment of the Court of Appeals Panel

45. The Pre-Trial Judge held that in assessing the independence and impartiality of a court or tribunal, consideration must be given to, *inter alia*, the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures, and whether the body presents an appearance of independence.<sup>135</sup> He further held that without any assertion of a violation of the legal framework governing the Specialist Chambers, a strong presumption of independence and impartiality attaches.<sup>136</sup>

46. The Panel notes that, contrary to Thaçi's arguments,<sup>137</sup> the ECtHR did not find that an obligation exists to consider whether, cumulatively, the features of a court mean that it cannot be considered impartial or independent or established by law. Rather, being "mindful of the difficulties involved in devising a comprehensive balancing test to cater to the possible irregularities that may arise in the judicial appointment processes in different jurisdictions", the ECtHR found that there are three criteria, which taken cumulatively, provide a solid basis "in the assessment as to whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law and whether the balance between the competing principles has been struck fairly and proportionately by the relevant State authorities in the particular circumstances of a

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<sup>134</sup> Response to Thaçi Appeal, paras 39-41, 44.

<sup>135</sup> Impugned Decision, para. 100, referring to ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, nos 2312/08 and 34179/08, Judgment, 18 July 2013, para. 49.

<sup>136</sup> Impugned Decision, para. 101, referring to ECtHR, *Kyprianou v. Cyprus*, no. 73797/01, Judgment, 15 December 2005, para. 119.

<sup>137</sup> Thaçi Appeal, para. 10, referring to *Ástráðsson v. Iceland* Judgment, para. 243 et seq.; ECtHR, *Reczkowicz v. Poland*, no. 43447/19, Judgment, 22 July 2021 ("*Reczkowicz v. Poland* Judgment"), paras 216-224; ECtHR, *Dolińska - Ficek and Ozimek v. Poland*, nos 49868/19, 57511/19, Judgment, 8 November 2021 ("*Dolińska - Ficek and Ozimek v. Poland* Judgment"), paras 272-280.

case”.<sup>138</sup> These three criteria are: (i) there must, in principle, be an objectively and genuinely identifiable breach of the domestic law; (ii) the breach in question must be assessed in light of the object and purpose of the requirement of a “tribunal established by law”; and (iii) it must be examined whether the allegations regarding the right to a “tribunal established by law” were effectively reviewed and remedied by the domestic courts.<sup>139</sup>

47. The Pre-Trial Judge conducted the assessment of all features challenged by Thaçi and concluded that none of them calls into question the independence and impartiality of the Specialist Chambers.<sup>140</sup> In this regard, the Panel notes that the Kosovo Constitutional Court held that, on the basis of ECtHR jurisprudence, the Specialist Chambers “are [...] in compliance with the requirement to be based in law”, and therefore, “the [constitutional amendment no. 24] complies with the requirements of an independent and impartial tribunal, as stipulated by Article 31 of the Constitution and Article 6, paragraph 1, of the ECHR”.<sup>141</sup>

48. Having found that none of the features of the Specialist Chambers violate the principles of independence and impartiality, it is logically impossible to find that they could do so cumulatively. For the Pre-Trial Judge to have engaged in an assessment of the cumulative impact of these features, he should have found, at a minimum, some irregularity or defect inconsistent with the object and purpose of the requirement of a “tribunal established by law” when assessing each of them individually– which he did not.<sup>142</sup>

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<sup>138</sup> *Ástráðsson v. Iceland* Judgment, paras 243-252; *Reczkowicz v. Poland* Judgment, paras 216-224; *Dolińska - Ficek and Ozimek v. Poland* Judgment, paras 272-280.

<sup>139</sup> *Ástráðsson v. Iceland* Judgment, paras 243-252; *Reczkowicz v. Poland* Judgment, paras 216-224; *Dolińska - Ficek and Ozimek v. Poland* Judgment, paras 272-280.

<sup>140</sup> Impugned Decision, paras 101-111.

<sup>141</sup> Kosovo Constitutional Court Judgment, para. 54.

<sup>142</sup> *Ástráðsson v. Iceland* Judgment, Joint Partly Concurring, Partly Dissenting Opinion of Judges O’Leary, Ravarani, Kucsko-Stadlmayer and Ilievski, para. 51 (“A series of shortcomings that, considered together, lead to the finding of a violation of Article 6 § 1”); ECtHR, *Mirilashvili v. Russia*, no. 6293/04,

49. In light of the above, the Panel finds that Thaçi has failed to demonstrate that the Pre-Trial Judge erred by not considering that, taken cumulatively, the features of the Specialist Chambers structurally fail to satisfy Article 6(1) of the ECHR. The Court of Appeals Panel, accordingly, dismisses the Fifth Thaçi Issue.

### **3. Whether the Pre-Trial Judge erred in finding that the relevant period to be tried within a reasonable time began only on 17 November 2019 (Seventh Thaçi Issue)**

#### (a) Submissions of the Parties

50. Thaçi submits that the ECtHR has held that a criminal charge exists for the purposes of determining the reasonableness of a trial period under Article 6(1) of the ECHR where a person is “substantially affected” by the actions of authorities.<sup>143</sup> Thaçi argues that he was substantially affected from, at least, the date of publication of the Council of Europe Report on 7 January 2011 and the claim that this was not a criminal investigation is irrelevant.<sup>144</sup> According to Thaçi, the Pre-Trial Judge adopted a “mistakenly restrictive interpretation of the ECtHR case law” by relying on two cases

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Judgment, 11 December 2008 (“*Mirilashvili v. Russia* Judgment”), paras 164-165 (“the [ECtHR] often assesses to what extent the defects complained of prejudiced the overall fairness of the trial, particularly with regard to the taking of evidence”); ECtHR, *Barberà, Messegué and Jabardo v. Spain*, no. 10590/83, Judgment, 6 December 1988, para. 89 (finding that “the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing”, after having found several procedural violations, including “the belated transfer of the applicants from Barcelona to Madrid, the unexpected change in the court’s membership immediately before the hearing opened, the brevity of the trial and, above all, the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants’ presence and under the watchful eye of the public”); ECtHR, *Ibrahim and others v. United Kingdom*, nos 50541/08, 50571/08, 50573/08, 40351/09, Judgment, 13 September 2016 (“*Ibrahim and others v. UK* Judgment”), para. 311 (“having regard to the cumulative effect of the procedural shortcomings [...], the [ECtHR] considers that the Government have failed to demonstrate why the overall fairness of the trial was not irretrievably prejudiced by the decision not to caution [the applicant] and to restrict his access to legal advice”). See also *Mirilashvili v. Russia* Judgment, para. 166 (“the Court *may* have to examine separately each limb of the applicant’s complaint and then make an overall assessment” (emphasis added)). Contra Thaçi Appeal, para. 10. See also above fn. 139.

<sup>143</sup> Thaçi Appeal, paras 12-14. See also Thaçi Reply, para. 7. This flexible approach to the starting point for the calculation of reasonableness of the trial period was, according to Thaçi, also endorsed by international criminal courts. See Thaçi Appeal, para. 15.

<sup>144</sup> Thaçi Appeal, paras 16, 22. See also Thaçi Appeal, paras 21, 23-24; Thaçi Reply, paras 8, 12.

that have no perceivable factual parallels with the present one.<sup>145</sup> This approach is undermined, in Thaçi's view, by the ECtHR case law which requires an expansive reading of Article 6(1) of the ECHR.<sup>146</sup>

51. The SPO responds that Thaçi's submissions, which are made in the context of claiming that the violation of his rights warrants the Specialist Chambers setting aside the jurisdiction over him, "come nowhere close to the standard" of being exceptional cases of extremely serious human rights violations which would be the only reasons that could justify setting aside the jurisdiction.<sup>147</sup> Further, the SPO submits that Thaçi misrepresents the Impugned Decision, since the Pre-Trial Judge correctly identified and applied the relevant test for determining when a "charge" arises for the purposes of Article 6 of the ECHR.<sup>148</sup> The SPO also argues that the Pre-Trial Judge's conclusion that no "criminal charge" within the meaning of Article 6 of the ECHR arose at the time of publication of the Council of Europe Report was correct and reasonable, since it is not enough that an allegation is made or an action is taken by an entity other than a competent authority with powers of enforcement in respect of the charge.<sup>149</sup>

52. In reply, Thaçi submits that the "competent authority" notion has no basis in the ECtHR case law concerning the "substantially affected" criterion.<sup>150</sup> According to Thaçi, the SPO attempts to bolster the Pre-Trial Judge's decision, which, however, did not rely on the "competent authority" theory.<sup>151</sup>

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<sup>145</sup> Thaçi Appeal, paras 16-18. See also Thaçi Appeal, paras 23, 25; Thaçi Reply, para. 11.

<sup>146</sup> Thaçi Appeal, para. 20. See also Thaçi Appeal, paras 19, 25.

<sup>147</sup> Response to Thaçi Appeal, paras 14-15.

<sup>148</sup> Response to Thaçi Appeal, paras 47-48, 51. The SPO submits that the Pre-Trial Judge did not choose as a starting point a formal date of notification of charges or of intended prosecution. See Response to Thaçi Appeal, para. 51.

<sup>149</sup> Response to Thaçi Appeal, paras 49-50, 52.

<sup>150</sup> Thaçi Reply, para. 9.

<sup>151</sup> Thaçi Reply, para. 10.

(b) Assessment of the Court of Appeals Panel

53. The Panel notes that the Pre-Trial Judge held that the starting point of the period to be taken into consideration for the purpose of evaluating what constitutes “reasonable time” under Article 6(1) of the ECHR is when an individual is officially notified by the competent authority of an allegation that he or she has committed a criminal offence, or from the point at which his or her situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him.<sup>152</sup> The Panel also notes that while *Thaçi* does not disagree with this standard, he argues that he has been substantially affected since the publication of the Council of Europe Report on 7 January 2011 instead of 17 November 2019, the date on which a summons to appear for an interview with the SPO was served on him, which was chosen by the Pre-Trial Judge.<sup>153</sup>

54. The Panel, however, considers that the Pre-Trial Judge’s approach is consistent with the ECtHR case law, including the cases cited by *Thaçi*.<sup>154</sup> The ECtHR specifically held that:

[T]he “reasonable time” referred to in Article 6§1 begins to run as soon as a person is “charged”; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened. Furthermore, “charge”, for the purposes of Article 6 § 1, may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test

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<sup>152</sup> See Impugned Decision, para. 123, referring to *Ibrahim and others v. UK* Judgment, para. 249; ECtHR, *Liblik and Others v. Estonia*, nos 173/15, 181/15, 374/15, 383/15, 386/15 and 388/15, Judgment, 28 May 2019, para. 90.

<sup>153</sup> See *Thaçi Appeal*, para. 16, referring to Impugned Decision, para. 125. See also Impugned Decision, para. 126.

<sup>154</sup> See *Thaçi Appeal*, paras 13-14.



whether the situation of the suspect has been substantially affected.<sup>155</sup>

55. As examples of what the ECtHR has accepted as “substantially affected”, Thaçi himself mentions the date a suspect’s house and offices were searched or when a suspect was questioned by customs officers.<sup>156</sup> The Panel notes that the decision of the International Criminal Court to which Thaçi refers to support that international criminal courts endorsed an expansive interpretation of “reasonable time” is in fact a minority opinion that similarly refers to the right of an accused to be tried without

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<sup>155</sup> ECtHR, *Etcheveste and Bidart v. France*, nos 44797/98 and 44798/98, Judgment, 21 March 2002, para. 77; ECtHR, *Reinhardt and Slimane-Kaïd v. France*, nos 23043/93 and 22921/93, Judgment, 31 March 1998 (“*Reinhardt and Slimane-Kaïd v. France Judgment*”), para. 93; ECtHR, *Hozee v. the Netherlands*, no. 21961/93, Judgment, 22 May 1998, para. 43. See also ECtHR, *Farzaliyev v. Azerbaijan*, no. 29620/07, Judgment, 28 May 2020, paras 47-48 (where the ECtHR held that even though the applicant was never formally charged with a criminal offence, he became aware of the allegations made against him in discontinued criminal proceedings after a civil claim was lodged against him and considered that “in the particular circumstances” of the case, the combined effect of the authorities’ actions taken as a result of a suspicion against the applicant was that his situation was “substantially affected”); ECtHR, *Beuze v. Belgium*, no. 71409/10, Judgment, 9 November 2018, para. 119 (holding that the applicant was substantially affected by actions taken by the authorities as a result of a suspicion against him), referring to ECtHR, *Simeonovi v. Bulgaria*, no. 21980/04, Judgment, 12 May 2017, para. 110 (where the ECtHR listed as specific examples: a person arrested on suspicion of having committed a criminal offence, a suspect questioned about his involvement in acts constituting a criminal offence and a person who has been formally charged under a procedure set out in domestic law with a criminal offence) and *Ibrahim and others v. UK Judgment*, para. 249 (where the ECtHR found that one of the applicants was not substantially affected when invited to be interviewed as a witness, as at that stage the police did not suspect him of involvement in a criminal offence but became so, when during the interview he started incriminating himself, since then a suspicion that he had committed a criminal offence had crystallised, see *Ibrahim and others v. UK Judgment*, para. 296); ECtHR, *Kagasluoma v. Finland*, no. 48339/99, Judgment, 20 January 2004, para. 26 (considering that the applicant officially learned of the investigation at the time when he was interrogated by police for the first time); ECtHR, *Heaney and McGuinness v. Ireland*, no. 34720/97, Judgment, 21 December 2000, paras 10, 42 (the applicants were “substantially affected” and therefore “charged” on the day they were interviewed by the police); ECtHR, *Foti and others v. Italy*, nos 7604/76, 7719/76, 7781/77, 7913/77, Judgment, 10 December 1982, para. 53 (considering as the starting point a date after the initiation of proceedings against the applicants).

<sup>156</sup> See Thaçi Appeal, para. 14, referring to ECtHR, *Coeme and others v. Belgium*, nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment, 22 June 2000, para. 133; ECtHR, *Diamantides v. Greece*, no. 60821/00, Judgment, 23 October 2003, para. 21; *Reinhardt and Slimane-Kaïd v. France Judgment*, para. 93; ECtHR, *Bertin-Mourovot v. France*, no. 36343/97, Judgment, 2 August 2000, para. 53.

undue delay in “[a]ll stages of the case, from the time the suspect is informed that the authorities are taking steps towards prosecution”.<sup>157</sup>

56. In view of this, the Panel observes that while the acts recognised in ECtHR jurisprudence as the starting point for the purpose of “reasonable time” do not necessarily constitute a formal notification that the concerned individual would be prosecuted by a judicial authority, all of them constitute steps taken by authorities in relation to an investigation for a criminal offence for which the individual was suspected. These acts are, in the Panel’s view, not comparable to the publication of the Council of Europe Report. In this context, the Panel considers that it is of relevance that the Report acknowledges that it does not constitute a criminal investigation.<sup>158</sup> In addition, ECtHR case law refers to actions taken by police, the prosecution or the judiciary and, therefore, the Council of Europe is not the type of competent authority whose acts could be taken into consideration for the purpose of calculating “reasonable time”.<sup>159</sup> The fact that a report by an international organisation preceded the criminal investigation conducted by the SPO is a peculiarity of the type of crimes for which the Accused are now facing charges, which are of interest for the

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<sup>157</sup> See *Thaçi Appeal*, para. 15, referring to ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-AnxI, Judgment pursuant to article 74 of the Statute, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014 (“Opinion in Katanga Judgment”), para. 121 (emphasis added). See also Schabas, W., and McDermott, Y., “Article 67”, in Ambos, K. (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, C.H.Beck, Hart, Nomos 2022 (Fourth Edition), p. 1981, marginal numbers 25-26 (stating that “[c]ase law and academic comment on the provision of the International Covenant on Civil and Political Rights [which is identical to Article 67(1)(c) of the ICC Statute providing that an accused shall be entitled to be tried without undue delay] have considered that the time limit begins to run at the moment the suspect or the accused is informed that the authorities are taking steps towards prosecution”). Notably, in the Opinion in Katanga Judgment, Judge Van den Wyngaert expressly states that “reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case [including] in particular the complexity of the case”. See Impugned Decision, paras 128-129.

<sup>158</sup> See Impugned Decision, para. 125. See also Council of Europe Report, paras 21, 175; Kosovo Constitutional Court Judgment, para. 51 (where the Kosovo Constitutional Court held that the Council of Europe Report outlines a number of highly specific criminal allegations and recommends them for investigation and prosecution); Appeal Decision on Jurisdiction, paras 69-70. The use of the term “revelations” refers to the information provided by the former ICTY Chief Prosecutor, Carla del Ponte, not to the information contained in the Council of Europe Report (contra *Thaçi Appeal*, para. 22).

<sup>159</sup> See above, fns 155-156. See also Impugned Decision, para. 123.

international community as a whole and, as such, invoked action by the Council of Europe.<sup>160</sup> If Thaçi's view were to be accepted, the starting point of calculating the "reasonable time" criterion would be considerably premature, since it is quite common in the international criminal justice context that different kinds of official or private reports are prepared referring to individuals allegedly involved in international crimes.

57. Consequently, the Panel considers that the Pre-Trial Judge's finding that the date on which a summons to appear for an interview with the SPO, as a result of a suspicion against him, was served on Thaçi is the date on which Thaçi was "substantially affected"<sup>161</sup> is in full conformity with the ECtHR case law, as this date represents the first contact of competent authorities in relation to a criminal investigation which would specifically involve the Accused. The Panel notes in this regard that this was well before the Accused's arrests, which occurred on 5 November 2020, and, as such, well before the Accused received a formal notification that they would be prosecuted.

58. In light of the above, the Panel finds that Thaçi has failed to demonstrate that the Pre-Trial Judge erred by finding that the relevant period to be tried within a reasonable time began on 17 November 2019. The Court of Appeals Panel, accordingly, dismisses the Seventh Thaçi Issue.

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<sup>160</sup> Council of Europe, Parliamentary Assembly, Resolution 1782 (2011), Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo, 25 January 2011, para. 14.

<sup>161</sup> See Impugned Decision, para. 126.

**4. Whether the Pre-Trial Judge erred in finding that the inclusion of the Council of Europe Report among the “Foundational Documents” of the Specialist Chambers did not violate Thaçi’s presumption of innocence (Eighth Thaçi Issue)**

(a) Submissions of the Parties

59. Thaçi argues that the Pre-Trial Judge erred in finding that the inclusion of the Council of Europe Report in the “Foundational Documents” of the Specialist Chambers has no impact on Thaçi’s presumption of innocence.<sup>162</sup> According to Thaçi, while reports of the United Nations (“UN”) have triggered the impetus for the creation of criminal courts, none of them are “anywhere near the inflammatory and conclusatory language and public condemnation of individuals”, including Thaçi, as the Council of Europe Report, which has been endorsed by the Specialist Chambers through its publication on their website.<sup>163</sup> Thaçi also argues that the Pre-Trial Judge’s finding that the Council of Europe Report has not been used to underpin any criminal charges is incorrect and Thaçi cannot verify the full extent of this error.<sup>164</sup> Thaçi, finally, submits that with the Council of Europe Report being among the “Foundational Documents” of the Specialist Chambers and an “accompanying and coordinated media campaign”, he faces concrete obstacles in the preparation of his defence.<sup>165</sup>

60. The SPO responds that Thaçi’s submissions, which are made in the context of claiming that the violation of his rights warrants the Specialist Chambers setting aside the jurisdiction over him, “come nowhere close to the standard” of being exceptional cases of extremely serious human rights violations which would be the only reasons that could justify setting aside the jurisdiction.<sup>166</sup> Further, the SPO submits that Thaçi

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<sup>162</sup> Thaçi Appeal, paras 27, 32.

<sup>163</sup> Thaçi Appeal, paras 27-28. See also Thaçi Appeal, para. 26.

<sup>164</sup> Thaçi Appeal, para. 29. See also Thaçi Reply, para. 13. Thaçi also submits that if the Council of Europe Report has not been used to underpin any charges, then it should be published with a caveat that the allegations therein are unfounded. See Thaçi Appeal, para. 30; Thaçi Reply, para. 14.

<sup>165</sup> Thaçi Appeal, para. 31. See also Thaçi Reply, paras 14-16.

<sup>166</sup> Response to Thaçi Appeal, paras 14-15.

seeks to circumvent Rule 77 of the Rules, as certification was granted only in relation to the impact of the inclusion of the Council of Europe Report among the “Foundational Documents” of the Specialist Chambers and does not cover any challenges regarding the nature of the report or its impact on the Accused’s presumption of innocence.<sup>167</sup> According to the SPO, Thaçi repeatedly focuses on circumstances independent of the Specialist Chambers and, as such, outside the scope of the certified issue.<sup>168</sup>

61. Moreover, the SPO argues that Thaçi attempts to portray any reference to the report as improper endorsement of criminal allegations, while its placement on the website reflects nothing more than that it is a document forming part of the legal framework governing the jurisdiction of the Specialist Chambers.<sup>169</sup> Finally, the SPO argues that there is nothing inappropriate or prejudicial about referring to or making available on the website the report and that Thaçi’s only submission about prejudice is “patently unconnected” to any act of the Specialist Chambers or the SPO.<sup>170</sup>

62. Thaçi replies that the elevation of the Council of Europe Report to a “Foundational Document” is a legal classification that cannot be found in the Constitution, the Law or the Rules.<sup>171</sup> The “blanket reliance” on the report’s allegations and its continued elevation by the institution undermines, according to Thaçi, his presumption of innocence.<sup>172</sup>

(b) Assessment of the Court of Appeals Panel

63. At the outset, the Panel notes that the Pre-Trial Judge found that part of the originally formulated issue for which certification was requested was not appealable

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<sup>167</sup> Response to Thaçi Appeal, paras 55-56.

<sup>168</sup> Response to Thaçi Appeal, para. 57.

<sup>169</sup> Response to Thaçi Appeal, paras 58-59.

<sup>170</sup> Response to Thaçi Appeal, paras 60-61.

<sup>171</sup> Thaçi Reply, para. 15.

<sup>172</sup> Thaçi Reply, para. 16.

because it misrepresented the Impugned Decision.<sup>173</sup> The Panel, consequently, considers that Thaçi's arguments that (i) the Council of Europe Report has been endorsed by the Specialist Chambers through its publication on their website<sup>174</sup> and is continuously elevated,<sup>175</sup> and (ii) the Pre-Trial Judge's finding that the Council of Europe Report has not been used to underpin any criminal charges is incorrect and Thaçi cannot verify the full extent of this error,<sup>176</sup> concern issues that fall outside the scope of the reformulated certified issue. Accordingly, the Panel will not consider these arguments.

64. Turning to the merits, the Panel notes that the Council of Europe Report is listed on the Specialist Chambers internet appearance among the Specialist Chambers' "Foundational Documents" along with the Exchange of Letters, the constitutional amendment of Article 162 of the Constitution, and the host agreement, as well as its interim version, between the Netherlands and Kosovo.<sup>177</sup> The Panel notes that the structure and organisation on a website simply serves an easy orientation for users visiting it. It is obvious that nothing follows in legal terms from such a practical organisation.

65. Moreover, the Panel observes that all of the documents listed as "Foundational Documents" concern the mandate and establishment of the Specialist Chambers. The Panel notes, in this regard, that the Specialist Chambers were explicitly established in order for Kosovo to comply with its international obligations in relation to allegations reported in the Council of Europe Report and that it is referred to in Article 162 of the

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<sup>173</sup> Certification Decision, para. 57, referring to Impugned Decision, para. 141. The issue for which Thaçi requested certification was: "Whether the Pre-Trial Judge erred in assessing the violation Mr Thaçi's presumption of innocence with respect to the [Council of Europe] Report itself, thereby failing to engage with the Defence submissions that the violation stems from the [Specialist Chambers] defining itself with respect to a report which condemns the accused, and the benediction of the report by the [Specialist Chambers] and SPO". See Certification Decision, para. 6(8).

<sup>174</sup> Thaçi Appeal, para. 28.

<sup>175</sup> Thaçi Reply, para. 16.

<sup>176</sup> Thaçi Appeal, paras 29-30; Thaçi Reply, para. 13.

<sup>177</sup> See <<https://www.scp-ks.org/en/documents/foundational-documents>> accessed on 19 May 2022.



Constitution and in Articles 1(2) and 2 of the Law.<sup>178</sup> Nevertheless, the Council of Europe Report is not a legal document or a document that in any way defines the substantive law applicable to the Specialist Chambers.<sup>179</sup>

66. Moreover, the ECtHR held that a fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question.<sup>180</sup> The Panel notes, in this regard, that the Council of Europe Report clarifies that the information provided therein constitutes mere allegations<sup>181</sup> and that the SITF and the SPO have conducted independent investigations into allegations of crimes related to the Council of Europe Report.<sup>182</sup>

67. As the Pre-Trial Judge noted, the presumption of innocence would be violated if a statement of a public official concerning a person charged with a criminal offence reflects the opinion that he or she is guilty before he or she has been proved so according to law, whether this statement is made in a criminal trial or other public setting.<sup>183</sup> The Panel additionally notes that the ECtHR held that Article 6(2) of the ECHR is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with the criminal proceedings, so that where no

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<sup>178</sup> Article 162(1) of the Constitution; Articles 1(2), 2, 5 of the Law. See also Article 6(1) of the Law (providing that the Specialist Chambers shall have jurisdiction over crimes within its subject-matter jurisdiction which relate to the Council of Europe Assembly Report). The Exchange of Letters incorporated Kosovo's international obligations stemming from the Council of Europe. See Kosovo Constitutional Court Judgment, para. 51. See also Kosovo Constitutional Court Judgment, paras 37-39; Appeal Decision on Jurisdiction, para. 68.

<sup>179</sup> See Article 3(2)-(4) of the Law (regarding the sources of applicable law).

<sup>180</sup> ECtHR, *Ismoilov and others v. Russia*, no. 2947/06, Judgment, 24 April 2008 ("*Ismoilov and others v. Russia* Judgment"), para. 166; ECtHR, *Nešťák v. Slovakia*, no. 65559/01, Judgment, 27 February 2007, para. 89.

<sup>181</sup> Council of Europe Report, paras 1, 16, 174-175.

<sup>182</sup> See Impugned Decision, para. 140.

<sup>183</sup> Impugned Decision, para. 136, referring to ECtHR, *Allen v. the United Kingdom*, no. 25424/09, Judgment, 12 July 2013 ("*Allen v. the United Kingdom* Judgment"), para. 93; ECtHR, *Daktaras v. Lithuania*, no. 42095/98, Judgment, 10 October 2000, para. 41; ECtHR, *Alenet de Ribemont v. France*, no. 15175/89, Judgment, 10 February 1995, para. 36; ECtHR, *Kemal Coşkun v. Turkey*, no. 45028/07, Judgment, 28 March 2017, para. 42.

criminal proceedings are or have been in existence, statements attributing criminal or other reprehensible conduct are not relevant to considerations related to the presumption of innocence.<sup>184</sup> The Panel notes that at the time the Council of Europe Report was issued, there were no criminal investigations.<sup>185</sup>

68. Further, as the Pre-Trial Judge noted, fact-finding missions and investigations are consistently being used to respond to situations of alleged serious violations of international humanitarian law and international human rights law.<sup>186</sup> The Panel notes that such reports have on certain occasions also referred to specific actors.<sup>187</sup> In any event, the Panel considers that the approach to not refer publicly to alleged perpetrators in reports prepared by UN fact-finding missions is linked to the different nature and aim of these reports. While the Council of Europe Report was the political impetus for the establishment of the Specialist Chambers,<sup>188</sup> these reports are generally meant to collect, consolidate, preserve and analyse evidence of international crimes in order to facilitate and expedite criminal proceedings.<sup>189</sup>

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<sup>184</sup> *Ismoilov and Others v. Russia* Judgment, para. 160, referring to ECtHR, *Zollmann v. the United Kingdom*, no. 62902/00, Decision, 27 November 2003; ECtHR, *Larrañaga Arando and others v. Spain*, no. 73911/16, Decision, 25 June 2019, para. 40. See also ECtHR, *Cleve v. Germany*, no. 48144/09, Judgment, 15 January 2015, paras 32-33 (“[the presumption of innocence is] a procedural guarantee in the context of a criminal trial itself”); *Allen v. the United Kingdom* Judgment, para. 104:

[W]henever the question of the applicability of Article 6 § 2 [of the ECHR] arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link [...] between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant’s participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant’s possible guilt.

See also Impugned Decision, para. 137.

<sup>185</sup> See above fn. 158. See also Impugned Decision, para. 139.

<sup>186</sup> Impugned Decision, fn. 288.

<sup>187</sup> See e.g. UN Office of the High Commissioner for Human Rights, Report of the Fact-Finding Mission on Syria pursuant to Human Rights Council resolution S-16/1, August 2011, para. 32. See also Thaçi Appeal, fn. 40.

<sup>188</sup> See Impugned Decision, para. 141.

<sup>189</sup> See e.g. UNHRC, Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela, A/HRC/48/69, 16 September 2021, paras 13, 108-116, 118-120; UNHRC, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the

69. Regarding Thaçi's argument that he faces obstacles in the preparation of his defence which are also linked to what he characterises as an "accompanying and coordinated media campaign",<sup>190</sup> the Panel notes that these are outside the control of the Specialist Chambers or the SPO. Unless statements made by the media are a verbatim reproduction of official information provided by public authorities, there is no issue under Article 6(2) of ECHR.<sup>191</sup> In addition, the Panel notes that the ECtHR has acknowledged that in a democratic society, severe comments by the press are sometimes inevitable in cases concerning public interest.<sup>192</sup>

70. In light of the above, the Panel finds that Thaçi has failed to demonstrate that the Pre-Trial Judge erred in finding that the inclusion of the Council of Europe Report among the "Foundational Documents" of the Specialist Chambers did not violate Thaçi's presumption of innocence. The Court of Appeals Panel, accordingly, dismisses the Eighth Thaçi Issue.

#### V. VESELI'S REQUEST FOR REFERRAL TO THE SPECIALIST CHAMBER OF THE CONSTITUTIONAL COURT

71. Veseli seeks, as an alternative relief, that the Veseli Issue be referred to the SCCC.<sup>193</sup> The SPO responds that Veseli does not have standing for such request, since it is in "clear violation" of Rule 75(5) of the Rules, and raises nothing that calls the constitutionality of the Law into doubt.<sup>194</sup> The Panel notes that the issue at stake is whether the Law insofar as it concerns the Specialist Chambers' substantive legal

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High Commissioner and the Secretary-General: Situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/HRC/RES/39/2, 25 September 2018, para. 22; UNHRC, Detailed findings of the commission of inquiry on human rights in Eritrea, A/HRC/32/CRP.1, 8 June 2016, paras 332-333; UNHRC, Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/19/69, 22 February 2012, para. 87.

<sup>190</sup> See Thaçi Appeal, para. 31. See also Thaçi Reply, para. 14.

<sup>191</sup> ECtHR, *Mityanin and Leonov v. Russia*, nos 11436/06 and 22912/06, Judgment, 7 May 2019, para. 102.

<sup>192</sup> ECtHR, *Burzo v. Romania*, nos 75109/01 and 12639/02, Judgment, 30 June 2009, para. 160; ECtHR, *Akay v. Turkey*, no. 34501/97, Decision, 19 February 2002, para. 2.

<sup>193</sup> Veseli Appeal, paras 5, 51(b). See above, para. 11(e).

<sup>194</sup> Response to Veseli Appeal, paras 42, 44.

regime gives rise to inequality in violation of the Constitution.<sup>195</sup> In accordance with Article 49(4) of the Law, a panel may refer questions of constitutionality of a law to the SCCC if, *inter alia*, it is uncertain with respect to the compatibility of the contested law with the Constitution. As demonstrated by the analysis above, this is not the case here. In light of this, the Panel dismisses Veseli's request to refer the Veseli Issue to the SCCC.

## VI. DISPOSITION

72. For these reasons, the Court of Appeals Panel:

**DENIES** the Appeals.



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**Judge Michèle Picard,  
Presiding Judge**

Dated this Friday, 20 May 2022

At The Hague, the Netherlands

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<sup>195</sup> See Certification Decision, paras 7, 66, 68(a),(d). See also Veseli Appeal, para. 2.