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In:	**KSC-BC-2023-12**
	Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi
Before:	**The President of the Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
Date:	2 July 2025
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Public Redacted Version of Appeal against Decision on the Thaçi Defence Preliminary Motion on Jurisdiction with Confidential and *Ex Parte* Annexes 1-3

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I. INTRODUCTION

1. The Defence of Mr Hashim Thaçi ("Defence") appeals as of right[1] the Pre-Trial Judge's Decision on the Thaçi Defence Preliminary Motion on Jurisdiction, issued on 19 June 2025 ("Impugned Decision").[2]

II. PROCEDURAL HISTORY

2. On 8 May 2025, the Defence filed a preliminary motion ("Defence Motion") which argued that the Pre-Trial Judge lacks jurisdiction in the present case ("Case 12"),[3] because:

   (i) The SPO's unilateral initiation of Case 12 proceedings before a Single Judge, and then the Pre-Trial Judge, ignored Trial Panel II's exclusive power to oversee matters concerning Mr Thaçi's fair trial in *Prosecutor v Thaçi, Veseli, Selimi, and Krasniqi* ("Case 06"); and

   (ii) The President wrongly assigned as Pre-Trial Judge the same judges who had already been (wrongly) seized as Single Judge, in violation of the requirements in Article 33 of the KSC Law that a Pre-Trial Judge acts only after the filing of an indictment, and that that a judge may not be assigned in successive roles within the same matter.

[1] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("KSC Law"), Article 45(2); Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules"), Rule 97(3). All references to "Rule" or "Rules" herein refer to the Rules unless indicated otherwise.
[2] KSC-BC-2023-12/F00343, Pre-Trial Judge, Decision on the Thaçi Defence Preliminary Motion on Jurisdiction, 19 June 2024, public ("Impugned Decision").
[3] KSC-BC-2023-12/F00290, Thaçi Defence Preliminary Motion on Jurisdiction, 8 May 2025, confidential and *ex parte* (public redacted version 12 May 2025).

3. The SPO filed a response on 23 May 2025.[4] As well as contesting the substance of the Defence Motion, the SPO argued that the Defence Motion did not "challenge the jurisdiction of the Specialist Chambers" within the meaning of Rule 91(1)(a) of the Rules.[5]

4. On 30 May 2025, the Defence filed its reply ("Defence Reply").[6]

5. On 19 June 2025 the Pre-Trial Judge issued the Impugned Decision. She rejected the Defence Motion in its entirety. The Pre-Trial Judge also held that the Defence Motion was not a jurisdictional challenge falling within Rule 97(1)(a) of the Rules, but rather a challenge to "the competence of the Pre-Trial Judge to hear the present case."[7]

6. On 30 June 2025, noting that the jurisdictional nature of the Defence Motion is among the matters on which appeal is sought, the Defence filed a request for certification with the Pre-Trial Judge, while asking that its determination be stayed pending the Court of Appeal Panel's determination of the latter question.[8]

III. APPLICABLE LAW

A. Admissibility

7. Under the KSC Law, interlocutory appeals lie as of right from decisions on any preliminary motion "challenging the jurisdiction of the Specialist Chambers."[9] For

[4] KSC-BC-2023-12/F00310, Prosecution Response to THAÇI Preliminary Motion on Jurisdiction, 23 May 2025, confidential and *ex parte* (public redacted version 27 May 2025).
[5] *Ibid*, para. 3.
[6] KSC-BC-2023-12/F00318, Thaçi Defence Reply to SPO Response to Preliminary Motion on Jurisdiction, 30 May 2025 (reclassified 27 June 2025), public.
[7] Impugned Decision, para. 22.
[8] KSC-BC-2023-12/F0035, Thaçi Defence Request for Certification to Appeal "Decision on the Thaçi Defence Preliminary Motion on Jurisdiction", 30 June 2025, confidential and *ex parte*, with confidential and *ex parte* Annex 1.
[9] KSC Law, Article 45(2); Rule 97(2).

any other interlocutory appeal, leave must be sought through certification by the Pre-Trial Judge (or Trial Panel).[10]

B. Standard of review on appeal

8. The standard of review applicable in interlocutory appeals is the same, *mutatis mutandis*, as that applied in appeals against judgment as set out in Article 46(1) of the KSC Law.[11]

9. Relevantly, where a party alleges an error of law, it must identify the alleged error, present arguments in support of the claim and explain how the error invalidates the decision.[12]

10. Article 46(4) of the KSC Law states that:

> When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgment arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.

IV. SUBMISSIONS: GROUNDS OF APPEAL

A. The jurisdictional nature of the challenge

11. Before ruling on the substance of the Defence Motion, the Pre-Trial Judge addressed whether it constituted a jurisdictional challenge under Rule 97(1)(a) of the Rules. [13] In doing so, she erred (as set out below), and concluded that the Defence Motion did not fall within Rule 97(1)(a). This error did not affect the determination of the Defence Motion (something which might call into question

[10] KSC Law, Article 45(2); Rules 97(3) and 77.
[11] *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/IA001/F00005, Court of Appeals Panel, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, public, para. 10.
[12] *Ibid.*, para. 12
[13] Impugned Decision, paras 21-22.

whether it was, in fact "necessary"[14] for this to be determined), since the Pre-Trial Judge considered that this did not preclude her resolution of the Defence Motion.[15] Nonetheless, it is necessary for the Defence to address the Pre-Trial Judge's error, because it affects the Defence's right of appeal under Article 45(2) of the KSC Law and Rule 97(3).

12. The Defence recalls that it has also filed a request for certification to the Pre-Trial Judge, in order to preserve the possibility of an appeal if the Court of Appeals Panel rejects the Defence's arguments on this issue. Nonetheless, the Defence submits that as a matter of principle and judicial economy it is appropriate for this matter to be determined by the Court of Appeals Panel.

13. Where a party seeks to exercise appeal as of right under Article 45(2) of the KSC Law and Rule 97(3), the Court of Appeals Panel will determine whether the requirements to do so are met regarding any or all of the grounds argued.[16] If the Court of Appeals Panel accepts that the matter (or any of it) can be appealed as of right, it will determine the merits of the grounds presented by the appealing party.

14. In contrast, if the matter is appealed through certification, the Pre-Trial Judge will determine which of the issues presented meets the requirements for leave to appeal. It may be that appeals of a far narrower scope (or none at all) reach the Court of Appeals Panel.

15. It is therefore most appropriate that the Court of Appeals Panel first determine the extent to which the Defence may appeal as of right. If the Court of Appeals Panel finds that the matters raised by the Defence can be appealed as of right,

[14] Impugned Decision, para. 21.
[15] *Ibid*., para. 23.
[16] *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/IA001/F00005, Court of Appeals Panel, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, public, paras 16–19; *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/IA003/F00005, Court of Appeals Panel, Decision on the Admissibility of Appeal and Joinder Against Decision on Preliminary Motions, 12 May 2021, public, paras 8–18.

there will be no need for the Pre-Trial Judge to determine the Defence certification request and it may be dismissed as moot. Alternatively, if the Court of Appeals Panel determines that some or all of the matters raised are not appealable as of right, it will then be clear which of those matters need to be considered by the Pre-Trial Judge for certification.

16. This course avoids duplication and unnecessary use of resources by both the judges and parties. It is the approach which has been used in some proceedings at the International Criminal Court ("ICC"). Most recently, in the *Palestine Situation*, Israel sought to appeal on two matters (admissibility and jurisdiction) by filing two direct appeal and two requests for leave to appeal in parallel. The ICC Pre-Trial Chamber referred to Article 82, which sets out a materially identical system for appeals to that used at the KSC as described above, and held that:

> In these circumstances, with Israel having elected to simultaneously follow two separate avenues set out in article 82(1) of the Statute, and noting the structure of the aforementioned provision and the inter-related nature of the proceedings, the Chamber considers it appropriate to defer its consideration of Israel's requests for leave to appeal under article 82(1)(d) of the Statute until the Appeals Chamber has pronounced itself on the admissibility of Israel's appeals pursuant to article 82(1)(a) of the Statute..[17]

17. The same approach to resolving parallel appeals was also taken in the ICC's *Abd-Al-Rahman Case*.[18]

18. The only instance of contrary practice which the Defence is aware of occurred in the ICC *Afghanistan Situation*, which proceeded differently for reasons specific to the appeals in that instance. There, the ICC Appeals Chamber deferred litigation on direct appeals by victims' counsel until after the Pre-Trial Chamber had determined leave to appeal requests filed by both the ICC Prosecutor and victims'

[17] ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Deferral of the Chamber's consideration of two requests for leave to appeal filed by the State of Israel, ICC-01/18-398, 12 December 2024, para. 6.
[18] See ICC, *Prosecutor v Abd-Al-Rahman*, Prosecutor, Request to Dismiss *In Limine* the "Acte d'appel de la «Decision on the Defence Request and Observations on Reparations pursuant to Article 75-1 of the Rome Statute», ICC-02/05-01/20-137, 27 August 2020; and ICC, *Prosecutor v Abd-Al-Rahman*, Appeals Chamber, Decision on the Admissibility of the Appeal, ICC-02/05-01/20-145, 4 September 2020.

counsel.[19] This was no doubt due to the fact that the central appeal request, by the ICC Prosecutor, had only been made by way of a leave request to the Pre-Trial Chamber. The appeals filed directly to the Appeals Chamber were only from victims, whose standing to appeal was uncertain (and indeed eventually rejected[20]).

19. The Defence therefore submits that it is most appropriate that the present matter first be determined by the Court of Appeals Panel, without waiting for a decision of the Pre-Trial Judge on the Defence's request for certification.

Ground 1: The Pre-Trial Judge erred in ruling that her "competence" is not a matter falling within Rule 97(1)(a), and gave insufficient reasons therefore

20. In paragraph 22 of the Impugned Decision, the Pre-Trial Judge ruled that the Defence Motion did not fall within the jurisdictional limb of Rule 97(1):

> The Pre-Trial Judge recalls that for an issue to fall within the jurisdictional limb of Rule 97(1) of the Rules it must relate to one of the grounds of jurisdiction stipulated in Articles 6 through 9 of the Law, which set out the traditional bases for jurisdiction: subject matter, temporal, territorial and personal."[21]

21. That sentence repeated a virtually identical statement made by the Pre-Trial Judge in *Prosecutor v Januzi, Bahtijari and Shala*,[22] which was itself based on a Case 06 ruling.[23]

22. However, the Defence Reply had addressed these two prior decisions. The Defence explained why the brief definition of jurisdiction set out in those previous

[19] ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Order Suspending the Time Limit for the Filing of an Appeal Brief and on Related Matters, ICC-02/17-54, 24 June 2019.
[20] ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Reasons for the Appeals Chamber's oral decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, ICC-02/17-137, 4 March 2020.
[21] Impugned Decision, para. 22.
[22] *Prosecutor v Januzi, Bahtijari and Shala*, KSC-BC-2023-10/F00433/RED, Pre-Trial Judge, Public Redacted Version of Decision on Preliminary Motions and Related Requests, 12 August 2024, public, para. 34.
[23] *Case 06*, KSC-BC-2020-06/F00450, Pre-Trial Judge, Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, 31 August 2021, public, para. 54.

decisions – while perhaps sufficient to resolve the issues arising in those cases – were insufficient to resolve the specific question arising in this case.[24] The Defence's reply also referenced more specific and detailed jurisprudence from other tribunals.[25] However, in the Impugned Decision the Pre-Trial Judge gave no indication of having considered these arguments or any reasons for having rejected them.

23. The obligation to provide sufficient reasons has been recognised as applying at all stages of international criminal proceedings,[26] and is an aspect of the right to a fair trial[27] which is guaranteed by Article 21(2) of the KSC Law and Article 6(1) of the European Convention on Human Rights ("ECHR"). The precise level of reasoning which is "sufficient" will vary depending on the circumstances,[28] and it is not required that a judge address every argument made by the parties, so long as the reasons which justify the decision are set out.[29] However the Defence notes that in this case the Pre-Trial Judge gave *no reasons*. She simply restated a definition which the Defence had challenged (with arguments), as though it was uncontested.

[24] Defence Reply, para. 4.
[25] Defence Reply, paras 5–6.
[26] See, most recently: ICC, *Situation in the State of Palestine*, Appeals Chamber, Judgment on the appeal of the State of Israel against Pre-Trial Chamber I's "Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute", ICC-01/18-422, 24 April 2025, paras 56–62; also ICC, *Prosecutor v Abd-Al-Rahman*, Appeals Chamber, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against two oral decisions of the Pre-Trial Chamber and the decision entitled 'Decision on the Defence Request to provide written reasoning for two oral decisions', ICC-02/05-01/20-236, 18 December 2020 ("*Abd Al-Rahman* Appeal Decision"), para. 14.
[27] ICC, *Abd Al-Rahman* Appeal Decision, para. 14; ICC, *Prosecutor v Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" ("*Lubanga* Appeal Decision"), para. 20.
[28] ICC, *Abd Al-Rahman* Appeal Decision, para. 14; ICC, *Lubanga* Appeal Decision, para. 20.
[29] ICC, *Prosecutor v Bemba et al.*, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber IT of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", ICC-01/05-01/13-560, 11 July 2014, para. 116.

24. The Pre-Trial Judge's decision is not only unreasoned, but also incorrect. The Impugned Decision contradicts both the plain meaning of "jurisdiction", and a purposive interpretation of Rule 97(3) and Article 45(2) of the KSC Law.

25. "Jurisdiction" refers to "[t]he power of a court to hear and decide a case or make a certain order".[30] This of course encompasses notions of subject matter, temporal, territorial and personal jurisdiction, but also extends beyond those, to include any matter going to a judicial body's powers to determine a particular matter.

26.

27. Questions regarding the Pre-Trial Judge's "competence" to issue an indictment, as raised in the Defence Motion, fall squarely within this meaning. In some decisions, the power of a specific KSC Panel to determine a matter has been termed as a question of "jurisdiction". The Specialist Chamber of the Constitutional Court, for instance, consistently satisfies itself that it "has *jurisdiction* to rule on [a] Referral" on the basis of whether the matter in question is one within its competence to adjudicate with reference to the KSC Law and the Rules before considering a referral on its merits.[31] Similarly, in protection of legality proceedings in the *Prosecutor v Gucati and Haradinaj*, the Supreme Court Panel considered that review of the Court of Appeals Panel's factual

[30] J. Law, *Oxford Dictionary of Law (8th ed.)*, online version, OUP, 2015. See also the OED definition: "Administration of justice; exercise of judicial authority, or of the functions of a judge or legal tribunal; power of declaring and administering law or justice; legal authority or power": *Oxford English Dictionary*, online version, OUP, July 2023.

[31] *E.g.*, *Prosecutor v Januzi, Bahtijari and Shala*, KSC-CC-2024-23/F00006, Specialist Chamber of the Constitutional Court, Decision on the Referral of Sabit Januzi, Ismet Bahtijari and Haxhi Shala to the Constitutional Court Panel Concerning the Constitutional Validity of the Legal Aid Regulations of the Specialist Chambers, 24 April 2024, public, para. 9; *Specialist Prosecutor v. Gucati and Haradinaj*, KSC-CC-2023-22/F00011, Specialist Chamber of the Constitutional Court, Judgment on the Referral by Nasim Haradinaj to the Specialist Chamber of the Constitutional Court, 31 May 2024, public, para. 64; *Specialist Prosecutor v Mustafa*, KSC-CC-2024-27/F00011, Specialist Chamber of the Constitutional Court, Judgment on the Referral of Salih Mustafa Concerning Fundamental Rights Guaranteed by Articles 31 and 33 of the Kosovo Constitution and Articles 6 and 7 of the European Convention on Human Rights, 17 April 2025, public, para. 56 (emphases added).

considerations on the *actus reus* of a charged offence were "beyond the *jurisdiction* of this Panel".[32] Moreover, in Case 06 interlocutory appeal proceedings, the Court of Appeals Panel held "that it does not have *jurisdiction* to decide on issues that do not arise from the Impugned Decision".[33] This repeated usage by the KSC's highest chambers demonstrates that the term "jurisdiction" is understood, *inter alia*, to refer to the powers of a particular panel of the KSC.

28. It is unclear what distinction the Pre-Trial Judge had in mind by ruling that the Defence Motion did *not* concern "jurisdiction", but *did* concern "competence". She gave no explanation of the meaning which she ascribed to the latter term. In academic literature, there is some debate about the potentially different scope of "jurisdiction" and "competence" in other fields of international law.[34] However, these terms are also often used synonymously or interchangeably.[35]

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[32] *Prosecutor v Gucati and Haradinaj*, KSC-SC-2023-01/F00021, Supreme Court Panel, Decision on Requests for Protection of Legality, 18 September 2023, public, para. 63.

[33] *Case 06*, KSC-BC-2020-06/IA017/F00011/RED, Court of Appeals Panel, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 5 April 2022, public, para. 17 (emphasis added). See, similarly, *Prosecutor v Shala*, KSC-BC-2020-04/IA004/F00008/RED, Court of Appeals Panel, Public Redacted Version of Decision on Pjetër Shala's Appeal against Decision on Motion Challenging the Form of the Indictment, 22 February 2022, public, paras 10–11.

[34] See, for example: L García-Corrochana Moyano, 'Competence and Jurisdiction in Public International Law: International Courts in the Americas', in N. Boschiero et al. (eds), *International Courts and the Development of International Law*, Springer, 2013) ("García-Corrochana Moyano, 'Competence and Jurisdiction'"), pp. 149–64; C. Ryngaret, *Jurisdiction in International Law* (2nd ed., OUP, 2015), p. 22; E. Roucounas, 'The Issue of Jurisdiction and Competence', in *A Landscape of Contemporary Theories of International Law*, Brill, 2019, pp. 336–39.

[35] See, for example, the definition of "jurisdiction" in J.P. Grant and J.C. Barker (eds), *Parry and Grant Encyclopaedic Dictionary of International Law* (3rd ed.), online version, OUP, 2009:

> In relation to international organizations, and especially international courts and tribunals, jurisdiction means competence. Thus, Chap. II of the Statute of the International Court of Justice, titled 'Competence of the Court', contains art. 36(1) providing that '[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'.

See also: García-Corrochana Moyano, 'Competence and Jurisdiction', p. 149 (writing that "[a]lthough these terms are clearly differentiated in civil law systems, they are indistinguishable in public international law and thus are employed randomly").

29. In international criminal law, treating "jurisdiction" and "competence" as equivalent is the rule rather than the exception. Each of the Statutes of the ICTY, ICTR, the Special Court for Sierra Leone, and the International Residual Mechanism for Criminal Tribunals (IRMCT) begins with an article on "Competence", which defines the scope of the court's "powers";[36] the equivalent provision in the Statute of the Special Tribunal for Lebanon instead uses the term "Jurisdiction".[37] Decisions of these tribunals have frequently used the terms interchangeably.[38] Preliminary motions have been described as including "objections raised by the parties against the *competence*, the proceedings and the functions of the Tribunal".[39] In the one rare instance in which the distinction between "competence" and "jurisdiction" was explicitly analysed, the ICTY Appeals Chamber in *Tadić* treated "competence" as a *subset* of "jurisdiction".[40] Indeed, the Chamber used the term "competence" to refer to the precisely narrow concepts of subject matter, temporal, territorial and personal jurisdiction which the Pre-Trial Judge defined as "jurisdiction"; and went on to say that in fact "jurisdiction" is broader than this:

> "[The Trial Chamber's] proposition implies 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, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner."[41]

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[36] Statute of the ICTY, Article 1; Statute of the ICTR, Article 1; Statute of the SCSL, Article 1; Statute of the IRMCT, Article 1. *See also* Law on the Establishment of the ECCC, Chapter II: "Competence".
[37] Statute of the STL, Article 1.
[38] See for example: STL, *Case against* New TV S.A.L. and *Al Khayat*, STL-14-05/PT/CJ, Contempt Judge, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, 24 July 2014, para. 47; IMRCT, *Case against Jojić and Radeta*, MICT-17-111-R90, Single Judge, Decision on Jurisdiction, 18 January 2018, p. 2; SCSL, *Prosecutor v Taylor*, Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004, paras 17(c), 28, 41(c);
[39] ICTR, *Prosecutor v Kanyabashi*, ICTR-96-15-T, Trial Chamber 2, Decision on the Defence Motion on Jurisdiction, 18 June 1997, para. 3 (emphasis added).
[40] *Prosecutor v Tadić*, IT-94-1, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision"), para. 10.
[41] *Ibid.*

30. In light of the usage of these terms in international criminal law, the Pre-Trial Judge's decision that the Defence Motion did not go to "jurisdiction" because it concerned her "competence"[42] is self-contradictory and without meaning. Indeed, the fact that the Defence Motion concerns her "competence" is precisely why it is a motion concerning "jurisdiction".

31. This interpretation is not only supported by a correct understanding of the terminology used in the KSC Law and the Rules, but also by the context and objectives of their relevant provisions. In *Tadić*, the ICTY Appeals Chamber went on to hold that:

> A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).[43]

32. Accordingly, the notion of "jurisdiction" should be understood broadly. It includes reference to the powers of a given judicial formation (i.e., a judge, chamber, or panel) of a tribunal within the 'self-contained system' regulated by the legal instruments of that tribunal.

33. Following the *Tadić* decision, the Rules of Procedure and Evidence were amended at the ICTY and ICTR to introduce a restrictive definition of what constituted a "motion challenging jurisdiction" for the purpose of preliminary motion proceedings.[44] The consequence of that explicit provision was to limit the right of direct appeal from preliminary motions to those which concern personal, territorial, temporal or subject matter jurisdiction only. However, no equivalent provision is found in the Rules of the KSC.

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[42] Impugned Decision, para. 22.
[43] *Tadić* Appeal Decision, para. 11.
[44] ICTY Rules of Procedure and Evidence, Rule 72(D); ICTR Rules of Procedure and Evidence, Rule 72(D).

34. It is true that Rule 97(1)(a) and Article 45(2) of the KSC Law refer not simply to motions challenging "jurisdiction" but to motions challenging "the jurisdiction of the Specialist Chambers". However, as set out in the Defence Reply, judges of the ICTR Appeals Chamber concluded that since the jurisdiction of the Tribunal was exercised through specific Trial Chambers, a challenge to the competence and legality of the composition of the Trial Chamber was a matter concerning the Tribunal's jurisdiction.[45]

35. The evident rationale of enabling direct appeals from decisions on jurisdiction is the importance of having any challenges to jurisdiction disposed of at an early stage of proceedings, rather than in an appeal following judgment. This is because proceedings initiated without jurisdiction are void *ab initio*. And this rationale applies not only to motions which concern the subject matter, temporal, territorial or personal jurisdiction of a court, but also those which concern the proper establishment or constitution of the tribunal or a judicial panel. These are matters which should never be left for final determination until an appeal following conviction.

B. The exclusive jurisdiction of Trial Panel II

Ground 2: The Pre-Trial Judge erred by construing the powers of Trial Panel II too narrowly, and those of the Single Judge and the SPO too broadly, in violation of the KSC Law

36. The Defence Motion argued that in all matters regarding the conduct of the *Case 06* trial proceedings, Trial Panel II has exclusive jurisdiction.[46] This includes exclusive jurisdiction over how to respond when witness interference may be affecting the

[45] Defence Reply, para. 5. *See* 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, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 4; see also Dissenting Opinion of Judge Shahabuddeen, p. 3 (who reached the same conclusion for different reasons).
[46] Defence Motion, paras 22-27.

trial proceedings.[47] This jurisdiction is essential because without it, a Trial Panel cannot ensure the fairness of proceedings, as it is required to so under Article 40(2) of the KSC Law.[48]

37. In the Impugned Decision, the Pre-Trial Judge agreed that a Trial Panel has wide powers regarding the conduct of trial proceedings:

> "…a Trial Panel has broad powers to adopt any measures and procedures that may be necessary to ensure the fair and expeditious conduct of trial." [49]

However, the Pre-Trial Judge went on to emphasize that such powers (a) "extend only to the conduct of the *trial proceedings*"; and (b) extend only within the case assigned to the Trial Panel.[50] She therefore concluded that the Trial Panel had no powers regarding the interference allegations which underpin Case 12 because Case 12 is in pre-trial and Trial Panel II is not assigned to it.[51]

38. However, the Pre-Trial Judge's reasoning is flawed. It presents an incorrect picture as to the roles and mandates of the KSC's judicial actors, as seen from the following analysis.

39. First, had the Pre-Trial Judge addressed the question correctly, it would have been clear that responding to the SPO's interference allegations clearly fell within the powers of Trial Panel II:

(i) The Pre-Trial Judge took the view that the allegations of witness interference are a pre-trial or investigatory matter – falling either under the discretionary powers of the SPO, or the judicial oversight of the Case 12 Pre-Trial Judge.[52] However, this ignores the fact that in March 2023 when

[47] *Ibid*., paras 28-45.
[48] *Ibid*., para. 27.
[49] Impugned Decision, para. 29.
[50] *Ibid*., para. 29.
[51] *Ibid*., para. 32.
[52] *Ibid*., paras 25-29,31.

the SPO first alleged that two of the Case 06 accused[53] were engaged in interfering with Case 06 witnesses, there was no Case 12. The allegation arose in the context of the SPO's Case 06 presentation of evidence. The powers of Trial Panel II to respond to this problem are evident in its decisions, once finally seized in November and December 2023, ordering modifications to conditions of detention for Mr Thaçi and two other Case 06 accused.[54] Thus, it seems undeniable that **Trial Panel II had at least some powers to address allegations of contempt**.

(ii) The Defence Motion set out detailed arguments as to why it is clear that Trial Panel II's powers included the power to issue the Special Investigative Measures ("SIMs") which the SPO instead requested from the Single Judge.[55] Such powers are granted to a Trial Panel seized with a case under Article 40(6) of the KSC Law. Moreover, under Articles 31(1), 35(1) and 37(1) of the KSC Law, SIMs may be granted by "a Panel", a phrase which is used throughout the KSC texts to indicate the Panel which is seized of a case.[56] Given that the SPO alleged interference with the involvement of Case 06 accused and in respect of Case 06 witnesses, these were matters in respect of which Trial Panel II clearly had the power to issue SIMs. The Pre-Trial Judge did not address these arguments at all. However, the Defence is not aware of any basis on which it could be denied that **Trial Panel II had the power to issue the SIMs in 2023**, had it been seized with a request

[53] The SPO initiated its investigations based on a belief that interference was being led by Mr Thaçi and Mr Veseli. See: KSC-BC-2023-12/INV/F00004/RED, SPO, Public redacted version of 'Prosecution requests for Detention Centre information and [REDACTED], 28 March 2023 (public redacted version 26 February 2025), public.
[54] *Case 06*, KSC-BC-2020-06/F01936, Trial Panel II, Decision on Prosecution Urgent Request for Modification of Detention Conditions, 17 November 2023 (reclassified on 23 November 2023), public; *Case 06*, KSC-BC-2020-06/F01977, Trial Panel II, Further Decision on the Prosecution's Urgent Request for Modification of Detention Conditions for Hashim Thaçi, Kadri Veseli, and Rexhep Selimi, 1 December 2023, Public.
[55] Defence Motion, paras 37-41.
[56] See Defence Motion, paras 39-41.

from the SPO. Even the SPO has never argued that Trial Panel II was without this jurisdiction (indeed, the SPO has never explained why it put SIM requests before the Single Judge rather than Trial Panel II).

40. The first aspect of the Pre-Trial Judge's error, therefore, was her apparently unduly restrictive understanding of what constituted the Trial Panel's powers over "the conduct of *trial proceedings*".[57] The Pre-Trial Judge did not address whether and to what extent this concept encompassed managing allegations of witness interference by the Accused in the case before the Trial Panel. Instead she appears to have wrongly assumed that such matters were not related to the conduct of trial proceedings.

41. Secondly, by failing to address the fact that witness interference fell within Trial Panel II's powers, the Pre-Trial Judge also enabled herself to fall into error regarding the powers of the Singe Judge. Had the Pre-Trial Judge first correctly construed Trial Panel II's powers regarding the SIMs, two further conclusions would have followed from this, regarding the Single Judge's correlative lack of jurisdiction:

    (i) Article 33(2) of the KSC Law allows for the assignment of a Single Judge, something which falls outside the usual scheme of judicial powers established under Article 33(1). A Single Judge's mandate is not only "temporary in nature",[58] it is also *residual*. A matter may be brought before a Single Judge only "if a Panel has not otherwise been assigned".[59] In the circumstances at hand, the Single Judge had no jurisdiction, because there *was* a Panel empowered to address allegations of Case 06 witness interference: Trial Panel II.[60]

[57] Impugned Decision, para. 29.
[58] KSC Law, Article 33(2).
[59] Rule 42(3). See further Defence Motion, paras 60-61.
[60] Defence Motion, paras 58-64.

(ii) As referenced above, SIMs are to be authorised by "a Panel".[61] The Defence Motion analysed the use of this phrase throughout the Rules and explained why it can only be understood as meaning the Panel seized of a case.[62] The Rules do not permit the SPO to seize *any* Panel with a SIM request. As Trial Panel II had the power and sole obligation under Article 40 of the KSC Law to resolve these matters which were fundamentally connected to Case 06, the Single Judge was not empowered to do so.

42. However, the Impugned Decision does not address these arguments from the Defence Motion. The Pre-Trial Judge held that the SPO was correct to seize the Single Judge with its SIM requests.[63] However, to reach this conclusion she simply cited the President's decision which assigned the Single Judge to deal with matters "prior to the filing of an indictment".[64] Even aside from the question of whether the President's assignment was valid,[65] this ignores the fact that in March 2023 when the question arose, the matter was *post*-indictment in Case 06. Case 06 was in trial proceedings when the SIM requests were made, meaning that because the alleged witness interference concerned Case 06, Trial Panel II had relevant powers and the sole obligation under Article 40 of the KSC Law to address this issues. Addressing any alleged misconduct of parties and suspected interference with the administration of justice is an essential aspect of a trial chamber's powers to ensure fair proceedings.[66] Without this power (and duty) the Trial Panel would be unable to ensure the integrity of the evidence heard by it. Contrary to what the Impugned Decision suggests, Case 06 and Case 12 do not need to be the "same

[61] Rules 31(1), 35(1) and 37(1).
[62] Defence Motion, paras 39-41.
[63] Impugned Decision, para. 37.
[64] Impugned Decision, para. 37.
[65] Contested in Defence Motion, paras 58-69.
[66] ICC, *Prosecutor v Kenyatta*, Trial Chamber V(B) Decision on the Defence application conceming professional ethics applicable to prosecution lawyers, ICC-01/09-02/11-747, 31 May 2013, paras 14-15; Defence Motion, paras 28 *et seq*.

case" in order for these matters to fall within Trial Panel II's powers[67] (and the Defence does not argue that the cases are the "same").

43. The Pre-Trial Judge's failure to correctly construe Trial Panel II's powers to oversee Case 06 not only led her into error regarding the Single Judge's jurisdiction, it also enabled her to too broadly interpret the SPO's powers.[68] The Pre-Trial Judge focused on the provisions of the KSC Law relating to the SPO's mandate and independence.[69] However, she failed to address the question of how the powers of the (also independent) Trial Panel under Article 40(2) necessarily regulate the SPO's powers in the context of an ongoing trial. Those powers mean that if the SPO seeks SIMs related to Accused in an ongoing trial (here, the Case 06 trial), it does not have the independence to seize a different panel.

44. If the SPO's independence regarding investigations implied a discretion to seize a Single Judge rather than the Trial Chamber (as the Pre-Trial Judge held), this would leave the SPO free to forum shop. It might opt based on the composition of the respective Panels, or based on the presence or absence of other parties in a given proceeding. This outcome cannot have been the intention of the KSC Law. Most problematically, if it is the SPO which decides which judicial authority deals with interference allegations, the result is that the Trial Panel already charged with extant trial proceedings no longer has full control over the conduct of those proceedings as mandated by Article 40(2) of the KSC Law. This is especially troubling given that the SPO is not merely an investigative entity, it is also a party in those extant trial proceedings, and should in theory be subject to the oversight of the Trial Panel.

[67] Impugned Decision, para. 32.
[68] *Ibid*., paras 25-26, 31.
[69] *Ibid*.

45. The Pre-Trial Judge's finding that the SPO may, in its independence, opt to file before a Single Judge, also has implications for the Pre-Trial Judge's own powers. If the SPO can circumvent Trial Panel II's powers, it could equally today exercise the same discretion to file a SIM request to the Single Judge, rather than the Pre-Trial Judge. [REDACTED].[70]

46. Lastly, the Pre-Trial Judge rejected the Defence submission that the ICTY practice should be followed at the KSC. She considered that there "are no lacunae" in the KSC's texts, because the KSC Law provides all necessary regulation regarding offences against the administration of justice in Articles 15(2), 16(3), and 33(5).[71]

47. What the Pre-Trial Judge's analysis omits is a consideration of where powers regarding the administration of justice lie when an alleged arises in the context of an ongoing trial. Where this occurs, the two key provisions of the KSC Law are Article 33(5) and Article 40(2). Article 33(5) states the main case judges continue in their functions. These functions are those set out in Article 40(2), which grant a Trial Panel exclusive powers to oversee the conduct of the trial proceedings.

48. Article 33(5) also provides that the "main case" judges may not also sit in the determination of any eventual contempt charges. This means that if contempt allegations proceed to trial, they will be heard by different judges. It does *not* mean that the main case judges are divested of their powers under Article 40(2) in the main case. Indeed Article 33(5) is explicit that those judges "continue to sit in [their] original capacity in the original criminal proceedings".

49. In this respect, the Defence agrees with the Pre-Trial Judge that there is no substantive gap in the KSC texts. Those texts make clear that a Trial Panel has authority over all matters regarding an ongoing trial, including allegations of

[70] [REDACTED].
[71] Impugned Decision, para. 33.

witness interference. The practice of the ICTY which the Defence has relied on in its submissions is derived from precisely this essential power of a judges seized with overseeing a trial.[72] That ICTY practice required that, based on these powers, where contempt allegations arose in the context of an ongoing trial, the Trial Chamber seized with the trial would have authority to determine how the contempt was dealt with.[73]

50. Despite the Pre-Trial Judge's concerns about SPO independence, a correct recognition of a Trial Panel's inherent powers does not diminish the ability of prosecutors to address contempt allegations. The SPO may either act with leave from the Trial Chamber, or simply wait for the trial to be completed in order to initiate a new case.

51. The Pre-Trial Judge was therefore wrong to conclude that the SPO was entitled to initiate interference investigations and proceedings without the leave of Trial Panel II.

<u>Ground 3</u>: The Pre-Trial Judge applied an incorrect understanding of res judicata

52. In paragraph 34 of the Impugned Decision, the Pre-Trial Judge held that findings in Case 06 will not be *res judicata* vis-à-vis the Case 12 proceedings because: "any findings as to the charges in the two cases are entirely different" and "Panels conduct their proceedings (and assessments) independently of each other".

53. This reflects a misunderstanding of the concept of *res judicata*. For the principle to come into effect, it is not necessary that the charges in the two cases are the same. Indeed, two cases against a single accused could never involve the same charges, as this would be precluded by the principle of *non bis in idem*.[74] Rather, as articulated by the ICTY, the principle applies when (in subsequent proceedings

[72] Defence Motion, paras 30, 32.
[73] *Ibid*., paras 32-33.
[74] KSC Law, Article 17; Rule 205.

involving the same two parties) "a specific matter" has been determined by litigation.[75] Domestic practice also supports this interpretation. As the Defence has submitted elsewhere,[76] Kosovan courts have applied *res judicata* to particular issues within a claim, as distinct from the claim itself ("collateral estoppel").[77]

54. The Pre-Trial Judge's brief consideration of this issue appears to assume that because the charges are different in the two cases, it is not possible that "a specific matter" might be decided in Case 06, which would also fall to be determined in Case 12. However, it is not only possible that this may occur, but likely. [REDACTED].[78] [REDACTED].[79]

55. This raises the very real likelihood that findings on [REDACTED] factual questions will be made in the Case 06 trial judgment. [REDACTED].[80]

56. The Pre-Trial Judge's explanation that *res judicata* is not a relevant consideration because the Panels in Case 06 and Case 12 "conduct their proceedings (and assessments) independently of each other" also demonstrates an erroneous

[75] ICTY, *Prosecutor v Delalić et al.*, IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 228. See further the Defence Submissions set out in KSC-BC-2023-12/F00285, Thaçi Defence Preliminary Motion Requesting Severance of the Indictment and Adjournment of Proceedings concerning Mr Thaçi, 7 May 2025, public, paras 63-65 and KSC-BC-2023-12/F00332, Thaçi Defence reply to SPO response to Preliminary Motion on Severance with Confidential and *Ex Parte* Annexes 1-3, 10 June 2025, confidential and *ex parte*, para. 20. See also IRMCT, *Prosecutor v Uwinkindi*, MICT-12-25-AR14.1, Appeals Chamber, Decision on an Appeal Concerning a Request for Revocation of a Referral, 4 October 2016, para. 29; ICC, *Situation in the Islamic Republic of Afghanistan*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation", ICC-02/17-218, 4 April 2023, para. 59, and references cited therein.
[76] KSC-BC-2023-12/F00332, Thaçi Defence reply to SPO response to Preliminary Motion on Severance with Confidential and *Ex Parte* Annexes 1-3, 10 June 2025, confidential and *ex parte*, para. 20.
[77] This has been recognised by Kosovan courts: *Zivan Mazic v Bardhil Azem Marmullaku*, C.No.47/04, Judgment, 7 August 2009 (Annex 1); *Vladimir Radosavljevic v Tahir Morina*, C.No.48/04, Judgment, 2 April 2009 (Annex 2); *Vladimir Radosavljevic v Tahir Morina*, Rev. no.49/2010, Judgment, 1 February 2013 (Annex 3). The original, Albanian, versions of these judgments were provided to the Defence by the Municipal Court of Klina, each with some material missing.
[78] [REDACTED].
[79] [REDACTED].
[80] [REDACTED].

understanding of the principle. *Res judicata* applies despite this. Indeed, the fact that two judicial decision-makers will make separate and thereby possibly different assessments is precisely why the principle is necessary to prevent inconsistent findings as between common parties to litigation.

C. The assignments of the Single Judge and Pre-Trial Judge

***Ground 4*: The PTJ erred in holding that she is unable to review the legality of her assignment**

57. The Defence Motion argued that the Pre-Trial Judge's assignment to serve *both* as a standing Single Judge on all pre-indictment investigative matters, *and* as Pre-Trial Judge, violated the KSC Law.[81] Article 33(1) of the KSC Law provides that a Pre-Trial Judge is assigned only after an indictment is filed. Article 33(4) of the KSC Law states that:

> 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.

In contravention of these provisions, the President has established a KSC-wide system whereby one specific judge acts as a standing Single Judge for all investigative matters, and also acts as Pre-Trial Judge for all cases. The practical consequence is to extend the role of the Pre-Trial Judge to begin prior to the filing of an indictment, in violation of Article 33(1) of the KSC Law. Or put differently, if the roles of Single Judge and Pre-Trial Judge are distinct, Article 33(4) of the KSC Law is violated as one judge has been appointed at two phases of the same matter.

58. The Impugned Decision fails to rule on these arguments. In paragraph 38, the Pre-Trial Judge stated that:

> [T]he assignment of Judges falls squarely within the powers and responsibilities of the President, pursuant to Article 33 of the Law. To the extent that the Thaçi Defence takes issue with the validity of the Single Judge's assignment (whether as a "standing" Judge or not), the Pre-Trial Judge does not have the competence to pronounce herself

[81] Defence Motion, paras 70-81.

> on this matter, as that would mean sitting in judgment of the President's decision in this regard.[82]

This involves two errors.

59. First, the central question which the Defence Motion asked the Pre-Trial Judge to rule on was the validity of the *Pre-Trial Judge's* assignment, not the assignment of the *Single Judge* as referenced in paragraph 38 of the Impugned Decision. It is true that arguments about the non-conformity of the role of standing Single Judge were also made in the Defence Motion. This provided context as to how the overall scheme established by the President violates the KSC Law. However, the Defence Motion's request for the Case 12 indictment to be dismissed was based on the invalidity of Judge Masselot's assignment as Pre-Trial Judge. Yet the Impugned Decision is simply silent on that question.

60. Secondly, if paragraph 38 is understood as also reflecting Judge Masselot's position regarding her assignment as Pre-Trial Judge, a significant substantive problem arises. The Pre-Trial Judge holds that she has no power to review her assignment. Yet she gives no indication of what forum *is* available to the Defence for the review of a judicial assignment by the President under Article 33. If there is no forum in which the President's assignments can be challenged, then Article 33's detailed and explicit limitations on that assignment power are rendered meaningless.

61. This would not only contravene the clear legislative intent of Article 33, but would also violate Mr Thaçi's right to a tribunal "established by law" under Article 6(1) of the ECHR. This principle requires that a criminal court must comply with the legislation establishing it and regulating it, including rules concerning the composition of benches.[83] In turn, Article 13 of the ECHR "guarantees the

[82] Impugned Decision, para. 38.
[83] ECtHR, *Ástráðsson v Iceland*, App. no. 26374/18, Judgment, 1 December 2020, paras 211-252; ECtHR, *Posokhov v Russia,* App. no. 63486/00, Judgment, 4 March 2003, paras 38-44; ECtHR, *Gurov v Moldova,*

availability of a remedy at national level to enforce the substance of Convention rights".[84]

> [I]ts effect is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.[85]

62. A process must be available so long as there is an "arguable" grievance regarding the substance of the ECHR right.[86] This means that an accused person must have a forum in which to raise any "arguable" challenge to the lawfulness of the establishment and/or composition of the court or bench that is trying him. If Mr Thaçi has no means by which to seek review of the legality of the Pre-Trial Judge's assignment, this breaches his ECHR rights.

Ground 5: The Pre-Trial Judge erred in ruling that Rule 20 bars the Defence from challenging through a preliminary motion the practice of appointing the same judge as both Single Judge and Pre-Trial Judge, and gave insufficient reasons therefore

63. In its response to the Defence Motion, the SPO argued that the Defence's arguments fall within Rule 20 concerning the disqualification of judges, and that since the Defence did not make these arguments before the President within the ten-day period set out in Rule 20(3) they are now barred.[87]

64. The Defence replied that the arguments made in the Defence Motion are not a disqualification request and do not fall within Rule 20 and that the procedure under Rule 20 cannot cure a violation of Article 33 of the KSC Law.[88]

65. In the Impugned Decision, the Pre-Trial Judge held that:

> Third, the Thaçi Defence's assertion that the assignment of one and the same judge as Single Judge and Pre-Trial Judge was improper falls squarely within the scope of Rule

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App. no. 36455/02, Judgment, 11 July 2006, paras 29-39; ECtHR, *Gorguiladzé v Georgia*, App. no. 4313/04, Judgment, 20 October 2009, paras 67-75

[84] ECtHR, *Smith and Grady v UK*, App. nos. 33985/96 and 33986/96, 27 September 1999, paras 136–39.

[85] *Ibid*., para. 135.

[86] ECtHR, *Hatton v. UK*, App. no. 36022/97, Judgment, 8 July 2003, para. 137.

[87] KSC-BC-2023-12/F00310/RED, Public redacted version of 'Prosecution response to THAÇI preliminary motion on jurisdiction', 23 May 2025 (public redacted version 27 May 2025), paras 23-24.

[88] Defence Reply, paras 19-20.

> 20 of the Rules on the "Recusal or Disqualification of Judges". If the Thaçi Defence believed that there were grounds for the disqualification of the Single Judge/Pre-Trial Judge, it could and should have raised this matter following the procedure set out in Rule 20(3) of the Rules. Yet, it did not do so. The Thaçi Defence cannot circumvent this procedure and applicable time limits by raising this matter now, in the context of a preliminary motion.[89]

66. Here again, the Pre-Trial Judge has failed to provide sufficient (or any) reasons. As set out above (at paragraph 23) the right to a fair trial encompasses a requirement that judges provide sufficient reasons for their decisions. The Pre-Trial Judge ruled that the Defence argument about her dual assignment "falls squarely" within the Rule 20 procedure. This was a contested question on which the Defence had made submissions. Yet the Impugned Decision made no reference to the Defence submissions, and offered no reason why the Pre-Trial Judge rejected them and decided that the Defence's arguments fall within Rule 20.

67. As above, in addition to being unreasoned, the Pre-Trial Judge's decision on this question is plainly wrong in law.

68. Rule 20 concerns recusal or disqualification. This is a process which addresses actual or perceived conflicts of interest and questions of partiality. It applies in circumstances where a judge has been duly and correctly appointed in conformity with the KSC Law, but where that judge's personal interests or prior professional activities call into question his or her impartiality. Questions as to the impartiality of a judge are not questions about their proper assignment. Parties may choose to accept that a judge with a potential conflict of interest has been assigned, and by not engaging through Rule 20, the judge's involvement becomes permissible.

69. The nature and effect of Article 33 of the KSC Law are entirely different. A judge at the KSC has powers only if and to the extent that he or she is assigned in conformity with Article 33. The effect of a violation of Article 33 by the President is that a judge has no competence (jurisdiction, power), and this is the case

[89] Impugned Decision, para. 39.

regardless of whether, how or how quickly a party raises the issue. There is nothing in Article 33 or any other provision of the KSC Law which suggests that judges (or other officials of the KSC) who are not duly appointed in conformity with the law will somehow gain valid status and competency through lack of objection.

70. It follows from this that a motion based on the violation of Article 33 is entirely different from a Rule 20 disqualification request. As a matter of *fact*, some violations of Article 33 may also involve questions of real or perceived partiality. However, this only means that there might be a basis for recognising the nullity of the assignment under Article 33 *and* seeking recusal or disqualification under Rule 20. The failure to pursue the latter does not affect the former. There are other possible violations of Article 33 which have nothing to do with partiality. For example, if the President acted in violation of the clear wording of Article 33(1) by assigning a judge who was not "from the Roster" established under the Rules on Assignment of Specialist Chambers Judges, this appointment would surely be null. No argument could be made that 10 days later the invalid judicial assignment would acquire validity via the silence of the parties.

71. The same principle applies to Article 33(4). A judge may not be appointed to sit twice at different phases of the same matter. This is an absolute principle. And while it appears designed to reduce the risk of partiality and increase checks and balances in the KSC's judicial structures, it operates regardless of whether a party is able to demonstrate actual or perceived partiality for the particular case and seeks disqualification via Rule 20.

72. It is axiomatic that the Rules are subsidiary to the KSC Law. As a result, it should also be clear that Rule 20 cannot dilute or qualify the conditions of assignment set out in Article 33. Rule 20 is intended to introduce an *additional* protection, not reduce those which the KSC Law established.

V. CLASSIFICATION

73. This request is filed confidentially and *ex parte* because it refers to other filings which are classified confidential and *ex parte*.[90] A public redacted version shall be filed in due course.

VI. RELIEF SOUGHT

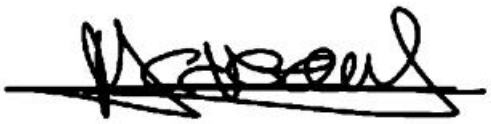
74. For these reasons, the Defence requests that the Court of Appeals Panel:

REVERSE the Impugned Decision; and

DECLARE that the Pre-Trial Judge did not have jurisdiction to issue the Case 12 indictment, which should accordingly be dismissed.

[Word count: 8,974 words]

Respectfully submitted,



Sophie Menegon

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2 July 2025

Paris, France

[90] Rule 82(4).