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About the Bar Human Rights Committee

The Bar Human Rights Committee of England and Wales ("**BHRC**") is the independent, international human rights arm of the Bar of England and Wales, working to protect the rights of advocates, judges, and human rights defenders around the world. BHRC is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial. It is autonomous of the Bar Council.

BHRC aims to:

- Uphold the rule of law and internationally recognised human rights norms and standards;
- Support and protect practising lawyers, judges and human rights defenders who are threatened or oppressed in their work;
- Further interest in and knowledge of human rights and the laws relating to human rights, both within and outside the legal profession; and
- Support and co-operate with other organisations and individuals working for the promotion and protection of human rights.

As part of its mandate, BHRC undertakes legal observation missions to monitor proceedings where there are concerns as to the proper functioning of due process and fair trial rights. The remit of BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer and critic.

BHRC members are primarily barristers called to the Bar of England and Wales, as well as legal academics and law students. Its members include some of the UK's foremost human rights barristers, legal practitioners, and academics. BHRC's Executive Committee and members offer their services pro bono, alongside their independent legal practices, teaching commitments and legal studies. BHRC is also supported by two Project Officers.

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I. INTRODUCTION & METHODOLOGY

1. The extent to which contemporary international criminal tribunals honour the rights of the accused matters not only for their legitimacy in the immediate proceedings, but for the legacy they leave to international criminal justice more broadly.[1] This point was made with lasting force by United States Chief Prosecutor Robert Jackson in his opening statement before the International Military Tribunal at Nuremberg in 1945:

> "*To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice … [We] have undertaken the burden of participating in a complicated effort to give them fair and dispassionate hearings. That is the best-known protection to any man with a defence worthy of being heard*".[2]

2. At the Kosovo Specialist Chambers ("**KSC**"), a court established under Kosovo law but seated in The Hague and tasked with trying former senior figures of a liberation movement that retains deep popular legitimacy among the population it is situated to serve, this principle carries particular weight.[3] The court operates under exceptional political and security pressures, against a broader background in which international criminal proceedings have not always lived up to their own standards, and in which the distinctive character of such proceedings has at times served to erode, rather than reinforce, the human rights protections otherwise available to accused persons at the domestic level.[4]

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1 Yvonne McDermott, 'The Right to a Fair Trial in Practice in International Criminal Trials' in *Fairness in International Criminal Trials* (OUP, 2016) 41.

2 Nuremberg Trial Proceedings, 'Opening Statement of Mr Justice Jackson, Chief Prosecutor for the United States of America' (1945)2, 100 as cited in Yvonne McDermott, *Fairness in International Criminal Trials*, (OUP, 2016), 1.

3 Gëzim Visoka, 'Assessing the potential impact of the Kosovo Specialist Court' (PAX, September 2017), 8-9.

4 Göran Sluiter, 'Human Rights in International Criminal Proceedings - The Impact of the Judgment of the Kosovo Specialist Chambers of 26 April 2017' (2019)27 Wm. & Mary Bill Rts. J. 623, https://scholarship.law.wm.edu/wmborj/vol27/iss3/3; Darryl Robinson, "The Identity Crisis of International Criminal Law" (2008) 21 Leiden Journal of International Law, 925–963, at 927; Yvonne McDermott, 'The Right to a Fair Trial in Practice in International Criminal Trials' in *Fairness in International Criminal Trials* (OUP, 2016); Fairlie, 'Due Process Erosion: The Diminution of Live Testimony at the ICTY' (2003) 34 California Western International Law Journal 47.

3. The Ombudsperson Institution of Kosovo has instructed the BHRC to conduct an independent review and evaluation of the extent to which the KSC upholds the applicable human rights standards. This review has been conducted without any input from the Ombudsperson Institution of Kosovo to ensure independence.

4. This report amounts to a "*Preliminary Review*". It is not intended to cover the breadth of human rights considerations as they manifest in the proceedings of the KSC. Rather, it responds to the specific issues identified by the Ombudsperson Institution of Kosovo for examination, namely:

   a. Provisional release, including the length of pre-trial detention and the monitoring of communications and family visits;

   b. The right to a competent, independent and impartial tribunal established by law, including the process for the appointment of judges and the absence of Kosovo judges;

   c. Admissibility of evidence, including documents obtained from Serbia;

   d. The principle of equality of arms;

   e. The principle of legality; and

   f. The accountability of the KSC, including its reporting obligations to the foreign States and international partners instrumental in the Specialist Chambers' creation and financing.

5. These are extremely broad and complex topics, and further issues than those identified would have also warranted analysis. Additionally, this review was completed against a challenging timeframe. As such, the analysis in this report has focused on identifying those features of a given issue that raise the most immediate concern regarding human rights compliance in the practice of the KSC. The analysis that underpins the discussion is not exhaustive and does not necessarily lead to definitive conclusions as to compliance

or non-compliance with the human rights norms in question. Nevertheless, the analysis is robust and serves to define and articulate those issues identified in clear terms.

6. The report was authored jointly by two authors, **Dr Gus Waschefort** (4-5 Gray's Inn Square) and **Lauren Lederle** (Outline Chambers[5]), and subjected to independent peer review by **Professor Kevin Jon Heller** (Doughty Street Chambers and University of Copenhagen) and **Haydee Dijkstal** (33 Bedford Row). The methodology involved desk-based research combined with doctrinal analysis focusing on primary sources, jurisprudence and secondary sources. The authors benefited from discussions with several members of legal teams recently or actively engaged in matters before the KSC. The purpose of these discussions was to assist in the identification of sources, particularly fillings and submissions made during trials and appeals. These discussions were conducted anonymously, in the spirit of Chatham House rules, and were confined to matters of publicly available information. They were not regarded and do not in fact form a source of information or data in the report and did not influence the choice of topics or conclusions adopted by the authors.

II. INSTITUTIONAL STRUCTURE OF THE KSC

A. Origins and establishment of the Specialist Chambers

7. The KSC, the crimes it prosecutes, the individuals it tries, and the political environment in which it operates, cannot be assessed in a vacuum. This section sets out the background essential to understanding what the court was created to do, how it came to exist, and the distinctive challenges that have shaped its establishment and which help inform the analysis in this report.

The Kosovo / Serbia conflict

8. The armed conflict in Kosovo between 1998 and 1999 forms the historical backdrop to the creation of the Specialist Chambers. Kosovo had long been a self-governing province of Serbia, but in 1989, Serbian president Slobodan Milošević stripped it of that status,

5 Guernica 37 Chambers is now Outline Chambers.

galvanising ethnic Albanians in their push for full independence.[6] The Kosovo Liberation Army ("**KLA**") emerged in the 1990s.[7] By 1998, it had risen in open rebellion against Serbian rule. Police and army reinforcements were sent in to crush the insurgency, and in doing so, Serb forces heavily targeted civilians, shelling villages and forcing Kosovo Albanians to flee.[8]

9. Internationally-brokered peace talks at Rambouillet collapsed in early 1999, and NATO intervened militarily in March of that year.[9] Serb forces responded by intensifying their persecution of Albanian civilians. Milošević ultimately agreed to withdraw his forces,[10] and NATO's Operation Allied Force was suspended on 10 June after 78 days.[11] The legal basis for that intervention was, and remains, deeply contested, with the majority of States and scholars rejecting its legality.[12]

10. The KLA emerged from the conflict as a liberation movement of profound popular significance within Kosovo.[13]

Del Ponte and the organ trafficking allegations

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6 James Pettifer, *The Kosova Liberation Army: Underground War to Balkan Insurgency, 1948–2001* (Hurst 2013), 56; 'Autonomy Abolished: How Milošević Launched Kosovo's Descent into War' (Balkan Insight, 23 March 2020) https://balkaninsight.com/2020/03/23/autonomy-abolished-how-milosevic-launched-kosovos-descent-into-war/btj/accessed 25 April 2026.

7 James Pettifer, The Kosova Liberation Army: Underground War to Balkan Insurgency, 1948–2001 (Hurst 2013), 60-64.

8 United Nations International Criminal Tribunal for the Former Yugoslavia, 'The Conflicts' (United Nations International Residual Mechanism for Criminal Tribunals) https://www.icty.org/en/about/what-former-yugoslavia/conflicts.

9 OSCE Office for Democratic Institutions and Human Rights, Kosovo/Kosova: As Seen, As Told — An Analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999 (OSCE/ODIHR 1999) https://www.osce.org/odihr/17772 accessed 25 April 2026

10 United Nations International Criminal Tribunal for the Former Yugoslavia, 'The Conflicts' (United Nations International Residual Mechanism for Criminal Tribunals) https://www.icty.org/en/about/what-former-yugoslavia/conflicts.

11 NATO, 'Kosovo Air Campaign (March – June 1999): Operation Allied Force' (NATO, Updated 21 October 2024) https://www.nato.int/en/what-we-do/operations-and-missions/kosovo-air-campaign-march-june-1999.

12 See for e.g., the following range of views: Frederic L. Kirgis, 'The Kosovo Situation and NATO Military Action' (March 1999) 4 ASIL 1; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1-22; Sir David Bethlehem KC, 'Stepping Back. Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention' (*EJIL:Talk!*, 12 September 2013) https://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/; Chrisine Chinkin, 'The legality of NATO's action in the former republic of Yugoslavia (FRY) under international law' (2000) 49 International & Comparative Law Quarterly 4, 910-925.

13 James Pettifer, *The Kosova Liberation Army: Underground War to Balkan Insurgency, 1948–2001* (Hurst 2013), 221.

11. The question of crimes allegedly committed by the KLA was not entirely absent from early post-war accountability efforts. Carla Del Ponte served as Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**") from 1999 to 2007. In 2008, following her departure, she published a memoir entitled *Madame Prosecutor*, in which she alleged that high-ranking members of the KLA had committed serious crimes against Serbian prisoners, including the forced removal of human organs for trafficking purposes.[14]

12. These allegations "*sent shock waves throughout the world*" and "*were vehemently denied in Kosovo*".[15]

13. In response, the ICTY Office of the Prosecutor ("**OTP**") acknowledged that in 2002–2003, the UN Interim Administration Mission in Kosovo ("**UNMIK**") had informed it of allegations that people had been abducted from Kosovo and taken to Albania where their organs were removed, and that Serbian authorities had also been aware of these allegations at the time. The OTP further stated that preliminary investigation had been conducted jointly with UNMIK and Albanian authorities, including a visit to a site in northern Albania, but the allegations could not be substantiated, and that the matter had been referred to UNMIK and the Albanian authorities as the competent authorities.[16]

The Marty Report

14. Del Ponte's allegations prompted a formal investigation under the auspices of the Council of Europe. The Council's Parliamentary Assembly tasked the Committee on Legal Affairs and Human Rights with examining the matter, and appointed Swiss senator Dick Marty as Rapporteur.[17]

15. Published after a two-year investigation, the Marty Report echoed many of Del Ponte's claims. It named senior KLA members (all members of the so-called Drenica Group)

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14 Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Pr LLC, 2009).

15 Dean B. Pineles, 'The Controversial Legacy of Dick Marty in Kosovo', (*Balkan Insight*, 26 April 2022) available here.

16 United Nations International Criminal Tribunal for the Former Yugoslavia, 'Highlights of 14/04/2008 through 25/04/2008 - Nr. 35' (*The ICTY Digest*, 28 April 2008) See here.

17 Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Doc.12462, 'Report: Inhuman treatment of people and illicit trafficking in human organs in Kosovo', (Council of Europe, 7 January 2011) ("**Marty Report**").

and accused them of murder, abductions, torture, forced disappearances, involvement in organised crime and organ-trafficking.[18] Those named included Hashim Thaçi, Kosovo's Prime Minister at the time, who was characterised by Marty as an organised crime "*boss*";[19] and Kadri Veseli,[20] the former head of the intelligence service and one of the founders of the KLA, who later became speaker of parliament. The alleged victims included Serbs, members of ethnic minority groups and political opponents.[21]

16. Marty further alleged that Thaçi's "*political and diplomatic endorsement from the United States and other western powers […] bestowed upon Thaçi, not least in his own mind, a sense of being 'untouchable'*". [22] He also claimed that "*all of the international community in Kosovo – from the governments of the United States and other allied western powers, to the European Union-backed justice authorities – undoubtedly possesses the same, overwhelming documentation of the full extent of the Drenica Group's crimes, but none seems prepared to react in the face of such a situation and to hold the perpetrators to account*".[23]

17. Marty later clarified that his report did not accuse Thaçi of direct involvement in organ trafficking, but rather that his close associates were implicated and that it was difficult to believe Thaçi had been unaware.[24]

18. Like Del Ponte's allegations, the Marty Report drew worldwide attention and condemnation, and was vigorously denied by those named and by Kosovo society at large.[25]

SITF / EULEX

19. In 2011, the European Rule of Law Mission ("**EULEX**") authorised a criminal investigation into the findings of the Marty Report, establishing the EU Special Investigative Task Force ("**SITF**"), headed by Clint Williamson, former US Ambassador-

18 Marty Report.
19 Marty Report. para 58.
20 Marty Report, paras 68, 72,
21 Marty Report, para 88.
22 Marty Report, para 60.
23 Marty Report, para 71.
24 Petrit Çollaku, 'Dick Marty Clarifies Organ Harvesting Allegations' (*Balkan Insight*, 19 January 2011) available here.
25 Dean B. Pineles, 'The Controversial Legacy of Dick Marty in Kosovo' (*Balkan Insight*, 26 April 2022) available here.

at-Large for War Crimes. The SITF was mandated to investigate, and if warranted prosecute, individuals for the crimes alleged in the Council of Europe report.[26]

20. In July 2014, Williamson announced that the task force was in a position to file indictments against certain KLA officials. On organ trafficking, he concluded that a small number of individuals had been killed for the purpose of extracting and selling their organs, consistent with the Marty Report's finding that a 'handful' of individuals had been subjected to this crime, but acknowledged that the evidence required for prosecution had not yet been secured.[27]

21. Williamson recommended that any indictment be filed before a specially constituted court rather than within EULEX's existing judicial apparatus in Kosovo. He also noted that the SITF had faced serious challenges due to a climate of intimidation aimed at undermining investigations into individuals associated with the former KLA.[28]

Establishment of the KSC

22. In April 2014, the European Union ("**EU**") High Representative, Catherine Ashton, exchanged letters with the President of Kosovo, Atifete Jahjaga, initiating the process to establish the KSC.[29] In the course of the next year, the tribunal was heavily challenged in domestic Kosovo politics.[30] On 3 August 2015, under significant pressure from the EU, the US and other Western powers, the Assembly of Kosovo amended the Kosovo Constitution to create the Specialist Chambers and its prosecutorial unit, the Specialist Prosecutor's Office ("**SPO**").[31] Among those subsequently indicted by the KSC were two of the very figures who had facilitated its establishment: Veseli, who as parliament speaker and had signed both the constitutional amendment and the 'Law on

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26 RECOM (Reconciliation Network), 'Statement by the Chief Prosecutor of the Special Investigative Task Force (SITF) on investigative findings in Kosovo' (RECOM, 29 July 2014) available here.

27 ibid.

28 ibid (n 26).

29 Kosovo Specialist Chambers and Specialist Prosecutor's Office, 'Law on ratification of the international agreement ("The Exchange of Letters") (Kosovo Specialist Chambers, 23 April 2014), Available here.

30 Silvia Steininger, 'The Kosovo Specialist Chambers – A New Chapter for International Criminal Justice in the Balkans' (*Völkerrechtsblog*, 14 March 2018), available here.

31 Aidan Hehir, The Assumptions Underlying the Kosovo Specialist Chambers and Their Implications' (2020) 20 Int'l Crim. L. Rev. 1, 17 and 27; Dean P. Bineles, 'Thaci Verdict Will Decide Legal of Kosovo Specialist Chambers' (*BalkanInsight,* 4 March 2026) https://balkaninsight.com/2026/03/04/thaci-trial-verdict-will-decide-legacy-of-kosovo-specialist-chambers/btj/.

Specialist Chambers and Specialist Prosecutor's Office' ("**KSC Law**"),[32] and Thaçi, who as deputy prime minister lent his political weight to its passage.[33] Both were indicted in 2020 and are currently on trial at the deliberations stage; the prosecution has sought a sentence of 45 years for each.

23. Opposition to the KSC did not dissipate after the legislation passed. In December 2017, a group of MPs signed a request to hold an extraordinary session to revoke the KSC Law.[34] The international reaction was swift and unequivocal. The US declared itself "*deeply concerned*" and called on Kosovo's political leaders to maintain their commitment to the court and leave its jurisdiction unchanged. The US Ambassador to Kosovo warned that the KSC's revocation would "*have profoundly negative implications for Kosovo's future as part of Europe*" and would be "*considered by the United States as a stab in the back*".[35]

24. While the attempt to revoke the KSC collapsed, it signalled the depth of domestic hostility that would continue to dog the court throughout its existence.[36]

B. Mandate, Jurisdiction, and Organisational Structure

25. Defining the mandate of the KSC with precision is illusive. The Constitution provides that the KSC and SPO serve to comply with Kosovo's international obligations in relation to the Council of Europe Report. The KSC Law further provides that the KSC and the SPO serve:

> "*to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe Parliamentary Assembly Report … and which have been the subject of criminal investigation by*

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32 Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Kosovo), 3 August 2015, available here.

33 Dean P. Bineles, 'Thaci Verdict Will Decide Legal of Kosovo Specialist Chambers' (*BalkanInsight,* 4 March 2026) https://balkaninsight.com/2026/03/04/thaci-trial-verdict-will-decide-legacy-of-kosovo-specialist-chambers/btj/.

34 Aidan Hehir, 'Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and its Implications' (2019) 20 Human Rights Review 267, 268.

35 Aidan Hehir, 'The Assumptions Underlying the Kosovo Specialist Chambers and Their Implications' (2020) 20 Int'l Crim. L. Rev. 17, 27 citing Erjone Popova, 'Kosovo Assembly Fails to Convene for Vote on Revocation of "Special Court"' (*Prishtina Insight*, 22 December 2017) https://prishtinainsight.com/kosovo-assembly-fails-convene-vote-revocation-special-court.

36 Sara L. Ochs & Kirbi Walters, 'Forced Justice: The Kosovo Specialist Chambers' (2022) 32 Duke Jornal of Comparative & International Law, 239, at 269-273.

the Special Investigative Task Force ("SITF") of the Special Prosecution Office of the Republic of Kosovo ("SPRK")".[37]

26. As the emphasis of the Council of Europe Report is on "*organised crime*" and the illicit trade in organs – matters that have not been prosecuted before the KSC – it is thus apparent the mandate of the KSC has shifted.[38] Its mandate can better be understood in terms of its jurisdiction, and the nature of the cases, past and present, on its docket. Such a reading confirms its mandate as focusing on the prosecution of former leaders of the KLA responsible for the commission of war crimes and crimes against humanity during the Kosovo War. The personal and territorial jurisdiction of the KSC allows for prosecution of individuals other than KLA members, however, the narrower focus on the KLA is brought about by the Council of Europe Report, the agreement with the EU in regards to the mandate of EULEX[39] and the broader political reality within which the KSC was established. This remains a point of much controversy.[40]

27. The jurisdiction of the KSC is defined in the KSC Law:

a. **Subject matter jurisdiction**: the KSC has narrow subject matter jurisdiction in respect a sub-set of war crimes and crimes against humanity identified in the KSC Law, but defined under customary international law at the time of the offence, as well as select domestic offences against the administration of justice and public administration; public order; and official corruption and official duty, as defined in the Kosovo Criminal Code 2012.[41]

b. **Temporal jurisdiction**: the temporal jurisdiction of the KSC only includes international crimes committed between 1 January 1998 and 31 December 2000.[42] However, the subject matter jurisdiction in respect of domestic offences is limited to those offences that relate to the KSC's official proceedings or its

37 Article 1(2) KSC Law.
38 For further discussion, see Michela Frulli, '*The Kosovo Specialist Chambers and Specialist Prosecutor's Office: The Turn of Kosovo to Complementarity*?' (2016) 14(1) Journal of International Criminal Justice 65, 68–70.
39 Law No. 04/L-274 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.
40 See, for example, Gëzim Visoka, 'Assessing the potential impact of the Kosovo Specialist Court' (PAX, September 2017), 26.
41 Article 6, read with Articles 12-14 KSC Law.
42 Article 7 KSC Law.

officials.[43] Accordingly, the limited temporal jurisdiction does not preclude prosecution in respect of offences such as witness intimidation during trial.

c. **Territorial jurisdiction**: the KSC has jurisdiction over crimes commenced or committed on the territory of Kosovo.[44]

d. **Personal jurisdiction**: the personal jurisdiction of the KSC is limited to natural persons and encompasses active and passive personality jurisdiction.[45] Accordingly, the KSC has jurisdiction over crimes committed by or against citizens of Kosovo or the Federal Republic of Yugoslavia, regardless of where the offence was committed.

28. The KSC is generally discussed within the context of international criminal tribunals. However, the KSC is a *sui generis* temporary mechanism with tensions and contradictions throughout its design. It is established premised on international commitments, mandated to prosecute international offences and staffed by international judges, yet it is patently a domestic institution established in terms of the Kosovo Constitution, which operates in terms of Kosovo law.[46] This point is not semantic, but one of significant consequence, particularly as it relates to the KSC's operation within the framework of a supreme constitution. This has bearing on issues such as legitimacy and accountability. Beyond drawing on interpretation of substantive crimes, the domestic character of the KSC renders comparison between it and international courts and tribunals of limited utility.

29. Structurally the KSC and the SPO are separate independent institutions each with full legal personality.[47] The Chambers consists of four separate chambers and the Registry. The four chambers follow the structure of the judiciary in Kosovo and include the Basic Court Chamber; the Court of Appeals Chamber; the Supreme Court Chamber; and the Constitutional Court Chamber. The appointment and assignment of judges is dealt with in the substantive report.[48]

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43 Article 6, read with Article 15 KSC Law.
44 Article 8 KSC Law.
45 Article 9 KSC Law.
46 Article 162(1) of the Kosovo Constitution.
47 Article 4 KSC Law.
48 See below, 'Appointment of Judges' and 'Assignment of Judges'.

a. **The Basic Court Chamber**: is the first-instance chamber for KSC proceedings and thus includes the Pre-Trial Chamber and Trial Chambers.

b. **The Court of Appeals Chamber**: acts as a second-instance appellate body in respect of judgments by Trial Panels.[49]

c. **The Supreme Court Chamber**: performs several reserved functions, including, acting as a third-instance appellate body in respect of certain Appeal Chamber decisions;[50] and hearing applications for extraordinary legal remedies as defined in the KSC Law.[51]

d. **The Constitutional Court Chamber**: deal exclusively with any constitutional referrals relating to the Specialist Chambers and the SPO.

30. The status and functions of the SPO are defined and regulated by the KSC Law.[52] The SPO is headed by the Specialist Prosecutor, who performs their functions independently from the KSC. The Specialist Prosecutor and Prosecutors primarily serve to investigate and prosecute crimes within the jurisdiction of the KSC.[53] However, as provided in the KSC Law, they have a wide range of duties and powers ancillary to their core function.[54]

31. The Registry is headed by the Registrar and is responsible for the administration of the KSC and all related functions.[55] The Registry includes the Victims' Participation Office; the Defence Office; Witness Protection and Support Office; the Detention Management Unit; and the Ombudsperson's Office.[56]

C. Legal framework

49 Article 46 KSC Law.
50 Article 47 KSC Law.
51 Article 48 KSC Law.
52 Article 35 KSC Law.
53 Article 24(2) KSC Law.
54 Article 35 KSC Law.
55 Article 34(1)-(2) KSC Law.
56 Article 34(6)-(12) KSC Law.

32. The political climate within which the KSC was established revolved significantly around international commitments to ensure accountability, drawn from the Council of Europe Report and made by Kosovo vis-à-vis the EU in regard to the mandate of EULEX.[57] However, those commitments relate to the establishment of a domestic Kosovo institution, not an international one. As discussed above, to give effect to these international commitments, in choregraphed legislative action, on 3 August 2015 Kosovo adopted both a Constitutional amendment to enact Article 162 of the Constitution and the KSC Law.[58]

33. Article 162 of the Constitution provides for the establishment of the KSC and SPO "*within the justice system of Kosovo*"[59] and that these institutions "*shall be regulated by this Article and by a specific law*". The KSC and SPO are uniquely complicated in their design. Unlike international criminal mechanisms, which operate autonomously and outside of existing domestic structures, the KSC sits within the Kosovo judiciary. The KSC Law, therefore, had to cater extensively for the proper place of the KSC/SPO within these existing structures. The international staffing of the KSC/SPO, and the fact that it has its primary seat in The Hague, complicates its relationship with other courts and actors in the Kosovo judiciary. The KSC Law defines in detail the institutional features, operation and legislative framework of the KSC and SPO.

34. As Kosovo is neither a member of the Council of Europe, nor the United Nations, it does not have the ability to ratify the European Convention on Human Rights ("**ECHR**") or any of the core UN Human Rights treaties. However, Article 22 of the Kosovo Constitution provides for the direct incorporation into domestic law of eight international human rights instruments, including the Universal Declaration of Human Rights (1948); the ECHR and its Protocols; and the International Covenant on Civil and Political Rights ("**ICCPR**").[60] The legal effect of this incorporation is that the substantive

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57 Law No. 04/L-274 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.

58 Assembly of Republic of Kosovo, Amendment no. 21, 3 August 2015.

59 Emphasis added.

60 Article 22 of the Kosovo Constitution, as amended by Constitutional Amendment No. 26, incorporates the following international human rights treaties into Kosovo domestic law: Universal Declaration of Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; International Covenant on Civil and Political Rights and its Protocols; Council of Europe Framework Convention for the Protection of National Minorities; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhumane

provisions of these instruments are applicable in the Republic of Kosovo as a source of domestic law and, in case of conflict, have priority over general domestic law.[61]

35. Such direct incorporation provides an effective method of creating a robust domestic human rights framework.[62] However, the incorporation of overlapping, yet not identical human rights instruments give rise to the possibility of normative fragmentation. This concern is mitigated through Article 53 of the Constitution, which deals with interpretation of human rights provisions, and provides: "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*". The practical effect of this is that the ECHR enjoys a privileged position within Kosovo law and practice. Article 3(2)(a) and (e) of the KSC Law requires that the Specialist Chambers adjudicate and function in accordance with the Kosovo Constitution and with international human rights law, including those required under the ECHR and the ICCPR.

36. The express incorporation by reference of ECHR standards, rather than the vague formulation of "*internationally recognized human rights*" found in Article 21(3) of the Rome Statute, represents a potentially significant strengthening of the rights framework applicable before an international(ised) criminal tribunal.[63] As some commentators have observed, the ECHR formulation avoids the ambiguity that attends the International Criminal Court ("**ICC**") standard and anchors the KSC's obligations in a developed and enforceable jurisprudence.[64] Furthermore, the "*reference to the ECHR in Kosovo's Constitution makes these human rights justiciable because in accordance with Article 49 KSC Law, the Specialist Chamber of the Constitutional Court shall be the final authority for the interpretation of the Constitution insofar as it relates to the subject-matter jurisdiction and activity of the KSC*".[65]

37. Article 19 of the KSC Law directs the Judges sitting in plenary to adopt the Rules of Procedure and Evidence ("**KSC RPE**"), which are to reflect "*the highest standards of*

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or Degrading Treatment or Punishment; and Council of Europe Convention on preventing and combating violence against women and domestic violence.

61 Article 22 of the Kosovo Constitution.

62 Perhaps the primary shortcomings of the Kosovo domestic human rights framework is the lack of effective protection of economic, social and cultural rights.

63 Alexander Heinze, 'The Kosovo Specialist Chambers' Rules of Procedure and Evidence: A Diamond Made Under Pressure?' (2017) 15 Journal of International Criminal Justice 5, 985-1009, at 1000.

64 *Ibid.*

65 *Ibid.*

international human rights law including the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) with a view to ensuring a fair and expeditious trial". In determining the KSC RPE, the judges should also be "*guided by the Kosovo Criminal Procedure Code 2012*".[66]

38. Article 19(2) of the KSC Law adds a further structural safeguard: following their adoption or any subsequent amendment, the draft KSC RPE must be reviewed by the Specialist Chamber of the Constitutional Court to ensure continued compliance with the Kosovo Constitution. As Sluiter has observed, inserting a judicial review mechanism was largely unheard of in international criminal justice and is "*a good and creative solution to improving the quality of what is in essence a legislative process, namely developing the procedural law of an international or internationalized criminal tribunal that can be emulated by other courts*".[67] Its value is borne out by the record: the 26 April 2017 judgment on the referral of the Rules and their legality (the "**2017 Referral Decision**") identified "*no fewer than thirteen provisions*"[68] as being in violation of human rights law, several of which are discussed in the sections that follow.

III. PRELIMINARY OBSERVATIONS ON PROVISIONAL RELEASE

39. This section examines the legal framework governing pre-trial detention and provisional release at the KSC, set against the broader context of specific challenges posed by international criminal proceedings. While the KSC's legal framework is, on its face, sound and has been meaningfully improved through the Special Constitutional Chamber's review, practical obstacles to interim release arising from the Host State Agreement and contextual considerations bearing on release in Kosovo warrant further scrutiny - particularly whether they risk creating, *ab initio*, conditions of prolonged detention incompatible with Article 5 ECHR and Article 9 ICCPR.

40. The right to liberty and security of person is among the most fundamental guarantees enshrined in international human rights law. Article 5 ECHR, mirrored in Article 9 ICCPR, establishes that no person shall be deprived of their liberty except on grounds and in accordance with procedures prescribed by law, and that anyone arrested or

66 Article 19(2) KSC Law.
67 Göran Sluiter, 'Human Rights in International Criminal Proceedings - The Impact of the Judgment of the Kosovo Specialist Chambers of 26 April 2017' (2019) 27 Wm. & Mary Bill Rts. J. 623, at 645.
68 *Ibid*, at 646.

detained on criminal charges is entitled to trial within a reasonable time or release pending trial.

41. For international criminal proceedings, this guarantee presents a distinctive challenge: accused persons are typically charged with the gravest offences known to law, proceedings are extraordinarily complex and prolonged, and the risk of flight or witness interference are routinely assessed as substantial.

42. Pre-trial detention at international criminal tribunals accordingly tends to be lengthy, its duration tracking, almost inexorably, that of the proceedings as a whole (from arrest through to trial and often to appeal judgment).[69] The human cost should not be obscured by legal analysis: presumptively innocent persons are subjected to years-long detention, missing the full arc of ordinary life.[70] The case of Hashim Thaçi offers a recent and pointed illustration. Detained in The Hague since November 2020, Thaçi was unable to attend the funeral of his father in March 2025, despite a request made the previous day.[71]

43. Comparative experience from international tribunals gives cause for concern and suggests that these systems were not always designed with the possibility of release of individuals clearly in contemplation. In the *Butare* case (the final case of the International Criminal Tribunal for Rwanda ("**ICTR**")), most of the accused had been arrested between 1995 and 1998. The trial judgment was not pronounced until 24 June 2011, making theirs among the most prolonged periods of pre-trial custody in the history of international criminal justice.[72] At the ICC, Laurent Gbagbo was transferred to the detention centre in November 2011 and acquitted in January 2019 – a person ultimately found not guilty remained in detention in a foreign country for over seven years. Following their acquittals by the Trial Chamber, the Appeals Chamber imposed conditions on the release of both

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69 Jacques B. Mbokani, 'Pre Trial Detention' (Max Planck Encyclopaedias of International Procedural Law, Updated October 2023), para 6.

70 *Ibid*, para 7.

71 KSC-BC-2020-06, Public Redacted Version of Urgent Thaçi Defence Request for Temporary Release on Compassionate Grounds with Confidential Ex Parte Annex 1, F 03024, 17 March 2025; KSC-BC-2020-06, Public Redacted Version of Urgent Thaçi Defence Consolidated Reply to the Registrar's Submissions F03031 and the SPO Response F03032, F03035, 18 March 2025, para 2: "*The Defence regrets that Mr Thaçi will de facto not be allowed to attend the funeral of his father. In a similar situation at the ICTY twenty years ago, Mr. Ramush Haradinaj was allowed to attend the funeral of his brother less than 48 hours after filing for provisional release on humanitarian grounds, flying to and from the Netherlands by commercial aircraft. It is deeply regrettable that the Kosovo Specialist Chambers is apparently unable to facilitate the attendance of its detainees at the funerals of immediate family members*".

72 Jacques B. Mbokani, 'Pre Trial Detention' (Max Planck Encyclopaedias of International Procedural Law, Updated October 2023), para 6.

Gbagbo and his co-accused, Charles Blé Goudé.[73] In March 2021, Gbagbo and Blé Goudé's acquittal was upheld by the Appeal Chamber.[74]

44. The experience of persons acquitted at the ICTR has been the most extreme: nine acquitted and released persons found themselves unable to reunite with their families following the closure of the tribunal, their applications for visas to countries of refuge having been unsuccessful or unanswered, leaving them stranded first in a UN safe house in Arusha and later, following a failed relocation agreement, under house arrest in Niger.[75] One man died before the relocation in Niger could take place. As of April 2026, a further three have died in Niger without ever being reunited with their families, and five others remain under illegal house arrest, still awaiting a solution.[76]

45. The KSC rules on provisional release, and on release following an acquittal, were drafted against this background by judges who themselves served at these tribunals. The following sections set out the applicable legal framework and assess the extent to which the KSC framework has learned from – or replicated – the experience of its predecessors.

A. Detention on remand

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73 ICC, *Prosecutor v Laurent Gbagbo and Charles Ble Goude*, Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, ICC-02/11-01/15 OA14, 1 February 2019. See also Kevin Jon Heller, 'The Appeals Chamber Invents Conditional Post-Acquittal Release' (*OpinioJuris*, 3 February 2019) available here.

74 ICC, *Prosecutor v Laurent Gbagbo and Charles Ble Goude*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motion, ICC-02/11-01/15 A, 31 March 2021.

75 Allison Turner, 'Let lawyers do their work: an analysis of the ICTR's unfree acquitted and released men dying in detention in Niger', IBA ICC & ICL Programme (31 October 2025), available at https://www.ibanet.org/let-lawyers-work-ictr-niger; International Association of Democratic Lawyers, 'No Transfer of ICTR Persons to Rwanda: IADL Observations on the Closing of the IRMCT' (5 April 2026), available at https://iadllaw.org/2026/04/no-transfer-of-ictr-persons-to-rwanda-iadl-observations-on-the-closing-of-the-irmct/.

76 International Bar Association, 'Remedying international injustice: appeals, retrials, and revisions of judgments in international criminal law' (International Bar Association) https://www.ibanet.org/document?id=IBA-ICL-Perspectives-Remedying-International-Injustice. See also, at the ICC, the Mokom Defence Response to the Registry's Submissions on the Defence Request for Compensation under Article 85 of the Rome Statute, ICC-01/14-01/22-344-Red, 12 July 2024, describing the Pre-Trial Chamber's findings that Mr Mokom had been subjected to conditions amounting to a form of house arrest for 43 days following his release, notwithstanding its order directing that no restrictions be placed on his freedom of movement. Mr Mokom's detention in a hotel in The Hague, and the Registry's failure to secure his free movement in the Netherlands was attributable in material part to the host State's refusal to permit his unencumbered presence on its territory following release — a structural obstacle rooted in the Host State Agreement. See also Pre-Trial Chamber II, "Public redacted version of 'Order regarding arrangements pending Mr Mokom's transfer'", 21 November 2023, ICC-01/14-01/22-294-Red, para 3.

46. The established jurisprudence of the European Court of Human Rights ("**ECtHR**") requires that detention pending trial be proportionate to the aim of bringing the accused before the court, and that its continuation only be justified if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweigh the right to liberty.[77] Grounds found "*relevant*" and "*sufficient*" in Strasbourg's case law have included the danger of absconding, the risk of pressure being brought to bear on witnesses or evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder, and the need to protect the detainee.[78]

47. The threshold for continued detention rises following first judicial review. In *Buzadji v. the Republic of Moldova*,[79] the Grand Chamber held that while reasonable suspicion may suffice to justify the initial arrest, from the moment of the first judicial control of detention (which must occur promptly after arrest), relevant and sufficient reasons beyond mere suspicion are required to justify continued detention on remand.[80]

48. The KSC legal framework adheres to these principles in large part:

a. Article 41(5) of the KSC Law echoes Article 5(3) ECHR and provides that a person shall be entitled to a trial within a reasonable time or to release pending trial. Rule 56(2) KSC RPE further provides that the Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case and for the possibility of release under conditions "*in case of undue delay caused by the Special Prosecutor*". In *Thaçi et al* (Administration of Justice – Case 12), due to substantial delays in the proceedings, the Single Judge ordered Isni Kilaj's release to Kosovo under strict conditions, finding that a further extension of his detention would be unreasonable.[81] The decision was upheld on appeal.[82]

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77 2017 Referral Decision, para 113.

78 *Idalov v. Russia* [GC], no. 5826/03 (22 May 2012) para 140; *Bykov v. Russia* [GC], no. 4378/02 (10 March 2009) paras 61-64; *McKay v. The United Kingdom*, cited above, paras 41-45.

79 *Buzadji v. the Republic of Moldova* [GC] (App. No. 23755/07), 5 July 2016.

80 *Idalov v. Russia* (n 70), para 140; *Jablonski v. Poland*, no. 33492/96 (21 December 2000) para 83.

81 KSC-BC-2018-01, Public Redacted Version of Corrected Version of Decision on Review of Detention of Isni Kilaj, F05999, 310 December 2025; KSC-BC-2023-12, INV/F00129/COR, Single Judge, Corrected Version of Decision on Review of Detention of Isni Kilaj ("Kilaj Release Decision"), 3 May 2024 (corrected version issued on 15 May 2024).

82 KSC-BC-2018-01, Public Redacted Version of Decision on the Specialist Prosecutor's Office's Appeal Against Decision on Isni Kilaj's Review of Detention, IA007-F00007RED, 13 May 2024.

b. Article 41(6) of the KSC Law provides that arrest and detention may only be ordered when: (a) there is a grounded suspicion that a person has committed a crime within the jurisdiction of the SC; and (b) there are articulable grounds to believe that the person: (i) is a risk of flight; (ii) will destroy, hide, change or forge evidence of a crime, or will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime which he or she has threatened to commit.

c. Pursuant to Article 41(10) of the KSC Law and Rule 57(2) KSC RPE, until a judgment is final or until release, the Pre-Trial Judge or Panel shall, upon expiry of two months from the last ruling on detention on remand, examine whether the grounds for detention still exist and render a ruling extending or terminating detention.

d. Rule 56(3) KSC RPE additionally provides, upon request or *proprio motu*, for the temporary release a detained person, where compelling humanitarian grounds justify such release.

49. Where release is ordered, Rule 56(4) KSC RPE provides that:

> "*Upon request under paragraphs (2) or (3), the Panel may impose such conditions upon the release as deemed appropriate to ensure the presence of the Accused during proceedings, in accordance with Article 41(12) of the Law. The Panel shall hear the Third State to which the detained person seeks to be released. A detained person* ***shall not be released in the Third State without the consent of that State****. A decision shall be rendered as soon as possible and no later than three (3) days from the last submission*."

50. The original formulation of this provision read as follows:

> "*The Panel shall hear the Third State to which the detained person seeks to be released. A detained person* ***shall not be released without the consent of that State***".

51. The Special Constitutional Chamber declared this incompatible with the Kosovo Constitution in its 2017 Referral Decision. While acknowledging that some delay in executing a release decision may be understandable, it found that conditioning release entirely on a State's consent was *"clearly, problematic"*:[83]

> "*this provision would make the release of a detained person entirely dependent upon the consent of a State even in circumstances where a Panel has found sufficient grounds requiring his or her release. If such consent were to be withheld then, applying the provision as it stands would mean that the detained person 'shall not be released'. The Court considers that any detention in those circumstances would lack the necessary legal basis and would not be a lawful detention*".[84]

52. The amendment (inserting the words "*in the Third State*") means that an accused who cannot secure a third State's consent can at least, in principle, be released in Kosovo, since the KSC RPE define a "*Third State*" as "[a] *State or entity thereof, other than the Republic of Kosovo*". This avenue must, however, be understood in context: the alleged climate of witness intimidation in Kosovo was among the principal considerations underlying both the KSC's establishment and its delocalisation to The Hague, and those considerations remain relevant to the assessment of release applications. It was therefore foreseeable, and the case law bears out, that an accused's influential position within Kosovar society and/or the risk of witness interference in Kosovo will serve as a high bar to provisional release.[85]

53. Release in the Netherlands, where the proceedings take place, is unavailable.[86] Despite hosting four international tribunals (ICC, ICTY, ICTR and Special Tribunal for Lebanon ("**STL**")) and now the KSC, the Netherlands has consistently opposed entry onto its

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83 2017 Referral Decision, para 120. See also: Maria Stefania Cataleta and Chiara Loiero, *The Kosovo Specialist Chambers: The Last Resort for Justice in Kosovo?* (LAP Lambert Academic Publishing, 2021), 97.

84 *Ibid.*

85 See for e.g., KSC-BC-2020-06, Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release, 22 January 2021, F00177; KSC-BC-2020-06, Decision on Periodic Review of Detention of Hashim Thaçi, F03718, 10 April 2026; KSC-BC-2020-06- Public Redacted Version of Corrected Version of Decision on Veseli Defence Request for Provisional Release, 11 June 2025, F03177; KSC-BC-2020-06, Public Redacted Version of Corrected Version of Consolidated Decision on Selimi Defence Request for Provisional Release and on Periodic Review of Detention of Rexhep Selimi, F03175, 13 May 2025; KSC-BC-2020-06, Public Redacted Version of Decision on Periodic Review of Detention of Jakup Krasniqi, F 01110, 18 November 2022.

86 Maria Stefania Cataleta and Chiara Loiero, *The Kosovo Specialist Chambers: The Last Resort for Justice in Kosovo?* (LAP Lambert Academic Publishing, 2021), 98.

territory to any person granted interim release.[87] This position is reflected in Article 42(1) of Host State Agreement, which states that "[p]*ersons detained by the Kosovo Relocated Specialist Judicial Institution in the Host State shall not be provisionally released in the Host State* […] *except for persons who are nationals or permanent residents of the Host State*".[88]

54. This arrangement differs materially from the position of a defendant on bail in a domestic criminal jurisdiction, who would ordinarily be able to attend their legal representatives and remain in close proximity to the court.

55. To date, the only accused ever granted interim release at the KSC are Isni Kilaj (first released on 15 May 2024 and again on 10 December 2025),[89] Bashkim Smakaj and Fadil Fazliu (both released on 3 February 2026),[90] in *Thaçi et al* (Case 12 – Administration of Justice).

Case number	Accused	Arrest and transfer to the KSC Detention Unit	Interim release	Start of the trial	Trial judgment
KSC-BC-2020-05/KSC-CA-2023-02	Salih Mustafa	24/09/2020	N/A	15/09/2021	16/12/2022
KSC-BC-2020-07/KSC-CA-2022-01	Hysini Gucati	25/09/2020	N/A	07/10/2021	18/05/2022
KSC-BC-2020-07/KSC-CA-2022-01	Nasim Haradinaj	26/09/2020	N/A	07/10/2021	18/05/2022
KSC-BC-2020-06	Hashim Thaçi[91]	04–05/11/2020	N/A	03/04/2023	Deliberations are ongoing
KSC-BC-2020-06	Kadri Veseli	04–05/11/2020	N/A	03/04/2023	Deliberations are ongoing
KSC-BC-2020-06	Rexhep Selimi	04–05/11/2020	N/A	03/04/2023	Deliberations are ongoing
KSC-BC-2020-06	Jakup Krasniqi	04–05/11/2020	N/A	03/04/2023	Deliberations are ongoing

87 Maïté Van Regemorter, 'Interim Release' (Max Planck Encyclopaedia of International Procedural Law, Updated November 2020), para 33. Whilst the main seat of the ICTR was based in Arusha, Tanzania, the Appeals Chamber was hosted in the Netherlands.

88 Article 42(1), Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands, 15 February 2016.

89 KSC-BC-2023-12, Public Redacted Version of Sixth Decision on Review of Detention of Isni Kilaj, F00599RED, 3 December 2022.

90 KSC-BC-2023-12, Public Redacted Version of Seventh Decision on Review of Detention of Bashkim Smakaj, F00719RED, 3 February 2026; and KSC-BC-2023-12, Public Redacted Version of Seventh Decision on Review of Detention of Fadil Fazliu, F00720RED, 3 February 2026.

91 Only the main case's dates have been included.

KSC-BC-2020-04/KSC-CA-2024-03	Pjetër Shala[92]	16/03/2021 (arrest) 15/04/2021 (Transfer)	N/A	21/02/2023	16/07/2024
KSC-BC-2023-10	Sabit Januzi	05-06/10/2023	N/A	Panel decided trial would open on 14/11/2024. Following the notifications by both parties, Panel postponed trial commencement to allow finalization of plea agreements.	Panel approved plea agreements and imposed sentences on 04/02/2025
KSC-BC-2023-10	Ismet Bahtijari	05-06/10/2023	N/A	Panel decided trial would open on 14/11/2024. Following the notifications by both parties, Panel postponed trial commencement to allow finalization of plea agreements.	Panel approved plea agreements and imposed sentences on 04/02/2025
KSC-BC-2023-12	Isni Kilaj	02–03/11/2023 (first arrest) 05–06/12/2024 (second arrest)	15/05/2024 (first interim release) 10/12/2025 (second interim release)	27/02/2026	Trial is ongoing
KSC-BC-2023-12	Fadil Fazliu	05–06/12/2024	03/02/2025	27/02/2026	Trial is ongoing
KSC-BC-2023-12	Hajredin Kuçi	05–06/12/2024	N/A	27/02/2026	Trial is ongoing
KSC-BC-2023-12	Bashkim Smakaj	05–06/12/2024	03/02/2025	27/02/2026	Trial is ongoing

B. Article 8 ECHR

56. Any detention that is lawful and justified will inevitably limit Article 8 rights to some degree. Thus, for example, restrictions on contact with the outside world are not themselves incompatible with Article 8, given the ordinary requirements of imprisonment.[93]

92 Only the main case's dates have been included.

93 *Khoroshenko v. Russia* [GC], App. 41418/04 (30 June 2015) paras 106, 109, 116-149.

57. The ECtHR has nonetheless held that, while the surveillance of communications in the visiting area of a prison may be justified on security grounds, their systematic surveillance for other purposes constitutes an interference with Article 8. The Court has placed particular emphasis on the requirement of lawfulness, including the clarity and foreseeability of the relevant legal basis.[94]

C. Detention following an acquittal

58. In their original form, the KSC RPE risked replicating the shortcomings of international(ised) courts and tribunals with respect to acquitted persons. Rule 158(2) read as follows:

> "*If the Specialist Prosecutor notifies the Panel that he or she intends to appeal an acquittal at the time of its pronouncement, the Panel may, on application by the Specialist Prosecutor and after hearing the Parties, under exceptional circumstances, order the continued detention of the Accused in accordance with Article 41(6)(b)(i) and (ii) of the Law, pending the determination of the appeal*".

59. The Special Constitutional Chamber declared this provision incompatible with the Constitution, stating unequivocally that "[t]*here is no provision within the [Kosovo] Constitution or the Convention, which permits the detention of a person who has been acquitted following a trial*",[95] and that

> " […]*regardless of the circumstances, the continued detention of an acquitted person pending the determination of the appeal against his or her acquittal in the absence of reasonable suspicion of his or her having committed a separate criminal act in respect of which a charge has been laid, is not foreseen by law and does not fall under one of the permissible grounds for deprivation of liberty. Consequently, the Court concludes that Rule 158(2) is not in compliance with the Constitution*."[96]

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94 *Wisse v. France*, App. 71611/01 (20 December 2005,) paras 29-34; *Doerga v. the Netherlands*, App. 50210/99 (27 April 2004) paras 44-54.

95 2017 Referral Decision, para 200.

96 2017 Referral Decision, para 205.

60. Rule 158(1) KSC RPE was accordingly amended to require the immediate release of a detained accused upon acquittal, unless they are lawfully detained or serving a sentence in relation to other crimes. The amended version meets the constitutional standard on its face and illustrates the value of the review mechanism that produced it.

D. Conclusion

61. The KSC's legal framework governing detention is, on its face, sound. The obligation of periodic review is built into the rules, provision is made for release on humanitarian grounds, and the post-acquittal framework has been corrected to reflect the constitutional prohibition on detaining persons who have been found not guilty. The Special Constitutional Chamber has played a material role in bringing the rules to their current form. However, the structural obstacle to interim release created by the Host State Agreement, and exacerbated by the contextual hurdles for release into Kosovo, has profound consequences on accused persons. The lawfulness of consequent detention cannot be assessed *in abstracto*, but such detention with very limited scope for interim release raises concern regarding compliance with Article 5 ECHR and Article 9 ICCPR.

62. An assessment of how the framework has operated in practice, including the consistency of detention decisions across cases, the legality of any restrictive measures imposed on accused persons while in custody, and their impact on their Article 8 rights, falls outside the scope of this report. Those questions raise important issues that merit dedicated examination, and their proper treatment requires a level of case-by-case analysis that goes beyond the aim and scope of this report. Meanwhile, it is recommended that the KSC proactively draw on the record surveyed in paragraphs 41-45 above to ensure that the failures documented at other international(ised) tribunals are not replicated.

IV. PRELIMINARY OBSERVATIONS ON THE RIGHT TO A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

63. This section examines the legal framework governing judicial independence and impartiality at the KSC, and assesses how that framework has operated in practice. It reviews the applicable international standards, the model for judicial appointment and

assignment, the rules on recusal and disqualification, and a sequence of proceedings arising from a diplomatic briefing in December 2020 that gave rise to applications for recusal and disqualification across two separate cases.

A. The right to a competent, independent, and impartial tribunal established by law

64. The right to a competent, independent, and impartial tribunal established by law is enshrined in all international human rights treaties addressing the right to a fair trial, as well as in the statutes of international criminal courts and related instruments.[97] Article 14(1) ICCPR provides that everyone shall be entitled to a hearing by "*a competent, independent and impartial tribunal established by law*". Article 6(1) ECHR is framed in identical terms save that it omits the word "*competent*", though the ECtHR has interpreted the requirement that a tribunal be "*established by law*" as encompassing guarantees relating to competence in any event.[98] The right applies to all stages of criminal proceedings, including pre-trial, trial, appeal and sentencing,[99] and requires that a tribunal satisfy conditions including "*the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards*".[100] This right is also entrenched in Article 31(2) of Kosovo's Constitution.

65. Judicial impartiality has generated extensive jurisprudence before both the ECtHR and international criminal tribunals. It is well established that judges must not only be free from bias (subjective impartiality, presumed unless rebutted) but must also be free from any reasonable apprehension of bias (objective impartiality, assessed from the standpoint

97 Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP, 2021), 72 (electronic version).

98 See for e.g., *Lavents v Latvia* (App. No. 58442/00) (28 November 2022) para 114; *Coeme v Belgium* (App Nos 32492/96 & others) (22 June 2000) paras 99 and 107-108.

99 *Easterbrook v UK* (App no. 48015/99), (12 June 2003).

100 *Coeme v Belgium* (App Nos 32492/96 & others) (22 June 2000) para 99.

of a reasonable observer).[101] The burden of proving any alleged lack of impartiality or independence rests on the moving party.[102]

Appointment of judges

66. KSC Judges are appointed to a "*Roster of International Judges*" by the Head of the EU Common Security and Defence Policy Mission ("**CSDP**")[103] upon the recommendation of an independent selection panel composed of "*three international members, with at least two members being international judges with substantial international criminal experience*".[104] The President and Vice-president of the Court are appointed through the same process.[105]

67. Roster judges receive no remuneration or other benefits for being on the roster and "*shall endeavour not to undertake any activity which could compromise the President of the Specialist Chambers' ability to assign them to exercise functions as a Judge in the Specialist Chambers*".[106] Once assigned to hear a phase of a case or a constitutional referral, the judge shall be assigned for a term of four years or until the completion of the phase of the proceedings to which he or she is assigned, if that phase completes earlier. As for the President of the Specialist Chambers, they shall be appointed for a renewable term of four years. That role has been held by Ekaterina Trendafilanova, since 2016.[107]

68. The bench is exclusively international: no national judges sit on the KSC. This deliberately departs from the "*mixed bench*" model typical of other hybrid or internationalised tribunals such as the Extraordinary Chambers in the Courts of Cambodia ("**ECCC**"), STL, Special Court for Sierra Leone ("**SCSL**") and Residual Special Court for Sierra Leone ("**RSCSL**"), where the bench is composed of a mix of domestic and international

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101 *Prosecutor v. Furundžija*, Judgment, ICTY Case No. IT-95-17/1-A, 21 July 2000, para 182; *Prosecutor v. Rutaganda,* Judgment, Case No. ICTR-96-3-A, 26 May 2003, para 39 et seq.; *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004-15-AR15, 13 March 2004, para 15; *Prosecutor v. Norman*, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, Case No. SCSL-2004-14-PT, 28 May 2004.

102 *Prosecutor v. Blagojević*, Decision on Motion for Disqualification, ICTR Case No. IT-02-60-R, 2 July 2008; *Prosecutor v. Šešelj*, Decision on Motion for Disqualification, ICTY Case No. IT-03-67-PT, 16 February 2007, para 5; *Furundžija* Judgment (n 93), para 196.

103 Article 28(3) KSC Law.

104 Article 28(2) KSC Law.

105 Article 32 KSC Law.

106 Article 26(2) and (3) KSC Law.

107 Kosovo Specialist Chambers and Special Prosecutor's Office, 'The President' (Kosovo Specialist Chambers) https://www.scp-ks.org/en/specialist-chambers/president.

judges.[108] A further distinctive feature (and to the authors' knowledge, unique[109]) is that judicial nominations are effectively controlled by the same (limited) group of States that finance the court, since Article 28 of the KSC Law provides that candidates are put forward by the funding States, i.e. EU States and contributing third States (Canada, Norway, Switzerland, Turkey, and the USA),[110] and the conditions set out in the call for nomination specifies that "[c]*andidates must have Citizenship of an EU Member State or of a Contributing Third State*".[111]

69. The KSC's appointment model reflects lessons learned from earlier international(ised) tribunals.[112] In particular, the requirement on "*established competence in criminal law and procedure or relevant parts of international law and constitutional law as appropriate, with extensive judicial, prosecutorial or defence experience in international or domestic criminal proceedings*" responds to sustained criticism of judicial appointments in prior institutions, where political considerations at times may have prevailed over professional competence.[113] The composition of the judicial roster lends empirical support to this claim.

70. The international nature of judicial appointment to the KSC has the invariable consequence that no judge that sits on the KSC has prior experience of Kosovo law and procedure. This reality is problematic due to two reasons. First, the KSC has limited subject matter jurisdiction in respect of domestic Kosovo criminal law. This creates a situation where a KSC sits in judgment of potentially serious criminal conduct that may

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108. Joseph Powderly, 'Getting to Know the International Criminal Judiciary: a Profile Portrait' in *Judges and the Making of International Criminal Law* (Brill Nijhoff, 2020), 36.

109 We note that, insofar as the Special Tribunal for the Crime of Aggression ("**STCoA**") is concerned, "*Members and Associate Members of the Management Committee will be able to propose candidates for the roster of judges*". However, insofar as the STCoA is concerned, "*candidates will **not need** to be a national of a state that is Member or Associate Member of the Management Committee*" (emphasis added – see here).

110 Article 28 of the KSC Law. See also the exchange of letters that accompany Law No. 04/L-274 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.

111 See for e.g., European External Action Service, Call for nominations for the reserve list for a judge on the roster of international judges of Kosovo Specialist Chambers, Annex II, page 2: "*EU Member States/Contributing Third States are requested to ensure that the following essential requirements are strictly met and accepted in respect of candidates: Citizenship – The candidates must have Citizenship of an EU Member State or of a Contributing Third State.* […]", available here.

112 Michael G. Karnavas, 'Kosovo Specialist Chambers – Part 3: Peculiar features of the Statute' (michaelgkarnavas.net/Blog, 20 February 2019) available here. Further, as noted by Joseph Powderly, "[t]*he fact that approximately one in five international criminal judges have no prior experience in adjudication is troubling*" (see Joseph Powderly, 'Getting to Know the International Criminal Judiciary: A Profile Portrait' in *Judges and the Making of International Criminal Law* (Brill Nijhoff, 2020), 36).

113 See Michael Bohlander, 'The International Criminal Judiciary Problems of Judicial Selection, Independence and Ethics' in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May, 2007), 326-62.

result in prolonged custodial sentences, with no judge on the bench having relevant experience or expertise in relation to the substantive or procedural criminal law in question. Secondly, and perhaps even more significantly, judges of the KSC are not well positioned to properly contextualise their function in the domestic constitutional tradition. Indeed, judges sitting on the Constitutional Court Chamber have no significant experience or expertise in relation to the Kosovo Constitution. There is an acute tension between the experience and expertise of the international judges on the roster in relation to international criminal law and practice, and their lack of experience and expertise in relations to domestic Kosovo criminal and constitutional law and practice. The implications of this tension may well bring into question the competence of the KSC per Articles 14(1) ICCPR and 6(1) ECHR.

71. The KSC Statute also lacks a provision requiring consideration of gender representation in judicial appointments. While similar omissions can be found in other internationalised tribunals,[114] this contrasts with the framework of the International Criminal Court and the Special Tribunal for the Crime of Aggression, which both include an express requirement to take gender balance into account,[115] as well as with Kosovo's domestic constitutional framework, which incorporates principles of gender equality in public appointments.[116] Among the roster of judges, there are currently 7 women for 22 men, roughly one-third representation.[117] By way of comparison, at the ICC women actually outnumber men on the bench (11 women for 7 men).[118]

Assignment of judges

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114 As noted by Powderly, the same omission is found in the statutes of the Special Court for Sierra Leone, the Residual Special Court for Sierra Leone, and the Special Tribunal for Lebanon (Joseph Powderly, 'Getting to Know the International Criminal Judiciary: a Profile Portrait' in *Judges and the Making of International Criminal Law* (Brill Nijhoff, 2020), 58).

115 Article 36(8)(a)(iii) mandates that States Parties "*shall take into account the need for a fair representation of female and male judges*". See also Joseph Powderly, 'Getting to Know the International Criminal Judiciary: a Profile Portrait' in *Judges and the Making of International Criminal Law* (Brill Nijhoff, 2020), 58). As regards the STCoA, Article 8(1) of its statute provides that "[i]*n electing the judges, due account shall be taken of the experience of the candidates in criminal law, in particular their criminal trial experience and international law, as well as ensuring a geographical and gender balance, and representation across legal systems*".

116 Article 104(2) of the Kosovo Constitution provides that "[t]*he composition of the judiciary shall reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality*". In addition to the Constitution, the Law on Gender Equality requires equal gender representation, defined as 50 per cent - 50 percent across all decision-making levels in all public institutions, including legislative, executive, and judicial bodies, as well as other public institutions.

117 Kosovo Specialist Chambers and Special Prosecutor's Office, 'Chambers' (Kosovo Specialist Chambers) https://www.scp-ks.org/en/specialist-chambers/chambers.

118 International Criminal Court, 'Judges' (International Criminal Court), https://www.icc-cpi.int/judges/judges-who-s-who

72. Judges are assigned from the Roster to Panels by the KSC President.[119] Rule 4 of the Rules on the Assignment of Specialist Chambers Judges provides that, in assigning Judges to the Panels, the President must be "*objective and transparent*" and "*guided by objective criteria such as experience, expertise, seniority, gender and geographical representation, as well as by the preferences of individual Judges and their availability at the time of commencement of the specific proceedings*".

73. Judicial independence requires that judges be assigned to courts and cases in accordance with objective and transparent procedures, as "*a non-transparent and subjective case assignment system is vulnerable to manipulation and corruption*".[120] Thus, the UN Special Rapporteur noted with concern the power of the president of a Russian court to assign cases to judges in "*the absence of an appropriate and transparent procedure for the allocation of cases*".[121] In *Bochan v Ukraine*, the ECtHR found a violation of the right to be tried by an independent tribunal when a defendant's case was reassigned to a different judge in Ukraine even though the defendant "*was not informed of the reasons for the reassignment … and … did not have an opportunity to comment on the matter*".[122]

74. Although Rule 4 sets out certain objective criteria,[123] Article 33(1) in practice grants the President considerable discretion to compose Panels with particular outcomes already in view, given that the President will generally have an awareness of the individual Judges' positions on specific legal questions.[124] This concern is especially acute in relation to the

119 Article 33(1) KSC Law.

120 UN Special Rapporteur, Report 2012 UN Doc. A/67/305 para 65; and Report 2014 UN Doc. A/69/294 para 80.

121 UN Special Rapporteur Gabriela Knaul, Report Addendum, Mission to the Russian Federation (2014) UN Doc. A/HRC/26/32/Add.1, paras 24, 26.

122 *Bochan v. Ukraine* (App. no. 7577/02) (3 May 2007), para 72. See also *Sutyagin v. Russia* (App. no. 30024/02) (3 May 2011), para 185.

123 Judicial independence requires that judges be assigned to courts and cases in accordance with objective and transparent procedures as *non-transparent and subjective case-assignment system is vulnerable to manipulation and corruption*. Non-random systems may also be compatible with independence as long as the assignment of cases is determined by 'objective criteria'. *See* UN Special Rapporteur Gabriela Knaul, Report (2012) UN Doc. A/67/305.

124 Michael G Karnavas, 'Kosovo Specialist Chambers – Part 3: Peculiar features of the Statute' (*michaelgkarnavas.net/Blog,* 20 February 2019) available here and see also discussion in practice: KSC-BC-2020-06, F00434, Thaçi's Defence Application for the Recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release with confidential Annex 1 and Public Annex 2, 16 August 2021, para 9.

composition of the Appeals Panel,[125] and a comparable method of allocation was used by the Appeals Chambers of the ad-hoc tribunals and attracted similar criticism.[126]

Consultations between the President, the Registrar, and the Specialist Prosecutor

75. Rule 12 provides for consultation between the President and the Registrar, and, where necessary, between the President and the Specialist Prosecutor, on matters concerning the administration of judicial activity.[127] Although framed in administrative terms, the provision raises issues concerning the delineation between administrative coordination and judicial independence, particularly insofar as it permits direct interaction between judicial and prosecutorial actors outside the presence of the defence.

76. In its 2017 Referral Decision, the Specialist Chamber of the Constitutional Court considered that Rule 12 could engage Article 31 of the Constitution, which guarantees the right to a fair trial. The Chamber emphasised that natural justice requires adherence to the principles of *audi alteram partem* and equality of arms in all *inter partes* proceedings, and that all parties, not only the Specialist Prosecutor, should be consulted on any administrative issues arising within and influencing the course of specific proceedings.[128] While the Chamber did not invalidate the rule, it highlighted the importance of ensuring that its application does not give rise to perceptions of imbalance or procedural inequality. The rule has remained unchanged in its amended form. Its application in practice is discussed in **Section IV.B.** below.

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125 Michael G Karnavas, 'Kosovo Specialist Chambers – Part 3: Peculiar features of the Statute' (*michaelgkarnavas.net/Blog,* 20 February 2019) available here.

126 Marko Milanovic, 'The Self-Fragmentation of the ICTY Appeals Chamber' (*EJIL: Talk!,* 23 January 2014) *https://www.ejiltalk.org/the-self-fragmentation-of-the-icty-appeals-chamber* : "[T]he case law of the ICTY remains in a state of flux and fragmentation on the specific direction issue – so much so that the guilt or innocence of specific accused will very much depend on which judges get assigned to their Appeals Chamber.

127 Rule 12 provides that "[w]ithout prejudice to the independent performance of their functions, where necessary, the President and the Registrar shall consult and coordinate on the administration of judicial activity of the Specialist Chambers. The President may also consult with the Special Prosecutor when necessary on the same subject-matter".

128 KSC, Decision 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-53 on Specialist Chambers and Specialist Prosecutor, para 32: ""Insofar as Rule 12 provides for unilateral consultations between the President and the Specialist Prosecutor, this rule **may engage Article 31 of the Constitution which guarantees the right to a fair and impartial trial**. The Court emphasises that in all inter partes proceedings natural justice requires adherence to the principles of 'audi alteram partem' and equality of arms. **This necessarily requires that the other party is heard during the course of any proceedings**. **Thus**, having regard to the provisions of Article 3(2) of the Law, **all parties and not only the Specialist Prosecutor should be consulted on any administrative issues which arise within and influence the course of specific proceedings**" (emphasis added).

Recusal or disqualification of KSC Judges

77. Rule 20 KSC RPE governs the recusal or disqualification of KSC Judges. Rule 20(1) provides that a Judge "*shall not sit in any case in which he or she has a personal interest or has or has had any involvement which may affect or appear to affect his or her impartiality, judicial independence or integrity of the proceedings*." Specific grounds include personal interest in the case (including family, professional or subordinate relationships with parties or Victims' Counsel, or situations reasonably perceived as giving rise to a conflict of interest); prior involvement in legal proceedings to which the suspect or accused was a party; prior performance of functions during which the Judge could have formed an opinion adversely affecting impartiality; and any other reason which could reasonably appear to affect impartiality.[129]

78. Rule 20(2) imposes a mandatory self-recusal obligation: a Judge who has reason to believe that grounds for recusal exist must immediately file a confidential application to the President, who may substitute the Judge accordingly.

79. Rule 20(3) permits any party to apply to the President for disqualification, no later than ten days after the grounds become known. The President may summarily dismiss applications that are vexatious, frivolous or lacking in substance; otherwise, a panel of three judges is convened to determine the matter. Proceedings before that panel afford the impugned Judge an opportunity to respond, with parties permitted to make observations. Decisions must be reasoned and public, subject to exceptional redactions.

80. Rule 20(4) addresses whether the impugned Judge may continue to sit pending determination. Rule 20(5) provides that disqualification decisions are final and not subject to higher review.

81. Rule 20(6) provides that where the application concerns the President, the Vice-President assumes the President's functions under Rule 20. On its face, this appears to close the most obvious gap. Whether it does so in practice fell to be determined in the proceedings described below.

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129 Rule 20(1) KSC RPE.

B. Select Practice

82. To date, only a limited number of (public) applications for recusal or disqualifications have been made before the KSC. The applications examined in this section stem from a main, single originating event (a diplomatic briefing in December 2020 ("**December Briefing**") yet gave rise to a sequence of proceedings across two separate cases. Because they engage interconnected issues of judicial independence and impartiality, transparency and accountability, they are examined in some detail.

Background

83. In December 2020, the President, the Specialist Prosecutor (then Jack Smith) and the Registrar appeared together at a diplomatic briefing attended by missions of most EU member States and contributing third States. The briefing was not disclosed to the defence in any pending case. A note was subsequently prepared by one of the attending missions; its representatives were sufficiently troubled by its contents to share it with defence teams, which is how the matters below came to light.[130]

84. Core extracts of that note, as reproduced in the *Thaçi* application, are set out below. The full note remains a confidential annex and its author is unknown. It is therefore anonymous, uncorroborated hearsay, and must be assessed accordingly. It is nonetheless significant that, as discussed below, neither the President nor the Specialist Prosecutor directly denied the substance of the statements attributed to them.

> **President (Judge Ekaterina Trendafilova)**
>
> "In 2011, the European Union established a Special Investigative Task Force (SITF) to collect evidence related to these allegations. After three years, the Chief Prosecutor of the SITF, Clint Williamson, announced that the evidence obtained was of sufficient weight to file an indictment. In order to address these allegations, there had to be an adequate institution for proper judicial proceedings meeting the international

130 KSC-BC-2020-07, Public Redacted Version of Application for Recusal of the President and Vice-President, F00268/RED, 28 July 2021.

standards of fair trial and the other rights of accused persons, as well as ensuring the security of witnesses"

"Asked if the Court will be allowed to hold proceedings outside The Hague, she said the question was addressed in the Exchange of Letters and later reflected in the Law on Specialist Chambers and Specialist Prosecutor's Office, which provides that the seat of the KSC may be equally in Kosovo and in The Hague. The decision to hold proceedings in the territory where the alleged crimes were committed, however, requires complex consideration of the situation in the country, position of witnesses and overall impact on the proceedings."

"**She said referring to the case of Thaçi that she has been informed by Specialist Prosecutor Jack Smith that he will present the reasons why Thaçi should not be released on bail and then the responsible Judge will take a decision on the matter**. She said that such a decision will be based on the KSC Law and the constitution of Kosovo that includes also the European and international conventions, although Kosovo is not a member of the Council of Europe, thus presenting an interesting and complex legal framework in consideration for this issue."

Specialist Prosecutor (Jack Smith)

"He said that he has been **confronted from his first days with attempts to obstruct the Specialist Chambers and Prosecutors Office and their work, mainly by Thaçi, Veseli and people loyal to them** in Kosovo's government and outside. This is the **reason why he was forced in June to make a statement**[131] **to show to the people of Kosovo and the international community the continuous and well-orchestrated efforts by Thaçi to hinder the work and administration of justice.**

131 The statement is available here and announces that, on 24 April 2020, the SPO filed a ten-count indictment charging Thaçi, Veseli and others. The statement specifies that the "indictment is only an accusation", "is the result of a lengthy investigation and reflects the SPO's determination that it can prove all of the charges beyond a reasonable doubt". It further states that "[t]he Specialist Prosecutor has deemed it necessary to issue this public notice of charges because of repeated efforts by Hashim THAÇI and Kadri VESELI to obstruct and undermine the work of the KSC. Mr THAÇI and Mr VESELI are believed to have carried out a secret campaign to overturn the law creating the Court and otherwise obstruct the work of the Court in an attempt to ensure that they do not face justice. By taking these actions, Mr THAÇI and Mr VESELI have put their personal interests ahead of the victims of their crimes, the rule of law, and all people of Kosovo."

Asked what did Thaçi do, he said he was very clear in his statement and he thanked EU and other countries for making statements that eliminated the obstructions by Thaçi. He said the public support given to Specialist Chambers by Ambassadors in Kosovo has helped the court, because witnesses are appearing to the Specialist Chambers realizing the commitment the international community has towards the Specialist Chambers. Now **witnesses who were under immense pressure by Thaçi and his loyal people are having confidence more in the work and ability of Specialist Chambers to serve justice to the victims**.' [page 3, emphasis added]

'He said that **Gucati and Haradinaj have been part of a continuous operation to intimidate the witnesses** and that **he is convinced both Gucati and Haradinaj acted in coordination with Thaçi and Veseli** and **he is investigating if any link can be proved**, although he said environment in Kosovo is difficult to conduct the investigations.' [page 3, emphasis added].

'He said **the strategy of the lawyers of Thaçi is to delay the trial and get bail based on this**,[132] and **any release of Thaçi will harm the process as witnesses will be intimidated and threatened by him and his loyal people, by damaging the process and threatening the witnesses**. He said that the list of witnesses will be kept secret. He asked for countries to agree to relocation agreements with the Specialist Chambers, he said they have already some, but more are needed. He said 37 relocation requests have been made and urged the Ambassadors to pressure their capitals to react faster to this.' [page 4, emphasis added]"

See KSC-BC-2020-06, The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, Thaçi Defence Application for the Recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release, F00434, para 32.

132 It is worth noting that similar accusations by the Special Prosecutor (Jack Smith) were also made in the public status conference of 16 February 2021 (see KSC-BC-2020-06, Status Conference of 16 February 2021 (Transcript), 278-281).

85. Both the Haradinaj and Thaçi applications additionally attributed to the Specialist Prosecutor a statement that certain defendants (whose name are redacted in the Haradinaj application but of which one is identified as Thaçi in the latter's pre trial brief) "*will get life sentences*".[133]

86. The Hardinaj application also stated that the note recorded the President having "*complained that* [REDACTED] *compromises* [sic] *a large number of lawyers which complicates the work of the Specialist Chambers*",[134] and that she had done so without "put[ting] *into perspective by explaining that the case before the Specialist Chambers is by far the largest and most complex case to be heard, with four Defendants who face numerous charges of some of the most serious crimes under international law – crimes which involve an enormous amount of evidential and legal work and thus require multiple lawyers and extensive legal teams*".[135]

Haradinaj and Gucati - Application for the Recusal or Disqualification of Judge Trendafilova and Vice-President Judge Smith

87. On 26 July 2021, following the assignment of Trial Panel II, Mr Haradinaj's defence filed an application for the recusal or disqualification of Judge Trendafilova from all judicial, administrative and case-management functions in the case, "*on the grounds that President Trendafilova's statements at [the] confidential diplomatic briefing undermine her independent and impartial judicial decision-making and representation of the Kosovo Specialist Chambers […] and seriously harm the proper administration of justice before the Specialist Chambers or the proper internal functioning of the Specialist Chambers and that President Trendafilova's conduct may have caused harm to the standing of the Specialist Chambers*".[136] The Haradinaj defence also sought the recusal or disqualification of Vice-President Judge Smith as both Vice-President and as Presiding

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133 KSCF00268/RED, Public Redacted Version of Application for Recusal of the President of the Specialist Chambers, Judge Ek[a]terina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith, Presiding Judge of Trial Panel II, 28 July 2021 (confidential version filed on 26 July 2021) (public with confidential annexes), para 37(c); KSC-BC-2020-06/F00434/A01/CONF, Annex 1-Notes from Diplomatic Briefing on 7 December 2020, 16 August 2021, 4. As cited in KSC-BC-2020-06/, Public Redacted Version of Pre-Trial Brief of Mr Hashim Thaçi, F01050, 8 November 2022, Fn 33.

134 KSCF00268/RED, Public Redacted Version of Application for Recusal of the President of the Specialist Chambers, Judge Ek[a]terina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith, Presiding Judge of Trial Panel II, 28 July 2021 (confidential version filed on 26 July 2021) (public with confidential annexes), para 36(a).

135 Ibid, para 45

136 KSCF00268/RED, Public Redacted Version of Application for Recusal of the President of the Specialist Chambers, Judge Ek[a]terina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith, Presiding Judge of Trial Panel II, 28 July 2021 (confidential version filed on 26 July 2021) (public with confidential annexes), para 1.

Judge of Trial Panel II, "*on the grounds of Vice President Smith's prior conduct in a high judicial office in the European Union Rule of Law Mission in Kosovo ("EULEX"), including alleged demonstrated abuse of judicial authority and exercise of political pressure that undermines his judicial decision-making and risks seriously harming the proper administration of justice before the Specialist Chambers or the proper internal functioning of the Specialist Chambers and further that Vice President Smith's conduct may have caused harm to the standing of the Specialist Chambers*".[137] Mr Gucati's defence joined the application.[138]

88. On 6 August 2021, Judge Trendafilanova dismissed all heads of the application.[139] Although she considered the application concerning her own disqualification to have been filed out of time, she addressed the merits in the interests of justice.[140]

89. On her own recusal/disqualification, Judge Trendafilanova held that Rule 20(1) applies only to judges sitting in a judicial capacity, and since she was being challenged in respect of her administrative functions, the rule did not apply. She further held that neither the KSC Law nor the KSC RPE provided any basis for a party to seek the disqualification of the President exercising administrative authority, including the assignment of judges to panels, and on that basis retained competence to determine the application in her own cause.[141]

90. On the substantive question, she described the diplomatic briefing as a "*routine*" institutional event forming part of her representative function under Article 4(3) KSC Law, and characterised the defence's arguments as grounded "*exclusively*" in a "*misinterpretation of comments made at a routine diplomatic briefing and drawn from an unnamed source's summary notes*".[142] She did not directly address or rebut the specific statements attributed to her or to the Specialist Prosecutor.

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137 *Ibid*, para 2.

138 KSCF00269, Joinder re Application for Recusal KSC-BC-2020-07/F00268, 28 July 2021 (confidential) (Joinder).

139 F00272, Decision on the Application for Recusal or Disqualification, 6 August. See also F00268/RED, Public Redacted Version of Application for Recusal of the President of the Specialist Chambers, Judge Ek[a]terina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith, Presiding Judge of Trial Panel II, 28 July 2021 (confidential version filed on 26 July 2021) (public with confidential annexes) ("Initial Application").

140 *Ibid*, para 14.

141 *Ibid*, paras 19-23.

142 *Ibid*, para 20.

91. On the application against Vice-President Judge Smith as Trial Panel judge, it was alleged that Judge Smith, in his capacity as former President of the Assembly of EULEX Judges, had pressured other judges to accelerate cases for political reasons, had indicated that convictions were expected and that judicial positions might be at risk in the event of acquittals, and had sought to influence the outcome of specific cases by instructing judges on how to proceed. Judge Trendafilova summarily dismissed these allegations as "*entirely lacking in substance*", finding that they concerned conduct at EULEX prior to his KSC appointment without demonstrating any connection to a reasonable apprehension of bias in the present proceedings.[143] That reasoning is unsatisfying on two levels:

a. First, it conflates the question of whether the alleged conduct occurred with the question of whether it is relevant. Prior conduct bearing on a judge's attitude towards the presumption of innocence, the weight to be accorded to acquittls, or the relationship between judicial output and institutional security of tenure is not rendered irrelevant merely because it predates the appointment in question – particularly where, as here, it is alleged to have occurred in an immediately adjacent institutional context.

b. Second, the evidence before Judge Trendafilanova comprised a witness statement of Judge Malcolm Simmons, a former EULEX judge, and contemporaneous correspondence from at least two other former EULEX judges. This evidence remains confidential, so that we cannot comment on its content. Nonetheless, to characterise it as "*entirely lacking in substance*" without any visible engagement with that content gives the appearance of a conclusion reached before the analysis was conducted.

92. As regards the application against Judge Smith in his capacity as Vice-President, she dismissed it as moot: since she had not been disqualified from her administrative role, the precondition for the Vice-President to assume her functions, her "*absence or inability to act*" under Article 32(4) of the KSC Law did not arise.[144]

143 *Ibid*, paras 29-35.
144 *Ibid*, para 27.

93. On 13 August 2021, both accused sought reconsideration. On 20 August 2021, Judge Trendafilanova dismissed the application, finding no clear error of reasoning or exceptional circumstances justifying reconsideration.[145]

Thaçi - Application for the Recusal of the President from Assigning a Court of Appeals Panel

94. On 16 August 2021, Mr Thaçi's defence filed an application seeking to recuse Judge Trendafilova from the specific task of assigning a Court of Appeals Panel to adjudicate his detention appeal.[146]

95. The background to the impugned panel composition issue is as follows. Mr Thaçi had applied for provisional release on 4 December 2020, which was refused. In April 2021, a Court of Appeals Panel, including Judge Ambos, dismissed his appeal, but Judge Ambos issued a separate concurring opinion signalling that the existence of a third-State guarantee willing to receive and monitor a released suspect could constitute a significant, potentially decisive factor in favour of conditional release.[147] On 23 July 2021, the Pre-Trial Judge ordered Mr Thaçi's continued detention notwithstanding the support of two third-State guarantees, including from a contributing State. Mr Thaçi sought to appeal. When the President assigned a Court of Appeals Panel to hear his extension of time request for that appeal, Judge Ambos was replaced by Judge Emilio Gatti, while the other two judges remained unchanged.[148] The defence contended that this substitution, read together with the Specialist Prosecutor's statements at the December Briefing about the consequences of Mr Thaçi's release and the President's stated assignment of a same pre-trial judge to all detention review proceedings to ensure consistency across decisions,

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145 KSC-BC-2020-07, Decision on the Request for Reconsideration of the Decision on Recusal or Disqualification, 20 August 2021, F00278.

146 KSC-BC-2020-06, F00434, Thaçi's Defence Application for the Recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release with confidential Annex 1 and Public Annex 2, 16 August 2021.

147 See KSC-BC-2020-06/IA004/F00005, Separate Concurring Opinion of Judge Kai Ambos, para 5(ii): "the existence of a Third State that may receive and, if necessary, monitor a released suspect or accused may constitute an important, perhaps decisive offer within the framework of conditional release".. "such an offer, if concretely made and supported by guarantees, including from the respective Third State, may shift the balance in favour of conditional release".

148 KSC-BC-2020-06/IA010/F00002, Decision Assigning a Court of Appeals Panel to Consider Request Regarding Time Limits, 29 July 2021; KSC-BC-2020-06, F00434, Thaçi's Defence Application for the Recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release with confidential Annex 1 and Public Annex 2, 16 August 2021, para 9.

indicated that the President's assignment function had been improperly influenced by those communications.[149]

96. On 24 August 2021, Judge Trendafilanova dismissed the application, reiterating that Rule 20 KSC RPE does not apply to the President's administrative functions, and explaining that the panel variation reflected the ordinary operation of the roster system, under which assignments lapse upon disposal of the relevant phase of proceedings, and denied any connection to the December Briefing.[150]

97. On 31 August 2021, the Thaçi defence filed a request for reconsideration,[151] and on 6 September 2021, it filed a further application seeking the disqualification of Judge Emilio Gatti from the Court of Appeals Panel assigned to decide Mr Thaçi's appeals on provisional release and jurisdiction, and the reinstatement of the originally constituted Appeals Panel.[152] The defence did not allege subjective bias on Judge Gatti's part but argued that his appointment by a President whose impartiality was in question sufficed to generate an appearance of bias, and that the panel variation amounted to the replacement of a judge in violation of Articles 30(3) and 33(1) KSC Law.[153]

98. On 17 September 2021, Judge Trendafilanova dismissed both applications.[154] A subsequent referral to the Specialist Chamber of the Constitutional Court was also dismissed.[155]

Conclusion and assessment

99. Five concerns emerge from this sequence of proceedings.

149 F00434, Thaçi's Defence Application for the Recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release with confidential Annex 1 and Public Annex 2, 16 August 2021.

150 KSC-BC-2020-06, Decision on Application for the Recusal of the President, 24 August 2021, F00440.

151 KSC-BC-2020-06, Thaçi Defence Request for Reconsideration of the 24 August 2021 Decision on Application for the Recusal of the President, 31 August 2021, F00449.

152 KSC-BC-2020-06, Thaçi Defence Application for the disqualification of Judge Emilio Gatti from the Court of Appeals Panel adjudicating Mr Thaçi's appeals on provisional release and jurisdiction, 6 September 2021, F00457.

153 *Ibid.*

154 KSC-BC-2020-06, Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel, 21 September 2021, F00476.

155 KSC-CC-2022-15, Decision on the Referral of Hashim Thaçi Concerning the Right to an Independent and Impartial Tribunal Established by Law and to a Reasoned Opinion, 13 June 2022.

100. The first relates to the KSC's framework: the combination of the President's broad discretion over panel composition, the absence of any mechanism for parties to challenge the exercise of that discretion, and the President's resulting authority to determine applications for her own disqualification creates a gap in the framework.

101. The second concerns the December Briefing. Whatever weight is accorded to the note (and its status as anonymous hearsay must be kept in view), neither the President nor the Specialist Prosecutor directly denied the substance of the statements attributed to them. The President's response in *Haradinaj and Gucati* was to characterise the defence's arguments as a misinterpretation without engaging with the specific content; only in *Thaçi* did she address the *ex parte* communication concern. However, the Specialist Prosecutor's attributed statements, asserting obstruction by individuals not yet charged relevant to pending bail applications, and predicting life sentences for named defendants, remain, on the record as it stands, unrefuted. His statements fall to be considered separately, under Article 6(2) ECHR and the established principle that public statements by prosecutorial authorities may themselves constitute a violation of the presumption of innocence.[156]

102. A third concern arises from the identity of the audience of the December 2020 Briefing. As discussed in **Section III**, and as Judge Ambos' concurring opinion had made clear, third-State consent to receive and monitor a released detainee may be a potentially decisive condition of provisional release, and the contributing States represented at the December Briefing were among those whose cooperation would determine whether release was practically available to Thaçi. To the extent that the alleged warning by the

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156 See for e.g., *Allenet de Ribemont v France*, Judgment, (10 February 2005) ECHR (Ser. A.), para 41; *Eshonkulov v. Russia* (App. no. 68900/13) (15 January 2015) paras 74–75; *Ismoilov v. Russia* (App. no. 2947/06) (24 April 2008) paras 162ff. See also: *Saidov v. Tajikstan* (Comm. no. 2680/2015), 4 April 2018, para 9.4; *Gridin v. Russia* (Comm. no. 770/1997), 18 July 2000, para 8.3.
Concerns about the Specialist Prosecutor's approach to the presumption of innocence are not confined to the December Briefing. In December 2018, the SPO issued a production order to a suspect requiring disclosure of documents concerning his whereabouts between 1998 and 2000, with a warning that non-compliance would be treated as disobedience to the law. The defence referred the order to the Specialist Chamber of the Constitutional Court, arguing violations of the privilege against self-incrimination and the presumption of innocence under Article 6(2) ECHR and Articles 30(6) and 31(5) of the Kosovo Constitution. The Constitutional Chamber granted an interim measure suspending the order. The SPO subsequently withdrew it, on the basis that the interim measure had redressed the alleged violation, with the result that the Chamber never ruled on the merits (see: Kosovo Specialist Chambers, "*The Interim Measure Order upon Mr. Mahiri's Request*", KSC-CC-2019-05, Hague, Netherlands, 7 February 2019; Lekë Batalli, 'Parallel Justice: A First Test for Kosovo Specialist Chambers and Specialist Prosecutor's Office' (*Verfassungsblog*, 4 March 2019) https://verfassungsblog.de/parallel-justice-a-first-test-for-kosovos-specialist-chambers-and-specialist-prosecutors-office/).

Specialist Prosecutor that "*any release of Thaçi will harm the process as witnesses will be intimidated and threatened by him and his loyal people, by damaging the process and threatening the witnesses*" was indeed made to that audience, in a closed forum and without the knowledge or participation of the defence, it raises questions that go beyond the presumption of innocence and touch on the integrity of the provisional release process itself.

103. The fourth concern relates to transparency. The briefing was not disclosed to any defence team in any pending case. Parties had no contemporaneous knowledge that it had taken place, no opportunity to respond to what was said, and no means of raising concerns until a copy of the note was shared by an anonymous mission representative.

104. The fifth concern arises from the terms in which the application against Judge Smith was dismissed. As noted above, the allegations rested on evidence that was neither anonymous nor hearsay. To characterise such evidence as "*entirely lacking in substance*", without any visible engagement with its content, is difficult to reconcile with the material on which it was based. That the conduct alleged predated his KSC appointment is a question going to relevance, not to substance; and relevance was not, on any reading, the basis on which the application was rejected.

C. Conclusion

105. Overall, the KSC has established a relatively strong normative framework for the independence and impartiality of its judges, consistent with the requirements under Article 6(1) ECHR. It is not, however, immune from criticism. In respect of the *structural* concerns identified by the Ombudsperson - i.e., the exclusively international composition of the bench and the relationship between the Court and its funding States - we have not identified a breach of Article 6(1) ECHR. We have nonetheless identified substantive concerns which bear more broadly on the Court's accountability and, therefore, its legitimacy.

106. The exclusively international composition of the bench is a deliberate design choice that traces back to the origins of the court (see **Section II.A.**, above). The KSC sits within the Kosovo judicial system; its judges rule on questions of Kosovo constitutional law. That function is discharged entirely by international judges, predominantly from the

Western European and Others group.[157] This is not merely a departure from the traditional hybrid tribunal model, it inverts it. Where hybrid tribunals typically use international participation to supplement domestic capacity, the KSC uses it to displace domestic participation entirely, producing what Ochs and Walters characterise as "*an internationally dominated court with minimal local involvement*" that subverts the goals of local ownership, capacity building, and transitional justice.[158] This design feature brings into question the competence of the KSC in relation to domestic law and practice.

107. Further, where the composition of the bench tracks that of the court's principal funding and nominating States, the appearance of institutional independence from those States is weakened, and that weakness is not without consequence for the court's broader legitimacy. The overlap between funders and nominators also invite an uncomfortable parallel: that a seat at the table of justice is reserved for those who can afford it. Greater transparency about the relationship between the court and its funders — the parameters of that relationship and the expectations, if any, set by financing States — would go a considerable way towards immunising the KSC against that criticism. There is no good reason why that transparency should be withheld.

108. Those structural concerns are compounded by what the practice examined reveals. The KSC operates in a demonstrably difficult environment. That does not, however, explain the fact that statements attributed to the President and the Specialist Prosecutor at the December Briefing were never directly denied. The proceedings examined in **Section IV.B** were a missed opportunity to confront the substance of what was said and provide a clear and public account. The silence that remains on record, particularly in respect of the statements attributed to the Specialist Prosecutor, is troubling.

109. It is against that background that we make the following two recommendations:

a. First, consideration should be brought to amend Rule 20 to provide an express mechanism for parties to seek the recusal or disqualification of the President in

157 Joseph Powderly, 'Getting to Know the International Criminal Judiciary: a Profile Portrait' in *Judges and the Making of International Criminal Law* (Brill Nijhoff, 2020), 49.

158 Sara L. Ochs & Kirbi Walters, 'Forced Justice: The Kosovo Specialist Chambers' (2022) 32 Duke Jornal of Comparative & International Law, 239. See also Beth Van Schaack, 'The Building Blocks of Hybrid Justice' (2016) 44 Denv. J. Int'l L. & Pol'y 169, 172.

respect of *both* judicial and administrative functions. The Rule as it stands leaves the most consequential actor in the court's institutional structure, the person who assigns all judges to all panels, beyond the reach of any party challenge.

b. Second, diplomatic briefings and similar institutional communications attended by the President and the Specialist Prosecutor should be subject to a published protocol. At a minimum, that protocol should require notification to parties in pending proceedings that such a briefing has taken place, together with disclosure of any statements made that bear on those proceedings. More fundamentally, where such briefings bring together the principal institutional actors of the court (the Chambers, the Registry and the Specialist Prosecutor's Office) a representative of the defence interest should also be present. The most appropriate vehicle for this at the KSC is likely to be the KSC Ombudsperson, who acts independently to monitor, defend and protect the fundamental rights and freedoms of persons interacting with the KSC and SPO.

V. PRELIMINARY OBSERVATIONS ON ADMISSIBILITY OF EVIDENCE

110. Questions surrounding the admission of evidence have been the subject of significant debate since the earliest international criminal proceedings.[159] The tendency of some prosecutors to flood the record with large volumes of documentary material, facilitated by liberal admissibility thresholds and the deferral of admissibility assessments to the end of trial, has generated recurring tensions in proceedings before international and hybrid tribunals alike.[160]

159 Yvonne McDermott, 'The Admission and Exclusion of Evidence' in *Proving International Crimes* (OUP, 2024), 39.

160 See for e.g., Prosecutor v Gbagbo and Blé Goudé, Reasons for Oral Decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, ICC- 02/ 11- 01/ 15- 1263, 16 July 2019, Opinion of Judge Tarfusser, para 4. See also Y. McDermott, Proving International Crimes, Oxford University Press (2024), Chapter 3 (The Admission and Exclusion of Evidence), pages 49-50: "*Admissibility rules also protect judicial economy and the efficiency of proceedings by preventing the record fro, being flooded with irrelevant material or evidence to which very limitd weight could reasonably be accorded*". For KSC proceedings, see for e.g., KSC-BC-2020-06, Status Conference of 16 February 2021 (Transcript), 237-256, 264-271.

111. The following sections set out the key rules applicable to the admission of evidence before the KSC and offer preliminary observations on their application in the proceedings to date.

A. General Principles

112. Rule 137 provides that evidence is submitted by the parties but may also be ordered by the Panel "*if considered necessary for the determination of the truth*". The Panel shall "*assess freely all evidence submitted in order to determine its admissibility and weight*". As discussed further in **Section VI.B.**, below, this leaves considerable scope for judicial intervention in the conduct of proceedings.

113. Rule 138(1) establishes a four-part conjunctive test: evidence is admissible if it is relevant, authentic, has probative value, and its admission does not cause unfair prejudice to the proceedings. Evidence which satisfies this test will be admitted "*unless excluded*". Rule 138(4) further empowers the Panel to request verification of the authenticity of evidence obtained out of court, subject to the constraints of Article 37(5) KSC Law.

114. The KSC legal framework affords the Trial Panel broad discretion on both *whether* and *when* it may rule on the admissibility of evidence.[161] Two distinct approaches have emerged in KSC proceedings. In *Shala* and *Mustafa*, the Panel followed a widespread provisional acceptance into the record, deferring admissibility decisions until the close of trial.[162] In *Thaçi et al.* (Case 6), the Panel applied a *prima facie* test of authenticity and relevance at the point of tender, reserving questions of weight for the judgment stage.[163] The practical consequences of these divergent approaches, particularly for how the parties prepare and argue their cases, are considered below.

115. The deferred submission approach, under which evidence is accepted provisionally into the record, and a final determination on relevance and probative value is reserved to the

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161 Shala Appeal Judgment; KSC-CA-2024-03/F00069/RED/57, para 139. See also para 141: "*the Panel is of the view that Rule 138(1) of the Rules, read in connection with Article 40(6)(b) of the Law, does not impose on a trial panel a duty to rule on admissibility of evidence under a specific timeframe*".

162 *Specialist Prosecutor v Shala*, Decision on the submission and admissibility of non-oral evidence, KSC- BC-2020- 04/ F00461, 17 March 2023; Specialist Prosecutor v Mustafa, Decision on the submission and the admissibility of evidence, KSC- BC- 2020- 05/ F00169, 25 August 2021.

163 KSC-BC-2020-06, Decision on Admission of Documents Shown to W04769, 27 November 2023, F01963.

judgment stage, is not novel to the KSC and has been adopted at the ICC. It has, however, sustained criticism. For instance, Yvonne McDermott, in her comprehensive study of evidence before international criminal tribunals, identifies the approach as generating significant uncertainty and potential unfairness for the parties, with detrimental consequences for how cases are prepared and argued.[164] Notably:

a. The deferred submission approach leaves parties uncertain as to which evidence the Chamber will ultimately rely upon — a concern illustrated by the *Gbagbo and Blé Goudé* acquittal, where the Presiding Judge's Opinion revealed that the majority of the prosecution's documentary exhibits would not have passed even a basic admissibility test in many domestic systems, a conclusion the prosecution had no opportunity to address during trial because admissibility had never been definitively ruled upon;[165] and

b. The approach undermines the defence's ability to prepare its case, since without clarity on admissibility, the defence risks expending excessive resources challenging evidence that is ultimately deemed inadmissible, while inadequately addressing evidence the Chamber does admit and rely upon in its judgment.

116. The KSC Appeals Panel in *Shala* explicitly acknowledged this latter concern, observing that "*while neither the Law nor the Rules do require an immediate ruling by trial panels on issues of admissibility, postponing the admissibility assessment to a later stage in the proceedings may have detrimental effects in terms of fairness to the Parties, in the sense that neither the SPO nor the Defence may know for sure what evidence will ultimately be considered by the Judges*".[166]

B. Exclusionary rules

117. Rule 138(2) KSC RPE introduces an exclusionary rule for evidence obtained in violation of the KSC Law, the KSC RPE, or international human rights law standards. Such

164 Yvonne McDemott, 'The Admission and Exclusion of Evidence' in *Proving International Crimes* (OUP 2024), 44-53.

165 Prosecutor v Gbagbo and Blé Goudé, Reasons for Oral Decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, ICC- 02/ 11- 01/ 15- 1263, 16 July 2019, Opinion of Judge Tarfusser, para 4 (references omitted) as cited in Yvonne McDemott, 'The Admission and Exclusion of Evidence' in *Proving International Crimes* (OUP, 2024), 53.

166 KSC-CA-2024-03, Appeal judgment, F00069/RED, 14 July 2025, para 146.

evidence must be excluded if either of two conditions is met: first, the violation casts substantial doubt on the reliability of the evidence; or second, admission would be antithetical to or would seriously damage the integrity of the proceedings.

118. The operation of this rule was considered by a Panel of the KSC Court of Appeals Chamber in *Shala*, where it found in respect of Shala's 2016 interview by the Belgian authorities that Shala was not informed of his right to legal assistance and was not afforded the right of access to a lawyer during this interview, and that this procedural failure constituted a violation of the standards of international human rights law as per Rule 138(2) of the Rules.[167] Nonetheless, the Appeals Chamber found that "*in light of the extent of the other procedural guarantees offered to Shala in the context of the 2016 Belgian Interview, there would be 'no indicia of unreliability or possible damage to the integrity of the proceedings if the interview is admitted*'".[168] However, it should be noted that the Trial Panel did not rely, in the Trial Judgment, on the 2016 Belgian Statement for any of its findings.[169]

119. Rule 138(3) KSC RPE provides an absolute and unconditional exclusionary rule for evidence obtained under torture or other inhuman or degrading treatment. Unlike the Rule 138(2) test, this exclusion allows no balancing: such evidence is inadmissible regardless of its reliability or the circumstances of the violation. This absolute prohibition reflects the status of the prohibition of torture as a peremptory norm of international law. A question that remains to be resolved, however, is whether Rule 138(3) will be narrowly construed to limit itself to evidence obtained directly by the entity exercising the torture, or whether the KSC will adopt a rights-based approach extending the exclusion to evidence obtained where an individual was interrogated within a broader context of torture or coercion, an issue that has arisen both in the *Al-Hassan* proceedings at the ICC[170] and in litigation concerning Guantanamo detainees.[171]

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167 KSC-BC-2020-04, Decision on Shala's Appeal Against Decision Concerning Prior Statements, I006/F00007, 5 May 2023, paras 75-76.

168 *Ibid,* paras 80-81.

169 KSC-CA-2024-03/ F00069/RED, Appeal judgment, 14 July 2025, para 113.

170 *Prosecutor v Al Hassan*, Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements', ICC-01/12- 01/18-1475, 17 May 2021, 1-7.

171 *Prosecutor v Al Hassan*, Request for Leave to File *Amicus Curiae* Submission on Behalf of Ammar Al Baluchi**,** ICC-01/12-01/18-1200, 7 December 2020, paras 4-9; see also: Carol Rosenberg, 'Lawyers Press Case That 9/11 Confessions Given to FBI Are Tainted' (*New York Times,* 29 July 2019) https://www.nytimes.com/2019/07/29/us/politics/september-11-confessions-guantanamo.html.

120. Rule 139 KSC RPE is also worth noting as it governs how the Panel assesses and weighs evidence when reaching its judgment: (i) inadmissible evidence shall not be considered; (ii) the evidence shall be assessed *holistically* in light of the entire body of evidence;[172] (iii) corroboration is not required; (iv) the weight of witness testimony hinges on credibility and reliability; (v) circumstantial evidence should be assessed with caution; (vi) inconsistencies in a piece of evidence do not per se require rejection; (vii) the Panel may accept parts of a piece of evidence and reject others; and (viii) the manner in which evidence was collected and its likely impact on the fairness of proceedings will be taken into account.

121. Rule 136(3) provides that once the case is closed the Panel may not receive further submissions or hear evidence, unless exceptional circumstances require otherwise. In *Thaçi et al.* (Case 6), a question arose after the close of proceedings as to whether the SPO's continued disclosure of material to the Panel during deliberations (pursuant to its ongoing obligations under Rules 103 and 112) was permissible under Rule 136. The defence argued that such disclosures constituted impermissible submissions of evidence to the Panel and amounted to *ex parte* contact during deliberations. The Panel rejected both arguments, finding that disclosure does not constitute submission of evidence within the meaning of Rule 136, that the Panel retained a legitimate interest in overseeing the SPO's continuing disclosure obligations, and that notification of disclosure to the Panel did not constitute impermissible *ex parte* contact. The Panel further noted that its judgment would be based exclusively on material tendered and admitted on the record, and that disclosed but unadmitted material would not affect its assessment of the evidence.[173]

122. The decision is not without difficulty from a fairness standpoint. Whatever the formal distinction between *disclosure* and *submission*, the practical effect of the SPO communicating material to the Panel during deliberations, including, material

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172 See McDermott on the risks inherent to a holistic approach: "The danger to the holistic approach is that it might be used to 'paper over the cracks', so to speak, or to brush over some specific gaps in the evidence because of the judges' impressionistic feeling that this particular accused is guilty. Such an approach may be suitable in a system where the standard of proof is l'intime conviction du juge, but it is profoundly unsuited to a system of proof beyond reasonable doubt. An appeal to holism may also result in a less focused prosecution case." in Yvonne McDermott, 'Strengthening the Evaluation of Evidence in International Criminal Trials' in *Strengthening the validity of international criminal tribnals* (Brill, 2018), 186-187.

173 KSC-BC-2020-06, *Decision on the Defence Request for an Order to the SPO Pursuant to Rule 136*, F03716, 2 April 2026.

characterised as exculpatory before the Panel but as inculpatory in separate proceedings,[174] is that the Panel is exposed to information that the defence has no opportunity to address.

C. Untested Evidence

123. Rules 153 to 155 provide the specific procedural mechanisms for the admission of written statements in lieu of oral testimony. Rule 153 permits the admission of prior recorded testimony from other proceedings where a witness is unavailable to testify in person, subject to conditions including that the evidence goes to the proof of a matter other than the acts and conduct of the accused as charged in the indictment, unless additional safeguards are met. Rule 155 provides for the admission of statements of deceased witnesses subject to equivalent conditions.

124. Both rules operate within the constraint imposed by Rule 140(4)(a), which provides the critical limiting principle on the use of untested evidence: a conviction may not be based "*solely or to a decisive extent*" on the statement of a witness whom the Defence has had no opportunity to examine. This rule gives effect to the fundamental fair trial right to examine or have examined witnesses, guaranteed by Article 6(3)(d) of the ECHR, Article 31(4) of the Kosovo Constitution and Article 21(4) of the KSC Law.

125. The KSC Appeals Panel in *Shala* clarified that the Rule 140(4)(a) prohibition "[applies] *only to the facts constituting the elements of the crimes or the modes of liability alleged, and to any other facts indispensable for entering a conviction*",[175] and that it applies to "*individual criminal incidents even where multiple such incidents are brought under a single count and are therefore not individually 'indispensable' for a conviction*".[176] The Appeals Panel also cautioned that where one piece of untested evidence is used to corroborate another piece of untested evidence, a trial panel must exercise caution to ensure that findings indispensable for a conviction do not rest solely or decisively on untested evidence.[177]

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174 *Ibid.*

175 KSC-CA-2024-03, *Specialist Prosecutor v Shala*, Appeal judgment, F00069/RED/, 14 July 2025, para 478.

176 *Ibid*, para 483. A similarly restrictive interpretation of the principle enshrined in Rule 140(4)(a) KSC RPE was also rejected by the IRMCT in the *Karadžić* Appeal Judgement (paras 460-475).

177 KSC-CA-2024-03, *Specialist Prosecutor v Shala*, Appeal judgment, F00069/RED/, 14 July 2025, para 480.

126. The *Shala* appeals judgment also resolved an important question about the relationship between Rule 140(4)(a) and the ECtHR's Article 6 jurisprudence. Under the relevant Strasbourg case law, "*counterbalancing factors*" (such as an accused's ability to cross-examine witnesses who testified about similar conduct) can, in principle, save a conviction notwithstanding its decisive reliance on untested evidence where the trial as a whole was fair.[178] Rule 140(4)(a) admits no such qualification: the prohibition is categorical, and the overall fairness of proceedings is not a cure.[179] The rule therefore functions as a floor that neither the SPO nor the Trial Panel can circumvent by pointing to the overall quality of the proceedings.

127. These principles bear directly on the *Thaçi et al.* proceedings. The SPO argued, at paragraphs 1408 and 1409 of its final trial brief,[180] that the Defence's non-objection to the admission of certain statements under Rules 153 and 155 amounted to a waiver of the right protected under Rule 140(4)(a) at the conviction stage.[181]

128. In *Shala*, the SPO applied under Rule 153 to admit the written statements of witnesses originally scheduled to testify live, characterising their evidence as cumulative, or corroborative, of live witnesses. The Trial Panel admitted those statements over defence objection. The Appeals Panel found that convictions which rested decisively on that admitted but untested evidence violated Rule 140(4)(a),[182] and attributed responsibility for the resulting situation to the conduct of both the SPO and the Trial Panel.[183] The *Shala* Appeals panel further rejected the proposition that cross-examination of other witnesses on broadly similar facts could serve as an adequate counterbalance to the absence of cross-examination of the specific untested witnesses.[184]

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178 *Ibid*, paras 485-486.

179 KSC-CA-2024-03, *Specialist Prosecutor v Shala*, Appeal judgment, F00069/RED/, 14 July 2025, para 486.

180 KSC-BC-2020-06, *Thaçi et al*, Closing Statement Transcript, 9 February 2026, page 28454. See also KSC-BC-2020-06, Further Redacted Version of Public Redacted Version of Final Trial Brief on Behalf of Kadri Veseli with Confidential Annexes 1 and 2, F03666/RED2, 19 January 2026, para 44.

181 KSC-BC-2020-06, *Thaçi et al*, Closing Statement Transcript 13 February 2026, page 28889.

182 KSC-CA-2024-03, *Specialist Prosecutor v Shala*, Appeal judgment, F00069/RED/, 14 July 2025.

183 *Ibid*, para 593. It notably identified the SPO's belated filing of Rule 153 applications, after the deadline set by the Trial Panel and after key live witnesses had completed their testimony as potentially distorting the defence's cross-examination strategy in respect of those witnesses. At paragraph 600, it further identified the SPO's failure to elicit from its live witnesses evidence capable of corroborating or clarifying the decisive untested allegations as a further dimension of prosecutorial responsibility. the evidentiary gap having been created by the manner in which the SPO chose to present its case. The Panel concluded that the resulting convictions violated Rule 140(4)(a) and the Shala's fundamental fair trial right, and could not stand to that extent.

184 *Ibid.*

129. In *Thaçi et al.*, witnesses initially scheduled to testify as live witnesses were switched to written admission late in proceedings, after other prosecution witnesses had already completed their testimony.[185] How the Trial Panel addresses the SPO's waiver argument, and whether any conviction rests decisively on those untested statements, will determine whether the resulting judgment withstands scrutiny under Rule 140(4)(a) as interpreted in *Shala*. This question is particularly acute given the composition of the evidentiary record. By the close of evidentiary proceedings in December 2025, approximately two years and eight months after the start of trial, 134 witnesses had testified in court, with an additional 164 witness statements admitted in written form only.[186] Around two thousand of the over five thousand exhibits were admitted via the bar table after the close of prosecution evidence.[187]

D. Admissibility of documents obtained from the Serbian authorities

130. The admission of evidence provided by the Serbian authorities has been among the most contested issues in KSC proceedings, and particularly in *Thaçi et all* (Case 6). Concerns have rested on three compounding factors:

a. The first is Serbia's political and legal position with respect to Kosovo.[188] Serbia does not recognise Kosovo's independence (under Article 182 of the Serbian Constitution, Kosovo remains formally designated a Serbian province) and continues to characterise the KLA as a terrorist organisation. The Humanitarian Law Centre has documented that Serbian official memory politics since 2012 have been shaped by a narrative built on Serbian victimhood and the heroisation of Serbian armed forces, with the systematic exclusion of crimes committed by

185 KSC-BC-2020-06, Further Redacted Version of Public Redacted Version of Final Trial Brief on Behalf of Kadri Veseli with Confidential Annexes 1 and 2, F03666/RED2, 19 January 2026, para 44.

186 Of which 125 called by the Prosecution, two called by Victims' Counsel and seven called by the Defence.

187 KSC-BC-2020-06, Further Redacted Version of Public Redacted Version of Final Trial Brief on Behalf of Kadri Veseli with Confidential Annexes 1 and 2, F03666/RED2, 19 January 2026, para 82.

188 See for e.g., the concerns raised in KSC-BC-2020-06, Public Redacted Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4 (F00877, dated 12 July 2022), 21 July 2022.

Serbian forces against Kosovo Albanians – a narrative actively promoted through State-controlled media.[189]

b. The second is Serbia's demonstrated institutional interest in the outcome of KLA-related prosecutions before the KSC.[190] In 2018, Serbian Foreign Ministry General Secretary Veljko Odalović stated publicly that Serbia had tracked down archives and worked with those who had relevant information to produce documents concerning alleged KLA crimes.[191] Serbian prosecutor Dragoljub Stanković was reported to have described his role as finding and encouraging witnesses to give statements to the SPO, characterising this as serving Serbia's interests by drawing attention to Serbian victims and advancing cases that the ICTY had not resolved.[192] Serbian Foreign Minister Ivica Dačić characterised the KSC proceedings as an opportunity to demonstrate KLA criminality and to counter what he described "*the Albanian lobby*" in the United States Congress.[193] These statements do not establish impropriety: a State providing evidence and encouraging witnesses to come forward is not, of itself, acting improperly, and the desire to see justice done for Serbian victims is a legitimate one. What is fair to say, however, is that Serbia approached its engagement with the SPO as a matter of national interest, which is relevant to how the reliability and independence of that engagement falls to be assessed.[194]

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189 Humanitarian Law Centre, 'Memory Politics of the 1990s Wars in Serbia: Historical Revisionism and Challenges of Memory Activism (Humanitarian Law Center, 2021), available at https://www.hlc-rdc.org/wp-content/uploads/2021/10/Politika_secanja_en.pdf

190 See for e.g., concerns raised in KSC-BC-2020-06, Public Redacted Version of Pre-Trial Brief of Jakupski, 22 October 2022, paras 27-30 and KSC-BC-2020-06, Public Redacted Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4 (F00877, dated 12 July 2022), 21 July 2022.

191 Koha.net, 'Serbia has many documents proving KLA crimes' (*Koha.net*, 23 July 2018), available at https://www.koha.net/en/arberi/serbia-ka-shume-dokumente-qe-deshmojne-krimet-e-uck-se

192 Kosovo Online, 'Serbia secured witnesses against former KLA members' (*Kosovo Online*, 5 November 2020), available at https://www.kosovo-online.com/vesti/hronika/srbija-obezbedila-svedoke-protiv-bivsih-pripadnika-ovk-5-11-2020

193 Telegraf, 'Serbia's offensive on US Congress: World Will Finally Hear about KLA Crimes', (*Telegraf*, 07 August 2019) available at https://www.telegraf.rs/english/3089889-we-reveal-details-of-serbias-offensive-on-us-congress-world-will-finally-hear-about-kla-crimes.

194 See also allegations advanced in KSC-BC-2020-06, Public Redacted Version of Pre-Trial Brief of Jakupski, 22 October 2022, para 27: "[…] It is clear that much of the SPO's evidence emanates directly from the Serbian State or, at least, has been gathered with the aid of Serbia. The SPO relies on witnesses directly from the Serbian intelligence services, including those who were actively engaged in Kosovo during the conflict. Indeed, some of these witnesses appear to have been part of, or otherwise supported individuals involved in, a common plan of the Serbian regime to inflict crimes against humanity and war crimes on the people of Kosovo and who were dedicated to the defeat of the KLA who stood in their way. **One such witness**, [REDACTED], **was even offered incentives by the Head of the Serbian intelligence and by the Serbian President to cooperate with the SPO**. [REDACTED] appear to have been contacted

c. The third concerns the provenance and integrity of documents seized by Serbian security forces during the 1998–99 conflict.[195] This concern is grounded in the ICTY Trial Chamber's findings in *Đorđević* regarding the staging of fabricated crime scenes and broader efforts by Serbian State actors to suppress, remove and conceal evidence of crimes against Kosovo Albanian civilians.[196]

131. These concerns do not compel the conclusion that Serbian-source material is inadmissible *per se* as a category. Provenance alone cannot be dispositive: findings that Serbian State actors fabricated scenes and concealed evidence during the conflict does not establish that *every* document alleged to have been seized by Serbian forces from KLA members is *necessarily* unreliable. The same applies to witnesses identified by Serbian authorities for the purpose of these proceedings.

132. In the authors' view, two requirements follow.

a. First, Serbian State handling, or involvement in the collection, of evidence cannot be *assumed* as neutral. While there can be no categorical rule that applies different admissibility standards to evidence according to its national origin, the specific institutional interests and documented conduct of the Serbian State identified above are factors that, when present, bear directly on the *application* of the ordinary rules governing authenticity and chain of custody. As such, judges should apply those rules with particular rigour – especially where originals are missing or the chain of custody is unverifiable.[197] The bare assertion of provenance or recognition of names within a document should not, without more, satisfy the *prima facie* authenticity threshold.

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through the Serbian State and **a representative of Serbia attended their interviews with the SPO**. [REDACTED]" (emphasis added and footnotes omitted).

195 See for e.g., concerns raised in KSC-BC-2020-06, Public Redacted Version of Pre-Trial Brief of Jakupski, 22 October 2022, para 28; KSC-BC-2020-06, Public Redacted Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4 (F00877, dated 12 July 2022), 21 July 2022; KSC-BC-2020-06, Further Redacted Version of Public Redacted Version of Final Trial Brief on Behalf of Kadri Veseli with Confidential Annexes 1 and 2, 19 January 2026, para 78.

196 *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Judgement, 23 February 2011, paras 415-416, 483.

197 See in that respect concerns raised in KSC-BC-2020-06, Further Redacted Version of Public Redacted Version of Final Trial Brief on Behalf of Kadri Veseli with Confidential Annexes 1 and 2, 19 January 2026, paras 29-32 and 77-78; KSC-BC-2020-06, Public Redacted Version of Pre-Trial Brief of Jakupski, 22 October 2022, paras 27-30; KSC-BC-2020-06, Selimi Closing Oral Statements - 13 February 2026 Transcript.

b. Second, the defence must have adequate opportunity to challenge both the admission and probative value of such material. Both requirements are grounded in the applicable international human rights jurisprudence which applies the right to examine witnesses to documentary evidence, and considers the defendant's right to challenge such evidence to be a feature of the right to adequate time and facilities for the preparation of a defence. For instance, the ECtHR has found a violation where domestic courts consistently refused a defendant's requests for production of original documents serving as the basis for conviction.[198] The Human Rights Committee, interpreting Article 14 ICCPR, has similarly held that where the source of incriminating evidence has a motive to falsify, courts must treat that evidence with particular caution, and that a failure to do so may itself constitute a fair trial violation.[199]

133. Against that background, two questions arising from the *Thaçi et al.* (Case 6) proceedings warrant attention:

a. How the Trial Panel assesses evidence from Serbian authorities; and

b. The outcome of any Defence disclosure requests concerning the SPO's relationship with Serbia and the chain of custody of material obtained from it.

134. On the first question, we are limited in our conclusions as the case is currently at the deliberations stage and the judgment pending. The following *preliminary* observations are therefore limited to the Panel's approach thus far.

135. The Panel's stated starting point, that the "*the fact that these documents came from a Serb or from Serbian authorities does not, on its own, raise doubt regarding their authenticity and/or reliability so as to render them inadmissible*",[200] is legally sound. The proceedings should nonetheless be examined close to assess whether the threshold for *prima facie* authenticity has been set at

198 *Papageorgiou v Greece*, App. No. 59506/00 (9 May 2003) paras 35-43.

199 *Larrañaga v Philippines*, Communication No. 1421/2005, Comm. No. 1421/2005, Views adopted 24 July 2006, para 7.4.; *Arutyuniantz v. Uzbekistan* (Comm. no. 971/2001), 30 March 2005, para 6.3.

200 KSC-BC-2020-06, Panel, Decision on Prosecution Motion for Admission of Evidence of W00072, W02153 and W04586 Pursuant to Rule 154, F01664, 10 July 2023, para 35. See also F 01963, Decision on Admission of Documents Shown to W04769, 27 November 2023, para 28.

a level that effectively reverses the burden of proof onto the Defence. In that respect, the hearings of 20 and 25 March 2024 are illustrative and merit attention.

136. The Panel admitted a handwritten notebook and a typed document with handwritten additions, both purported to be contemporaneous KLA intelligence and counter-intelligence records seized by Serbian authorities during the conflict and subsequently transmitted via the ICTY / International Residual Mechanism for Criminal Tribunals ("**MICT**") to the SPO. The SPO's chain of custody narrative rested not on evidence in the record but on a statement from the ICTY *Haradinaj* proceedings and which had not been disclosed to the Defence or tendered for admission.[201] The SPO contended that the "*Defence ha*[d] *not demonstrated any basis to challenge the authenticity of the document*", and that since the witness had recognised his name and that of several others, "*the content of the item demonstrate*[d] *its KLA provenance and authenticity including when considered with other documents*".[202]

137. The Panel admitted both documents. In doing so, it acknowledged that "*the Defence bears no burden in this regard*", but then proceeded to find that "*the Defence has not offered any credible explanation as to why the documents should be taken to be anything other than records of intelligence and counter-intelligence gathering conducted by unknown individuals*".[203] These two propositions are

201 KSC-BC-2020-06, Trial Hearing Transcript Case 6, 20 March 2024.

202 KSC-BC-2020-06, Trial Hearing Transcript Case 6, 19 March 2024, Page 13418.

203 KSC-BC-2020-06, Trial Hearing Transcript Case 6, 25 March 2024, Page 13521: "Finally, though the Defence bears no burden in this regard, the Panel finds that the Defence has not offered any credible explanation as to why the documents should be taken to be anything other than records of intelligence and counter-intelligence gathering conducted by unknown individuals in respect of individuals suspected of collaboration with Serb authorities or Serb officials. The Panel has found in a prior decision, that is F01963, paragraph 28, that there is no basis to suggest that documents provided by Serbian authorities are prima facie suspicious and that the Defence itself has offered such documents for admission. Thus, the Panel is satisfied that the documents are prima facie authentic". See also Trial Hearing Transcript Case 6, 20 March 2024, pages 13506-13510: "JUDGE METTRAUX: […] Of course, you don't have the onus of establishing the requirements for admission or to dispel them. It's for the Prosecution as offering party to do so. But I want to understand what your case is in relation to that document. Are you telling us that these are fake, forgeries, or that you've established evidence of fabrication in these documents? Or are you simply underlining your proposition that the Prosecution has failed to meet its own burden? […] MS. ROWAN: […] The starting position is, considering the vacuum in which this document appears, this document is incapable of self authenticating. When we consider both the background of the facts of this case and the context in which this war occurred, and **if one looks at the content of the document, the content of that document and the knowledge that would have been required to be possessed to author that document is not a document that could be said to be unique to the KLA.** The Panel and the SPO are not able to set aside any other inference. T**his document is just as likely to have been authored by Serb intelligence themselves** because, of course, for example, Serb intelligence may well were the document to be true that's not our case, but were the document to be true, there are Serbian authority figures, perhaps, Serbian persons who may well have had similar knowledge that would have enabled them to write such a document […] JUDGE METTRAUX: I'll stop you there again. I mean, we are talking about this document. I don't think it assists me, at least, to suggest that something happened somewhere

internally contradictory: if the absence of a credible defence explanation operates as a reason to admit, the practical burden has shifted regardless of its *formal* allocation. The significance of this is compounded by the scale: the defence further contended that it had identified through the Courts evidence management platform at least 2,356 documents originating from Serbia or its organs - a significant proportion of the overall evidentiary record. The authentication standard applied to Serbian-source material is therefore not a marginal question; it bears on the evidential foundation of the case as a whole.

138. On the second question, the Defence has sought, on at least two occasions, an order of disclosure from the panel of all material emanating from the Serbian state, its organs, and its agents, together with the provenance of any such material relied upon by the SPO.[204] The SPO declined, contending that the Defence had not demonstrated that its relationship with Serbia, "*without more*", affected the reliability or credibility of the evidence obtained, and confirming only that no Serbian-source evidence was being withheld pursuant to Rule 107. The SPO position was that its relationship to Serbia was analogous to any other information provider. Unfortunately, these questions remain unresolved on the public record as no publicly available decision has been identified in respect of these motions, despite them dating from 2023. The absence of any publicly available ruling is itself a transparency concern.

139. Finally, it bears repeating that these observations are necessarily preliminary: they are based on the public record alone, and the questions they raise would benefit from more dedicated and detailed examination than the scope of this report permits.

E. Conclusion

140. The KSC was established to deliver justice that the region's then existing domestic courts could not, and to do so to a standard that commands international confidence. The

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else. I'll ask you the question simply: **Do you have any indication that this document is anything other than what it purports to be; and if so, on what basis?** MS. ROWAN: Well, **Your Honour, in my submission, that is reversing the burden of this trial."** (emphasis added). See also Case 6, Trial Hearing Transcript Case 6, 20 March 2024, page 13507.

204 See KSC-BC-2020-06, Public Redacted Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4 (F00877, dated 12 July 2022), 21 July 2022. See also KSC-BC-2020-06, Veseli Defence Submissions for 11th Status Conference (F00744), 21 March 2022, paras 31-32; KSC-BC-2020-06, Veseli Defence Submissions for 12th Status Conference (F00806/A01), 18 May 2022.

evidentiary questions examined in this section are not peripheral to that mission; they are especially acute given the broader context in which these proceedings sit. Whether or not accusations that the KSC proceedings serve to rewrite the historical narrative of the conflict are well-founded (and this report makes no conclusions either way), the evidentiary foundations of any conviction must be capable of withstanding scrutiny, and that scrutiny can only be met through the highest standards of fairness[205] and the greatest possible transparency in how the evidentiary record is constructed and relied upon. A record flooded with poorly authenticated material of marginal probative value would not serve that standard; it undermines it, by distorting the defence's ability to prepare, and lending credence to criticism that ought otherwise to be answerable.

141. It is accordingly recommended that dedicated attention be given (including through a more exhaustive review) to the evidentiary questions identified in this section as well as their cumulative impact on the ability of the defence to prepare and present its case, with a view to ensuring that the evidentiary framework meets the standard of transparency and fairness that the KSC's mandate demands.

VI. PRELIMINARY OBSERVATIONS ON THE PRINCIPLE OF EQUALITY OF ARMS

142. This section examines the principle of equality of arms as it applies to proceedings before the KSC. It identifies preliminary concerns across a range of areas — including access to counsel, adequate time and facilities to prepare a defence, disclosure, concurrent proceedings, legal aid, witness protection, and the right to interpretation — before examining in greater depth the issue of judicial questioning. No conclusive finding of a violation of equality of arms can be made at this stage; the concerns identified are preliminary indicators that warrant sustained and systematic scrutiny, and that assessment can only be completed once judgments are delivered and independently reviewed. Nonetheless, the seriousness and breadth of those concerns is such that sustained trial monitoring across KSC proceedings is recommended as a matter of priority.

A. Challenges

205 Yvonne McDermott, 'Setting the Highest Standards of Fairness, or Just "Fair Enough"' in *Fairness in International Criminal Trials* (OUP, 2016), 147.

143. Equality of arms is an inherent and fundamental feature of the right to a fair trial. The KSC Appeals Chamber has recognised that "[t]*he right to a fair trial guaranteed by Article 21 of the Law covers the principle of equality of arms between the prosecutor and accused in a criminal trial, which goes to the heart of the fair trial guarantees*".[206] The Appeals Panel observed that "*this principle embodies the obligation to ensure that neither of the parties is put at a disadvantage when presenting their case*", and that the ECtHR has described it "*impl*[ying] *that each party must be afforded a reasonable opportunity to present* [its] *case – including* [its] *evidence – under conditions that do not place* [it] *at a substantial disadvantage vis-à-vis* [its] *opponent*".[207]

144. Violations of the right to equality of arms have been found on their own, though they commonly arise in connection with a specific component of the right to a fair trial, and are not confined to the minimum fair trial guarantees.[208]

145. The institutional strength of the prosecution – as a permanent actor with dedicated staff – is a structural feature of criminal proceedings, both domestic and international, that must inform any assessment of equality of arms.[209] At the KSC, the SPO "*took over the personnel and mandate*" of the SITF in September 2016,[210] and as early as July 2014, the SITF's Chief Prosecutor had announced that the investigation had produced compelling evidence sufficient to file indictments against certain former senior officials of the KLA.[211]

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206 KSC-CA-2022-01, Appeal Judgment (Gucati and Haradinaj), F00114, 2 February 2023, para 50.

207 KSC-CA-2022-01, Appeal Judgment (Gucati and Haradinaj), F00114, 2 February 2023, para 50. Although in this instance the Panel cited *Dombo Beheer v The Netherlands*, a judgment relating to civil proceedings where the reference to 'each party' in that case therefore referred to two adversaries on an equal footing and where the claimant bears the evidential burden (see Yvonne McDermott, 'The Highest Standards of Fairness' in *Proving International Crimes* (OUP, 2021), 35), the ECtHR has expressed the same formulation consistently when assessing the criminal limb of Article 6 (see for e.g., *Foucher v. France*, App. 22209/93, 18 March 1997, para 34; *Bulut v. Austria,* App. 17358/90, 22 February 1996, para 47; *Bobek v. Poland*, App. 68761/01, 17 July 2007, para 56; *Klimentyev v. Russia*, App. 46503/99, 16 November 2006, para 95).

208 Amal Clooney & Philippa Webb, *The Rights to a Fair Trial in International Law* (OUP, 2021) 748 (electronic version).

209 Yvonne McDermott, 'The Highest Standards of Fairness' in *Proving International Crimes* (OUP, 2021), 35; Masha Fedorova, 'The Principle of Equality of Arms in International Criminal Proceedings' in Colleen Rohan and Gentian Zyberi (eds.), *Defense Perspectives on Internationl Criminal Justice*, (CUP, 2017), 204-234, at 206; Charles C. Jalloh and Amy DiBella, 'Equality of Arms in International Criminal Law: Continuing Challenges' in William A. Schabas, Yvonne McDermott, and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Aldershot: Ashgate, 2013), 251, 263–4.

210 Kosovo Specialist Chambers and Special Prosecutor's Office, 'Special Investigative Task Force' (Kosovo Specialist Chambers) https://www.scp-ks.org/en/spo/special-investigative-task-force.

211 Kosovo Specialist Chambers and Specialist Prosecutor's Office, 'Statement of the Chief Prosecutor of the Special Investigative Task Force' (Kosovo Specialist Chambers, 29 July 2014) available here; KSC-BC-2020-06, Status Conference of 16 February 2021 (Transcript) and KSC-BC-2020-06, Status Conference of 17 December 2020 (Transcript)).

146. As foreshadowed in the introduction, a comprehensive review of equality of arms at the KSC falls outside the scope of this report. The assessment of such a broad subject would require sustained observation of proceedings over time and access to information that a report of this kind cannot replicate.

147. The following discussion therefore identifies preliminary concerns arising from our research that warrant further scrutiny and analysis:

a. **Access to counsel** - The KSC Registry Practice Direction on Counsel Visits and Communications provides that only Counsel and Co-Counsel are entitled to privileged visits and communications with detained persons. Other members of the defence team (for e.g., assistants to counsel, case managers, legal consultants) may accompany counsel or co-counsel but cannot conduct privileged visits independently.[212] This formal restriction does not reflect the operational reality of how, in the authors' experience, a defence team functions in international criminal proceedings. In practice, assistants to counsel (also called legal assistants), legal consultants and case managers alike are often qualified lawyers with significant experience and in any event conduct a substantial share of the work of taking instructions, reviewing evidence with the client, and developing case strategy and defence investigations, often through dedicated one-to-one visits with the accused. The Practice Direction's restriction of privileged visit status to Counsel and Co-Counsel ignores this division of labour and creates a structural obstacle to effective preparation that falls disproportionately on detained accused who depend on regular, substantive contact with all members of their legal team.

b. **Adequate facilities to prepare a defence**: Beyond the formal restriction on who may conduct visit, concerns have also been raised about physical infrastructure at the detention centre. According to the Registry, the facility operates at maximum visiting room capacity and must borrow space from other tribunals at short notice, in some instances confirming visits only hours in

212 Kosovo Specialist Chambers and Special Prosecutor's Office, 'Registry Practice Direction on Detainees: counsel visits and communication' (adopted on 23 September 2020), available here.

advance.[213] For instance, at a Status Conference in April 2025 in the *Thaçi et al.* case, multiple defence teams raised this, noting that unpredictable confirmation times disrupted travel arrangements and, in at least one instance, an accused's ability to focus on preparing his defence case.[214]

c. **Adequate time to prepare a defence**: The right to adequate time and facilities to prepare a defence was a contested issue in Case 06 from an early stage. At the Status Conference of 16 February 2021, defence teams provided detailed accounts of the obstacles imposed on their preparation by the SPO's disclosure methodology, characterised as a system requiring the defence to reconstruct the prosecution's case from an indiscriminate volume of material.[215] The SPO's response was to allege that the defence was 'seeking delay' and to argue that the defence teams were already well on their way to being prepared (pointing to the defence's detailed first-appearance submissions as evidence of readiness), notwithstanding that the SPO's PTB had not been disclosed, and invoked (*inter alia*) witness intimidation as justification for the need for compressed timelines between SPO disclosure and the start of trial.[216] The defence observed that accusations of delay-seeking were difficult to sustain against teams that had been in the case for only a matter of months, especially when contrasted with the five years the SPO had had to prepare its case.[217]

In the authors' view, the SPO's position was further undermined by an internal tension since it was pressing for an expeditious trial date while resisting defence suggestions that the pre-trial brief be brought forward and with a significant portion of its disclosure that remained outstanding. The Veseli defence characterised the SPO's approach as a "*policy* […] *to handicap the Defence to the last possible moment*" and "*keep the Defence as much as possible in the dark till the last possible moment before the trial*".[218] This tension was foreshadowed by the position articulated by SPO at the December 2020 Status Conference, when the SPO acknowledged that it could file the pre-trial brief by June or July 2021 but

213 KSC-BC-2020-06, Status Conference of 17 December 2020 (Transcript), 26170 – 26175.
214 KSC-BC-2020-06, Status Conference of 17 December 2020 (Transcript), 26170 - 26175
215 KSC-BC-2020-06, Transcript of 16 February 2021– Status Conference, 270-292
216 KSC-BC-2020-06, Transcript of 16 February 2021 – Status Conference, 277–282.
217 KSC-BC-2020-06, Transcript of 16 February 2021 – Status Conference, 291–292
218 KSC-BC-2020-06, Transcript of 16 February 2021 – Status Conference, 287-288.

indicated it would only do so if trial were to follow three months later, suggesting it would withhold earlier filing if trial were scheduled for a later date, even where earlier filing was practicable.[219] In the authors' view, on its face, this position appears difficult to reconcile with anything other than a deliberate decision to calibrate the timing of disclosure so as to minimise the defence's preparation window.

The SPO ultimately filed its pre-trial brief on 24 February 2022, with an initial version having been filed *ex parte* on 17 December 2021, though significant disclosures remained outstanding and extensive redactions, including to the indictment itself, remained in place by the time the defence filed its own PTBs in response. Trial commenced on 3 April 2023**.**

d. **Concurrent proceedings**: The conduct of concurrent proceedings against a same accused (*Thaçi et al.* Case 06) and *Thaçi et al* Case 12 (administration of justice proceedings) is without precedent in international criminal proceedings. Multiple defence challenges to this arrangement were raised, including a request for severance in Case 12, but were rejected at nearly every available procedural level.[220] The ECtHR has held that it is crucial that both the accused and their defence counsel should be able to participate in proceedings and make submissions without suffering from excessive tiredness.[221] The practical implications of requiring the same accused to face two concurrent trials of this complexity are self-evident: a detained accused attending court all day in one case has limited practical capacity to participate meaningfully in the preparation

219 KSC-BC-2020-06, Transcript of 17 December 2020 – Status Conference, 199-202.

220 KSC-BC-2023-12/F00427-Red-Corr, Thaçi Defence Submissions on the Pre-Trial Calendar; KSC-BC-2023-12/F00602, Order Scheduling Commencement of Trial; KSC-BC-2023-12/F00612, Thaçi Defence Request for reconsideration and adjournment; KSC-BC-2023-12/F00705, Decision on Request for Adjournment of the Start of Trial Proceedings; KSC-BC-2023-12/F00285+A01 Thaçi Defence Preliminary Motion Requesting Severance of the Indictment and Adjournment of Proceedings concerning Mr Thaçi With Public Annex 1 ; KSC-BC-2023-12/F00354/KSC-BC-2023-12/Red Decision on Preliminary Motions for Adjournment and Severance of the Proceedings; KSC-BC-2023-12/IA006/F00004-Red Thaçi Defence Appeal against "Decision on Preliminary Motions for Adjournement and Severance of the Proceedings"; KSC-BC-2023-12/IA007/F00007 = KSC-BC-2023-12/IA006/F00009KSC-BC-2023-12/ AC Decision on Appeals Against "Decision on the Thaçi Defence Preliminary Motion on Jurisdiction" and "Decision on Preliminary Motions for Adjournment and Severance of the Proceedings"; KSC-CC-2025-31/F00003 CC Decision on the Referral of Hashim Thaçi to the Constitutional Court Panel Concerning Fundamental Rights.

221 *Makhfi v. France*, App. 59335/00, 19 October 2004, para 40; *Barberà,Messegué and Jabardo v. Spain*, série A no 146, 6 December 1988, para 70.

of another. This is compounded by restrictions identified in points (a) and (b), above.

e. **Legal aid**: The KSC Legal Aid Regulations were revised in February 2024 to significantly reduce legal aid fees for contempt proceedings. The Association of Defence Counsel practising before the International Courts and Tribunals ("**ADC-ICT**") expressed concern that this reduction (which it characterised as amounting to between 60 and 74%) had been imposed unilaterally, without consultation with list counsel before the KSC or the wider legal profession, and warned that it undermined the right of the accused to a fair trial and jeopardised effective representation.[222]

f. **Balance between witness protection and fair trial rights**: The KSC's regime for witness protective measures is exceptionally broad. Most notably, Rule 80(4)(e) provides that, pursuant to an order by the Panel for the protection of witnesses, measures may include, "*in exceptional circumstances, and subject to any necessary safeguards: (i) non-disclosure to the Parties of any material or information that may lead to the disclosure of the identity of witnesses or victim participating in the proceedings; or (ii)* ***total anonymity of a witness***".[223] Rule 80(1) states that any such measure must be "*consistent with the rights of the Accused*". This goes further than any other international(ised) criminal tribunal. At the ICTY, the *Tadić* Trial Chamber granted partial anonymity to several of the Prosecution's witnesses,[224] but the practice of using anonymous witnesses did not continue post-Tadić, and Rule 69(c) ICTY RPE requires that a witness' identity be disclosed to the defence in advance of their testimony. The same applies at the ICTR and SCSL. Likewise, at the ICC, any witness providing evidence against the defendant must relinquish their anonymity.[225]

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222 Association of Defense Counsel, 'Press release: ADC-ICT Expresses Significant Concern Over The Significant Reduction in Legal Aid at the Kosovo Specialist Chambers' (ADC-ICT, 6 May 2024) available here.

223 Emphasis added.

224 *Prosecutor v. Tadić* (IT-94-1-T), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras 67–68, 75–85. The Tadic case began while the Bosnian War was still ongoing. The ICTY observed that whilst "there [was] some constraint to cross-examination' it 'had to protect witnesses who [were] genuinely frightened" and the prejudice to the defendant's right to examine witnesses could "be substantially obviated by the procedural safeguards".

225 See, e.g., *Prosecutor v. Ngudjolo Chui* (ICC-01/04-02/12 A), Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, 23 September 2013, para 19; *Prosecutor v. Bemba Gombo* (ICC-1/05-01/08-2027), Second order regarding the

International human rights bodies have consistently recognised that a defendant's ability to cross-examine witnesses against him/her is seriously prejudiced if they are not informed of the witness' identity.[226] Nonetheless, the ECtHR does not prohibit anonymous witnesses, requiring instead a balancing exercise to assess whether a trial can still be fair in such circumstances.[227] In its 2017 Referral Decision, the Specialist Constitutional Chamber acknowledged that it could "*accept that, in some cases, it may be necessary to withhold certain evidence from the Defence in order to preserve the fundamental rights of another individual or to safeguard an important public interest*",[228] but emphasised that this should only apply in exceptional circumstances, and that any such measure "*must be sufficiently counterbalanced by the procedures adopted by the judicial Authorities*".[229] What those counterbalancing procedures consist of in practice – and whether they are compatible with the righst of the accused, requires close examination.

g. **Disclosure**: Disclosure is "*vital for a fair trial*",[230] and another area in which equality of arms concerns arise with particular acuity.[231] The scope of this report has not permitted analysis, yet the issues disclosure raises warrant dedicated scrutiny. For instance, the impact of allegedly delayed, piecemeal, and incomplete disclosure on the defence's ability to prepare its case has been a consistent theme in Case 06 (see above). As noted above, the defence PTBs were filed against a backdrop of a heavily redacted indictment, before a trial date had been set and before the SPO had completed its disclosure exercise: 68

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applications of the legal representatives of victims to present evidence and the views and concerns of victims, 21 December 2011, para 19.

226 In *Asani v Macedonia*, the ECtHR observed that "in the case of a fully anonymous witness, where no details whatsoever are known as to the witness's identity or background, the defence faces the difficulty of being unable to put to the witness, and ultimately to the jury, any reasons which the witness may have for lying" (*Asani v. Macedonia* (App. no. 27962/10), 1 February 2018). See also *Khaleel v. Maldives* (Comm. no. 2785/2016), 27 July 2018, 13 March 2019, para 9.5; *Al-Khawaja v. United Kingdom* [GC] (App. nos 26766/05 & 22228/06), 15 December 2011, para 127; *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, ECHR 2000-II, paras 60-62; 2017 Referral Decision, para 133.

227 *Asani v. Macedonia* (App. no. 27962/10), 1 February 2018, para 36; *Donohoe v. Ireland* (App. no. 19165/08), 12 December 2013, paras 79–94.

228 2017 Referral Decision, paras 135-138.

229 ibid, para 137.

230 Alexander Heinze, 'Disclosure: International Criminal Courts and Tribunals' (Max Planck Encyclopedia of International Procedural Law, August 2020) para 1.

231 McDermott notes that "[d]isclosure of both inculpatory and exculpatory materials is easily one of the most litigated fair trial rights before international criminal tribunals, and that trend shows no signs of abating" (Yvonne McDermott, 'The Right to a Fair Trial in Practice in International Criminal Trials' in *Fairness in International Criminl Trials* (OUP, 2016) at 81).

witness identities remained unknown to the defence, and 46,000 pages of new or less-redacted material had yet to be provided, with disclosure scheduled only 30 days before trial.[232]

Against that background, the practical operation of Rule 110 KSC RPE, which provides for sanctions in cases of late disclosure and which has been heralded as a "*promising and progressive example of liberal procedural legislation*",[233] merits examination in its own right: specifically, whether it has operated to protect defence rights or whether its application has relied so heavily on ICTY precedent as to dilute its protective function.

h. **Right to interpretation**: In light of the linguistic background of individuals indicted so far before the KSC, the right to interpretation warrants careful scrutiny. Already we note that in Case 6, at the pre-trial stage, the Albanian translation of the Rule 86(3)(b) mandatory Prosecution's "*detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s)*" and which "*shall be filed together*" with the indictment, was not made available until mid 2021, a matter of acute concern since one of the accused does not speak or read English.[234] The document is not a procedural formality: it is the primary vehicle through which an accused can understand the case being asserted against him and give meaningful instructions to his legal team. Further, at approximately that date, of some 289 case filings, only around 65 had been translated into Albanian, and among the untranslated documents were decisions of fundamental importance, including the decision confirming the indictment and the decision on interim release.[235] Any further such delays - across all KSC cases

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232 See KSC-BC-2020-06/F01050/RED para 15; KSC-BC-2020-06/F00952, Prosecution submissions for fourteenth status conference, 5 September 2022 ("F00952"), paras 11 and 81; Transcript of Fourteenth Status Conference, 1543-1544, 1559-156; Krasniqi PTB, para 10; Selimi PTB paras 16-42.

233 Alexander Heinze, 'The Kosovo Specialist Chambers' Rule of Procedure and Evidence' (*EJIL: Talk!*, 17 Agust 2017) https://www.ejiltalk.org/the-kosovo-specialist-chambers-rules-of-procedure-and-evidence/; Maria Stefania Cataleta and Chiara Loiero, *The Kosovo Specialist Chambers: The Last Resort for Justice in Kosovo* (*LAP* Lambert Academic Publishing, 2021), 108; Michael G. Karnavas, 'Kosovo Specialist Chambers – Part 6: The Rules of Procedure and Evidence (The Proceedings)' (*michaelgkarnavas.net/blog*, 26 June 2017) https://michaelgkarnavas.net/blog/2017/06/26/kosovo-specialist-chambers-part-6/.

234 KSC-BC-2020-06, Transcript of 16 February 2021– Status Conference, 259-260.

235 ibid.

- and their impact on the ability of affected accused to follow proceedings and participate effectively in the preparation of their defence, warrant careful review.

148. The concerns identified above are preliminary indicators that cannot, at this stage, support a finding of a violation of equality of arms in any particular case. They warrant, however, that steps are taken to conduct a more exhaustive assessment, including through sustained trial monitoring.

B. Judicial questioning

149. Of the concerns identified throughout our research, judicial questioning is examined in depth below for two reasons: it sits at the intersection of two other themes examined in this report (judicial impartiality and the admissibility of evidence), and it engages directly the structural tension inherent in the KSC's hybrid framework.

150. The KSC framework vests broad inquisitorial powers in the Trial Panel alongside an adversarial trial structure and in which the burden of proof rests with the prosecution.[236] Rule 127 KSC RPE governs the presentation and examination of evidence in adversarial sequence (and includes the common law terminology of "*direct examination*" and "*cross-examination*"), but provides in terms that "*a Judge may at any stage put any question to the witness*".[237] Rules 132 and 137(1) go further, empowering the Panel to request the parties to produce additional evidence, or to call evidence on its own initiative, when it considers this "*necessary for the determination of truth*". Article 40(6)(e) of the KSC Law additionally authorises the Panel to order the production of evidence beyond that already collected prior to trial or presented during it by the parties. Article 329(4) of the Kosovo Criminal Procedure Code 2012, incorporated by reference, adds that the trial panel "*shall have the authority to collect evidence that it considers necessary for the fair and complete determination of the case*".

151. This tension warrants scrutiny from an equality of arms perspective. Michael Karnavas identified early on that this framework creates a potentially expansive judicial role, warning that civil law judges "*could dominate the proceedings, seeking and admitting evidence they*

236 Rule 140(1) KSC RPE ("*A Panel may find an Accused guilty where guilt is proved beyond reasonable doubt*").
237 Rule 127 KSC RPE; Michael G Karnavas, International Criminal Law Review 20 (Brill, 2020) 77-124, 89.

think is necessary for the truth, and intrusively intervening in the questioning of witnesses".[238] He further warned that such hyper-engagement by one panel, when compared to a less interventionist panel in another case, "*should cause concern*":[239]

> "*From the Defence perspective, this has the potential to raise issues of lack of fairness and impartiality.* ***From an equality of arms perspective, the Defence is inherently at a disadvantage****, regardless of whether the trial proceedings are conducted in a more adversarial or more inquisitorial fashion.* ***Unequivocally, the Specialist Prosecutor*** *(also assisted by Victims' Counsel)* ***is in no real need of any help from the Judges***".[240] (Emphasis added)

152. These were not reactive criticisms, but structural concerns identified at the design stage, before proceedings began. What has since materialised in *Thaçi et al.* (Case 6) warrants consideration against that early warning.

153. Within ten days of the first witness giving evidence in April 2023, the Thaçi and Selimi defence teams raised objections to the manner in which the Panel was conducting its questioning. The defence argued that it is incumbent on the Prosecutor to lead the evidence of a witness *viva voce* if considered relevant, and that the defence's cross-examination will generally be limited to the evidence elicited by the Prosecutor. If the Panel could ask questions on any item that the SPO puts in its 'presentation queue', the defence would have to cross-examine on everything in that queue; that cross-examining in this way, and recommencing cross-examination after judicial questioning, would lead to excessive delay and might force cross-examination estimates to triple or quadruple; and that it is not appropriate for judges to look into unadmitted statements of a witness to "*fish out new lines of inquiry*".[241]

154. The Panel held that the scope of its judicial questioning power "*is broad and is not constrained by any consideration of subject or substance*".[242] It further observed that in this instance the Panel

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238 Rule 127 KSC RPE; see also: Michael G. Karnavas, 'Kosovo Specialist Chambers – Part 6: The Rules of Procedure and Evidence (The Proceedings)' (*michaelgkarnavas.net/blog*, 26 June 2017) https://michaelgkarnavas.net/blog/2017/06/26/kosovo-specialist-chambers-part-6/.

239 Karnavas (n 238).

240 Karnavas (n 238).

241 KSC-BC-2020-06, Transcript of Hearing, 20 April 2023, 3263-3264.

242 ibid, 3267. The Trial Panel relied on Article 40(6)(e) of the KSC Law and Article 329(4) of the Kosovo Criminal Code 2012.

had put questions to the witness on a document which was also listed on the SPO's presentation queue, but that in any event the Panel "*is not limited to questioning witnesses on the basis of material listed in the presentation queue of the calling party*".[243]

155. As regards the defence's objection to a document used by the Panel which the Defence said had been found to be unauthentic by the Kosovo Court of Appeal, the Panel held that it would consider and rule upon any challenge by the Defence to any document which is submitted on the basis of authenticity, and would in due course rule on the challenge by Defence to the authenticity of the document put to the witness by the Panel.[244] It further held that Rule 143(3) KSC RPE (which governs examination of witnesses by the parties and prohibits leading questions in direct examination) does not bind the Panel, since that provision applies to the parties rather than the judges.[245]

156. The KSC Appeals Panel upheld this, requiring only that questioning not give rise to "*the apprehension of bias, suffering of prejudice, or otherwise encroach upon the rights of the Accused*".[246]

157. Subsequent rulings illustrate the evidentiary consequences of that broad power in practice.[247] In March 2024, ruling upon an objection from the Defence concerning the Judges' use of Rule 102(3) documents,[248] the Trial Panel held that it would "***endeavour*** *to give notice of that fact to the parties prior to the commencement of questioning*" when it puts documents to a witness that are from the public domain or which have been disclosed by the SPO at the outset of trial to the Defence pursuant to this rule.[249] In June 2024, this

243 ibid (n 241), 3266.
244 ibid (n 241), 3263-3269.
245 ibid (n 241), 3263-3269.
246 KSC-BC-2020-06, IA028/F00011, Appeals Panel, Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning ("Appeal Decision"), 4 July 2023, para 32.
247 See also concerns raised in the Selimi Final Trial Brief: "Throughout trial, the Panel asked questions of witnesses based on untendered documents, many of which were inadmissible based on the RPE, including statements of individuals not called as witnesses. Many of those documents were not admitted into evidence." (KSC-BC-2020-06, Public Redacted Version of "Selimi Defence Final Brief with Confidential Annex 1" with Public Redacted Version of Annex 1, 19 January 2026, para 34 (footnotes omitted).
248 Rule 102(3) KSC RPE: "The Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in his or her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay. The Specialist Prosecutor shall immediately seize the Panel where grounds to dispute the materiality of the information exist."
249 (emphasis added). KSC-BC-2020-06, In Court – Oral Order, Order on Defence Objection to the Use by Judges of Documents Disclosed to Defence Pursuant to Rule 102(3), 19 March 2024, page 13383.

was extended to Rule 103[250] material also. The need for such notice must be assessed against the scale of the evidentiary record: the defence receives thousands of documents through SPO disclosure, and advance notice of which among them the Panel intends to deploy is critical to reduce the burden of having to anticipate and respond to judicial questioning across that entire corpus, in addition to facing the prosecution's case. That the practice had already produced tangible evidentiary consequences is illustrated by the Panel's admission, in May 2024, of four documents that had only been used during judicial questioning.[251]

158. The quantitative dimension of judicial questioning provides important context. By 11 November 2024, after approximately nineteen months of witness testimony, the Panel had spent 71 hours questioning witnesses, exceeded the individual questioning time of three of the four defence teams individually.[252] In addition, the defence collectively spent a further 31h and 23 minutes in re-examination addressing matters raised by the Panel's questions,[253] compared to just twelve minutes spent by the prosecution responding to the same task.[254] The BHRC requested updated data as of 2026 from the KSC Registry; at the time of publication of this report, no response has been received.

159. Beyond the quantitative dimension, the qualitative character of the Panel's questioning also warrants attention. The defence filed a Joint Defence Request on 13 November 2024, requesting that the Panel take measures to ensure the appearance of impartiality in its conduct of questioning.[255] The request identified three specific concerns:

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250 Rule 103 KSC Rule: "Subject to Rule 107 and Rule 108, the Specialist Prosecutor shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence." The Trial Panel in *Gucati* held that "reasonably suggests" means that "the information in question must point, in some logical manner, towards the innocence or mitigated guilt of the Accused, regardless of whether the SPO finds the informational reliable or "fanciful". Holding evidence otherwise would lead to the SPO's entitlement to withhold exculpatory evidence in violation of the Accused's right to a fair trial and the equality of arms principle." (see KSC-BC-2020-07/F00413/RED, para 43).

251 KSC-BC-2020-06, F02293, Trial Panel, Decision on Prosecution Request for Admission of Documents Shown to W04739, confidential, 8 May 2024.

252 In the same period, the prosecution conducted examination-in-chief over approximately 201 hours; Victims' Counsel took just under nine hours; and the four defence teams used 154, 54, 52, and 59 hours respectively. The Panel's seventy-one hours of questioning.

253 KSC-BC-2020-06, Joint Defence Request for the Trial Panel to take Measures to Ensure the Appearance of Impartiality of the Proceedings and Avoid Prejudice to the Defence, F02718, 13 November 2024, para 20.

254 KSC-BC-2020-06, Joint Defence Request for the Trial Panel to take Measures to Ensure the Appearance of Impartiality of the Proceedings and Avoid Prejudice to the Defence, F02718, 13 November 2024, para 20.

255 ibid.

a. that the Panel was not using its questioning power to test the prosecution case;

b. that the Panel was systematically suggesting answers to witnesses through the formula "*I don't want to put words in your mouth*" as a preface to leading questions;

c. and that the Panel was using judicial questioning to elicit evidence against the accused that went beyond the scope of the prosecution's direct examination.

160. It falls beyond the scope of this report to conduct an *exhaustive* analysis of *all* judicial questions and their impact on the accused's rights to a fair trial, not least since the number of witnesses heard in camera renders that exercise necessarily incomplete. On our review of publicly available transcripts, however, the formula "*I don't want to put words in your mouth, but...*", is indeed used with notable frequency by at least one member of the Panel, including on a number of occasions as a preface to leading questions.[256] The white coat effect must be borne in mind here. In addition, on at least one occasion a Panel member put questions to a witness on a document he downloaded from the internet, with no prior notice provided to the defence.[257]

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256 See for e.g., KSC-BC-2020-06 Transcripts - Witness W04408, 7 September 2023; Witness Shaun Byrnes, 27 March 2024; Witness Shaun Byrnes, 28 March 2024; Witness Johann Fritsch, 22 May 2024; Witness Jan Rickert, 29 May 2024; Witness Kurtesh Fondaj, 25 June 2024 (see in particular 17195–17205: Examining the witness on the arrest and detention of Blerim Kuqi, Judge Mettraux asked whether it was "*fair to assume*" that a third party was upset (T.17195), whether the witness would dispute that Jakup Krasniqi had communicated the arrest order to the military police, and whether Bislim Zyrapi "did not want to have anything to do with the arrest and imprisonment" of Kuqi (T.17195–96). The Zyrapi question was a call for speculation in the strict sense: the witness had no personal knowledge of Zyrapi's motivations or state of mind in relation to the arrest, and the document he was being shown said nothing about arrest or imprisonment. Inviting the witness to opine on what Zyrapi wanted or intended asked him to reason beyond his evidence into conjecture. Defence counsel for Mr Krasniqi objected on precisely this basis, and Judge Mettraux conceded the point: "I'll reformulate, Mr Ellis. I think you have a point" (T.17196). Judge Mettraux reformulated the question to ask whether the witness would dispute what "Bislim Zyrapi were to say", but as Mr Ellis observed, this did not cure the defect: "**If that is going to be the evidence from another witness, then we need to hear it from the other witness, not from somebody who clearly has no knowledge of it"** (T.17204, emphasis added). Presiding Judge Smith overruled that objection and directed the witness to answer); Witness Paul Williams, 18 September 2025; Witness John Duncan, 23 September 2025.

257 KSC-BC-2020-06 Witness Jan Rickert, 29 May 2024 (see in particular 15707, and also 17015: "*MR. ROBERTS:* Second, if I could just move to some questions from Judge Mettraux. And apologies for addressing a question to the Bench, but it would assist me. There was a document that was referred to by Judge Mettraux. Is it possible to have the ERN of the document so I could bring it up by the Court Officer? **JUDGE METTRAUX:** I don't think there's an ERN, Mr. Roberts, but **you could probably find it online as I did.** It's a publicly available document. **MR. ROBERTS: So am I correct in understanding it hasn't been disclosed to the Defence by the Prosecution in this case? JUDGE METTRAUX: I**

161. As mentioned above, the KSC framework affords the Panel considerable latitude as finder of both fact and law. In the absence of constraints on its scope and direction, such powers create the conditions for a Panel to function, in effect, as a second prosecutor, impacting equality of arms. The defence must then respond not only to the prosecution's case but also effectively to the Panel's case, with all the additional resource implications that entails. This is a foreseeable pitfall of grafting expansive inquisitorial powers onto an adversarial framework without fully resolving the tension between them or providing adequate guardrails.

162. This issue will only become fully assessable upon the publication of the judgment. The extent to which any guilty finding relies on evidence elicited through leading or speculative judicial questioning will be a critical indicator of whether the concerns identified above had material consequences for the fairness of the proceedings as a whole.

C. Conclusion

163. No conclusion as to a violation of equality of arms can be drawn from this analysis alone. The fairness of proceedings must be assessed holistically, taking account of any remedial measures or counterbalancing steps taken by a panel. Some of the pressures documented in this section may yet prove to have been adequately addressed within the proceedings themselves; others may not. Where cases are still pending, that determination cannot be made until the judgment is delivered and its reasoning examined. What this section does establish is that the structural conditions for equality of arms concerns are present and that several have manifested in concrete and documented form. It is sufficient to warrant sustained and systematic monitoring.

VII. PRELIMINARY OBSERVATIONS ON THE PRINCIPLE OF LEGALITY

164. In its 2025 'Judgment on the Referral of Salih Mustafa Concerning Fundamental Rights Guaranteed by Articles 31 and 33 of Kosovo's Constitution ('Mustafa Constitutional Referral Judgment'), the Specialist Chamber of the Constitutional Court declared that the

haven't checked, Mr. Roberts.MR. ROBERTS: So that my understanding to that extent is correct, that it wasn't found within the case file at least. That's all I was seeking to verify […]" (emphasis added)).

KSC operates in compliance with both the principles *nullum crimen sine lege* and the non-retroactivity of criminal law.[258] However, this broad commitment fails to capture the complexities in relation to the principle of legality brought about by the unique institutional nature and history of the KSC, which necessitates that due consideration be given to its practice in relation to the principle of legality. It is beyond the scope of the present review to consider the practice of the KSC as it relates to every element of the principle of legality.[259] Consistent with the purpose of this review, the focus is on areas of actual or potential concern in the practice of the KSC. To this end, three themes are considered: 1) the operation of the *nullum crimen sine lege* principle at the international level, focusing on the need to ensure that judicial interpretation of Articles 13 and 14 of the KSC Law is consistent with customary international law at the time of the offence; 2) the operation of the *nullum crimen sine lege* principle at the domestic level, both in the context of the substantive offences of war crimes and crimes against humanity, as well as is the KSC's reliance on Joint Criminal Enterprise III ("**JSCIII**") as a mode of liability; and 3) the complexity of the *lex mitior* principle in the recent case law of the KSC. The analysis of these areas of practice of the KSC points to concerns that the jurisprudence of the KSC has not to date appropriately engaged with a contextual interpretation and application of the principle of legality within its unique institutional architecture.

165. The principle of legality is entrenched both directly in Kosovo's Constitution,[260] as well as through the domestic incorporation of international human rights instruments, particularly, Article 11(2) of the UDHR; Article 15 of the ICCPR; and Article 7 of the ECHR.[261] Even though there is no apparent conflict between any of these provisions, the co-application of several norms with the same substantive focus can significantly complicate judicial interpretation and reasoning. This potential problem is alleviated, though not fully resolved through a more holistic interpretation of the Constitution. Among the applicable international human rights law norms, Article 7 of the ECHR is effectively privileged within Kosovo's Constitution in that human rights protections

258 *Specialist Prosecutor v. Mustafa*, Judgment on the Referral of Salih Mustafa Concerning Fundamental Rights Guaranteed by Articles 31 and 33 of the Kosovo Constitution and Articles 6 and 7 of the European Convention on Human Rights, KSC-CC-2024-27/ F00011, 17 April 2025 ('Mustafa Constitutional Referral Judgment').

259 The ECtHR has a wide-ranging jurisprudence on Article of the ECHR that engages, non-exhaustively, with: *nullum crimen sine lege*; *nulla poena sine lege*; non-retroactivity of criminal law; *lex mitior*; accessibility and foreseeability; prohibition of extensive interpretation (analogy); and the exception of international crimes clause.

260 Article 33 of the Kosovo Constitution.

261 See the discussion above in **Section IV.A. on** the "*Applicability of the ECHR and ICCPR*".

within the Constitution are to be interpreted consistent with the jurisprudence of the ECtHR.[262] For this reason the ECHR and the jurisprudence of the ECtHR plays a more significant role in the judicial reasoning of the KSC, including as it relates to the principle of legality.

166. The KSC has a limited jurisdiction *ratione materiae*, extending only as follows:

a. The Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Assembly Report.

b. The Specialist Chambers shall also have jurisdiction over offences under Chapter XXXII, Articles 384-386, 388, 390-407, Chapter XXXIII, Articles 409-411, 415, 417, 419, 421, and Chapter XXXIV, Articles 423-424 of the Kosovo Criminal Code 2012, Law 04/L-082 where they relate to its official proceedings and officials.[263]

167. Articles 12 to 16 of the KSC Law addresses two categories of offences, international crimes (crimes against humanity and war crimes); and domestic offences. The domestic offences within jurisdiction of the KSC were criminalised throughout the temporal jurisdiction of the KSC and pose no obvious concerns from the perspective of *nullum crimen sine lege* or the norm against retrospective application. Accordingly, the focus is on international offences.

A. *Nulla crimen sine lege* at the International Plane

168. *Ad hoc* international criminal tribunals do not exist within the domestic legal framework of the states in respect of which they exercise jurisdiction. Accordingly, their ability to exercise jurisdiction is not constrained by the domestic criminal law in force in any given state at any given time, but is instead premised on customary international law as it was at the time of the offence. This was confirmed by the ICTY Appeal's Chamber in *Tadić*:

262 Article 53 of the Kosovo Constitution.
263 Article 6 of the KSC Law.

> "*…the offences listed in Article 5 were all beyond any doubt part of customary international law, and therefore the principle of nullum crimen sine lege is not violated. Article 5 may even be said to be more restrictive than customary international law in force at the time in that it requires proof of a nexus with an armed conflict. Consequently, Article 5 comports with the principle of nullum crimen sine lege*".[264]

169. The KSC Law includes statutory definitions for both crimes against humanity and war crimes. However, Article 12 confirms that the source of law that applies to conduct amounting to international crimes is "*customary international law … applicable at the time the crimes were committed*". Because the KSC Law was enacted on 3 August 2015, postdating the temporal jurisdiction of the KSC (1 January 1998 and 31 December 2000), grounding war crimes and crimes against humanity in contemporaneous customary international law is an important aspect in ensuring the KSC operates consistent with the principle of *nullum crimen sine lege*.[265] However, the KSC is not an international tribunal. As a Kosovo judicial mechanism, prosecutions before the KSC must also be consistent with the principle of legality, both as a constitutional principle and by virtue of the domestic legal effect of international human rights law, is it applies within the law of Kosovo. As flagged earlier, the issue of compliance with the *nullum crimen sine* legal principle at the domestic plane is considered in the subsequent section.

170. Articles 13 and 14 of the KSC Law articulates statutory definitions of war crimes and crimes against humanity. Doing so creates the risk of assuming that these statutory definitions are automatically consistent with the applicable customary international law. This risk is enhanced by the inherent difficulty in determining the existence and scope of a norm of customary international law as it applied in a specific, historic timeframe. To this end, the foundational principles of the KSC includes, "*In determining the customary international law at the time crimes were committed, Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international ad hoc tribunals, the International Criminal Court and other criminal courts*".[266]

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264 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para 141.

265 *Specialist Prosecutor v. Mustafa*, Trial Judgment, KSC-BC-2020-05/ F00494/RED, 16 December 2022 ('Mustafa Trial Judgment').

266 Article 3(3) of the KSC Law.

171. The expression of war crimes and crimes against humanity in the KSC Law is drawn from the Rome Statute. Whilst the language of these offences is minimally adjusted for suitability to the context of the KSC, and some underlying offences are excluded from the KSC Law, the contextual elements of both crimes against humanity and war crimes are wholly consistent with the Rome Statute, and the elements of most underlying offences are indeed directly copied from the Rome Statute. Because the ICC predominantly exercises jurisdiction prospectively, it is not generally restrained by the principle of legality from applying these offences as defined in the Rome Statute, even should any such offences be inconsistent with contemporaneous customary international law. However, where the ICC's jurisdiction is triggered by a United Nations Security Council referral in respect of a State not party to the Rome Statute, similar legality challenges manifest to those faced by the KSC.

172. The Rome Statute was adopted on 17 July 1998, seven months after the commencement of the temporal jurisdiction of the KSC, and came into force on 1 July 2002, a year and a half after the end of the temporal jurisdiction of the KSC. Several commentators have identified that some offences proscribed in the Rome Statute may not have crystalized as offences under customary international law at the time of the drafting of the Rome Statute. Indeed, both the Chairman of the Drafting Committee for the Diplomatic Conference on the Establishment of an International Criminal Court, M. Cherif Bassiouni, as well as the US Representative at the Rome Conference, Michael Scharf, expressed the view that the crime in non-international armed conflict ("**NIAC**") of "*conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities*" was not a crime under customary international law at the time of the adoption of the Rome Statute.[267] This offence is reflected in an unchanged form in the KSC Law.[268]

173. Notwithstanding its inclusion in Article 14 of the KSC Law, to the extent that the offence of use or recruitment of child soldiers during NIAC was not proscribed in customary international law until after 31 December 2000, it does not fall within the jurisdiction *ratione materiae* of the KSC. However, the experience of the SCSL illustrates the risk posed

267 Cherif M. Bassiouni, 'The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities' (2000) 75 International Law Studies 3, page 20; 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', Committee of the Whole, 'Summary Record of the 4th Meeting', A/CONF.183/C.1/SR.4 (20 November 1998), para 54.

268 Article 14(1)(d)(vii) of the KSC Law.

by the scenario where an offence defined in statute is potentially not reflective of customary international law.

174. In the case *Prosecutor v Sam Hinga Norman*, the defendant was, among other charges, indicted for the war crime of child soldier use and recruitment during a NIAC, which was directly copied in the Statute of the SCSL from the Rome Statute, as is the case in the KSC Law.[269] The Defendant made an interlocutory appeal challenging the SCSL's subject matter jurisdiction in respect of this offence on the basis that the charge was inconsistent with the principle of legality, as the offence was not proscribed in customary international law at the time relevant to the indictment. The majority held that the prosecution as it relates to that charge was not inconsistent with the principle of legality.[270] However, the minority opinion of Judge Robertson, which concluded that indeed the prosecution in respect of the charge in question would violate the principle of legality, is widely considered to be correct in law.[271]

175. It may well be that the crime of child soldier use and recruitment is unique among the international crimes within the jurisdiction of the KSC so far as it may not have been a crime under customary international law at the time of the KSC's temporal jurisdiction. Nevertheless, this example is illustrative of a broader risk. As mentioned, in their determination of customary international law, Judges may be assisted by subsidiary sources, including jurisprudence of the ICC and *ad hoc* tribunals.

176. Relying on sources that post-date the temporal jurisdiction of the KSC runs the risk of adopting an interpretation of customary international law that is temporally inconsistent with the *actus reus* under consideration. This risk may seem remote, however, in the period immediately following the adoption of the Rome Statute customary international criminal law went through a rapid period of development. Moreover, all jurisprudence by the ICC post-dates the temporal jurisdiction of the KSC. In relying on subsidiary sources, it is vital that judges consider carefully to what extent the relevant source is reflective of the law contemporary with the events relevant to the charge.

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269 *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, SCSL-2004-14-AR72E, 31 May 2004.

270 ibid, paras 53-54.

271 For a fuller discussion, see: Gus Waschefort, *International Law and Child Soldiers*, (Hart Publishing, 2015), 108-111.

B. *Nullum crimen sine lege* at the Domestic Plane

177. Compliance with the principle of legality at the international plane per the ICTY's *Tadić* formulation is not necessarily sufficient to ensure that domestic courts comply with the principle of legality when prosecuting international offences. At the domestic level, the principle of legality may be understood to require that the conduct in question must have been subject to prosecution by the domestic courts at the time at which it took place. In *Kokkinakis v. Greece*, the ECtHR expressed the *nullum crimen sine lege* principle in the following terms:

> "*...an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable*".[272]

178. In *Vasiliauskas v Lithuania* the ECtHR addressed the progressive development of the criminal law through interpretation, finding that "*Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen…*".[273] Here the Court addressed progressive development of the criminal law through interpretation of preexisting law, not retrospective law.

179. Kadri Veseli, amongst other defendants, challenged the subject matter jurisdiction of the KSC on the basis that not all the offences under customary international law in terms of which the KSC exercises jurisdiction was domesticated during the temporal jurisdiction of the court.[274] Moreover, for a given offence to be prosecuted consistent with the principle of legality, a corresponding offence must have existed in domestic law at the time in question. Veseli's challenge extended to the KSC's reliance on JCEIII as a mode of liability.[275] However, the question whether the KSC's reliance on JCEIII as a mode of

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272 *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [52].

273 *Vasiliauskas v Lithuania* App no 35343/05 (ECtHR, 20 October 2015) [155].

274 *Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 'Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC' KSC-BC-2020-06/F00223, 15 March 2021 (**'Veseli Challenge'**). See further, Lachezar Yanev, 'To Custom or Not to Custom: A Battle for the Applicable Sources of Law at the Kosovo Specialist Chambers' (*EJIL: Talk!*, 10 August 2021) https://www.ejiltalk.org/to-custom-or-not-to-custom-a-battle-for-the-applicable-sources-of-law-at-the-kosovo-specialist-chambers/.

275 Veseli Challenge, paras 94-119.

liability complies with the principle of legality was peripheral to his challenge.[276] Whilst the very notion of JCEIII has proven to be significantly controversial, the current focus is on whether individual criminal responsibility premised on JCEIII is consistent with the principle of legality.

Veseli's Challenge to the KSC's Jurisdiction over Customary International Law

180. The 1974 Constitution of the SFRY regulated the domestication of international law in Kosovo during the temporal jurisdiction of the KSC. Article 181 of the 1974 Constitution entrenches the principle of legality:

"*No one shall be punished for any act which before its commission was not defined as a punishable offence by statute or a legal provision based on statute, or for which no penalty vas threatened. Criminal offences and criminal-law sanctions may only be established by statute. Sanctions for criminal offences shall be imposed by the competent court in proceedings regulated by statute. No one may be considered guilty of a criminal offence until so proven by a final judgement of a court of law. Any person who has been unjustifiably convicted of a criminal offence or who has been deprived of liberty without cause shall be entitled to rehabilitation and compensation for damage by society, and to other statutorily established rights*".

181. Article 210 of that Constitution addresses the domestication of public international law but addresses only treaty law. It provides that for a treaty to be applied directly by the courts; it must first be promulgated. This suggests that at the time of the commission of the offences charged before the KSC, customary international law offences were not directly applicable in the law applicable in Kosovo.

182. In so far as the argument is premised on the proposition that the domestic character of the KSC requires that the conduct in question was criminal in domestic law at the time of its commission, the Pre-Trial Judge held, "*the exercise of categorising a court of law as domestic, international, hybrid, or otherwise, is not dispositive of the law it shall apply when adjudicating cases*".[277] The Judge elaborated that the intention of the legislature in creating the KSC was to

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276 ibid, paras 91-119. To this end Vaseli argued that reliance by the KSC on JCEIII without a statutory basis falls foul of the prohibition against expansive interpretation of the criminal law in terms of Article 7 of the ECHR and Article 33 of the Constitution; that JCEIII does not attach to specific intent crimes; and in any event, there is no adequate basis for JSCIII in customary international law.

277 ibid (n 275), para 98.

establish a specialised court aimed at fulfilling Kosovo's international obligations, ultimately concluding:

> "*In light of the above considerations, the Pre-Trial Judge finds that the essence of the provisions of Article 7 ECHR and Article 15 ICCPR, as reflected in Article 33(1) of the Constitution, lies in the authority of the Kosovar legislator to lawfully adopt domestic legislation explicitly providing for international crimes already existing under customary international law at the material time. In so doing, the legislator can allow – or even mandate – prosecution for conduct that took place before the penalisation was introduced in domestic written law. In such cases, there is actually no issue of retroactivity: the legislator is simply transposing (into its own domestic written legislation) crimes that were already part of the legal order, and that were binding on individuals, according to international law, at the time of the alleged commission of the charged crimes*".[278]

183. This proposition is in tension with the Pre-Trial Judge's correct contention that the functioning of the KSC "*must still be in accordance with the constitutional safeguards, in particular the provision on non-retroactivity, enshrined in Article 33 of the Constitution, Article 7 ECHR, and Article 15 ICCPR*".[279] As the *Kokkinakis* case suggests, compliance with the *nullum crimen sine lege* principle turns on whether, as a matter of fact, an accused could have known or foreseen that their conduct may have given rise to criminal responsibility. Determining that a legislature can enact law that criminalizes conduct for which an accused could not have been prosecuted at the time of the conduct, even if the conduct amounted to crimes under customary international law, is not wholly convincing.

184. In regards to the question of foreseeability, the Pre-Trial Judge held that given the fact that the offences in question were crimes under international law at the relevant time, the accused could foresee that the underlying conduct may give rise to individual criminal responsibility.[280] In discussing the principles *nullum crimen, nulla poena sine lege* in the *Vasiliauskas* case, the ECtHR commented, "*It follows from these principles that an offence must be clearly defined in the law, be it national or international*".[281] However, this statement was made in the general and not in specific consideration of compliance with the principle of legality

278 ibid (n 275), para 101.
279 ibid (n 275), para 90.
280 ibid (n 275), para 104.
281 ibid (n 275), para 154.

in circumstances where the domestic prosecution of crimes under customary international law are at issue and where those crimes were not subject to domestic prosecution at the time. To the extent that this relates to the challenge, the Pre-Trial Judge's decision conflates compliance with legality at the international plane with legality at the domestic plane.

The KSC's Jurisdiction over JCEIII

185. Article 16 of the KSC Law codifies the modes of liability within the jurisdiction of the KSC in respect of war crimes and crimes against humanity. Whilst these do not explicitly include JCEIII, individual criminal responsibility does extend to "*a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of*" war crimes and crimes against humanity.[282]

186. Article 16(1) is materially identical to Article 7(1) of the Statute of the ICTY. When the ICTY first articulated JCEIII in the *Tadić* case, it premised its reasoning on individual criminal responsibility under Article 7(1) of its statute, and concluded that JCE, including JCEIII, is "*firmly established in customary international law*".[283] The ICTY Appeals Chamber articulated three distinct categories of the notion of common design as a form of accomplice liability, in respect of the third category, JCEIII, the following *mens rea* requirements were defined:

> "*(i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to predict this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other*

282 Art 16(1)(a) KSC Law.

283 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para 220.

words, the so-called dolus eventualis is required (also called "advertent recklessness" in some national legal systems)".[284]

187. Given the ICTY's approach in the *Tadić* case, it is not altogether surprising that the KSC has proceeded on the basis that it too has jurisdiction in respect of JCEIII premised on both Article 16(1) of the KSC Law and customary international law. However, in the years since the *Tadić* case, the customary footing of JCEIII has been authoritatively challenged, with the ECCC Supreme Court Chamber concluding that contrary to the finding in *Tadić*, customary international law did not provide a "*sufficiently firm basis*" for criminal liability founded on JCEIII at the time relevant to the indictment.[285] However, as mentioned, the focus is on the question of expansive interpretation of the criminal law.

188. In the *Vasiliauskas* case, the ECtHR held: "*The Court must ascertain whether the domestic courts' interpretation of the offence… was consistent with the essence of that offence and could reasonably be foreseen*". This principle logically extends to the mode or basis of individual criminal responsibility. It may well be that JCEIII is adequately reflective of modes of criminal liability recognized in domestic law at the time of the commission of the alleged offences – this was a matter of contention between the Vaseli and the SPO. However, what is necessary, is that the compliance of JCEIII with the principle of legality be fully considered and reasoned by the KSC.

189. The interpretation advanced in the *Kokkinakis* case is premised on the ability of an individual to know or at least foresee that their conduct may result in criminal liability – this is largely a question of fact. This suggests that where crimes under customary international law are not domesticated at the time of the commission of the offence, the individual cannot know that his acts or omissions relevant to such customary offences will make them criminally liable under domestic law, as indeed it may not. Accordingly, this suggests that where domestic courts have criminal jurisdiction in respect of customary international law offences, those customary offences must have had domestic legal effect at the time of the commission of the offence for prosecution of such offences to be consistent with the principle *nullum crimen sine lege*. In true monist states, customary

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284 ibid.

285 *Co-Prosecutors v Nuon Chea and others* (Appeal Judgment) Case No 002/19-09-2007/ECCC/SC, 23 November 2016, para 791.

international law offences will *ipso jure* have domestic legal effect. However, in dualist states, an act of domestication is needed to transpose customary international offences into the domestic legal framework.

C. Lex Mitior

190. In *Scoppola v. Italy*, the ECtHR confirmed that Article 7 of the ECHR included the *lex mitior* principle, which provides that if the law applicable to a criminal offence change after the offence was committed, the defendant should benefit from the more lenient penalty. The Court held, "*Article 7 § 1 of the Convention guarantees not only the principle of non-retroactivity of more severe criminal laws but also, implicitly, the principle of retroactivity of the more lenient criminal law.*"[286] The development of domestic law from the temporal jurisdiction of the KSC to the present day is uniquely complicated in the Kosovo context. Not only is there a fifteen-year gap between the adoption of the KSC Law and the conduct of the accused, but also the consequences of the declaration of independence of Kosovo of 2008 gave rise to significant law reform. This inherently gives rise to a need for diligence in considering the consequences of legal development on the rights of the accused. The case of Salih Mustafa brings into sharp focus the need for consideration of the KSC's approach to the *lex mitior* principle. This case's complex procedural history is set out below, whereafter the KSC's practice is analysed.

191. Salih Mustafa was the commander of a specialist guerrilla unit within the KLA known as the "*BIA*" unit. Following trial, he was convicted of the war crimes of arbitrary detention, torture and murder and acquitted of the war crime of cruel treatment. In sentencing, the Trial Panel identified the component sentences for each charge he was convicted of as: ten years for the war crime of arbitrary detention; twenty-two years for the war crime of torture; and twenty-five years for the war crime of murder.[287] Based on the principle of totality he was sentenced a single sentence of 26 years' imprisonment.[288]

192. Following his conviction, Mustafa pursued several avenues of appeal and review in respect of various aspects of his conviction and sentence. The procedural history includes the following key judgments and decisions:

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286 *Scoppola v Italy (No 2)* App no 10249/03 (ECtHR, 17 September 2009) [109].
287 Mustafa Trial Judgment, paras 827-831.
288 Pursuant to Rule 163(4) of the Rules.

a. Trial Panel I judgment of 16 December 2022.[289]

b. Appeal Panel judgment of 14 December 2023.[290]

c. Supreme Court Panel decision in respect of application for protection of legality of 29 July 2024.[291]

d. Appeal Panel's decision on the new determination of sentence of 10 September 2024.[292]

e. Supreme Court Panel decision in respect of requests for protection of legality pursuant to the new determination of sentence by the Appeal Panel of 25 February 2025.[293]

f. Constitutional Court Panel's decision on a fundamental rights referral by Mustafa of 17 April 2025.[294]

193. Whilst each of these proceedings were highly complicated and unique, Mustafa's core position in relation to the principle of legality remained largely consistent. Mustafa maintained that the Trial Panel should have applied the Criminal Code of the Socialist Federal Republic of Yugoslavia (1976) ("**1976 SFRY Criminal Code**"), which was in force at the time of the commission of offence, in determining the applicable sentence range.[295] Mustafa argued that the sentencing range for the crime of murder under the 1976 SFRY Criminal Code provides for a maximum custodial sentence of fifteen years.[296] The basis for his argument was the interpretation and application of Article 44(2) of the KSC Law and the applicability of the *lex mitior* principle.

194. Article 12 of the KSC Law provides that the "*applicable law*" to KSC includes "*the substantive criminal law of Kosovo … as applicable at the time the crimes were committed*". Article 15

289 Mustafa Trial Judgment.

290 *Specialist Prosecutor v. Mustafa*, Appeal Judgment, KSC-CA-2023-02/ F00038/RED, 14 December 2023 ('Mustafa Appeal Judgment').

291 *Specialist Prosecutor v. Mustafa*, Decision on Salih Mustafa's request for protection of legality, KSC-SC-2024-02/ F00018, 29 July 2024 ('Mustafa Protection of Legality Decision').

292 *Specialist Prosecutor v. Mustafa*, Decision on the new determination of Salih Mustafa's sentence, KSC-CA-2023-02/ F00045, 10 September 2024 ('Mustafa Appeal Resentencing Decision').

293 *Specialist Prosecutor v. Mustafa*, Decision on Mustafa and SPO protection of legality, KSC-SC-2024-03 & KSC-SC-2024-04/ F00006, 25 February 2025 ('Mustafa and SPO protection of Legality Decision').

294 Mustafa Constitutional Referral Judgment.

295 See, inter alia, *Specialist Prosecutor v. Mustafa*, Defence Notice of Appeal pursuant to Rule 176 (of Rules of Procedure and Evidence) against the Judgment of the Trial Panel I of 16 December 2022, KSC-CC-2023-02/ F00006RED2, 2 February 2023 ('Mustafa Notice of Appeal'), para 12; and *Specialist Prosecutor v. Mustafa*, Second Further Public Redacted Version of Corrected Version of Defense Appeal Brief pursuant to Rule 179 (1) of Rules of Procedure and Evidence ("Rules") with confidential Annex 1, 2 and 3, KSC-CA-2023-02/ F00021, 2 May 2023 ('Mustafa Appeal Brief'), paras 412-413 & 419-427.

296 ibid.

defines "*the substantive criminal laws in force under Kosovo law during the temporal jurisdiction of the Specialist Chambers*", which expressly includes the 1976 SFRY Criminal Code.

195. The *lex mitior* principle is reflected in Article 7 of the ECHR and is entrenched in Article 33(2) and (4) of the Constitution:

> *2) No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed.*
>
> *3) […[*
>
> 4) *Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favorable to the perpetrator.*

196. Article 44(2) of the Law provides:

> *In considering the punishment to be imposed on a person adjudged guilty of an international crime under this Law, the Specialist Chambers shall take into account,*
>
> *a) the sentencing range for the crime provided under Kosovo Law at the time of commission,*
>
> *b) any subsequent more lenient sentencing range for the crime provided in Kosovo Law, and*
>
> *c) Article 7(2) of the European Convention for Human Rights and Fundamental Freedoms and Article 15(2) of International Covenant for Civil and Political Rights as incorporated and protected by Articles 22(2), 22(3) and 33(1) of the Constitution of the Republic of Kosovo, and the extent to which the punishment of any act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2 (a) and (b).*

197. Mustafa's interpretation of the sentencing range under the 1976 SFRY Criminal Code was contested by the Appeal Chamber. Significantly this criminal code provided for the death penalty, which is not a competent sentence for the KSC, which brings into doubt whether it is the *lex mitior*.[297] However, in the present context the focus is on the proper construction of Article 44(2) of the Law and the applicability of the *lex mitior* principle to proceedings of the KSC as it relates to domestic Kosovo law applicable at the time of the offence.

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297 Article 142 of the 1976 SFRY Criminal Code, provided for either "imprisonment for not less than five years or […] the death penalty". Article 38 further provided that the "punishment of imprisonment may not be longer than 15 years" but that "a term of 20 years [may be imposed] for criminal acts eligible for the death penalty".

Appeal Panel Judgment

198. Mustafa's appeal on conviction was dismissed. Whilst his appeal on sentence was partially upheld. His grounds of appeal included: the Trial Panel "*straightforwardly rejected the application*" of the principle of *lex mitior*;[298] it failed to apply/correctly apply the *lex mitior* principle, resulting in violation of his constitutional rights;[299] and it misconstrued Article 44 of the Law, leading to the violation of his rights under Article 33(2) of Kosovo's Constitution.[300] The essence of these arguments were advanced during all subsequent reviews and appeals.

199. To the extent that the appeal was upheld, the Appeal Panel held that the Trial Panel did not adequately discharge its duty to "*take into account*" domestic sentencing ranges; and the single sentence, as well as component sentences, imposed on Mustafa were out of reasonable proportion with sentences imposed for similar offences in similar circumstances, and this amounts to a an error in sentencing by the Trial Panel.[301] His single sentence was reduced from twenty-six years to twenty-two years. The component sentences were reduced as follows: eight years for the war crime of arbitrary detention; twenty years for the war crime of torture; and twenty-two years for the war crime of murder.[302]

200. In rejecting the sub-grounds of appeal, the Court structured its reasoning as follows:

a. Whilst Article 44(2) of the Law provides and imperative on the Tribunal by use of the word "*shall*", that imperative is to "*take into account*", not apply or give effect to.[303] Accordingly, the KSC is not bound by the domestic sentencing regime applicable at the time of the offence.

b. The Court then specifically held that because the KSC is not bound by the domestic sentencing regime, "*the principle of lex mitior is not engaged vis-à-vis these domestic provisions*".[304]

298 Mustafa Notice of Appeal, para 12, Ground 9C.
299 Mustafa Notice of Appeal, Ground 9D.
300 Mustafa Notice of Appeal, Ground 9E.
301 Mustafa Appeal Judgment, para 479.
302 Mustafa Notice of Appeal, para 480.
303 Mustafa Notice of Appeal, para 466.
304 Mustafa Notice of Appeal para 467.

c. In regard to the entrenchment of the principle of *lex mitior* in Kosovo's Constitution, the Court held that the principle is only applicable to law that binds the KSC. The Appeal Panel bolstered its reasoning on this point by reference to the fact that the applicable law of war crimes is customary international law as at the time of the offence, and the KSC is mandated to apply the KSC Law as *lex specialis* and other law directly incorporated into the KSC regime.[305] In particular, the 1976 SFRY Criminal Code is not so incorporated.

201. Following the Appeal judgment, the Applicant filed a request for protection of legality before a Supreme Court panel seeking, inter alia: "*modification of the appeal judgment in relation to sentencing on grounds of alleged failure to adhere to the lex mitior principle*".[306]

Supreme Court Panel decision (protection of legality)

202. The Supreme Court Panel emphasised that it is not the nature of the Court, but the law itself that determines the applicable law.[307] It conducted a more holistic analysis both of the KSC Law as well as Kosovo's Constitution in concluding that the words "*shall take into account*" in Article 44(2) of the KSC Law is to be construed such that relevant the Panel is obliged to consider which applicable sentencing range under Kosovo law is in accordance with the *lex mitior* principle and to then take that sentencing range into account when determining the sentence.[308] In particular, the Supreme Court Panel held, "*the language "shall take into account" must be interpreted in line with the lex mitior principle set out in Article 33(4) of the Constitution, Article 7(1) of the ECHR and as reflected in Article 44(2)(b) of the Law*".[309]

203. The Panel determined that the Appeal Panel erred by not first determining the applicable sentence range before determining the sentence. It rejected the applicability of the 1976

305 Mustafa Notice of Appeal para 468. Article 3(4) of the KSC Law provides "Any other Kosovo law, regulation, piece of secondary regulation, other rule or custom and practice which has not been expressly incorporated into this Law shall not apply to the organisation, administration, functions or jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office. This Law shall prevail over any and all contrary provisions of any other law or regulation".

306 *Specialist Prosecutor v. Mustafa*, Defence Request for Protection of Legality with Confidential Annex 1 and 2 pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules, KSC-SC-2024-02/ F00011, 14 March 2024 ('Mustafa Request for Protection of Legality').

307 Mustafa Protection of Legality Decision, para 76.

308 ibid, para 87.

309 ibid (n 306), para 88.

SFRY Criminal Code as a matter law, and in any event concluded that it is not the *lex mitior*, as it provided for the death penalty in respect of the offence in question. Finding instead that the *lex mitior* is the 2019 Kosovo Criminal Code, which provide for a sentencing range of five to 25 years of imprisonment.[310] The Panel referred the matter back to the Appeal Panel for resentencing and directed the Appeals Panel to be guided by: "*(i) Rule 163 of the Rules; (ii) the sentencing range of five to 25 years identified by this Panel in Mr Mustafa's case; (iii) the sentencing factors identified by the Appeals Panel;164 (iv) the jurisprudence analysed by the Appeals Panel and by this Panel;165 and (v) the specific circumstances of Mr Mustafa's case*".[311]

204. The Appeal Chamber imposed a single sentence of fifteen years, with the constituent sentences being fifteen years for the war crime of murder; thirteen years for the war crime of torture; and still eight years for the war crime of arbitrary detention.[312]

205. Both the Applicant and the SPO filed separate requests for protection of legality, with both application effective being dismissed.[313] The Applicant then made a referral to the Constitutional Court Panel alleging violations of his rights under Articles 22, 31 and 33 of Kosovo's Constitution and Articles 6 and 7 of the ECHR.[314]

Constitutional Panel

206. The basis of the referral, in so far as the issues under discussion are concerned, was that the Supreme Court Panel misapplied the principle of *lex mitior* in excluding from the applicable sentencing range the 1976 SFRY Criminal Code.[315] Importantly, the Constitutional Panel's jurisdiction was limited to determining the alleged rights violations. It does not have appeal powers *per se* in relation to the Supreme Court Panel's decision.

207. The Constitutional Panel rejected the Supreme Court Panel's reasoning in relation to Article 44(2) of the KSC Law and the applicability of the *lex mitior* principle. Its reasoning

310 ibid (n 306), para 102.
311 ibid (n 306), para 111.
312 Mustafa Appeal Resentencing Decision, paras 24-25.
313 Mustafa and SPO Protection of Legality Decision, para 64.
314 *Specialist Prosecutor v. Mustafa*, Referral to the Constitutional Court Panel concerning the violations of Mr. Salih Mustafa's fundamental rights guaranteed under Articles 22, 31 and 33 of the Constitution of the Republic of Kosovo and Articles 6 and 7 of the European Convention on Human Rights, KSC-CC-2024-22/ F00001, 27 September 2024 ('Mustafa Constitutional Referral').
315 ibid, Ground 2, paras 37-107.

was premised on the view that "*the SC and the SPO function in an autonomous manner, in accordance with their own established legal framework*".[316] It held that per Article 44(2) of the KSC Law "*the criminal chambers are bound to take these ranges into account when determining the punishment to be imposed on a person found guilty of a crime under international law, they are not bound to apply them*."[317] Furthermore, the Constitutional Panel agreed with the Appeal Panel that the principle of *lex mitior* did not apply on the basis that the sentencing framework under the Kosovo domestic law does not bind the KSC, therefore only the KSC Law binds the Panel in determining sentence.[318] It further noted that it is not persuaded by the Supreme Court Panel's reasoning for not applying the 1976 SFRY Criminal Code.

208. The Constitutional Panel is the apex panel as regards interpretation and application of Kosovo's Constitution and fundamental rights. Accordingly, its findings as discussed above represent the prevailing authority on the interpretation of Article 44(2) of the KSC Law and the applicability of the *lex mitior* principle. However, given that it determines that the *lex mitior* principle is not engaged, any shortcomings in the Supreme Court Panel's reasoning as to why it regarded the 1976 SFRY Criminal Code as inapplicable, does not give rise to a rights violation. As such, the revised sentencing determined by the Appeal Panel after the protection of legality decision remains in place.

D. Conclusion

209. The well-established model of international criminal tribunals with retrospective jurisdiction illustrates that prosecuting historic offences under customary international law absent contemporaneous statutory law is not inherently in conflict with the principle *nullum crimen since lege*, as in indeed the offences in question was contrary to international criminal law at the relevant time. This speaks to the principle of legality on the international plane. Nevertheless, the statutory framework of the KSC, particularly the adoption of Rome Statute offences and the nod to ICC jurisprudence as an interpretive tool creates risk that offences may be constructed in a manner inconsistent with the state of development of customary international law as it was between 1 January 1998 and 31 December 2000. To mitigate this risk, judges must be alive to it.

316 Mustafa Constitutional Referral Judgment, para 113.
317 ibid (n 314), para 115.
318 ibid (n 314), para 119.

210. Compliance with the principle of legality on the international plane does not automatically result in compliance with the same principle on the domestic plane. The KSC, after all, is a domestic mechanism not an international criminal tribunal. The Pre-Trial Chambers reasoning in its decision on Veseli's motions challenging its jurisdiction does not adequately address the principle of legality at the domestic plane, both as it relates to substantive offences, as well as JCEIII as a form of individual criminal responsibility. A central tenant of the Pre-Trial Judge's reasoning emphasised the specialised nature and the self-classified *lex specialis* character of the KSC Law, this allowed for his conclusion that the principle of legality is satisfied on the domestic plane so long as the offences were proscribed by customary international law. Indeed, this reasoning is deeply entrenched in the jurisprudence of the KSC more broadly and paints the KSC as a mechanism that largely sits outside of the Kosovo Constitutional framework. This is perhaps a consequence of the lack of expertise on Kosovo constitutional law and the Kosovo legal tradition more broadly on the KSC bench. There remains a need for the KSC through its jurisprudence to consider this issue fully.

211. The complicated structure of the KSC results in an ever-present danger of institutional fragmentation, brought into sharp focus by the proceedings in the *Mustafa case*. The procedural history in the *Mustafa case*, particularly as it relates to sentencing, raises several red flags. As illustrated below, separate appeals and applications took the matter from the Trial Panel, to the Appeal Panel, to the Supreme Court Panel and back to the Appeal Panel for an overall reduction in effective sentence of 11 years or 42.3% Yet, after a further referral to the Constitutional Panel, the legal position as regards the proper construction of Article 44(2) of the KSC Law and the applicability *val non* of the *lex mitior* principle, effectively reverted to the position adopted by the Appeal Panel in its judgment in respect of the initial appeal.

Charge	Trial Panel:	Appeal Panel:	Appeal Panel:	Gross reduction:
War crime of murder	25 years	22 years	15 years	10 years / 40%
War crime of torture	22 years	20 years	13 years	9 years / 40.9%
War crime of arbitrary detention	10 years	8 years	8 years	2 years / 20%

Single sentence	26 years	22 years	15 years	11 years / 42.3%

212. It is beyond the scope of this preliminary review to reach firm conclusions on complex matters of law. However, several preliminary observations are in order that are aimed at identifying matters for further consideration and future review.

213. The Constitutional Panel relied on ICTY jurisprudence to the effect that the *lex mitior* principle is not engaged in the ICTY as regards domestic law, as that law does not bind the ICTY.[319] Without further consideration, the Panel drew an equivalency between itself and *ad hoc* international tribunals, which is illustrative of the Panel's emphasis on the KSC as a separate, autonomous regime.[320] Such equivalency and emphasis on separateness and autonomy is misplaced. It loses sight of the fact that the KSC is, as a matter of law, a domestic institution that operates within the framework of Kosovo's supreme constitution, not outside of it. Moreover, this approach loses sight of the fact that the KSC's jurisdiction *ratione materiae* extends to the 1976 SFRY Criminal Code. It is unconvincing to find that the principle of *lex mitior* is not engaged *vis-à-vis* the 1976 SFRY Criminal Code on the basis that it does not bind the KSC, when in fact the KSC exercises criminal jurisdiction in respect of that code. The Panel's position in this regard is likely a symptom of the unique establishment of the KSC and the fact that the judges are all international – there is thus an acute lack of domestic legal and constitutional expertise on the bench of the KSC.

214. The Constitutional Panel's finding that the *lex mitior* principle binds the KSC only in so far as law that is incorporated in the KSC Law, is inconsistent with the essence and purpose of the *lex mitior* principle. The KSC Law which was enacted as part of domestic Kosovo law on 3 August 2015, postdating the KSC's temporal jurisdiction by more than fourteen years. By its very nature, the principle applies to historic acts and the law contemporary with those historic acts. Moreover, this finding leaves it open to states to evade the *lex mitior* principle by design. This can be achieved by legislating for the creation of self-contained, specialist mechanisms with narrow subject matter jurisdiction. This

319 ibid (n 314), para 117, referring to *Prosecutor v Nikolić*, Sentencing Judgment, IT-94-2-S, 2 December 2003, paraspg 81-84, the ICTY held that "*it is not bound by the sentencing practice of the former Yugoslavia, although it may have recourse to it*".

320 Mustafa Constitutional Referral Judgment, 109-121.

exposes a failure to consider in any detail that the *lex mitior* principle has the character of an individual right, not a procedural restriction that exists within the tribunal.

215. Furthermore, Constitutional Panel's finding loses sight of the fact that the KSC is, as a matter of law, a domestic institution that operates under a supreme constitution. The reasons for this is likely to be, in part, due to its unique establishment and the fact that the judges are all international, meaning not from Kosovo. There is thus an acute lack of domestic legal and constitutional expertise on the bench of the KSC.

VIII. CONCLUSION

216. This report is, by design, a temperature check rather than a verdict. It does not conclude that the KSC is failing in its mission, nor that everything is in order.

217. What it records is a set of preliminary concerns serious enough to demand attention and documented enough to resist dismissal. The appropriate benchmark is not what other international(ised) courts and tribunals have tolerated – comparison with institutions that have themselves at times fallen short of upholding fair trial standards offer cold comfort. The KSC answers (or should) to the Kosovo Constitution and to the ECHR standards embedded in its own legal framework, and it is against those standards, rigorously applied, that its performance falls to be assessed.

218. This assessment matters for reasons that go beyond the procedural. The liberty of individuals is at stake. Victims have waited decades for accountability, and the communities affected have a profound interest in justice that is not merely delivered but seen to be delivered. Further, the KSC's outputs will impact, inevitably, broader transitional justice efforts and the still-fragile architecture of peace and stability in the region.[321] The consequences of getting this wrong extend far beyond the courtroom.

219. For these reasons, the BHRC recommends the establishment of a systematic trial monitoring programme that is independent, sustained and adequately resourced. The KSC was established to provide justice that commands confidence across the region and

[321] ibid (n 31); Aidan Hehir, 'Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and its Implications, 20 Hum. Rts. Rev. 267, 268 (2019), at 268 and 282-283. See also Gëzim Visoka, 'Assessing the potential impact of the Kosovo Specialist Court' (PAX, September 2017), 7.

beyond. Whether it does so require those outside to keep looking, and the court itself to welcome that scrutiny.