



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**File number:** KSC-CC-2020-11

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

**Registrar:** Fidelma Donlon

**Date:** 26 November 2020

**Language:** English

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

**Classification:** Public

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**Judgment on the Referral of  
Proposed Amendments to the Constitution of Kosovo**

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**President of the Assembly of Kosovo**  
Vjosa Osmani - Sadriu

## The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge

Antonio Balsamo, Judge

Roumen Nenkov, Judge

Having deliberated remotely delivers the following Judgment

### I. PROCEDURE

1. On 24 August 2020, the President of Kosovo at the time proposed amendments No. 26 and No. 27 to the Constitution of the Republic of Kosovo (the “Constitution”), in particular paragraphs (13) and (14) of Article 162 on the Specialist Chambers and the Specialist Prosecutor’s Office (referred to also as the “SPO”).<sup>1</sup>
2. On 18 September 2020, the President of the Assembly of Kosovo, pursuant to Articles 144(3) and 162(3) of the Constitution, conveyed the proposed constitutional amendments to the President of the Specialist Chambers for their prior assessment by this Chamber (the “Referral”).<sup>2</sup>
3. On 5 October 2020, the Chamber,<sup>3</sup> pursuant to Rule 15(2) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (the “Rules”),

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<sup>1</sup> KSC-CC-2020-11, F00001, A01 Proposal for amendments to the Constitution, public, 24 August 2020 (filed on 21 September 2020).

<sup>2</sup> KSC-CC-2020-11, F00001, Letter from the President of the Assembly of Kosovo, public, 18 September 2020, with annex A01 (filed on 21 September 2020).

<sup>3</sup> As regards the assignment of the Constitutional Court Panel, see KSC-CC-2020-11, F00002, Decision assigning a Constitutional Court Panel, public, 22 September 2020. As regards the working language of these proceedings, see KSC-CC-2020-11, F00003, Decision on the working language, public, 24 September 2020. As regards the venue of these proceedings, see KSC-CC-2019-06, F00002, Decision on the location of proceedings before the Specialist Chamber of the Constitutional Court, public, 22 January 2019; KSC-CC-2019-06, F00001, Invocation of change of venue for referrals made pursuant to Article 49 of the Law, public, 18 January 2019.

notified certain authorities of the Referral with a possibility for them to file written submissions, should they wish so to do, on the admissibility and merits of the Referral. The Chamber also requested the President of Kosovo to submit certain information.<sup>4</sup>

4. On 7 October 2020, the Chamber, pursuant to Rule 15(2) of the Rules, granted the SPO's request for leave to file written submissions on the admissibility and merits of the Referral.<sup>5</sup>

5. On 16 and 19 October 2020, the Ombudsperson of the Specialist Chambers and the SPO filed their written submissions,<sup>6</sup> and the President of Kosovo submitted information regarding the proposed amendments.<sup>7</sup>

6. On 20 October 2020, the Chamber granted the requests<sup>8</sup> of the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission (the "High Representative") and the Head of the European Union Rule of Law Mission in Kosovo (the "EU" and "EULEX Kosovo" respectively) to extend to 2 November 2020 the time limit for filing written submissions.<sup>9</sup>

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<sup>4</sup> KSC-CC-2020-11, F00004, Decision on notification of the Referral and request for information, public, 5 October 2020.

<sup>5</sup> KSC-CC-2020-11, F00006, Decision on SPO request for leave to make submissions, public, 7 October 2020; KSC-CC-2020-11, F00005, Prosecution request for leave to make submissions, public, 6 October 2020.

<sup>6</sup> KSC-CC-2020-11, F00007, Ombudsperson's submissions on Referral, public, 16 October 2020; KSC-CC-2020-11, F00008, Prosecution submissions on proposed amendments to the Constitution of Kosovo, public, 19 October 2020.

<sup>7</sup> KSC-CC-2020-11, F00009, Submissions by the President of the Republic of Kosovo, public, 16 October 2020 (filed on 19 October 2020).

<sup>8</sup> KSC-CC-2020-11, F00011, Request for extension of the time limit submitted on behalf of the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission, public, 19 October 2020; KSC-CC-2020-11, F00010, Request for extension of the time limit by the Head of EULEX Kosovo, public, 19 October 2020.

<sup>9</sup> KSC-CC-2020-11, F00012, Decision on the requests for extension of the time limit for filing written submissions, public, 20 October 2020.

7. On 30 October and 2 November 2020, the High Representative and the Head of EULEX Kosovo filed their written submissions.<sup>10</sup>

8. The Prime Minister of Kosovo, whom the Chamber had also notified of the Referral, did not file his written submissions.

## II. FACTUAL BACKGROUND

### A. COUNCIL OF EUROPE REPORT

9. On 25 January 2011, the Parliamentary Assembly of the Council of Europe endorsed a report containing allegations of inhuman treatment and killing of people during and in the aftermath of the armed conflict in Kosovo (the “Report”),<sup>11</sup> and called for an investigation of those allegations.<sup>12</sup>

10. In September 2011, the Special Investigative Task Force (the “SITF”) was formed to conduct an independent criminal investigation into the allegations contained in the Report. The SITF derived its legal authority from the Council Joint Action 2008/124/CFSP of 4 February 2008, which had established EULEX Kosovo.<sup>13</sup>

### B. 2012 EXCHANGE OF LETTERS

11. On 4 September 2012, the President of Kosovo and the High Representative exchanged letters with regard to the mandate of EULEX Kosovo. In her letter to the High Representative, the President of Kosovo confirmed that the work of the SITF

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<sup>10</sup> KSC-CC-2020-11, F00013, Submissions by the High Representative of the Union for Foreign Affairs and Security Policy on the admissibility of the Referral, public, 30 October 2020; KSC-CC-2020-11, F00014, Submissions by the Head of EULEX Kosovo, public, 2 November 2020.

<sup>11</sup> Council of Europe Parliamentary Assembly, Report Doc. 12462, Inhuman treatment of people and illicit trafficking in human organs in Kosovo, 7 January 2011.

<sup>12</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.

<sup>13</sup> Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo. It has been amended 15 times. The last amendments were made by the Council Decision (CFSP) 2020/792 of 11 June 2020, extending EULEX Kosovo until 14 June 2021.

would continue until the Council of the European Union (the “Council”) notifies Kosovo that the investigations or any proceedings resulting therefrom have been concluded.

12. On 7 September 2012, the Assembly of Kosovo, by Law No. 04/L-148, ratified the aforementioned exchange of letters as an international agreement between Kosovo and the EU. Article 1(2) of the Law provides for ratification of the international agreement in its entirety.<sup>14</sup>

### C. 2014 EXCHANGE OF LETTERS

13. On 14 April 2014, the President of Kosovo and the High Representative exchanged letters. The President of Kosovo, in her letter to the High Representative, stated as follows:

[...]

If the SITF investigation culminates in an indictment and trial proceedings, an environment conducive to the proper administration of justice should be provided. Accordingly, a specialist court within the Kosovo court system and a specialist prosecutor’s office would be used for any trial and appellate proceedings arising from the SITF investigation. [...] sensitive proceedings, including hearing of witnesses, would take place outside [Kosovo] [...] filings and sensitive records would be introduced and maintained exclusively outside [Kosovo].

To allow such proceedings [...] Kosovo will set up dedicated separate judicial chambers, which would be relocated to a third State [...] for any criminal proceedings that arise out of the SITF’s work.

These structures will be governed by their own statute and rules of procedure and evidence [...] All legal measures [...] to establish a specialist court [...] and a specialist prosecutor’s office in connection with SITF [...] including any constitutional amendments as needed, will be adopted in accordance with Kosovo law and subject to Constitutional Court review.

[...]

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<sup>14</sup> Law No. 04/L-148 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. On 7 September 2012, the President of Kosovo, by Decree no. DL-039-2012, promulgated Law No. 04/L-148. The same day, Law No. 04/L-148 entered into force, pursuant to its Article 3.

We will undertake, in accordance with the Constitution and applicable Kosovo law, with the EULEX Kosovo Head of Mission and/or EUSR [...] consultations in the process of amending laws having an impact on the discharge of EULEX Kosovo mandate as well as for the judicial proceedings arising from SITF investigation, and the EUSR implementing their mandate.

[...]

[...] 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 judicial chambers resulting therefrom have been concluded.

14. The High Representative, in her letter to the President of Kosovo, stated as follows:

[...]

[...] the work of [the SITF] and any judicial proceedings deriving from it shall continue until such time as the Council of the European Union notifies Kosovo that the investigation and these proceedings have been concluded.

[...]

15. On 23 April 2014, the Assembly of Kosovo, by Law No. 04/L-274, ratified the aforementioned exchange of letters as an international agreement between Kosovo and the EU. Article 1(2) of the Law provides for ratification of the international agreement in its entirety.<sup>15</sup>

#### D. CONSTITUTIONAL AMENDMENT

16. On 7 March 2015, the Government of Kosovo proposed an amendment to the Constitution adding, after Article 161, a new Article 162 on the Specialist Chambers

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<sup>15</sup> 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. The Assembly of Kosovo approved Law No. 04/L-274 by a two-thirds majority pursuant to Article 18 of the Constitution. As regards the approval by a two-thirds majority, see 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, Judgment, 14 April 2015 (15 April 2015), para. 51. On 7 May 2014, the President of Kosovo, by Decree no. DL-022-2014, promulgated Law No. 04/L-274. On 15 May 2014, Law No. 04/L-274 was published in the Official Gazette of Kosovo, and, pursuant to its Article 3, entered into force 15 days thereafter.

and the Specialist Prosecutor's Office.<sup>16</sup> Article 162(1) provides that, in order "[t]o comply with its international obligations in relation to the [Report], the Republic of Kosovo may establish Specialist Chambers and a Specialist Prosecutor's Office [...]".

17. On 9 March 2015, the President of the Assembly of Kosovo referred the aforementioned amendment to the Constitutional Court of Kosovo for a prior assessment, under Articles 113(9) and 144(3) of the Constitution, that it did not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.<sup>17</sup>

18. On 14 April 2015,<sup>18</sup> the Constitutional Court of Kosovo confirmed that the amendment did not diminish the rights and freedoms guaranteed by Chapters II and III of the Constitution, as well as its letter and spirit. The Constitutional Court noted that the introduction of the amendment derived from the international agreement between Kosovo and the EU of 14 April 2014 (see paragraphs 13-15 above).<sup>19</sup>

19. On 3 August 2015, the Assembly of Kosovo amended the Constitution adding, after Article 161, a new Article 162 on the Specialist Chambers and the Specialist Prosecutor's Office. The same day, it entered into force.

#### E. LAW

20. On 3 August 2015, the Assembly of Kosovo approved Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (the "Law"). Pursuant to Article 1(1) of the Law, this Law regulates the organisation, functioning and jurisdiction of the Specialist Chambers and the SPO.

21. On 31 August 2015, the Law was published in the Official Gazette of Kosovo, and, pursuant to its Article 65, entered into force 15 days thereafter.

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<sup>16</sup> Kosovo, Constitutional Court, KO 26/15, cited above, para. 13.

<sup>17</sup> Ibid., paras 1, 14.

<sup>18</sup> Ibid., paras 9-10.

<sup>19</sup> Ibid., para. 37.

#### F. HOST STATE AGREEMENT

22. On 15 February 2016, Kosovo concluded with the Netherlands an agreement on the hosting of the relocated Specialist Chambers and Specialist Prosecutor's Office in the Netherlands, in view of Article 162 of the Constitution, the 2014 exchange of letters and the Law.

23. Article 2 of the agreement provides that "[i]t shall [...] create conditions conducive to the stability and independence of [the relocated Specialist Chambers and Specialist Prosecutor's Office] and facilitate its smooth and efficient functioning".

24. On 1 January 2017, the agreement entered into force.

#### G. OTHER EXCHANGES OF LETTERS

25. Between 2016 and 2020, the President of Kosovo and the High Representative exchanged further letters, none of which regulates the mandate of the Specialist Chambers and the SPO.<sup>20</sup>

#### H. PROPOSED CONSTITUTIONAL AMENDMENTS

26. On 24 August 2020, the President of Kosovo proposed amendments No. 26 and No. 27 to the Constitution, in particular its Article 162(13) and (14).<sup>21</sup>

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<sup>20</sup> On 9 and 15 June 2016, the President of Kosovo and the High Representative exchanged letters with regard to the mandate of EULEX Kosovo. See Law No. 05/L-102 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.

On 4 and 8 June 2018, the President of Kosovo and the High Representative exchanged letters with regard to the mandate of EULEX Kosovo.

On 8 and 10 July 2020, the President of Kosovo and the High Representative exchanged letters with regard to the mandate of EULEX Kosovo.

<sup>21</sup> KSC-CC-2020-11, F00001, A01 Proposal for amendments to the Constitution, public, 24 August 2020 (filed on 21 September 2020).



### III. REFERRAL

27. On 18 September 2020, the President of the Assembly of Kosovo, referring to Articles 144(3) and 162(3) of the Constitution, conveyed the proposed constitutional amendments to the President of the Specialist Chambers. In particular, the President of the Assembly requested this Chamber to carry out a prior assessment of the proposed constitutional amendments that they do not diminish any of the rights and freedoms set forth in Chapter II of the Constitution (the “Referral”).<sup>22</sup>

### IV. JURISDICTION

28. The Chamber reiterates that, pursuant to Article 162(3) of the Constitution and Article 49(2) of the Law, this Chamber has exclusive jurisdiction over referrals that, firstly, are made under Article 113 of the Constitution, and, secondly, relate to the Specialist Chambers and Specialist Prosecutor’s Office.

29. As to the first criterion, the Chamber observes that the President of the Assembly made the Referral referring to Article 144(3) of the Constitution, which provides for a prior assessment by the Constitutional Court of proposed constitutional amendments. Such prior assessment of proposed constitutional amendments is also provided for in Article 113(9) of the Constitution. It follows that the Referral has been made under Article 113, in particular its paragraph (9), as well as under Article 144(3).<sup>23</sup>

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<sup>22</sup> KSC-CC-2020-11, F00001, Letter from the President of the Assembly of Kosovo, public, 18 September 2020, with annex A01 (filed on 21 September 2020).

<sup>23</sup> In this regard, see Kosovo, Constitutional Court, KO 26/15, cited above, paras 1, 4; *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, 19 December 2018 (7 February 2019), para. 4; *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/D0-179*, KO 13/15, Judgment, 10 March 2015 (16 March 2015), paras 1, 4; *Assessment of amendments to the Constitution proposed by the Government and submitted by the President of the Assembly of the Republic of Kosovo on 11 March 2014 by letter no. 04-DO-2186*, KO 44/14, Judgment, 31 March 2014 (3 April 2014), paras 2, 5.

30. As to the second criterion, the Chamber observes that the proposed constitutional amendments concern Article 162(13) and (14) of the Constitution. Paragraph (1) of Article 162 provides that “the organisation, functioning and jurisdiction of the Specialist Chambers and Specialist Prosecutor’s Office shall be regulated by this Article [...]”. It follows that the Referral relates to the Specialist Chambers and Specialist Prosecutor’s Office.

31. The Chamber therefore concludes that it has exclusive jurisdiction to decide the Referral pursuant to Article 162(3) of the Constitution and Article 49(2) of the Law.<sup>24</sup>

## V. ADMISSIBILITY

### A. THE SUBMISSIONS

32. The Ombudsperson of the Specialist Chambers and the High Representative submitted that the Referral was inadmissible because the President of Kosovo had proposed the constitutional amendments in violation of the applicable procedure. He had failed to carry out the consultations as required by the 2014 exchange of letters (see paragraph 13 above) prior to forwarding the constitutional amendments to the President of the Assembly.<sup>25</sup>

33. Similarly, the Head of EULEX Kosovo considered that the Referral was inadmissible. Referring to Rule 14(f) of the Rules, he appeared to argue that the Referral constituted an abuse of process as the President of Kosovo had not consulted with EULEX Kosovo in relation to the proposed amendments. This requirement to

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<sup>24</sup> As to jurisdiction, see Kosovo, Constitutional Court, KO 26/15, cited above, paras 36 (point c.), 78.

<sup>25</sup> KSC-CC-2020-11, F00007, Ombudsperson’s submissions on Referral, public, 16 October 2020, paras 21-27; KSC-CC-2020-11, F00013, Submissions by the High Representative of the Union for Foreign Affairs and Security Policy on the admissibility of the Referral, public, 30 October 2020, paras 13-17.

consult followed from the 2014 exchange of letters, as incorporated in Article 162 of the Constitution through reference to Law No. 04/L-274.<sup>26</sup>

34. The SPO, on the other hand, did not argue that the Referral was inadmissible. It noted that the Referral had been filed in accordance with Article 113(9) of the Constitution.<sup>27</sup>

#### B. THE CHAMBER'S ASSESSMENT

35. The Chamber reiterates that, pursuant to Article 113(1) of the Constitution, it "decides only on matters referred to [it] in a legal manner by authorised parties".<sup>28</sup> As noted above, the present Referral is based on Article 113(9), which reads as follows:

The President of the Assembly of Kosovo refers proposed constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.

36. In the present case, the proposed constitutional amendments have been referred to the Chamber by the President of the Assembly, who is authorised so to do pursuant to Article 113(9). Further, the President of the Assembly has requested the Chamber to carry out a prior assessment of the proposed amendments as to whether they diminish the rights and freedoms set forth in Chapter II (see paragraph 27 above). It follows that the Referral meets the requirements of Article 113(1) and (9).

37. Insofar as the Ombudsperson and the High Representative considered that the procedure for proposing the constitutional amendments constitutes an admissibility requirement of the Referral, the Chamber notes that no such admissibility requirement is set out in the Constitution, the Law or the Rules. Similarly, the Chamber finds it

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<sup>26</sup> KSC-CC-2020-11, F00014, Submissions by the Head of EULEX Kosovo, public, 2 November 2020, paras 12, 14, 17-18.

<sup>27</sup> KSC-CC-2020-11, F00008, Prosecution submissions on proposed amendments to the Constitution of Kosovo, public, 19 October 2020, para. 7.

<sup>28</sup> KSC-CC-2020-08, F00020, RED, Public redacted version of decision on the referral of [REDACTED] further to a decision of the Single Judge, public, 20 April 2020, para. 38.

difficult to accept the argument of the Head of EULEX Kosovo that, due to the lack of these consultations, the Referral constitutes an abuse of process under Rule 14(f) of the Rules. The information before the Chamber is insufficient to show that the Referral entails a harmful exercise of a right for purposes other than those for which it is designed.<sup>29</sup> At the same time, the Chamber will return to the aspect of consultations in its assessment of the Referral on the merits.

38. The Chamber thus concludes that the Referral has been made in a legal manner by an authorised party under Article 113(9) of the Constitution, and therefore must be declared admissible pursuant to its Article 113(1).<sup>30</sup>

## VI. ASSESSMENT

### A. ARTICLE 162 OF THE CONSTITUTION

39. Article 162(13) and (14) of the Constitution, which the proposed constitutional amendments concern, read as follows:

**Article 162**  
**The Specialist Chambers and the Specialist Prosecutor's Office**

Notwithstanding any provision in this Constitution:

[...]

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.

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<sup>29</sup> In this regard, see ECtHR, *Zhdanov and Others v. Russia*, nos. 12200/08 and 2 others, 16 July 2019, para. 79; *Miroļubovs and Others v. Latvia*, no. 798/05, 15 September 2009, para. 62.

<sup>30</sup> See Kosovo, Constitutional Court, KO 26/15, cited above, paras 16-21; KO 162/18, cited above, paras 17-21; KO 13/15, cited above, paras 17-22; KO 44/14, cited above, paras 21-22; *Confirmation of the proposed constitutional amendment, submitted by the President of the Assembly of the Republic of Kosovo on 18 January 2013 by letter no. 04-DO-1357*, KO 09/13, Judgment, 29 January 2013, paras 13-15; *Confirmation of proposed constitutional amendments submitted by the President of the Assembly of the Republic of Kosovo on 22 June 2012 by letter no. 04-DO-1095*, KO 61/12, Judgment, 31 October 2012, paras 14-16; *Proposed amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012*, KO 29/12 and KO 48/12, Judgment, 20 July 2012, paras 34-37; *Assessment of the Government's proposals for amendments of the Constitution submitted by the President of the Assembly of the Republic on 12 April 2012*, KO 38/12, Judgment, 10 March 2012 (15 May 2012), paras 20-26.

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.

B. PROPOSED CONSTITUTIONAL AMENDMENTS

40. The constitutional amendments proposed by the President of Kosovo to the Constitution, in particular its Article 162(13) and (14) read as follows:

I.

**Amendment No. 26**

Paragraph 13 of the Article 162 [The Specialist Chambers and the Specialist Prosecutor's Office], shall be deleted and reformulated with the following text:

13. The 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 Republic of Kosovo.

**Amendment No. 27**

Paragraph 14 of the Article 162 [The Specialist Chambers and the Specialist Prosecutor's Office], shall be deleted.

II.

Constitutional amendments enter into force immediately after the adoption by the Assembly of the Republic of Kosovo.

C. INFORMATION BY THE PRESIDENT OF KOSOVO

41. In reply to the Chamber's request for information regarding the rationale for the proposed constitutional amendments,<sup>31</sup> the President of Kosovo indicated that paragraphs (13) and (14) of Article 162 have created ambiguity as to completion of the mandate of the Specialist Chambers and the SPO. In view of the wording of these provisions, an opinion has emerged that the mandate will last for a maximum period of five years, provoking numerous reactions.

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<sup>31</sup> KSC-CC-2020-11, F00004, Decision on notification of the Referral and request for information, public, 5 October 2020.

42. The proposed amendments therefore aim to avoid “these ambiguities and to eliminate any dilemma”. They provide that the mandate of the Specialist Chambers and the SPO will last “until the announcement of the completion of the mandate is made by the Council of the European Union, in consultation with the Government of the Republic of Kosovo”. Therefore, the proposed amendments, the President of Kosovo stated, harmonise Article 162 with Law No. 04/L-274.<sup>32</sup>

#### D. SUBMISSIONS BY OTHER AUTHORITIES

##### 1. The Ombudsperson of the Specialist Chambers

43. The Ombudsperson submitted that the proposed constitutional amendments would remove from Article 162 the essential reference to Law No. 04/L-274 (see paragraph 15 above) and hence the international obligations of Kosovo deriving from the 2014 exchange of letters. These international obligations, the Ombudsperson argued, are central to the proper administration of justice and protecting the fundamental rights and freedoms of those participating in the proceedings before the Specialist Chambers and Specialist Prosecutor’s Office.

44. In particular, they include such aspects as the relocation of the Specialist Chambers and Specialist Prosecutor’s Office to a third State, their staffing with international personnel only, delegation of all State powers necessary for their operation, as well as this delegation and operation until the Council notifies Kosovo of conclusion of the proceedings. These international obligations, the Ombudsperson maintained, should not be deleted from the Constitution, which is the highest legal act of Kosovo pursuant to its Article 16(1).<sup>33</sup>

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<sup>32</sup> KSC-CC-2020-11, F00009, Submissions by the President of the Republic of Kosovo, public, 16 October 2020 (filed on 19 October 2020), p. 7, paras 5-6.

<sup>33</sup> KSC-CC-2020-11, F00007, Ombudsperson’s submissions on Referral, public, 16 October 2020, paras 31-32, 35-36, 40-42, 44.

## 2. The SPO

45. The SPO also considered that the proposed constitutional amendments would remove from the Constitution all explicit references to the 2014 exchange of letters. The proposed amendments would also create uncertainty regarding the duration of the mandate of the Specialist Chambers and the SPO. Such uncertainty would jeopardise several fundamental rights and freedoms guaranteed by Chapter II of the Constitution, including the right to life under Article 25, the right to fair trial under Articles 30 and 31, and the right to judicial protection of rights under Article 54.

46. With regard to uncertainty that the proposed constitutional amendments would create, the SPO referred to the statements of the President of Kosovo. With regard to these proposed amendments, the President had stated that there was a need to 'extend' and 'clarify' the mandate of the Specialist Chambers and the SPO. The 'extension' of the mandate in particular implied that the mandate had already expired. The adoption of the proposed amendments would thus open to interpretation the duration of the mandate of the Specialist Chambers and the SPO. This mandate, however, was clearly set out in paragraphs (13) and (14) of Article 162 as read in conjunction with the 2014 exchange of letters.

47. Further, the SPO pointed out that the proposed constitutional amendments contained in fact two separate amendments, No. 26 and No. 27. Thus, it is possible to adopt one of them but not the other. In case only the proposed amendment No. 27 were adopted, the duration of the mandate of the Specialist Chambers and the SPO would be reduced to five years, which have already expired. This would clearly violate the fundamental rights and freedoms guaranteed by Chapter II.<sup>34</sup>

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<sup>34</sup> KSC-CC-2020-11, F00008, Prosecution submissions on proposed amendments to the Constitution of Kosovo, public, 19 October 2020, paras 8-13, 16-21.

## E. THE CHAMBER'S ASSESSMENT

### 1. Scope of Review

48. At the outset, the Chamber recalls that the Referral has been made under Article 113(9) of the Constitution. This provision therefore sets the limits of the present review.<sup>35</sup> In view of the wording of Article 113(9) (see paragraph 35 above), the specific question before the Chamber is of a substantive nature, in particular whether or not the proposed constitutional amendments diminish the rights and freedoms guaranteed by Chapter II.

49. Since Article 113(9) provides for the assessment of the proposed constitutional amendments as to the rights and freedoms guaranteed by Chapter II, a question arises whether the Chamber is to carry out this assessment by reference to Chapter II only. In this regard, the Chamber observes that the Constitutional Court of Kosovo, in its review of the amendment introducing Article 162 referred, in addition to the rights and freedoms guaranteed by the Constitution, to the letter and spirit of the Constitution.<sup>36</sup> The Constitutional Court has taken a similar approach also in other cases on review of proposed constitutional amendments under Article 113(9) of the Constitution.<sup>37</sup>

50. In view of the foregoing, the Chamber will carry out the assessment of the proposed constitutional amendments by reference to Chapter II of the Constitution and its other relevant provisions that ensure the fundamental rights and freedoms, and with due regard to the Constitution as a whole.

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<sup>35</sup> As regards jurisdictional competence under Article 113(9) of the Constitution, see Kosovo, Constitutional Court, KO 29/12 and KO 48/12, cited above, para. 59.

<sup>36</sup> Kosovo, Constitutional Court, KO 26/15, cited above, para. 22.

<sup>37</sup> See Kosovo, Constitutional Court, KO 162/18, cited above, paras 24-25, 27, 49; KO 13/15, cited above, paras 23-24; KO 44/14, cited above, paras 25-28; KO 09/13, cited above, para. 17; KO 61/12, cited above, para. 18; KO 29/12 and KO 48/12, cited above, paras 61-64, 68-70; KO 38/12, cited above, para. 31.



51. At this juncture, the Chamber also recalls that, pursuant to Article 53 of the Constitution, it is required to interpret the human rights and fundamental freedoms guaranteed by Chapter II of the Constitution consistent with the rulings of the European Court of Human Rights (the “ECtHR”).<sup>38</sup>

52. With that in mind, the Chamber turns to the question, pursuant to Article 113(9) of the Constitution, before it on whether or not the proposed constitutional amendments diminish the fundamental rights and freedoms.

## **2. Whether the Proposed Amendments Diminish the Fundamental Rights and Freedoms**

53. At the outset, the Chamber observes that the real significance of the proposed constitutional amendments for the fundamental rights and freedoms may only be determined by taking into account the specific context and purpose of the Specialist Chambers and the SPO, and the specific features of their legal regime.<sup>39</sup>

### **(a) Context and Purpose**

54. The Chamber recalls that the Specialist Chambers and the SPO were established in connection with the Report (see paragraphs 9-10, 13 and 16 above),<sup>40</sup> which contains

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<sup>38</sup> See KSC-CC-2019-05, F00012, Decision on the referral of Mahir Hasani concerning prosecution order of 20 December 2018, public, 20 February 2019, para. 25; KSC-CC-PR-2020-09, F00006, Judgment on the referral of amendments to the Rules of Procedure and Evidence adopted by the Plenary on 29 and 30 April 2020, public, 22 May 2020, para. 16; KSC-CC-PR-2017-01, F00004, Judgment on the referral of the Rules of Procedure and Evidence adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court, public, 26 April 2017, para. 16 *in fine*. See also Kosovo, Constitutional Court, *Constitutional review of Judgment Pml no. 181/15 of the Supreme Court of the Republic of Kosovo, of 6 November 2015*, KI 43/16, Resolution on inadmissibility, 14 April 2016 (16 May 2016), para. 50 *in fine*; *Gëzim and Makfire Kastrati against Municipal Court in Prishtina and Kosovo Judicial Council*, KI 41/12, Judgment, 25 January 2013 (26 February 2013), para. 58.

<sup>39</sup> The Chamber has previously referred to the existence of the legal system of the Specialist Chambers and the SPO, see KSC-CC-2019-07, F00013, Decision on the referral of Driton Lajci concerning interview procedure by the Specialist Prosecutor’s Office, public, 13 January 2020, para. 32.

<sup>40</sup> See also Article 1(2) of the Law, which provides that “Specialist Chambers [...] and the Specialist Prosecutor’s Office are necessary [...] to ensure [...] proceedings in relation to allegations [...], which relate to those reported in the [Report] [...]”. Also, the Kosovo Constitutional Court in case no. KO 26/15 stated that the establishment of the Specialist Chambers and the Specialist Prosecutor’s Office was

serious allegations of inhuman treatment and killing of people during and in the aftermath of the armed conflict in Kosovo. Further, it mentions several impediments to the discovery of the truth about these events. These include the reluctance or fear on the part of witnesses to testify, their lack of confidence in protective measures, as well as elimination. It also claims that persons involved in the alleged criminal activities subsequently came into positions of power or are close to those in power, and names specific individuals. In addition, the Report highlights connections between the alleged organised crime and politics, including representatives of the authorities.<sup>41</sup>

55. The Chamber may not overlook the fact that it is precisely in that context that the 2014 exchange of letters envisaged the establishment of the Specialist Chambers and the SPO to ensure the proper administration of justice in relation to proceedings arising out of the SITF investigations. Indeed, Article 1(2) of the Law refers to the establishment of the Specialist Chambers and the SPO “to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations [...], which relate to those reported in the [Report] and which have been the subject of criminal investigation by the [SITF] [...]”.

56. It therefore follows that the *raison d'être* of the Specialist Chambers and the SPO and hence their legal regime is to realise, in their own specific context, the respective fundamental rights and freedoms in relation to allegations contained in the Report and proceedings arising out of the related SITF investigations in particular. The proposed constitutional amendments concern this legal regime as they propose to amend Article 162(13) and (14) of the Constitution, which regulate the relevant aspects of the Specialist Chambers and the SPO.

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necessary for Kosovo to comply with its international obligations stemming from the Report. See Kosovo, Constitutional Court, KO 26/15, cited above, paras 50-53.

<sup>41</sup> See Report, Section B. Explanatory memorandum, paras 7, 21, 25, 61, 68-69, 72, 74, 76, 104, 113-114, 172, 176.

57. It follows that the proposed constitutional amendments require the most careful scrutiny, with due regard to the specific features of the legal regime of the Specialist Chambers and the SPO.

(b) Specific Features

58. It transpires from the context in which the Specialist Chambers and the SPO were established that the specific features of their legal regime ensure that the Specialist Chambers and the SPO, in their own specific context, realise “the proper administration of justice” in respect of proceedings arising out of the SITF investigations, as provided for in the 2014 exchange of letters.

59. In this connection, and for the purposes of the present review, the Chamber points out the delegation by Kosovo of specific sovereign powers for the operation of the Specialist Chambers and the SPO under the 2014 exchange of letters. Indeed, the 2014 exchange of letters refers to Article 20(1) of the Constitution, which provides that “[t]he Republic of Kosovo may on the basis of ratified international agreements delegate state powers for specific matters to international organisations”. Furthermore, the mandate delegated under the 2014 exchange of letters shall last until the Council notifies Kosovo of completion of the mandate.

60. In addition to the aforementioned delegation of specific sovereign powers, the 2014 exchange of letters provided that the Specialist Chambers and the SPO would have their own legal framework. In particular, the 2014 exchange of letters states that the Specialist Chambers and the SPO be “governed by their own statute and rules of procedure and evidence [...]”. Furthermore, Kosovo undertook to adopt legislation for the operation of the Specialist Chambers and the SPO, including “any constitutional amendments as needed”.

61. In this connection, the Chamber observes that Kosovo complied with this obligation to adopt legislation for the operation of the Specialist Chambers and the

SPO by adopting Article 162 of the Constitution and the Law. In this respect, the Chamber endorses the view of the Constitutional Court of Kosovo that the introduction into the Constitution of Article 162 on the Specialist Chambers and the SPO derived from the 2014 exchange of letters (see paragraph 18 above).

62. In relation to the own legal framework of the Specialist Chambers and the SPO, the Chamber notes that this feature is further reflected in Article 162(1) of the Constitution, which provides that “[t]he organisation, functioning and jurisdiction of the Specialist Chambers and Specialist Prosecutor’s Office shall be regulated by this Article and by [the Law]”. Furthermore, Article 162 on the Specialist Chambers and the SPO applies “notwithstanding any provision in this Constitution”. Also, Article 3(4) of the Law provides that “[a]ny other Kosovo law, regulation, piece of secondary regulation, other rule or custom and practice which has not been expressly incorporated into this Law shall not apply to the organisation, administration, functions or jurisdiction of the Specialist Chambers and Specialist Prosecutor’s Office [...]”.

63. It clearly follows from the features of the Specialist Chambers and the SPO as envisaged in the 2014 exchange of letters that this exchange of letters intended, and with a view to the “proper administration of justice”, that the Specialist Chambers and the SPO function in an autonomous manner. It also follows that the autonomous functioning 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.

(c) The Proposed Constitutional Amendments

(i) Duration of the Mandate

64. In that light, the Chamber initially observes that the constitutional amendments, as proposed, raise, as a matter of principle, a question of autonomy, as well as legal

certainty, including the aspect of stability, of the legal regime of the Specialist Chambers and the SPO for the duration of the mandate as delegated under the 2014 exchange of letters.<sup>42</sup> In particular, the Chamber notes that the President of Kosovo has proposed the amendments while there has been no notification by the Council of completion of the mandate in accordance with the 2014 exchange of letters and Article 162(13) and (14) of the Constitution.

65. In this connection, the President of Kosovo referred to “ambiguity” in Article 162(13) and (14), which could suggest that the duration of the mandate of the Specialist Chambers and the SPO was limited to a five-year period, which has already expired. However, the Chamber is unable to discern any such possible interpretation of those provisions.

66. Article 162(13) and (14) provide that, in case there is no notification by the Council 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).

67. The continuation of the mandate of the Specialist Chambers and the SPO is also in line with the 2014 exchange of letters, to which Article 162(13) and (14) in their current wording refer. Furthermore, the 2014 exchange of letters specifies what the completion of the mandate means. In particular, that the mandate “shall continue until [...] Kosovo is notified by the Council of the European Union *that the investigations*

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<sup>42</sup> It should be noted that the Constitutional Court of Kosovo in relation to paragraphs (13) and (14) of Article 162 of the Constitution, as currently phrased, stated that “this is in compliance with the principle of legal certainty”. See Kosovo, Constitutional Court, KO 26/15, cited above, para. 101.

*have been concluded and that any proceedings by the judicial chambers resulting therefrom have been concluded". (emphasis added)*

68. Insofar as the proposed constitutional amendments suggest to delete from Article 162(13) and (14) of the Constitution the reference to the 2014 exchange of letters, the Chamber observes that this reference specifies with regard to the mandate of the Specialist Chambers and the SPO that it shall continue until the completion of the respective proceedings. The precision in the Constitution regarding the duration of the mandate of the Specialist Chambers and the SPO safeguards their uninterrupted operation, in secure, independent, impartial, fair and effective manner, until completion of the respective proceedings arising out of the SITF investigations.

69. Hence, the deletion of this reference – as proposed in the amendments No. 26 and No. 27 – would diminish the fundamental rights and freedoms of persons involved in the proceedings. In particular, and without being exhaustive, the Chamber points out, in relation to victims – the right to independent and effective investigation under the procedural heads of Articles 25 and 27 of the Constitution and Articles 2 and 3 of the Convention.<sup>43</sup> In relation to protected witnesses, as the case may be – the right to physical and psychological integrity under Article 26 of the Constitution and Article 8 of the Convention.

70. The aforementioned conclusion regarding the amendments No. 26 and No. 27 is irrespective of what appears to be a technical error in Article 162(14) where it refers to the notification by the Council of earlier completion of the mandate under “paragraph 12”. Paragraph 12 does not concern this notification, but paragraph 13. Accordingly, “paragraph 12” in Article 162(14) should be read as referring to paragraph 13. In any event, there is no ambiguity also in this respect.

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<sup>43</sup> The “Convention” refers to the European Convention on Human Rights.

## (ii) Consultations

71. In view of how the constitutional amendments No. 26 and No. 27 have been proposed, it should not escape the Chamber's attention that the 2014 exchange of letters provides for a requirement on Kosovo to conduct consultations with the respective EU authorities in the process of amending Kosovo laws having an impact on judicial proceedings arising out of the SITF investigations (see paragraph 13 above).

72. It emerges that Kosovo has not conducted these consultations in relation to the proposed constitutional amendments. The Chamber is aware that this amounts to a procedural deficiency, and the Chamber's review in the instant case does not extend to a mere review of the procedure.<sup>44</sup> Pursuant to Article 113(9) of the Constitution, its assessment concerns a substantive question of whether or not the proposed amendments diminish the fundamental rights and freedoms (see paragraph 48 above).<sup>45</sup>

73. At the same time, Article 162(13) and (14), as currently phrased, incorporate the obligation to conduct consultations, through reference to Law No. 04/L-274, on the constitutional level. These provisions refer not only to "completion of the mandate" but also, more generally, specify the mandate by reference to Law No. 04/L-274. Therefore, the obligation to conduct consultations as provided for in the 2014 exchange of letters is also a constitutional requirement relevant in the legislative process of Kosovo.<sup>46</sup> The constitutional nature of this requirement is significant. By way of illustration, in the constitutional review of a procedure followed for the

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<sup>44</sup> By way of comparison, as to review of procedural aspects under Article 113(5) of the Constitution, see Kosovo, Constitutional Court, *Constitutional review of decision no. 05-V-139 of the Assembly of the Republic of Kosovo on approval of amendment XXIV to the Constitution of the Republic of Kosovo, adopted on 3 August 2015*, KO 107/15, 8 September 2015 (21 September 2015), paras 6, 56, 59, 91 *et seq.*

<sup>45</sup> See Kosovo, Constitutional Court, KO 162/18, cited above, para. 2; KO 13/15, cited above, para. 2.

<sup>46</sup> In its case law, the Constitutional Court of Kosovo has emphasised that, in the domestic legal order of Kosovo, the Constitution is the highest legal act. See Kosovo, Constitutional Court, KO 162/18, cited above, para. 23; KO 44/14, cited above, para. 24.

adoption of laws, the procedure is assessed as to its compliance with the relevant constitutional requirements.<sup>47</sup>

74. It is true that the requirement to conduct consultations in the process of amending the respective domestic laws of Kosovo may be seen as restricting in some ways the exercise of the legislative powers by the national authorities. Yet, such restriction is consistent with the delegation of specific sovereign powers for the operation of the Specialist Chambers and the SPO under the 2014 exchange of letters.<sup>48</sup> Furthermore, with regard to the Specialist Chambers and the SPO, the requirement of consultations safeguards their independent, effective and secure operation.

75. Hence, the deletion of this requirement from Article 162 of the Constitution – as a consequence of the proposed amendments No. 26 and No. 27 – would diminish the fundamental rights and freedoms of persons involved in the proceedings. In particular, and without being exhaustive, the Chamber points out, in relation to victims – the right to independent and effective investigation under the procedural heads of Articles 25 and 27 of the Constitution and Articles 2 and 3 of the Convention. In relation to protected witnesses, as the case may be – the right to physical and psychological integrity under Article 26 of the Constitution and Article 8 of the Convention.

### **3. Overall Conclusion**

76. Having regard to the foregoing, and pursuant to Articles 113(9) and 144(3) of the Constitution, the Chamber finds that, in the specific context of the Specialist Chambers

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<sup>47</sup> See Kosovo, Constitutional Court, *Constitutional review of the Law, no. 04/L-199, on ratification of the first international agreement of principles governing the normalization of relations between the Republic of Kosovo and the Republic of Serbia and the implementation plan of this agreement*, KO 95/13, Judgment, 2 September 2013 (9 September 2013), para. 72.

<sup>48</sup> This is also demonstrated, for example, by Article 162(5) of the Constitution, which provides for conclusion by the Specialist Chambers of international treaties relating to judicial cooperation.



and the SPO, the proposed constitutional amendments No. 26 and No. 27 diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution.

77. The Chamber adds that reference in its assessment to some of the specific features of the legal regime of the Specialist Chambers and the SPO is not to exclude its other features. Similarly, the Chamber's reference to some of the fundamental rights and freedoms is not to exclude the relevance of other rights and freedoms in relation to the operation of the Specialist Chambers and the SPO in accordance with the requirements of Chapter II of the Constitution.

78. The Chamber further reiterates that, pursuant to Article 112(1) of the Constitution and Article 49(1) of the Law, this Chamber is the final authority for the interpretation of the Constitution as it relates to the Specialist Chambers and Specialist Prosecutor's Office.

79. Furthermore, pursuant to Article 116(1) of the Constitution, this judgment is binding on the judiciary and all persons and institutions of Kosovo.<sup>49</sup>

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<sup>49</sup> With regard to such binding nature, under Article 116(1) of the Constitution, also of judgments reviewing the constitutionality of the proposed amendments, see Kosovo, Constitutional Court, KO 29/12 and KO 48/12, cited above, para. 71.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

1. *Declares* the Referral filed by the President of the Assembly of Kosovo admissible;
2. *Holds* that the constitutional amendments No. 26 and No. 27 proposed by the President of Kosovo on 24 August 2020 diminish the rights and freedoms guaranteed by Chapter II of the Constitution.



**Vidar Stensland**  
**Presiding Judge**

Done in English on Thursday, 26 November 2020  
At The Hague, the Netherlands