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
Date:	17 September 2021
Language :	English
Classification :	Public

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)

Specialist Prosecutor's Office
Jack Smith

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law 05/L-053 ("Law") and Rule 77 of the Rules of Procedure and Evidence ("Rules"), the Defence of Mr. Veseli ("Defence") hereby files this Application for Leave to Appeal the 'Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused' ("Impugned Decision").[1]

2. The Defence proposes the following issue for certification:

> *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 Article 44 of the Constitution, rendering the Court "unlawful" for the purposes of Article 103(7).*

II. APPLICABLE LAW

3. Article 45(2) of the Law and Rule 77 set out the legal test for leave to appeal through certification. The party seeking certification must demonstrate the existence of an issue which (1) significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial; and (2) the immediate resolution of which by a Court of Appeals Panel may materially advance proceedings.

4. The Defence further recalls that in order for an 'issue' to be appealable it must relate to discrete issue(s) that (i) emanate from the Impugned Decision and which (ii) do not amount to abstract questions or hypothetical concerns, or a mere disagreement with the decision.[2]

[1] KSC-BC-2020-06/F00450, Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, 31 August 2021.
[2] KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, para. 11.

III. SUBMISSIONS

A. The issue is appealable

5. The issue is concrete, easily identifiable and stems directly from the Impugned Decision. At paragraph 113, the Pre-Trial Judge concluded that the court was properly characterised as specialised as opposed to extraordinary – and therefore not constitutionally invalid. He reached this conclusion on the following basis:

> *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. This rests on a *prima facie* observation that the KSC was established by law. However, this is not the issue on which the Veseli Defence sought a ruling. The issue on which it sought a ruling was whether the peculiarities of *the* Law that was passed and subsequently interpreted by this Court – not the abstract prospect of *a* law – creates a different substantive legal regime that results in unequal treatment before the law in violation of the Constitution. This was not tested before the KCC when it considered the constitutionality of the KSC in 2015 because it could not be: the Law did not yet then exist. Nor was this issue addressed in the Impugned Decision.[3]

7. The fact that the Law was adopted by the parliament does not obviate all concerns about its constitutionality, nor satisfy the requirement of Article 103(7).[4] Laws passed by parliamentary bodies may still (and frequently are)

[3] The decision recalls that the Defence has raised this point at para 85, but fails to address it in its reasoning.
[4] *See* Decision, para. 86.

held to be unconstitutional when submitted to judicial review. As the Defence has pointed out, such judicial review has not occurred here.

8. Were it the case that the Law gave rise to unequal protection, it could *not* be maintained that the substantive law applied by the KSC complied with Article 44 of the Constitution. The Law creates a different substantive legal regime to that which would be applicable under the ordinary domestic law regime. As the Defence explained in its original submissions, 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. Application of customary international law was prohibited under the law as it then existed.

9. Under the circumstances, to apply customary international law retroactively is to bring to bear on the Accused a separate substantive law, which creates a situation of unequal protection under the law for a discrete category of individuals before Kosovar courts. That is a violation of the constitution, which thereby renders the KSC Law in violation of Article 103(7).

10. Relatedly, the Pre-Trial Judge maintains that the category of persons that may be tried before the Court is not unduly restrictive as it is "abstract enough to accommodate a multiplicity of…categories of perpetrators."[5] To state that it is abstract enough to accommodate a multiplicity of categories of perpetrators without addressing evidence to the contrary, or putting forward any evidence in support of this conclusion, is not adequate. It is incumbent on the Court to provide reasons for its decisions. In the instant case, this would necessarily require an explanation of *how* it arrived at the above conclusion despite the fact that Article 6 of the Law confines jurisdiction to just one party to the conflict,

[5] Decision, para. 114.

within which only an extremely small number of individuals were ever going to be tried.

11. Regardless of whether more individuals within this narrow category could theoretically have been charged, they have not and will not be charged. The temporal and budgetary constraints placed on the SPO – which were well known from the outset – have inevitably resulted in an almost exclusive focus on a small group of individuals perceived as most responsible as a consequence of their official positions within the KLA.

12. The point that the Veseli Defence wishes to underscore here is not that it disagrees with the Court's conclusion (which goes without saying) but that again, the Court has not engaged with the Defence's submissions in arriving at its conclusions.[6]

13. To conclude, the issue for which certification is sought does not represent a mere disagreement with the Impugned Decision. Instead, it concerns the requirements of judicial scrutiny that are necessary to properly assess whether the Law complies with Article 103(7) of the Constitution and the failure of the Court to provide reasons in response to a fundamental issue raised in the Veseli submissions. It is therefore appropriate to certify it for appeal.

B. The issue significantly affects both the fair conduct of the proceedings as well as the outcome of the trial

14. The issue touches upon fundamental guarantees protected by the Constitution. If the Defence is correct in this issue, the introduction of a separate substantive criminal law (irrespective of whether customary international law has direct effect in the domestic legal order) in the KSC Law will be in violation of Articles 24, 55, of the Constitution and consequently, 103(7) of the Constitution. As it

[6] KSC-BC-2020-06/F00224, Preliminary motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the basis of violations of the Constitution, 15 March 2021, paras 13-19.

implicates both the fundamental rights of the Accused and the charges themselves, it has clear consequences for both fairness and for the outcome of trial.

C. An immediate resolution by the Appeals Chamber will materially advance the proceedings

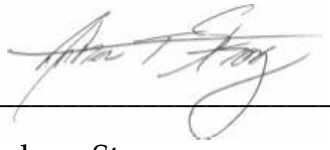
15. The Defence understands that this last requirement does not necessarily relate to the expediency of the proceedings but may also relate to the need to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".[7] A prompt determination by the Appeals Chamber would provide certainty on whether a fundamental constitutional guarantee has been violated, the discovery of which at a later date would have very far reaching consequences indeed. Considering that the Accused – presumed innocent – currently remains in detention pending trial, the consequences to him of postponing the resolution of this issue may ultimately be irremediable.

IV. CONCLUSION

16. In view of the above, the Defence respectfully requests the Pre-Trial Judge to grant the application and certify the issue proposed in paragraph 2.

Word Count: 1370

Ben Emmerson, CBE QC
Counsel for Kadri Veseli



Andrew Strong
Co-Counsel for Kadri Veseli

[7] ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 19.