



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2023-12
Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni
Kilaj, Fadil Fazliu and Hajredin Kuçi

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Public redacted version of 'Prosecution response to THAÇI preliminary motion on
jurisdiction'

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I. INTRODUCTION

1. THAÇI's Preliminary Motion¹ abuses the Rule² 97 procedure to raise inapt and inadmissible matters, many of which have been extensively litigated in other case files or are squarely addressed by other provisions of the applicable framework with which THAÇI has failed to comply. THAÇI has been given every opportunity to seek relief for any issue affecting his rights in both KSC-BC-2018-01 and KSC-BC-2020-06. He has done so before the Single Judge, Trial Panel, Appeals Panel and Constitutional Court Chamber. At each instance, THAÇI's challenges have been dismissed.

2. In the Preliminary Motion, THAÇI now attempts to bend the Kosovo Specialist Chambers' ('KSC') legal framework to the misplaced assertion that the Pre-Trial Judge lacks jurisdiction over the Indictment. However, THAÇI once again fails to establish his claim. THAÇI's submissions lack legal basis, run contrary to the express language of the Law,³ and seek to circumvent applicable provisions and timelines. Accordingly, the Preliminary Motion should be dismissed in its entirety.

II. SUBMISSIONS

A. THE PRELIMINARY MOTION DOES NOT FALL WITHIN RULE 97

3. In seeking to challenge the Pre-Trial Judge's jurisdiction over the Indictment, THAÇI places reliance on Rule 97(1)(a),⁴ but without acknowledging that this provision only authorises challenges to the traditional bases for jurisdiction of the

¹ Thaçi Defence Preliminary Motion on Jurisdiction, KSC-BC-2023-12/F00290, 8 May 2025, Confidential and *Ex Parte* ('Preliminary Motion').

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' are to the Rules, unless otherwise specified.

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' are to the Law, unless otherwise specified.

⁴ Preliminary Motion, KSC-BC-2023-12/F00290, paras 1, 4-6.

Specialist Chambers as per Articles 6 to 9 of the Law.⁵ The Preliminary Motion is not a jurisdictional challenge within the meaning of that rule, and merely stating the matter to be jurisdictional does not make it so. Rather, it seeks to challenge the competence and/or legality of the appointment of individual Single and Pre-Trial Judges.⁶

4. While Article 39(1) has been interpreted to permit a broader range of preliminary challenges at this stage,⁷ that does not obviate the need to identify an applicable legal basis, appropriately apply the legal framework and relevant legal standards, and comply with relevant deadlines. THAÇI has failed to do so, as further outlined below.

B. TRIAL CHAMBER II IS NOT THE PROPER FORUM FOR KSC-BC-2023-12

5. The proposition that Trial Panel II has exclusive jurisdiction over the allegations in the Indictment⁸ is contrary to the plain text of the Law and the Rules.

6. The authority to carry out investigations and file indictments lies solely with the Specialist Prosecutor's Office ('SPO'),⁹ subject only to judicial oversight over

⁵ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Admissibility of Appeal and Joinder Against Decision on Preliminary Motions, KSC-BC-2020-07/IA003/F00005, 12 May 2021, para.14; *Specialist Prosecutor v. Januzi et al.*, Public Redacted Version of Decision on Preliminary Motions and Related Requests, KSC-BC-2023-10/F00433/RED ('Case 10 Preliminary Motions Decision'), 12 August 2024, para.34; *Specialist Prosecutor v. Thaçi et al.*, Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, KSC-BC-2020-06/F00450 ('Case 6 Decision on Legality'), 31 August 2021, para.54.

⁶ The Preliminary Motion challenges: (i) the Pre-Trial Judge's competence to review the Indictment and preside over the pre-trial proceedings (Preliminary Motion, KSC-BC-2023-12/F00290, paras 21-56); (ii) the legality of the President's appointments of the Single Judges to rule on matters during the investigation (Preliminary Motion, KSC-BC-2023-12/F00290, paras 58-69); and (iii) the legality of the President's appointments of the Pre-Trial Judges in KSC-BC-2023-12 (Preliminary Motion, KSC-BC-2023-12/F00290, paras 70-81).

⁷ Case 10 Preliminary Motions Decision, KSC-BC-2023-10/F00433/RED, para.36; Case 6 Decision on Legality, KSC-BC-2020-06/F00450, paras 54-55.

⁸ Preliminary Motion, KSC-BC-2023-12/F00290, paras 21-56.

⁹ Articles 24(2), 35(1) and (5); *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, paras 151, 184; The Specialist Chamber of the Constitutional Court, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 29 May 2017

certain investigative measures.¹⁰ The Law and Rules set out a clear procedure for initiating charges for offences within the KSC's jurisdiction. Once the Specialist Prosecutor files an indictment, the President appoints a Pre-Trial Judge,¹¹ who reviews the indictment and, if the indictment is confirmed, presides over the pre-trial phase of proceedings.¹²

7. THAÇI seeks to entirely invert this procedure on the sole basis that the present case concerns witness interference arising in the context of another case before the KSC.¹³ In making this argument, THAÇI disregards clear provisions of the KSC framework in favour of attempting to import alien rules from the ICTY.¹⁴ To try and justify doing so, THAÇI incorrectly claims that the KSC's legal framework does not 'address this question specifically'.¹⁵ It is therefore fatal to his argument that the Law explicitly regulates the investigation and conduct of criminal proceedings arising in the exact circumstances of this case.

8. Article 15(2) offences must – by definition – relate to the KSC/SPO's official proceedings and its officials. The Law does not distinguish between Article 15(2) offences and other offences within the KSC's jurisdiction. Had the drafters of the Law intended a wholly different pre-trial procedure for these offences, they would have legislated accordingly.

to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L- 053 on Specialist Chamber and Specialist Prosecutor's Office, KSC-CC-PR-2017-03/F00006, 28 June 2017, para.18.

¹⁰ Articles 35, 38; Rules 30-41, 86.

¹¹ Article 33(1)(a); Rule 86(1).

¹² Article 39; Rules 85-98.

¹³ *See for example* Preliminary Motion, KSC-BC-2023-12/F00290, para.21.

¹⁴ Preliminary Motion, KSC-BC-2023-12/F00290, paras 31-41.

¹⁵ Preliminary Motion, KSC-BC-2023-12/F00290, para.30.

9. THAÇI refers to the Trial Panel's broad powers under Article 40,¹⁶ but fails to acknowledge that these powers only come into existence after the completion of the pre-trial proceedings and after the Pre-Trial Judge determines that the case is ready for trial.¹⁷ The Trial Panel's powers to manage the proceedings in KSC-BC-2020-06 do not extend to separate charges filed in another case against separate Accused. In this regard, THAÇI's seeming claim that KSC-BC-2023-12 is a 'matter' or an 'aspect' of KSC-BC-2020-06¹⁸ is completely misplaced. While there may be links between KSC-BC-2023-12 and KSC-BC-2020-06, the former is a separate and distinct case, concerning distinct charges and different accused than the latter.

10. However, even more decisive is Article 33(5), which explicitly bars the Judges of Trial Panel II from 'any resulting criminal proceedings arising from' the violations of Article 15(2) alleged in the Indictment (emphasis added). Contrary to THAÇI's submissions,¹⁹ this is plainly not confined only to trial proceedings. The ordinary meaning of the provision's text is unambiguous, especially when read in the context of Article 33(1), which refers to all stages of the court process as 'proceedings', including the pre-trial stage. Numerous other passages in the Law confirm this interpretation.²⁰

¹⁶ Preliminary Motion, KSC-BC-2023-12/F00290, paras 22-27.

¹⁷ Rule 40(1).

¹⁸ Preliminary Motion, KSC-BC-2023-12/F00290, paras 22, 25, 30, 42.

¹⁹ Preliminary Motion, KSC-BC-2023-12/F00290, paras 37, 42. Despite being the clearly governing provision, the Preliminary Motion barely mentions Article 33(5).

²⁰ Article 22 distinguishes between 'criminal proceedings' generally and 'trial proceedings' specifically. Article 35(2)(g) grants the Specialist Prosecutor the power to, *inter alia*, initiate criminal proceedings. Article 39(7) speaks of the 'trial phase' of proceedings. Article 40(1) mentions 'trial proceedings'. Article 41(6)(b)(ii) addresses the risk that an accused will obstruct the progress of criminal proceedings, which has always been interpreted to include pre-trial proceedings (*see for example* Second Decision on Review of Detention of Hashim Thaçi, KSC-BC-2023-12/F00250, 7 April 2025, Confidential, paras 28-32). Finally, criminal proceedings have been interpreted to include pre-trial proceedings for the purpose of applications for protection of legality against decisions on detention under Article 48(6) (*see for example* *Specialist Prosecutor v. Thaçi et al.*, Decision on Kadri Veseli's Request for Protection of Legality, KSC-BC-2020-06/PL001/F00008, 15 August 2022).

11. THAÇI himself has previously recognised and relied upon this reality. Indeed, in November 2023, when the SPO filed some of the materials obtained through the Special Investigative Measures ('SIMs') with Trial Panel II in the context of a request to modify detention conditions, THAÇI forcefully objected to *any involvement* of Trial Panel II in this matter:

Judicial authorisation for the covert audio-recording was obtained from a Single Judge. The application for variation of the detention conditions, by contrast, was brought before the Trial Panel. In so doing, the SPO provided the Trial Panel with hundreds of pages of covertly-recorded material, containing a wealth of unproven allegations that directly concern the credibility of evidence in this case. [...] There is no doubt that prejudice arises from the SPO placing specific information concerning unproven allegations before the Trial Panel. The question then becomes whether, to a reasonable observer, this information could be seen to contaminate the impartiality of the Trial Panel, when no measures were taken to preserve Mr Thaçi's rights. Put another way, could a reasonable observer conclude that there was a deliberate effort on the part of the SPO to taint the credibility of exculpatory evidence, in a manner that would inevitably impact on the objective appearance of the Judges' ability to assess the credibility of evidence in a fair manner.²¹

12. These submissions stand in stark contrast to THAÇI's self-serving posture in the Preliminary Motion, where he sees no reason why Trial Panel II could not preside over the Pre-Trial Proceedings in KSC-BC-2023-12 while delivering judgment on the charges in KSC-BC-2020-06. However, THAÇI contradicts himself yet again when he argues that the Pre-Trial Judge has been irreparably corrupted by her involvement in an investigation that he would have wanted Trial Panel II to take charge of.²²

13. THAÇI further argues that, when the SPO formed a view that orders in KSC-BC-2020-06 were being breached, it should have seized Trial Panel II with any such concerns, particularly as detention of the accused in that case were under its authority.²³ This claim is entirely belied by the record, which shows the SPO did

²¹ *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of 'Thaçi Defence Response to Prosecution urgent request for modification of detention conditions (F01933)', KSC-BC-2020-06/F01944/RED, 22 November 2023, paras 11-12.

²² Preliminary Motion, KSC-BC-2023-12/F00290, paras 77-81.

²³ Preliminary Motion, KSC-BC-2023-12/F00290, paras 43, 47.

exactly what THAÇI claims it failed to do. Indeed, beginning as early as 28 March 2023, the SPO proactively and repeatedly seized Trial Panel II about developments in the investigation into potential interference with KSC-BC-2020-06.²⁴ The SPO did so precisely because these developments touched on the Panel's Authority.²⁵

14. THAÇI's claim is further repudiated by the events of October and November 2023. On 5 October 2023, the SPO informed Trial Panel II that it had obtained judicial authorisation to covertly record THAÇI's non-privileged Detention Centre visits from May through October 2023, for the specific purpose of investigating a pervasive pattern of potential interference with, and obstruction of, proceedings in KSC-BC-2020-06.²⁶ Then, on 17 November 2023, the SPO urgently requested detention modifications in KSC-BC-2020-06.²⁷ The request laid out, in detail, the results of the covert monitoring. The express purpose of the SPO's detention modification request was to seize Trial Panel II with the SPO's concerns – based on its investigation – of potential interference emanating from the Detention Centre and to obtain an order from the Panel aimed at preventing such conduct. Then, on 20 November 2023, the SPO disclosed all of the judicially authorised visit recordings to all KSC-BC-2020-06 accused.

15. In short, THAÇI's assertions that Trial Panel II has been prevented from implementing measures in response to breaches of its orders, that it cannot guarantee

²⁴ See [REDACTED].

²⁵ [REDACTED]. While these filings are generally referenced in the Preliminary Motion, at footnotes 17 and 95, the fact that they undermine THAÇI's claims is not acknowledged. See [REDACTED].

²⁶ See [REDACTED].

²⁷ *Specialist Prosecutor v. Thaçi et al.*, Public redacted version of 'Prosecution urgent request for modification of detention conditions with confidential Annexes 1 to 5', KSC-BC-2020-06/F01933/RED, 17 November 2023.

a fair trial in KSC-BC-2020-06, and that its authority has somehow been undermined or circumvented,²⁸ are baseless.

16. Finally, although THAÇI vaguely argues that Trial Panel II is generally authorised to sanction violations of its orders,²⁹ he presents no tangible alternative that would address the perceived inequities from concurrent criminal proceedings overseen by separate panels. THAÇI merely suggests that Trial Panel II should have determined: (i) whether the investigation should be overseen by another panel, including for reasons of bias; and (ii) whether the issue of an indictment and a separate case was warranted.³⁰ Even assuming *arguendo* that there was a legal basis for the suggested course, THAÇI's proposal would do nothing to address his grievances, particularly in light of his concessions that Trial Panel II could not have adjudicated KSC-BC-2023-12 itself and that even the investigation may have to be overseen by another panel.³¹ THAÇI's inability to present a coherent interpretation of the applicable legislative scheme illustrates the falsity of his argument.

17. THAÇI cannot evade criminal proceedings through a mis-reading of the Law. KSC-BC-2023-12 is properly before the Pre-Trial Judge in accordance with the ordinary procedures, conforming to the express language of the applicable legal framework, as outlined above.

²⁸ Preliminary Motion, KSC-BC-2023-12/F00290, paras 47-56.

²⁹ See Preliminary Motion, KSC-BC-2023-12/F00290, para.28 ('[handle] misconduct or breach of orders'), para.29 ('is responsible for handling matters concerning the administration of justice in a case before it'), (may 'sanction non-compliance with an order made by that Panel'), para.30 (has 'the full power and responsibility to determine how allegations of contempt or witness interference concerning the case are handled'), para.42 (has the 'power to sanction violations of Case 06 orders'; may 'authorise investigative measures concerning alleged interference with Case 06 witnesses'), (has 'exclusive power and responsibility to determine what action should be taken'); (is 'responsible for determining how the matter should be disposed of').

³⁰ Preliminary Motion, KSC-BC-2023-12/F00290, para.44.

³¹ Preliminary Motion, KSC-BC-2023-12/F00290, paras 37, 42, 44.

C. NO LEGAL BASIS TO CHALLENGE THE LEGALITY OF THE SINGLE JUDGE'S ASSIGNMENT

18. THAÇI impermissibly seeks to challenge the President's assignment of the Single Judge in KSC-BC-2018-01.³²

19. While THAÇI claims that material underpinning the Indictment was obtained without legal basis,³³ there is no avenue for challenging the evidence underpinning the charges in the Indictment at the current stage of proceedings, as the Pre-Trial Judge and Appeals Panel have previously confirmed.³⁴

20. THAÇI had ample opportunity to challenge the Single Judge's competence during the appeal against the Single Judge's decisions authorising the SIMs. Having failed to raise the issue at that time, THAÇI now attempts to reopen this extensive litigation before the Pre-Trial Judge, who has no mandate to review the President's decision to assign the Single Judge.

21. In any event, THAÇI submissions regarding the Single Judge's appointment and/or competence³⁵ are without merit. As THAÇI himself acknowledges,³⁶ one of the circumstances when utilisation of a Single Judge is appropriate is in the context of an investigation prior to the filing of charges. That was precisely the situation in which the Single Judge in this case was seized. THAÇI's challenge to that again rests on the flawed claim - addressed above – that Trial Panel II had exclusive jurisdiction over distinct Article 15 charges and accused. The legal framework provides otherwise, and

³² Preliminary Motion, KSC-BC-2023-12/F00290, paras 57-69.

³³ Preliminary Motion, KSC-BC-2023-12/F00290, para.87.

³⁴ See *Specialist Prosecutor v. Thaçi et al.*, Public redacted version of Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00413/RED, 22 July 2021, paras 45-49; Case 10 Preliminary Motions Decision, KSC-BC-2023-10/F00433/RED, paras 39, 47; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021, para.23.

³⁵ Preliminary Motion, KSC-BC-2023-12/F00290, paras 57-69.

³⁶ Preliminary Motion, KSC-BC-2023-12/F00290, para.60.

THAÇI's submissions should be rejected accordingly. With regard to THAÇI's claim that the Single Judge appointment became a 'standing mandate', THAÇI: (i) misleadingly misquotes Article 32(2);³⁷ (ii) provides no citation or authority for sweeping assertions;³⁸ and (iii) engages in misplaced speculation and faulty logic.³⁹

D. THE PRE-TRIAL JUDGE'S APPOINTMENT WAS PROPER

22. THAÇI's claim that the Pre-Trial Judge's assignment violates the Law is also without merit.⁴⁰ As outlined below, these submissions both constitute a blatant attempt to circumvent applicable procedures and timelines, and a misreading of the applicable framework.

23. Parties seeking the disqualification of a Judge must do so under Rule 20, which covers the precise factual basis alleged in the Preliminary Motion, namely:

The grounds for recusal or disqualification may include [...] performance of functions, prior to his or her assignment, during which the Judge could have formed an opinion on the case in question, that could adversely affect the Judge's required impartiality.⁴¹

24. Rule 20(3) requires a Party to apply to the President for the disqualification of a Judge no later than ten days after the grounds on which the application is based become known to the Party. None of the factual grounds raised in the Preliminary Motion are new. THAÇI has been aware of the dual roles of the Single Judge and Pre-Trial Judge since the Indictment was notified to him in December 2024. Further, any motion for disqualification of a Judge must be filed with the President, not the

³⁷ Article 33(2) refers only to a 'matter' not a 'specific matter', *contra* Preliminary Motion, KSC-BC-2023-12/F00290, para.65.

³⁸ *For example*, the core assertion that one Single Judge would not be permitted to handle all matters at the investigative stage (see Preliminary Motion, KSC-BC-2023-12/F00290, para.68 – which simultaneously mischaracterizes the Single Judge's appointment as 'permanent').

³⁹ Preliminary Motion, KSC-BC-2023-12/F00290, para.69 (speculating that the President could have assessed that jurisdiction lay with Trial Panel II. THAÇI, however, fails to address the fact that it would have been equally within the powers of the Single Judge to make a similar finding had he considered that to be the case).

⁴⁰ *Contra* Preliminary Motion, KSC-BC-2023-12/F00290, paras 70-81.

⁴¹ Rule 20(1)(c).

impugned Judge directly. THAÇI is, therefore, attempting to use the Preliminary Motion to circumvent clearly set out procedures and timelines, which he failed to comply with. The submissions under this heading should be dismissed *in limine* on this basis alone.

25. In any event, Article 33(4) of the Law delineates the circumstances under which Judges are unable to sit on multiple Panels:

Having been assigned as Pre-Trial Judge or to a panel for a matter, a judge may not sit on another panel at a different phase of the same matter.

26. The Pre-Trial Judge's assignment to KSC-BC-2023-12 conforms with this provision, for the following reasons.

27. First, the Single Judge was not appointed to another 'panel'⁴² because the Pre-Trial Judge is not a 'panel' for the purpose of this provision. Otherwise, the words 'Pre-Trial Judge' in the first part of the sentence would have no meaning, since 'Pre-Trial Judge' would already be included in the word 'panel'. Article 33(4) should be interpreted in line with the principle of statutory interpretation that every word included in a statute should be given meaning.⁴³

28. Notably, Article 33(1) does not refer to the Pre-Trial Judge as a 'panel', whereas every other level of the KSC's judiciary is referred to as a 'panel' in Article 33(1). Likewise, Article 25 distinguishes individual judges acting as Single Judge or Pre-Trial

⁴² *Contra* Preliminary Motion, KSC-BC-2023-12/F00290, para.76.

⁴³ United States, Court of Appeals (7th Circuit), *Gustafson v. Alloyd Co*, pp 574-575; Canada, Court of Appeal for Ontario, *R. v. Fox*, 2023 ONCA 674, para.27; Australia, High Court, *Project Blue Sky Inc v Australian Broadcasting Authority*, [1998] HCA 28, para.71. *See also* ICTY, *Prosecutor v. Delalić et al.*, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, IT-96-21-T, 1 May 1997, para. 17, which reads in relevant part: 'Of the many rules [in statutory interpretation], one of the most familiar and commonly used is the literal or golden rule of construction. By this rule, the interpreter is expected to rely on the words used in the Statute, and to give such words their plain natural import in the order in which they are placed. The rationale is that the law maker should be taken to mean what is plainly expressed.'

Judge from panels at all other levels and Article 49(4) also distinguishes between a Pre-Trial Judge and a panel of the KSC. Although the word ‘panel’ is defined in the Rules to include a Pre-Trial Judge,⁴⁴ the definitions in the Rules apply to them only,⁴⁵ the Rules are subservient to the Law and, in the event of a conflict, the Law prevails.⁴⁶

29. Second, and consistent with that, the word ‘phase’ as used in the Law, refers to pre-trial, trial, court of appeal and supreme court phases of proceedings.⁴⁷ As such, the reference to ‘a different phase’ of the same matter in Article 33(4) should be read accordingly, and does not *per se* encompass assignments of a Single Judge.

30. Third, and relatedly, the Pre-Trial Judge was not assigned to the ‘same matter’ as the Single Judge.⁴⁸ It is clear from Article 33(2) that the Law regards a matter triggering the assignment of the Single Judge as self-contained and distinguishable from the phases of a case as provided for under the Law.

31. The teleological arguments advanced by THAÇI do not survive close scrutiny either. There is no principled reason for the separation of the Pre-Trial Judge from the matters decided by a Single Judge, as is evident from the fact that the Pre-Trial Judge deals with any such matters once appointed.⁴⁹ THAÇI’s assertion that the Pre-Trial Judge should not be aware of the wider circumstances of an investigation, which ‘may be prejudicial’,⁵⁰ is belied by his expressed desire for Trial Panel II to be intimately involved in the same investigation. It is telling that no other similarly constituted international court or tribunal has enacted the strict separation between pre-trial

⁴⁴ Rule 2.

⁴⁵ Rule 2(1) (‘In the Rules, ...’).

⁴⁶ Article 3(2); Rule 4(2).

⁴⁷ See especially Article 30(3).

⁴⁸ Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law, KSCPR-2018/F00004, 29 May 2018 (‘Decision Assigning a Single Judge’), para.15.

⁴⁹ Decision Assigning a Single Judge, KSCPR-2018/F00004, paras 11-13.

⁵⁰ Preliminary Motion, KSC-BC-2023-12/F00290, para.74.

judges that THAÇI claims is so fundamental to the integrity of proceedings.⁵¹ Indeed, THAÇI himself even acknowledges that at other institutions such duality is expressly envisaged.⁵²

32. THAÇI's argument that the Pre-Trial Judge should scrutinise, with a fresh mind, the procedures by which Indictment supporting material has been gathered⁵³ is erroneous because the Pre-Trial Judge is not tasked to do that.⁵⁴ THAÇI misrepresents the functions of the Pre-Trial Judge to raise issues he failed to bring up before the Single Judge and Appeals Panel at the appropriate time.

33. Next, THAÇI misleadingly cites the President's Decision in support of his proposition that '[p]rocedures undertaken before the filing of an indictment are to be handled by a different judge.'⁵⁵ In fact, the Decision explicitly states the opposite:

In accordance with Article 33(4) of the Law, the Single Judge hereunder assigned may not sit on a panel at a different phase of the same matter other than as a Pre-Trial Judge.⁵⁶

34. The President was evidently cognisant of the provisions relied on in the Preliminary Motion, but adopted the same common-sense interpretation set out above:

The purpose of [Articles 25(1)(f) and 33(2)] is thus to capture those instances where an individual Judge needs to be assigned in order to deal with a specific matter without the conditions for the assignment of a Pre-Trial Judge under Article 33(1)(a) of the Law being triggered.⁵⁷

⁵¹ In any event, as a professional judge, the Pre-Trial Judge is able to exclude irrelevant and/or prejudicial material from her mind where necessary (*See for example Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning, KSC-BC-2020-06/IA028/F00011/RED, 4 July 2023, para.53; ICTY, *Prosecutor v. Tolimir et al.*, IT-04-80-AR73.1, Decision on Radivoje Miletić's interlocutory appeal against the Trial Chamber's decision on joinder of Accused, 27 January 2006, para.21.).

⁵² Preliminary Motion, KSC-BC-2023-12/F00290, para.73.

⁵³ Preliminary Motion, KSC-BC-2023-12/F00290, para.74.

⁵⁴ See Article 39.

⁵⁵ Preliminary Motion, KSC-BC-2023-12/F00290, para.73.

⁵⁶ Decision Assigning a Single Judge, KSCPR-2018/F00004, para.17.

⁵⁷ Decision Assigning a Single Judge, KSCPR-2018/F00004, para.11.

35. Judge Guillou was assigned as a Single Judge to ‘any request for judicial authorisation submitted by the Specialist Prosecutor prior to the filing of an Indictment’,⁵⁸ for matters that could have come within the purview of a Pre-Trial Judge, but arose before the event triggering the assignment of a Pre-Trial Judge had occurred. Appropriately considered in the totality of the circumstances, there is nothing improper in those functions being performed by the same Judge.

36. The object and purpose of this legislative scheme is not difficult to discern. The most obvious reason for appointing a permanent Pre-Trial Judge only upon the filing of an Indictment is judicial economy. It is worth recalling that the Law was adopted in 2015, long before the contours of any of the KSC’s cases were visible to its’ drafters. Appointing a Pre-Trial Judge in the early stages of the SPO’s investigations could have been a waste of resources if that Judge was rarely called upon. In the absence of a permanent Pre-Trial Judge, the KSC’s legal framework had to provide for a Judge to be available on an *ad hoc* basis when required. With that object and purpose in mind, the President is afforded a reasonable degree of discretion in the assignment of judges to ‘allow flexibility and the ability to account for circumstances as they present themselves’.⁵⁹

37. For these reasons, THAÇI’s interpretation of Article 33 would lead to untenable results and should be rejected.⁶⁰

III. CLASSIFICATION

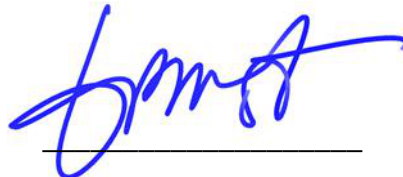
⁵⁸ Decision Assigning a Single Judge, KSCPR-2018/F00004, para.20.

⁵⁹ See Case 6 Decision on Legality, KSC-BC-2020-06/F00450, para.106.

⁶⁰ See SCSL, *Prosecutor v. Fofana et al.*, Decision on Motion to compel the production of exculpatory witness statements, witness summaries and materials pursuant to Rule 68, SCSL-2004-14-T, 8 July 2004, para.19, which states that ‘no rule, however formulated, should be applied in a way that contradicts its purpose.’

38. This filing is confidential and *ex parte* pursuant to Rule 82(4). A public redacted version will be filed.

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Kimberly P. West

Specialist Prosecutor

Friday, 23 May 2025,

At The Hague, The Netherlands.