

**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 Kai Ambos  
Judge Nina Jørgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence Counsel for Kadri Veseli  
Defence Counsel for Jakup Krasniqi

**Date:** 27 July 2023

**Language:** English

**Classification:** Confidential

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**Veseli and Krasniqi Defence Appeal**

**against the Second Decision on Specialist Prosecutor's Bar Table Motion**

**with confidential and *ex parte* Annex 1 and public Annex 2**

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## I. INTRODUCTION

1. Pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and the Decision Granting Certification,<sup>1</sup> the Defence for Jakup Krasniqi and the Defence for Kadri Veseli (collectively "Defence") submit their appeal against the Second Decision on Specialist Prosecutor's Bar Table Motion ("Impugned Decision").<sup>2</sup>

2. Certification was granted on the following discrete issue: whether the Trial Panel erred in its interpretation of Rule 39(4),<sup>3</sup> with specific regard to the requirement that the inventory must contain "a detailed description of and information regarding each item seized".<sup>4</sup>

3. This Appeal arises from search and seizure operations performed by the Specialist Prosecutor's Office ("SPO") at Mr. Krasniqi's and Mr. Selimi's residences. The Rules provide mandatory procedural safeguards for such operations, including Rule 39(4), which provides *inter alia* that "[t]he Specialist Prosecutor shall prepare an inventory with a **detailed description** of and information regarding **each item** seized". Contrary to these clear provisions, the SPO's inventory did not contain any "detailed description" or "information" concerning any of the items seized.<sup>5</sup>

4. The Impugned Decision nonetheless determined that "[t]he Defence has argued in favour of a level of specificity of the inventory not required by the Rules",

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<sup>1</sup> KSC-BC-2020-06, F01678, Trial Panel II, *Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor's Bar Table Motion* ("Decision Granting Certification"), 17 July 2023, confidential.

<sup>2</sup> KSC-BC-2020-06, F01596, Trial Panel II, *Second Decision on Specialist Prosecutor's Bar Table Motion*, 9 June 2023, confidential.

<sup>3</sup> Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules").

<sup>4</sup> Decision Granting Certification, paras 15-18.

<sup>5</sup> See Annex 1.

considered that it was satisfied that the records of the searches fulfil the requirement of Rule 39(4) for an itemised and detailed inventory<sup>6</sup> and considered sufficient a generic reference to “collections” of documents, whenever they were found as a bundle or collection of documents.<sup>7</sup>

5. Besides unjustifiably departing from the plain and binding meaning of the text of Rule 39(4), the standard adopted in the Impugned Decision is also manifestly erroneous because it: (a) deprives Mr. Krasniqi and Mr. Veseli of a procedural safeguard specifically envisioned by the Rules, thus seriously impacting their right to a fair trial; (b) it trivializes the rights of the person affected by the search and seizure; and (c) ultimately undermines the integrity of the proceedings. This overly broad interpretation of Rule 39(4) is an **error of law** by which Mr. Krasniqi and Mr. Veseli were deprived of fundamental safeguards envisioned by the drafters to protect their fundamental rights under Article 31 of the Constitution of Kosovo, Article 21(2) of the KSC Law, and Articles 6 and 8 of the European Convention on Human Rights. By removing the itemisation requirement of Rule 39(4) the Impugned Decision sidestepped the effective procedural safeguards embodied in this provision without providing any compelling reasons justifying such an overly broad approach to this fair trial guarantee, thereby rendering it theoretical and illusory.

6. Having erroneously found that the Rule 39(4) requirements had been respected, the Impugned Decision did not consider whether the additional requirements of Rule 138(2) had been met and, accordingly, whether the circumstances warranted the exclusion of the tendered items. The Defence therefore requests the Court of Appeals Panel to reverse the Impugned Decision, and remand

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<sup>6</sup> Impugned Decision, para. 110.

<sup>7</sup> *Idem*, para. 113.

the matter to the Trial Panel for a new determination on the admissibility of the evidence, applying the correct interpretation of Rule 39(4).

7. Pursuant to Rule 82(3) of the Rules, this appeal is filed confidentially because it refers to documents bearing the same classification.

## II. PROCEDURAL HISTORY

8. On 8 February 2023, the SPO filed the Bar Table Motion.<sup>8</sup>

9. On 21 March 2023, following a decision extending the time-limit to respond,<sup>9</sup> the Defence jointly responded to the Bar Table Motion.<sup>10</sup>

10. On 23 March 2023, the SPO filed a notification correcting two submissions presented in its Bar Table Motion.<sup>11</sup>

11. On 31 March 2023, the Trial Panel issued the first decision on the Bar Table Motion, in which it addressed a limited selection of documents pertaining to SPO's first witnesses.<sup>12</sup>

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<sup>8</sup> KSC-BC-2020-06, F01268, Specialist Prosecutor, *Prosecution Application For Admission of Material Through the Bar Table*, 8 February 2023, public, with Annexes 5 and 8, public, and Annexes 1-4, 6 and 7, confidential.

<sup>9</sup> KSC-BC-2020-06, F01309, Trial Panel II, *Decision on Defence Request for a Revised Bar Table Motion and a Suspension and an Extension of Time*, 21 February 2023, public.

<sup>10</sup> KSC-BC-2020-06, F01387, Joint Defence, *Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table* ("Defence Response to BTM"), 21 March 2023, confidential, with Annexes 1-8, confidential.

<sup>11</sup> KSC-BC-2020-06, F01393, Specialist Prosecutor, *Prosecution Notification Concerning Two Submitted Bar Table Items*, 23 March 2023, confidential.

<sup>12</sup> KSC-BC-2020-06, F01409, Trial Panel II, *Decision on Specialist Prosecutor's Bar Table Motion*, 31 March 2023, confidential.

12. On 9 June 2023, the Trial Panel issued a second decision on the SPO's Bar Table Motion.<sup>13</sup>

13. On 23 June 2023, the Defence sought leave to appeal two issues arising from the Impugned Decision.<sup>14</sup> The SPO filed a response on 4 July 2023,<sup>15</sup> and the Defence replied on 10 July 2023.<sup>16</sup>

14. On 17 July 2023, the Trial Panel granted the Defence leave to appeal the First Issue.<sup>17</sup>

### III. STANDARD OF REVIEW

15. The Court of Appeals Panel has previously set out the standard of review applicable to interlocutory appeals.<sup>18</sup>

16. A party alleging an error of law "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision."<sup>19</sup> The Appeals Chambers of the International Criminal Court ("ICC") and the International Criminal Tribunal for the former Yugoslavia ("ICTY") have also previously found that "[they] will not defer to the Trial Chamber's interpretation of

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<sup>13</sup> Impugned Decision.

<sup>14</sup> KSC-BC-2020-06, F01624, Veseli and Krasniqi Defence, *Veseli and Krasniqi Defence Request for Certification to Appeal the "Second Decision on Specialist Prosecutor's Bar Table Motion"*, 23 June 2023, confidential.

<sup>15</sup> KSC-BC-2020-06, F01640, Specialist Prosecutor, *Prosecution response to 'Veseli and Krasniqi Defence request for certification to appeal the "Second Decision on Specialist Prosecutor's Bar Table Motion"'*, 4 July 2023, confidential.

<sup>16</sup> KSC-BC-2020-06, F01661, Veseli and Krasniqi Defence, *Veseli and Krasniqi Defence Reply to the Prosecution Response to the 'Request for Certification to Appeal the "Second Decision on Specialist Prosecutor's Bar Table Motion"'*, 10 July 2023, confidential.

<sup>17</sup> Decision Granting Certification, paras 18, 28.

<sup>18</sup> KSC-BC-2020-07, IA001/F00005, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention ("Gucati Appeals Decision")*, 9 December 2020, public.

<sup>19</sup> *Gucati Appeals Decision*, para. 12.

the law. Rather, [they] will arrive at [their] own conclusions as to the appropriate law and determine whether or not the Trial Chamber has misinterpreted the law.”<sup>20</sup>

17. The Court of Appeals Panel will only find the existence of an error of fact when no reasonable trier of fact could have made the impugned finding, and the error has caused a miscarriage of justice.<sup>21</sup>

18. If the impugned decision is a discretionary one, it must be demonstrated that the lower level panel has committed a discernible error, in that the decision is based on an erroneous interpretation of the law; a patently incorrect conclusion of fact; or is so unfair and unreasonable as to constitute an abuse of discretion.<sup>22</sup>

#### IV. SUBMISSIONS

##### A. BACKGROUND TO THE APPEAL

19. In the Impugned Decision, the Trial Panel admitted a series of items which the SPO purports were found during search and seizure operations carried out at Mr.

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<sup>20</sup> ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Appeals Chamber, *Judgment on the Appeal of Thomas Lubanga Dyilo against his Conviction*, 1 December 2014, para. 18; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2276-Red, Appeals Chamber, *Judgment on the Appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the Decision of Trial Chamber VII Entitled “Decision on Sentence pursuant to Article 76 of the Statute”*, 8 March 2018, para. 90; *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, Appeals Chamber, *Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s Judgment*, 8 June 2018, para. 37; *Prosecutor v. Al Hassan*, ICC-01/12-01/18-601-Red, Appeals Chamber, *Judgment on the Appeal of Mr Al Hassan against the Decision of Pre-Trial Chamber I Entitled ‘Décision Relative à L’exception D’irrecevabilité pour Insuffisance de Gravité de L’affaire Soulevée par la Défense’*, 19 February 2020, para. 38; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2666-Red, Appeals Chamber, *Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 Entitled ‘Judgment’*, 30 March 2021, para. 36; ICTY, *Prosecutor v. Kordić and Čerkez*, IT-65-14/2-A, Appeal Chamber, *Judgment*, 17 December 2004, para. 16; *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Chamber, *Judgement*, 25 February 2004, para. 6; *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeals Chamber, *Judgement*, 27 September 2007, para. 9.

<sup>21</sup> *Gucati Appeals Decision*, para. 13.

<sup>22</sup> *Gucati Appeals Decision*, para. 14.

Krasniqi's and Mr. Selimi's residences.<sup>23</sup> In finding that these items fulfil the requirements for admission, the Trial Panel dismissed the challenges raised by the Defence on the manner in which the operation was conducted, and found the search and seizure to be lawful and compliant with the requirements of Rule 39(4) of the Rules.<sup>24</sup>

20. In particular, the Defence had argued that the search and seizure operations performed by the SPO at Mr. Krasniqi's and Mr. Selimi's residences did not comply with the procedural safeguards of Rule 39(4), which provides *inter alia* that "[t]he Specialist Prosecutor shall prepare an inventory with a **detailed description of and information regarding each item seized.**"<sup>25</sup> Indeed, the inventory prepared by the SPO did not contain any "detailed description" or "information" concerning any of the items seized, but merely labels such as "documents", "binder", "photos" or "documents in binders".<sup>26</sup>

21. In light of these shortcomings, the Defence had argued that (i) these violations cast substantial doubt on the reliability of the evidence, primarily as it cannot now be established whether each of the proposed documents listed in the Bar Table Motion were actually seized from Mr. Krasniqi's or Mr. Selimi's residences, as the SPO purports; and (ii) the failure to comply with Rule 39 violated the rights of the Accused under Article 8 of the European Convention on Human Rights ("ECHR") and Article 36(1) of the Constitution of the Republic of Kosovo ("Constitution") which, if ignored, could seriously damage the integrity of proceedings.<sup>27</sup> The SPO failed to comply with a clear legal requirement which serves the important purpose of allowing chain of custody and authenticity to be established. Accordingly, the Defence

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<sup>23</sup> Impugned Decision, paras 144, 153, 162, 167, 177.

<sup>24</sup> Impugned Decision, paras 101-120.

<sup>25</sup> Defence Response to BTM, paras 31-59.

<sup>26</sup> Defence Response to BTM, para. 36.

<sup>27</sup> Defence Response to BTM, paras 33, 42, 46-48.



opposed the admission of all items purportedly obtained through the search and seizure at Krasniqi's and Mr. Selimi's residences, and requested that they be excluded pursuant to Rule 138(2) of the Rules.

22. The Impugned Decision summarily dismissed the argument that the inventory provided by the SPO did not fulfil the Rule 39(4) requirement of "a detailed description of and information regarding each item seized". Without any further explanation, the Trial Panel stated that "[t]he Defence has argued in favour of a level of specificity of the inventory not required by the Rules"<sup>28</sup> and considered that it was satisfied that the records of the searches fulfil the requirement of Rule 39(4) for an itemised and detailed inventory.<sup>29</sup> In particular, the Impugned Decision did not explain how the words "detailed description" could be construed as extending to descriptions such as "documents" or "binder." Such descriptions are rudimentary at best, and fall far short of the standard required by the the literal meaning of the word "detailed".

23. As concerning the itemisation requirement of Rule 39(4), which requires that a detailed description and information be provided for **each item**, the Impugned Decision considered sufficient a generic reference to "collections" of documents, whenever they were found as a bundle or collection of documents.<sup>30</sup> Besides the fact that neither the Trial Panel, nor the Defence, is privy to the state in which these documents were allegedly found, such a broad interpretation of the words "each item" effectively departs from the ordinary meaning of the text of the Rule.

24. At the heart of this Appeal is the correct interpretation to be applied to the terms "detailed description" and "each item seized" in Rule 39(4). The extremely

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<sup>28</sup> Impugned Decision, para. 110.

<sup>29</sup> *Ibidem*.

<sup>30</sup> *Idem*, para. 113.



broad interpretation adopted by the Trial Panel is erroneous because it is inconsistent with the plain meaning of the words in Rule 39(4) and because it renders its procedural safeguards ineffective. This constitutes an error of law, which requires resolution by the Court of Appeals' Panel.

**B. THE TRIAL PANEL ERRONEOUSLY DEPARTED FROM THE PLAIN TEXT OF RULE 39(4)**

**1. The plain text of the law is a binding source of interpretation**

25. The interpretation of the Rules is regulated by Rule 4, which provides that the Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law<sup>31</sup> and, where appropriate, the Kosovo Criminal Procedure Code. The same provision also establishes the prevalence of the Law over the Rules, and clarifies that any interpretation ambiguity should be resolved in favour of the suspect or the Accused.

26. Article 3 of the Law in turn provides a series of successive legal sources which should guide the function of the Specialist Chambers, namely: (i) the Constitution of the Republic of Kosovo; (ii) the Law as *lex specialis*; (iii) other provisions of Kosovo law as expressly incorporated and applied by this Law; (iv) customary international law; and (v) international human rights law, including the European Convention on Human Rights and Fundamental Freedoms ("ECtHR") and the International Covenant on Civil and Political Rights ("ICCPR").

27. In this context, the Specialist Chamber of the Constitutional Court ("Constitutional Court") has previously elaborated on the guiding principles

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<sup>31</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law").

underpinning its analysis of the Rules,<sup>32</sup> which the Court of Appeals panel has previously used as a guide to correct interpretation.<sup>33</sup> In particular, the Constitutional Court devoted specific attention to the actual language of the text as adopted by the Plenary, finding that **the “plain meaning of the text has a binding effect.”**<sup>34</sup>

28. These principles were then echoed by the Court of Appeal Panel, which previously stressed that whenever a term is not expressly defined by the Law, its correct interpretation requires that reference be made to its “ordinary meaning”,<sup>35</sup> including through an analysis of dictionary definitions.<sup>36</sup> The binding effect of the plain meaning of a rule’s text applies equally to those provisions which grant a certain degree of discretion to the Panel; in these circumstances, the Court of Appeals Panel found that “[t]he very fact that there is discretion does not mean [...] that a judge may circumvent the plain meaning of the Law.”<sup>37</sup>

## 2. The text of Rule 39(4) is unambiguous

29. The plain or ordinary meaning of Rule 39(4) is clear. Far from simply mandating that an inventory must simply ‘record’ each item seized, Rule 39(4) instead

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<sup>32</sup> KSC-CC-PR-17-01, F00004, Constitutional Court Panel, *Judgement on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05-L-053 on SC and SPO* (“Constitutional Court Decision”), 26 April 2017, public, paras 12-16.

<sup>33</sup> See, e.g., KSC-BC-2020-07, IA001/F00005, Court of Appeals Panel, *Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention* (“Gucati 9 December Decision”), 9 December 2020, para. 30; KSC-BC-2020-06, IA009/F00030, Court of Appeals Panel, *Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”* (“Appeal Decision on Jurisdiction”), 23 December 2021, public, fn. 374.

<sup>34</sup> Constitutional Court Decision, paras 12, 14.

<sup>35</sup> Appeal Decision on Jurisdiction, paras 66, 139 and fn. 374.

<sup>36</sup> KSC-BC-2020-06, IA011/F00005, Court of Appeals Panel, *Decision on Krasniqi Appeal Regarding Provisional Measures for the Preservation of Assets* (“Assets Appeal Decision”), 25 February 2022, confidential and *ex parte*, para. 16 and fn. 35, which refers to the definition contained in Black’s Law Dictionary. See also, KSC-BC-2020-06, IA013/F00012, Court of Appeals Panel, *Decision on Defence Appeals Against Decision on Motions Challenging the Legality of the Specialist Chambers and the Specialist Prosecutor Office and Alleging Violations of Constitutional Rights of the Accused*, 20 May 2022, public, fn. 57.

<sup>37</sup> Gucati 9 December Decision, para. 49.

requires the Specialist Prosecutor to provide a “detailed description of and information regarding each item seized.”<sup>38</sup> A “detailed” description is one that is “described minutely” and/or that “gives particulars of” an item.<sup>39</sup> This imputes specifics as to the nature of an item, regardless of “the quantity, state, and condition of material being seized.”<sup>40</sup> Without appropriate labelling and inventory of the items seized, the Defence has no way of ascertaining whether all of the materials seized were appropriately processed through Legal Workflow, nor which materials may contain evidence to exonerate the Accused.<sup>41</sup> The requirement in the Rules to undertake this process for *each item seized* further extends this requirement of detail to “all (or every one)”<sup>42</sup> of the items in a set. Far from this being a “level of specific of the inventory not required by the Rules”,<sup>43</sup> this is exactly what the ordinary meaning of the Rules requires.

30. The Impugned Decision departed from the ordinary meaning of these words in establishing a highly malleable interpretation of Rule 39(4) which it said should be stretched and shaped according to the circumstances of each case:

While Rule 39(4) requires the inventory to record each “item seized”, this requirement is to be interpreted in light of what is being seized in a given case, the quantity, state and condition of the material when seized.<sup>44</sup>

This construal of the Rule improperly revises the requirements of the inventory process, permitting the Specialist Prosecutor to relax otherwise stringent requirements

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<sup>38</sup> Emphasis added.

<sup>39</sup> Oxford English Dictionary: <https://www.oed.com/search/dictionary/?scope=Entries&q=detailed> (accessed 21 July 2023).

<sup>40</sup> Impugned Decision, para. 113.

<sup>41</sup> ICC, *Prosecutor v. Mbarushimana*, 01/04-01/10-329-Corr, Defence for Mr. Callixte Mbarushimana, *Defence Request for a Ruling on the Admissibility of Two Categories of Evidence*, 10 August 2011, para. 9.

<sup>42</sup> Oxford English Dictionary: <https://www.oed.com/search/dictionary/?scope=Entries&q=each+one> (accessed 21 July 2023).

<sup>43</sup> Impugned Decision, para. 110.

<sup>44</sup> Impugned Decision, para. 113.

which were specifically envisioned by the drafters to protect the rights of the Accused and the integrity of the proceedings before the Specialist Chambers. The Defence submits that correct standard – as reflected by the language of the Rule - is unequivocal and must be understood on the basis of its plain and ordinary meaning.

31. As has been manifestly demonstrated by the Defence in its Response, the Prosecution clearly did not uphold this standard in conducting its search, seizure, and inventory of items seized from Mr. Krasniqi's and Mr. Selimi's residence.<sup>45</sup> The SPO did not catalogue individual documents, and did not provide any description, let alone detailed, of the items seized. Rather, it simply used labels such as "documents", "binders", "documents in binders" or "pictures", without even listing, for each "collection" of documents, the number of individual documents allegedly contained therein.<sup>46</sup> By lowering the requisite standard, which has a binding effect on future searches and seizures conducted by the Prosecution, the mere fact that the Trial Panel departs so substantially from the ordinary meaning of the wording of Rule 39(4) requires reconsideration by the Appeals Panel.

32. Finally, while stating that the Defence has "argued in favour of a level of specificity not required by the Rules"<sup>47</sup>, the Trial Panel did not provide any reasons why it considered that the level of specificity argued by the Defence was not required by the Rules. The level of specificity argued by the Defence was grounded on the plain and ordinary meaning of the language in Rule 39(4). The Trial Panel failed to explain its conclusion that this level of specificity was not required. Such a significant departure requires additional contextual information, as the absence of complete information on every individual item seized, has a prejudicial effect on Defence preparations and case strategy. The acquisition and use of materials seized by an

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<sup>45</sup> Defence Response to BTM, para. 36.

<sup>46</sup> See Annex 1.

<sup>47</sup> Impugned Decision, para. 110.

accused must be conducted according to law – and thus clarity as to the exact parameters of the law is essential. The Defence therefore respectfully requests the Court of Appeals Panel to reverse the Impugned Decision and remand the matter to the Trial Panel for it to issue a new decision applying the plain meaning of Rule 39(4).

### C. THE BROAD INTERPRETATION ADOPTED BY THE PANEL RENDERS THE PROCEDURAL SAFEGUARDS OF RULE 39(4) INEFFECTIVE

33. Besides unjustifiably departing from the plain text of the rule, the overly broad interpretation adopted by the Panel is manifestly erroneous insofar as it deprives the procedural safeguards of Rule 39(4) of their effective function to protect the fair trial rights of the Accused, the rights of the person concerned by the search and seizure, and ultimately the integrity of the proceedings.

34. The Court of Appeals Panel has previously recognised the **importance of effective interpretation**, which requires that whenever a right is recognised in the Specialist Chambers' legal framework and/or by other international instruments, the applicable provisions must be interpreted so that the protection of this right is not rendered *ineffective*.<sup>48</sup>

35. This principle is rooted in the jurisprudence of the ECtHR, which has consistently reiterated that the Convention must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory.<sup>49</sup> That also applies to the procedural safeguards during the investigative

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<sup>48</sup> Assets Appeal Decision, para. 21.

<sup>49</sup> See, among other authorities, ECtHR, *Artico v. Italy*, no. 6694/74, Judgment (Merits and Just Satisfaction), 13 May 1980, para. 33; *Soering v. the United Kingdom*, no. 14038/88, Judgment (Merits and Just Satisfaction), 7 July 1989, para. 87; *Cruz Varas and Others v. Sweden*, no. 15576/89, Judgment (Merits and Just Satisfaction), 20 March 1991, para. 99. See also *Buck v. Germany*, no. 41604/98, Judgment (Merits and Just Satisfaction), 28 July 2005, para. 52; *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, Judgment (Merits and Just Satisfaction), 16 January 2008, paras 64-66.

stage guaranteed under Article 6. In line with this approach, the Constitutional Court found that where a rule engages a question of fundamental human rights, a heightened scrutiny is required, requiring an interpretation consistent with the court decisions of the ECtHR.<sup>50</sup>

36. The principle of effective interpretation becomes of heightened importance when read in combination with the role of the safeguards contained in Rule 39(4), including those concerning the inventory of seized items, which serve a three-fold function in protecting a variety of fundamental rights and the integrity of the proceedings.

37. First, as recognised by the Specialist Chambers,<sup>51</sup> the lack of an itemised description for each document seized impedes the Defence's ability to verify whether the items later tendered for admission were effectively retrieved during the search and seizure. This, in turn, infringes on the Accused's right to meaningfully test the provenance of documents tendered in support of the case against them.

38. Second, this requirement is instrumental in protecting the rights of the person concerned by the search and seizure, who, in the present case, coincides with two of the Accused. Search and seizure operations are highly invasive investigative acts, which "represent a serious interference with private life, home and correspondence",<sup>52</sup> as protected by Article 8 of the European Convention on Human Rights. The procedural safeguards of Rule 39(4) thus serve the fundamental purpose of minimising their impact. In this context, a detailed and itemised inventory allows the

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<sup>50</sup> Constitutional Court Decision, para. 16.

<sup>51</sup> KSC-BC-2020-06, F00251, Pre-Trial Judge, *Decision on the Request of the Veseli Defence regarding Documents Seized during the Search*, 16 April 2021, confidential, para. 15.

<sup>52</sup> ECtHR, *Petri Sallinen and Others v. Finland*, no. 50882/99, *Judgment (Merits and Just Satisfaction)* ("*Sallinen and Others Judgment*"), 27 December 2005, para. 90; *Saber v. Norway*, no. 459/18, *Judgment (Merits and Just Satisfaction)*, 17 March 2021, para. 50.

concerned person to be informed with precision of what items have been seized, and, if needed, to protect his rights before the competent jurisdiction.

39. Third, the procedural safeguards of Rule 39(4) have the fundamental role of preventing and avoiding abuse by the investigative authority, which in turn is crucial for the protection of individual rights and the integrity of the proceedings. Combined with the protection of Rule 138(2) - which provides for the inadmissibility of evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law - respect for the procedural requirements set out in Rule 39(4) becomes an essential shield against the admission into the case record of evidence obtained in violation of fundamental rights.

40. It is for this reason that depriving the relevant provisions of their literal meaning – or interpreting them in an overly broad manner - equates to depriving the Accused of fundamental safeguards, which were specifically envisioned by the drafters to protect their fundamental rights under Article 31 of the Constitution of Kosovo, Article 21(2) of the KSC Law, and Articles 6 and 8 of the European Convention on Human Rights. Procedural safeguards regulating search and seizure operations represent a minimum degree of protection to which everyone is “entitled under the rule of law in a democratic society”,<sup>53</sup> and thus require a strict and narrow interpretation, which gives full and effective recognition to their protective function.

41. The principle of construing procedural safeguards narrowly was extensively addressed by the European Court of Human Rights (ECtHR) in the seminal *Salduz v. Turkey*. In this case, the Grand Chamber of the ECtHR has underlined the importance of the investigation stage for the preparation of the criminal proceedings, as the

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<sup>53</sup> *Sallinen and Others* Judgment, para. 92; ECtHR, *Narinen v. Finland*, no. 45027/98, Judgment (*Merits and Just Satisfaction*), 1 September 2004, para. 36.



evidence obtained during this stage determines the framework in which the offence charged will be considered at trial.<sup>54</sup> That also applies to the right enshrined in Article 6, which includes search and seizure operations.

42. The ECtHR noted that fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with fair trial rights provisions.<sup>55</sup> It has emphasised that, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the authorities' failure to comply with the fundamental procedural safeguards during the investigative stage "irretrievably undermined" the applicant's defence rights and resulted in Article 6 violation.<sup>56</sup>

43. While the ECtHR does allow for defence fair trial rights under Article 6 to be exceptionally restricted or delayed, the Court consistently applies a stringent criterion requiring the existence of compelling reasons to justify such a restriction to the right to a fair trial. The Court has held that, given the fundamental nature and importance of the fair trial safeguards during the investigative stage, such restrictions may be permitted only in exceptional circumstances, must be temporary, and assessed based on individual circumstances.<sup>57</sup>

44. By removing the itemisation requirement of Rule 39(4), and by moving away from the literal meaning of the words "detailed description" and "each item", the

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<sup>54</sup> ECtHR, *Salduz v. Turkey*, no. 36391/02, *Judgment (Merits and Just Satisfaction)* ("Salduz Judgment"), 27 November 2008, para. 54.

<sup>55</sup> *Salduz Judgment*, para. 50 (in this case, the applicant had been denied the right to a lawyer while in police custody, but the reasoning applies *mutatis mutandis* to the issue at stake in the present case).

<sup>56</sup> ECtHR, *Çimen v. Turkey*, no. 19582/02, *Judgment (Merits and Just Satisfaction)*, 3 May 2009, para. 27; *Panovits v. Cyprus*, no. 4268/04, *Judgment (Merits and Just Satisfaction)*, 11 March 2009, paras 75, 84-86; *Budak v. Turkey*, no. 69762/12, *Judgment (Merits and Just Satisfaction)*, 16 May 2021, para. 89; *Botea v. Romania*, no. 40872/04, *Judgment (Merits and Just Satisfaction)*, 10 March 2014, paras 42-43.

<sup>57</sup> ECtHR, *Ibrahim and Others v. the United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, *Judgment (Merits and Just Satisfaction)*, 13 September 2016, paras 256-258; *Beuze v. Belgium*, no. 71409/10, *Judgment (Merits and Just Satisfaction)*, 9 November 2018, paras 142, 161.

Impugned Decision sidestepped the effective procedural safeguards embodied in this provision and failed to provide any compelling reasons justifying such an overly broad approach to this fair trial guarantee, thereby rendering it theoretical and illusory.

#### D. THE ERROR INVALIDATES THE DECISION

45. The erroneous interpretation of the relevant provision renders the Impugned Decision fundamentally flawed, requiring the Court of Appeal's Panel's intervention.

46. The Trial Panel examined the lawfulness of the search and seizure operations - which required an analysis of whether the procedural steps of Rule 39(4) had been respected by the SPO - as a preliminary matter before ruling on the admissibility of the items purportedly retrieved during the search and seizure.<sup>58</sup> However, having erroneously found that the Rule 39(4) requirements had been respected, the Impugned Decision did not consider whether the additional requirements of Rule 138(2) had been met and accordingly whether the circumstances warranted the exclusion of the tendered items.<sup>59</sup>

47. Applying the correct interpretation of Rule 39(4), a reasonable Trial Panel would have determined that the search and seizure operations carried out at Mr. Krasniqi's and Mr. Selimi's residences were conducted in violation of the applicable procedural safeguards. Accordingly, adopting a correct interpretation of Rule 39(4) and taking into consideration previous Defence submissions on the impact of the search and seizure on the reliability of the evidence and the integrity of the proceedings,<sup>60</sup> a new determination pursuant to Rule 138(2) is required.

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<sup>58</sup> Impugned Decision, paras 120-121.

<sup>59</sup> Decision Granting Certification, para. 16.

<sup>60</sup> Defence Response to BTM, paras 33, 42, 46-48.

## V. CONCLUSION AND RELIEF SOUGHT

48. In light of the foregoing, the Defence requests that the Court of Appeals Panel:

**GRANT** the present appeal;

**REVERSE** the Impugned Decision, and

**REMAND** the matter to the Trial Panel for a new determination adopting the correct interpretation of Rule 39(4).

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