



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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: Specialist Prosecutor

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Prosecution submissions on proposed amendments to the Constitution of Kosovo

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Pursuant to the authorisation of the panel of the Specialist Chambers of the Constitutional Court ('SCCC'),¹ and Rule 15 of the Rules,² the Specialist Prosecutor's Office ('SPO') hereby provides its written submissions on the Proposed Amendments³ to the Kosovo Constitution.

2. Article 162 of the Constitution, in its current form, adequately delineates the continuing temporal mandate of the Specialist Chambers ('KSC') and SPO. The Proposed Amendments purport to restate or reframe that mandate. It is apparent from Mr THAÇI's own public statements that a core purpose of the Proposed Amendments is an attempt to terminate, or otherwise invalidate, acts of the KSC/SPO in violation of Kosovo's binding international obligations and contrary to the rights and interests of parties and participants in ongoing proceedings. As such, the Proposed Amendments diminish the rights and freedoms guaranteed by Chapter II of the Constitution, and are unconstitutional.

II. BACKGROUND

3. In 2014, Kosovo and the EU entered into an exchange of letters, which was subsequently ratified by the Kosovo Assembly.⁴ The Exchange of Letters is an international agreement, incorporated into the Kosovo legal framework, with superiority over other laws, and binding on the Government of Kosovo.⁵ Pursuant to the Exchange of Letters,⁶ all necessary powers and mandates for the effective

¹ Decision on SPO Request for Leave to Make Submissions, KSC-CC-2020-11/F00006, 7 October 2020.

² Rules of Procedure for the Specialist Chamber of the Constitutional Court, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

³ Letter of referral of proposed amendment to the Constitution of Kosovo, 18 September 2020, KSC-CC-2020-11/F00001 ('Referral'), with one Annex, KSC-CC-2020-11/F00001/A01 ('Proposed Amendments').

⁴ Law No. L04-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, 23 April 2014, ('Exchange of Letters'); Notification Decision, KSC-CC-2020-11/F00004, paras 1-3.

⁵ Constitution, Articles 17-19; Constitutional Court Judgment, K026/15, paras 50-51.

⁶ Exchange of Letters, pp.9 and 10; Constitution, Art.20(1); Law, Art.5.

functioning and operation of the KSC/SPO have been delegated in accordance with Article 20(1) of the Constitution. In the Exchange of Letters, Kosovo also, *inter alia*:

- a. made a 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’;⁷ and
- b. expressly undertook obligations to consult with the EULEX Head of Mission (and/or the EUSR) in the process of amending laws having an impact on EULEX Kosovo and any judicial proceedings arising from SITF investigations.⁸

4. On 3 August 2015, the Kosovo Assembly amended the Constitution (Amendment no. 24), adopting Article 162. Article 162(1) of the Constitution provides for the establishment of Specialist Chambers and a Specialist Prosecutor’s Office in order for Kosovo ‘[t]o comply with its international obligations’ in relation to Council of Europe Report 12462. Article 162(13) and (14) of the Constitution set out the temporal mandate of the KSC/SPO by way of reference to the Exchange of Letters.

5. Also on 3 August 2015, the Kosovo Assembly adopted the Law,⁹ which regulates the organisation, functions and jurisdiction of the KSC/SPO.

6. On 24 August 2020, the President of Kosovo presented the Proposed Amendments.

⁷ Exchange of Letters, p.10. *See similarly* 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.

⁸ Exchange of Letters, p.10; Notification Decision, KSC-CC-2020-11/F00004, para.2. The SPO is not aware of any such consultation having taken place in relation to the Proposed Amendments. The SCCC’s invitation to the EULEX Head of Mission to make submissions in this matter (Notification Decision, KSC-CC-2020-11/F00004, para.14), does not compensate for the Kosovo Government’s failure to do so.

⁹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’).

III. SUBMISSIONS

7. The Referral comes within the exclusive jurisdiction of the SCCC¹⁰ and is filed in accordance with Article 113(9) of the Constitution and Article 49(2) of the Law. As such, the SPO focuses its submissions below on the merits.

a. The Proposed Amendments are unnecessary and require careful scrutiny

8. The Constitution, in its present form, adequately delineates the temporal mandate of the KSC/SPO,¹¹ which – in accordance with Kosovo’s binding undertaking in the Exchange of Letters – shall continue until Kosovo is notified by the Council of the European Union that any judicial proceedings resulting from the investigations initiated by the SITF have been concluded.¹²

9. While Article 162(13) of the Constitution makes reference to an anticipated period of 5 years,¹³ when the relevant constitutional provisions are read as a whole, including in the context of the Exchange of Letters which is expressly incorporated by reference into those provisions, it is apparent that if investigations and proceedings did not conclude within the initial five-year period, then the mandate would continue

¹⁰ Constitution, Art. 162(3); Law, Art.49; SCCC, Decision on Notification of the Referral and Request for Information, KSC-CC-2020-11/F00004, 5 October 2020, (‘Notification Decision’), para.12.

¹¹ Constitution, Art.13 (‘The mandate of the Specialist Chambers and the Specialist Prosecutor’s Office shall be for a period of five (5) years, unless notification of completion of the mandate in accordance with Law No. 04/L-274 occurs earlier.’) and Art.14 (‘In the absence of notification of completion of the mandate under paragraph 12, 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.’). There is one minor typographical error in Art.162(14), which cross-refers to sub-paragraph 12 instead of sub-paragraph 13, however the intended meaning remains clear.

¹² Constitution, Art.162(14) (specifying that the mandate of the KSC/SPO shall continue until notification is made in accordance with the Exchange of Letters); Exchange of Letters, p.10 (where the Kosovo President ‘confirm[s] 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 there from have been concluded’).

¹³ See also Constitutional Court Judgment, K026/15, paras 56, 61 (in the course of finding that the specialised chambers and prosecutor’s office would be established in law, specialised, and necessary, the constitutional court panel addresses the mandate period in *dicta* referring to a ‘foreseen’ period).

until notification in accordance with the Exchange of Letters. Indeed, this is the only available interpretation of the constitutional provisions in question, from a literal, contextual, and purposive perspective.

10. Any other interpretation would (i) result in absurdity and contradiction, (ii) render Article 162(14) of the Constitution devoid of meaning, (iii) fail to give effect to Article 162(1) of the Constitution, and (iv) be contrary to the purpose of Constitutional Amendment No.24, which was to give effect to Kosovo's binding obligations pursuant to the Exchange of Letters.¹⁴ Additionally, as outlined further below,¹⁵ any other interpretation would have had the foreseeably unconstitutional consequence of potentially terminating, or otherwise significantly disrupting, any proceedings which were ongoing at the end of the initial five year period.

11. Consequently, based on the current wording of the Constitution: (i) the mandate of the KSC/SPO continues uninterrupted until notification of completion is made by the Council of the European Union; and (ii) such notification is to be done in consultation with the Government of Kosovo. No constitutional amendment, or other legislative act of any kind, is necessary in order for this to be the case.

12. The Proposed Amendments purport to restate or reframe that mandate. At the time of making these submissions no official drafting history is available.¹⁶ Nonetheless, the fact that the amendments are proposed by a President who is the subject of an indictment submitted by the SPO relating to war crimes and crimes against humanity warrants assessing them with particular scrutiny.¹⁷ Mr THAÇI is not

¹⁴ See also Constitutional Court Judgment, K026/15, paras 37-39 (recalling that Amendment No.24 'derive[d] from' the Exchange of Letters, and – referring to the language of the amendment itself - acknowledging Amendment No.24 as a 'requirement' for Kosovo to comply with its international obligations).

¹⁵ Section III(b).

¹⁶ The SPO notes that the SCCC has requested the President of Kosovo to submit the supporting rationale for the Proposed Amendments, and any preparatory work or similar materials (Notification Decision, KSC-CC-2020-11/F00004, para.16). The SPO may request to supplement these submissions in light of material submitted in response to that request.

¹⁷ See ECHR, *Biraghi and Others*, no.3429/09, 24 June 2014, para.33 (laws that had the effect of definitively modifying the outcome of litigation in favour of a State who is a party must be 'treated with the greatest possible degree of circumspection'); ECHR, *Aćimović v. Croatia*, no.61237/00, 9 October 2003, para.30;

a disinterested party, and there is good reason to believe that the Proposed Amendments are part of a larger strategy to undercut the court. Indeed, essential context to understanding and interpreting the Proposed Amendments is provided by Mr THAÇI's own public statements. On 24 August 2020, the day on which he put forward the Proposed Amendments, Mr THAÇI said:

'[...] [a]nd I still believe this now urging the Assembly of the Republic of Kosovo **to extend the mandate** of the Specialist Chambers and Specialist Prosecutor's Office until a final announcement of the EU Council in consultation with the Government of the Republic of Kosovo on concluding the mandate of this court.¹⁸ [...] **We need clarification** the way the Specialist Chambers will close, therefore I believe MPs will support my initiative.'¹⁹ (emphasis added)

13. By suggesting that the temporal mandate of the court requires 'extension' and 'clarification', Mr THAÇI implies that its mandate already expired in August 2020. A potential consequence of that position would be the invalidation of all actions taken by the KSC/SPO since that time, notably including any confirmation of the indictment against Mr THAÇI himself.

14. In fact, Mr THAÇI has a demonstrated record of making multiple prior attempts to undermine the framework of the KSC/SPO.²⁰ For example, in November

ECHR, *Case of National & Provincial Building Society et al. v. United Kingdom*, no.21319/93, 23 October 1997, para.112.

¹⁸ Hashim THAÇI, video message posted to Facebook, 24 August 2020, available at <https://www.facebook.com/HashimThaciOfficial/videos/665026434109997> (see in particular timestamp 7:37-8:03). English text, as quoted, taken from Gazetta Express, 'Kosovo President urges MPs to extend mandate of the War Crimes Court', 24 August 2020, available at <https://www.gazetaexpress.com/kosovo-president-urges-mps-to-extend-mandate-of-the-war-crimes-court/>.

¹⁹ This statement was contained in a written message posted to Mr THAÇI's facebook account on 24 August 2020, which was shortly afterwards replaced with the video message (see <http://botapress.info/gabimi-teknik-qe-u-leshua-nga-facebook-u-i-thacit/> for a screenshot of the prior written message). See also Gazetta Express, 'Kosovo President urges MPs to extend mandate of the War Crimes Court', 24 August 2020, available at <https://www.gazetaexpress.com/kosovo-president-urges-mps-to-extend-mandate-of-the-war-crimes-court/>.

²⁰ For example, amongst those which have been publicly reported, in relation to reports that the PDK party, of which Mr THAÇI is the former leader, was attempting to generate support for abolition of the KSC/SPO see (a) RFE/RL, Interview with Hashim THACI, 27 December 2017, at <https://www.rferl.org/a/kosovo-thaci-legislation-abolishing-war-crimes-court/28943894.html> (Mr THAÇI stated that he is not 'encouraging lawmakers' to pass a bill abolishing the KSC/SPO but added that he would sign any decision made by parliament on the matter); and (b) RTK, Thaci: MPs decide on Special Court, their initiative is legal, 28 December 2017, at <https://www.rtklive.com/en/news-single.php?ID=10335>.

2019, Mr THAÇI wrote to US Secretary of State Mike Pompeo asserting, *inter alia*, that it is for the Kosovo government to decide the 'mandate, operation and geographic location' of the KSC and SPO.²¹ In other words, notwithstanding Kosovo's binding legal commitments and prior delegation of sovereignty,²² Mr THAÇI suggests in a presumably considered letter to the US government that Kosovo retains discretion to decide on the mandate and functioning of the court. Such statements of position and intent are essential to assessing the Proposed Amendments, and understanding the manner in which they are likely to be used in violation of the rights set out in Chapter II of the Constitution.

b. The Proposed Amendments are unconstitutional

15. Proceedings have been initiated before the KSC on the basis of an established framework and mandate, as outlined in the Exchange of Letters, the Constitution and the Law. The SPO has already issued multiple indictments, and pre-trial proceedings have commenced in one of those cases, including the opening of the possibility for victims to submit applications to participate in proceedings. In addition, two other persons are in detention on remand, pending the imminent issuance of a further indictment later this month.

16. As outlined above, one of the clear (indeed, stated) purposes of the Proposed Amendments is an attempt to manufacture a situation in which it can be argued that the temporal mandate of the KSC/SPO has already expired. No constitutional amendment, or other legislative act of any kind, is in fact required for the continuation of the KSC/SPO mandate until notification by the Council of the European Union.²³ However, making an otherwise unnecessary change to the Constitution, and doing so in the context of Mr THAÇI's public statement of rationale, could alter that *status quo*.

²¹ Gazetta Express, 5 March 2020, available at: <https://www.gazetaexpress.com/thaci-pompeos-u-shkel-marrevshja-per-specialen-qe-10-vjet-kercenohemi-se-do-te-na-denojne/> .

²² See para.3 above.

²³ See paras 8-11 above.

It creates an impression - or even presumption - that the amendments were necessary to extend the mandate, or that the amendments otherwise result in some change to the KSC/SPO mandate or to Kosovo's related obligations.

17. Consequently, the Proposed Amendments generate uncertainty for all persons affected by such proceedings and could result in the termination, interruption or delay in execution of the KSC/SPO mandates, as well as undermine Kosovo's international obligations to conduct an effective investigation in relation to the contents of the 2011 Council of Europe Assembly Report.²⁴ Additionally, as a result of the Proposed Amendments, victims and their families may be deprived of a fair hearing,²⁵ of judicial protection of their rights, including effective remedies,²⁶ and – noting the KSC/SPO's role in providing protection – of their safety and security.²⁷ Equally, suspects and accused persons may be deprived of their right to a fair and expeditious trial.²⁸ Chapter II of the Constitution protects all such rights, as do the human rights instruments incorporated within it.²⁹

18. Even beyond the context within which the Proposed Amendments must be considered, the language of the Proposed Amendments also generates far-reaching constitutional concerns. The Proposed Amendments contain two separate components:³⁰ (i) a deletion of the existing text of Article 162(13) of the Constitution and its replacements with the following '[t]he mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall continue until notification of completion is made by Council of the European Union, in consultation with the Government of the

²⁴ Article 162(1) of the Constitution, *referencing* Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Doc.12462, Report: Inhumane treatment of people and illicit trafficking in human organs in Kosovo, 7 January 2011.

²⁵ Article 31 of the Constitution; Article 22 of the Law.

²⁶ Article 54 of the Constitution.

²⁷ Articles 22 and 25 of the Constitution; Article 23 of the Law.

²⁸ Articles 30-31 of the Constitution.

²⁹ Article 22 of the Constitution.

³⁰ It is worth emphasising that, despite relating to sub-paragraphs of the same constitutional article, the Proposed Amendments have been separately labelled as Amendment 26 and Amendment 27, thereby making them divisible, raising the possibility that one could be adopted without the other. The SPO consequently also addresses them in that context.

Republic of Kosovo' ('Amendment 26'); and (ii) the deletion of Article 162(14) ('Amendment 27').

19. If Amendment 27 were adopted, it would delete the operative constitutional provision governing the temporal mandate of the KSC/SPO, leaving only a provision (Article 162(13)) referring to the expired five-year period. An amendment which, again, would clearly violate the rights set out in Chapter II of the Constitution.

20. Proposed Amendment 26 is presented in a manner which is presumably intended to address that lacuna. However, unnecessarily restating the mandate generates uncertainty and confusion – and, as explained above, potentially even has the effect of changing the interpretative framework. The Proposed Amendments remove all explicit reference to the Exchange of Letters from the Constitution and restate the temporal mandate in altered language.³¹ While these steps cannot, in and of themselves, alter the status, meaning, or effect of the Exchange of Letters, they open the door to further manoeuvres³² which would be detrimental to, and potentially compromise, the completion of fair and expeditious proceedings before the KSC.

21. There is a general principle of statutory interpretation that words chosen are those necessary to convey the intended meaning. Purporting to amend the Constitution merely to restate Kosovo's pre-existing obligations would be a potentially dangerous exception to that principle. Doing so in light of Mr THAÇI's public statements of intent violates the rights set out in Chapter II of the Constitution. As such, whether adopted separately or in combination, the Proposed Amendments are detrimental and contrary to the rights set forth in Chapter II of the Constitution.

³¹ For example, proposed Amendment 26 includes a final clause referring to 'consultation with the Government of the Republic of Kosovo'. While - consistent with the existing Article 162(14) - notification of completion and giving effect thereto necessarily requires consultation with the Kosovo Government, the continuation of the mandate itself up until that point does not require, and is not dependent upon, any such consultation. This distinction is particularly important in light of Mr THAÇI's prior assertions on this matter (see para.14 above).

³² For example, having removed constitutional references to the Exchange of Letters, Mr THAÇI could undertake further steps to attempt to unilaterally dismantle it, or to challenge the appropriate forum for its interpretation and enforcement.

IV. RELIEF REQUESTED

22. For the foregoing reasons, it is respectfully requested that the SCCC:
- a. find that, pursuant to Article 162(13) and (14) of the Constitution, the temporal mandates of the KSC/SPO continue uninterrupted until notification of completion by the Council of the EU; and
 - b. find the Proposed Amendments unconstitutional; or in the alternative,
 - c. only find the Proposed Amendments constitutional to the extent that they have no impact on the KSC/SPO mandates and/or on Kosovo's related binding international obligations, including pursuant to the Exchange of Letters.

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At The Hague, the Netherlands.