



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

File number: KSC-CC-2022-15

Before: The Specialist Chamber of the Constitutional Court

Judge Vidar Stensland, Presiding

Judge Roumen Nenkov

Judge Romina Incutti

Registrar: Fidelma Donlon

Date: 13 June 2022

Language: English

File name: Referral by Hashim Thaçi to the Constitutional Court Panel
Concerning the Fundamental Rights to an Independent and Impartial
Tribunal Established by Law and to a Reasoned Opinion

Classification: Public

**Decision on the Referral of Hashim Thaçi Concerning
the Right to an Independent and Impartial Tribunal
Established by Law and to a Reasoned Opinion**

Applicant

Hashim Thaçi

Specialist Prosecutor

Jack Smith

The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge
Roumen Nenkov, Judge
Romina Incutti, Judge

Having deliberated remotely delivers the following Decision

I. PROCEDURE**A. REFERRAL**

1. On 28 February 2022, Mr Hashim Thaçi (the "Applicant") lodged with the Specialist Chamber of the Constitutional Court (the "Chamber")¹ a referral, dated 28 February 2022 (the "Referral"),² under Article 113(7) of the Constitution of the Republic of Kosovo (the "Constitution") and Article 49(3) of the Law. The Applicant was represented by Mr Gregory W. Kehoe.

2. In the Referral, the Applicant complained about violation of his fundamental rights in relation to the criminal proceedings against him, taking place before the Specialist Chambers (the "SC"). In particular, he submitted that there was a violation of his fundamental rights under Article 31(2) of the Constitution and Article 6(1) of the European Convention on Human Rights (the "Convention"). He argued that the SC did not have jurisdiction to adjudicate the charges against him, and, when he challenged the SC's jurisdiction before the Court of Appeals panel, the latter failed to

¹ With regard to assignment of the Constitutional Court Panel under Article 33(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), see KSC-CC-2022-15, F00002, Decision to assign judges to a Constitutional Court panel, public, 1 March 2022.

² KSC-CC-2022-15, F00001, Referral to the Constitutional Court Panel on the Violation of Mr Thaçi's Fundamental Rights to an Independent and Impartial Tribunal Established by Law, and to a Reasoned Opinion, public, 28 February 2022 ("Referral").

address his important argument in this regard, and that the Court of Appeals panel had been constituted in breach of the Law.³

B. WRITTEN SUBMISSIONS

3. On 30 March and 8 April 2022, the SPO and the Applicant filed their written submissions on the Referral,⁴ addressing questions put to them by the Chamber pursuant to Rule 15(2) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (the “SCCC Rules”).⁵

C. EXAMINATION OF THE REFERRALS

4. The Chamber turns to the examination of the Referral, based on the Referral and the aforementioned written submissions of the SPO and the Applicant. The Chamber refers to the facts of the case and the submissions of the SPO and the Applicant insofar as relevant for the Chamber’s assessment of the Referral.

II. THE FACTS

A. COUNCIL OF EUROPE REPORT

5. On 7 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”).⁶

6. The Report was drawn up in the wake of the revelations contained in the

³ Referral, paras 4-8, 26-27, 33-47, 49-50, 58-64, see KSC-CC-2022-15, F00004, Decision on further submissions, public, 15 March 2022, paras 3-5.

⁴ KSC-CC-2022-15/F00004, F00005, Corrected version of ‘Prosecution response to decision on further submissions in relation to Thaçi referral, public, 30 March 2022, with annex 1, public (“SPO’s submissions”). KSC-CC-2022-15, F00009, Thaçi written submissions pursuant to the Constitutional Court Panel’s ‘Decision on further submissions’, public, 8 April 2022 (“Applicant’s submissions”).

⁵ KSC-CC-2022-15, F00004, Decision on further submissions, public, 15 March 2022.

⁶ Council of Europe Parliamentary Assembly, Report Doc. 12462, Inhuman treatment of people and illicit trafficking in human organs in Kosovo, 7 January 2011.

memoirs of the former Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, primarily concerning the alleged trafficking of human organs, linked to the territory of Albania.⁷ At the same time, the inquiry shed light on further, related allegations and drew a very sombre and worrying picture of what had taken place in Kosovo.⁸

7. In particular, its findings included that little or no detailed investigation had been carried out into organised crime or war crimes committed against Serbs and Kosovar Albanians regarded as collaborators or as rivals of the dominant factions.⁹ While the inquiry, for the most part, focused on the period from the summer of 1999 onwards, it also alleged crimes in the period between 1998 and 2000.¹⁰

8. In view of the aforementioned Report, 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.¹¹

B. 2014 EXCHANGE OF LETTERS

9. On 14 April 2014, the President of Kosovo and the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission (the “High Representative”) exchanged letters. The President of Kosovo, in her letter to the High Representative, stated as follows:

[...]

⁷ Report, A. Draft Resolution, paras 3-8, 12, 17, 19; Report, B. Explanatory memorandum, paras 9, 14-19, 26, 93-167.

⁸ Report, B. Explanatory memorandum, paras 19, 175. See also Report, A. Draft Resolution, paras 1-6, 10-13, 16-17, 19; Report, B. Explanatory memorandum, paras 1, 3-9, 12-15, 20-21, 26-35, 68-74, 84-92, 109, 123-124, 126-127, 129-132, 137, 144, 150, 168-176.

⁹ Report, A. Draft Resolution, para. 11.

¹⁰ Report, A. Draft Resolution, paras 5, 10, 17; Report, B. Explanatory memorandum, paras 4, 13, 21, 44-48, 55-61, 72-74, 87-90, 130, 144.

¹¹ The SITF derived its legal authority from the Council Joint Action 2008/124/CFSP of 4 February 2008, which established EULEX Kosovo. See Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo.

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. [...]

[...]

These structures will be governed by their own statute [...] Kosovo undertakes to adopt appropriate legislation to allow for the establishment and operation of the dedicated judicial chambers in accordance with the terms above. [...] All legal measures undertaken by Kosovo to establish a specialist court [...] and a specialist prosecutor's office in connection with SITF [...] will be adopted in accordance with Kosovo law and subject to Constitutional Court review.

[...]

10. 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.

[...]

11. 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.¹²

C. CONSTITUTIONAL AMENDMENT

12. On 7 March 2015, the Government of Kosovo proposed an amendment to the Constitution, adding a new Article 162 on the Specialist Chambers and the Specialist Prosecutor's Office.

13. Article 162(1) states, in its relevant part, that "[t]o comply with its international obligations in relation to the [Report], the Republic of Kosovo may establish Specialist

¹² 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.

Chambers and a Specialist Prosecutor's Office within the justice system of Kosovo. The [...] jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office shall be regulated by this Article and by a specific law".

D. CONSTITUTIONAL REVIEW OF THE AMENDMENT

14. On 14 April 2015, the Constitutional Court confirmed the constitutional amendment.¹³ In its assessment, the Constitutional Court first recalled that the amendment derived from the 2014 exchange of letters between Kosovo and the EU,¹⁴ and that the establishment of the SC and the SPO was a requirement for Kosovo to comply with its international obligations in relation to the Report.¹⁵

15. The Constitutional Court then considered that Article 103(7) of the Constitution provided for a possibility to establish specialised courts. As regards the aspect of the SC's jurisdiction in particular, the Court considered that a "specialised court" in Article 103(7) was a court with a specifically defined scope of jurisdiction.¹⁶ Further, pursuant to Article 103(7) of the Constitution, Kosovo could establish a specialised court when "necessary".¹⁷ The Court found that the SC's scope of jurisdiction as provided for in the amendment complied with the requirement of "necessity", as Kosovo's international obligation to establish the SC and the SPO stemmed from the Report.¹⁸

16. Further, in assessing the constitutionality of the amendment, the Constitutional Court observed that the "scope of jurisdiction [...] of the Specialist Chambers [would]

¹³ 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).

¹⁴ Kosovo, Constitutional Court, KO 26/15, para. 37.

¹⁵ Kosovo, Constitutional Court, KO 26/15, para. 39, see also paras 50-51.

¹⁶ Kosovo, Constitutional Court, KO 26/15, para. 43, see also para. 44.

¹⁷ Kosovo, Constitutional Court, KO 26/15, paras 45, 50.

¹⁸ Kosovo, Constitutional Court, KO 26/15, paras 50-53, referring to European Court of Human Rights (the "ECtHR"), *Fruni v. Slovakia*, no. 8014/07, 21 June 2011, para. 142.

be regulated by further laws in compliance with the Constitution".¹⁹ The Constitutional Court applied these considerations also to the proposal to establish the SPO.²⁰

E. ADOPTION OF THE LAW

17. On 3 August 2015, the Assembly of Kosovo approved the Law. Pursuant to its Article 1(1), the Law "establishes and regulates the [...] jurisdiction" of the SC and the SPO. Article 6 of the Law specifies the SC's subject matter jurisdiction. In particular, its paragraph (1) provides that the SC "shall have jurisdiction over crimes [...] which relate to the [Report]".

F. PROCEEDINGS AGAINST THE APPLICANT

18. On 26 October 2020, the pre-trial judge confirmed an indictment against the Applicant, charging him and other accused with war crimes and crimes against humanity, allegedly committed between at least March 1998 and September 1999 in Kosovo and areas of northern Albania.²¹ Referring to Article 6 of the Law, the pre-trial judge found that the charges fell within the SC's subject matter jurisdiction.²²

19. Following the pre-trial judge's confirmation of the charges, the SPO, on 30 October 2020, submitted the confirmed indictment.²³ On 4 November 2020, the SPO submitted a corrected indictment, and, on 3 September 2021, it submitted a further corrected confirmed indictment.²⁴

¹⁹ Kosovo, Constitutional Court, KO 26/15, para. 59.

²⁰ Kosovo, Constitutional Court, KO 26/15, paras 59-60, 62.

²¹ KSC-BC-2020-06, F00026/RED, Public redacted version of Decision on the confirmation of the indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, public, 26 October 2020 (the public redacted version was filed on 30 November 2020) ("Confirmation decision"), paras 15, 39, 41-42, 127, 129.

²² Confirmation decision, paras 32, 38, see also para. 43.

²³ KSC-BC-2020-06, F00034/A01, Annex 1 to Submission of confirmed indictment, strictly confidential and *ex parte*.

²⁴ KSC-BC-2020-06, F00045/RED, Public redacted version of 'Submission of corrected and public redacted versions of confirmed indictment and related requests', filing KSC-BC-2020-06/F00045 dated

20. The indictment alleged, amongst others, that the Applicant, as a member of a joint criminal enterprise (“JCE”), shared the common purpose to gain and exercise control over all of Kosovo by unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents.²⁵ The indictment alleged that the JCE members carried out a widespread or systematic attack against the civilian population of opponents in Kosovo and areas of northern Albania, from at least March 1998 through September 1999.²⁶

21. In the meantime, on 5 November 2020, the Applicant was arrested.²⁷ On 4 February 2021, the Applicant filed an interlocutory appeal challenging his detention.²⁸ The same day, the President assigned a panel to decide the appeal pursuant to Articles 33(1)(c), 41(10) and 45(2) of the Law.²⁹

G. THE APPLICANT’S CHALLENGE TO THE SC’S JURISDICTION

22. On 12 March 2021, the Applicant filed a preliminary motion alleging, *inter alia*, that the indictment exceeded the SC’s subject matter jurisdiction.³⁰ He argued that the

²⁵ November 2020, public, 18 November 2020 (the original filed on 4 November 2020); KSC-BC-2020-06, F00455/RED, Public redacted version of ‘Submission of corrected indictment and request to amend pursuant to Rule 90(1)(b)’, KSC-BC-2020-06/F00455, dated 3 September 2021, public, 8 September 2021, with Annex 1, public (the original filed on 3 September 2021); KSC-BC-2020-06, F00647/RED, Prosecution submission of lesser redacted versions of indictment and Rule 86(3)(b) outline, public, 28 January 2022, with Annexes 1-2, confidential (the original filed on 17 January 2022). A further confirmed amended indictment was filed on 29 April 2022, see KSC-BC-2020-06, F00789/A05, Public redacted version of amended Indictment, public, 29 April 2022.

²⁶ Indictment, para. 32.

²⁷ Indictment, para. 16.

²⁸ KSC-BC-2020-06, F00051, Notification of arrest of Hashim Thaçi pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020).

²⁹ KSC-BC-2020-06, IA004/F0001/RED, Public redacted version of Thaçi Defence appeal against the “Decision on Hashim Thaçi’s application for interim release”, public, 4 February 2021, with Annexes 1-2, public. See KSC-BC-2020-06, F00177/RED, Public redacted version of Decision on Hashim Thaçi’s application for interim release, public, 26 January 2021 (the original filed on 22 January 2021).

³⁰ KSC-BC-2020-06, IA004, F00002, Decision assigning a court of appeals panel, public, 4 February 2021 (“Decision assigning an appeals panel”). See also KSC-BC-2020-06, F0005, Public redacted version of decision on Hashim Thaçi’s appeal against decision on interim release, public, 30 April 2021.

³¹ KSC-BC-2020-06, F00216, Preliminary motion to dismiss the indictment due to lack of jurisdiction, public, 12 March 2021 (“Preliminary motion”), paras 28-43.

constitutional amendment did not endorse the broad approach adopted by the SITE, and instead linked the SC's jurisdiction back to the far narrower allegations of the Report.³¹ In this connection, the Applicant submitted that the Report described the framework of alleged criminal activity as "organised crime".³² However, the indictment did not refer to organised crime in Kosovo or elsewhere.³³ In that light, the Applicant argued that, by failing to address the central allegations of the Report, the case against him was far outside the SC's jurisdiction.³⁴

23. On 22 July 2021, the pre-trial judge dismissed the Applicant's preliminary motion insofar as it argued that the charges in the indictment, in their entirety or in part, did not relate to the allegations arising from the Report.³⁵ In this regard, the pre-trial judge considered that Article 162(1) of the Constitution provided for the establishment of the SC "in relation to" the Report.³⁶ Similarly, Article 6(1) of the Law specified the SC's subject matter jurisdiction over crimes that "relate to" the Report.³⁷ The plain meaning of "in relation to" and "relate to" in those provisions required a sufficient connection between the charges brought against the Applicant and the Report.³⁸

24. The pre-trial judge concluded that this was further supported by the scope of jurisdiction provided for in the Law, which was broader than the specific contents of the Report.³⁹ The relevant factors for determining this are the victims, the locations, the time-frame, the *modus operandi*, the nature of the conduct, the intent behind the

³¹ Preliminary motion, para. 24.

³² Preliminary motion, para. 40.

³³ Preliminary motion, paras 40-41.

³⁴ Preliminary motion, para. 43.

³⁵ KSC-BC-2020-06, F00412, Decision on motions challenging the jurisdiction of the Specialist Chambers, public, 22 July 2021 ("Pre-trial judge's decision"), para. 142.

³⁶ Pre-trial judge's decision, paras 110-111.

³⁷ Pre-trial judge's decision, para. 111.

³⁸ Pre-trial judge's decision, para. 108.

³⁹ Pre-trial judge's decision, paras 109-110.

conduct, and the context of the conduct and the Report.⁴⁰ The pre-trial judge found that the decision confirming the indictment demonstrated that the charges were sufficiently connected to the Report.⁴¹

25. On 27 August 2021, the Applicant appealed the pre-trial judge's decision.⁴² Firstly, the Applicant referred to the findings of the Constitutional Court (see paragraphs 14-16 above).⁴³ He submitted that the Constitutional Court found that the necessity to establish the SC, which gave rise to their specialised nature in accordance with the Constitution, was based on Kosovo's international obligations.⁴⁴ These obligations, in turn, stemmed from the Report which outlined highly specific crimes of cruel treatment and organ trafficking.⁴⁵ The pre-trial judge's conclusion that the SC had not been established to solely adjudicate these specific crimes rendered the court one of general jurisdiction and therefore an extraordinary court prohibited by Article 103(7) of the Constitution.⁴⁶

26. Secondly, the Applicant argued that, pursuant to Article 1(2) of the Law, the SC had jurisdiction in respect of crimes that relate to the Report and that had been investigated by the SITF.⁴⁷ The pre-trial judge had expanded the scope of jurisdiction beyond these limits.⁴⁸ Further, the Applicant argued that the pre-trial judge had selected parts of the Report to purportedly show that it was about international crimes during the conflict in Kosovo and not merely about allegations of post-war organ trafficking and inhuman treatment of detainees in Albania.⁴⁹

⁴⁰ Pre-trial judge's decision, paras 107-108, 111, 139, 141.

⁴¹ Pre-trial judge's decision, para. 141.

⁴² KSC-BC-2020-06, IA009, F00012, Thaçi Defence appeal against decision on motions challenging the jurisdiction of the Specialist Chambers, public, 27 August 2021 ("Appeal").

⁴³ Appeal, paras 14-17, referring to Kosovo, Constitutional Court, KO 26/15, cited above, paras 50-54.

⁴⁴ Appeal, paras 14-15.

⁴⁵ Appeal, paras 14-17, referring to Kosovo, Constitutional Court, KO 26/15, cited above, paras 50-54.

⁴⁶ Appeal, para. 22.

⁴⁷ Appeal, para. 24.

⁴⁸ Appeal, paras 24-33.

⁴⁹ Appeal, para. 34.

27. On 30 August 2021, the President, pursuant to Articles 33(1)(c) and 45(2) of the Law, assigned a panel to decide the Applicant's appeal.⁵⁰

28. On 23 December 2021, the Court of Appeals panel denied the Applicant's appeal.⁵¹ As regards the relevance of the Report, the appeals panel referred to the phrasing of Article 162(1) of the Constitution and Article 6(1) of the Law (see paragraph 23 above), and found that a mere "relation" between the charges and the Report would suffice to meet the jurisdictional requirement under Article 6(1) of the Law.⁵² The Court of Appeals panel found that, since the charges must relate to the Report, this may allow for a broader scope of jurisdiction than the specific allegations contained in the Report.⁵³ The panel further affirmed that, as the jurisdictional provisions set forth in Articles 6 through 9 of the Law are broader than the specific allegations of the Report, the intention of the Law was not to confine the jurisdiction to these specific allegations in the Report.⁵⁴

29. The Court of Appeals panel further recalled that the Constitutional Court had found that the SC were a specialised court in compliance with Article 103(7) of the Constitution due to their specific jurisdiction and because their establishment had been a requirement for Kosovo to comply with its international obligations.⁵⁵ The panel found that the Constitutional Court's judgment was confined to whether the amendment limited any rights or freedoms guaranteed in the Constitution and that it did not exclude jurisdiction over broader allegations than crimes committed in Albania detailed in the Report.⁵⁶ The appeals panel further observed as follows:

⁵⁰ KSC-BC-2020-06, IA009, F00015, Decision assigning a court of appeal panel, public, 30 August 2021.

⁵¹ KSC-BC-2020-06, IA009, F00030, Decision on appeals against "Decision on motions challenging the jurisdiction of the Specialist Chambers", public, 23 December 2021 ("Appeals decision").

⁵² Appeals decision, para. 66.

⁵³ Appeals decision, para. 66.

⁵⁴ Appeals decision, para. 67.

⁵⁵ Appeals decision, para. 68.

⁵⁶ Appeals decision, para. 69.

[...] the fact that the Specialist Chambers were established as a result of Kosovo's international obligations "stemming from" the [Report] does not limit their jurisdiction in the manner suggested by the Defence. The Panel recalls that these international obligations arise out of the [2014 exchange of letters] [...] While they relate to the [Report], these obligations are broader than the mere obligation to investigate the allegations contained therein in that they are also connected to the establishment of the Specialist Chambers as "a requirement for the Republic of Kosovo" and the need to provide secure, independent, impartial, fair and efficient criminal proceedings for crimes relating to the Report.⁵⁷

H. THE APPLICANT'S CHALLENGE TO THE ASSIGNMENT OF THE APPEALS PANEL

30. In the meantime, on 16 August 2021, the Applicant filed a request, *inter alia*, to disqualify and/or recuse the President from appointing an appeals panel to decide his appeal on provisional release.⁵⁸ The Applicant requested disqualification and/or recusal of the President alleging that she had displayed an appearance of bias in composing different Court of Appeals panels on his applications concerning provisional release and detention, by removing one of the judges appointed to decide on his first interlocutory appeal.⁵⁹

31. On 24 August 2021, the President dismissed this request.⁶⁰ The President held that Rule 20 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (the "Rules"), does not provide for the recusal or disqualification of a President acting in his/her judicial administrative capacity and she therefore retained competence in the matter.⁶¹ In dismissing the motion, the President noted that judges appointed to the Roster are not permanently allocated to panels but assigned to

⁵⁷ Appeals decision, para. 70 (citations omitted).

⁵⁸ KSC-BC-2020-06, F00434, Thaçi Defence application for the recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals panel to adjudicate Mr Thaçi's appeal on provisional release, public, 16 August 2021 ("Defence application for recusal"), with Annex 1, confidential, and Annex 2, public.

⁵⁹ KSC-BC-2020-06, F00434, Thaçi Defence application for the recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals panel to adjudicate Mr Thaçi's appeal on provisional release, public, 16 August 2021, paras 9, 42-43, with Annex 1, confidential, and Annex 2, public.

⁶⁰ KSC-BC-2020-06, F00440, Decision on application for the recusal of the President, public, 24 August 2021 ("Decision on recusal").

⁶¹ Decision on recusal, para. 32.

proceedings or phases where needed under Article 33 of the Law and in accordance with the criteria set out in the Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judges (the “Rules on Assignment”). The President further observed that judges were not removed but rather the assignment of a panel ended with a pronouncement on the specific subject matter *sub judice*.⁶²

32. The Applicant filed two subsequent applications. On 31 August 2021, he requested reconsideration of the President’s decision.⁶³ On 6 September 2021, he requested the disqualification of a judge from the Court of Appeals panel deciding the Applicant’s appeals on provisional release and on the SC’ jurisdiction, as this judge had not been assigned to the appeals panel that had decided the Applicant’s first interlocutory appeal (see paragraph 21 above).⁶⁴ The Applicant requested that the initial appeals panel assigned on 4 February 2021 be reinstated.⁶⁵

33. On 17 September 2021, the President dismissed the Applicant’s requests.⁶⁶ The President observed that she had appointed the competent panel in accordance with Articles 30(3) and 33(1)(c) of the Law. The President noted that the judge was not “replaced or removed” but assigned to a new panel to address an interlocutory appeal in accordance with the Law and the Rules.⁶⁷ In this regard, the President noted that an assignment of the Court of Appeals panel elapsed upon the disposal of a decision

⁶² Decision on recusal, para. 30.

⁶³ KSC-BC-2020-06, F00449, Thaçi Defence request for reconsideration of the 24 August 2021 Decision on application for the recusal of the President, public, 31 August 2021.

⁶⁴ KSC-BC-2020-06, F00457, Thaçi Defence application for the disqualification of Judge Emilio Gatti from the Court of Appeals panel adjudicating Mr Thaçi’s appeals on provisional release and jurisdiction, annulment of the decisions of the President Nos. KSC-BC-2020-06/IA010/F00005 and KSC-BC-2020-06/IA009/F00015, dated 26 August 2021 and 30 August 2021, respectively, and the reinstatement of the Court of Appeals panel appointed by the President by decision KSC-BC-2020-06/IA004/F00002, dated 4 February 2021, to rule on Mr Thaçi’s appeals on provisional release and jurisdiction, public, 6 September 2021 (“Disqualification application”), with Annex 1, confidential, and Annex 2, public.

⁶⁵ Disqualification application, paras 7, 45, referring to Decision assigning an appeals panel.

⁶⁶ KSC-BC-2020-06, F00476, Decision on applications for reconsideration and disqualification of a judge from a Court of Appeals panel, public, 17 September 2021 (“President’s decision”).

⁶⁷ President’s decision, paras 45-46.

during a discrete phase of the proceedings.⁶⁸ With respect to the disqualification and reinstatement of the initial panel, the President recalled that she was the responsible authority to assign judges to panels in accordance with the Law and found the Applicant's submission to lack substance.⁶⁹

III. ALLEGED VIOLATIONS

34. The Applicant set forth three alleged violations in the Referral. First, he complained that his fundamental right to be tried by a tribunal "established by law" under Article 31(2) of the Constitution and Article 6(1) of the Convention had been breached, as the charges against him exceeded the scope of the Report, and, therefore, the SC did not have jurisdiction to adjudicate them.

35. Second, the Applicant complained that, when he challenged the SC's jurisdiction before the Court of Appeals panel (see paragraph 25 above), the latter had failed to address his important argument as regards the "extraordinary" nature of the SC under Article 103(7) of the Constitution. According to the Applicant, the appeals panel had thus breached his fundamental right to a reasoned opinion under Article 6(1) of the Convention.

36. Lastly, the Applicant complained that the Court of Appeals panel that decided his interlocutory appeal had been constituted in breach of the Law, as it was a different panel from that which had decided his very first interlocutory appeal filed on 4 February 2021 (see paragraph 21 above). In this regard, the Applicant invoked his right to an "independent and impartial tribunal established by law" under Article 31(2) of the Constitution and Article 6(1) of the Convention.

⁶⁸ President's decision, paras 47-51.

⁶⁹ President's decision, paras 46, 51.

IV. JURISDICTION

37. The Chamber recalls that the Referral was filed under Article 113(7) of the Constitution. The Chamber also observes that, in the Referral, the Applicant raised complaints in relation to the proceedings against him before the SC, specifically, regarding the SC's jurisdiction to adjudicate the charges against him, the reasoning in the impugned decision in relation to the issue of the SC's jurisdiction and the composition of the Court of Appeals panel. The Referral thus relates to the SC and the SPO, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. It follows that the Chamber has jurisdiction to rule on the Referral.

V. PRELIMINARY ISSUE – APPEARANCE OF BIAS

(a) The Submissions

38. At the outset, the Chamber observes that the Applicant submitted that, by inviting the SPO and the Applicant to make submissions on specific questions regarding the admissibility of the Referral, the Chamber had revealed its bias as regards the admissibility of the Referral.⁷⁰ According to the Applicant, the Chamber had also identified the lines of arguments for the SPO to challenge the Referral, by specifying certain relevant elements, such as that the proceedings were pending.⁷¹

39. In this regard, the Applicant stated that, pursuant to Article 35(2)(i) of the Law, the SPO had the “responsibility” to respond to the Referral, and it first had to respond to the whole Referral and not to certain designated parts.⁷² Such responsibility to respond was applicable also in the proceedings before the Kosovo Constitutional Court, pursuant to Article 22 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (the “Law on Constitutional Court”).⁷³ Further, Rule 15(2) of

⁷⁰ Applicant's submissions, para. 2.

⁷¹ Applicant's submissions, paras 2, 4-5.

⁷² Applicant's submissions, para. 3.

⁷³ Applicant's submissions, para. 3.

the SCCC Rules did not provide a legal basis for such specific questions as put by the Chamber regarding the admissibility of the Referral.⁷⁴

40. The Applicant, therefore, submitted that the proceedings before the Chamber had breached his right to an impartial tribunal under Article 31(2) of the Constitution and Article 6(1) of the Convention.⁷⁵

(b) The Chamber's Assessment

41. The Chamber first recalls that its task, under Article 113(7) of the Constitution and Article 49(1) and (3) of the Law, is to assess whether the irregularities complained of by the Applicant violated his individual rights and freedoms guaranteed by the Constitution. The Chamber therefore does not decide on the Applicant's guilt, nor does it function as a court of appeal in respect of decisions taken by the other panels of the SC.⁷⁶

42. However, before the Chamber may assess whether the alleged violation of the Applicant's fundamental rights was committed, it must first, after having ascertained its jurisdiction, determine whether the Referral is admissible. This follows from Article 113(1) of the Constitution, which provides that the Constitutional Court decides only on matters "referred to the [C]ourt in a legal manner by authorised parties".⁷⁷ Further, Rule 15(1) of the SCCC Rules provides that the Chamber shall

⁷⁴ Applicant's submissions, para. 6.

⁷⁵ Applicant's submissions, paras 2, 7.

⁷⁶ Kosovo, Constitutional Court, *Constitutional Review of Judgment PML No. 44/2018 of the Supreme Court of 10 April 2018*, KI 72/18, Resolution on inadmissibility, 22 November 2018 (14 December 2018), paras 40-41; *Imer Ibrahim et. Al. vs. 49 Individual judgments of the Supreme Court of the Republic of Kosovo*, KI 40/09, Judgment, 23 June 2010, para. 66; *Constitutional review of the Judgment of the Supreme court of Kosovo Rev. 383/2008, dated 10 June 2011*, KI 140/11, Resolution on inadmissibility, 11 July 2012 (12 July 2012), para. 29.

⁷⁷ See KSC-CC-2020-08, F00020/RED, Public redacted version of decision on the referral of [REDACTED] further to a decision of the Single Judge ("Decision concerning a decision of the single judge"), public, 20 April 2020, para. 37. See also Kosovo, Constitutional Court, *Constitutional review of decision Ae no. 287/18 of the Court of Appeals of 27 May 2019 and decision I.EK. no. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019*, KI 195/19, Judgment, 5 May 2021 (31 May 2021), paras 68-69; *Constitutional review of decision Pml no. 313/2018 of the Supreme Court of 10 December 2018*, KI 12/19, Resolution on inadmissibility, 10 April 2019 (3 May 2019), paras 30-31; *Constitutional*

decide on “the admissibility and/or merits of a referral” made under Article 49 of the Law. The question of whether the Referral is admissible is, therefore, the first stage in the Chamber’s examination of the Referral. Hence, the fact that, in this case, the Chamber requested specific submissions regarding the admissibility of the Referral does not indicate any bias on part of the Chamber, but merely that the Chamber is engaged in the first stage of its examination of the Referral and is carrying out its responsibility under Article 113(1) of the Constitution to assess whether the Referral is admissible.

43. In relation to the examination of the admissibility of the Referral, the Chamber observes that the Applicant essentially claimed that the SPO had the responsibility to challenge the admissibility, and that, by raising specific questions, the Chamber had assisted the SPO in carrying out that responsibility. In this regard, the Chamber reiterates that, pursuant to Article 113(1) of the Constitution, it must, in all cases, first determine whether a referral is admissible or not. In carrying out its assessment of the admissibility, the Chamber is in no way limited by the submissions of the SPO, as it has to examine the admissibility *ex officio*.

44. In that vein, Rule 14 of the SCCC Rules provides that, in certain cases, the Chamber may, in a “summarily” manner, dismiss as inadmissible a referral filed pursuant to Article 49 of the Law. It follows that a referral may also be dismissed without inviting submissions on the referral. Where, however, the Chamber decides to request submissions, Rule 15(2) of the SCCC Rules provides that the Chamber may request additional submissions, “as deemed necessary”. The Chamber considered it necessary in the present circumstances to request submissions in order to assist with its consideration of the admissibility of the Referral. Indeed, rather than being prejudiced, the Applicant was given an additional opportunity to provide views on

review of judgment Pml no. 41/2017 of the Supreme Court of the Republic of Kosovo of 3 July 2017, KI 119/17, Resolution on inadmissibility, 3 April 2019 (3 May 2019), paras 35-36.

the admissibility of his Referral and to respond to the SPO's submissions thereafter.

45. In this regard, the Chamber further observes that Article 35(2)(i) of the Law provides the SPO with a legal basis to respond to certain applications before the Chamber, but it does not create an obligation upon the Chamber to seek such a response.

46. The Chamber further notes that the Applicant appeared to argue that, in proceedings before the Kosovo Constitutional Court, the respective prosecutor's office responds to a referral in its entirety, rather than only to specific issues raised therein. In this regard, the Applicant referred to Article 22 of the Law on Constitutional Court, which provides in relevant part that the "opposing party or participant has forty-five (45) days from the reception of the referral to submit [...] its reply to the referral". The Chamber observes that Rule 15(2) of the SCCC Rules governs submissions before the Chamber and that Article 22 of the Law on the Constitutional Court is not applicable to it pursuant to Article 3(4) of the Law.

47. Moreover, the case law of the Kosovo Constitutional Court with regard to referrals on alleged violations of the fundamental rights in relation to criminal proceedings does not support the Applicant's argument. Indeed, as a general practice, the Kosovo Constitutional Court has not requested submissions from the prosecutor's office.⁷⁸ For example, in case no. KI 70/21, an applicant complained that, *inter alia*, his right to a fair and impartial trial was violated. The decision of the Constitutional Court in this case reveals that the prosecutor's office was not asked to comment on the

⁷⁸ Cf., Kosovo, Constitutional Court, *Constitutional review of Judgment Pml.no. 29/2021 of the Supreme Court of Kosovo, of 13 April 2021*, KI 113/21, Judgment, 5 January 2022 (20 December 2021), para. 9; *Constitutional review of Decision PN. No. 426/2020 of the Court of Appeals of 23 June 2020*, KI 142/20, Resolution on inadmissibility, 10 June 2021 (20 May 2021), para. 9; *Constitutional Review of the Judgment Rev. no. 324/2019 of the Supreme Court of Kosovo of 17 October 2019*, KI 05/20, Resolution on inadmissibility, 12 April 2021 (29 March 2021), para. 11.

referral.⁷⁹ Similarly, in cases nos. KI 31/21 and KI 193/19, concerning fair trial complaints, the respective prosecutor's offices were not asked to comment on the relevant referrals.⁸⁰

48. The Chamber further observes that, the ECtHR, especially in more complex cases, regularly raises specific questions to the applicant and the respondent government, not only as regards the admissibility of the complaints filed before the ECtHR, but also as regards their merits.⁸¹

(c) Conclusion

49. In view of the foregoing, the Chamber is unable to accept that, by raising specific questions to the Applicant and the SPO as regards the admissibility of the Referral, the Chamber prejudiced the present proceedings in any way.

VI. ADMISSIBILITY

A. ALLEGED VIOLATION OF ARTICLE 31(2) OF THE CONSTITUTION AND ARTICLE 6(1) OF THE CONVENTION ON ACCOUNT OF THE CHARGES AGAINST THE APPLICANT

50. The Chamber notes that the Applicant complained that the charges against him exceeded the scope of the Report and hence fell outside the SC's jurisdiction.⁸² As the

⁷⁹ Kosovo, Constitutional Court, *Constitutional Review of the Judgment Pml.no. 293/2020 of the Supreme Court of Kosovo, of 10 November 2020*, KI 70/21, Resolution on inadmissibility, 2 June 2021 (21 June 2021), paras 6-13.

⁸⁰ Kosovo, Constitutional Court, *Constitutional review of Judgment PML.no.224/2020 of the Supreme Court of Kosovo, of 17 September 2020*, KI 31/21, Resolution on inadmissibility, 5 May 2021 (21 May 2021), paras 6-12; *Constitutional review of Judgment Pml.no.36/2019 of the Supreme Court, of 5 June 2019*, KI 193/19, Judgment, 17 December 2020 (31 December 2020), paras 5-14.

⁸¹ ECtHR, *Milovanović and Jakovljević v. Serbia* (communication), no. 16489/20, 10 March 2022; *Zec v. Croatia* (communication), no. 35853/19, 2 June 2021; *Biba v. Albania* (communication), no. 24228/18, 10 May 2021.

⁸² Referral, paras 4-7.

SC do not have jurisdiction to adjudicate the charges, his fundamental right to be tried by a tribunal “established by law” under Article 31(2) of the Constitution and Article 6(1) of the Convention had been breached.⁸³

51. In this regard, the Chamber notes that, indeed, the complaint concerns the Applicant’s right to be tried by a tribunal “established by law” under Article 31(2) of the Constitution and Article 6(1) of the Convention.⁸⁴ As regards the application of Article 6(1) of the Convention, the Chamber recalls that, by virtue of Article 22(2) of the Constitution, it applies at the constitutional level.⁸⁵

52. However, before the Chamber can examine the Applicant’s complaint on the merits, the Chamber must first ascertain whether it is admissible.⁸⁶ The Chamber thus turns to the assessment of the admissibility requirements provided for in the Constitution, the Law, and the Rules, which arise in the present proceedings.

1. Whether the Applicant’s Complaint is Premature

53. The Chamber recalls that, pursuant to Article 113(7) of the Constitution and Article 49(3) of the Law, individuals are authorised to refer to the Chamber “alleged violations [...] of their individual rights and freedoms guaranteed by the Constitution [...]. Rule 14(f) of the Rules provides that a referral shall be inadmissible if nothing in the referral gives rise to the appearance of a violation of a constitutional right.

⁸³ Referral, paras 7, 21-44.

⁸⁴ ECtHR, *Jorgic v. Germany*, no. 74613/01, 12 July 2007, para. 65; *Richert v. Poland*, no. 54809/07, 25 October 2011, para. 41.

⁸⁵ KSC-CC-2019-07, F00013, Decision on the Referral of Driton Lajçi Concerning Interview Procedure by the Specialist Prosecutor’s Office, public, 13 January 2020 (“*Decision on the referral of Driton Lajci*”), para. 15. As regards the incorporation of the Convention and its Protocols into the law of Kosovo at the constitutional level, see Kosovo, Constitutional Court, *Judgment*, KO 01/09, 27 January 2010 (18 March 2010), para. 40.

⁸⁶ See *Decision concerning a decision of the single judge*, para. 37. See also KI 12/19, cited above, para. 30; KI 195/19, cited above, para. 68; KI 119/17, cited above, para. 35.

(a) Scope of Assessment

54. The Chamber notes that the Applicant alleged that the charges against him exceed the scope of the SC's jurisdiction in breach of Article 31(2) of the Constitution and Article 6(1) of the Convention. The Chamber observes that the criminal proceedings against the Applicant are ongoing and the charges at issue are yet to be decided. A question therefore arises whether the Applicant may claim to be a victim of the alleged violation.

(b) The Submissions

55. The Applicant submitted that he could, at this stage of the proceedings, claim to be a victim of the alleged violation.⁸⁷ He argued that the SPO, in its submissions, had offered no specific legal authority to support its claim that fairness of a trial, under Article 31(2) of the Constitution and Article 6(1) of the Convention, had to be assessed as a whole.⁸⁸ Referring to *Dvorski v. Croatia* and *Imbrioscia v. Switzerland* the Applicant argued that Article 31(2) of the Constitution and Article 6(1) of the Convention applied to preliminary stages of criminal proceedings.⁸⁹ The Applicant also referred to the case law of the ECtHR and of the Kosovo Constitutional Court on the application of fair trial rights to preliminary stages of civil proceedings.⁹⁰

56. The Applicant also submitted that such preliminary phases could affect the duration of the trial.⁹¹ The Applicant argued that forcing him to submit a constitutional complaint regarding the SC's jurisdiction at the end of the criminal

⁸⁷ Applicant's submissions, paras 23-28.

⁸⁸ Applicant's submissions, para. 24.

⁸⁹ Applicant's submissions, para. 25, referring to ECtHR, *Dvorski v. Croatia*, no. 25703/11, 20 October 2015, para. 76 and ECtHR, *Imbrioscia v. Switzerland*, no. 13972/88, 24 November 1993, para. 37.

⁹⁰ Applicant's submissions, paras 25-26, referring to Kosovo, Constitutional Court, *Constitutional review of Judgment Rev. no 185/2017 of the Court of Appeals, of 11 August 2017, and Decision IV. EK. C. No. 273/2016 of the Basic Court in Prishtina, of 14 June 2017*, KI 122/17, 18 April 2018 (30 April 2018), para. 127, and the ECtHR jurisprudence cited therein.

⁹¹ Applicant's submissions, para. 27.

proceedings would be a punishment in and of itself.⁹² The Applicant further argued that the Chamber's findings in the *Decision on the referral of Driton Lajci* indicated that a final ruling of a pre-trial judge on a preliminary motion could also constitute a final ruling in criminal proceedings amenable to appeal before the Chamber.⁹³

57. The SPO submitted that the Applicant's complaint regarding an alleged violation of a fair trial right under Article 31(2) of the Constitution and Article 6(1) of the Convention could be assessed only after the conclusion of the criminal proceedings.⁹⁴ The SPO contended that, since the proceedings against the Applicant were pending, his complaint was premature.⁹⁵ Referring to *Lenev v. Bulgaria*, the SPO argued that, in the event of an acquittal or discontinuation of the proceedings, an individual could not claim to be a victim of the alleged violation of the right to a fair trial. This represented a logical corollary to the fact that fair trial rights are to be reviewed holistically at the conclusion of proceedings.⁹⁶

(c) The Chamber's Assessment

58. The Chamber notes at the outset that the Applicant's complaint that the charges against him exceed the SC's jurisdiction concerns a specific aspect of fair trial guarantees contained in Article 31(2) of the Constitution and Article 6(1) of the Convention. In particular, it concerns the Applicant's right to determination of the charges against him by a tribunal "established by law".⁹⁷

59. The Chamber observes that the criminal proceedings against the Applicant are pending and the charges at issue are yet to be examined and determined by a trial

⁹² Applicant's submissions, para. 27.

⁹³ Applicant's submissions, para. 16, referring to KSC-CC-2019-07, F00013, Decision on the Referral of Driton Lajçi Concerning Interview Procedure by the Specialist Prosecutor's Office, 13 January 2020 (the "*Decision on the referral of Driton Lajci*"), para. 24.

⁹⁴ SPO's submissions, para. 26.

⁹⁵ SPO's submissions, paras 26, 31.

⁹⁶ SPO's submissions, para. 30, referring to ECtHR, *Lenev v. Bulgaria*, no. 41452/07, 4 December 2012, para. 158.

⁹⁷ ECtHR, *Richert v. Poland*, cited above, para. 41; *Jorgic v. Germany*, cited above, para. 64.

panel and, as the case may be, by a Court of Appeals and a Supreme Court panel, in accordance with their respective competence. In the course of the criminal proceedings, the specific charges at issue will need to be assessed by the competent panels and, as the case may be, the legal classification to be attributed to them in accordance with the jurisdiction of the SC. It is therefore not known, at this stage of the proceedings, how the charges against the Applicant will be classified and decided.

60. In this regard, the outcome of the proceedings may be relevant in determining whether an individual may claim to be a victim of the alleged violation of a fair trial right under Article 31(2) of the Constitution and Article 6(1) of the Convention. The Chamber notes that in *Sakhnovskiy v. Russia* [GC] and *Oleksy v. Poland*, the ECtHR held that an individual could not claim to be a victim of a violation of his or her right to a fair trial under Article 6(1) of the Convention where those proceedings had been discontinued or where the individual had been acquitted.⁹⁸ The limited exceptions to this principle include complaints pertaining to the length of the proceedings in question.⁹⁹ The Chamber notes, however, that it does not need to determine how it would apply this ECtHR case law, as the criminal charges against the Applicant are yet to be examined and decided and the outcome of the criminal proceedings is thus not known.

61. As regards the Applicant's argument that violations of fair trial rights under Article 31(2) of the Constitution and Article 6(1) of the Convention apply to all stages of proceedings, the Chamber considers that the Applicant submitted that a separate stage of criminal proceedings may be examined for its compliance with the respective fair trial rights. In this regard, the Chamber observes that the case law of the ECtHR referenced by the Applicant, addressing an alleged violation during an early stage of criminal proceedings, concerned a question of whether the proceedings as a whole

⁹⁸ ECtHR, *Sakhnovskiy v. Russia* [GC], no. 21272/03, 2 November 2010, para. 77; *Oleksy v. Poland*, no. 1379/06, 16 June 2009.

⁹⁹ ECtHR, *Osmanov and Husseinov v. Bulgaria* (dec.), nos 54178/00 and 59901/00, 4 September 2003.

had been fair after their completion.¹⁰⁰ In both cases, the ECtHR considered whether an alleged violation, which had occurred during an early stage of the criminal proceedings, had affected the fairness of the trial as a whole following a conviction during criminal proceedings.¹⁰¹

62. The Chamber further observes that in case no. KI 122/17, the Kosovo Constitutional Court considered the alleged violation in light of whether it affected the fairness of the trial as a whole and following the completion of civil proceedings.¹⁰² The Chamber considers that the aforementioned case, which addressed alleged violations that occurred during an early stage of proceedings and were considered following the conclusion of proceedings, does not alter the conclusion that the outcome of proceedings may determine whether the Applicant may claim to be a victim of the complaint.

63. The Chamber observes that the *Decision on the referral of Driton Lajci*, referenced by the Applicant, does not support his claim, as the Chamber, there too, found the applicant's referral premature and thus inadmissible.¹⁰³ Unlike the present circumstances, the Chamber in the *Decision on the referral of Driton Lajci* found that the remedy that the individual, a suspect, could have resorted to, was not a remedy the Chamber considered could be taken into account in that situation.¹⁰⁴ Moreover, the case concerned the investigatory stage and a situation where a panel had not yet been seised.

64. As regards the Applicant's argument concerning unnecessary proceedings which may arise, the Applicant appears to argue that the length of the criminal proceedings violate Article 31(2) of the Constitution and Article 6(1) of the

¹⁰⁰ *Dvorski v. Croatia* [GC], cited above, paras 57, 112; *Imbrioscia v. Switzerland*, cited above, para. 35.

¹⁰¹ *Dvorski v. Croatia* [GC], cited above, paras 49, 55; *Imbrioscia v. Switzerland*, cited above, paras 21, 23, 26.

¹⁰² KI 122/17, para. 176.

¹⁰³ *Decision on the referral of Driton Lajci*, paras 24-25.

¹⁰⁴ *Decision on the referral of Driton Lajci*, paras 28-29.

Convention. The Chamber notes in this regard that the Applicant alleged a distinct violation of Article 31(2) of the Constitution and Article 6(1) of the Convention, namely the right to be tried by a “tribunal established by law”. Accordingly, the Applicant did not raise a complaint that the proceedings are excessively long. While the assessment of complaints concerning the length of proceedings would require different considerations, they have no bearing on the assessment of the arguments raised in the present complaint related to a tribunal “established by law” since the grievance is merely hypothetical at this time.

(d) Conclusion

65. The Chamber therefore finds that, in view of its considerations as regards the victim status of the Applicant, the complaint, at this stage of proceedings, is premature. Accordingly, it must be declared inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 14(f) of the SCCC Rules.

66. While the Chamber finds that the Referral must be dismissed for the aforementioned reasons, it recalls that, pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 20(1)(a) of the Rules, an individual may make a referral to the Chamber after exhaustion of all effective remedies provided for by law against the alleged violation. In this connection, the Chamber notes that according to Article 47 of the Law, a Supreme Court panel of the SC shall, in certain specifically enumerated instances, hear appeals against a judgment of a Court of Appeals panel and that Article 48(6), (7) of the Law provides that, in case of a final judgment, a protection of legality request may be filed to a Supreme Court panel of the SC with regard to, *inter alia*, violations of the criminal law.¹⁰⁵

¹⁰⁵ The Chamber notes the Applicant’s submissions in relation to the exhaustion of remedies, see Referral, paras 7, 65; Applicant’s submissions, paras 9-22, referring to, *inter alia*, Kosovo, Constitutional Court, *Constitutional review of Judgment Rev. no. 50/2016, of the Supreme court of Kosovo, of 4 April 2016*, KI 102/16, 14 December 2016 (2 March 2017), para. 38. See also SPO’s submissions, paras 2, 13-17, 20, 27-28.

67. It therefore emerges that these are remedies that would need to be considered for the purposes of the requirement of exhaustion with respect to the alleged violation of Article 31(2) of the Constitution and Article 6(1) of the Convention.¹⁰⁶ Given, however, that the complaint is premature, the Chamber considers that it does not need to rule on the requirement of exhaustion at this point in time.

68. The Chamber further observes that while the complaint must be dismissed as premature, it raises a fundamental question pertaining to the functioning of the SC, namely whether the jurisdiction of the SC as set out in the Law is limited to the content set out in the Report. In view of the fundamental nature of this issue in the functioning of the SC, the Chamber deems it appropriate to address this matter. However, given the premature nature of the complaint, the Chamber must be cautious so as not to encroach, at this stage, upon the role of the other panels of the SC in determining the issues of law and fact relevant to the criminal case before them.

2. Whether there is an appearance of a violation

(a) Scope of Assessment

69. As noted above, the Chamber must first recall that it is the task of the other panels of the SC to assess, in accordance with their competence, the facts and evidence, as well as to interpret and apply the legal provisions relevant to the case before

¹⁰⁶ See Kosovo, Constitutional Court, *Constitutional review of Judgment of the Supreme Court of the Republic of Kosovo, PML 125/14, dated 8 July 2014, KI 185/14, Resolution on inadmissibility, 8 July 2015* (28 September 2015), paras 11-13, 28-29; KI 119/17, cited above, paras 15-28, 37-38; *Constitutional Review of Judgments of the District Court in Prishtina P.nr.529/06 dated 15 March 2007, and Supreme Court of Kosovo pp.nr. 200/07 dated 5 July 2007, and District Court in Prishtina P.nr.465/07 dated 12 December 2008*, KI 113/10, Resolution on inadmissibility, 23 May 2011 (3 November 2011), paras 20-24. The Chamber observes in this regard that the practice of the Constitutional Court establishes, with respect to an alleged violation of Article 31 of the Constitution and Article 6 of the Convention, that the rule of exhaustion of remedies under Article 113(7) of the Constitution requires, in principle, that an applicant raise the respective alleged violation, at least in substance, up to the Supreme Court in proceedings for the protection of legality.

them.¹⁰⁷ As it follows from the Chamber's earlier practice, once the competent panels of the SC have had an opportunity to examine these issues, the Chamber may assess their findings insofar as the fundamental rights and freedoms guaranteed by the Constitution are concerned.¹⁰⁸ In addition, and as mentioned, the Chamber notes that the question of whether the jurisdiction of the SC is limited to the specific contents of the Report is of central and fundamental constitutional importance within the legal framework of the SC.

70. In that light, the Chamber finds it appropriate, at this stage of the proceedings, to consider whether the Court of Appeals panel's conclusion regarding the scope of the SC's jurisdiction gives rise to an appearance of a violation of the Applicant's right to a "tribunal established by law" under Article 31(2) of the Constitution and Article 6(1) of the Convention, pursuant to Rule 14(f) of the SCCC Rules.

(b) The Submissions

71. The Applicant submitted that the charges in the indictment are not within the jurisdiction of the Specialist Chambers, as they do not relate to the contents of the Report, in violation of the Applicant's right to be tried by a tribunal "established by law" under Article 31(2) of the Constitution and Article 6(1) of the Convention.¹⁰⁹ The Applicant contended that the Court of Appeals panel erred in concluding that an indictment containing broad allegations of war crimes and crimes against humanity

¹⁰⁷ See Kosovo, Constitutional Court, *Constitutional review of 16 decisions of the Supreme Court of Kosovo rendered between 26 March and 12 April 2018*, KI 96/18 et al., Resolution on inadmissibility, 30 January 2019 (19 February 2019), para. 51; *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017*, KI 37/18, Resolution on inadmissibility, 30 May 2018 (11 June 2018), para. 39; *Constitutional review of decision PA-II-KZ-II-7/15 of the Supreme Court of Kosovo of 26 November 2015*, KI 15/16, Resolution on inadmissibility, 16 March 2016 (5 April 2016), para. 40; *Request for constitutional review of judgment Pml-Kzz no. 170/2014 of the Supreme Court of Kosovo of 19 February 2015*, KI 38/15, Resolution on inadmissibility, 11 September 2015 (2 November 2015), para. 30.

¹⁰⁸ *Decision concerning a decision of the single judge*, para. 36. See ECtHR, *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, ECHR 2007-I, para. 89. See Kosovo, Constitutional Court, KI 37/18, cited above, paras 41-43; *Constitutional review of Judgment of Supreme Court in Pkl no. 45/12 dated 18 June 2012*, KI 85/12 and KI 86/12, Resolution on inadmissibility, 21 January 2013 (22 January 2013), para. 28.

¹⁰⁹ Referral, paras 1–4, 21–44.

was related to the specific allegations contained in the Report.¹¹⁰ The Applicant stated that the requirement outlined in Article 6(1) of the Law, requiring charges to relate to the Report, is the “narrowest” and “most important” limitation to the jurisdiction of the SC.¹¹¹

72. The SPO submitted that the interpretation of law is within the purview of regular courts and that it is not the role of the Chamber, under Article 49 of the Law, to re-evaluate decisions of law or facts by the regular courts.¹¹² According to the SPO, interpretation of the law, including domestic incorporation of international law, is for the regular courts¹¹³ and intervention by the Chamber is only appropriate where an error is “flagrantly and manifestly arbitrary”.¹¹⁴ The SPO submitted that the primary submissions by the Applicant concerning subject matter jurisdiction do not raise a *prima facie* case of a constitutional or rights violation.¹¹⁵

(c) The Chamber’s Assessment

73. The Chamber recalls that Article 31(2) of the Constitution and Article 6(1) of the Convention provide for the Applicant’s right to a determination of the criminal charges against him by a tribunal “established by law”. The phrase “established by law” in those provisions includes jurisdiction over the Applicant. Accordingly, the requirement that a tribunal must have jurisdiction must be in accordance with the applicable “law”.¹¹⁶

74. The Chamber thus needs, at the outset, to identify what “law” in the present case determines the SC’s jurisdiction in connection with the Report. The Chamber recalls

¹¹⁰ Referral, paras 32-36, 42.

¹¹¹ Referral, paras 35-36, 43.

¹¹² SPO’s submissions, paras 33-40.

¹¹³ SPO’s submissions, para. 38, referring to Kosovo, Constitutional Court, *Request for constitutional review of Judgment PML No. 325/2020 of the Supreme Court of 16 December 2020*, KI 11/21, Resolution on Inadmissibility, 25 March 2021 (31 May 2021).

¹¹⁴ SPO’s submissions, para. 35, referring to *Decision concerning a decision of the single judge*, para. 36.

¹¹⁵ SPO’s submissions, para. 32.

¹¹⁶ ECtHR, *Jorgic v. Germany*, cited above, para. 65; *Richert v. Poland*, cited above, para. 41.

in this regard that it is in the first place for other SC's panels to interpret and apply the law (see paragraph 69 above). In this connection, the Chamber observes that in determining the SC's jurisdiction in connection with the Report, the pre-trial judge and the Court of Appeals panel relied on Article 162(1) of the Constitution and Article 6(1) of the Law and considered that the SC's has jurisdiction over charges which "relate to" the Report (see paragraphs 23, 28, and 29 above).

75. The Chamber will therefore consider the relevant law, applied by the pre-trial judge and Court of Appeals panel, which sets out the SC's jurisdiction in connection to the Report. At the outset, the Chamber notes that Article 162(1) of the Constitution observes that the SC were established in order to comply with Kosovo's international obligations in relation to the Report and reads, in its relevant part, as follows:

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

[...]

1. To comply with its international obligations in relation to the [Report], the Republic of Kosovo may establish Specialist Chambers and a Specialist Prosecutor's Office within the justice system of Kosovo. The organisation, functioning and jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office shall be regulated by this Article and by a specific law.

[...]

76. The Chamber notes that, by the way this provision is construed, the expression "in relation to" contained in the first part of Article 162 of the Constitution specifically refers to and connects the international obligations (deriving from the 2014 Exchange of Letters) to the Report. Accordingly, it is those international commitments that are related to the Report. It is further observed that Article 162(1) of the Constitution states that "the organization, functioning and jurisdiction" of the SC shall be regulated both by Article 162(1) of the Constitution and the Law. The Chamber thus observes that the remainder of Article 162 of the Constitution refers to neither the jurisdiction of the SC nor the Report in this respect. In other words, Article 162 of the Constitution does not

establish the parameters of the SC's personal, temporal, territorial and subject matter jurisdiction. Instead, the jurisdiction of the SC is set forth in the Law.

77. Article 6(1) of the Law, which subsequently set out the SC's jurisdiction over crimes which relate to the Report, reads as follows:

Article 6
Subject Matter Jurisdiction

1. The Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the [Report].

[...]

78. The Chamber considers that Article 162(1) of the Constitution and Article 1(1) of the Law establish that the Law serves as the specific instrument set forth by the Constitution to govern all aspects of the functioning of the SC, thereby complying with and implementing the international obligations as agreed in the Exchange of Letters. This includes, *inter alia*, establishing the boundaries of the SC's jurisdiction as set forth in Article 6(1) to specific offences under international criminal law. The fact that the jurisdiction of the SC is not only limited to offences mentioned in the Report is further supported by Article 6(2) of the Law, which extends jurisdiction of the SC to specific criminal offences provided for in the Criminal Code of Kosovo where they relate to official proceedings and officials of the SC.

79. Concerning the primacy of the Law in setting out the jurisdiction, the Chamber also recalls the Kosovo Constitutional Court's conclusion that the scope of jurisdiction of the SC provided in Article 162(1) of the Constitution complied with the requirement of necessity in establishing a specialised court arising from international obligations which stemmed from the Report (see paragraphs 14 and 15 above). The 2014 exchange of letters further set out the scope of jurisdiction in light of investigations, carried out in connection with the allegations emerging from the Report (see paragraph 9 above).

80. The Applicant submitted that his right to be tried by a “tribunal established by law” under Article 31(2) of the Constitution and Article 6(1) of the Convention was violated as the charges against him exceed the scope of the Report. The Applicant appeared to submit in this respect that the pre-trial judge and the Court of Appeals panel failed to limit the scope of jurisdiction to the specific crimes contained in the Report on the basis that the Report was central to the creation of the SC. The Chamber, accordingly, will consider the instruments relevant to the establishment of the scope of jurisdiction of the SC.

81. The Chamber observes that following the Report, the 2014 exchange of letters provided that a specialist court would be established for any trial and appellate proceedings, which arose from the SITF investigation. The 2014 exchange of letters further stated that the SC would be ultimately be governed by their own statute (see paragraph 9 above). The Chamber further observes that the Kosovo Constitutional Court, following its conclusion that the specialised nature of the SC's was in compliance with the Constitution due to the necessity to comply with Kosovo's obligations, set out that the scope of jurisdiction of the SC would be regulated by a further law (see paragraphs 14 and 15 above). The wording of amendment no. 24, which the Kosovo Constitutional Court examined, and as noted above, similarly provided for the establishment of the SC in line with Kosovo's international obligations in relation to the Report (see paragraph 13 above).

82. The Chamber recalls in this regard that the Court of Appeals panel concluded that Article 162(1) of the Constitution and Article 6(1) of the Law, based on the ordinary meaning of “in relation to” and “relate to”, required that charges must relate to the Report, but may be broader than the specific contents thereof. The Chamber considers that insofar as charges must relate to the Report, such a relation should be understood as taking into consideration the contents and context reflected in the Report and Kosovo's international obligations stemming from the Report. In other words, the grave acts to be assessed should relate to the contents and context of the

Report, which, *inter alia*, outlined an overall worrying picture of the situation in Kosovo including a lack of accountability for certain serious criminal conduct (see paragraphs 5-7 above). This finding is further reflected by the reference to the Report in Article 1 of the Law, which sets forth the *purpose* of the Law.

83. The Chamber further agrees in this regard with the Court of Appeals panel's determination that if the drafters of the Law had intended to restrict the jurisdiction of the SC to specific allegations contained in the Report, and not the overall context and conclusions of the Report, they would have done so expressly in the Law.

84. The Chamber further observes that the instruments relevant to the establishment of the SC emphasised the importance of the establishment of the SC in light of the Report. These instruments, in doing so, did not determine the specific parameters of the SC's scope of jurisdiction, which was left to be regulated by the Law that was enacted in light of Kosovo's obligations and for which the Report had been the impetus. The Chamber observes that the relevant instruments, and the interpretation of these instruments, establish the importance of the Report in the establishment of the SC without setting out the specific parameters of the SC's jurisdiction, which is provided for in the Law. The Chamber therefore finds no contradiction in the conclusion by the pre-trial judge and the Court of Appeals panel concerning the jurisdiction of the SC as set out in the Law.

85. Accordingly, the Chamber finds that the complaint reveals no appearance of a violation of the Applicant's right under Article 31(2) of the Constitution and Article 6(1) of the Convention, to the determination of the charges by a "tribunal established by law". It follows that the complaint is inadmissible pursuant to Rule 14(f) of the Rules.

B. ALLEGED VIOLATION OF ARTICLE 31(2) OF THE CONSTITUTION AND ARTICLE 6(1) OF THE CONVENTION ON ACCOUNT OF THE REASONING BY THE APPEALS PANEL

(a) Scope of Assessment

86. The Chamber notes that the Applicant complained that the Court of Appeals panel failed to address his submission that the pre-trial judge's conclusion on the scope of jurisdiction of the SC rendered it an "extraordinary" court in violation of Article 103(7) of the Constitution. According to the Applicant, the Court of Appeals panel thus breached the Applicant's fundamental right to a reasoned opinion under Article 6(1) of the Convention.

87. The Chamber observes that the Applicant relied on Article 6(1) of the Convention. The Chamber recalls that, by virtue of Article 22(2) of the Constitution, Article 6 of the Convention applies at the constitutional level.¹¹⁷

88. The Chamber further observes that the Applicant refers only to Article 6(1) of the Convention. In this respect, the Chamber recalls that the Kosovo Constitutional Court has affirmed that the right to a reasoned opinion is also applicable under Article 31(2) of the Constitution.¹¹⁸

89. Insofar as the Applicant complained that the appeals panel did not address an important argument as regards the "extraordinary" nature of the SC under Article 103(7) of the Constitution, the Chamber therefore finds that this concerns the Applicant's right to a reasoned opinion under Article 31(2) of the Constitution and

¹¹⁷ *Decision on the referral of Driton Lajci*, para. 15. As previously noted, for the incorporation of the Convention and its Protocols into the law of Kosovo at the constitutional level, see Kosovo, Constitutional Court, KO 01/09, cited above, para. 40.

¹¹⁸ Kosovo, Constitutional Court, *Constitutional Review of the Decisions of the Kosovo Prosecutorial Council related to the election procedure of Chief State Prosecutor*, KI 99/14 and KI 100/14, Decision on interim measures, 3 July 2014 (8 July 2014), para. 86. See also ECtHR, *Torija v. Spain*, no. 18390/91, 9 December 1994, para. 30.

Article 6(1) of the Convention.¹¹⁹

90. Turning to the assessment of the complaint, the Chamber notes that its earlier considerations as regards the Applicant's victim status are relevant also with respect to this complaint (see paragraphs 58-68 above). The Chamber recalls, however, that it may assess the findings of a panel of the SC insofar as the fundamental rights and freedoms guaranteed by the Constitution are concerned, in particular where they are flagrantly and manifestly arbitrary.¹²⁰ As noted above, the Chamber recalls that such an assessment is without prejudice to any future determination of a complaint, if any, which the Applicant may bring before the Chamber (see paragraphs 68-(b) above).

91. The Chamber therefore deems it appropriate to consider whether, at this stage of the proceedings, the Court of Appeals panel findings, or lack thereof, regarding the pre-trial judge's conclusions give rise to the appearance of a violation of Article 31(2) of the Constitution and Article 6(1) of the Convention, pursuant to Rule 14(f) of the SCCC Rules.

(b) The Submissions

92. The Applicant argued that, when he challenged the SC's jurisdiction before the Court of Appeals panel, it failed to address an important argument of the Applicant. The Applicant submitted that if the SC's jurisdiction is not limited to the specific allegations contained in Report, it is not a "specialised court" permitted by Article 103(7) of the Constitution, but an "extraordinary court" prohibited by Article 103(7).¹²¹ The Applicant argued that, by failing to address that argument, the Court of Appeals panel breached the Applicant's fundamental right to a reasoned opinion under Article 6(1) of the Convention.¹²²

¹¹⁹ ECtHR, *Moreira Ferreira v. Portugal*, no. 2 [GC], no. 19867/12, 11 July 2017, para. 84.

¹²⁰ *Decision concerning a decision of the single judge*, para. 36.

¹²¹ Referral, para. 59.

¹²² Referral, paras 58-64; Applicant's submissions, para. 32.

93. The SPO submitted that the Applicant failed to allege a constitutional violation as the Court of Appeals panel decision is sufficiently reasoned in accordance both with the case law of the Kosovo Constitutional Court and the ECtHR.¹²³ The SPO submitted that the Court of Appeals panel summarised the Applicant's arguments regarding the specialised nature of the SC and addressed the pre-trial judge's reasoning in relation thereto.¹²⁴

(c) The Chamber's Assessment

94. The Chamber recalls that a right a fair hearing under Article 31(2) of the Constitution and Article 6(1) of the Convention requires courts to adequately state the reasons on which a judgment is based. While a detailed answer is not required for every argument, the essential arguments of an applicant must be addressed and the reasons given must be based on the applicable law.¹²⁵

95. In the present case, the Applicant submitted that the Court of Appeals panel failed to address his submission that if the SC jurisdiction is not limited to specific allegations contained in the Report, then it is not a "specialised court" permitted by Article 103(7) of the Constitution, but an "extraordinary court" prohibited by Article 103(7) of the Constitution.

96. In this regard, the Chamber observes that the Court of Appeals panel addressed the compatibility of the SC jurisdiction with Article 103(7) of the Constitution. The

¹²³ SPO's submissions, para. 41, referring to Kosovo, Constitutional Court, *Constitutional review of Judgment AML No. 1/2019 of the Supreme Court of 16 April 2019*, KI 131/19, Resolution on inadmissibility, 11 March 2020 ((21 April 2020), para. 41; Kosovo, Constitutional Court, *Constitutional review of Decision AC No. 3917/17 of the Court of Appeals of Kosovo, of 25 October 2017*, KI 154/17 and KI 05/18, Resolution on inadmissibility, 22 July 2019 (13 August 2019), para. 85; Kosovo, Constitutional Court, *Request for constitutional review of Judgment ASC -11-0012 of 22 September 2016 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters*, KI 143/16, Resolution on inadmissibility, 17 May 2018 (8 June 2018), para. 56; ECtHR, *Merabishvili v. Georgia*, no. 72508/13, 28 November 2017, para. 227.

¹²⁴ SPO's submissions, para. 44, referring to Appeals decision, paras 66-73.

¹²⁵ *Moreira Ferreira v. Portugal* (no. 2), cited above, para. 84; Kosovo, Constitutional Court, *Constitutional review of Judgment PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo of 19 July 2017*, KI 146/17, Judgment, (30 May 2018 (7 June 2007), para. 78; KI 119/17, cited above, para. 47.

panel referred to the Kosovo Constitutional Court's conclusion that the SC were in compliance with Article 103(7) of the Constitution both because of their specifically defined scope of jurisdiction and as their establishment was a requirement to comply with international obligations stemming from the Report. The Court of Appeals panel noted in this regard that the scope of the assessment by the Kosovo Constitutional Court was limited to whether the SC were in compliance with the Constitution and did not pronounce itself on the jurisdiction of the SC (see paragraph 29 above).

97. The Court of Appeals panel observed that the necessity which gave rise to the specialised nature of the court stemmed from obligations arising from the Report and the 2014 exchange of letters including the "need to provide secure, independent, impartial, fair and efficient criminal proceedings relating to the Report". The Court of Appeals panel concluded that the fact that the SC had a broader scope of jurisdiction than the specific contents of the Report, due *inter alia* to the obligations which gave rise to the SC, did not remove the specialised nature of the SC as assessed by the Kosovo Constitutional Court and render it an "extraordinary court" in violation of Article 103(7) of the Constitution (see paragraph 29 above).

98. In light of the aforementioned, the Chamber finds that the Court of Appeals panel addressed the Applicant's submission and specifically relied on the jurisprudence of the Kosovo Constitutional Court in this respect. Accordingly, the Chamber finds that the Applicant's complaint that the Court of Appeals panel failed to provide a reasoned opinion does not give rise to the appearance of a violation of Article 31(2) of the Constitution and Article 6(1) of the Convention. This complaint must, therefore, be declared inadmissible pursuant to Rule 14(f) of the Rules.

C. ALLEGED VIOLATION OF ARTICLE 31(2) OF THE CONSTITUTION AND ARTICLE 6(1) OF THE CONVENTION ON ACCOUNT OF THE ASSIGNMENT OF THE APPEALS PANEL

(a) Scope of Assessment

99. The Applicant complained that the Court of Appeals panel that decided his interlocutory appeal against the pre-trial judge's decision on the preliminary motion relating to the SC's jurisdiction had been constituted in breach of the Law, as it was not the same panel that had decided his very first interlocutory appeal (see paragraph 30 above).¹²⁶ Further, the Applicant complained, in general terms, that the President's interpretation of the legal provisions governing the judges' appointments to panels removed the institutional safeguards ensuring the independence and impartiality of the SC's judges, in addition to providing the President with the authority to influence their decision-making.¹²⁷ In this regard, the Applicant invoked his right to an "independent and impartial tribunal established by law" under Article 31(2) of the Constitution and Article 6(1) of the Convention.¹²⁸

100. Insofar as the Applicant complained that the Court of Appeals panel had been constituted in breach of the Law, the Chamber finds that this concerns the Applicant's right to be tried by a "tribunal established by law" under Article 31(2) of the Constitution and Article 6(1) of the Convention.¹²⁹ Similarly, the Applicant's claim as regards the independence and impartiality of the Court of Appeals panel falls to be examined under Article 31(2) of the Constitution and Article 6(1) of the Convention.

101. Turning to the assessment of the complaint, the Chamber notes that its earlier considerations as regards the Applicant's victim status are relevant also with respect to this complaint (see paragraphs 58-68 above). The Chamber recalls, however, that it may assess the findings of a panel of the SC insofar as the fundamental rights and freedoms guaranteed by the Constitution are concerned, in particular where these findings are flagrantly and manifestly arbitrary.¹³⁰ The Chamber recalls that such an

¹²⁶ Referral, para. 45.

¹²⁷ Referral, paras 49-50.

¹²⁸ Referral, paras 45, 50.

¹²⁹ See, among many others, ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 212, with further case law references.

¹³⁰ *Decision concerning a decision of the single judge*, para. 36.

assessment is without prejudice to any future determination of a complaint, if any, which the Applicant may bring before the Chamber (see paragraphs 68-(b) above).

102. The Chamber therefore deems it appropriate to consider whether, at this stage of the proceedings, the complaint gives rise to the appearance of a violation of Article 31(2) of the Constitution and Article 6(1) of the Convention, pursuant to Rule 14(f) of the SCCC Rules.

(b) The Submissions

103. The Applicant argued that Articles 30(3) and 33(1)(c) of the Law provides that judges appointed to a Court of Appeals panel on a specific case shall serve on the appeals panel until a judgment on the merits in that case has been rendered.¹³¹ The Applicant submitted that the President incorrectly interpreted the Law as providing for the assignment of an appeals panel to decide on an interlocutory appeal only.¹³² According to the Applicant, the President's erroneous application of the Law and the ensuing assignment of separate appeals panels, allow the President to influence the appeals panel.¹³³

104. The SPO submitted that, insofar as the Applicant challenged the President's interpretation of the Law, the Applicant's complaint regarding the assignment of the Court of Appeals panel is not within the purview of the Chamber.¹³⁴ In particular, the SPO averred that the interpretation of the Law was within the purview of the other panels and that deviation from this rule is allowed only where an error is so egregious that it rises to the level of "flagrantly and manifestly arbitrary".¹³⁵ As the Applicant merely disagreed with the outcome of the President's interpretation of the Law, his

¹³¹ Referral, para. 47.

¹³² Referral, para. 49.

¹³³ Referral, paras 45-47, 49-50.

¹³⁴ SPO's submissions, para. 33.

¹³⁵ SPO's submissions, paras 34-35.

complaint is therefore inadmissible.¹³⁶

(c) The Chamber's Assessment

105. The Chamber notes that both Article 31(2) of the Constitution and Article 6(1) of the Convention guarantee a fair trial by a “tribunal established by law”.¹³⁷ As regards the term “law” in that phrase in particular, the Chamber recalls that, in its case law, the ECtHR has held that “law” comprises not only legislation providing for the establishment and competence of judicial organs, but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular.¹³⁸ In other words, the phrase “established by law” covers also the compliance by a tribunal with the particular rules that govern it and the composition of the bench in each case.¹³⁹

106. It follows that, in order to determine whether there is an appearance of a violation as regards the assignment of the Court of Appeals panel, the Chamber must first determine the legal provisions that govern the duration of the assignment. In this regard, the Chamber observes that the President, in her decision assigning the impugned appeals panel, referred, *inter alia*, to Article 33(1)(c) of the Law (see paragraph 27 above). Further, the Chamber observes that also Article 30(3) of the Law is relevant for the present assessment. These provisions read, in their relevant parts, as follows:

¹³⁶ SPO's submissions, para. 39.

¹³⁷ It is noted that also the Kosovo Constitutional Court, in case no. KI 108/19, examined a complaint as regards composition of a panel under Article 31 of the Constitution and Article 6 of the Convention, applying the ECtHR case law pursuant to Article 53 of the Constitution. See Kosovo, Constitutional Court, *Constitutional review of decision AC-1-19-0016 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatisation Agency of Kosovo Related Matters of 28 February 2019*, KI 108/19, Resolution on inadmissibility, 12 April 2021 (7 May 2021), paras 36, 38.

¹³⁸ See, among others, ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], cited above, para. 212; *Lavents v. Latvia*, no. 58442/00, 28 November 2002, para. 114; *Pandjikidzé and Others v. Georgia*, no. 30323/02, 27 October 2009, para. 104.

¹³⁹ ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], cited above, para. 213; *Lavents v. Latvia*, cited above, para. 114; *Kontalexis v. Greece*, no. 59000/08, 31 May 2011, para. 42; *Fatullayev v. Azerbaijan*, no. 40984/07, 22 April 2010, para. 144; *Buscarini v. San Marino*, no. 31657/96, 4 May 2000.

Article 30
Powers and Status of the Judges

[...]

3. If assigned from the Roster to hear a pre-trial, trial, court of appeal or supreme court phase of a case [...], the judge shall be assigned for a term of four years or until the completion of the phase of proceedings to which he or she is assigned, if that phase completes earlier.

[...]

Article 33
Assignment of the Judges and Composition of Panels

1. The President [...] shall assign judges from the Roster [...] as follows:

[...]

c. A Court of Appeals Panel, as soon as a motion for an interlocutory appeal in relation to a decision of a Pre-Trial Judge or a Trial Panel by right under Article 45(1) is filed, leave to appeal is granted for an interlocutory appeal under Article 45(2) or a notice of appeal in relation to a judgement of a Trial Panel is filed in accordance with Article 46. The assignments of Court of Appeals Panel judges shall elapse on the day after the Court of Appeal Panel renders its judgement [...].

[...]

107. In relation to the aforementioned provisions, the Chamber notes that the Applicant argued before the President that she had “removed” from the impugned Court of Appeals panel a judge that had initially been assigned to decide the Applicant’s first interlocutory appeal. The Chamber also notes that the President dismissed this argument, stating that judges were not permanently allocated to panels and were assigned to proceedings or phases of proceedings only where needed under Article 33 of the Law and in accordance with the criteria set out in the Rules on Assignment (see paragraph 31 above).

108. The President further found that the legal framework of the SC contemplated the assignment of a Court of Appeals panel upon filing of an interlocutory appeal and that the assignment elapsed once the panel had decided the interlocutory appeal. In this regard, she concluded that an interlocutory appeal was a discrete phase of the proceedings under Article 30(3) of the Law and that, therefore, a judge’s assignment

elapsed when the proceedings related to that phase were completed (see paragraph 33 above).

109. In relation to the interpretation of the Law by the President, the Chamber notes that, indeed, Article 30(3) of the Law provides for the assignment of a panel to a phase of proceedings. It follows from Articles 30(3) and 33(1)(c) of the Law that an appeal phase of proceedings can be triggered on three occasions: (i) when a motion for an interlocutory appeal is filed in relation to a decision of a pre-trial judge or a trial panel by right under Article 45(1) of the Law; (ii) when leave to appeal is granted for an interlocutory appeal under Article 45(2) of the Law; or (iii) when notice of appeal in relation to a judgment of a trial panel is filed in accordance with Article 46 of the Law.

110. The Chambers considers that the aforementioned scenarios trigger distinct appeals phases of proceedings. An appeals phase of proceedings triggered specifically by an interlocutory appeal can also take place while the case itself is in another phase before a different panel, as in the instant case – in the pre-trial phase before the pre-trial judge. As the determination of an interlocutory appeal constitutes a discrete appeals phase of the proceedings, the assignment of judges to that phase pursuant to Article 30(3) of the Law ceases upon completion of that assignment.

111. The Chamber finds that the above considerations are not contradicted by Article 33(1)(c) of the Law. In particular, the Chamber notes that Article 33(1)(c) of the Law states that the assignment of a Court of Appeals panel shall elapse on the day after it renders a “judgment”. The use of the word “judgment” may suggest that a panel must remain assigned for the examination of a case on the merits at second instance. At the same time, Article 33(1)(c) of the Law provides for the assignment of a Court of Appeals panel in three different scenarios as specified above (see paragraph 109 above). In case an appeals panel is assigned to decide an interlocutory appeal, the panel will not render a “judgment” as there is no examination of a case at second instance. Therefore, given the context in which “judgment” is used in Article 33(1)(c),

it rather refers to a ruling on the respective appeal, be it an appeal lodged against a trial judgment under Article 46 or an interlocutory appeal lodged under Article 45(1) or (2) of the Law.

112. Furthermore, the Chamber notes that the aforementioned reading of the Law appears also in the SC's practice. In particular, various assignment decisions issued by the President reveal that the President has consistently assigned separate Court of Appeals panels, often composed of different judges, to decide distinct interlocutory appeals in the same case. Furthermore, this practice had started and consolidated well before the Applicant lodged his complaint before the President.¹⁴⁰

113. In relation to the President's interpretation of the Law, the Chamber recalls the general principle that it is in the first place for the competent SC's panels to interpret and apply the Law.¹⁴¹ The Chamber finds that the President's interpretation of the relevant provisions of the Law as regards the assignment of the impugned Court of Appeals panel was not flagrantly or manifestly arbitrary, in a manner that would raise an issue under Article 32(1) of the Constitution and Article 6(1) of the Convention. The Chamber finds that the Applicant's complaint that the President had assigned the Court of Appeals panel in breach of the Law does not give rise to the appearance of a violation of Article 31(2) of the Constitution or Article 6(1) of the Convention. This

¹⁴⁰ See, for example, for case KSC-BC-2020-04, IA001/F0002, Decision assigning a Court of Appeals panel, 30 June 2021 (assigning judges Michèle Picard, Kai Ambos and Nina Jørgensen); IA002/F00004, Decision assigning a Court of Appeals panel, 10 November 2021 (assigning judges Michèle Picard, Emilio Gatti and Nina Jørgensen); for case KSC-BC-2020-06, IA001/F00002, Decision assigning a Court of Appeals panel, 5 February 2021 (assigning judges Michèle Picard, Kai Ambos and Nina Jørgensen); IA005/F00005, Decision assigning a Court of Appeals panel, 7 June 2021 (assigning judges Michèle Picard, Emilio Gatti and Kai Ambos); for case KSC-BC-2020-07, IA001/F00002, Decision assigning a Court of Appeals panel, 4 November 2020 (assigning judges Michèle Picard, Emilio Gatti and Kai Ambos); IA002/F00002, Decision assigning a Court of Appeals panel, 6 January 2021 (assigning judges Michèle Picard, Kai Ambos and Nina Jørgensen); IA005/F00001, Decision assigning a Court of Appeal panel, 16 June 2021 (assigning judges Michèle Picard, Emilio Gatti and Nina Jørgensen).

¹⁴¹ See Kosovo, Constitutional Court, KI 96/18 et al., cited above, para. 51; KI 38/15, cited above, para. 30.

complaint must, therefore, be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

114. Lastly, the Chamber notes that the Applicant also claimed that, through separate assignments of different panels, the President had the authority to influence the decision-making by SC's judges appointed to different panels. The Applicant alleged that such assignments of panels removed the institutional safeguards ensuring the independence and impartiality of the SC's judges, in violation of Article 6(1) of the Convention and Article 31(2) of the Constitution. In this regard, the Chamber observes that the Applicant did not substantiate this specific allegation, whether with respect to the impugned Court of Appeals panel specifically (see paragraphs 103 and 104 above) or as to a more structural lack of independence or impartiality of SC's judges more generally. Accordingly, the Chamber dismisses this part of the Applicant's complaint as unsubstantiated and, therefore, inadmissible pursuant to Rule 14(f) of the SCCC Rules.

VII. CONCLUSION

115. Based on the foregoing, the Chamber dismisses as premature for lack of victim status the Applicant's first complaint concerning an alleged violation of his fundamental right to be tried by a tribunal "established by law" under Article 31(2) of the Constitution and Article 6(1) of the Convention. It follows that this part of the Applicant's referral, must, at this stage of the proceedings, be declared inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 14(f) of the SCCC Rules. The Chamber recalls its further finding that, at this stage of the proceedings and without any prejudice to any future determination of a referral, the issue as to whether charges must relate to the specific allegations of the Report does not give rise to an appearance of a violation of the Applicant's right to a "tribunal

established by law" under Article 31(2) of the Constitution and Article 6(1) of the Convention.

116. The Chamber finds that the Applicant's second complaint, concerning the failure to provide a reasoned opinion, reveals no appearance of a violation of Article 31(2) of the Constitution and Article 6(1) of the Convention. It follows that this part of the Applicant's referral must, at this stage of the proceedings, be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

117. Finally, the Chamber finds that the Applicant's third complaint, concerning an alleged violation of his fundamental right to be tried by an "independent and impartial tribunal established by law", reveals no appearance of a violation of Article 31(2) of the Constitution and Article 6(1) the Convention. It follows that this part of the Applicant's referral must, at this stage of the proceedings, be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

118. The Chamber reiterates that the above conclusions are made in light of the current stage of the proceedings and are without prejudice to the assessment by the Chamber of any future referrals submitted by the Applicant.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

1. *declares Mr Hashim Thaçi's complaints raised in the Referral inadmissible; and*
2. *dismisses the Referral in its entirety.*



Vidar Stensland
Presiding Judge

Done in English on Monday, 13 June 2022

At The Hague, the Netherlands