

In: KSC-BC-2020-06
**Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli,
Rexhep Selimi and Jakup Krasniqi**

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Emilio Gatti
Judge Kai Ambos

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: 15 November 2021

Language: English

Classification: Public

**Veseli Defence Appeal Against
Decision on Motions Challenging Violations of Certain Constitutional
Rights of the Accused (F00450)**

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I. INTRODUCTION

1. The Veseli Defence (“Defence”) files this appeal against the Impugned Decision¹ in accordance with Article 45(2) of the Law, Rule 77 of the Rules, and the Pre-Trial Judge’s Certification Decision of 25 October 2021.²

2. The issue certified for appeal (the “Issue”) is:

Whether the Pre-Trial Judge erred by failing to consider whether the Court’s substantive legal regime gives rise to inequality under the law in violation of Articles 3 and 24 of the Constitution, rendering the Court “unlawful” for the purposes of Article 103(7).

3. The Defence addresses the Issue with reference to the following grounds of appeal:

- a. **Ground 1** – In determining that the Kosovo Specialist Chambers (the “Court” or the “KSC”) was lawful for the purposes of Article 103(7) of the Constitution of Kosovo (the “Constitution”), the Pre-Trial Judge erroneously failed to consider the quality of the law by which it was established, in particular the safeguards it affords against arbitrariness; further and in any event
- b. **Ground 2** – When determining the lawfulness of the KSC for the purposes of Art 103(7) of the Constitution, the Pre-Trial Judge erred in law by placing undue reliance on the Constitutional Court Decision in Case No. KO26/15;³ further, and in any event
- c. **Ground 3** – The Court is endowed with a special power to apply its own law and, in exercising this power, it dispenses with the procedural

¹ F00450, Decisions on Motions Challenging the Legality of the SC and SPO and Alleging Violations of the Certain Constitutional Rights of the Accused, 31 August 2021 (“Impugned Decision”).

² F00546, Decision on Applications for Leave to Appeal “Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused”, 26 October 2021.

³ Kosovo Constitutional Court, Case No. KO26/15, Judgement, 15 April 2015.

safeguards protected under the Constitution and International Human Rights Law. The Pre-Trial Judge: (a) breached his duty to ensure fairness in the proceedings by failing to address the Defence's submissions in this regard; and (b) erred in law by failing to give due (or any) weight to this highly relevant factor when determining the lawfulness of the KSC for the purposes of Art 103(7).

4. Such errors are each of sufficient gravity and consequence as to invalidate the Impugned Decision and/or occasion a miscarriage of justice for the reasons set out in this appeal.
5. Accordingly, the Defence requests that the Court of Appeals Panel sets aside the Impugned Decision and either: rules that, insofar as the KSC purports to apply customary international law to criminalise conduct which would not have been so criminalised under the domestic law applicable in Kosovo in 1998, it acts as an extraordinary court in violation of the prohibition under Article 103(7); or refers the Issue to the Specialist Chamber of the Constitutional Court.
6. Further, given that the Issue is closely connected to the issues in the Jurisdictional Appeal⁴, the Defence requests that the two appeals be heard together, before the same panel of the Court of Appeals.

II. BACKGROUND

7. On 15 March 2021, the Defence filed its preliminary motion to challenge the jurisdiction of the court on the basis of violations of the constitution (the "Motion").⁵ It requested that the Pre-Trial Judge consider the constitutionality of the Law in view of Article 103(7) of the Constitution. The Defence submitted

⁴ IA009/F00010, Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021 (Annex 2 hereto).

⁵ F00224, Preliminary motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the basis of violations of the Constitution, 15 March 2021.

that certain provisions of the KSC Law, in particular the fact that it was to apply a different substantive legal regime to other Kosovo courts seized of materially similar cases, effectively gave the KSC the characteristics of an extraordinary court, in violation of Article 103(7) of the Constitution.

8. On 31 August 2021 the Pre-Trial Judge rejected the Motion, finding in relevant part that:

Having found above that the SC are established by law and that its independence and impartiality have not been called into question, either by, inter alia, the procedures surrounding the appointment of Judges or the SC's reliance on a separate law, the Pre-Trial Judge finds no basis in the assertion that the SC are de facto an extraordinary court in violation of Article 103(7) of the Constitution.⁶

9. The Defence submissions regarding the applicable substantive law were not addressed in the Impugned Decision, the Pre-Trial Judge stating in a footnote that “Mr Veseli’s submissions on applicable law are addressed in the Decision on Jurisdictional Motions.”⁷ While the issues are closely connected and the Defence requests that this appeal is heard alongside the Jurisdictional Appeal by a single Appeals Panel, the jurisdictional challenge does not address the effect of the KSC Law on the lawfulness of the Court in accordance with Article 103(7).⁸
10. On 17 September 2021, the Defence requested certification to appeal the Impugned Decision.⁹ On 8 October 2021, the SPO filed its response wherein it opposed the request.¹⁰ The Defence replied on 18 October 2021.¹¹

⁶ Impugned Decision, para. 113. See also para. 145 (declining to refer the issue to the SCCC).

⁷ F00474, Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on the Basis of Violations of the Constitution (KSC-BC-2020-06/F00450), 17 September 2021, fn 11.

⁸ IA009/F00010.

⁹ F00474.

¹⁰ F00507, Prosecution Response to Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on Basis of Violations of the Constitution, 6 October 2021.

¹¹ F00530, Veseli Defence Reply to SPO Response to Filing KSC-BC-2020-06-F00474, 18 October 2021.

11. On 26 October 2021, the Pre-Trial Judge granted certification, finding that the issue *“significantly affects the fairness of the proceedings as it is directly linked with Mr Veseli’s fair trial rights under Article 6(1) of the ECHR.”*¹²

III. STANDARD OF REVIEW

12. The Defence recalls that the Court of Appeals Panel has previously applied *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgments under Article 46(1) of the Law.¹³ Article 46(1) provides the following grounds of appeal:
- a. *“an error on a question of law invalidating the judgement;*
 - b. *an error of fact which has occasioned a miscarriage of justice; or*
 - c. *an error in sentencing.”*
13. Further, the Defence recalls the Court of Appeals Panel rulings that:
- a. *“an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision”;*¹⁴ and
 - b. *“as part of their obligation to ensure the fairness of the proceedings pursuant to Article 31 of the Constitution, a Panel, including a Panel consisting of a Pre-Trial Judge, must indicate with sufficient clarity the grounds upon which decisions taken are based”.*¹⁵

¹² F00546, para. 64.

¹³ KSC-BC-2020-07/IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, paras 8-11.

¹⁴ *Id.*, paras 14.

¹⁵ KSC-CC-PR-2017-01/F00004, Judgement on the Referral of the Rules, 26 April 2017, para. 143; 115. See also, Kosovo Constitutional Court, Cases no. KI99/14 and KI100/14, Judgment, 8 July 2014, para. 86.

IV. SUBMISSIONS

Ground 1 – In determining that the KSC was lawful for the purposes of Article 103(7) of the Constitution, the Pre-Trial Judge erroneously failed to consider the quality of the law by which it was established, in particular the safeguards it affords against arbitrariness.

14. The Pre-Trial Judge found that the KSC was a tribunal “unequivocally based in law”.¹⁶ On this basis and because he found that neither its independence nor impartiality was called into question by the KSC’s reliance on a separate law, he rejected the submission that the KSC was an extraordinary court in violation of Article 103(7) of the Constitution.¹⁷
15. In reaching this conclusion, the Pre-Trial Judge relies on the fact that the KSC was established by a law, *i.e.* Amendment No. 24, now Article 162 of the Constitution and that an additional law, *i.e.* the KSC law, would be adopted to regulate the “organisation, functioning and jurisdiction” of the KSC. He rightly referred to ECtHR jurisprudence on the importance of the “established by law” requirement and ensuring that there is a legal basis for the establishment of the judiciary and protection against unlawful external influence, particularly from the executive.¹⁸ However, the Pre-Trial Judge neglected to consider the fundamental issue of the quality of this law and, specifically, the requirement that the law affords adequate safeguards against arbitrariness.
16. It is well established that the term “law” in Article 6(1) is used in the same sense as when it appears elsewhere in the Convention, for example in articles 2, 5, 7,

¹⁶ Impugned Decision, para. 88.

¹⁷ Impugned Decision, para. 113.

¹⁸ Impugned Decision, para. 87.

8, 9, 10 and 11.¹⁹ There is a rich body of ECtHR jurisprudence supporting the proposition that wherever the term “law” is used in the Convention, it imports certain qualitative requirements. Thus, the Court has held that (emphasis added):

*The phrase “in accordance with the law” does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law; it thus implies that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded.*²⁰

17. As the Grand Chamber has recently confirmed, the rule of law and the avoidance of arbitrary power are fundamental principles underlying the entire Convention system.²¹ In the context of Article 6, specifically, multiple judgments confirm the need for an assessment of whether the law provides sufficient safeguards against arbitrariness²². On this basis, the Defence submits, that when determining that the Court was established by law, the Pre-Trial Judge was required to carry out an assessment of whether sufficient safeguards were in place to avoid the risk of arbitrariness.²³
18. However, the Pre-Trial Judge carried out no such assessment. This was a material error of law which, for the reasons set out below, invalidates the Impugned Decision. The Defence submits that, when the quality of law requirement is taken into consideration, the law by which the KSC was

¹⁹ See for example Schabas, W. “The European Convention on Human Rights; A Commentary”, Oxford, 2015 p. 336; Teleki, C., “The Case-law of the ECtHR on the Right to an Independent and Impartial Tribunal” in “Due Process and Fair Trial in EU Competition Law”, Volume 18, p. 166.

²⁰ ECtHR, *Olsson v. Sweden (no. 1)*, App. 10465/83, Judgment, 24 March 1988, para. 61.

²¹ ECtHR, *Lhermitte v Belgium*, App. 34238/09, [Judgment](#), 29 November 2016, para. 67.

²² *Id.*; ECtHR, *Parlov-Tkalčić v. Croatia*, App. 24810/06, [Judgment](#), 22 December 2009, paras 86-89; ECtHR, *Moiseyev v. Russia*, App. 62936/00, [Judgment](#), 9 October 2008, para. 183; ECtHR, *Ramanauskas v. Lithuania*, App. 74420/01, [Judgment](#), 5 February 2008, paras 51, 65-66.

²³ See ECtHR, *Lhermitte v Belgium*, App. 34238/09, para. 69.

established (*i.e.* the KSC Law)²⁴ does not in fact afford sufficient safeguards against arbitrariness for the following reasons.

19. First, the KSC seeks to prosecute Mr. Veseli and his co-accused on the basis of customary international law, incorporated via Article 12 of the KSC Law, whereas an individual tried in the ordinary domestic courts would be prosecuted on the basis of the domestic law in force at the time, *i.e.* the SFRY Criminal Code. The Defence submits in its Jurisdictional Appeal that this is contrary to the Constitution and International Human Rights Law. The SPO and the Pre-Trial Judge disagree. However, it appears to be common ground that customary international law, as applied by the KSC, criminalises conduct which is not so criminalised under the applicable domestic law. Accordingly, there exist two parallel systems, applying materially different bodies of substantive law. Whether a person is put into the KSC system and tried according to customary international law; or put into the ordinary courts of Kosovo and tried according to the SFRY Criminal Code has potentially drastic consequences for the accused. In one system he may commit no crime at all; while in the other he would be liable for the worst crimes known to mankind and stand to lose his liberty for life.
20. This is by no means a theoretical problem. There are currently twelve war crimes cases being prosecuted before other Kosovo courts and all have been brought under the SFRY Criminal Code.²⁵
21. Second, there exist no objective criteria upon which to determine whether a person should be tried in the KSC according to customary international law as

²⁴ Law No. 05/L-053 On Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015, Article 1(1): "*This Law establishes and regulates the organisation, functions and jurisdiction of the Specialist Chambers and the Specialist Prosecutor's Office.*"

²⁵ IA009/F00026, Veseli Defence Reply to SPO Response (KSC-BC-2020 06/IA009/F00020), 18 October 2021, para. 19.

opposed to in the domestic courts according to domestic law. On a plain reading of Article 1 of the KSC Law, it could be said that the qualifying criterion is that only persons suspected of crimes which relate to those reported in the Council of Europe Report are liable to be tried in the KSC. However, in practice, none of the allegations contained in the Council of Europe Report are the subject of any prosecution at the KSC. Indeed, in the Decision on Jurisdiction, the Pre-Trial Judge states in terms that:

[...]appraised accurately, the Council of Europe Report extends to: (i) alleged international crimes, including crimes against humanity and war crimes, that have been perpetrated against persons on account of their ethnicity or for being perceived as "collaborators" or "traitors"; (ii) alleged crimes in Kosovo with and without a connection to Albania; (iii) alleged crimes committed from 1998 onwards; and (iv) alleged perpetrators that were or had been members of, or affiliated with, the KLA without any limitation to those explicitly identified as such.²⁶

22. If correct, this would create an extremely broad class of suspects liable to be tried at the KSC. The SPO has not sought to prosecute all of the suspects who fall into this class. Indeed all of the individuals currently standing trial in the ordinary courts of Kosovo for crimes allegedly carried out in the context of the conflict in 1998 would fall into this class. Accordingly, it does not amount to an objective criterion applied by the SPO to determine whether to try suspects at the KSC.
23. In any event, even if the Appeals Court were to consider that the Council of Europe Report, as interpreted by the Pre-Trial Judge, provided the basis for such an objective criterion, the Defence submits that there is no justification for treating those accused of crimes within the scope of the Council of Europe Report differently to other people accused of the same conduct and that the implementation of any such criterion would violate the principles of equality before the law and non-discrimination in the Constitution and applicable International Human Rights Law.

²⁶ F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021.

24. Third, and in any event, there is no mechanism for judicial review of the SPO's decision to try a person at the KSC. Accordingly, there is no check on how the SPO exercises this extraordinary power.
25. This is a paradigm example of arbitrariness. Whether or not a person is liable for a crime and loses their liberty may depend entirely on the untrammelled discretion of the executive. The law by which the KSC was established does not provide adequate safeguards against such arbitrariness and is therefore defective, in violation of Mr. Veseli's rights under Article 6(1) of the ECHR.
26. Further, this self-evidently results in unchecked violations of:
- a. the right to equality before the law protected under Article 3(2) and 24 of the Constitution and applicable International Human Rights Law;²⁷ and
 - b. the prohibition on non-discrimination under Articles 7 and 24 of the Constitution and Article 14 of the ECHR.²⁸ This is particularly the case in circumstances where the persons who stand accused at the KSC are exclusively of Albanian ethnicity whereas those liable to be tried before the ordinary courts of Kosovo are of diverse ethnic groups, leading to a material difference in treatment of persons of Albanian descent vis-à-vis potential suspects of another ethnicity. It is the duty of the State, acting through the KSC, to justify such a difference in treatment.²⁹ Absent any such justification, the difference in treatment is discriminatory, contrary to Articles 7 and 24 of the Constitution and Article 14 of the ECHR.³⁰
27. The Defence submits that such a defect in the law establishing the KSC and the consequent constitutional and human rights violations can be addressed by the

²⁷ Articles 14 and 26 ICCPR, incorporated into the Constitution via Article 22.

²⁸ Incorporated into the Constitution via Article 22.

²⁹ ECtHR, *Timishev v. Russia*, Apps. No 55762/00 55974/00, Judgment, 13 December 2005, para. 57.

³⁰ Incorporated into the Constitution via Article 22.

Court of Appeals Panel through the proper application of Article 103(7) of the Constitution. Article 103(7) provides a safeguard against arbitrariness through the prohibition of extraordinary courts. The Appeals Panel should give effect to this and determine that, insofar as the KSC continues to apply a substantive law which is different to the domestic law of Kosovo applied in the ordinary domestic courts, the KSC acts as an extraordinary court, contrary to Article 103(7) of the Constitution.

28. In this respect, while the Issue is distinct from the issues in contention in the Jurisdictional Appeal, it is intimately connected. If the Appeals Panel finds in favour of the Defence on the Jurisdictional Appeal, the issue of arbitrariness is, save perhaps in relation to punishment, neutralised because the KSC will apply the same substantive criminal law as the domestic courts. However, if it finds against the Defence and the KSC continues to apply a different substantive law on an arbitrary basis, the Appeals Panel has no alternative but to find that the KSC acts as an unconstitutional extraordinary court, prohibited by Article 103 (7).

Ground 2 – When determining the lawfulness of the KSC for the purposes of Art 103(7) of the Constitution, the Pre-Trial Judge erred in law by placing undue reliance on the Constitutional Court Decision in Case No. KO26/15.

29. In finding that the KSC is “established by law” and therefore compatible with Art 103(7) of the Constitution, the Pre-Trial Judge relied on the Constitutional Court’s assessment of the constitutionality of Amendment No. 24 to the Constitution in *Case no. KO26/15*.³¹
30. As the Defence set out in the Motion,³² Amendment No. 24 predated the KSC Law. It did not anticipate that the KSC Law might provide for a separate

³¹ Impugned Decision, paras 86-87.

³² F00224, para. 3.

substantive law unavailable in the ordinary domestic courts of Kosovo. Still less did it anticipate the creation of a legal regime which would be applied in such a way as to deny those accused at the KSC their rights to protection against retroactive application of the criminal law, equal treatment before the law and discrimination. Accordingly, these issues were not before the Constitutional Court in *Case no. KO26/15*.

31. In the Impugned Decision, the Pre-Trial Judge suggests that this does not matter because the *“relevant features of the Law were, in general terms, before the KCC at the relevant time through the Exchange of Letters.”*³³ This is incorrect. The application of a different substantive law was not anticipated in the Exchange of Letters. This is, as further set out in relation to Ground 3, a feature which is highly relevant to the assessment of whether the Court is “specialised” or “extraordinary”.
32. Further, in its judgment in *Case no. KO26/15*, the Constitutional Court stressed that the new specialised court will, amongst other things, [...] *“function within the legal framework of criminal justice.”*³⁴ It explained that the KSC (emphasis added):

*“will be established within the already established existing courts within the justice system of the Republic of Kosovo similar to the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters”.*³⁵

33. The Defence notes that the Special Chamber of the Supreme Court on Privatization is similar to the KSC in the sense that it has: (i) primacy over other courts of Kosovo;³⁶ (ii) its own Rules of Procedure;³⁷ and (iii) its own Registry.³⁸

³³ Impugned Decision, para. 87.

³⁴ Case No. KO26/15, para. 68.

³⁵ Case No. KO26/15, para. 46.

³⁶ Law No. 04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, 22 September 2011, Article 24.

³⁷ *Id.*, Article 7.

³⁸ *Id.*, Article 14.

Unlike the KSC, however, it applies the domestic law of Kosovo.³⁹ This is a material difference between the two courts which the Pre-Trial Judge wrongly neglected to consider. It further supports the Defence's position that the Constitutional Court did not anticipate that the KSC Law would give rise to a separate substantive legal regime to that which applies in the ordinary criminal courts of Kosovo, demonstrating that *Case no. KO26/15* is not dispositive of, or even relevant to, the issue of whether the Law renders the KSC an extraordinary court.

34. For these reasons, the Defence submits that the Pre-Trial Judge erred in placing such weight on the judgment of the Constitutional Court in *Case no. KO26/15* when determining that the KSC was compatible with Art 103(7). The highly relevant, if not determinative, issue of the applicable law was simply not before the Constitutional Court when it decided the case. Accordingly, *Case no. KO26/15* is inapposite to the determination of the Issue.
35. As the Pre-Trial Judge provides no other basis for his disposal of the Defence's submissions in this regard, it follows that this error invalidates the Impugned Decision.

Ground 3 - The Court is endowed with a special power to apply its own law and, in exercising this power, dispenses with procedural safeguards protected under the Constitution and International Human Rights Law. The Pre-Trial Judge: (a) breached its duty to ensure fairness in the proceedings by failing to address the Defence's submissions in this regard; and (b) erred in law by failing to give due (or indeed any) weight to this highly relevant factor when determining the lawfulness of the KSC for the purposes of Art 103(7).

36. The Defence recalls that Article 103(7) of the Constitution allows, where necessary, for the establishment by law of "specialised" courts. However, it

³⁹ *Id.*, Article 54(1). For a summary explanation, see Supreme Court website, Special Chamber of the Supreme Court.

strictly prohibits the creation of any “extraordinary court”. This distinction is more than mere semantics. Specialised courts may be justified in certain circumstances, for example to ensure that the judiciary is equipped with the necessary expertise and infrastructure to meet the complexity or particular requirements of a specific legal field, provided that the necessary safeguards are in place to protect against arbitrariness. However, *ad hoc* or extraordinary courts are seen as posing a grave danger to the separation of powers and procedural safeguards provided in domestic Constitutions and enshrined in Article 6 ECHR.⁴⁰ The prohibition on extraordinary courts (and the associated principle of the *juge naturel*)⁴¹ is typical of many European systems.⁴² For instance, Article 101(1) of the German Basic Law, provides, similarly to Article 103(7) of the Constitution: “*Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.*”

37. As to the definition of “specialised” and “extraordinary” courts, the Defence recalls the output of the Council of Europe’s Commission for Democracy through Law or “Venice Commission” and, in particular the *indicia* referred to in its Opinion on Ukraine’s Draft Law on Anticorruption Courts.⁴³ In the Motion, the Defence referred to a number of these *indicia*, including: “**Whether the court is endowed with any special powers or whether it follows specific procedures different to those applied in the existing criminal courts.**”⁴⁴ For the sake of brevity, this is referred to in this Appeal as the “Applicable Law Indicium”.

⁴⁰ See Opinion (2012) No. 15 of the Council of Europe’s Consultative Council of European Judges on the Specialisation of Judges, 13 November 2012, para. 37.

⁴¹ See *Kavanagh v. Ireland*, CCPR/C/71/D/819/1998, 4 April 2001. See also, F00224, para. 6.

⁴² See for example, French Constitution of 1848, Article 4; German Basic Law of 1949, Article 101(1); Italian Constitution of 1947, Article 25.

⁴³ Venice Commission, Ukraine Opinion on the Draft Law on Anti-Corruption Courts, and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges, 6-7 October 2017.

⁴⁴ F00224, paras 12 *et seq.*

38. The significance of the Applicable Law Indicium is to ensure the same treatment of individuals subject to the same legal regime, *i.e.* to ensure equality before the law. It is further reflected in the emphasis that the Venice Commission places on the need for uniform application of law in order to ensure that a special court does not fall foul of the prohibition on extraordinary courts.⁴⁵ The right to equality before the law is a right explicitly protected by the Constitution of Kosovo,⁴⁶ the Law⁴⁷ and international human rights instruments made explicitly binding on the State of Kosovo *via* the Constitution.⁴⁸ As observed by the Pre-Trial Judge when granting certification for this appeal, the issue “*significantly affects the fairness of the proceedings as it is directly linked with Mr Veseli’s fair trial rights under Article 6(1) of the ECHR.*”⁴⁹
39. Further, the Defence notes that the European Court of Human Rights has recently confirmed the relevance of the applicable legal framework in determining whether or not a Turkish specialised court was “established by law” for the purposes of compliance with Article 6 of the Convention. The ECtHR found it relevant and agreed with the reasoning provided by domestic courts that, *inter alia*, “the 8th Assize Court was not governed by a separate legal framework”.⁵⁰ Further:

53. [...] The Court notes in that connection that the Istanbul 8th Assize Court was not an “extraordinary tribunal” established ad hoc or ad personam to deal specifically with the applicant’s case; it rather operated as a specialised chamber within the existing structure of the Istanbul assize courts, which was granted jurisdiction to take over trials in respect of all relevant banking offences in the province of Istanbul, which was subject to the same rules of procedure as all assize courts, and to which were appointed judges who enjoyed the same safeguards and benefits as all assize court judges

[...]

⁴⁵ Venice Commission Ukraine Opinion, paras 33, 41.

⁴⁶ Constitution of Kosovo, Article 3, Article 24.

⁴⁷ Law No. 05/L-053, Article 21(1).

⁴⁸ Constitution of Kosovo, Article 22.

⁴⁹ F00546, para. 64.

⁵⁰ ECtHR, *Bahaettin Uzan v. Turkey*, App. No 30836/07, Judgement, 24 November 2020, para. 17.

64. As to its judicial functioning, the Court observes that the judgments of the Istanbul 8th Assize Court were subject to the supervisory jurisdiction of the Court of Cassation upon appeal, as in other criminal cases processed by the assize courts, and that the entire procedure, including the appeal proceedings, was governed by the standard rules of procedure with no special provisions or limitations.

40. The Defence notes relevant authority from the Human Rights Committee of the United Nations in which special or extraordinary courts were determined to have violated the right to equality before the law under the International Covenant on Civil and Political Rights by depriving those tried before a special or extraordinary court the procedural rights available to those accused before the ordinary criminal courts. In *Kavanagh v. Ireland*⁵¹ the Human Rights Committee found a violation of Article 26 ICCPR on the basis that the applicant was deprived of various procedural guarantees in a special criminal court, including the right to be tried by a jury, which were available to other accused charged with similar offences in the ordinary courts of Ireland.⁵²
41. Accordingly, the Defence maintain that the Applicable Law Indicium is, at the very least, relevant to any determination of whether the Court is a permitted, “specialised” or a prohibited “extraordinary” court for the purposes of Article 103(7).
42. However, the Pre-Trial Judge did not address the Applicable Law Indicium in his determination of the lawfulness of the KSC for the purposes of Article 103(7), still less give it due weight in reaching his conclusion. Had the Pre-Trial Judge done so, the Defence submits that the Pre-Trial Judge would have reached a different conclusion on the lawfulness of the KSC for the purposes of Article 103(7). Accordingly, the Defence submits that: (1) in failing to address the Defence’s submissions in this regard, the Pre-Trial Judge failed to discharge

⁵¹ *Kavanagh v. Ireland*, CCPR/C/71/D/819/1998, 4 April 2001.

⁵² *Kavanagh v. Ireland*, CCPR/C/71/D/819/1998, 4 April 2001, paras 10.2-10.3.

his duty to ensure fairness in the proceedings; and/or (2) that this amounts to a material error of law which invalidates the Impugned Decision.

43. The Defence maintains that, in light of the KSC Law and the practice of the KSC since its inception, the KSC is in fact "*endowed with special powers*" and "*follows specific procedures different to those applied in the existing criminal courts*". Accordingly, as further set out below, it manifests characteristic features of a prohibited "extraordinary" court.
44. Art 12 of the KSC Law purports to give the KSC power to apply a different substantive law to the ordinary courts of Kosovo. Even if the issue of non-retroactivity, discrimination and equality before the law is put to one side, this is a paradigm example of the type of "special power" bestowed upon an "extraordinary" court envisaged by the Venice Commission and this should be given due weight in any determination of the Court's lawfulness under Art 103(7).
45. In doing so, the KSC rides roughshod over vital procedural safeguards available to other citizens of Kosovo and protected under domestic and international law, namely (and as set out in further detail in the Jurisdictional Appeal): the protection against retroactive application of the criminal law under Article 33 of the Constitution and applicable International Human Rights Law;⁵³ the principle of equality before the law protected under Article 3(2) and 24 of the Constitution and applicable International Human Rights Law;⁵⁴ and the prohibition on discrimination under Articles 7 and 24 of the Constitution and Article 14 of the ECHR.⁵⁵

⁵³ Article 7 ECHR and Article 15 ICCPR, both incorporated into the Constitution via Article 22.

⁵⁴ Articles 14 and 26 ICCPR, incorporated into the Constitution via Article 22.

⁵⁵ Incorporated into the Constitution via Article 22

46. The Pre-Trial Judge: (a) breached his duty to ensure fairness in the proceedings by failing to address the Defence's submissions in this regard; and (b) erred in law by failing to give due (or indeed any) weight to the Applicable Law Indicum when determining the lawfulness of the KSC for the purposes of Article 103(7). Such an error by the Pre-Trial Judge exposes Mr Veseli and his co-accused to continuing and egregious violation of their rights under the Constitution and International Human Rights Law which must be remedied.
47. Finally, the Defence notes that, in previous submissions, the SPO has referred to the Extraordinary African Chambers within Senegal; the Special Tribunal for Lebanon;⁵⁶ or the Extraordinary Chambers in the Courts of Cambodia,⁵⁷ to justify the "constitutionality" of the KSC or its deviation from the Kosovo domestic criminal law. However, these courts are both international and extraordinary.⁵⁸ The KSC is neither. That the KSC now functions in many respects as if it were an *ad hoc* or extraordinary international court⁵⁹ is at the very heart of the problem and of this appeal. Such courts, while legally permissible under other legal frameworks, are prohibited by Article 103(7) of the Kosovo Constitution.
48. The fundamentally domestic nature of the KSC and, critically, the fact that it would apply domestic Kosovo law was never in any doubt amongst the key international stakeholders involved in the formation of the KSC who gave

⁵⁶ F00260, Prosecution response to preliminary motions concerning the status of the Kosovo Specialist Chambers and allegations of rights violations, 23 April 2021, para. 20.

⁵⁷ F00262, Prosecution response to preliminary motion concerning applicability of customary international law, 23 April 2021, para. 6.

⁵⁸ The Extraordinary African Chambers were set up on the basis of a treaty between the AU and Senegal; the ECCC by an agreement between the UN and Cambodia; and the STL on the basis of a Chapter VIII UN SC Resolution, similar to the ICTY and ICTR.

⁵⁹ Indeed, many provisions of the Law are similar, if not identical to the statutes of the ECCC, STL, or the Extraordinary African Chambers.

repeated assurances to this end in response to widespread concerns that an international jurisdiction would be created to try the alleged crimes:

- a. Former Dutch Ambassador to Kosovo Robert Bosch, speaking in April 2014, took care to underscore that *“the Court is subject to Kosovo laws.”*⁶⁰
- b. Former UK Ambassador Ian Cliff reminded the public in March 2015 that the Special Court *“which, after all, is the Court of Kosovo abroad”* would be far preferable than resorting to a Security Council-backed initiative that could be influenced by adverse interests.⁶¹
- c. Former US Ambassador for War Crimes Stephen Rapp, in interview with Koha Ditore, underscored that *“the formula agreed by the EU is a Kosovo Court, established by Kosovo legislation, but with active funding and support from the EU.”* He added that:

*There are some like from Serbia and Russia and some other countries who would like to have an international UN tribunal. We do not think this is necessary. We always think of the best approach for the country itself to take action and establish an institution with sufficient independence to ensure that allegations are cleared, that people who are guilty are found guilty, while those who are innocent are found not guilty. And the best approach to do that is through the legislation of the country.*⁶²

- d. Former US Ambassador Tracey Ann Jacobson in an interview with national news agency Lajme wished to *“emphasise that this Court will only deal with individual cases and I assure you that it will not be more than 10 cases...If Kosovo fails in this route, of course, the matter will be dealt with by the international community and we will have Hague (ICTY) 2.0”.*⁶³

49. The Defence submits that the Court of Appeals Panel should bring the KSC back to its original status as a specialised, domestic court, in line with the

⁶⁰ Radio Evropa e Lirë, Tribunali për Kosovën, jo para 2015-s(?), 12 April 2014.

⁶¹ Anadolu Agency, Ambasadori britanik Cliff: Gjykata Speciale çeshtje e reputacionit të Kosovës, 28 March 2015.

⁶² US Embassy in Kosovo, Interview with Ambassador for War Crimes Stephen Rapp, 20 April 2015.

⁶³ Lajme 19:30 interview with Tracey Ann Jacobson at 03m24-03m54, 20 February 2015.

Exchange of Letters, Article 162 of the Constitution and *Case no. KO26/15* of the Constitutional Court.

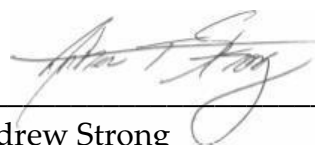
V. RELIEF

50. Given the close connection between the Issue and the issues in contention in the Jurisdiction Appeal, the Defence requests that the two appeals be heard together, before the same panel of the Court of Appeals.
51. For the reasons set out in this appeal, the Defence requests that the Court of Appeals Panel set aside the Impugned Judgment and either:
- a. rules that, insofar as the KSC purports to apply customary international law to criminalise conduct which would not have been so criminalised under the domestic law applicable in Kosovo in 1998, it acts as an extraordinary court in violation of the prohibition under Article 103(7); or
 - b. refers the Issue to the Specialist Chamber of the Constitutional Court.

Word Count: 5921



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