PUBLIC
Date original: 02/05/2025 14:16:00
Date public redacted version: 07/05/2025 13:43:00

In:	**KSC-BC-2020-06** **The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Trial Panel II** Judge Charles L. Smith, III, Presiding Judge Christoph Barthe Judge Guénaël Mettraux Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
Date:	02 May 2025
Language:	English
Classification:	Public

Public Redacted Version of 'Thaçi Defence Response to SPO Request for Admission of Proposed Exhibits (F03120) and Second Request for Exclusion of Materials *in limine*'

with Public Redacted Version of Annex 1

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Luka Misetic

Counsel for Kadri Veseli

Rodney Dixon KC

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The SPO first alleged witness "interference" by Mr Hashim Thaçi in March 2023. In the opening paragraph of the SPO's first request for special investigative measures ("SIMs") in March 2023, the SPO alleged that it suspected that Mr Thaçi was "attempting to interfere with witnesses"[1] who would be called in Case 06. This allegation triggered a nine-month regime of surveillance and intrusion into Mr Thaçi's private and intimate conversations and exchanges, including his thoughts about the case against him and how he planned to defend it. Rather than seeking authorisation for these SIMs from the Trial Panel with jurisdiction over such investigations and whose orders were allegedly being violated, the SPO initiated a parallel proceeding before a Single Judge. The SPO's decision to seize the Single Judge was a clear violation of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and statutory framework, and the requirement under Article 40(1) that the Trial Panel is "responsible for the conduct of the trial proceedings".

2. This alleged case of interference never materialised.

3. Despite having unprecedented access to Mr Thaçi's communications over nine months, the SPO has been unable secure the confirmation of any charges of interference on his part. Instead, the Case 12 charges allege that Mr Thaçi revealed Protected Information in violation of the Trial Panel's orders in Case 06, violated the terms of Trial Panel's Contact Protocol in Case 06,[2] and attempted to obstruct official persons in performing official duties in Case 06.[3] Importantly, the Pre-Trial Judge found that the supporting material **did not** demonstrate that there was a well-grounded suspicion that Mr Thaçi actually obstructed the work of any officials in the

[1] KSC-BC-2018-01/F00321, para. 1.
[2] F00854, pp. 85-91.
[3] KSC-BC-2023-12/F00036/RED; KSC-BC-2023-12/F00264/A02, para. 46.

context of the Case 06 proceedings.[4] It is an obvious point, but worth repeating, that Mr Thaçi remains presumed innocent of all the Case 12 allegations until they have been proven beyond a reasonable doubt.

4. On 3 April 2025, the SPO's second attempt to expand the Case 12 charges failed.[5] Having failed to secure the confirmation of charges that Mr Thaçi had interfered with the Case 06 witnesses, the SPO pivoted. It made a last-minute attempt to repurpose the materials gathered from the SIMs ("Proposed Exhibits") to make allegations in Case 06 that it has failed to get confirmed in Case 12.[6] Knowing, for example, that it has failed to secure interference charges in Case 12, the SPO boldly asserts in Case 06 that the Proposed Exhibits are probative of witness intimidation "irrespective of whether the instructions on how to testify actually reached them, or were adhered to".[7] Importantly, the SPO has sought to introduce these materials without ever having put them to the witnesses implicated in the alleged interference, which has now been made impossible by the timing of their proposed admission.

5. Despite the SPO's revised attempt at re-framing their relevance, the Proposed Exhibits remain inadmissible in the present case. In addition, for reasons also set out below, the Defence for Mr Hashim Thaçi ("Defence") seeks the exclusion *in limine* of all materials arising from the SPO's investigation into alleged interference, and requests findings that both the SPO's decision to seize a Single Judge and the President's initial assignment of a standing Single Judge violated the Law.

[4] KSC-BC-2023-12/F00036/RED, para. 192.
[5] KSC-BC-2023-12/IA002/F00012/RED, paras. 44-45, 71, 75.
[6] SPO Request, para. 1.
[7] SPO Request, para. 5.

II. PROCEDURAL HISTORY AND CLASSIFICATION

6. The relevant procedural history is known to the Trial Panel and the parties and has recently been set out.[8] This filing contains confidential information and is therefore filed confidentially pursuant to Rule 82(3).[9] A public redacted version will be filed.

III. PART A: THE PROPOSED EXHIBITS ARE INADMISSIBLE

7. In May 2024, the SPO sought to amend its Exhibit List in Case 06 to include materials gathered through the SIMs. In this request, the SPO made its first round of submissions on the relevance of these materials in Case 06. The SPO stated that it "foresees the potential need to tender or use these materials to clarify, challenge, and/or contextualise the evidence" of certain SPO witnesses. It also argued that the materials were relevant to "the serious climate of witness interference and intimidation in which these proceedings are being conducted",[10] as well as "the charges, including, potentially, state of mind".[11]

8. The Trial Panel agreed that the materials could be added to the SPO Exhibit List, in a decision rendered in August 2024. Critically, the Trial Panel expressly rejected the SPO submission that the materials were relevant to the charges, and did not accept their relevance to the alleged climate of witness interference and intimidation. Rather, the materials were added to the SPO Exhibit List on the basis that "[e]vidence of **witness interference** may be relevant to the Panel's evaluation of the reliability and weight of the evidence brought before it", and that the materials were "*prima facie* relevant to the credibility of certain witnesses and the reliability of

[8] F03127, paras. 5-16.
[9] KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").
[10] F02279, para. 2.
[11] F02334, para. 5.

their evidence, rather than to the Indictment charges directly."[12] The Trial Panel noted that the "[t]he [REDACTED] **appear to concern alleged interferences** with multiple SPO witnesses and are therefore *prima facie* relevant insofar as they may potentially contextualise the substance of the evidence which witnesses give at trial, and may assist the Panel in assessing the credibility of witnesses and the reliability of their evidence."[13]

9. However, the Trial Panel now knows the Proposed Exhibits are not "evidence of witness interference". No charges of interference have been confirmed in Case 12, be it under Article 386 of the Kosovo Criminal Code, related to obstruction of evidence, Article 387 related to intimidation during criminal proceedings, or Article 388 related to retaliation. The SPO has not demonstrated that alleged instructions were received by witnesses, and then adhered to. There is, accordingly, no basis on which the Proposed Exhibits could remain relevant to "potentially contextualise the substance of the evidence which witnesses give at trial", given that the SPO is unable to establish that any interference occurred, or any instructions reached an SPO witness who testified. On that basis alone, the materials are inadmissible, and the SPO Request should be rejected. The Proposed Exhibits are not relevant, even in relation to the one limited purpose for which the SPO was authorised to add them to the Exhibit List.

10. In full awareness of this ruling, and the limited scope for relevance in the August Decision, the SPO has again pivoted in April 2025, and seeks to expand and re-characterise the purported relevance of the Proposed Exhibits in Case 06.[14] In seeking the admission of the Proposed Exhibits, the SPO is now arguing that they are: (i) relevant to sentencing; (ii) "probative of the serious climate of witness intimidation in which these proceedings are being conducted **and inform the credibility**

[12] August Decision, para. 42. *See also* paras. 32, 35.
[13] August Decision, para. 29.
[14] F02279, para. 3.

assessments of SPO witnesses"; and (iii) relevant to the state of mind of the Accused for the charged crimes.[15] None of these three submissions open a path for admission in Case 06.

A. THE PROPOSED EXHIBITS ARE NOT RELEVANT TO SENTENCING

11. The SPO alleges that the Proposed Exhibits "**demonstrate"** that Mr Thaçi breached court orders, violated the secrecy of proceedings, and/or unlawfully attempted to influence SPO witness evidence. The SPO submits that this alleged conduct would constitute "aggravating circumstances for any sentence imposed" and "the absence of mitigating circumstances" in sentencing.[16] However, the Trial Panel has already ruled that it has no mandate to examine whether, in fact, the Proposed Exhibits "demonstrate" the conduct alleged. In the August Decision, the Panel held that this kind of assessment "goes beyond the Panel's present determination. The Panel's mandate does not extend to determining whether any person has committed any offences other than those charged in the Indictment in the present case."[17]

12. This remains the position, given that to accept the SPO submission on relevance, the Trial Panel would first be required to consider whether the Proposed Exhibits indeed "demonstrate" the commission of the charges pending in Case 12. This would require the Defence to substantively defend the Case 12 charges in Case 06, and then require the Trial Panel to adjudicate the same pending allegations that are concurrently pending in Case 12, which it has already ruled it has no mandate to do. In what amounts to a request for reconsideration of the August Decision, the SPO tries to circumvent this glaring issue by reassuring the Trial Panel that it would not need "to make a formal finding of guilt"[18] against Mr Thaçi by accepting its

[15] SPO Request, paras. 3-6.
[16] SPO Request, para. 4.
[17] August Decision, para. 35.
[18] SPO Request, para. 2

submission that the Proposed Exhibits "demonstrate" the alleged Case 12 conduct. This argument fails to demonstrate any injustice or "clear error in reasoning" in the August Decision, which should not be reconsidered. Were it now to reverse itself, the Trial Panel would be required to obliterate Mr Thaçi's presumption of innocence and rights as a defendant in Case 12, and make findings which would have a knock-on effect on the other Case 12 accused, given that findings would be made on the same alleged conduct, without them having been heard. This process would also risk the fragmentation and legal uncertainty brought about by potentially inconsistent judicial findings as between Case 06 and Case 12. The impact on public funds of running two parallel proceedings in respect of the same conduct against Mr Thaçi would also be considerable.

13. Of course, all of these problems arise even before consideration of the reality that the SPO is asking, in no uncertain terms, for double punishment. The principle of *non bis in idem* protects a person from being tried or punished twice in respect of the same offence. This principle is recognised in the Kosovo Constitution,[19] texts of the KSC,[20] as well as in the European Convention on Human Rights ("ECHR").[21] Caselaw of the European Court of Human Rights confirms that the principle of *non bis in idem* is applicable where conduct is considered as an aggravating circumstance (as opposed to a standalone offence).[22] The SPO has pointed to no examples of an international court considering allegations or convictions for offences against the administration of justice as aggravating circumstances in sentence in the main case. Even in *Šešelj*, where the accused had served three sentences for three contempt convictions (15 months, 18

[19] Kosovo Constitution, article 34.
[20] Law, article 17; Rules, Rule 205.
[21] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11), ETS No. 117, Strasbourg, 22 November 1984, article 4.
[22] *See, e.g., Gradinger* Judgment, para. 55, where a first ruling that the aggravating circumstance of intoxication did not apply to the applicant meant that it was impermissible for subsequent proceedings to be brought against him for that intoxication.

months and 2 years)[23] by the time he was sentenced on appeal, the ICTY Prosecutor **did not** seek to increase his main case sentence on the basis of this proven conduct, or allege that these convictions were an aggravating factor.[24] Similarly, the Appeals Chamber noted that Mr Šešelj had consistently obstructed the proper administration of justice by exposing protected witnesses to risk, but did not rely on these convictions as an aggravating circumstance, nor as a reason for an absence of mitigating circumstances,[25] aligning with the clear prohibition against double punishment which the SPO is trying to circumvent in this case. The Proposed Exhibits do not "demonstrate" that Mr Thaçi committed the conduct alleged in Case 12, and the SPO's choice to frame their relevance in those terms, precludes their admission.

B. THE PROPOSED EXHIBITS ARE NOT PROBATIVE OF THE CLIMATE OF WITNESS INTIMIDATION AND DO NOT INFORM CREDIBILITY ASSESSMENTS

14. Next, the SPO submits that the Proposed Exhibits are "probative of the serious climate of witness intimidation in which these proceedings are being conducted and **inform the credibility assessments of SPO witnesses**".[26] This is an imaginative twist on the SPO's original submissions that the materials were relevant to "clarify, challenge, and/or contextualise the evidence" of the affected witnesses.[27] The shift in the SPO submissions accounts for the fact that it has failed to establish in Case 12 that any of the alleged conduct impacted any of the SPO witnesses or their testimony, and thus cannot "inform" the Trial Panel's credibility assessments. As such, the SPO's attempt to frame relevance in these terms must also fail.

[23] *Šešelj* 2010 Contempt Judgment, para. 42*;* *Šešelj* 2012 Contempt Judgment, para. 34*;* *Šešelj* 2013 Contempt Judgment, para. 54.
[24] *Šešelj* Prosecution Appeal Brief, para. 250.
[25] *Šešelj* 2018 Appeal Judgment, para. 179.
[26] SPO Request, para. 5.
[27] F02279, para. 2.

15. Had the SPO wanted to make this attenuated submission that the Trial Panel's assessment of the credibility of certain SPO witnesses can be informed by the "climate" to which Mr Thaçi allegedly contributed, it needed to recall the witnesses whom the SPO claims were impacted by this "climate" and put this suggestion to the witnesses, thereby giving the Defence the opportunity to cross-examine the witnesses and either challenge their evidence or elicit testimony on Mr Thaçi's behalf. Indeed, the Trial Panel invited the SPO to [REDACTED],[28] but the SPO has declined to do so. By filing its request for admission of the Proposed Exhibits in the last hours of its case, the SPO has denied Mr Thaçi his fundamental right to confront witnesses against him, and has undermined its own submissions on relevance, which cannot now succeed.

C. THE PROPOSED EXHIBITS ARE NOT RELEVANT TO THE STATE OF MIND OF THE ACCUSED

16. Lastly, the SPO submits that the Proposed Exhibits are relevant to the state of mind of the Accused for the charged crimes.[29] Again, the SPO has already tried and failed to demonstrate that the Proposed Exhibits are relevant to the charges in this case, "including, potentially, state of mind,"[30] having already made this argument in May 2024. This submission was rejected, with the Trial Panel ruling that the materials were "*prima facie* relevant to the credibility of certain witnesses and the reliability of their evidence, **rather than to the Indictment charges directly**."[31] The SPO has not attempted to provide any basis for reconsideration of the Trial Panel's ruling.

17. Again, this must remain the position. For the Trial Panel to accept that the Proposed Exhibits were relevant to Mr Thaçi's state of mind, and indeed that they demonstrate "awareness of how these witnesses can otherwise expose [his] criminal

[28] [REDACTED].
[29] SPO Request, para. 6.
[30] F02334, para. 5.
[31] August Decision, para. 42. *See also* paras. 32, 35.

intentions",[32] the Defence would first need to be given an opportunity to present evidence that, for example, the Proposed Exhibits are evidence of consciousness of innocence. Even assuming *arguendo* that the Proposed Exhibits are an accurate reflection of recorded conversations and were collected pursuant to legal orders from a Panel with jurisdiction (which is not accepted), the Defence would require an opportunity to question already-heard SPO witnesses and to bring evidence to demonstrate that the Proposed Exhibits are in fact indicative of Mr Thaçi's consistent and ongoing belief in his own innocence, opening up the need for comparison of courtroom testimony with prior statements for each of the allegedly impacted witnesses, and requiring what would essentially amount to a trial within a trial. This is precisely the reason that the *Bemba* Trial Chamber rejected the SPO request to admit investigation materials in the main case, observing that it would not be in the interests of justice for the same matters to be litigated in parallel before two chambers, and noting the potential lengthy delays that would result.[33]

D. PREJUDICE TO THE DEFENCE

18. None of the three reasons advanced by the SPO demonstrate the relevance of the Proposed Exhibits to the charges in Case 06. Importantly, the purported relevance, even if accepted, could not possibly outweigh the monumental prejudice which would result from admission of the Proposed Exhibits, thereby barring admission under Rule 138. Introducing unproven allegations of alleged misconduct *through a bar table submission*, in a situation where the Trial Panel has held it has no mandate to examine whether the materials demonstrate the conduct alleged, is already manifestly prejudicial. This prejudice is magnified by the timing of the SPO seeking to introduce the Proposed Exhibits in the final hours of a two-year case.

[32] SPO Request, para. 6.
[33] ICC-01/05-01/08-3029, paras. 26-27, 31.

19. Taking [REDACTED] as an example, during his testimony, the Defence sought to introduce [REDACTED]'s prior statements to safeguard against future allegations that his testimony had been in any way impacted by the conduct allegedly captured in the Proposed Exhibits. The SPO opposed the admission of [REDACTED]'s prior statements on the basis that the SPO had not been authorised to question him about witness interference and, therefore, the Defence should not be allowed to tender rebuttal evidence to that allegation.[34] The SPO was entitled, and indeed had been invited by the Panel to apply to [REDACTED] after it had been authorised to add the relevant exhibits to the SPO Exhibit List.[35] This decision was rendered in August 2024. The SPO chose not to [REDACTED], and then decided not test this evidence with witnesses implicated in the Proposed Exhibits who were called after the August 2024 decision, including [REDACTED],[36] [REDACTED],[37] and [REDACTED].[38] Having deliberately left these allegations untested, the SPO decided instead only to seek to rely on the Proposed Exhibits relating to these witnesses when any opportunity for their recall had well and truly passed, while at the same time claiming "relevance" on the basis of an alleged climate of witness interference which "informs" credibility, without having put these allegations to the witnesses themselves, or giving the Trial Panel or the Defence the chance to do so. The prejudice of admission, already monumental, is amplified by the SPO's conduct. The SPO has failed to demonstrate relevance of the Proposed Exhibits, and any purported relevance and probative value is far outweighed by the substantial prejudice to the accused through admission. The requirements of Rule 138(1) are not met, and the Proposed Exhibits should not be admitted.

[34] [REDACTED].
[35] [REDACTED]
[36] [REDACTED].
[37] [REDACTED].
[38] [REDACTED].

IV. PART B: THE PROPOSED EXHIBITS SHOULD BE EXCLUDED *IN LIMINE*

A. THE PROPOSED EXHIBITS WERE OBTAINED BY MEANS OF A VIOLATION OF THE LAW OR THE RULES

20. In addition to the Proposed Exhibits being inadmissible for the reasons set out above, the Defence also seeks a ruling that all materials gathered through the SIMs and associated investigations should be excluded *in limine* from the Case 06 proceedings. These materials were obtained by means of a violation of the Law and Rules, and their admission would be antithetical to and would seriously damage the proceedings, further precluding their admission pursuant to Rule 138(2).

1. The Single Judge did not have jurisdiction to order the SIMs, which were issued **ultra vires**

(a) Trial Panel II has exclusive jurisdiction over all matters concerning Case 06

21. Under Article 40 of the Law, a Trial Panel is responsible for all first-instance decisions concerning the case before it. The Trial Panel's powers under Article 40 are comprehensive and exclusive. Once the Panel is seized, the Law grants it complete authority over **all** matters concerning that case. The Law also makes no provision for any other Panel to act regarding the case, other than on appeal from a Trial Panel decision.

22. The **exclusive** nature of the Trial Panel's jurisdiction is clear from the statutory framework. Article 40(1) states that the Trial Panel "shall be responsible for the conduct of the trial proceedings." Article 40(2) provides that the Trial Panel is charged with ensuring that "a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." Article 40(6) then empowers a Trial Panel to exercise any functions or powers that the

Pre-Trial Judge held prior to transfer of the case.[39] Rule 116 sets out areas of authority, including disclosure obligations, protective measures, communication between the parties, and conditions of detention. These are listed **inclusively**: Trial Panels are empowered by the Law and the Rules even beyond these specific areas, to oversee any aspect of a case that has a bearing on its fairness. There is therefore no scenario in which a litigant must seize a panel other than the Trial Panel on matters related to the case.

23. Article 40(2) not only grants a Trial Panel necessary powers, it also creates an "obligation" on the Trial Panel "to ensure that the trial is fair and expeditious and that the proceedings are conducted with full respect for the rights of the Accused".[40] This obligation could not be fulfilled if a separate panel has been seized with matters concerning the conduct of the case, putting those matters outside the Trial Panel's control. Article 40(2) reflects a cornerstone principle of international criminal law, with equivalent provisions at other tribunals,[41] reflecting the trial chamber's "innate understanding of the process thus far".[42] It is also an essential element of fair trial guarantees, which require the existence of a judicial panel with the powers and information to enforce them. Trial Panel control over a case is "a fundamental criterion for any trial to be fair."[43] Where a Trial Chamber loses control of proceedings, it may become impossible to ensure a fair trial.[44]

(b) Trial Panel II's exclusive jurisdiction includes oversight of contempt allegations

24. This complete authority of the Trial Panel extends to the handling of

[39] Article 40(6)(a), referring to the powers set out in Article 39. Article 39 powers include handling the privacy and protection of witnesses, and the preservation of evidence: Article 39(11).
[40] KSC-BC-2020-04/F00434/RED, paras. 14, 31, 39. *See also* F01977, para. 22.
[41] Rome Statute, Article 64(2); ICTY Statute, Article 20(1); ICTR Statute, Article 19(1); ECCC Law, Article 33new; SCSL Rules of Procedure and Evidence, Rule 26*bis*.
[42] ICC-01/04-01/06-2582, para. 56.
[43] ICC-01/04-01/06-2582, para. 48.
[44] ICC-01/04-01/06-2582, para. 58.

misconduct or breach of its orders. Under Rule 81, for example, a Panel maintains its jurisdiction over protective measures it has ordered and, as long as it remains seized of the case, is the only Panel empowered to modify them. Rule 65 gives a Panel powers to sanction non-compliance with an order made by that Panel.

25. At the ICTY, Rule 77 gave a trial chamber the power to initiate a contempt investigation by an ICTY or independent prosecutor, or to "initiate proceedings itself".[45] The Practice Direction relevantly stated that "**the Chamber in which the contempt allegedly occurred shall adjudicate the matter** unless there are exceptional circumstances such as cases in which the impartiality of the Chamber may be called into question, warranting the assignment of the case to another Chamber."[46]

26. This Practice Direction merely articulated principles which were a necessary consequence of the Tribunal's judicial structure. In a case where counsel sought to have a separate chamber handle an allegation of contempt, Judge Bonomy explained why the "main case" trial chamber had presumptive control, noting "[i]t is vital to the proper administration of justice that a court maintains its authority over the conduct of proceedings before it."[47]

27. Judge Bonomy explained that there would be some circumstances in which contempt should be handled by a different chamber, such as where a question of bias arose.[48] The ICTY procedure dealt with this possibility by creating a rebuttable presumption, with the "main case" chamber taking the decision as to whether to send contempt proceedings to a separate chamber, and thus maintaining its exclusive jurisdiction over matters related to the case.

[45] ICTY, IT/32/Rev.50, Rules of Procedure and Evidence, 8 July 2015, rule 77.
[46] ICTY, IT/227, Practice Direction on Procedures for the Investigation and Prosecution of Contempt Before the International Tribunal, 6 May 2024, para. 13 (emphasis added).
[47] *Milošević* Contempt Decision, para. 8.
[48] *Milošević* Contempt Decision, paras. 7, 10.

28. At the ICC, the Prosecution has first generally brought suspicions of contemptuous conduct before the Trial Chamber which is seized of the case.[49] However, Trial Chambers have referred investigative requests to Pre-Trial Chambers.[50] This is unavoidable under the ICC's legal texts, as they grant judicial powers concerning investigations **exclusively** to Pre-Trial Chambers.[51] Trial Chambers are not given all the powers of Pre-Trial Chambers, but only those relating to proceedings subsequent to the confirmation of charges hearings.[52]

29. Judges of the ICC have identified the difficulties of this division of judicial authority during contempt investigations. In *Ntaganda,* the accused was subjected to a lengthy investigation but never charged. The Trial Chamber expressed frustrations that investigations authorised by a Pre-Trial Chamber were impacting the main case trial, including through the large volumes of disclosure. The Chamber emphasised that "investigations cannot be permitted to continue indefinitely in a manner which could impact the proceedings in this case".[53] The Appeals Chamber voiced similar concerns about the parallel proceedings, finding that the Single Judge of the Pre-Trial Chamber:

> should have promptly sought instructions from the Trial Chamber on whether disclosure of such material might 'prejudice further or ongoing investigations' and whether such material or information had to be disclosed to Mr Ntaganda. The Appeals Chamber notes that the Trial Chamber became aware of the Prosecutor's access to additional parts of recordings of non-privileged calls of Mr Ntaganda only in May 2016 and thus several months after the Single Judge of Pre-Trial Chamber I had granted such access. This made it difficult for the Trial Chamber to take any measures in that period to prevent any potential prejudice resulting from the

[49] *See, e.g.*: ICC-01/05-01/08-2412; ICC-01/05-01/08-2548-Red4; ICC-01/04-02/06-349-Red3; ICC-01/09-01/11-2028-Red; ICC-02/04-01/15-482-Red.
[50] ICC-01/05-01/08-2606-Red; ICC-01/09-01/11-2034, para. 11.
[51] Rome Statute, article 57(3), especially paragraph (a).
[52] Rome Statute, article 64(6)(a), conferring on Trial Chambers the same powers granted to Pre-Trial Chambers under article 61, but not those granted under article 57.
[53] ICC-01/04-02/06-T-159-Red-ENG, p. 2, lines 15-20. *See also* ICC-01/04-02/06-1883, para. 50.

> Prosecutor's access to additional material. It was only able to assess whether Mr Ntaganda suffered prejudice.[54]

30. While the ICC is locked into the above system by legal texts which do not grant investigative powers to trial chambers, that is not the case at the KSC. To the contrary, Trial Panels at the KSC have comprehensive powers, akin to those granted to ICTY Trial Chambers. From the time of the filing of an indictment,[55] Article 39 of the Law grants a Pre-Trial Judge powers, including to make "orders pertaining to a special investigative opportunity and special investigative measures."[56] Under Article 40(6), those same powers are granted to the Trial Panel upon its assumption of jurisdiction over the case.[57] The only relevant limit on a Trial Panel's powers is that it cannot try the contempt allegations itself, as per Article 33(5). This does not prevent the Trial Panel from overseeing the investigation of any allegations of contempt, and determining how they shall be handled. Indeed, in contrast to the situation at the ICC, at the KSC, powers over investigative measures are very clearly assigned to the Panel with carriage of a case.

31. Importantly, the Trial Panel's authority over its case is **exclusive**, including in respect of its power to authorise SIMs. The position is not altered by the fact that the Rules provide that SIMs are to be authorised by "a Panel".[58] The use of the term "a Panel" rather than "the Panel seized with the case", reflects that there may be situations where SIMs are sought for individuals not current on trial, meaning that no Panel will yet be "seized with the case". This reflects the scheme in the Law, whereby in each case, a Pre-Trial Judge is assigned for the pre-trial period; and proceedings are then transferred to a Trial Panel. The phrasing "a Panel" or "the Panel", is used for powers which can be exercised by either a Pre-Trial Judge or Trial Panel, depending

[54] ICC-01/04-02/06-2666-Red, paras. 177-178.
[55] Law, Article 33(1)(a).
[56] Law, Article 39(3).
[57] Law, Article 40(6)(a).
[58] Rules, Rules 31(1) and 35(1).

on which is seized of the case. Once a Trial Panel is seized, the reference to "a Panel" can only logically mean the panel seized with the case.

32. The same phrase, "a Panel", (or "the Panel"[59]) is used repeatedly in the Rules. "A Panel" may issue arrest warrants, summonses, decisions or orders;[60] may hold a site visit;[61] and may withhold legal aid for frivolous or abusive submissions.[62] "A Panel" cannot mean "any Panel", because this would enable forum shopping and lead to absurd results. A party seeking an order for a site visit under Rule 74(1) must request it from the Panel seized of the case to which the site visit relates. A decision to withhold legal aid in respect of a frivolous or abusive motion under Rule 75(4) can only be made by the Panel before which the motion was filed. Enabling "a Panel" to be read as "any Panel" would allow a party to circumvent the Panel seized of the case when this appeared advantageous, for example, in order to seize a judge thought to be more sympathetic.

(c) The SPO was required to bring any contempt allegations before Trial Panel II

33. The Law and Rules gave Trial Panel II exclusive jurisdiction over all matters concerning Case 06. This included the power to address and sanction violations of Case 06 orders. It also included the power to authorise investigative measures concerning interference with Case 06 witnesses. Significantly, if such investigations revealed that interference was occurring, Trial Panel II had **exclusive** power and responsibility to determine what action should be taken. While Article 33(5) means that Trial Panel II could not have tried any resulting contempt case itself, it was still responsible for determining how the matter should be disposed of, in order to guarantee the fairness of Case 06.

[59] *See, e.g.*, Rules 5, 8, 9. Context suggests that there is no difference between the meaning of "a Panel" and "the Panel". In some provisions, both are used: *see, e.g.*, Rules 35, 37.
[60] Rules, Rule 48. *See also* Rules 53(1) and 54.
[61] Rules, Rule 74(1).
[62] Rules, Rule 75(4). *See also* Rules 50, 80(1), 82(3).

34. This means that, from the outset, when the SPO formed a view that Mr Thaçi was allegedly breaching Trial Panel II's orders, or seeking to interfere with Case 06 witnesses, the judicial forum for raising those concerns was **Trial Panel II**. If SIMs were considered necessary, the forum for requesting them was Trial Panel II. It was for Trial Panel II to oversee any such measures, to ensure that they did not compromise the fairness of Case 06. It was likewise for Trial Panel II to determine if, for any reason such as bias, it had become more appropriate for the contempt allegations to be handled by a different Panel, or if the matter warranted the issuance of an indictment and a separate case. No such determination was ever made by Trial Panel II. To the contrary, when the question was later raised, Trial Panel II ruled that no question of bias arose.[63]

35. In violation of Trial Panel II's exclusive jurisdiction, the SPO instead seized a separate Panel with *ex parte* filings on matters fundamentally linked to Case 06. The Single Judge was seized not pursuant to a decision from the competent judicial authority, Trial Panel II, but in an act of impermissible forum shopping by the SPO. By raising matters fundamentally connected to Case 06 before a separate Panel, and without prior authorisation from Trial Panel II, the SPO seized a judge who was without jurisdiction, in violation of the Law and Rules. As such, the resulting decisions and orders authorising the SIMs were issued *ultra vires*.

36. The consequences flowing from the existence of parallel proceedings demonstrate, in practical terms, how the SPO's impermissible forum shopping compromises the Article 40(2) requirement that the Trial Panel maintain oversight of all aspects of a case, to ensure the fairness and integrity of the proceedings. The examples are numerous. Mr Thaçi was initially arrested and detained in the context

[63] F01977, para. 25.

of Case 06. Since receiving the Case 06 file, Trial Panel II has overseen Mr Thaçi's detention. However, on confirming the Case 12 indictment, the Pre-Trial Judge determined that Case 12 gave rise to a separate regime of detention oversight for Mr Thaçi "based on its own legal basis and authority".[64] The result is that for any matter concerning detention, neither the Pre-Trial Judge nor Trial Panel II has full oversight, and there are parallel streams of decision-making. This is inefficient. It also resulted in inconsistent decisions. Trial Panel II has consistently found the Mr Thaçi is not a flight risk,[65] while the Pre-Trial Judge considers that he is.[66] On 19 March 2025, the Pre-Trial Judge and Trial Panel II both granted Mr Thaçi compassionate release following his father's death, but with different conditions regarding visits with his mother, wife and sister.[67] This fragmentation not only leads to farcical results, but also the real possibility that the implementation of an order from Trial Panel II may be blocked because of a parallel inconsistent decision from the Pre-Trial Judge. It also means in real terms that Trial Panel II loses its ability to ensure full compliance with its obligations to protect Mr Thaçi's right to liberty, as well as his right to Counsel and privileged communications in Case 06, given that the Pre-Trial Judge is making rulings about these issues.[68]

37. To take another example, on 8 May 2025, the Thaçi Defence will raise these same issues in preliminary motions before the Pre-Trial Judge in Case 12, arguing not only that the SPO's decision to seize the Single Judge was unlawful, as set out above, but also that the Single Judge was assigned in violation of the Law, as set out below. The same overarching jurisdictional issues will therefore be simultaneously pending before the decision makers in Case 06 and Case 12. The Pre-Trial Judge in Case 12 may rule that the Single Judge was properly seized, or she may agree with the Defence that

[64] KSC-BC-2023-12/F00037/RED, para. 34.
[65] For example, most recently: F03106, paras. 13-15; F02926, paras. 15-17; F02781, paras. 13-17.
[66] KSC-BC-2023-12/F00165, paras. 22-28; KSC-BC-2023-12/F00250, paras. 23-27.
[67] KSC-BC-2023-12/F00230/COR/RED; F03037/RED.
[68] For example, the Single Judge authorised [REDACTED], *see* KSC-BC-2018-01/F00629, paras. 41-42.

Trial Panel II maintained exclusive jurisdiction over the SIMs under the KSC framework, and the SIMs materials were unlawfully collected. Either way, the potential for conflicting rulings on these fundamental issues is now real and present. This is the consequence of acting outside the KSC's carefully calibrated statutory framework, and the SPO's failure to recognise the Trial Panel's exclusive jurisdiction over Case 06.

38. Perhaps the most striking example, is the most fundamental. The SPO apparently believed, from 28 March 2023 (before the Case 06 trial began), that witnesses were being improperly influenced, and the value of its Case 06 evidence was thereby being undermined. Had the SPO properly brought these concerns before Trial Panel II, the Trial Panel could have itself determined whether interference was occurring, and taken any necessary take steps to prevent it. At the end of its case, the SPO has called into question the integrity of parts of its Case 06 evidence which it considers unfavourable, but without having afforded Trial Panel II an opportunity to ensure the evidence's integrity and prevent any such allegations. It is precisely to prevent difficulties like these that the Trial Panel has exclusive jurisdiction over the conduct of proceedings in the case before it.

39. Fragmentation of a case, which the SPO has triggered, will invariably impinge on a Trial Panel's ability to ensure a fair trial. This is why all matters relating to the case must be resolved by the Trial Panel seized with it, pursuant to Article 40(2). This fundamental error undermines the decisions authorising the SIMs, which were accordingly issued without a legal basis and by means of a violation of the Law and Rules. The resulting materials should be excluded *in limine*.

2. Proceedings were wrongly brought before a standing Single Judge not envisaged by the Law

40. Not only did the SPO circumvent the authority of Trial Panel II, but it did so by seizing a judge operating as a combined standing judge for investigations and pre-trial matters. That purported judicial role violates the KSC's framework for the division of judicial responsibility.

(a) A Single Judge can only act where no Panel is already seized of a matter

41. Under Article 25(1) of the Law, the KSC's judicial roles include Pre-Trial Judge, Trial Panels, and "individual judges as necessary performing other functions required under this Law"[69] (as well as other judges in appellate and Constitutional functions).

42. Articles 39 and 40 concern the powers of the Pre-Trial Judge and Trial Panel, while Article 33 concerns the assignment of judges into these and other judicial roles. A Pre-Trial Judge is assigned upon the filing of an indictment,[70] and his or her powers include reviewing an indictment, and preparing a case for trial.[71] When these steps are completed and the Pre-Trial Judge has determined that the case is ready for trial, a Trial Panel is assigned[72] which, under Article 40, "shall be responsible for the conduct of the trial proceedings".[73]

43. No similar defined tasks, such as overseeing investigative measures, are allocated by the Law to a standing "Single Judge" or "Single Judge Panel". Rather, the Law permits the (*ad hoc* and temporary) assignment of single judges where a judicial power exists and there is no other judge or panel already assigned who can carry it out. Article 33(2) allows the President to assign a single judge "to deal with a matter which […] requires the assignment of a judge other than the Pre-Trial Judge (a single judge panel)". When this assignment power was exercised for the first time, on 29 May

[69] Law, Articles 25(1)(a), (b) and (f).
[70] Law, Article 33(1)(a).
[71] Law, Article 39(1).
[72] Law, Article 33(1)(b).
[73] Law, Article 40(1).

2018, the President noted that as an indictment had not yet been filed, there was not yet a Pre-Trial Judge. A single judge assignment would enable a judicial determination of "a specific matter without the conditions for the assignment of a Pre-Trial Judge […] being triggered."[74] The assignment of a single judge under Article 33(2), in other words, fills a judicial lacuna where no existing Panel was otherwise assigned to the matter. This is reinforced by Rule 42(3), which provides that:

> Any challenge to a summons, order or investigative undertaking by the Specialist Prosecutor on the basis that it adversely affects the person's rights, shall be brought before a Single Judge to be assigned pursuant to Article 25(1)(f) of the Law, **if a Panel has not otherwise been assigned**.

44. In this case, the SPO requested SIMs to investigate interference allegations in Case 06. The allegations arose in relation to Case 06 witnesses, and in respect of orders made by Trial Panel II in Case 06. Manifestly, there was already a Panel assigned to manage those matters: Trial Panel II. Under the Law and the Rules there was no scope for the residual powers for which a Single Judge's functions are intended.

45. Contrary to the SPO's previous submissions,[75] the fact that a Single Judge has made orders does not mean they had the jurisdiction to do so. This is particularly the case for *ex parte* orders, made without any submissions on jurisdiction, or any apparent judicial consideration of this question. The SPO's requests for SIMs were adjudicated for well over a year before any discussion of the Single Judge's competence was raised. At that time, the SPO responded that the Single Judge had jurisdiction over the investigation because SIMs had been authorised by the Single Judge.[76] However, the SPO cannot create jurisdiction in a Panel which does not have it, simply by presenting a filing. Nor can a Single Judge give him or herself jurisdiction by granting an SPO request.

[74] KSCPR-2018/F00004, para. 11.
[75] KSC-BC-2018-01/F00773, para. 4.
[76] KSC-BC-2018-01/F00773, para. 4.

(b) A Single Judge has a temporary and *ad hoc* role, not a standing mandate

46. On 29 May 2018, the President referred to a "forthcoming request for judicial authorisation" from the SPO.[77] Rather than assigning a single judge temporarily to deal only with this "specific matter" (the words used in Article 33(2) of the Law) the President assigned Judge Guillou as:

> a Single Judge to consider any request for judicial authorisation and related matters submitted by the Specialist Prosecutor prior to the filing of an indictment and the ensuring assignment of a Pre-Trial Judge under Article 33(1)(a) of the Law.[78]

47. In effect this became a standing judicial role. Judge Guillou was maintained as a "Single Judge Panel" handling all investigative matters arising at the KSC. When Judge Guillou resigned in June 2024, the President invoked Rule 5 of the Rules on the Assignment of Specialist Chambers Judges, which applies when a judge assigned to a Panel is unable to perform his or her duties,[79] and assigned Judge Masselot.[80]

48. Such a role, assigning tribunal-wide judicial authority over investigative matters is not foreseen in the Law or the Rules. It would have been a simple matter for drafters to create such a role; to define it in a provision equivalent to Articles 39 and 40; and to set out the conditions and terms of its assignment in Article 33. However, there is no mention of a standing Single Judge (on investigations or any other issue). Rather, the Law is explicit that the assignment of a Single Judge under Article 33(2) "**shall be temporary in nature**". Such assignments "shall cease as soon as the matter triggering them has been disposed of".[81] Rules 85(1) and 85(2) then make clear that the Pre-Trial Judge has jurisdiction over investigative requests, and not an *ad hoc* temporary Single Judge. In Case 06, given that the Pre-Trial Judge had been divested

[77] KSCPR-2018/F00004, para. 2.
[78] KSCPR-2018/F00004, p. 5. This decision was cross-filed in *Prosecutor v. Gucati and Haradinaj*, as KSC-BC-2020-07/F00003.
[79] KSC-BC-2018-01/F00697/COR, para. 4.
[80] KSC-BC-2018-01/F00697/COR, p. 2. *See also* KSC-BC-2018-01/F00698.
[81] Law, Article 33(2).

of jurisdiction following the transmission of the case to Trial Panel II on 15 December 2022,[82] the SPO was required to direct requests for investigations to this Trial Panel.

49. In the first SIMs decision, the Single Judge simply footnoted to the President's decision assigning him as the standing Single Judge.[83] However, the President's assignment of a judge does not, in itself, establish that judge's jurisdiction. Article 30(1) provides that a judge "shall have the authority and responsibility to perform judicial functions" for the proceedings "to which he or she may be assigned **and according to the modalities established by this Law**". The assignment of a judge by the President is an administrative function, which cannot bestow judicial powers not granted under the Law and the Rules. Otherwise, the President could simply use her Article 33 functions to override the division of judicial powers established by the Law and the Rules. If the President had the power to decide which matters would be handled by which types of Panels, this would render Articles 39 and 40 of the Law meaningless.

50. As such, through a combination of errors by the SPO and the President, this matter has been handled outside the judicial scheme foreseen by the Law. In the first instance, when it became concerned about the possible violation of Case 06 orders, or the wrongful sharing of Case 06 information, the SPO should have seized Trial Panel II, enabling it to exercise its responsibilities under Article 40(2) as it best saw fit. Had the SPO considered that investigations into potential Article 15 offences were appropriate, this path was open to it. However, if SIMs were to be sought, the SPO was required to request them from the correct panel. As long as Trial Panel II had power in respect of a given SIM request, no gap in judicial authority existed necessitating the assignment of a Single Judge to that task under Article 33(2). The SIMs were gathered in violation of the Law and Rules, and should be excluded *in*

[82] F01132, para. 4; F01166, para. 10.
[83] KSC-BC-2018-01/F00324, fn. 1.

limine from the Case 06 proceedings.

3. The Single Judge committed errors in granting the SIMs

51. In addition to the above structural errors, once appointed, the Single Judge committed legal errors in the decisions authorising the SIMs. The Defence request for certification to appeal these errors was rejected,[84] meaning they have not been subject to appellate scrutiny. They remain as manifest legal errors which provide a further basis for the SIMs' exclusion.

(a) The Single Judge erred in finding the initial SIMs were "necessary"

52. Rule 34(2) is explicit: SIMs "may be undertaken where evidence **cannot** be obtained by other, less intrusive but equally effective means".

53. In support of its initial request for SIMs, the SPO alleged interference with [REDACTED]. The SPO relied on three "Official Notes",[85] created by the SPO, which reported on contacts with [REDACTED] regarding their alleged contact with [REDACTED]. Relying on these notes, the SPO asserted that in March 2023, [REDACTED]. [REDACTED] explained that a person that he refused to name (the "Unknown Person"), had contacted him 2-3 weeks earlier, and had instructed him to deliver a message to [REDACTED]. [REDACTED] [REDACTED] the Unknown Person told him that he had met with Mr Thaçi and Mr Veseli at the Detention Unit. During this meeting, Mr Thaçi and Mr Veseli had instructed the Unknown Person to deliver a message to [REDACTED]. The message then delivered by [REDACTED], allegedly coming from the Unknown Person but originating with Mr Thaçi and Mr

[84] KSC-BC-2018-01/F00629, paras. 36-43, 51.
[85] [REDACTED].

Veseli, was that [REDACTED] should withdraw as a witness or weaken [REDACTED] case against the accused.[86]

54. Having received anonymous double hearsay about alleged interference with [REDACTED], an obvious follow-up step would have been to ask [REDACTED] to identify the alleged Unknown Person, and to investigate whether the alleged Unknown Person had any links to Mr Thaçi or Mr Veseli, or had indeed visited the Detention Unit in the period alleged, or ever. These investigative steps were significantly less intrusive than the imposition of SIMs. They were not taken. Rather than risk any revelation that, in fact, this allegation had **nothing** to do with the accused, the SPO relied on this anonymous double hearsay and, having taken no steps to test or probe it, told the Single Judge that it was sufficient to justify the intrusion into Mr Thaçi's rights. In agreeing with the SPO, the Single Judge found that the SIMs were "necessary".

55. Critically, this finding was made without the Single Judge having considered **any other reasonable alternatives**, as required.[87] The Single Judge's reasoning was one paragraph in length, and failed entirely to consider the standard set in Rule 34(2) itself, being that SIMs "may be undertaken where evidence **cannot** be obtained by other, less intrusive but equally effective means". This language was not cited. No other less intrusive measures were considered. There was no finding that there were no less intrusive measures that would be equally effective. Incredibly, the Single Judge concluded [REDACTED].[88] [REDACTED]. The SIMs were not necessary, and the contrary finding is undermined by the Single Judge's failure to consider the Rule 34(2) legal standard.

[86] [REDACTED].
[87] KSC-BC-2018-01/F00324, para. 20.
[88] KSC-BC-2018-01/F00324, para. 20.

(b) The Single Judge erred in authorising the covert surveillance

56. Having secured the initial regime of SIMs, the SPO came back to the Single Judge in April 2023 seeking to covertly monitor and record all Mr Thaçi's non-privileged Detention Unit visits.[89] In support of its request for this most intrusive of measures, the SPO pointed to three instances of alleged contact with protected SPO witnesses [REDACTED] and claimed a "pattern of intimidation".[90] **None of these three instances** produced any evidence of Mr Thaçi giving instructions to contact or intimidate any SPO witness.

57. [REDACTED] attributes the source of the contact to [REDACTED], and not Mr Thaçi.[91] [REDACTED]. [REDACTED].[92] Mr Thaçi was not specifically identified by [REDACTED] as the source. Then, in relation to [REDACTED], the Single Judge erroneously misstated an earlier finding. In F00324, the Single Judge said the message [REDACTED].[93] The Single Judge relied on this same language to claim that [REDACTED].[94] This erroneously overstates the Single Judge's original finding. The SPO then provided a list of forthcoming visitors to Mr Thaçi who are former KLA members,[95] and made unsubstantiated allusions to [REDACTED].

58. In summary, the Single Judge authorised covert surveillance of a detained accused based on examples of alleged interference which make no link with Mr Thaçi, while erroneously overstating his original finding concerning [REDACTED]. The "pattern of intimidation" was no pattern at all. This was a manifestly insufficient basis to open the SPO's direct line into Mr Thaçi's private statements.

[89] KSC-BC-2018-01/F00340. *See also* KSC-BC-2018-01/F00344.
[90] KSC-BC-2018-01/F00350, para. 25.
[91] [REDACTED]. *See also* KSC-BC-2018-01/F00350, para. 7.
[92] [REDACTED]. *See also* KSC-BC-2018-01/F00350, para. 8; KSC-BC-2018-01/F00340, paras. 13-15.
[93] KSC-BC-2018-01/F00324, para. 19.
[94] KSC-BC-2018-01/F00350, para. 25.
[95] KSC-BC-2018-01/F00350, para. 9.

59. The Single Judge then considered this "pattern of intimidation" as against [REDACTED]. Namely, the Single Judge considered that [REDACTED].[96] [REDACTED]. [REDACTED]. [REDACTED]:[97]

[REDACTED]

60. [REDACTED]. [REDACTED].[98] The alleged "pattern of interference" was without an evidential basis, and the speculation as to its [REDACTED] was erroneous and insufficient. The covert surveillance should never have been authorised, and its results were obtained without a legal basis.

B. ADMISSION WOULD BE ANTITHETICAL TO OR WOULD SERIOUSLY DAMAGE THE INTEGRITY OF THE PROCEEDINGS.

61. The above errors, being that the SPO wrongly seized the Single Judge, who was without authority to authorise the SIMs, and the Single Judge's subsequent errors in SIMs decisions, mean that the Proposed Exhibits were obtained without a lawful basis.

62. Covert surveillance and recording of an accused's private conversations is exceptional. Under the KSC framework, it may only occur where the conditions of Rule 34 are met. The Rule 34 requirements are stringent, precisely because SIMs encroach on rights of the accused protected by the KSC statutory regime, and the overarching ECHR framework. The Thaçi Defence has previously set out how the imposition of the SIMs without lawful basis would violate a litany of Mr Thaçi's fundamental rights, including the right to privacy, not to incriminate oneself, and to benefit from the advice of counsel before making statements, all of which are

[96] KSC-BC-2018-01/F00350, para. 25.
[97] [REDACTED].
[98] [REDACTED].

incompatible with covert surveillance by the prosecuting authority absent lawful authorisation. The Defence repeats and relies on these submissions.[99]

63. The admission of the Proposed Exhibits will also necessarily impact Mr Thaçi's right to be tried within a reasonable time under Article 21(4)(d). To date, more than 7,400 documents have been admitted in Case 06. The SPO is now seeking to admit nearly 2,700 pages of Proposed Exhibits, which are purportedly relevant to the testimony of a small number of witnesses. Importantly, the Proposed Exhibits do not represent the entirety of the materials collected though the SIMs, only those which the SPO considers to be supportive of its own position on their significance. The Defence would likely seek to introduce the remainder. Admission of materials in this volume, considering the current evidential record, risks incompatibility with an expeditious trial.[100]

64. Importantly, the Proposed Exhibits have not yet been investigated by the Defence. The SPO's description of this material is partial and self-serving. The Pre-Trial Judge, in central respects, has found these same materials to be "vague and inconclusive"[101] in terms of the SPO's allegations, with the audio recordings regularly referred to as "inaudible".[102] As such, the admission of the Proposed Exhibits would necessitate the Defence being given the time to investigate and test the SPO's position as to relevance. Practically, therefore, the current delay between the end of the SPO case and the start of the Defence case in Case 06 would need to be prolonged to incorporate these investigations, and allow the Defence to prepare for what would essentially be a "trial within a trial". To be clear, the Defence position is that the

[99] F02312, paras. 41-44.
[100] See concerns expressed by the Trial Panel regarding the risks of creating an unmanageable trial record in F01380, para. 29.
[101] KSC-BC-2023-12/F00036, paras. 178-179.
[102] *See, e.g.*, KSC-BC-2023-12/F00036, fn. 383.

admission of the Proposed Exhibits would require the Case 12 allegations to be defended during the Defence case in Case 06.

65. Any admission of the Proposed Exhibits in Case 06 would also act as a permanent threat to the integrity of the proceedings, and any Judgment rendered in this case. Given the novelty of the SPO's jurisdictional choices and the erroneous assignment of a Single Judge by the President, it is inevitable that the legality of the SIMs will be litigated before the Court of Appeals Panel and Constitutional Court in Case 06, and likely also through these appellate layers in Case 12.

66. If the Proposed Exhibits are admitted in Case 06, following which another Judge or Panel decides that the SIMs were illegal and their results inadmissible, it will be impossible to separate the contaminated evidence from the Case 06 record, particularly when the Proposed Exhibits have been relied upon by the Trial Panel to "inform the credibility assessments of SPO witnesses", or considered relevant to the Trial Panel's assessment of "the state of mind of the Accused for the charged crimes".[103] The Judgment would automatically be vulnerable to review and revision given its reliance on, and contamination by, this illegally-obtained material.

67. As such, the Proposed Exhibits were obtained by means of a violation of the Law and Rules, and their admission would be antithetical to and would seriously damage the integrity of the proceedings, rendering them inadmissible under Rule 138(2) of the Rules.

V. CONCLUSION AND RELIEF SOUGHT

68. The layers of jurisdictional, structural, and legal errors committed by the SPO, the President, and the Single Judge, came together to block the exclusive jurisdiction

[103] SPO Request, paras. 3-6.

of the Trial Panel to keep control over the case it had been overseeing since 15 December 2022. These errors have not yet been imported into Case 06 which remains, at present, untainted by them.

69. The Proposed Exhibits do not meet the requirements for admission in Rule 138(1). The SPO's revised attempt at framing them as being relevant to sentencing would give rise to further illegality through impermissible double publishment. The other proposed bases for admission require the Trial Panel to decide factual issues pending in Case 12, and would necessitate a "trial within a trial" to be run within Case 06, throwing these proceedings open to certain delays of uncertain length.

70. Even if the admissibility hurdles of Rule 138(1) could be met, and the manifest prejudice overcome, the Proposed Exhibits were still collected in violation of the Law and Rules, by circumventing the statutory framework and the Trial Panel's exclusive jurisdiction over the case with which it is seized. The SIMs decisions were rendered by a Single Judge who had been assigned in contravention of the Law, and who committed further errors of law in finding that the SIMs were necessary, and that covert surveillance could be ordered.

71. Had the SPO wished to establish that the alleged conduct contained in the Proposed Exhibits impacted, in any way, the integrity of the Case 06 evidence, it was entitled (and arguably required) to put this to witnesses it says were impacted. This would have allowed the SPO, the Trial Panel, and the Defence, to explore whether the witnesses had, indeed, been impacted by any alleged "climate" of interference to which the alleged conduct purportedly contributed. The SPO declined to do so. This last-ditch attempt to inject these allegations into proceedings it deliberately circumvented, through a bar table motion filed in the closing hours of its case, must also fail.

72. The Defence accordingly requests the Trial Panel to:

REJECT the SPO Request for the admission of obstruction related materials, in its entirety;

FIND that the SPO erred in law in bringing its request for SIMs before a Single Judge who did not have jurisdiction;

FIND that the President's assignment of a standing Single Judge violated Article 33(2) of the Law; and

EXCLUDE all material arising from the SIMs and associated interference investigations *in limine* from the Case 06 proceedings.

[Word count: 9998 words]

Respectfully submitted,

Luka Misetic

Counsel for Hashim Thaçi

Friday, 02 May 2025

At New York, United States