



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO  
GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT

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Prishtina, 20 September 2011  
Ref. No.: AGJ138/11

## JUDGMENT

in

Case No. KO-98/11

Applicant

**The Government of the Republic of Kosovo**

**Concerning the immunities of  
Deputies of the Assembly of the Republic of Kosovo,  
the President of the Republic of Kosovo and  
Members of the Government of the Republic of Kosovo**

### THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President  
Kadri Kryeziu, Vice-President  
Robert Carolan, Judge  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Ivan Cukalovic, Judge  
Gjyljeta Mushkolaj, Judge and  
Iliriana Islami, Judge

#### **The Referral**

1. The Referral was lodged by the Prime Minister of Kosovo, Mr Hashim Thaqi, on behalf of the Government of the Republic of Kosovo (the Government).

2. On 20 July 2011, the Constitutional Court of the Republic of Kosovo (the Constitutional Court) received the Referral containing three separate issues from the Government. The questions submitted to the Court related to the immunities of different state bodies of Kosovo, namely - the deputies of the Assembly, the President, and the members of the Government.
3. The Government considered that there was a necessity to interpret and clarify the questions of immunities of the deputies of the Assembly, the President and members of the Government because "this issue has a direct impact on the democratic functioning of the institutions of the Republic of Kosovo, pursuant to the Constitution of the Republic of Kosovo."
4. The Government stated that it based the Referral on Article 93 (10) and Article 113 (3) (1) of the Constitution.

### **Proceedings before the Court**

5. On 20 July 2011 the Applicant filed the Referral with the Court.
6. On the same date, the President of the Constitutional Court appointed Judge Snezhana Botusharova as the Judge Rapporteur and appointed a Review Panel composed of Judges Robert Carolan (Presiding) and Enver Hasani and Iliriana Islami.
7. On 22 July 2011 the President of the Court notified the President of the Assembly, the President of the Republic of Kosovo and the Prime Minister of the lodging of the Referral and asked them to respond to and comment on the questions raised within 45 days.
8. In addition, in its letter to the President of the Assembly, and in a further one of 26 July 2011 complementing the first letter, in which it was noted that it would be useful to receive deputies' replies and remarks on issues raised in the Referral., the President of the Court asked the President of the Assembly to furnish papers and files, and in particular:
  - The *travaux preparatoires* of the Constitution to the extent that they relate to the several immunities under Articles 75, 89 and 98 of the Constitution;
  - A full copy of the files of the Assembly in relation to the Articles dealing with the immunities of the deputies under the Law on Rights and Responsibilities of Deputies, Law No. 03/L-111, and in particular, copies of all preparatory work of the Assembly, minutes of all meetings and all correspondence concerning the said Articles;
  - A full copy of the files of the Assembly in relation to the Articles dealing with the immunities of the deputies under the Rules of Procedure of the Assembly of Kosovo, adopted on 29 April 2010, and in particular, copies of all preparatory work of the Assembly, minutes of all meetings and all correspondence concerning the said Articles; and,
  - A full copy of the files of the Assembly in relation to the Articles dealing with the immunities of the President of the Republic of Kosovo under the Law No. 03/L-094 on the President of The Republic Of Kosovo, and in

particular, copies of all preparatory work of the Assembly, minutes of all meetings and all correspondence concerning the said Articles.

9. On 21 August 2011 Mr. Nait Hasani, a deputy of the Assembly, submitted a reply to the Court giving his view of the questions.
10. On 23 August 2011 Dr. Jakup Krasniqi, President of the Assembly of Kosovo, replying to the President of the Court's letter of 26 July 2011, wrote to the Court and enclosed a letter sent by the Assembly to Mr Xavier De Marnhac, Head of the EULEX Mission in Kosovo, on the issue and he also furnished the Legal Opinion prepared by the Legal Office of the Assembly of Kosovo.
11. On 8 September 2011 a further letter was sent to the President of the Assembly reminding him to furnish the files, papers and other documentation requested on 22 July 2011. The President of the Assembly responded on 9 September 2011 to this reminder, which was received on 12 September 2011. The response had attached the dossiers on the Law on Rights and Responsibilities of the Deputy and on the Rules of Procedure of the Assembly of Kosovo, approved on 29 April 2010.
12. On 9 September 2011 a response and comments were received from Mr Visar Ymeri on behalf of the Parliamentary Group of Vetevendosje.
13. On 12 September 2011 the Constitutional Court received a reply from Ms. Alma Lama, a deputy of the Assembly.
14. On 13 September 2011 the Court received a response, dated 12 September 2011, from Mr Fatmir Limaj, a deputy of the Assembly.
15. On 13 September 2011 a further response, dated 13 September 2011, was received from Dr. Jakup Krasniqi, President of the Assembly,
16. Responses were not received from other deputies of the Assembly, the President of the Republic of Kosovo or from members of the Government.
17. The Review Panel considered the Report prepared by the Judge Rapporteur, Judge Snezhana Botusharova and made a recommendation to the full Court.
18. On 20 September 2011 the Court at its full session decided to give priority to the Referral in view of the nature of the constitutional questions that were raised by the Government and it deliberated and voted on the Referral, .

## **Responses and comments**

### **A Response of Mr. Nait Hasani, deputy of the Assembly**

19. Mr. Nait Hasani stated that he had the immunities guaranteed to him by the Rules of Procedure of the Assembly of Kosovo and the Constitution. He stated that the immunities were clearly defined and that the immunity of a deputy could be waived by the Assembly on the request of a competent body in charge of criminal prosecution.

### **B Response and comments of the Assembly**

20. The response of the Assembly to the Constitutional Court, dated 13 September 2011, sent by Dr. Jakup Krasniqi President of the Assembly, contained his letter dated 15 July 2011 to Mr. Xavier De Marnhac, Head of the EULEX Mission in Kosovo. It stated that there was no incompatibility between the Law on Rights and Responsibilities of the Deputy and the Constitution and there was no need to address the Constitutional Court in the matter. He pointed out that it was completely within the discretion of the Government to refer a question to the Constitutional Court and it did not require a resolution of the Assembly to do that. The letter stated that the Assembly could take procedural action concerning the immunity of a deputy only when a request was made by the General Prosecutor (Albanian: Prokurori i Përgjithshëm i Kosovës, Serbian: Glavni javni tužilac Kosova, Unofficial English translation: Attorney General) based on Article 9 (3) of the Law on Rights and Responsibilities of the Deputy.
21. The Legal Opinion of the Legal Office of the Assembly of Kosovo identified certain constitutional and statutory provisions and maintained that the wording in them was identical. There was, therefore, no incompatibility issue which would require interpretation from the Constitutional Court. Further, the opinion stated that the constitutional provisions did not provide for the possibility of the Assembly to request a resolution from the Government to commence proceedings in the Constitutional Court.
22. Finally, the opinion stated that according to the Constitution and Article 9 of the Law on Rights and Responsibilities of the Deputy, Law No. 03/L-111, criminal prosecution shall not be prevented, suspended or delayed in any way when a suspect is a deputy of the Assembly. It further stated that the judiciary may follow its course by continuing an investigation and a trial. Following final conviction and sentencing to one or more years of imprisonment a deputy's mandate ends prematurely and this can lead to arrest and imprisonment.

### **C Response and comments of the Parliamentary Group of Vetevendosje**

23. Mr. Ymeri in his response on behalf of the Parliamentary Group of Vetevendosje stated that the issues of the immunities of the deputies were clearly regulated by the constitutional and legal provisions in force. His opinion was that the immunity meant that a deputy could not be subject to criminal prosecution, civil lawsuit for the free expression of thoughts regardless of form, and from voting or not voting for any decision taken in the Assembly. The constitutional provisions did not prevent criminal prosecution by competent authorities for all other actions taken outside of the scope of their responsibilities as deputies.
24. They considered that the immunity cannot serve as a shield to those deputies who have committed criminal acts of organized crime, corruption and other acts that seriously damage the property and health of citizens. The purpose of the immunity was to prevent arbitrary power over the deputy, to free the deputy from possible political constraints and, above all, to guarantee necessary political space to the deputy to perform his/her duties in representing citizens' interests and will, without being subject to political-legal pressure during this representation.
25. They considered that the separation of powers should guarantee sufficient autonomy to enable the performance of institutional functions. The immunity of deputies was essential for the autonomy of the Assembly and therefore it was essential for the constitutional order and that the immunity was linked to his/her mandate and was for the whole time that he/she served in that political post.

26. They considered that the immunity was reduced in cases where he/she was suspected or prosecuted. They pointed out the law in relation to prosecution, under Article 9 of the Law on the Rights and Responsibilities of the Deputy, which dealt with arrest without the consent of the Assembly, for persons caught while committing (in flagrante) a severe criminal act punishable with five or more years of imprisonment.
27. They pointed out provisions of Articles 281 and 210 of the Criminal Procedure Code of Kosovo that allowed the arrest of a person pursuant to a court order and by the police or other person when caught committing a criminal offence even without a court order.
28. They pointed out that Article 22(3) of the Rules of Procedure of the Assembly provided for the deputy to enjoy immunity from measures of detention, arrest and prosecution until the Assembly takes a decision on waiving his/her immunity. However, this could be considered to be in contradiction to Article 75(2) of the Constitution because the immunity does not prevent criminal prosecutions for actions taken outside the scope of the responsibilities of the deputy.
29. Finally, they stated that, regardless of the severity of a criminal offence, the immunity of a deputy could be waived after full observance of procedures after the vote of a majority of the deputies of the Assembly.

#### **D Response and comments of Ms. Alma Lama, a deputy of the Assembly**

30. Ms Lama stated that Article 75 provided immunity to the deputies of the Assembly, while paragraph 2 of the same Article prevented arrest and detention of the deputy while he/she was performing his/her duties without the consent of the majority of all deputies of the Assembly. She stated that she had no unclarity about the issues.

#### **E Response and comments of Mr. Fatmir Limaj, a deputy of the Assembly**

31. Mr Limaj stated that he had a number of central issues, namely, whether there was any provision regarding immunity in the Constitution of Kosovo, whether there was any provision regarding immunity in the ordinary law of Kosovo, whether there was authority for the Government to have recourse to the Constitutional Court directly and whether any such Referral was time barred.
32. Firstly, he quoted Article 75 of the Constitution and concluded that this Article provided that there was a provision regarding immunity.
33. Secondly, he referred to Article 9 of the Law on Rights and Responsibilities of the Deputy, Law no. 03/L-111, and, pointing out the similarity between it and the constitutional provisions, he concluded that there was provision regarding immunity in the ordinary law of Kosovo.
34. Thirdly, he emphasised Article 113 (2) of the Constitution which gives the Government, *inter alia*, power to refer questions concerning the compatibility with the Constitution of laws, decrees of the President or Prime Minister, and of regulations of the Government. He pointed out that no question of compatibility had been identified by the Government and that therefore no Referral was possible under Article 113.

35. He was of the opinion that the Constitution did not permit referral to the Constitutional Court for advisory opinions on question pertaining to the scope or application of the law and that therefore any such Referral was *ultra vires* the Constitution. He was of the view that a Referral under Article 93 (10) of the Constitution was subject to the provisions of Article 113 of the Constitution and that the Government had no special access to the Court outside Article 113 of the Constitution.
36. Fourthly, he pointed out that the provisions of Article 29 and 30 of the Law on the Constitutional Court, Law No. 03/L-121, provided that Referrals made under Article 113 (2) of the Constitution had to be filed within six months from the date upon which the contested Law enters into force. As the Law on the Rights and Responsibilities of the Deputy had entered into force on 4 June 2010 any challenge to that Law had to be filed by 3 December 2010.
37. In addition, Mr. Limaj observed that in balancing the administration of justice the Constitution determined that deputies would not be above the law but that they should not be subjected to politically motivated prosecutions simply because they were elected officials. He also pointed out that a criminal prosecution was not stayed by dint of a suspect being a deputy of the Assembly and that an investigation and trial could be conducted.

**F Further response and comments of the President of the Assembly,  
Dr. Jakup Krasniqi**

38. The further response and comments from Dr. Jakup Krasniqi, the President of the Assembly, dated 13 September 2011, closely reflected those arguments of Mr Limaj described above.

**Subject matter**

39. The subject matter of the Referral concerns immunity. The questions put to the Constitutional Court were in the terms that follow.

**A Immunity of the Deputies of the Assembly**

- 1 *The Government of the Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 75 (1) (Immunity) of the Constitution of Kosovo, which stipulates: "1. Deputies of the Assembly shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly. The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly." The Constitutional Court is asked to clarify if the deputies of the Assembly of the Republic of Kosovo shall be immune from prosecution, civil lawsuit, dismissal and arrest or detention for their actions and decisions taken outside the scope of their responsibilities as deputies?*
- 2 *The Government of the Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 75 (2) (Immunity) of the Constitution of Kosovo, which stipulates: "2. A member of the Assembly shall not be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies of the Assembly." The Constitutional Court is also*

asked to clarify the meaning of “while performing her/his duties as a member of the Assembly”, mentioned in Article 75.2. Does this performance include only those duties of deputies taken in carrying out their mandate as deputies of the Assembly?

- 3 The Government of the Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 75 of the Constitution of Kosovo, which stipulates: *The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly.* How should Article 75 be applied in cases when there is suspicion of crimes committed prior to the start of the mandate of a deputy of the Assembly or for crimes committed during the mandate, but which are outside of the scope of their responsibilities?

## **B Immunity of the President of the Republic**

The Government of Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 89 (Immunity) of the Constitution of Kosovo, which stipulates: *“The President of the Republic of Kosovo shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of responsibilities of the President of the Republic of Kosovo.”* The Constitutional Court is asked to clarify if the President shall be immune from prosecution, civil lawsuit, dismissal and arrest or detention for actions or decisions taken outside the scope of responsibilities of the President of the Republic of Kosovo?

## **C Immunity of the members of the Government**

The Government of the Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 98 (Immunity) of the Constitution of Kosovo, which stipulates: *“Members of the Government shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as members of the Government”.* The Constitutional Court is asked to clarify if the members of the Government of the Republic of Kosovo shall be immune from prosecution, civil lawsuit, dismissal and arrest or detention for actions and decisions taken outside the scope of their responsibilities as members of the Government?

## **Assessment of the Admissibility of the Referral**

40. The Government bases its Referral to the Constitutional Court under Article 93 (10) and Article 113 (3) (1) of the Constitution. According to Article 93 (10) the Government may refer Constitutional questions to the Constitutional Court. If the questions are constitutional questions then the Government will be an authorised party and the Referral will be admissible. The Court will look at the questions closely to see if the Referral contains constitutional questions.
41. According to the Constitution, the sovereignty of the Republic of Kosovo that stems from the people and that belongs to the people is exercised, inter alia, through elected representatives. (See Art.2 of the Constitution) The Constitution gives a special status with immunity, as prescribed in Article 75, to the deputies of the Assembly. This is a

necessary tool which permits the legislative power, the Assembly, to be independent, separate from and equal to the other powers of the State.

42. The institution of the President also is granted with immunity according to Article 89 of the Constitution. This special status and privilege stems from the President expressing the unity of the nation and of being head of State. This state body, the President of the Republic needs the special status, privilege and immunity in order to perform his functions with independence, dignity and efficiency and at the same time not to be interfered with by the other powers - legislative, executive and judicial.
43. The Government as the bearer of the executive branch also needs to be independent with strictly defined functions and to be separate from the legislative and judicial branches. Thus, the Constitution grants immunity to the members of the Government to ensure their independence, efficiency and to protect them from interferences from the other branches.
44. The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of the separation of powers and the checks and balances among them. The separation of powers is one of the bases that guarantees the democratic functioning of a State. The essence of the independence and effective functioning of these branches is the immunity provided to the persons embodying these powers.
45. As the Prime Minister states, the immunity questions raised affect the democratic functioning of the state.
46. The questions are of a constitutional nature as they are linked to the form of governance of the State. They concern the mechanisms of the exercise of the division of power in the Republic of Kosovo.
47. Under the Constitution, those that implement power and exercise duties in the State have immunities and special status in order to ensure their independence so that they can do their work effectively, to ensure that other powers are stopped from interfering with their work and to prevent abuse.
48. The Deputies must be free to perform their functions and not be liable for their actions, decisions, votes and opinions expressed while they are acting as deputies of the Assembly. That freedom, guaranteed by immunity, is to enable them to perform their representative mandate and to give expression to the popular will and to the sovereignty of the people. Without this freedom there is a danger that the Assembly would not be able to operate properly. They are immune for their actions and decisions within the scope of their responsibilities as deputies. It is important to note that this privilege attaches to the deputy, not for his or her own convenience, but for the benefit of the people who have elected him or her. This is a reflection of the wording of the immunity which is expressed to be for actions "*within the scope of their responsibilities as Deputies of the Assembly*".
49. For a Referral to be declared admissible the Constitution requires that the matter be referred to the Court in a legal manner by an authorised party, according to Article 113 (1) of the Constitution. The Court finds that the questions of the Applicant are raised in a legal manner. The Constitutional Court, as the final authority for the interpretation of the Constitution, considers that these questions relating to immunity are of a constitutional nature. Therefore, the Government, has raised constitutional questions and it is an authorised party.

50. The questions raised are constitutional questions as contemplated by Article 93 (10) of the Constitution, It is therefore not necessary to consider the Referral in the context of Article 113 (3) (1) of the Constitution. Furthermore, whereas there are time restrictions provided for in Chapter III, Special Procedures, of the Law on the Constitutional Court for bringing Referrals under Article 113 of the Constitution, there are no time restrictions in the bringing of such Referrals under Article 93 (10).

### **Merits**

51. The Court will interpret and clarify the constitutional questions submitted by the Government in the following order: A - Immunity of the Deputies of the Assembly, B - Immunity of the President of the Republic and C - Immunity of the Members of the Government.

#### **A Concerning the Immunity of the Deputies of the Assembly**

### **General Principles**

52. When addressing the constitutional questions raised by the Government - the immunity of the deputies of the Assembly of Kosovo - the Court shall look at the Constitution in its entirety and not just at Article 75. It provides:

*“1. Deputies of the Assembly shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly. The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly.*

*2. A member of the Assembly shall not be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies of the Assembly.”*

53. According to constitutional theory and practice different legal systems recognize and implement two categories of, or sides to, the concept of parliamentary immunity.
54. The first category is non-liability in judicial proceedings of any nature over the opinions expressed, votes cast or decisions taken in their work as deputies and other actions taken while performing their duties. This type of immunity extends after their mandate comes to the end and it is of unlimited duration. They will never be liable to answer to anyone or any court for such actions or decisions. This is clearly provided for by the Constitution of Kosovo. This is functional immunity.
55. The second category of parliamentary immunity relates to inviolability for acts outside the scope of responsibilities of the deputies of the Assembly. It has two aspects:

#### *Criminal Prosecution*

- a) The first aspect relates to the criminal prosecution of deputies with the consent of the Assembly. However, this is not provided for in the Constitution of Kosovo. The Constitution permits criminal prosecution without the consent of the Assembly for actions taken outside the scope of their responsibilities. (See Article 75 (1), second sentence)

*Arrest and Detention*

- b) The second aspect refers to freedom from arrest and detention. Deprivation of liberty is permitted with or without a decision of the Assembly. The Constitutional Court will elaborate on these two aspects further in the Judgment.

**Applicability of these General Principles in the Republic of Kosovo**

56. The Government poses the question whether the deputies of the Assembly of the Republic of Kosovo are immune from prosecution, civil lawsuit, dismissal and arrest or detention for their actions and decisions taken outside the scope of their responsibilities as deputies. The Court notes that the Government asks:
- a) whether deputies are immune from prosecution for actions and decisions taken outside the scope of their responsibilities;
  - b) whether deputies are immune from civil lawsuits for actions and decisions taken outside the scope of their responsibilities;
  - c) whether deputies are immune from dismissal for actions and decisions taken outside the scope of their responsibilities; and,
  - d) whether deputies are immune from arrest and detention for actions and decisions taken outside the scope of their responsibilities.
57. As far as acting within the scope of the responsibilities of deputies is concerned it should be stressed that the deputies of the Assembly of the Republic of Kosovo have functional immunity. This means that they shall be immune from prosecution, civil lawsuit, and dismissal for their actions and decisions. (See Article 75 (1), first sentence)
58. Article 75 (1) of the Constitution provides that the deputies of the Assembly of Kosovo have functional immunity in respect of opinions expressed, or votes cast, or actions or decisions taken within the scope of their responsibilities as deputies. Indeed, due to the characteristics and importance of rights and duties of deputies they have a privileged position taken within the scope of their responsibility. Because of the special status as elected representatives performing their constitutional mandate they are given immunity to provide to them greater freedom, security and independence from the executive and the judiciary, but only to the extent of their actions and decisions taken within the scope of their responsibility.
59. The Constitution clearly defines the scope of the responsibility of the deputies. Those are the actions taken and decisions made in order to perform the competencies of the Assembly of Kosovo prescribed in Article 65 of the Constitution. Consequently, the Deputies are immune for any action taken or decision made that is related to:
- (1) *adoption of laws, resolutions and other general acts;*
  - (2) *decision to amend the Constitution by two thirds (2/3) of all its deputies including two thirds (2/3) of all deputies holding seats reserved and guaranteed for representatives of communities that are not in the majority in Kosovo;*
  - (3) *announcement of referenda in accordance with the law;*
  - (4) *ratification of international treaties;*
  - (5) *approval of the budget of the Republic of Kosovo;*

- (6) election and dismissal the President and Deputy Presidents of the Assembly;
- (7) election and dismissal the President of the Republic of Kosovo in accordance with this Constitution;
- (8) election the Government and expresses no confidence in it;
- (9) overseeing the work of the Government and other public institutions that report to the Assembly in accordance with the Constitution and the law;
- (10) election of members of the Kosovo Judicial Council and the Kosovo Prosecutorial Council in accordance with this Constitution;
- (11) proposing the judges for the Constitutional Court;
- (12) overseeing foreign and security policies;
- (13) giving consent to the President's decree announcing a State of Emergency;
- (14) decision in regard to general interest issues as set forth by law.

- 60. In doing so the Deputies are obliged to exercise their function in the best interests of the Republic of Kosovo and pursuant to the Constitution, the Laws and the Rules of Procedure (see Article 74 of the Constitution).
- 61. Consequently, in order to ensure the separation of powers and independent functioning of the Assembly free from interfering of executive or judicial power into the legislative domain, deputies of the Assembly of Kosovo enjoy functional immunity and they are non-liable for the actions taken and decisions made within the scope of their responsibilities.
- 62. In a number of cases the European Court of Human Rights addressed the applicability of non-liability of members of parliaments in the Contracting States vis-à-vis the European Convention on Human Rights and Fundamental Freedoms and the Protocols thereto.
- 63. For example, in the case of *Syngelidis v. Greece* (Application no. 24895/07) of 11 February 2010 the European Court on Human Rights emphasised:

*“41...The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court.*

*42. The Court observes in this connection that when a State affords immunity to its members of parliament, the protection of fundamental rights may be affected. That does not mean, however, that parliamentary immunity can be regarded in principle as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1 (see *Kart v. Turkey*, cited above, § 80). Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the Contracting States as part of the doctrine of parliamentary immunity (see *A. v. the United Kingdom*, cited above, § 83, and, *mutatis mutandis*, *Al-Adsani v. the United Kingdom [GC]*, no. 35763/97, § 56, ECHR 2001-XI). The Court has already acknowledged that it is a long-standing practice for States generally to confer varying degrees of immunity on parliamentarians, with the aim of allowing free speech for representatives of the people and preventing partisan complaints*

from interfering with parliamentary functions (see *A. v. the United Kingdom*, cited above, §§ 75-77; *Cordova*, cited above, § 55, and *De Jorio v. Italy*, no. 73936/01, § 49, 3 June 2004). That being so, the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued (see *A. v. the United Kingdom*, cited above, § 88).

43. It would be equally incompatible with the purpose and object of the Convention, however, if the Contracting States, by adopting one of the systems of parliamentary immunity commonly used, were thereby absolved from all responsibility under the Convention in relation to parliamentary activity. It should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see *Aït-Mouhoub v. France*, 28 October 1998, § 52, Reports 1998-VIII). It would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1, if a State could, without restraint or control by the Court, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons (see *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

44. Thus, where parliamentary immunity hinders the exercise of the right of access to justice, in determining whether or not a particular measure was proportionate the Court examines whether the impugned acts were connected with the exercise of parliamentary functions in their strict sense (see *Cordova* (no. 1), cited above, § 62, and *De Jorio*, cited above, § 53). The Court reiterates here that the lack of any clear connection with parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. This is particularly so where the restrictions on the right of access stem from the resolution of a political body (see *Kart v. Turkey*, cited above, § 83, and *Tsalkitzis v. Greece*, no. 11801/04, § 49, 16 November 2006). Moreover, the broader an immunity, the more compelling must be its justification (see *A. v. the United Kingdom*, cited above, § 78)."

#### **Responses to the four parts of the first question of the Government in relation to the immunity of deputies**

64. The Court recalls that the Government questioned whether the deputies of the Assembly are immune from prosecution, civil law suit, dismissal and arrest or detention for their actions and decisions taken outside the scope of their responsibilities. The Court will respond to each of the questions.
- a) **Immunity from prosecution for actions and decisions outside the scope of the responsibility of the deputies.**
65. The second sentence of Article 75 (1), of the Constitution provides a caveat to the overall immunity that is granted to the deputies, "*The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope*

*of their responsibilities as deputies of the Assembly.*” There is a clear distinction made by the Constitution between what the deputy does as a representative of the people and what he or she does in their private capacity. There is no blanket immunity granted by the Constitution for all prosecutions.

66. The deputies are, in their capacity as private citizens, subject to the same treatment under the Criminal Code and the Criminal Procedure Code of the Republic of Kosovo as all other citizens. This conclusion stems from the second sentence of Article 75 (1) of the Constitution which provides that the immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside the scope of their responsibilities as deputies of the Assembly.
67. It is further reinforced when one considers Article 70(6) of the Constitution that prescribes that the mandate of the deputy comes to the end when a deputy is convicted and sentenced to one or more years of imprisonment by a final court decision of committing a crime.
68. The Constitution does not allow any limitation or interference by the legislature with the criminal prosecution of deputies of the Assembly for actions taken outside the scope of their responsibilities.
69. Since the Constitution does not grant inviolability with regard to criminal prosecution of deputies of the Assembly for actions taken outside the scope of their responsibilities, they are not inviolable either with regard to prosecution for criminal acts allegedly committed prior to the beginning of their mandate as deputies or during the course of their mandate.
70. Article 22(3) of the Rules of Procedure of the Assembly provides that “*A member of the assembly shall enjoy immunity from ... prosecution until the Assembly takes a decision on waiving his/her immunity.*” The Constitutional Court notes that this provision, concerning prosecution, is null and void as there is no such immunity against criminal prosecution for the deputies in the Constitution. The Court reiterates once again that immunity to prevent the criminal prosecution of deputies for acts taken outside the scope of their responsibility does not exist. No decision of the Assembly is necessary for such a prosecution.
71. The only circumstance when a decision of the Assembly waiving immunity is required is for the arrest or detention of a deputy when he/she is performing his/her duties as a deputy. This is the constitutional position.

**b) Immunity from civil lawsuits for actions and decisions outside the scope of their responsibilities.**

72. There is no constitutional obstacle for the filing of such civil lawsuits. It stems from the explicit language related to the functional immunity. In such a situation it is evident that the respective provisions of the applicable laws will be enforced.

**c) Immunity from dismissal for actions and decisions outside the scope of their responsibility.**

73. The interpretation of dismissal in this context means removal of the deputy as a member of the Assembly. Article 70 of the Constitution regulates the scope, duration and the possibly of the mandate of the deputy to come to an end or to become invalid. These provisions do not give arguments to conclude that a deputy can be dismissed for

actions outside the scope of his responsibilities. It could be read in conjunction with this question that, when a deputy is convicted to one or more years of imprisonment by a final court decision of committing a crime, his/her mandate ends.

**d) Immunity from arrest and detention for actions and decisions outside the scope of their responsibility**

74. Immunity from arrest and detention must also be read in conjunction with the second question of the Government and the Court will answer them jointly.
75. The Government requested the interpretation of the words “while performing her/his duties as a member of the Assembly” set out in Article 75 (2) of the Constitution.
76. The Constitution guarantees equality before the law and everyone enjoys the right to equal legal protection. Thus, the Constitution provides for justice to be rendered and not to be delayed. This applies to deputies in their capacity as private citizens. They can be criminally prosecuted and are liable for acts outside the scope of their responsibilities for actions prior to and during their mandate.
77. It goes without saying that deputies, as it is with any other person under the jurisdiction of the courts in the Republic of Kosovo, are entitled protection of their fundamental rights and freedoms guaranteed under the Constitution and the law. These include the rights set out in paragraph 1 of Article 24 [Equality Before the Law], Article 29 [Right to Liberty and Security] in conjunction with Article 5 of The European Convention on Human Rights and Fundamental Freedoms, Article 30 [Rights of the Accused] and Article 31 [Right to Fair and Impartial Trial] both in conjunction with Article 6 of the ECHR and Article 54 [Judicial Protection of Rights]. Deputies, as is the case with all citizens, are also entitled to fair pre-trial and trial procedures that are guaranteed under the Constitution and the law. The Court also notes that Article 19 of the Constitution, concerning the applicability of legally binding norms of international law, can be taken into consideration.
78. In such circumstances, as it is prescribed in Article 29 of the Constitution, a measure of “deprivation of liberty”, which includes a measure of “arrest or otherwise detention” may be issued against a deputy in cases foreseen by law and after a decision of a competent court in the situations listed in Article 29 of the Constitution.
79. The Court recalls that Article 29 (1) [Right to Liberty and Security], reads as follows:
- 1. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:*
    - (1) pursuant to a sentence of imprisonment for committing a criminal act;*
    - (2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;*
    - (3) for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order;*
    - (4) for the purpose of medical supervision of a person who because of disease represents a danger to society;*
    - (5) for illegal entry into the Republic of Kosovo or pursuant to a lawful order of expulsion or extradition.”*

80. The Court also notes that Article 29 (2) of the Constitution provides that where arrest or detention occurs without a court order the person detained shall be brought within forty-eight (48) hours before a judge who shall decide on her/his detention not later than forty-eight (48) hours from the moment the detained person is brought before the court.
81. The overseeing of the personal liberty guaranteed under the Constitution is entrusted to all law enforcement bodies, prosecutorial authorities and the Courts, according to applicable law.
82. Article 5 of the ECHR deals with the right to liberty, which provides that an individual may be subject to lawful arrest or detention only under clearly defined circumstances. These include such issues as imprisonment following sentence and arrest on suspicion of the commission of a crime. In particular, Article 5 provides for the right to prompt access to a Court or appropriate judicial proceedings to determine the legality of the arrest or detention and to a trial within a reasonable period or release pending such a trial.
83. The provisions of Article 5 of the ECHR are directly applicable in Kosovo by virtue of Article 22 of the Constitution and have priority over national laws in the case of conflict. Article 54 of the Constitution gives effect to the Convention by providing that everyone, including deputies of the Assembly, shall have the right of judicial protection and the right to an effective legal remedy arising from a breach of any such right or fundamental freedom.
84. The same general provisions and safeguard concerning arrest and detention and fair trial are applicable not only in criminal investigation and trials but also to civil lawsuits.

**Constitutional and legal provisions related to arrest and detention of deputies of the Assembly of Kosovo**

85. Arrest and detention of a deputy is contemplated by the terms of the Constitution and under the Law on Rights and Responsibilities of the Deputy. The following provisions allow this :

Constitution

- i. The first is when the assembly waives the immunity from arrest or other detention of a deputy while performing his or her duties, pursuant to Article 72 (2) which reads:

*2. A member of the Assembly shall not be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies of the Assembly."*

Constitution

- ii. While a deputy is not performing duties. This stems from Article 75 (2) of the Constitution.

Law on Rights and Responsibilities of the Deputy

- iii. Article 9 (9) of the Law on the Rights and Responsibilities of the Deputy specifically provides that if a deputy is caught while committing a serious offence (in flagrante) punishable with five years imprisonment or more then arrest may occur. Article 9 (2) and (9), of that Law provide:

*2. The deputy of the Assembly can not be arrested or stopped [detained] while he/she is performing his/her duties as deputy of the Assembly, without consent of the majority of all deputies of the Assembly.*

...

*9. With exception from paragraph 3 [this should refer to paragraph 2] of this Article, the measure of imprisonment can be undertaken towards a deputy without any prior consent from the Assembly in case when he or she is caught while committing (in flagranti [flagrante]) a severe criminal act that is condemnable with five (5) or more years of imprisonment.*

#### Constitution

- iv. When a mandate ends because of final conviction and sentence to one of more years of imprisonment arrest may proceed without reference to any other person or body as there is no longer constitutional protection.
86. In the first circumstance providing for arrest or other detention of a deputy the Constitution clearly defines circumstances that must be available so that an arrest or detention of a deputy can happen. The Constitutional term “while performing his/her duties” requires an interpretation from the Court not just because of the questions asked but because it is important in answering the questions raised in relation to the functioning of the Assembly.
87. Article 66 of the Constitution , uses the term “mandate” to describe the duration of the Assembly. It states that the four years commences with the constitutive session held after the announcement of the election results and ends with the dissolution of the Assembly.
88. The Constitution also uses the term “mandate” in relation to the deputies of the Assembly whereby as representatives of the people they are not bound by any obligatory mandate. Each deputy has an individual mandate which commences on the date of the certification of the results of the election. While the mandate of the Assembly commences on the constitutive session of the newly elected Assembly the mandate of each deputy may commence earlier. The mandate for a deputy ends at the occurrence of any of the circumstances set out in Article 70 (3) of the Constitution. The mandate of the deputy embodies his/her representative function.
89. The organisation of the work of the Assembly is done in two annual sessions. They commence on the third Monday in January and the second Monday of September and ending at a time decided by the Assembly.
90. Article 40 of the Law on Rights and Responsibilities of the Deputy provides that deputies are obliged to participate in the Plenary “Sessions” and in meetings of the assisting bodies of the Assembly in which he is a member

91. Article 39 of the Rules of Procedure of the Assembly provides that the Assembly performs at plenary session and committees. It is when the deputies are at these meetings and committees that they are performing their duties. Thereby they fulfil, exercise and give completion to the competencies of the Assembly as set out in Article 65. The actions and decisions including their discussions, speeches, votes all take place at these plenary and committee meetings and they have functional immunity to undertake this work. The functional immunity protects that work. That is the purpose of the immunity and they cannot ever be liable for what they do at these meetings.
92. The Assembly functions only when it is convened. It is the President of the Assembly who decides on the dates of meetings. Outside of the convening of the Assembly or its committees the deputies of the Assembly can not be said to be performing the work necessary to give effect to the Assembly. (See Article 39 of the Rules of Procedure of the Assembly)
93. Different legal systems and constitutions in Europe have different definitions of a mandate and the duration concerning both the scope and the timing of this immunity of the deputy. This includes the entire mandate of the parliament or the sessions of the parliament or the meetings of the houses of the parliament.
94. The period of performing the duties of a deputy is his/her work in the Assembly during its plenary and committee meetings.
95. Article 75 (2) stipulates that while a deputy is performing his/her duties, in order to be arrested or detained a decision to waive the immunity is required by a majority of all of the deputies of the Assembly. The purpose of this requirement is to ensure that the work of the Assembly must not be hindered. While the deputy is performing his/her duties it is for the benefit of the Assembly and the conduct of its work. A decision of the Assembly is required to remove the deputy because his/her physical presence is necessary at the meeting of the Assembly and its committees. During the work of the Assembly the deputy is there in his capacity as a representative of the people and as a constituent member of the Assembly. It is only the Assembly itself which can decide that arrest and detention of a deputy can occur while he/she is performing the work of the Assembly.
96. The Court reiterates that outside the scope of his/her responsibilities a deputy is to be treated as any other citizen. A deputy is liable for his/her private acts and behaviour as are all citizens. Therefore, while not performing his/her duties he/she may be arrested or detained without a decision of the Assembly according to the regular law. This could happen following the provisions of the regular law that is applicable for the Republic of Kosovo as it is for any other citizen. The applicable law and who has the authority to order arrest will be elaborated further.
97. The situation of permitting arrest and detention while caught committing a serious crime (in flagrante) punishable by five or more years imprisonment is a standard that is recognised in the constitutional order of all countries, be it in their Constitutions or in their organic law. The public must have confidence that their interests are protected in these circumstances. The public administration of justice cannot be stalled merely because there is an apprehension that at some stage of a criminal process a deputy might plead that he/she had immunity from prosecution. This would undermine confidence in the administration of justice. This Law on Rights and Responsibilities of the Deputy in Article 9 (9) recognises this exception. The case for arrest in such circumstances speaks for itself.

98. The mandate of the deputy is provided for in the Constitution. However, the Constitution provides for when the mandate can end prematurely. In relation to the situation when there is a final court decision for the sentencing of a deputy for a term of one or more year of imprisonment, the deputy is stripped of his/her mandate and therefore the mandate ends and he/she no longer can enjoy the privilege and immunity attaching to the mandate. Then, the sentence of imprisonment can be served and his/her arrest can follow in execution of the sentence of the Court.

#### **Authority to request waiver of immunity**

99. When there is a prosecution in process, the prosecutorial body or the court considers that the waiving of immunity is required for the conduct of the prosecution then a request for the waiving of immunity must be considered by the Assembly. There is a constitutional obligation for the Assembly to consider requests for waiving immunity, in cases where it is necessary. A lacuna in the law or the failure of the Assembly to pass Laws necessary to give effect to the proper functioning of the judicial power of the state can not be used as an excuse to fail to give effect to the positive obligation to consider the waiver.
100. Therefore Article 9 (3) of the Law on the Rights and Responsibilities of the Deputies provides that a request may only be made by the General Prosecutor (Albanian: Prokurori i Përgjithshëm i Kosovës, Serbian: Glavni javni tužilac Kosova, Unofficial English translation: Attorney General). Clearly there are other situations where arrest may be necessary, in the opinion of the police, the Public Prosecutor, the State Prosecutor or the Special Eulex Prosecutors. In the case of a private prosecution the Court dealing the matter, must sent the request to waive the immunity to the Assembly.
101. The failure of the Law on Rights and Responsibilities of the Deputy to state that any or all of these to request the waiver of the immunity is not a bar to such a request being received. If such a request is made by a competent body then the Assembly is obliged to consider it. It is entirely a matter within the prerogative of the Assembly to approve the request or not - but they must consider it.
102. In that respect, it is important to recall that according to Article 109 of the Constitution the *“State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law.”*
103. The Court also notes that on 30 September 2010, the Assembly adopted the *“Law No.03/L –225 on State Prosecutor”*, which will enter into force on 1 January 2013. From that date on the following will cease to be applicable: *“1.1. The Law on the Public Prosecution Office of the Autonomous Province of Kosovo, 1.2. UNMIK Reg. 1999/05, on the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor. 1.3. Any other law to the extent that it is inconsistent with the provisions of this law.”*
104. Further, upon the entry into force of that law any reference in any law, regulation, directive, rule or other legal act to “Prosecution Services” or “Public Prosecutor” shall be construed to mean the “State Prosecutor”. However, nothing in that law is construed or applied to alter, restrict, expand or otherwise change the authorities, jurisdiction, powers, or duties granted the Special Prosecution Office as provided in the Law on Special Prosecution Office of the Republic of Kosovo, No. 2008/03-Lo52.
105. It appears therefore that at present the legal acts that regulate the competences and organisation of the Prosecutors are *The Law on the Public Prosecution Office of the*

*Autonomous Province of Kosovo and UNMIK Reg. 1999/05, on the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor. In addition to this, there is also the Law on the Special Prosecution Office of the Republic of Kosovo.*

106. The Court also notes that pursuant to the 2008 Law on the Special Prosecution Office of the Republic of Kosovo, the Special Prosecution Office is established as a permanent and specialized prosecutorial office operating within the Office of the State Prosecutor of Kosovo. The Law envisaged that for duration of EULEX Mission in Kosovo, the Special Prosecution Office will be composed of five EULEX prosecutors in addition to those prescribed by the Law.
107. On 13 March 2008 the Assembly of the Republic adopted the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.
108. The Law on the Public Prosecutor (Official Gazette of Autonomous Socialist Province of Kosovo, KSAK, no. 32/76, 52/77, 49 (79), 44/82, 44/84 and 18/87) is still in force and it provides:

*Pursuant to Article 1, the Public Prosecutor is an independent state body who prosecutes the perpetrators of criminal deeds and other deeds condemned by law, takes measures in accordance with the law in protecting the interests of the social communities, exercise the legal remedies for protecting the constitutionality and legality and performs other duties in accordance with the law.*

109. The Constitutional Court consequently notes that the prosecution of persons charged with committing criminal acts as described by Article 109 of the Constitution is performed by operation of different legal acts.
110. The bodies that have the right to request the Assembly to waive immunity of a deputy, while he/she is performing his/her duties, are also authorised to arrest or detain without the waiver of the Assembly while the deputy is not performing his/her duties.

### **Procedure for waiving the immunity for detention and arrest**

111. This procedure is not specifically provided for in the Constitution but it is not necessary. The procedure set out in Article 23 of the Rules of the Assembly is to be used in cases or request for waiving immunity of a deputy concerning arrest or detention. This is not applicable for non existent immunity from prosecution according to the Constitution. The Court reiterates that Article 22 (3) of the Rules of Procedure which speaks of immunity from prosecution is null and void when it purports to grant such immunity. The procedure is further elaborated in Article 23 of the Rules of Procedure. This is compliant with the constitutional provisions only in so far as it pertains to a waiver concerning arrest or detention.
112. It is to be noted that the Rules of Procedure of the Assembly introduce a special procedure related to a situation when a deputy of the Assembly is arrested or detained by a competent body without a waiver, i.e. a decision of the Assembly. When there is arrest or detention without a waiver it may be for the conduct of a criminal prosecution which was for a crime outside the scope of the responsibility and outside a time when the deputy was performing his/her duties. In such circumstances the Assembly cannot overrule a judicial decision ordering arrest and detention. Any power that the Assembly purports to give to itself to do so is null and void and inconsistent with the Constitution. A deputy, of course, has all the remedies for the protection of his/her

rights as stated earlier in this Report, and has full recourse to the courts of the Republic of Kosovo for the vindication of those rights according to the Constitution and the law.

113. Comparative studies indicate that it is the predominant position that, when a deputy is arrested committing a serious crime, the arresting authorities inform the ruling body of the Assembly that the arrest has occurred. Article 24 (1) of the Rules of Procedure stipulates that the competent prosecuting authority shall immediately inform the President of the Assembly of the arrest or detention. This ensures the proper functioning of the Assembly.

### **Response to the third question of the Government in relation to immunity of deputies**

114. The Government seeks interpretation of Art 75 of the Constitution in cases where there is suspicion of crimes committed prior to the start of the mandate of the deputy or for crimes committed during the mandate but outside the scope of his/her responsibility. As previously stated in paragraph 65 above, the Constitution does not grant immunity with regard to criminal prosecution of deputies of the Assembly for actions taken outside the scope of their responsibilities. They are liable to prosecution for crimes allegedly committed prior to the beginning of their mandate as deputies. They are also liable for prosecution during the course of their mandate for crimes outside the scope of their responsibilities.

#### **B Concerning the Immunity of the President of the Republic of Kosovo**

115. In the Referral of the Government concerning the immunity of the President there are two questions asked.
- i) Interpretation of the applicability and effect of Article 89 of the Constitution.
  - ii) The Government asks for clarification if the President shall be immune from prosecution, civil lawsuit, dismissal and arrest or detention for actions or decisions taken outside the scope of responsibilities of the President of the Republic of Kosovo.
116. The Court notes that the Government asks for clarification as to:
- a) whether the President is immune from prosecution for actions and decisions taken outside the scope of the President's responsibilities;
  - b) whether the President is immune from civil lawsuits for actions and decisions taken outside the scope of his/her responsibilities;
  - c) whether the President is immune from dismissal for actions and decisions taken outside the scope of his/her responsibilities; and,
  - d) whether the President is immune from arrest and detention for actions and taken decisions outside the scope of his/her responsibilities

117. Article 89 [Immunity] says:

*The President of the Republic of Kosovo shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of responsibilities of the President of the Republic of Kosovo.*

118. This is a functional immunity and the characteristics of functional immunity have already been discussed in the section dealing with the immunity of the deputies and they apply equally to the President of the Republic. The President of the Republic is the head of State and he/she represents the unity of the people of the Republic of Kosovo. The head of State acts both internally and externally as an important figure above all others in the State and ranking equally with the heads of other states in the world for representative purposes. The immunities granted to the President are functional immunities to ensure that the President will be unimpaired in carrying out the State duties entrusted to that institution under the Constitution.
119. The status of President of the Republic is regulated also by the Law on the President, Law No. 03/L-094. The privileges and immunity granted to the President in the Constitution and the Law befit the role of head of State. Therefore the functional immunity granted to the President immunizes him/her for actions and decisions within the scope of his/her responsibilities and that immunity covers non-liability for actions within the scope of his/her responsibility and particularly there can be no prosecution, civil lawsuits and dismissal.
120. Article 8 of the Law on the President also provides that this functional immunity shall be valid after the end of the mandate.
121. As far as the second question is concerned each of the parts merits a separate answer.
- a) **Immunity from prosecution for actions and decisions outside the scope of the responsibilities of the President.**
122. The Constitution in Article 91 (1) refers to the dismissal of the President if he/she has been convicted of a serious crime. If conviction for a serious crime is a reason for dismissal it is evident that the President has to be convicted and this must inevitably follow a criminal investigation and trial. Therefore the President is not immune from prosecution for actions and decisions outside the scope of his/her responsibility.
- b) **Immunity from civil lawsuits for actions and decisions outside the scope of his/her responsibility.**
123. The interpretation of this part of the question is the same as that for the immunity of the deputies. There is no constitutional obstacle for the filing of civil lawsuits for actions and decisions outside the scope of his/her responsibility. It stems from the explicit language related to the functional immunity. In such a situation it is evident that the respective provisions of the applicable laws will be enforced.
- c) **Immunity from dismissal for actions and decisions outside the scope of his/her responsibility.**
124. There is a particular provision in the Constitution dealing with the dismissal of the President contained in Article 91 of the Constitution. It provides:

*Article 91 [Dismissal of the President]*

1. *The President of the Republic of Kosovo may be dismissed by the Assembly if he/she has been convicted of a serious crime or if she/he is unable to exercise the responsibilities of office due to serious illness or if the Constitutional Court has determined that he/she has committed a serious violation of the Constitution.*
2. *The procedure for dismissal of the President of the Republic of Kosovo may be initiated by one third (1/3) of the deputies of the Assembly who shall sign a petition explaining the reasons for dismissal. If the petition alleges serious illness, the Assembly shall consult the medical consultants team on the status of the President's health. If the petition alleges serious violation of the Constitution, the petition shall be immediately submitted to the Constitutional Court, which shall decide the matter within seven (7) days from the receipt of the petition.*
3. *If the President of the Republic of Kosovo has been convicted of a serious crime or if the Assembly in compliance with this article determines that the President is unable to exercise her/his responsibilities due to serious illness, or if the Constitutional Court has determined that he/she has seriously violated the Constitution, the Assembly may dismiss the President by two thirds (2/3) vote of all its deputies.*

The provision does not make explicit distinction for the dismissal of the President for actions or decisions within or outside the scope of his/her responsibility. The President may be dismissed after conviction for a serious crime, as previously dealt with above. The President may also be dismissed if she/he is unable to exercise the responsibilities of his/her office due to serious illness or if the Constitutional Court has determined that he/she has committed a serious violation of the Constitution. The decision for dismissal is taken by the Assembly following the procedures in Article 91 (2) and (3) of the Constitution.

**d) immunity from arrest and detention for actions and decisions outside the scope of her/her responsibilities.**

125. The President exercises unique functions that reside in his/her capacity alone. The Constitution requires the President to be available at all times to perform these functions. They are indivisible from the Presidency and therefore the President cannot be hindered in the exercise of these functions by arrest and detention. The President must be permanently available to execute the functions of the institutions and with matters of state.
126. When Article 90 refers to the temporary absence of the President there is no indication there that arrest or detention is contemplated. It is absurd to suggest that a temporary absence of the President could be linked to his voluntarily transferring of his duties for a certain period of time allied to an arrest or detention.
127. The arrest and detention of such a person is repugnant to those ideals of the President representing the unity of the people and by embodying the statehood as head of State. The proper remedy is the impeachment of the President pursuant to the Constitution.
128. When a President is dismissed only then may arrest or detention occur, because he/she is no longer President but is now a private citizen to whom the regular laws apply.

## **C Concerning the Immunity of the Members of the Government of Kosovo**

129. In the Referral of the Government concerning the immunity of the members of the Government there are two questions asked.

- i) Interpretation of the applicability and effect of Article 98 of the Constitution.
- ii) Clarification on immunity of the members of the Government from prosecution, civil lawsuit, dismissal and arrest or detention for actions taken or decisions made outside the scope of their responsibilities.

130. The Court notes that the Government asks for clarification as to:

- a) whether members of the Government are immune from prosecution for actions and decisions taken outside the scope of their responsibilities;
- b) whether members of the Government are immune from civil lawsuits for actions and decisions taken outside the scope of their responsibilities;
- c) whether the members of the Government are immune from dismissal for actions and decisions taken outside the scope of their responsibilities; and,
- d) whether the members of the Government are immune from arrest and detention for actions and decisions taken outside the scope of their responsibilities

131. Article 98 of the Constitution deals with the immunity of the members of the Government and it provides:

***Article 98 [Immunity]***

*Members of the Government shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as members of the Government.*

132. As is the case for the Deputies of the Assembly and for the President there is a functional immunity for the members of the Government. Again, this immunity is for actions and decisions taken within the scope of their responsibilities, referred to in Article 97 of the Constitution. They have immunity from prosecution, civil lawsuit and dismissal within the scope of this functional immunity.

133. In contrast to the position regarding deputies of the Assembly and the President, members of the Government are accountable to the Assembly. They are accountably jointly with the Prime Minister and Deputy Prime Minister(s) for the decisions made by the Government and individually accountable for decision made in their fields of responsibility. This political accountability is completely different from their functional immunity. They are elected by the Assembly and therefore are accountable to it.

134. For members of the Government there are no special protections given for actions outside that scope. As far as members of the Government are concerned if they are charged with offences they are no different from other citizens of the Republic of Kosovo.

135. As far as the four parts of the second question of the Government are concerned members of the Government do not have any protection for actions taken and decisions made outside the scope of their responsibilities. In such circumstances, they have no immunity and they are liable for prosecution, civil lawsuits and arrest or detention as for any other private citizen. Dismissal and appointment of the members of the Government follows the specific procedures set out in Articles 95 and 96 of the Constitution.

**FOR THESE REASONS  
THE COURT UNANIMOUSLY DECIDES AS FOLLOWS:**

- I. The Referral is admissible;
- II. In accordance with Article 75(1), Article 89 and Article 98 of the Constitution, the deputies of the Assembly, the President of the Republic and the members of the Government enjoy functional immunity for actions taken or decisions made within the scope of their respective responsibility. Accordingly, deputies of the Assembly, the President of the Republic and the members of the Government are non-liable in judicial proceedings of any nature over the opinions expressed, votes cast or decisions taken within the scope of their responsibility. This type of immunity is of unlimited duration.

*A. Concerning the immunity of the deputies of the Assembly*

- III. Acting outside the scope of their responsibilities:
1. Deputies are not immune from criminal prosecution for actions taken or decisions made outside the scope of their responsibilities. This is applicable both with regard to prosecution for criminal acts allegedly committed prior to the beginning of their mandate and during the course of their mandate as deputies;
  2. Deputies are not immune from civil lawsuit for actions taken and decisions made outside the scope of their responsibilities;
  3. Deputies of the Assembly cannot be dismissed other than for reasons set out in Article 70 of the Constitution.

IV. Arrest or other detention of a deputy.

1. A deputy may be arrested or detained while performing his/ her duties, that is, at plenary meetings of the Assembly and/or of its committees, following a decision of the Assembly.
2. A deputy may be arrested or detained while not performing his/her duties, that is, when there are no plenary meetings of the Assembly or meetings of its committees without a decision of the Assembly.
3. A deputy may be arrested or detained when caught committing (*in flagrante*) a serious offence that is punishable with five (5) or more years of imprisonment without a decision of the Assembly.

4. A deputy may be arrested or detained when his/her mandate ends arising from a conviction and sentence to one or more years of imprisonment by a final court decision of committing a crime.

V. “While performing his/her duties” means the work of the Assembly during its plenary and committee meetings.

VI. Any prosecutorial body/institution that is performing the prosecution of persons charged with committing criminal acts as described by Article 109 of the Constitution and that acts within the jurisdiction prescribed by the applicable law for the Republic of Kosovo have the right to request the Assembly to waive the immunity of a deputy.

This body/institution is authorised to arrest or detain without a decision of the Assembly while the deputy is not performing his/her duties that is, when there is no plenary meeting of the Assembly or of its committees.

*B. Concerning the immunity of the President of the Republic*

VII. Acting outside the scope of his/her respective responsibility:

1. The President is not immune from prosecution for actions taken and decisions made outside the scope of his/her responsibility. A prosecution may be initiated and performed against a President for a serious crime.
2. The President is not immune from civil lawsuit for actions taken and decisions made outside the scope of their responsibilities.
3. The President may be dismissed by the Assembly in accordance with Article 91 of the Constitution.
4. The President cannot be subject to arrest or detention during his/her term of office because of the nature of the functions of the President which require his/her permanent availability to perform them.

*C. Concerning the immunity of the members of the Government*

VII. The members of the Government do not have any special protection for their actions taken and decisions made outside the scope of their responsibility.

*D. Concerning the legal effects of this Judgment*

VIII. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

IX. This Judgment is effective immediately.

**Snezhana Botusharova**

Judge Rapporteur



**Prof. Dr. Enver Hasani**

President of the Constitutional Court

