

In: KSC-CC-2020-11

Before: The Specialist Chamber of the Constitutional Court
Judge Vidar Stensland, Presiding
Judge Antonio Balsamo
Judge Roumen Nenkov

Registrar: Dr Fidelma Donlon

Filing Participant: Ombudsperson, Kosovo Specialist Chambers

Date: 16 October 2020

Language: English

File name: Referral on proposed amendments to the Constitution of Kosovo

Classification: Public

Ombudsperson's Submissions on Referral

Ombudsperson's Office

Pietro Spera

1. BACKGROUND TO THE SUBMISSION

1. On 24 August 2020, the President of Kosovo proposed an amendment to Article 162 of the Constitution of the Republic of Kosovo (“the Constitution”).¹
2. On 18 September 2020, the President of the Assembly of Kosovo conveyed a proposed amendment to the Constitution (‘Proposed Amendment’) to the President of the Specialist Chambers, requesting its referral to the Specialist Chambers of the Constitutional Court (‘SCCC’)².
3. On 22 September 2020, the Referral was assigned to the above Panel of the SCCC (‘Panel’)³.
4. On 5 October 2020, the Panel, *inter alia*, issued a Decision on Notification of the Referral and invited certain interested authorities to make written submissions, should they wish to do so, on the admissibility and/or merits of the Referral by 19 October 2020⁴.
5. In the Decision on Notification, the Panel noted that the Ombudsperson of the Kosovo Specialist Chambers has exclusive responsibility for the Specialist Chambers and Specialist Prosecutor’s Office. In addition, the Panel referred to Rule 28(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers which provides that the Ombudsperson shall defend and protect the fundamental rights and freedoms enshrined in Chapter II of the Constitution of persons interacting with the Specialist Chambers and the Specialist Prosecutor’s Office.
6. In light of that competence of the Ombudsperson, the Panel found it appropriate to notify the Ombudsperson of the Referral with a possibility for the Ombudsperson to file written submissions, should he wish to do so, on the admissibility and/or merits of the Referral.

2. SUBMISSIONS ON ADMISSIBILITY

A. INTERNATIONAL OBLIGATIONS

¹ KSC-CC-2020-11,F00001, A1 Proposal for Amendment to the Constitution (filed on the record on 21 September 2020)

² KSC-CC-2020-11,F00001, Letter from the President of the Assembly of Kosovo, public, 18 September, with Annex A01 filed on the record on 21 September 2020

³ KSC-CC-2020-11, F00002, Decision assigning a Constitutional Court Panel, public, 22 September, 2020.

⁴ KSC-CC-2020-11, F00004, Decision on Notification of the Referral for Information, public, 05 October 2020.

7. Kosovo's obligations arising from its international agreements with the EU are set forth in detail below.

-2014 Exchange of Letters and Council Joint Action 2008/124/CFSP

8. The Kosovo Specialist Chambers / Specialist Prosecutor's Office were established pursuant to the 2014 Exchange of Letters, an international agreement between Kosovo and the EU dated 14 April 2014 and ratified by the Assembly on 23 April 2014. In the 2014 Exchange of Letters, Kosovo committed to providing "an environment conducive to the proper administration of justice" for independent judicial proceedings that arise out of the work of the Special Investigative Task Force ('SITF')⁵.
9. The SITF has its origins in Council Joint Action 2008/124/CFSP of 4 February 2008 ('Joint Action'), as amended.
10. The independent SITF was formally established in 2011 in order to investigate allegations of "grave trans-boundary and international crimes committed during and in the aftermath of the conflict of Kosovo" that were related to those described in the 2011 Council of Europe Report. In 2012, Kosovo and the EU concluded an international agreement on the extension of the EULEX Kosovo mandate, and Kosovo confirmed its support for the Joint Action and the work of the SITF⁶.
11. In the 2014 Exchange of Letters, Kosovo again confirmed its support for the Joint Action and the work of the SITF, but went one step further. Kosovo agreed that "[i]f the SITF investigation culminates in an indictment and trial proceedings, an environment conducive to the proper administration of justice should be provided".⁷

⁵2014 Exchange of Letters, pp 8-9. The 2014 Exchange of Letters was based on several constitutional provisions, namely Article 17(1) [International Agreements], Article 18(1) [Ratification of International Agreements], Article 20 [Delegation of Sovereignty] of the Constitution. The 2014 Exchange of Letters was ratified pursuant to Article 65 [Competencies of the Assembly] of the Constitution.

⁶ 2012 Exchange of Letters, p. 3-4. [This international agreement was ratified by the Assembly on 7 September 2012 pursuant to Law No. 04/L-148 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Rule of Law Mission ('2012 Exchange of Letters').]

⁷ 2014 Exchange of Letters, pp 7-8. [In Council Decision 2014/685/CFSP, the EU Council amended the Joint Action to provide for proceedings arising out of the work of the SITF pursuant to the 2014 Exchange of Letters. Accordingly, the Joint Action specifies that "EULEX KOSOVO shall support re-located judicial proceedings within a Member State, in order to prosecute and adjudicate criminal charges arising from the investigation into the allegations" raised in the Council of Europe Report.] [The 2018 and 2020 Exchanges

12. Due to “the nature of the allegations”, Kosovo and the EU agreed that “sensitive proceedings” arising from the SITF investigation, “including hearing of witnesses, would take place outside of [Kosovo]” and that “filings and sensitive records would be introduced and maintained exclusively outside [of Kosovo]”⁸. To allow such proceedings to operate, the EU and Kosovo agreed that Kosovo would set up “dedicated separate judicial chambers” for the purpose of conducting criminal proceedings “that arise out of the SITF’s work”⁹. Kosovo further agreed that this “specialist court”, as well as “a specialist prosecutor’s office” in connection with SITF, would be “relocated to a third State” outside of Kosovo and staffed and operated by “international staff only”¹⁰.
13. This separate specialist court and its structures, which “would include all levels of the court system, including the Constitutional Court”, would “be governed by their own statute and rules of procedure and evidence, including provisions on the limitations of the issuance of pardons, detention on remand and the service abroad of sentences of imprisonment” should there be convictions¹¹.
14. Notably, the 2014 Exchange of Letters also explicitly confirmed Kosovo’s commitment that “the work of and the mandate delegated in order to operate the aforementioned judicial chambers and specialist prosecutor’s office [...] shall continue until such time as Kosovo is notified by the [EU Council] that the investigations have been concluded and that any proceedings by the judicial chambers resulting therefrom have been concluded”. This provision is a repetition of Kosovo’s commitment in 2012 that the work of the SITF “shall continue until such time as Kosovo is notified by the [EU Council] that investigations have been concluded or any proceedings resulting there from have been concluded”¹².

of Letters emphasise the support functions of EULEX Kosovo to the SC/SPO.] [The special character of the activities of EULEX Kosovo in support of the relocated proceedings is endorsed by various EU Council Decisions amending the Joint Action]

⁸ 2014 Exchange of Letters, p. 9

⁹ 2014 Exchange of Letters, p. 9

¹⁰ 2014 Exchange of Letters, p. 9.

¹¹ 2014 Exchange of Letters, p. 9.

¹² The 2018 and 2020 Exchange of Letters between Kosovo and the EU reiterates this commitment in the 2012 and 2014 Exchange of Letters.

15. In order to achieve its above commitments, Kosovo agreed to negotiate and ratify “a Host State Agreement” for the purpose of relocating proceedings outside of Kosovo to a third State¹³. Kosovo further agreed to delegate “all necessary powers and mandates to operate the separate judicial chambers and specialist prosecutor’s office in Kosovo and in the Host State”¹⁴. In this respect, the 2014 Exchange of Letters refers to Articles 18 and 20(1) of the Constitution, which provide that Kosovo may delegate state powers for specific matters to international organizations on the basis of ratified international agreements¹⁵.
16. With the adoption of Article 162 [The Specialist Chambers and the Specialist Prosecutor’s Office] of the Constitution on 15 April 2015 and the Law on the Kosovo Specialist Chambers and the Specialist Prosecutor’s Office on 3 August 2015, the Kosovo Specialist Chambers and the Specialist Prosecutor’s Office were established with full legal and juridical personality, which set them apart from EULEX Kosovo. Prior to its adoption, the Constitutional Court of Kosovo assessed Article 162 of the Constitution (that is, Amendment no. 24 adopting the new Article 162) and found it constitutional¹⁶.
17. Article 19(2) of the Constitution gives ratified international agreements superiority over all other Kosovo laws: “Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo”.
18. The Kosovo Constitutional Court, in *dicta*, has elaborated on the relationship between international treaties and the domestic legal order. The Kosovo Constitutional Court stated: “Following ratification by the Assembly, an international agreement becomes binding on the state in its relations with other states, and such agreements become part of the internal legal system” (para. 52)¹⁷.

II. Consultations as required by the Exchange of Letters 2014

¹³ 2014 Exchange of Letters, p. 9.

¹⁴ 2014 Exchange of Letters, p. 9.

¹⁵ 2014 Exchange of Letters, p. 9.

¹⁶ [See Kosovo Constitutional Court, Judgment, Case No. KO26-15 (15 Apr. 2015)].

¹⁷ See Kosovo Constitutional Court, Judgment, Case No. KO 95/13 (9 Sept. 2013), available at https://gjk-ks.org/wp-content/uploads/vendimet/gjkk_ko_95_13_ang.pdf

19. In the 2014 Exchange of Letters, Kosovo expressly committed in writing to consulting the EU on any proposed amendments that could have an impact on judicial proceedings stemming from the SITF investigations.
20. The 2014 Exchange of Letters states: “[w]e will undertake, in accordance with the Constitution and applicable Kosovo law, with the EULEX Head of Mission and/or the EUSR (as applicable) any supplementary commitments and modalities necessary to facilitate the effective functioning of EULEX, **including consultations in the process of amending laws having an impact on the discharge of EULEX mandate as well as for the judicial proceedings arising from the SITF investigation**, and the EUSR in implementing their mandate (emphasis added). [...]”.¹⁸

B. CONCLUSIONS

21. Noting that the proposed amendment relates directly to Article 162 of the Constitution and mindful of the fact that the Kosovo Constitution is the highest law in Kosovo, the Ombudsperson is of the view that consultations on the proposed amendment are mandatory. The consultation process is expressly set out in the 2014 Exchange of Letters.
22. The Ombudsperson is of the opinion that only once consultations with the EU have taken place can the proposed amendment be submitted to the President of the Assembly for the next step, namely referring the proposed constitutional amendment to the Constitutional Court as Article 113(9) of the Constitution dictates.
23. Given the fact that there is no evidence provided in the Referral which would demonstrate or indeed even indicate that The President of Kosovo complied with his mandatory obligation to consult the EU or the EULEX Head of Mission and/or the EU Special Representative in advance of submitting his proposal to the Assembly whereby he seeks to amend Article 162(13) and (14) of the Constitution to delete reference to the 2014 Exchange of Letters, the Ombudsperson can only conclude that he violated the first obligatory step of the procedure.

¹⁸ 2014 Exchange of Letters, Page 4.

24. The Ombudsperson further takes the view that the relevant paragraph of the Exchange of Letters (set out above at para. 20) should be interpreted in accordance with its ordinary meaning taking account of the object and purpose of the entire 2014 Exchange of Letters. Specifically, in the context of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office [the institutions subsequently created to manage the judicial proceedings arising from the SITF investigation referenced in the 2014 Exchange of Letters], the paragraphs directly preceding this paragraph set out the agreed principles regarding the future key elements of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office and the last paragraph of the Exchange of Letters, which provides for the completion of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office mandate by the EU Council's unilateral notification, which are now enshrined in Art. 162 of the Constitution and the Law.
25. To fulfil this objective Kosovo committed to consult on any changes/amendments to laws that enshrine those obligations before a formal legal process to amend is initiated. In addition, a good faith interpretation of the Exchange of Letters, as required by the Vienna Convention, would require that the consultation on the amendment happens before the formal national legal process commences¹⁹.
26. The Ombudsperson notes that, respecting this principle previously, the consultation/negotiation with the EU in 2015 on the amendment of the Constitution, to include the proposed new Article 162 regulating the Kosovo Specialist Chambers and the Specialist Prosecutor's Office, and the proposed Law on the Kosovo Specialist Chambers and the Specialist Prosecutor's Office commenced in January 2015, well before the constitutional amendment to include the proposed Article 162 was submitted to the President of the Assembly for referral to the Constitutional Court as foreseen by the 2014 Exchange of Letters.
27. Therefore, the Ombudsperson concludes that the Referral is fundamentally flawed and is inadmissible based on the procedural deficiencies outlined above and the failure of the

¹⁹ Article 26 Vienna Convention 1969. See also Third Preamble to the Vienna Convention on the Law of Treaties (1969), the *pacta sunt servanda* rule. Further discussed at paras. 40 and 41 below.

President to comply with his mandatory obligations to consult as set out in the 2014 Exchange of Letters.

3. SUBMISSIONS ON THE MERITS OF THE REFERRAL

28. At the outset, the Ombudsperson notes that the President of Kosovo has not provided any rationale for the proposed amendment and that no explanatory memorandum accompanied the Referral. The submissions of the Ombudsperson are formulated accordingly.
29. The Specialist Chambers and the Specialist Prosecutor's Office were established pursuant to Law. No. 04/L-274, the 2014 Exchange of Letters, an international agreement between Kosovo and the EU. Article 162 (13) and (14) of the Constitution explicitly refer to Law. No. 04/L-274. Article 162 (14) provides that '...the mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall continue until notification of completion is made in accordance with Law. No. 04/L-274 and in consultation with the Government.'
30. The President of Kosovo has proposed the deletion of Article 162 subsections (13) and (14) of the Constitution. The proposed amendment inserts a new subsection (13) and the deletion of subsection (14) in its entirety.
31. The proposed amendment deletes the essential reference to Law. No. 04/L-274 - the 2014 Exchange of Letters and thus removes this vital international agreement and the international obligations enshrined in it from the Kosovo Constitution.
32. In 2015, in order to fulfil the international obligations stemming from the 2014 Exchange of Letters, the Kosovo Assembly adopted Article 162 of the Constitution and the Law on Specialist Chambers and the Specialist Prosecutor's Office.
33. Prior to its adoption, the Constitutional Court of Kosovo assessed the constitutionality of Amendment no. 24, pursuant to Article 113(9) of the Constitution. In finding Amendment no. 24 constitutional, the Court made a number of significant pronouncements.
34. First, the Court recalled that Amendment no. 24 "derives from" the 2014 Exchange of Letters in that Amendment no. 24 explicitly states that the establishment of the KSC/SPO is a "requirement" for Kosovo to comply with its international obligations in relation to

the Council of Europe Report²⁰ . Second, the Court noted that Article 103(7) of the Constitution “foresees a constitutional right of the Republic of Kosovo to establish specialized courts”, which “may be established by law when necessary”²¹. Third, the Court stated that the international obligations enshrined in the 2014 Exchange of Letters and stemming from the Council of Europe Report “were incorporated into the legal framework” of Kosovo upon ratification²² . Therefore, the Court concluded, the establishment of the KSC/SPO was “necessary” within the meaning of Article 103(7) of the Constitution in order for Kosovo “to comply with its international obligations”²³ .

35. The proposed deletion by the President of Kosovo of the reference to the 2014 Exchange of Letters from the Constitution is troubling. As “the highest legal act” of Kosovo, the Constitution has supremacy pursuant to Article 16(1) of the Constitution. Consistent with the 2014 Exchange of Letters, the Constitution makes explicit provision for the Specialist Chambers and the Specialist Prosecutor’s Office and should not be deleted from it.
36. In the absence of any rationale being provided for the proposed amendment, the Ombudsperson will not speculate as to the purpose and scheme of the proposed amendment by the President. However, as previously stated, the proposed amendment deletes from Article 162 any reference to Law. No. 04/L 274, the 2014 Exchange of Letters and thus the removal of this vital international agreement and the international obligations contained in it from the Constitution.
37. In this regard, the Ombudsperson recalls the Third Preamble to the Vienna Convention on the Law of Treaties (1969) (‘VCLT’) which states that ‘the principle of good faith and the *pacta sunt servanda* rule are universally recognised’. The rule is stated in the one sentence of Art. 26, entitled *pacta sunt servanda*: ‘Every treaty in force is binding upon the parties to it and must be performed in good faith’.

²⁰ KCC, Case No. K026-15, paras 37-39

²¹ KCC, Case No. K026-15, para. 42

²² KCC, Case No. K026-15, para. 51

²³ KCC, Case No. K026-15, para. 65

38. The International Court of Justice (ICJ) has held that the principle of good faith is a legal principle which forms an integral part of the *pacta sunt servanda* rule.²⁴
39. The Ombudsperson is of the view that, to properly understand the current situation, the proposed amendment must be considered taking full account of the intent of the drafters of the 2014 Exchange of Letters, Article 162 of the Constitution, the Law on the Kosovo Specialist Chambers and the Specialist Prosecutor's Office and the intensified investigations of the Specialist Prosecutor's Office over the last 2 years.
40. The 2014 Exchange of Letters international obligations are central to the effective functioning of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office, the proper administration of justice and the protection of the fundamental rights and freedoms of all those participating in the proceedings.
41. Critically, the 2014 Exchange of Letters international obligations include as follows:
- a. Kosovo's commitment to create "an environment conducive to the proper administration of justice" for independent proceedings.
 - b. To allow such proceedings to operate, the EU and Kosovo agreed on the establishment and operation of separate "dedicated judicial chambers and specialist prosecutor's office" relocated to a third State and staffed by "international staff only", for the purpose of investigating, prosecuting, and adjudicating the crimes arising from the Council of Europe Report and the Special Investigative Task Force ('SITF') investigation.
 - c. Those dedicated separate judicial chambers "would include all levels of the court system, including the Constitutional Court", which would "be governed by their own statute and rules of procedure and evidence, including provisions on the limitations on the issuance of pardons, detention on remand and the service abroad of sentences of imprisonment" should there be convictions. Notably, the EU and Kosovo agreed that "sensitive proceedings, including hearing of witnesses, would take place outside of [Kosovo] and "filings and

²⁴ Case concerning the Gabčíkovo-Nagymaros Project [Hungary v Slovakia], paras 114, 142

sensitive records would be introduced and maintained exclusively outside [of Kosovo]”.

- d. To achieve the above ends, the 2014 Exchange of Letters stated that “all necessary powers and mandates to operate the separate judicial chambers and specialist prosecutor’s office in Kosovo and in the Host State will be delegated”.
- e. The Exchange of Letters also explicitly confirmed Kosovo’s commitment that “the work of and the mandate delegated in order to operate the aforementioned judicial chambers and specialist prosecutor’s office [...] shall continue until such time as Kosovo is notified by the Council of the European Union that the investigations have been concluded and that any proceedings by the judicial chambers resulting therefrom have been concluded”²⁵.

42. It is reasonable to interpret that the intent of Article 162 (13) and (14) and the drafters of it, is to prevent exactly the situation the Specialist Chambers and the Specialist Prosecutor’s Office is now confronted with. Its purpose is to protect the fundamental rights of those participating in the proceedings and the joint commitments with Kosovo as set out in the Exchange of Letters.

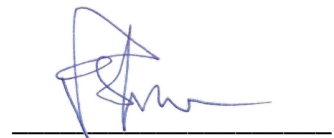
43. Critically, it provides that if the SITF investigation culminates in an indictment and trial proceedings, an environment conducive to the proper administration of justice should be provided and amendments to laws designed to frustrate this obligation prevented by ensuring prior consultation with the EU.

44. In this regard, the Ombudsperson is particularly cognisant of the fact that the Kosovo Specialist Chambers is a fully functioning Court in which a number of proceedings are ongoing. The protection of the fundamental rights and freedoms of all those involved in these proceedings, including accused persons, victims and witnesses will only be guaranteed if the international obligations as set out in the 2014 Exchange of Letters are fully upheld and respected.

²⁵ The 2018 and 2020 Exchanges of Letters between Kosovo and the EU reiterates this commitment in the 2012 and 2014 Exchanges of Letters

45. The Ombudsperson is of the opinion that this proposed amendment and action, if successful, would weaken the position of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office. If successful, it will serve as a precedent that Kosovo may amend Art. 162 and the Law on the Kosovo Specialist Chambers and the Specialist Prosecutor's Office as they wish. And this result, in particular when considering that the EU is the sole funder of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office, is clearly not in line with the spirit of the 2014 Exchange of Letters and may result in the dismantling of the institutions that have been successfully established since 2014 as well as the work completed and ongoing by the institutions.
46. As noted by the former President of the Constitutional Court of Kosovo, the 2014 Exchange of Letters "constituted a political treaty and a transfer of sovereignty" under Articles 18 and 20 of the Constitution²⁶.
47. In view of the above, and taking account of the common commitment and endeavour between the EU and Kosovo as set out in the 2014 Exchange of Letters, the Ombudsperson can see no merit to the proposed amendment.

Word Count: 3770



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Ombudsperson, Kosovo Specialist Chambers

Friday, 16 October 2020

At The Hague, the Netherlands.

²⁶ See Hasani, E. and Mjeku, G. (2020). International(ized) Constitutional Court: Kosovo's Transfer of Judicial Sovereignty, ICL Journal 13(4): 373-402, p. 382.