

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

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**Preliminary motion of the Defence of Kadri Veseli
to Challenge Jurisdiction on the basis of violations of the Constitution**

Specialist Prosecutor
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I. Introduction

1. In accordance with Article 113 (7) of the Constitution of the Republic of Kosovo ("Constitution") and pursuant to Article 49(3) of the KSC Law, and Rule 4(c), 20(1) and 97(1)(a) of the Rules of Procedure and Evidence ("RPE") the Defence of Mr Veseli ("Defence") files this Motion challenging the jurisdiction of the KSC on the basis that the KSC Law is *ultra vires* and has fundamentally infringed the principle of legality by effectively turning the KSC into a *de facto* extraordinary court, as opposed to a specialised one, that violates Article 103(7) of the Constitution.
2. Article 103(7) of the Constitution allows, when necessary, for the establishment of specialised courts while specifically prohibiting the creation of any extraordinary court for a very simple reason laid out by the European Commission for Democracy through Law (the Council of Europe's independent advisory body on constitutional matters) and the Consultative Council of European Judges (CCJE): that such courts set up specifically to meet the needs "dictated by individual or specific circumstances"¹ create a "potential danger (...) [of] failing to provide all the safeguards enshrined in Article 6 of the Convention."²
3. While the Constitutional Court *in Case no. KO26/15*³ has already considered whether the proposed amendment to the Constitution (which would be the basis for the establishment of the Court) was in violation of the prohibition of creating extraordinary courts contained in Article 103(7) of the Constitution, and decided,

¹ [Venice Commission, Opinion No. 896/2017, 9 October 2017](#), para. 17.

² Consultative Council <https://rm.coe.int/16807477d9> of European Judges on the Specialisation of Judges, Opinion No. 15, 5-5 November 2012., para. 37.

³ [Constitutional Court, Case No. KO26/15 'Assessment if an Amendment to the Constitution of the Republic if Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on March 15 by Letter No. 05-433/DO-318, 15 April 2015.](#)

on the basis of the information available at the time, that it was not the case, the Defence submits that the nature and compatibility of the KSC with the Constitutional provision were considered prematurely because:

- a) Firstly, the Constitutional Court did not review the KSC Law in itself, but the proposed Amendment, which would in a successive stage, allow the Assembly to set up the KSC. In other words, that preliminary stage assessment of the Constitutional Court was not informed by what the KSC's jurisdiction would amount to in the future; and
 - b) secondly, nowhere does either [Article 162 of the Constitution](#), or the Exchange of Letters between President Jahjaga and EU High Representative Ashton⁴ refer to the possibility that the KSC would operate on the basis of a separate 'applicable law'. On the contrary, the only references relate to procedural issues and the assurance that the Rules of Evidence would be guided by the Kosovo Code of Criminal Procedure.
4. The Defence therefore submits that cogent reasons now exist for the Constitutional Court Panel to revisit this finding. Far from being a theoretical question, the nature of the KSC and the compatibility of its jurisdiction with the Kosovo Constitution are concrete legal impediments to Mr Veseli's constitutional rights to a fair and impartial trial, free from extraordinary and arbitrary deviation of procedures such as those set out in the preliminary motions of the Defence of Mr Veseli to Challenge the Jurisdiction of the KSC and the Indictment. The Defence therefore

⁴ [Annex to Law No. 04/L-247, Law On Ratification Of The International Agreement Between The Republic Of Kosovo And The European Union On The European Union Rule Of Law Mission In Kosovo, 23 April 2014.](#)

requests the Pre-Trial Judge to refer the matter to the Specialist Chamber of the Constitutional Court to determine whether the KSC's jurisdiction complies with Kosovo's Constitution.

II. The KSC is a *de facto* extraordinary court that violates Article 103(7) of the Constitution

5. The Defence submits that the KSC is *de facto* an extraordinary court, as opposed to a specialised one, and that as a result, its jurisdiction violates Article 103(7) of the Constitution.
6. While Article 103(7) of the Constitution allows, when necessary, for the establishment of specialised courts, it specifically prohibits the creation of any extraordinary court. The distinction between a specialised court and an extraordinary one is not merely semantic but has significant repercussions on the right to a fair trial and the right to equality before the law of the accused.
7. However, since the Constitution does not specify in detail what an 'extraordinary court' means, the Defence refers the Pre-Trial judge to the position of the European Commission for Democracy through Law ("Venice Commission"), which is the Council of Europe's independent advisory body on constitutional matters. In its Opinion on Ukraine's Draft Law on Anticorruption Courts,⁵ the Commission found that the following 'indicia' can be useful to differentiate a specialised court from a special or extraordinary court.

⁵ [Venice Commission, Opinion No. 896/2017, 9 October 2017](#), paras 22-29.

a) Whether the court is set up to handle one single or a limited number of cases

8. According to the Venice Commission, the fact that a court that is established to adjudicate a limited number of cases is a strong indicator that such a court is, in fact, extraordinary in nature.⁶ On the contrary, a 'specialised court' would be competent for a generally and abstractly defined range of criminal offences and perpetrators.
9. In the case of the KSC, the Law openly states in Article 1 that its purpose is to prosecute the allegations contained in Mr Dick Marty's 2011 Council of Europe Assembly Report. The Law on the KSC is neither general nor abstract. It is unique and unprecedented in the history of modern criminal justice for an Accused to be one of the reasons for passing the Law. In other words, the KSC was specifically set up to prosecute a defined set of cases and therefore of accused, including Mr Veseli, amongst others.

b) Whether the appointment of judges deviates from the general appointment procedure

10. The KSC claims to be an entirely domestic court, yet all of its judges, prosecutors and staff are international. Not only does the appointment procedure of the Judges of the KSC deviate from the normal procedures set out in Chapter VII of the Constitution, but the KSC Judges have no formal institutional connection whatsoever with the Kosovar judiciary. As a result, the only possible conclusion is that it was not intended to be a specialised court but rather an extraordinary in

⁶ Ibid, paras. 23-24.

nature.

11. In this respect, the Defence for Mr Veseli notes that even international courts, such as the SCSL,⁷ or hybrid courts such as the STL or ECCC, are/were composed of both national and international judges.

c) Whether the court is endowed with any special powers or whether it follows specific procedures different to those applied in the existing criminal courts⁸

12. The KSC has primacy over all the other courts in the Republic of Kosovo, and it deviates both from the Kosovan Code of Criminal Procedure and the applicable national laws.
13. While the Defence might, arguably, understand the practical need of having separate Rules of Procedure, there is no reason whatsoever for the KSC not to apply the national law of Kosovo relevant at the time of the events. The Defence notes that the SPO, to its credit, attempted to refer to the Kosovo national law in its original Indictment.⁹ However, the Pre-Trial Judge requested the SPO to amend the Indictment and charge the Accused only on the basis of customary international law:

Insomuch as Article 142 of the SFRY Criminal Code incorporates by reference the international law applicable during armed conflict, the constitutive elements of the charged crimes under Article 142 of the SFRY Criminal Code

⁷ Special Court for Sierra Leone, Prosecutor v. Morris Kallon *et al*, Appeals Chamber, *Decision On Constitutionality And Lack Of Jurisdiction*, 13 March 2014, para. 17 (“As a creature of an international treaty, the Special Court exists and functions in the sphere of international law. The judicial power that it exercises is not the judicial power of the Republic of Sierra Leone”).

⁸ *Ibid*, Para. 25.

⁹ KSC-BC-2020-06/F00002, Public redacted version of ‘Submission of Indictment for confirmation’, filing KSC-BS-2020-06/F00002 dated 24 April 2020, 18 November 2020, para.3.

correspond to those identified above under Article 14(1)(c).

For these reasons, and in light of the Specialist Chambers' obligation to adjudicate and function in accordance with the Law as *lex specialis*, the Pre-Trial Judge requests the Specialist Prosecutor to consider choosing Article 14(1)(c) of the Law as the primary and appropriate legal basis for the charged war crimes and Article 16 of the Law as the appropriate legal basis for the charged modes of liability.¹⁰

14. The Defence respectfully disagrees with the Pre-Trial Judge's assessment of the applicable law at the KSC because contrary to the Pre-Trial Judge's determination, the law applicable at the time prohibited the application of customary international law.
15. The words 'international law at the time' in Article 142 of the 1976 SFRY Criminal Code refer to the ratified international treaties that were incorporated in the Yugoslav domestic system.
16. Moreover, and contrary to the practice of international criminal courts, the war crime specified in Article 142 of the 1976 SFRY follows a 'singularity of the crime' approach, not subject to be divided into 'separate counts'. Further, the modes of liability defined in international law, as opposed to the relevant national legislation, are substantially different and neither JCE nor command responsibility appeared or had been incorporated in the Yugoslav domestic system.

¹⁰ KSC-BC-2020-06/F00010, Pre-Trial Judge, *Order to the Specialist Prosecutor pursuant to Rule 86(4) of the Rules*, Public, 2 July 2020, paras 25-26.

17. However, even if it was the case that both domestic and international law apply (which it is not), the Pre-Trial Judge's determination is in flagrant disregard of the principle of *jus de non evocando* whereby no domestic or international law can bar the application of the substantive criminal law which was in force at the time of the events. The ICTY Appeals Chamber considered the issue when challenged by Mr Tadic on the right to be tried by his national courts under his national laws, stating that:

the Appellant argues that he has a right to be tried by his national courts under his national laws. No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent the Appellant from being tried [...] before an international tribunal?¹¹

18. The Appeals Chamber went on to answer the question in the negative, as long as the international tribunal could replicate the rights of the appellant in a domestic court.

19. The Defence submits that whether or not the Pre-Trial Chamber agrees with the reasoning of the ICTY Appeals Chamber, its interpretation of the relationship between domestic and international law is that: each is supreme in their own domain. Therefore, unlike the ICTY, which operated primarily based on international law, the KSC operates primarily based on Kosovo's domestic law. As a result, unlike the ICTY, the KSC is bound by both constitutional principles and human rights principles and cannot simply choose to disregard national law.

¹¹ [ICTY, Prosecutor v Tadic, case no IT-94-1, Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction](#), para. 61.

20. Taken cumulatively, the Defence submits that all the factors outlined by the Venice Commission above support the argument that the KSC, as it stands today, is de facto an extraordinary court, not a specialised one and that its jurisdiction is therefore incompatible with Article 103(7) of the Constitution.

III. CONCLUSION

21. The Defence requests the Pre-Trial Judge to urgently refer the matter to the Specialist Chamber of the Constitutional Court to determine whether the KSC is competent to try the criminal offences alleged against Mr Veseli in a fair and impartial process, free from undue external political influence, and based on domestic Kosovo law, in compliance with Kosovo's Constitution.

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