

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 Counsel for Hashim Thaçi

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Thaçi Defence reply to SPO response to Preliminary Motion on Jurisdiction

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SUBMISSIONS

1. In its preliminary motion on jurisdiction,¹ the Defence of Mr Hashim Thaçi (“Defence”) submitted that the Pre-Trial Judge was without jurisdiction to issue the indictment in this case (“Case 12”), for two reasons: (1) The allegations of attempted interference are fundamentally connected to the trial in *Prosecutor v Thaçi, Veseli, Selimi, and Krasniqi* (“Case 06”) and therefore fell within the exclusive jurisdiction of Trial Panel II. Rather than seizing Trial Panel II with its concerns, the SPO wrongly initiated separate *ex parte* proceedings before a Single Judge. (2) When the SPO filed an indictment, the President assigned it to the same judges who had been seized as Single Judge, violating the clear terms of the KSC Law.
2. The SPO’s response² entirely fails to address the central question raised by the Defence: what was the SPO’s legal basis for having filed its Special Investigative Measure (“SIM”) requests to the Single Judge, when Trial Panel II had the power to determine them? That question remains unanswered, even today. Instead, the SPO raises a series of untenable procedural objections and legal interpretations which attempt to deflect from its error.
3. This reply is filed confidential and *ex parte* in compliance with Rule 82(4). A public redacted version will be filed.

1.1 THE SCOPE OF RULE 97

4. The SPO argues that the Defence Motion does not amount to a jurisdictional challenge.³ It cites KSC decisions explaining Rule 97(1) jurisdiction motions as being concerned with subject-matter, temporal, territorial or personal

¹ KSC-BC-2023-12/F00290, Thaçi Defence Preliminary Motion on Jurisdiction, 8 May 2025, (“Defence Motion”)

² KSC-BC-2023-12/F00310, Prosecution response to THAÇI preliminary motion on jurisdiction, 23 May 2025, (“SPO Response”).

³ SPO Response, para.3.

jurisdiction.⁴ However, none of those decisions addressed whether Rule 97(1)(a) encompasses matters concerning the jurisdiction of a particular *panel* of the KSC.

5. In *Kanyabashi*, the ICTR Appeals Chamber ruled that a challenge to the powers of a particular *chamber*; or even to the proper constitution of the chamber, was a matter concerning jurisdiction.⁵ Judges McDonald and Vohrah explained:

The jurisdiction of a tribunal concerns its right and power to hear and determine a judicial proceeding. Articles 1 through 7 of the Statute of the International Tribunal establish the competence of the International Tribunal as a whole, with respect to subject matter, personal, territorial and temporal (*ratione materiae, ratione personae, ratione loci and ratione temporis*) jurisdiction. However, the jurisdiction of the Tribunal is exercised by the Trial Chambers. Consequently, if the competence and legality of the composition of the Trial Chamber are challenged, it raises the issue of the power of the Trial Chamber to exercise the jurisdiction that the Tribunal possesses.⁶

6. Although in a different context, the ICTY Appeals Chamber also rejected a narrow concept of jurisdiction:

[The Trial Chamber decision] implie[d] a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae and materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as “competence”); it is basically – as is visible from the Latin origin of the word itself, *jurisdiction* – a legal power, hence necessarily a legitimate power, “to state the law” (*dire le droit*) within this ambit, in an authoritative and final manner.⁷

7. In any event, it is settled law that the Defence right under Article 39(1) to file preliminary motions exceeds those listed in Rule 97(1).⁸

⁴ *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/IA001/F00005, [Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention](#), para. 17; *Prosecutor v Januzi, Bahtijari and Haxhi Shala*, KSC-BC-2023-10/F00433, [Public Redacted Version of Decision on Preliminary Motions and Related Requests](#), 12 August 2024, para.34.

⁵ ICTR, *Kanyabashi v Prosecutor*, ICTR-96-15-A, [Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I](#), 3 June 1999.

⁶ *Ibid.*, [Joint and Separate Opinion of Judge McDonald and Judge Vohrah](#), para.4. See also [Dissenting Opinion of Judge Shahabuddeen](#), p.3.

⁷ ICTY, *Prosecutor v Tadić*, [Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, para.10.

⁸ *Prosecutor v Thaçi, Veseli, Selimi, and Krasniqi*, KSC-BC-2020-06/F00450, [Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights](#)

8. The Defence notes that the SPO recently argued in Case 06 that these same matters could not be raised before Trial Panel II.⁹ The SPO's position is, therefore, that a forum question concerning the Single Judge/Pre-Trial Judge and Trial Panel II can be raised before *neither* of the affected judges.

1.2 EXCLUSIVE JURISDICTION OF TRIAL PANEL II OVER ALLEGATIONS OF INTERFERENCE

9. The SPO seeks to rely on its independence in conducting investigations and filing indictments.¹⁰ However, the SPO acknowledges that it is subject to judicial oversight. Where such oversight exists, the SPO's independence does not extend to deciding which Judge or Panel it should seize. This is determined by the Court's legal framework. In none of its filings to the Single Judge regarding SIMs is any legal basis given for the SPO's choice of forum. Even now, this is unexplained.
10. The SPO asserts that the Defence Motion seeks to apply a "wholly different pre-trial procedure" for Article 15(2) offences.¹¹ That is not the case. The same pre-trial procedures apply in any case at the KSC, including Article 15 offences. However, where such offences are suspected in the context of an ongoing trial, the Trial Panel with oversight of that trial is responsible for addressing them, under Article 40(2) of the KSC Law. The necessary consequence is that such matters must first be brought to the Trial Panel, and pre-trial proceedings cannot be initiated in parallel to the ongoing trial without Trial Panel authorisation. Despite the SPO's claims,¹² nothing in the KSC Law says otherwise.

[of the Accused](#), 31 August 2021, paras 54-55; *Prosecutor v Januzi, Bahtijari and Haxhi Shala*, KSC-BC-2023-10/F00433, [Public Redacted Version of Decision on Preliminary Motions and Related Requests](#), 12 August 2024, para.36.

⁹ *Case 06*, KSC-BC-2020-06/F03172, Consolidated Prosecution reply to responses to obstruction bar table motion, 12 May 2025 (PRV 29 May 2025), para.12

¹⁰ SPO Response, para.6.

¹¹ SPO Response, para.8.

¹² SPO Response, para.7.

11. In reality, it is the SPO which seeks to create a different procedure that lacks a basis in the KSC's texts. The SPO does not appear to dispute that a Trial Panel has jurisdiction over the handling of alleged witness interference in an ongoing trial. However, the SPO suggests that this jurisdiction can *simultaneously* be held by a Single Judge where the SPO has unilaterally decided to seize it of investigative matters. The SPO seems to consider itself empowered to decide which judge(s) will review its allegations, but it cites no provision of the Law which permits such forum-shopping.
12. The SPO also tries to downplay the connection between Case 06 and Case 12, calling them "separate and distinct".¹³ The disingenuousness of this claim is clear from the SPO's own filings. In November 2023 the SPO finally seized Trial Panel II with requests based on the same suspicions of interference which are the basis for Case 12.¹⁴ The SPO is currently seeking to admit materials obtained pursuant to the Single Judge's SIMs in Case 06, even claiming that these are relevant to Case 06 sentencing.¹⁵
13. The SPO complains that the Defence Motion is not consistent with previous Defence filings.¹⁶ The Defence did raise concerns with Trial Panel II regarding possible bias. However, Trial Panel II ruled that no issue of bias arose,¹⁷ and the Defence must accept that ruling. In any event, if Trial Panel II concluded that the prior Defence position was incorrect, it is unclear why the Defence should now be required not to adopt the ruling of Trial Panel II.

¹³ SPO Response, para.9.

¹⁴ SPO Response, para.14.

¹⁵ Case 06, KSC-BC-2020-06/F03120, [Prosecution motion for admission of obstruction related materials](#), 15 April 2025.

¹⁶ SPO Response, paras 11-12.

¹⁷ Case 06, KSC-BC-2020-06/F01977, [Further Decision on the Prosecution's Urgent Request for Modification of Detention Conditions for Hashim Thaçi, Kadri Veseli, and Rexhep Selimi](#), 1 December 2023, para. 25

14. Finally, the SPO argues that in any event it *did* put its interference concerns before Trial Panel II,¹⁸ citing its requests for non-disclosure and the November 2023 request for detention modifications. In doing so, the SPO implicitly acknowledges that these were matters for Trial Panel II and that Trial Panel II had the power to rule on its SIM requests.
15. This renders even more glaring the SPO's inability to justify its choice of forum, whether at the time or even now. While apparently recognising that Trial Panel II had power over these matters, the SPO has not explained why, in the 7.5 months between the SPO's first SIM request and its detention modification request on 17 November 2023, the only requests made to Trial Panel II were for non-disclosure. Indeed, the SPO did not even *inform* Trial Panel II that it had sought SIMs from a different chamber until 5 October 2023, six months after those requests began.¹⁹ Even now it remains unexplained why, when the SPO was concerned about interference with Case 06 witnesses, it waited 7.5 months to seek measures from Trial Panel II to prevent such interference. Likewise, it remains unexplained why a different panel was seized with SIMs at all, even though the SPO *has not disputed that the Trial Panel had the power to determine those SIM requests*.
16. Under Article 40(6)(a) and Rule 35, the Trial Panel was empowered to issue the SIMs sought by the SPO. Moreover, that jurisdiction did not overlap with the jurisdiction of a Single Judge; it was and is exclusive. Article 33(2) leaves scope for a Single Judge only where an existing judicial authority is lacking. Precisely because the Trial Panel had jurisdiction, there was no judicial lacuna to be filled, and therefore no jurisdiction for the Single Judge.

¹⁸ SPO Response, paras 13-14.

¹⁹ SPO Response, para.14, revealing that this information was first shared with Trial Panel II on 5 October 2023.

1.3 INVALID ASSIGNMENT OF THE PRE-TRIAL JUDGE

17. The Defence has submitted that the assignment of the Pre-Trial Judge was impermissible because of her simultaneous assignment as a Single Judge overseeing investigative matters. For context, the Defence Motion explained the KSC's legal framework for judicial assignments, including the circumstances in which a Single Judge may be assigned. The SPO misunderstands these submissions as a request for the Pre-Trial Judge to rule on the Single Judge's assignment.²⁰ As indicated in the Defence's request for relief, it seeks a ruling that the *Pre-Trial Judge* was impermissibly assigned. This is a matter squarely within the Pre-Trial Judge's competence. Submissions concerning the assignment of the Single Judge are included in the Defence Motion because these are necessary for understanding the full context of the President's error in applying the KSC Law, which led to the flawed Pre-Trial Judge assignment.
18. It is telling that the SPO Response gives no answer to the Defence submissions concerning the assignment and jurisdiction of the Single Judge. The SPO makes no attempt to defend the President's creation of a permanent, standing, Single Judge mandate, in clear violation of KSC Law Article 33(2). The SPO also does not explain why it believed that the Single Judge had jurisdiction over matters already before a Trial Panel.
19. As concerns the impermissible assignment of the Pre-Trial Judge, the SPO's primary response is procedural, claiming that these arguments could only have been brought under Rule 20 as a recusal request (and therefore within 10 days).²¹ This mischaracterises the Defence argument. The Pre-Trial Judge's appointment is not merely affected by perceived bias: it is in violation of the KSC's explicit legal framework. It is true that at other tribunals, judicial disqualification or recusal for

²⁰ SPO Response, paras 18-21.

²¹ SPO Response, paras 23-24.

bias has been raised because of a judge's prior involvement in the same or related matters.²² That is not what is sought here. The Defence is not challenging the personal qualifications of a particular judge, but rather challenging the legality of the institution of standing Single Judge created by the President. This is clearly a question of jurisdiction rather than recusal. The President's error was not merely that in a specific instance she assigned the wrong judge. Rather, she has systematically diverged from the judicial structures established by the KSC Law by creating a role of standing Single Judge for investigations and merging it with the Pre-Trial Judge's function. This was not merely done for Judge Masselot, but also Judge Guillou. In effect, the President extended the role of the Pre-Trial Judge to begin before an indictment is filed. This violates the clear terms of Articles 33(1)(a) and Article 33(4) of the KSC Law. As a result, these assignments are invalid *ab initio*. They cannot be rendered valid by a party's failure to object under Rule 20.

20. This position is reinforced by the fact that the disqualification procedure under Rule 20 is subsidiary to the KSC Law. Questions of bias arise only where a judicial assignment has been correctly and validly made in conformity with the KSC Law. That is not the case here.
21. The SPO argues in the alternative that the Defence has wrongly interpreted Article 33(4), claiming that "the Pre-Trial Judge is not a 'panel'".²³ However, the Rules define a "panel" as "any panel or individual judge".²⁴ Given that the KSC Law

²² See for example: ICC, *Prosecutor v Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1266, 3 July 2009, [Annex II](#); ICC, *Prosecutor v Lubanga*, [Decision replacing a judge in the Appeals Chamber](#), ICC-01/04-01/06-2138, 23 September 2009, and its [Annex II](#) and [Annex III](#); ICC, *Prosecutor v Katanga*, [Decision replacing judges in the Appeals Chamber](#), ICC-01/04-01/07-1949, 8 March 2010, [Annex II](#); ICC, *Prosecutor v Lubanga*, [Decision replacing a judge in the Appeals Chamber](#), ICC-01/04-01/-6-2524, 20 July 2010, [Annex II](#); ICC, *Situation in the Democratic Republic of the Congo*, [Notification of decisions on requests for excusal](#), ICC-01/04-584, 11 November 2010, [Annex 4](#).

²³ SPO Response, paras 27-29.

²⁴ Rules of Procedure and Evidence, Rule 2.

requires the Rules to be consistent with it,²⁵ it can be inferred that the judges considered this definition to be consistent with the use of the term “panel” in the KSC Law. KSC judges routinely use the term “panel” in a way which plainly includes any KSC judicial authority, including the Pre-Trial Judge.²⁶

22. In contrast, the SPO’s interpretation not only strains the ordinary meaning of “panel”, but also the clearly intended meaning of Article 33(4). The SPO interpretation would mean that a judge assigned to any KSC judicial role cannot be assigned to a further judicial role in the same matter, *except* where the subsequent judicial role is that of Pre-Trial Judge. It is entirely unclear why, as a matter of policy, the role of Pre-Trial Judges would be excluded in this way. Moreover, if this peculiar meaning had been intended, there would surely have been simpler ways for the drafters of the Rules to express it.
23. A more obvious explanation for Article 33(4)’s wording is that in light of Article 33(1)(a), the drafters were not anticipating a scenario in which a different judicial panel preceded the assignment of a Pre-Trial Judge, and therefor saw no need to explicitly mention the Pre-Trial Judge in the second part of Article 33(4). Nonetheless, the intended meaning of the Article is clear: a judge may not be assigned in two different roles within the same matter.

²⁵ KSC Law, Article 19(3).

²⁶ See for example: *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/IA002/F00005, [Decision on Nasim Haradinaj’s Appeal Against Decision Reviewing Detention](#), 9 February 2021, paras 55-56; *Case 06*, KSC-BC-2020-06/IA006/F00005/RED, [Public Redacted Version of Decision on Jakup Krasniqi’s Appeal Against Decision on Review of Detention](#), 1 October 2021, paras 14-15, 54; *Prosecutor v Shala*, KSC-BC-2020-04/F00188/RED, [Public Redacted Version of Decision on Remanded Detention Review Decision and Periodic Review of Detention of Pjetër Shala](#), 22 April 2022, para.25; KSC-BC-2023-12/IA002/F00012/RED, [Public Redacted Version of Decision on the Specialist Prosecutor’s Office’s Appeal Against the Decision on the Confirmation of the Indictment](#), 3 April 2025, para.40. Even the decision of the President which the SPO refers to (SPO Response, para. 33) treats the Pre-Trial Judge as a “panel”. The President went on to incorrectly assert that Pre-Trial Judges are exempt from the rule in Article 33(4), but gave no reasons. See: KSCPR-2018/F00004, [Decision Assigning a Single Judge Pursuant to Article 33\(2\) of the Law](#), 29 May 2018, para.17.

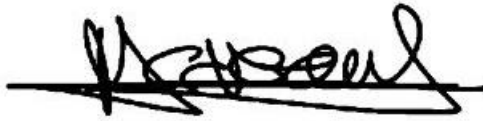
24. The SPO has similar difficulties justifying the President's effective violation of Article 33(1)(a) by extending the Pre-Trial Judge's mandate to cover the pre-indictment period. Here, the SPO's only response appears to be that violation of this provision is unproblematic because the only rationale of Article 33(1)(a) – in the SPO's view – is cost saving.²⁷ As such, no harm is done by merging the Single Judge and Pre-Trial Judge roles because a Pre-Trial Judge's investigative oversight powers post-indictment are similar to those being exercised by the standing Single Judge pre-indictment.²⁸ This misses the point. The issue is not the type of power, but the scope of its exercise. A Pre-Trial Judge's oversight of investigative matters is limited narrowly to those matters which form part of the indictment. In contrast, the standing Single Judge has accessed a wide range of material, some of which is now not within the scope of the indictment but may concern the accused and be prejudicial to them.
25. Clear policy considerations underpin both Article 33(1)(a) and Article 33(4). However, in any event, these provisions are both also unambiguous in their plain wording and intended meaning. Aside from its reinterpretation of the term "panel", the SPO gives no explanation of how the President's assignment did not breach the clear meaning of these provisions; nor does the SPO dispute that if the Pre-Trial Judge was assigned in violation of Article 33, the indictment must be invalid.
26. For these reasons, the Defence maintains its request that the Pre-Trial Judge dismiss the indictment.

[Word count: 2999 words]

²⁷ SPO Response, para 36.

²⁸ SPO Response, para. 31.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sophie Menegon', written over a horizontal line.

Sophie Menegon

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30 May 2025

Paris, France