PUBLIC
Date original: 18/08/2025 18:22:00
Date public redacted version: 20/08/2025 11:17:00

In:	**KSC-BC-2023-12/IA007**
	Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi
Before:	**A Panel of the Court of Appeals Chamber**
	Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
Date:	18 August 2025
Language:	English
Classification:	Public

Public Redacted Version of Thaçi Defence Appeal against "Decision on the Thaçi Defence Preliminary Motion on Jurisdiction"

Specialist Prosecutor's Office
Kimberly P. West

Specialist Counsel for Hashim Thaçi
Sophie Menegon
Luka Mišetić

Specialist Counsel for Bashkim Smakaj
Jonathan Elystan Rees KC
Huw Bowden

Specialist Counsel for Isni Kilaj
Iain Edwards
Joe Holmes

Specialist Counsel for Fadil Fazliu
David A. Young

Specialist Counsel for Hajredin Kuçi
Alexander Admiraal

I. INTRODUCTION

1. The Defence of Mr Hashim Thaçi ("Defence") hereby files its appeal from the Pre-Trial Judge's Decision on the Thaçi Defence Preliminary Motion on Jurisdiction ("Impugned Decision").[1]

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"),[2] because:

   (i) The SPO's unilateral initiation of proceedings before a Single Judge, and then the Case 12 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 (1)(a) and (4) of the KSC Law[3] that a Pre-Trial Judge acts only after the filing of an indictment, and that that a judge may not be assigned to multiple successive roles within the same matter.

3. On 19 June 2025 the Pre-Trial Judge issued the Impugned Decision, rejecting the Defence Motion in its entirety.

[1] KSC-BC-2023-12/F00343, Pre-Trial Judge, Decision on the Thaçi Defence Preliminary Motion on Jurisdiction, 19 June 2024, public ("Impugned Decision").
[2] 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] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("KSC Law").

4. On 30 June 2025, the Defence requested leave to appeal the Impugned Decision, identifying four issues for cetification.[4]

5. On 23 July 2025, the Pre-Trial Judge granted certification for three of the four issues requested.[5]

6. Following a Defence request,[6] on 28 July 2025 the assigned Panel of the Court of Appeals Chamber ("Appeals Panel") granted the Defence until 18 August 2025 to file the appeal.[7]

III. APPLICABLE LAW

7. The standard of review in interlocutory appeals is the same, *mutatis mutandis*, as that applied in final appeals against judgment.[8] Relevantly, where a party alleges an error of law, it must identify the error, present arguments in support, and explain how the error invalidates the decision.[9] An appeal may be rejected if the error of law would not have changed the outcome of the decision in question.[10]

8. Where an Appeals Panel determines that there has been an error of law, it:

> …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.[11]

---

[4] KSC-BC-2023-12/F00355, Thaçi Defence Request for Certification to Appeal "Decision on the Thaçi Defence Preliminary Motion on Jurisdiction", 30 June 2025, confidential and *ex parte* (public redacted version 4 July 2025).
[5] KSC-BC-2023-12/F00391, Pre-Trial Judge, Decision on the Thaçi Defence Request for Certification to Appeal the 'Decision on the Thaçi Defence Preliminary Motion on Jurisdiction', 23 July 2025, public.
[6] KSC-BC-2023-12/IA007/F00001, Thaçi Defence Request for Variation of Time Limit for the Filing of Appeals, 25 July 2025, public.
[7] KSC-BC-2023-12/IA007/F00003, Appeals Panel, Decision on Thaçi Defence Requests for Variation of Time Limit for the Filing of Appeals, 28 July 2025, public.
[8] *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/IA001/F00005, Appeals Panel, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, public, para. 10. *See ibid.*, paras 4-14.
[9] *Ibid.*, para. 12.
[10] *Ibid*.
[11] KSC Law, Article 46(4).

IV. SUBMISSIONS:

9. The Pre-Trial Judge certified three issues for appeal:

   (i) The first certified issue concerns the principle of *res judicata*.

   (ii) The second and third certified issues both concern the Pre-Trial Judge's refusal to rule on whether her assignment violated Article 33 of the KSC Law.

A. Ground 1: *Res judicata*

10. The Defence Motion argued that Trial Panel II was deprived of the ability to manage fundamental aspects of Case 06 because the SPO unilaterally created paralell proceedings before other judges on with Case 06 matters. The Defences argued that one of several ways in which this had imperilled Mr Thaçi's fair trial rights arose by operation of the principle of *res judicata*.

11. *Res judicata* has become relevant because some of the same specific questions of fact arise in both Case 06 and Case 12. Notwithstanding the existence of Case 12, the question of whether or not Mr Thaçi sought to influence the testimony of SPO witnesses during the course of 2023 also remains before Trial Panel II in Case 06. Trial Panel II has admitted evidence on the basis that it is relevant [REDACTED].[12] [REDACTED],[13] [REDACTED]:

   (i) [REDACTED];[14]

   (ii) [REDACTED];[15]

   (iii) [REDACTED].[16]

[12] KSC-BC-2020-06/F03216, Trial Panel II, Decision on Prosecution Motion for Admission of Obstruction Related Materials, 29 May 2025, confidential and *ex parte* in Case 12 (confidential in Case 06), [REDACTED].
[13] [REDACTED].
[14] [REDACTED].
[15] [REDACTED].
[16] [REDACTED].

12. This raises the real likelihood that findings on these factual questions will be made in the Case 06 trial judgment. These are matters which are specifically alleged by the SPO in the Case 12 Indictment, and are all but certain to arise for factual determination in Case 12. Indeed, the allegation that Mr Thaçi provided "information and instructions" to unauthorised third parties is the central factual allegation of the SPO in Case 12.

***The Pre-Trial Judge applied an incorrect understanding of* res judicata**

13. However, 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".[17]

14. This reflects an erroneously narrow concept of *res judicata*.[18] For the principle to come into effect, it is not necessary that the *charges* in the two cases are the same. Indeed, two criminal cases against a single accused could not be brought to conclusion on the same charges, as this would be precluded by the principle of *non bis in idem*.[19] In fact, *res judicata* is a broader concept, as the Supreme Court Chamber of the ECCC explained:

> At the international level, the doctrine of *res judicata*, while closely related to *non bis in idem*, applies more broadly to a situation in which a specific issue or matter has already been judicially resolved.[20]

15. Appellate decisions of international criminal tribunals have ruled that *res judicata* applies when two rulings involve: (i) "identity of parties"; (ii) "identity of issues"; and (iii) "a final determination of those issues in the previous decision by a court

[17] Impugned Decision, para. 34.
[18] *See also* KSC-BC-2023-12/IA006/F00004, Thaçi Defence Appeal against "Decision on Preliminary Motions for Adjournment and Severance of the Proceedings", 18 August 2025, confidential and *ex parte*, paras 26-42.
[19] KSC Law, Article 17; Rule 205.
[20] ECCC, *Case 002/02*, F76, Supreme Court Chamber, Appeal Judgment, 23 December 2022 ("*Case 002/02* Appeal Judgment"), para. 634.

competent to decide them".[21] It is clear that not only the *charges*, but any issue common to two rulings can engage *res judicata*.[22]

16. This conclusion is supported by consistent references in international caselaw to *res judicata* as attaching to an "issue" already decided (rather than to a charge).[23] It is likewise supported by the range of instances in which international tribunals have applied *res judicata* to interlocutory matters which are not concerned with the charges against an Accused.[24]

17. This approach to *res judicata* in international criminal law – which sees it attaching to any issue finally determined – is consistent with decisions of the European

[21] 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 ("*Uwinkindi* Appeal Decision"), para. 29; see also ECCC, *Case 002/02* Appeal Judgment, para. 634.

[22] For an explicit ruling to this effect see: ICTR, *Prosecutor v Bizimungu et al.*, ICTR-99-50-T, Trial Chamber II, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of His Right to Trial Without Undue Delay, 29 May 2007, paras 5-6.

[23] *See, e.g.*, IRMCT, *Uwinkindi* Appeal Decision, para. 29; ICC, *Prosecutor v Ngudjolo*, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", ICC-01/04-02/12-271-Corr, 7 April 2015, para. 246; STL, *El Sayed* Appeal Decision, para. 19; ICTY, *Prosecutor v Delalić et al.*, IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 228; ICTR, *Prosecutor v Karemera et al.*, ICTR-98-44-T, Trial Chamber III, Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Motion to Admit Testimony of Elizaphan Ntakirutimana, 24 March 2009, para. 14; ICTY, *Prosecutor v Simić et al.*, IT-95-9, Trial Chamber III, Decision on (1) Application by S. Todorović to Re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000 ("*Todorović* Decision"), para. 9.

[24] ICTY, *Todorović* Decision, para. 9; ICTY, *Prosecutor v Prlić et al.*, IT-04-74-T, Trial Chamber III, Decision on Prlić Defence Request for Certification to Appeal, 7 December 2009, p. 3; ICTR, *Prosecutor v Nyiramasuhuko*, ICTR-97-21-T, Trial Chamber II, Decision on Defence Motion for Certification to Appeal the Decision on Defence Motion for a Stay of Proceedings and Abuse of Process, 19 March 2004, para. 28; ICTR, *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Trial Chamber II, Decision on Nyiramasuhuko's Oral Motion Regarding Prosecution's Use of Material Under Seal, 27 April 2004, para. 29; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Trial Chamber III, Decision on Motion to Vacate Sanctions, 23 February 2005, para. 10; ICTR, *Prosecutor v. Bikindi*, ICTR-2001-72-PT, Trial Chamber III, Decision on the Amended Indictment and the Taking of a Plea Based on the Said Indictment, 11 May 2005, para. 3; ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, 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; ICC, *Prosecutor v Ruto, Kosgey and Sang*, Pre-Trial Chamber II, Decision on the "Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings", ICC-01/09-01/11-313, 1 September 2011, para. 8; ICC, *Prosecutor v. Abd-Al-Rahman*, Pre-Trial Chamber II, Decision on the Defence Request to provide written reasoning for two oral decisions, ICC-02/05-01/20-118, 18 August 2020, para. 8.

Court of Human Rights ("ECtHR")[25] and the Constitutional Court of Kosovo, with the latter having observed that *res judicata* applies "where the courts have finally determined an *issue*".[26]

18. The Pre-Trial Judge's brief consideration of this question appears to assume that because the charges are different in the two cases, it is not possible that "a specific matter" might fall to be decided in both Case 06 and Case 12. That is not correct. Cases with different charges often involve overlapping questions, including common questions of fact. The reason that *res judicata* does not arise more frequently as a result is that usually such cases do not involve two common parties. In this instance, it is already clear that some specific questions of fact arise in both cases.[27]

19. 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 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.[28]

20. It is therefore clear that the Pre-Trial Judge's conclusions about *res judicata* demonstrate an error of law.

The error affected the outcome of the Impugned Decision

21. Although the Defence's argument about *res judicata* was made as one supporting branch of a broader argument about Trial Panel II's powers in Case 06, this issue

[25] ECtHR, *Brumărescu v. Romania*, App. No. 28342/95, Grand Chamber, Judgment, 28 October 1999, para. 61.
[26] Constitutional Court of Kosovo, *Banka për Biznes*, KI 195/19, Judgment, 31 May 2021, para. 100.
[27] Paragraphs 11-12 above.
[28] See *Montana v United States*, 440 U.S. 147, 154 (1979) (observing the value of *res judicata* in "minimizing the possibility of inconsistent decisions").

had the potential to affect the outcome of the Impugned Decision. That is because, had the Pre-Trial Judge correctly understood and applied *res judicata*, it would have led her to conclude that Mr Thaçi's fair trial rights necessarily required Trial Panel II to maintain control of the matters which have become the subject of Case 12.

22. It is possible, if not likely, that Trial Panel II will rule on some or all of the questions of fact set out in paragraph 11. Although this would not determine Mr Thaçi's *criminal responsibility* for the Case 12 charges, nonetheless it would determine the central factual matters disputed in Case 12, thereby relieving the SPO of its burden of proof on these crucial questions. Such factual findings would have so substantial an impact on Case 12 that they would thwart Mr Thaçi's right to be presumed innocent in Case 12.

23. Had the Pre-Trial Judge correctly applied *res judicata*, she would have recognised that the establishment of a parallel case, *without* Trial Panel II's authorisation, has created a situation in which Trial Panel II's ruling on these matters – [REDACTED] – will have the effect of violating Mr Thaçi's presumption of innocence in Case 12. This demonstrates precisely why Article 40(2) must be understood as providing a Trial Panel with exclusive powers over all matters relating to a case before it, including the determination of how and when allegations of witness interference will be handled.

B. Grounds 2 and 3: Article 33 or the KSC Law and its enforcement

24. The two remaining certified issues are interrelated. They concern the Defence's arguments that Judge Masselot'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.[29]

[29] Defence Motion, paras 70-81.

25. 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.

26. 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. This dual role was first played by Judge Guillou; and after his resignation, by Judge Masselot.[30]

27. The result of this scheme is that a given judge is appointed at two separate phases of the same case, first as investigative Single Judge and then as Pre-Trial Judge. This violates the clear meaning and purpose of Article 33(4) of the KSC Law which ensures that a judge may never sit in different phases of the same case.

28. Moreover, the consequence of this scheme has been to extend the role of the Pre-Trial Judge to begin *prior* to the filing of an indictment. By assigning one judge to both roles of Single Judge and Pre-Trial Judge, the President has caused the Pre-Trial Judge's involvement with a matter to begin well before the SPO files an indictment. This is not the scheme foreseen by Article 33(1) KSC Law, under which a Pre-Trial Judge is not assigned until an indictment is filed.

29. In the Defence Motion, the Defence gave examples of the negative consequences which have arisen from the violation of these provisions, to demonstrate the problems which Article 33(1)(a) and (4) were likely intended to prevent.[31] However, it is the violation of Article 33 itself which invalidates the Pre-Trial Judge's assignment, regardless of these consequences. The explicit requirements of Article 33 must be given meaning, and must be capable of adjudication and enforcement.

[30] Defence Motion, paras 71-73.
[31] Defence Motion, paras 77-81.

30. In the Impugned Decision, the Pre-Trial Judge refused to rule on the merits of these arguments, giving two bases for that refusal. They are the subjects of Grounds 2 and 3.

Ground 2: The Pre-Trial Judge erred in holding that she is unable to review the legality of her assignment

31. 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 on this matter, as that would mean sitting in judgment of the President's decision in this regard.[32]

This involves two errors.

32. First, the 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 the Defence Motion also addressed the impermissibility of the role of standing Single Judge.[33] 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.[34] On that question, the Impugned Decision is simply silent.

33. Secondly, if paragraph 38 of the Impugned Decision 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 held that she has no power to review her assignment for conformity with Article 33. The only avenue that she identified as available in principle to the Defence is an application for disqualification under Rule 20(3). However for the reasons addressed below

[32] Impugned Decision, para. 38.
[33] Defence Motion, paras 58-69.
[34] Defence Motion, para. 87.

under Ground 3, the question of valid assignment under Article 33 is an entirely separate question from conflicts of interest and partiality, and is not regulated by Rule 20. If an assigned judge is not competent to evaluate the lawfulness of his or her own assignment, the result is that no forum exists in which the President's assignments can be challenged. This result would render Article 33's detailed and explicit limitations on that assignment power unenforceable and meaningless.

34. 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 31(2) of the Kosovo Constitution and 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.[35] In turn, Article 32 of the Kosovo Constitutoin and Article 13 of the ECHR guarantee "the availability of a remedy at national level to enforce the substance of Convention rights".[36]

> [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 to access a remedy.[37]

35. A review process must be available so long as there is an "arguable" grievance regarding the substance of the ECHR right.[38] 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 avenue for challenging of the legality of the Pre-Trial Judge's assignment, this breaches his ECHR rights.

---

[35] 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,* 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.
[36] ECtHR, *Smith and Grady v United Kingdom*, App. nos 33985/96 and 339886/96, Judgment, 27 September 1999, para. 135.
[37] *Ibid.*
[38] ECtHR, *Hatton v Untied Kingdom*, App. no. 36022/97, Judgment, 8 July 2003, para. 137.

36. The KSC Law and the Kosovo Constitution incorporate the ECHR.[39] Moroever the human rights guaranteed by the Kosovo Constitution (including those set out in Articles 31 and 32) shall be interpreted consistently with decisions of the ECtHR.[40] It can be presumed that the KSC Law intends to comply with these principles. As such, the Defence submits that any ambiguity in the KSC Law's provisions should be resolved so as to render them consistent with the ECHR and the decisions of the ECtHR.

37. In the absence of a specific fora or process identified in the texts, the general principle of law "competence-competence" (*compétence de la competence*, *kompetenz-kompetenz*) should be applied.[41] Accordingly, the Pre-Trial Judge possesses the inherent jurisdiction to determine her own competence, including to determine whether her assignment violated Article 33. The fact that doing so would "mean sitting in judgment of the President's decision"[42] is "beside the point", as the ICTY Appeals Chamber put it.[43] In *Tadić*, it ruled that although the ICTY's substantive jurisdiction did include reviewing decisions of the UN Security Council, nonetheless competence-competence enabled the Tribunal to review the lawfulness of its own creation, even where this necessitated determining the legality of Security Council action.[44]

---

[39] KSC Law, Article 3(2)(e); Kosovo Constitution, Article 22(2).
[40] Kosovo Constitution, Article 53.
[41] ICTY, *Prosecutor v Tadić*, IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision"), paras 17-22; STL, *In re El Sayed*, CH/AC/2010/02, Appeals Chamber, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010 ("*El Sayed* Appeal Decision on Jurisdiction"), para. 43; ICC, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 6 September 2018, paras 30-33, and referenced cited therein.
[42] Impugned Decision, para. 38.
[43] ICTY, *Tadić* Appeal Decision, para. 20.
[44] *Ibid*, paras 20-22. See also ICTR, *Prosecutor v Kanyabashi*, ICTR-96-15-T, Trial Chamber II, Decision on the Defence Motion on Jurisdiction, 18 June 1997, paras 13-16, 24, 26-27, 29, 39; ICTY, *Prosecutor v Milošević*, IT-02-54-T, Trial Chamber, Decision on Preliminary Motions, 8 November 2001, paras 5-10, 15-17; ICTY, *Prosecutor v Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on the Accused's Motion Challenging the Legal Validity and Legitimacy of the Tribunal, 7 December 2009, paras 11-16; STL, *El Sayed* Appeal Decision on Jurisdiction, paras 44-49; SCSL, *Prosecutor v Kallon et al.*, SCSL-2004-15-

38. Accordingly, the Pre-Trial Judge did have the power to rule on this Defence arguments regarding Article 33. Pursuant to Article 46(4) of the KSC Law, the Appeals Panel is likewise now empowered to do so.

Ground 3: 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

39. In its response to the Defence Motion, the SPO argued that the Defence's arguments fall within Rule 20,[45] which concerns 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.[46]

40. The Defence replied that the arguments made in the Defence Motion are not a disqualification request under Rule 20 and that the Rule 20 procedure cannot cure a violation of Article 33 of the KSC Law.[47]

41. 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 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.[48]

42. The Pre-Trial Judge merely states that the Defence argument about her dual assignment "falls squarely" within the Rule 20 procedure. This was a contested

---

AR7(E), Appeals Chamber, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para. 37. A conflicting approach was taken in STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR90.1, Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Appeals Against the Trial Chamber's Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012, however that decision remains an outlier and, in the Defence's submission, is wrong in law.

[45] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules").

[46] 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.

[47] Defence Reply, paras 19-20.

[48] Impugned Decision, para. 39.

question on which the Defence had made submissions. Yet the Impugned Decision made no reference to the Defence submissions, and offered no reason for rejecting them.

43. The obligation to provide sufficient reasons is well-established at the KSC,[49] including with respect to decisions on preliminary motions.[50] The precise level of reasoning which is "sufficient" will vary depending on the circumstances,[51] 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.[52] However, in this case the Pre-Trial Judge gave *no* reasons which explained her conclusion that Rule 20 applied.

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

45. Rule 20 concerns the recusal or disqualification of judges. This is a process which addresses actual or perceived conflicts of interest and questions of partiality. It applies 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 the judge's proper assignment. Parties may choose to accept that a judge with a potential conflict of interest has been assigned,

---

[49] *Prosecutor v Shala*, KSC-CA-2024-03/F00069/RED, Appeals Panel, Public Redacted Version of Appeal Judgment, 14 July 2025 ("*Shala* Appeal Judgment"), para. 43; *Prosecutor v Mustafa*, KSC-CA-2023-02/F00038/RED, Appeals Panel, Public Redacted Version of Appeal Judgment, 14 December 2023 ("*Mustafa* Appeal Judgment"), para. 34, and references cited therein.

[50] *Prosecutor v Thaçi et al.*, KSC-BC-2020-06/IA009/F00030, Appeals Panel, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021 ("*Thaçi* Appeal Decision"), para 154.

[51] *Thaçi* Appeal Decision, para. 154; 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, para. 14.

[52] *Shala* Appeal Judgment, para, 43; *Mustafa* Appeal Judgment, para. 34; *Prosecutor v Thaçi et al.*, KSC-BC-2020-06/IA001/F00005, Appeals Panel, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, para. 72.

and by not engaging through Rule 20, the judge's involvement becomes permissible.

46. 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, and this is the case 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.

47. Consideration of the Rule 20 procedures further reinforces the conclusion they have no application to the type of violation the Defence complains of. Because Rule 20 is concerned with matters which are personal to a particular judge,[53] it provides an opportunity for the judge in question to be heard personally.[54] Such a process would be entirely out of place where the issue in question is a violation of Article 33 by the President. The latter scenario has nothing at all to do with the particular judge, or that judge's personal interests or past work.

48. 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 identifying 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

[53] See also the Defence's previous arguments: KSC-BC-2023-12/F00318, Thaçi Defence reply to SPO response to Preliminary Motion on Jurisdiction, 30 May 2025, public, para. 19.
[54] Rule 20(3).

"from the Roster" established under the Rules on Assignment of Specialist Chambers Judges,[55] 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.

49. 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.

50. Finally, it is axiomatic that the Rules are subsidiary to the KSC Law.[56] As a result, it should also be clear that Rule 20 cannot dilute or qualify the conditions of assignment set out in Article 33.[57] Rule 20 is intended to introduce an *additional* protection, not reduce those which the KSC Law established.

51. Accordingly, the Pre-Trial Judge erred in law when she ruled that the Defence should have raised its arguments regarding Article 33 by the means and within the timeframe set out in Rule 20.

The errors affected the outcome of the Impugned Decision

52. In responding to the Defence certification request, the SPO argued that the Pre-Trial Judge *did* go on to consider the merits of the Defence arguments, referencing paragraph 40 of the Impugned Decision.[58] The SPO thus asserted that errors by

[55] Rules on Assignment of Specialist Chambers Judges, KSC-BD-02/1 of 3, 27 March 2017, Rule 3(1).
[56] Rule 4(2); KSC Law, Article 19(3). See also KSC-CC-PR-2020-09/F00006, Constitutional Court Chamber, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 22 May 2020, para. 16.
[57] *Prosecutor v Shala*, KSC-SC-2025-06/F00005, Supreme Court Panel, Decision on the Request for an Extension of Time and Word Limit, 8 August 2025, para. 10; *Prosecutor v Mustafa*, KSC-SC-2024-02/F00009, Supreme Court Panel, Decision on the Request for an Extension of Time, 25 January 2024, para. 12.
[58] KSC-BC-2023-12/F00370, Prosecution response to 'Thaçi Defence Request for Certification to Appeal

the Pre-Trial Judge regarding her competence and Rule 20 would not have affected the outcome of the Impugned Decision (since, in the SPO's view, the Pre-Trial Judge rejected the Defence arguments on their merits in any event).

53. However, paragraph 40 does not address the Defence arguments. Rather, it focuses on whether or not the Pre-Trial Judge is impartial. Thus, it simply continues the error addressed above, by wrongly characterising the Defence's arguments as raising questions of disqualification or recusal, and thus dismissing them on the basis that they do not demonstrate her impartiality:

> beyond this procedural argument, the Pre-Trial Judge finds that the Thaçi Defence makes sweeping and unsubstantiated arguments in the abstract and fails to concretely demonstrate how her assignment as Single and Pre-Trial Judge could have affected or appeared to affect her impartiality.[59]

54. This misses the point. The Defence Motion argued that Judge Masselot's assignment as Pre-Trial Judge was invalid not because she was partial, but because her assignment violated Article 33 of the KSC Law.

55. The Pre-Trial Judge went on, in paragraph 40 of the Impugned Decision, to respond to a series of matters which the Defence had raised in paragraphs 77 to 81 of the Defence Motion. Here the Defence had indeed addressed questions of (perceived or real) partiality, these being the *consequences* which had flowed from the violation of Article 33. These arguments in the Defence Motion were made to demonstrate the underlying objectives of Article 33 and their importance. They show that violating Article 33 can have negative effects, and that these occurred in the present case. However, even if the view were taken that the violation of Article 33 had done no harm to the Defence, and had not compromised Judge Masselot's (real or perceived) impartiality, this would not change the fact that she was assigned in violation of Article 33.

"Decision on the Thaçi Defence Preliminary Motion on Jurisdiction"', 11 July 2025, public, paras 8 and 12.

[59] Impugned Decision, para. 40.

56. The Pre-Trial Judge's observations in paragraph 40 make no reference to Article 33(1)(a) or Article 33(4). They give no explanation of how Judge Masselot's assignment as both Single Judge and Pre-Trial Judge could be seen as consistent with these provisions. Nothing in paragraph 40 of the Impugned Decision, or any other part of the Impugned decision, considers the merits of the Defence argument.

57. Indeed, the Pre-Trial Judge's error regarding Rule 20, and her misdirected observations in paragraph 40 of the Impugned Decision appear to stem from a common source. Both conflate the Defence's arguments concerning Article 33 with the concept of impartiality justifying disqualification or recusal.

58. Having fallen into error both in this respect and regarding her power to rule on the lawfulness of her own assignment, the Pre-Trial Judge simply did not consider the merits of the Defence's arguments about Article 33 of the KSC Law. Had the Pre-Trial Judge correctly ruled on the Defence's arguments, she would have concluded that her assignment was invalid.

V. CLASSIFICATION

59. This filing is made confidentially and *ex parte* because it refers to other filings which are classified confidential and *ex parte*.[60] A public redacted version will be filed in due course.

VI. RELIEF SOUGHT

60. For the above reasons, the Defence requests that the Court of Appeals Panel:

REVERSE the Impugned Decision; and

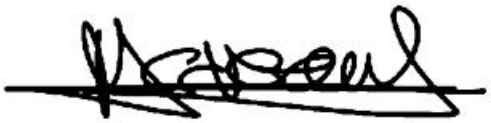
DECLARE that the Pre-Trial Judge was not competent to issue the Case 12 Indictment; and accordingly,

[60] Rule 82(4).

DISMISS the Case 12 Indictment.

[Word count: 6,000 words]

Respectfully submitted,



Sophie Menegon

Counsel for Hashim Thaçi

18 August 2025

The Hague, Netherlands