

Case No.: KSC-BC-2020-04  
Before: Judge Nicolas Guillou, Pre-Trial Judge  
Registrar: Dr Fidelma Donlon  
Date: 17 November 2021  
Filing Party: Defence Counsel  
Original Language: English  
Classification: Public

**THE SPECIALIST PROSECUTOR**

**v.**

**PJETËR SHALA**

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**Defence Reply to Prosecution Response in Filing F00104**

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**Specialist Prosecutor**  
Jack Smith

**Specialist Counsel for the Accused**  
Jean-Louis Gilissen  
Hedi Aouini

## I. INTRODUCTION

1. On 26 October 2021, the Defence of Mr Shala (*"Defence"*) sought certification to appeal a number of issues in the Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers (*"Impugned Decision"*).<sup>1</sup>
2. On 10 November 2021, the Prosecution filed its response to the Defence request.<sup>2</sup>
3. The Defence hereby replies to the Prosecution Response and invites the Pre-Trial Judge to certify the four issues identified in its certification Request. While this Reply is limited to the issues raised in the Response, the Defence maintains its original submissions in full and rejects all submissions made by the Prosecution in their entirety.

## II. SUBMISSIONS

### A. THE FIRST ISSUE IS APPEALABLE

4. The Defence requests certification of the following issue: *"whether the Impugned Decision erred by failing to consider whether the Law and procedure applicable to the KSC offer weaker procedural guarantees for the rights of an accused in breach of*

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<sup>1</sup> KSC-BC-2020-04, F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 18 October 2021 (notified on 19 October 2021); KSC-BC-2020-04, F00095, Defence Application for Leave to Appeal the Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 26 October 2021 (*"Request"*). All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

<sup>2</sup> F00104, Prosecution Response to the Defence Application for Leave to Appeal the Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 10 November 2021 (*"Prosecution Response"*).

*Articles 6 and 7 of the ECHR and the equivalent provisions of the Kosovo Constitution”.*

5. The SPO impermissibly seeks to interpret this issue in a vacuum as a mere *“expression of concern”* about the law and procedure applicable to the KSC and wrongly asserts that no specific provision has been challenged and that the Defence does not specify which procedural regime it uses as comparative when it argues that the KSC procedure offers weaker guarantees.
6. The Defence refers the Pre-Trial Judge to the submissions made in the Request in which it clarifies that this issue concerns the finding made in paragraph 74 of the Impugned Decision that rejected the Defence argument that *“the procedure governing proceedings before the KSC offers weaker procedural guarantees compared to the Kosovo Code of Criminal Procedure.”*<sup>3</sup> It is recalled that this submission was rejected for not being properly raised in the original Preliminary Motion.<sup>4</sup> However, as the Defence previously noted, this issue was explicitly raised in its Motion and was further developed in its Reply.<sup>5</sup>
7. Contrary to the Prosecution’s Submissions,<sup>6</sup> the Defence provided specific examples and noted that the procedural guarantees available to an accused under Articles 242, 244, and 245 of the Kosovo Code of Criminal Procedure were not available to Mr Shala while the equivalent provisions of the Law provided for substantially weaker protection.

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<sup>3</sup> Request, para. 6.

<sup>4</sup> Impugned Decision, para. 74.

<sup>5</sup> Request, para. 6 *referring to* F00054, Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, 12 July 2021 (“Preliminary Motion”), paras. 2, 7. *See also* F00084, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC, 24 September 2021, para. 13.

<sup>6</sup> Prosecution Response, paras. 13, 14.

8. The Prosecution's response is contradictory: on the one hand it purports to argue that the Defence submissions complain of "*'weaker procedural guarantees' without specifying what they are purportedly weaker than*" and on the other argues that "*the Accused's challenge was framed entirely around how such guarantees purportedly fell short of the protections in the Kosovo Code of Criminal Procedure, rather than the ECHR or Kosovo Constitution*".<sup>7</sup> It is evident that the Defence submits that the procedural framework before the KSC offers weaker protection compared to that established by the Kosovo Constitution and Kosovo Code of Criminal Procedure. The Prosecution also misconstrues the Defence submission; the Defence is not suggesting that the applicable framework is weaker than the ECHR or Kosovo Constitution; it is arguing that the weaker procedural guarantees available to Mr Shala under the KSC procedure breach Articles 6 and 7 of the ECHR and the equivalent guarantees of the Kosovo Constitution that require *inter alia* that in the event of possible application of different frameworks the one most favourable to the accused is the one that ought to be applied.
9. The Prosecution's selected reading of the Defence submission should be rejected as unfair. The Defence clearly argued in its Preliminary Motion that: "*the Law purports to attribute 'primacy' to the KSC over all other courts in Kosovo and has been interpreted by the Specialised Prosecutor and Judicial Panels of the KSC in a manner that substantially deviates from the Constitution of Kosovo, the domestic Code of Criminal Procedure, the applicable Law on Courts, Law No. 03/1-199, and the substantive Kosovo criminal laws. (emphasis added)*".<sup>8</sup> This argument was made in support of the Defence submissions challenging the lawfulness of the establishment of the KSC as an extraordinary court applying an extraordinary legal framework.

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<sup>7</sup> Contrast Prosecution Response, para. 14 with Prosecution Response, para. 15.

<sup>8</sup> See Preliminary Motion, para. 7.

10. The Defence developed the above submission in its Reply to the Prosecution's Response to its Preliminary Motion, in which it explained that, by according primacy to the KSC, "[t]he Law establishes an extraordinary legal framework, which goes beyond the ordinary domestic law regime in the various ways discussed in the Motion." The Defence specifically submitted (as one example in which the KSC legal framework *deviates* from the ordinary domestic law regime) the fact that "[t]he KSC procedure does not follow [in other words deviates from] the Kosovo Code of Criminal Procedure and offers weaker procedural guarantees for the rights of an accused." It then specifically referred to the procedural guarantees available in Articles 244, 244, 245 of the Kosovo Code of Criminal Procedure. In addition, this part of the Defence submissions specifically responded to the Prosecution's concession that it considers the Kosovo Criminal Procedure Code irrelevant.<sup>9</sup> The Defence replied that the Kosovo Criminal Procedure and the procedural guarantees set out therein cannot be deemed "irrelevant" and failure to consider them and apply the guarantees most favourable to the Accused would violate Articles 6 and 7 of the ECHR.
11. Certification to appeal would be in the interests of justice in order for this issue to be determined on appeal; contrary to the Prosecution's submissions certification would not delay the proceedings but rather ensure that the proceedings continue on a correct procedural basis that ensures Mr Shala's most fundamental rights.

## B. THE SECOND ISSUE IS APPEALABLE

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<sup>9</sup> F00070, Prosecution Response to the SHALA Defence's Corrected Version of the Preliminary Motion Challenging the Form of the Indictment, 6 September 2021, para. 13 ("the Defence's references to the Kosovo Criminal Procedure Code ('KCPC') are inapposite").

12. The Defence requests certification of the following issue: “*whether the Impugned Decision erred by failing to consider whether the KSC has been established in accordance with the law as an impartial and independent tribunal as required by Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution.*”
13. The Prosecution responds that the Defence “*misrepresents the Decision*” as “[t]he Accused incorrectly states that the Decision ‘fail[ed] to consider’ this issue.”<sup>10</sup> As argued in the Request,<sup>11</sup> the Impugned Decision summarily dismissed the Defence submissions which challenged the lawfulness of the establishment of the KSC and its compliance with the requirements of Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution, and merely repeated the Pre-Trial’s findings made in different proceedings<sup>12</sup> without providing sufficient reasoning or adequate consideration of the Defence arguments. The Impugned Decision simply did not engage with the Defence submissions on the basis of Article 14 of the ECHR and, importantly, Protocol no. 12 to the ECHR,<sup>13</sup> the argument that the application of a different (and less favourable) legal and procedural regime unlawfully brings the KSC outside the Kosovo legal framework and that the KSC *de facto* operate as an extraordinary court.
14. The issue here is not that the Defence disagrees with the Pre-Trial Judge’s dismissal of its submissions. What merits appellate intervention is the failure to consider core submissions and offer adequate and sufficient reasoning in support of the impugned findings, in breach of Mr Shala’s rights.

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<sup>10</sup> Prosecution Response, para. 17.

<sup>11</sup> Request, para. 8.

<sup>12</sup> See, e.g., Impugned Decision, para. 76 and extensive references to *Thaçi et al. Legality Decision*. Evidently, the Defence is not a party to the *Thaçi et al.* proceedings and its position and specific arguments were not presented before the *Thaçi et al. Legality Decision* was issued. This renders the automatic application to the present case of findings made in the *Thaçi et al.* proceedings unfair.

<sup>13</sup> Notably, the Defence arguments based on Protocol No. 12 were not examined neither in this case nor in the *Thaçi et al.* proceedings in which the complaints for discrimination were raised under a substantially different provision (Article 14 ECHR).

### C. THE THIRD ISSUE IS APPEALABLE

15. The Defence requests certification of the following issue: *“whether the Impugned Decision erred by failing to consider whether the purported primacy granted by the Law to Customary International Law (‘CIL’) violates Article 7 of the ECHR and the equivalent provisions of the Kosovo Constitution.”*
16. As noted in the Request, at paragraph 77 of the Impugned Decision the Pre-Trial Judge dismissed the Defence submission that the purported primacy granted by the Law to CIL violates Article 7 of the ECHR and the equivalent provisions of the Kosovo Constitution. Specifically, he found that:
- “(i) the legislator, in adopting the Law as the primary instrument governing SC proceedings, merely transposed crimes that were already part of the legal order and that were binding on individuals under international law into written domestic legislation; (ii) the law is not applied retroactively in these circumstances; and (iii) the application of CIL was accessible and foreseeable at the relevant time. The Defence’s claim that the Law is unconstitutional insofar as it grants primacy to CIL fails for the same reasons.”*
17. The Defence notes that the above finding does not adequately consider the Defence’s elaborate submissions as to the violation of Mr Shala’s rights under Article 7 of the ECHR and the equivalent constitutional guarantees as raised in its Preliminary Motion and Reply.<sup>14</sup>

### D. THE FOURTH ISSUE IS APPEALABLE

18. The Defence requests certification of the following issue: *“whether the Impugned Decision erred by failing to consider that the charges against the Accused (a) for the crime of arbitrary detention and (b) that rely on the doctrine of Joint Criminal Enterprise*

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<sup>14</sup> Preliminary Motion, paras. 2-4, 7, 12-20; Reply, paras. 17-34.

*violate Article 7 of the ECHR and the equivalent guarantees of the Kosovo Constitution.”*

19. The Pre-Trial Judge summarily dismissed the Defence’s extended arguments to the effect that prosecuting Mr Shala for the crime of arbitrary detention in NIAC and as a member of a joint criminal enterprise violates Article 7 of the ECHR and the equivalent guarantees of the Kosovo Constitution. The Impugned Decision noted that the Defence submission was “*unsubstantiated*” and that “[t]he Defence does not specify which charged offences and modes of liability would fall short of the principle of legality and how such charged offences and modes of liability would specifically fail to comply with the applicable standards. As such, this argument is rejected.”
  
20. The above extract shows how the Impugned Decision fundamentally misconstrues the Defence submissions. The Preliminary Motion argues specifically and explicitly that prosecuting Mr Shala under the mode of liability of a joint criminal enterprise and for the crime of arbitrary detention violates Article 7 of the ECHR and the equivalent guarantees of the Kosovo Constitution.<sup>15</sup> These arguments were not examined. They were dismissed without adequate reasoning in breach of Article 6 ECHR and the equivalent guarantees under the Kosovo Constitution.

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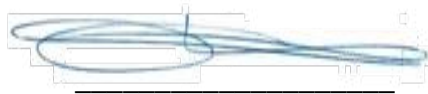
<sup>15</sup> See, for instance, Preliminary Motion, paras. 2-4 (in the latter the Defence explains that, in support of its position in paragraph 3, “it relies in this respect on recognized principles of international human rights law, especially the principle of *nullum crimen sine lege*, which prohibit the KSC from retroactively applying substantive criminal law, including modes of liability that were not applicable or binding in Kosovo at the time the alleged offences were committed.”), 14, 15, 19.



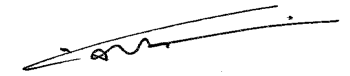
### III. CONCLUSION

21. The present request for certification raises issues that go to the core of the guarantees of fair trial. If the Defence is correct, Mr Shala's trial will proceed in violation of these guarantees and the result will be irreparable prejudice, a real miscarriage of justice.
22. The Defence respectfully requests the Pre-Trial Judge certification for all four appealable issues.

Respectfully submitted,



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