

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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Veseli Defence Reply

to Prosecution Response to Preliminary Motion Challenging Jurisdiction on the basis of Violations of the Constitution

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I. INTRODUCTION

1. The Defence for Mr Veseli (Defence) hereby replies to the SPO Response (“Response”)¹ to the Veseli Defence Preliminary Motion to Challenge Jurisdiction on the basis of violations of the Constitution (“Motion”).²

2. On a preliminary note, the Defence notes that whether a challenge is jurisdictional in nature can be easily discerned by looking at the result sought. A challenge to the legality of the KSC necessarily encompasses a challenge to the jurisdiction of the court. The SPO reference to the Ayyash Decision on Jurisdiction³ is inapposite because Rule 90(E) of the STL Rules of Procedure defines very narrowly challenges to jurisdiction.⁴ By contrast, Rule 97(1)(a) of the KSC Rules does not provide any definition to the challenges to jurisdiction and is similar in wording to Rule 73(A)(i)⁵ of the ICTY which was in force at the time the *Tadic Decision on Jurisdiction*⁶ was decided. Therefore, *Tadic* is the appropriate authority concerning this matter.

¹ F00260, Prosecution to preliminary motions concerning the status of Kosovo Specialist Chambers and allegations of rights violations, 23 April 2021 (“Response”). The Defence would like to provide a correction with regard to the legal basis of the present Motion, which is filed in accordance with Article 113(8) of the Constitution; Article 49(4) of the Law; Part II, Rules of Procedure for the Specialist Chamber of the Constitutional Court, Section III (Rule 25), and Rule 75 and/or 97(1)(a) of the Rules.

² F00224, Preliminary motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the basis of violations of the Constitution, 15 March 2021 (“Motion”).

³ Prosecutor v Ayyash, STL-11-01/PT/TC, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 27 July 2012; Prosecutor v Ayyash, STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals Against the Trial Chamber’s ‘Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal’, 24 October 2012.

⁴ [Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.11](#), p. 96.

⁵ [Rules of Procedure and Evidence \(IT/32IRev. 5, 15 June 1995\)](#), p. 40.

⁶ [ICTY, Prosecutor v. Tadic, Case no. IT-94-1, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction](#), 2 October 1995.

3. In any event, the Defence submits that the discussion on admissibility is moot, considering that the present motion, while it is intrinsically connected to jurisdictional issues, relates, as it was easily discernible from the text of the Motion, to a request pursuant to Article 113(8) of the Constitution.⁷

4. Unlike the proceedings pursuant to Article 113(7) of the Constitution, which lie as of right following the exhaustion of all legal remedies, it is the Pre-Trial Judge who will ultimately decide whether questions of constitutional compatibility of the Law arise and subsequently refer the case to the Specialist Chamber of the Constitutional Court (“SCCC”). Therefore, the Defence defers to the Pre-Trial Judge whether to consider the present Motion as filed pursuant to Rule 75 or Rule 97(1)(a) of the Rules.

II. REPLY

A. The SCCC should consider the compatibility of the Law establishing the KSC with the Constitution⁸

5. The SPO misinterprets a fundamental point. The Defence is not seeking reconsideration of Judgment KO26/15.⁹ The scope of review of that judgement was very narrow. It concerned the constitutionality of the proposed amendments to the Constitution (now Article 162 of the Constitution) and not, what the Defence is requesting, the constitutionality of the Law with the Constitution, even in light of Judgment KO26/15. The Constitutional Court did not find a violation of the proposed amendments under the condition that the new Law would be in accordance with Article 55 of the Constitution.¹⁰ As it stands, the Law directly violates Article 55 of the

⁷ See the Defence correction at footnote 1.

⁸ Response, paras. 3-8.

⁹ [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](#). (“Case No. KO26/15”)

¹⁰ Ibid, paras 57, 60, 75.

Constitution by ‘unlocking a jurisdictional venue’¹¹ and giving it primacy over domestic criminal legislation.

6. The Defence was very careful in using the words ‘separate applicable law’.¹² The SPO attempt to equate the method of establishing the KSC (law as a vessel) with the ‘applicable law’ (law as content) quickly fails. Moreover, the claim that the Exchange of Letters and Article 162 of the Constitution ‘clearly envisaged a substantive applicable law’ is false.¹³

7. In order to dispel any possible doubt, and at the risk of stating the obvious, the Defence recalls that reference to ‘jurisdiction’ in Article 162 of the Constitution, does not equate to ‘separate applicable law’ considering that the term ‘jurisdiction’ covers also the temporal, personal, and geographical jurisdiction.

8. The Pre-Trial Judge is invited to read for himself not only the above instruments, but also the text of Judgment KO26/15. He will note, among others, that Article 162(6) of the Constitution specifically mentions that the new specialised court may determine its own Rules of Procedure and Evidence. While criminal procedural legislation may be applied retroactively it seems that the drafters believed that such departure was still very important to be ‘implied’, and reassured that in any event, such rules would be a) in accordance with the relevant human rights law and the constitutional framework; b) guided by the Kosovo Code of Criminal Procedure, and c) subject to the prior review of the Constitutional Court. Likewise, other measures less intrusive to the fundamental rights of individuals were included both in the Exchange of Letters and in Article 162 of the Constitution.

¹¹ F0026, Prosecution response to preliminary motion concerning applicability of customary international law, 23 April 2021, para. 24.

¹² Motion, para. 3(b); *contra*, Response paras 4-5.

¹³ To the extent that such substantive applicable law would circumvent the Kosovo domestic legislation in criminal matters.

9. Yet, when it comes to the most controversial element of this Law, namely the disregard of domestic criminal law in favour of a body of law not directly applicable by domestic courts, both the Exchange of Letters and the Constitutional Amendment, as well as the Constitutional Court in its Judgment KO26/15 are silent. It is thus unconceivable to accept the SPO's argument that serious violation of the fundamental non-derogable guarantees provided by the Constitution were simply implied in the texts.

10. Turning to Judgment KO26/15, it was clear that the Constitutional Court could not review something that did not exist at the time. What the Constitutional Court could do, was to provide a *prima facie* assessment of what a specialised court would look like. The Court was adamant in stressing that,

'a specialised court [...] means a court with a specifically defined scope of jurisdiction, and which remains within the existing framework of the judicial system of the Republic of Kosovo [...]. Unlike a specialised court, an "extraordinary court" would be placed outside the structure of the existing court system and would operate without reference to the existing systems.¹⁴

11. According to the Court, the new specialised court would need to be in compliance with the rights provided by Chapter II and III of the Constitution.¹⁵

12. Therefore, to remain 'within the existing framework' of Kosovo courts, it means that, in accordance with Article 102(3) of the Constitution, 'Courts shall adjudicate based on the Constitution and the law'. While it should be self-explanatory that 'law' refers to Kosovo law, the Constitutional Court made sure to highlight that

¹⁴ Case No. KO26/15, para. 43.

¹⁵ Ibid, para. 44.

the new specialised court will, amongst others, [...] 'function within the legal framework of criminal justice'.¹⁶

13. This is further confirmed when the Court explained that the KSC '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 (Special Chamber of the Supreme Court).¹⁷ Like the KSC, the Special Chamber of the Supreme Court has its own Rules of Procedure and its own Registry. However, it is in accordance with the Constitution because, unlike the KSC, it adjudicates a) a general and abstractly defined types of cases; and b) is based on Kosovo domestic law.¹⁸

14. Therefore, and contrary to the SPO's submission,¹⁹ not only did the Constitutional Court not have all the relevant matters before it at the time of issuing Judgment *KO26/15*, it is plain that the Constitutional Court was under the impression that the Law would operate on the basis of domestic substantive criminal law.

B. The KSC is *de facto* an extraordinary court

15. The SPO fails to mention that the Defence referred to the criteria set out by the Venice Commission, which is the most authoritative international body on constitutional reform matters. Despite its formally consultative role, an Opinion of the

¹⁶ Ibid, para. 68.

¹⁷ Ibid, para. 46.

¹⁸ [Law No. 04/L-033 On The Special Chamber Of The Supreme Court Of Kosovo On Privatization Agency Related Matters](#), Article 48 (A decision of the Special Chamber adjudicating a claim shall be set forth in a Judgment which shall meet the requirements of Articles 10 and 11 of the Special Chamber law. The Special Chamber shall base a judgment upon an analysis of the evidence and the written and oral submissions presented during proceedings and the law of Kosovo.)

¹⁹ Response, para. 8.

Venice Commission holds considerable weight and is in practice mandatory for the requesting government.

16. The criteria used by the Constitutional Court referred exclusively to the formal requirements set out in Article 103(7) of the Constitution. This was expected, in view of its narrow scope of review and in the absence of an actual law establishing the KSC. To the contrary, the criteria adopted by the Venice Commission referred to the assessment of an actual law establishing a specialised court. In the specific case cited by the Defence,²⁰ the Commission did not simply look at the formal constitutional requirements necessary to set up a specialised court, but at the substantial repercussions vis-à-vis constitutional guarantees.

17. The SCCC will be invited to assess the relevant provisions of the Law and to decide whether, despite the KSC being formally a domestic court, it is in practice acting as an international court, outside the legal framework of the Kosovo criminal justice.

18. As to the “necessity” test, while the Constitutional Court identified the correct legal standard set out in the ECtHR case-law, (namely a general and abstract necessity, like fighting corruption) the Defence respectfully disagrees with the finding that the necessity test is met simply because it emanates from a ratified international agreement. Such finding would mean that contrary to Article 16 of the Constitution, a ratified international treaty would trump the Constitution.

19. Finally, it is the SPO that is factually incorrect in attempting to mix domestic specialised courts with international ‘actual’ extraordinary courts. On all the cases cited by the SPO only the Lockerbie Trials concern a domestic court. While politically

²⁰ [Venice Commission, Opinion No. 896/2017, 9 October 2017](#)

complicated, the case concerned criminal charges with a change of venue of the legal proceedings to the Netherlands, based on a bilateral treaty between the United Kingdom and the Netherlands. In any event, this was a Scottish court applying Scottish law to the case. As regards the Extraordinary African Chambers and the Special Tribunal for Lebanon, both these courts are hybrid in nature, and apply law, as the ECCC, in accordance with their constitutive (international) agreements. Notably, an initial option to try Habré before domestic courts was rejected by the ECOWAS Court, which concluded that while the international principle of legality could allow the prosecution of Habré by international courts, Senegalese courts were barred from doing so due to the lack of domestic legislation incorporating international crimes at the time of the event.²¹ Hence, the establishment by agreement between Senegal and the African Union of a court which applies exclusively international law and its statute.²²

20. Finally, none of the abovementioned states specifically prohibit the establishment of extraordinary courts by their respective constitutions.

III. CONCLUSION

21. Accordingly, the Defence requests the Pre-Trial Judge to grant the request and urgently refer the matter to the SCCC.


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²¹ [ECOWAS, Hissène Habré v. Republic of Senegal, Case no ECW/CCJ/JUD/06/10](#), para. 58

²² [Statute of the Extraordinary African Chambers](#), Article 16.



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