In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
Date:	12 March 2021
Language:	English
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Motion challenging jurisdiction on the basis of violations of fundamental rights enshrined in the Constitution

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I. INTRODUCTION

1. The prosecution of Hashim Thaçi, violates his right to a fair and impartial public hearing within a reasonable time by an independent and impartial tribunal established by law, in accordance with Article 31(2) of the Constitution of the Republic of Kosovo ("Constitution"). It also violates his right to be presumed innocent, protected by Article 31(5) of the Constitution.

2. The violations of Mr Thaçi's rights described in the present motion are neither theoretical nor minor, and have already taken place. In these circumstances, the Pre-Trial Judge should determine whether they give rise to a legal impediment to the exercise of the Kosovo Specialist Chamber's jurisdiction over the accused, in order to ensure the integrity of the judicial process.[1] For the reasons set out below, it is submitted that the gravity and cumulative nature of these violations mean that such a legal impediment to jurisdiction exists, warranting a dismissal of the charges and release of Mr Thaçi. As such, the present motion is brought pursuant to Rule 97(1)(a) of the Rules.[2]

II. BACKGROUND

3. The relevant background to the establishment of the Kosovo Specialist Chambers ("KSC") and Special Prosecutor's Office ("SPO") is set out in the Thaçi Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction,[3] the relevant section of which is incorporated here by reference.

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[1] ICTY, *Prosecutor v. Nikolić*, IT-94-2-PT, Trial Chamber, Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, (*Nikolić* Decision) para. 115: "the Tribunal has an inherent right to decide whether there exists a legal impediment to the exercise of jurisdiction over the Accused in order to ensure the integrity of the entire judicial process."
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules").
[3] KSC-BC-2020-06, Defence for Mr. Hashim Thaçi, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021, paras. 3-27.

4. The Defence additionally highlights, for the purposes of the present Motion, that although the Law on the Specialist Chamber and the Specialist Prosecutor's Office ("KSC Law") was adopted on 3 August 2015, the SPO was not established until 1 September 2016, when Mr David Schwendiman, former Chief Prosecutor of the SITF and Mr Clint Williamson's successor since May 2015, was appointed as "Specialist Prosecutor".[4] The SPO operated as a continuation of the SITF. The 2018 Annual Report spoke of the SITF's "transition to the SPO", noting that "the 35-member SITF staff has steadily increased to close to 60".[5]

5. In 2018, the Acting Specialist Prosecutor wrote, in the KSC Annual Report: "[s]ince the SITF began its work in 2011 with two binders of material, we have acquired some 70,000 documents, comprising nearly 700,000 pages. Our work in recent months has been focused on evaluating this evidence to make sure we are ready for any eventual judicial proceedings."[6]

6. Mr Schwendiman, who was seconded by the US Department of State, resigned abruptly in 2018. It was only on 4 November 2020, nearly ten years after being accused of serious crimes in the Marty Report, that the Indictment against Mr Thaçi was issued.

III. SUBMISSIONS

A. THE RIGHT TO TRIAL WITHIN A REASONABLE TIME

7. Article 31(2) of the Constitution corresponds to, and is modelled on, Article 6(1) of the European Convention on Human Rights ("ECHR"). Article 13 ECHR guarantees a right to a remedy for a violation of Article 6(1), even when the

[4] KSC & SPO, 2018 Report, February 2019 ("KSC 2018 Report"), p. 53
[5] *Ibid.*, p. 53.
[6] *Ibid.*, p. 51.

proceedings are still pending, to the extent that there is already a violation of the right to a hearing within a reasonable time.[7]

8. The rationale for the principle of trial within a reasonable time was formulated by the European Court of Human Rights ("ECtHR" or "Court") in one of its earliest judgments. In *Stögmüller v. Austria*, the Court said that the "reasonable time" requirement was "designed to avoid that a person charged should remain too long in a state of uncertainty about his fate".[8] The ECtHR Grand Chamber recently reprised this formulation,[9] which has been regularly affirmed.[10] The "precise aim of this provision in criminal matters is to ensure that accused persons do not have to lie under a charge for too long".[11] According to the Court, "the vicissitudes of criminal proceedings that remain pending for too long generally also harm the reputation of the alleged offender."[12]

9. The ECtHR has also pointed to a rationale that goes beyond protection of the rights of the accused, with the Court reiterating that "in requiring cases to be heard within a "reasonable time", the Convention underlines the importance of justice without delays which might jeopardise its effectiveness and

[7] For example, ECtHR, *Barry v. Ireland*, 18273/04, Third Section, Judgment, 15 December 2005, para. 47 (*Barry* Judgment).
[8] ECtHR, *Stögmuller v. Austria*, 1602/62, Court (Chamber), Judgment, 10 November 1969, p. 40, para. 5. For a similar formulation by the United Nations Human Rights Committee, see UNHRC, General Comment 32, CCPR/C/GC/32, 23 August 2007, para. 35.
[9] ECtHR, *Kart v. Turkey*, 8917/05, Grand Chamber, Judgment, 3 December 2009, para. 68 (*Kart* Judgment).
[10] ECtHR, *Cuško v. Latvia*, 32163/09, Fifth Section, Judgment, 7 December 2017, para. 44; ECtHR, *Grujović v. Serbia*, 25381/12, Third Section, Judgment, 21 July 2015, para. 60; ECtHR, *Sociedade de Construções Martins & Vieira, Lda. and Others v. Portugal*, 56637/10, 59856/10, 72525/10, 7646/11 and 12592/11, First Section, Judgment, 30 October 2014, para. 56; ECtHR, *Veliyev v. Russia*, 24202/05, First Section, Judgment, 24 June 2010, para. 173; ECtHR, *Ivanov v. Ukraine*, 15007/02, Fifth Section, Judgment, 7 December 2006, para. 71; ECtHR, *Vergelskyy v. Ukraine*, 19312/06, Fifth Section, Judgment, 12 March 2009, para. 116; ECtHR, *Nakhmanovich v. Russia*, 55669/00, First Section, Judgment, 2 March 2006, para. 89. See also, ECommHR, *X. v. United Kingdom*, 8233/78, Plenary, Decision of 3 October 1979 on the admissibility of the application, 3 October 1979, para. 62.
[11] ECtHR, *Wemhoff v. Germany*, 2122/64, Court (Chamber), Judgment, 27 June 1968, p. 23, para. 18.
[12] *Kart* Judgment, para. 70.

credibility."[13] The reasonable time requirement "serves to ensure public trust in the administration of justice".[14] According to the Court, "it is in the general interest of society to have a justice system which operates efficiently and this includes court proceedings unhindered by unjustified delays".[15] Moreover, "excessive delays in the administration of justice constitute a significant threat, in particular as regards respect for the rule of law".[16]

10. Failure to deal with a particular case within a reasonable time may be the result of a variety of factors. The Court has referred to "lack of diligence on the part of the investigator, prosecutor or judge in charge of a particular case",[17] but also to "the State's failure to place sufficient resources at the disposal of its judicial system"[18] or "to allocate cases in an efficient manner".[19]

1. Calculation of the relevant time period

11. Because of "the prominent place held in a democratic society by the right to a fair trial" the concept of "charge" in Article 6(1) ECHR must be understood in a "substantive" rather than a "formal" sense.[20] Although the primary objective of

[13] ECtHR, *Katte Klitsche de la Grange v. Italy*, 12539/86, Court (Chamber), Judgment, 27 October 1994, para. 61. Cited in ECtHR, *Di Mauro v. Italy*, 34256/96, Grand Chamber, Judgment, 28 July 1999, para. 23; ECtHR, *Piper v. the United Kingdom*, 44547/10, Fourth Section, Judgment, 21 April 2015, para. 49. Also ECtHR, *H. v. France*, 10073/82, Court (Chamber), Judgment, 24 October 1989, para. 58; ECtHR, *Niederböster v. Germany*, 39547/98, Third Section, Judgment (extracts), 27 February 2003, para. 44; ECtHR, *Austin and Budiartini v. Portugal*, 70692/13, Fourth Section, Judgment, 25 July 2017, para. 30; ECtHR, *Albertina Carvalho et filhos LDA v. Portugal*, 23603/14, Fourth Section, Judgment, 4 July 2017, para. 36.

[14] ECtHR, *Rutkowksi and Others v. Poland*, 72287/10, Fourth Section, Judgment, 7 July 2015, para. 126; ECtHR, *Finger v. Bulgaria*, 37346/05, Fourth Section, Judgment, 10 May 2011, para. 93.

[15] ECtHR, *Konstantin Stefanov v. Bulgaria*, 35399/05, Fourth Section, Judgment, 27 October 2015, para. 64.

[16] ECtHR, *Joannou v. Turkey*, 53240/14, Second Section, Judgment, 12 December 2017, para. 96.

[17] ECtHR, *B. v. Austria*, 11968/86, Court (Chamber), Judgment, 28 March 1990, paras. 52, 54; ECtHR, *Reinhardt and Slimane-Kaïd v. France*, 23043/93 and 22921/93, Grand Chamber, Judgment, 31 March 1998, para. 100 (*Reinhardt* Judgment).

[18] ECtHR, *Zimmermann and Steiner v. Switzerland*, 8737/79, Court (Chamber), Judgment, 13 July 1983, paras. 30-32.

[19] ECtHR, *Georgiadis v. Cyprus*, 50516/99, Second Section, Judgment, 14 May 2002, para. 46.

[20] ECtHR, *G.C.P. v. Romania*, 20899/03, Third Section, Judgment, 20 December 2011, para. 38.

Article 6 ECHR is to ensure that trial proceedings are fair, it "may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions".[21] Consequently, the Court considers itself "compelled to look behind the appearances and investigate the realities of the procedure in question".[22] For this reason, the relevant date for the purpose of assessing the reasonableness of the time taken by the criminal proceedings may begin well before the individual is "charged" in a formal sense.

12. In a consistent line of cases, the Court has insisted that the criminal charge exists, for the purposes of applying Article 6(1) ECHR, when a person is "substantially affected". Although a "charge" clearly exists once there has been an "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", or when a notice of intended prosecution has been issued,[23] the Court has insisted that "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect".[24] In other words, it is not necessary that the person be "formally charged"; the right to a hearing within a reasonable time begins once the person is "substantially affected".[25]

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[21] ECtHR, *Şaman v. Turkey*, 35292/05, Second Section, Judgment, 5 April 2011, para. 30. Also: ECtHR, *Salduz v. Turkey*, 36391/02, Grand Chamber, Judgment, 27 November 2008, para. 50; ECtHR, *Imbrioscia v. Switzerland*, 13972/88, Court (Chamber), Judgment, 24 November 1993, para. 36; ECtHR, *Hovanesian v. Bulgaria*, 31814/03, Fifth Section, Judgment, 21 December 2010, para. 30.

[22] ECtHR, *Deweer v. Belgium*, 6903/75, Court (Chamber), Judgment, 27 February 1980, para. 44. Also: ECtHR, *Shabelnik v. Ukraine*, 16404/03, Fifth Section, Judgment, 19 February 2009, para. 52.

[23] ECtHR, *O'Halloran and Francis v. the United Kingdom*, 15809/02 and 25624/02, Grand Chamber, Judgment, 29 June 2007, para. 35.

[24] ECtHR, *Farzaliyev v. Azerbaijan*, 29620/07, Fifth Section, Judgment, 28 May 2020, paras. 47-48; ECtHR, *Beuze v. Belgium*, 71409/10, Grand Chamber, Judgment, 9 November 2018, para. 119, citing ECtHR, *Simeonovi v. Bulgaria*, 21980/04, Grand Chamber, Judgment, 12 May 2017, para. 110; ECtHR, *Ibrahim and Others v. the United Kingdom*, 50541/08, 50571/08, 50573/08 and 40351/09, Grand Chamber, Judgment, 13 September 2016, para. 249 (*Ibrahim* Judgment).

[25] ECtHR, *Heaney and McGuinness v. Ireland*, 34720/97, Fourth Section, Judgment, 21 December 2000, para. 42; ECtHR, *Hozee v. the Netherlands*, 21961/93, Court (Chamber), Judgment, 22 May 1998, para.

13. A person may be deemed charged at different dates, "such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when preliminary investigations were opened".[26] This has also been described as "the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him".[27] In looking for the start date, the Court will inquire as to when the individual had "knowledge of the criminal investigation against him".[28]

14. Based upon this, Mr. Thaçi was substantially affected from at least 7 January 2010, when the Marty Report was released. The Parliamentary Assembly resolution of 25 January 2011 endorsing the Marty report called upon EULEX, which was then responsible for prosecutions in Kosovo, to investigate the allegations. EULEX responded immediately by establishing the SITF, which subsequently was absorbed by the SPO. Notwithstanding the Marty Report's insistence that it was not conducting a criminal investigation,[29] this context makes plain that Mr Thaçi was substantially affected from the date of its publication. This finds substantiation in his 13 January 2020 SPO interview, in which Mr Thaçi describes the "black cloud" under which he has been living for 10 years, from "accusations of the public opinion, individuals and others", stating that "it has been a completely unjust pressure instead of this having been done earlier." [30]

43; *Reinhardt* Judgment, para. 93; ECtHR, *Etcheveste and Bidart v. France*, 44797/98 and 44798/98, First Section, Judgment, 21 March 2002, para. 77.

[26] ECtHR, *Włoch v. Poland*, 27785/95, Fourth Section, Judgment, 19 October 2000, para. 144.

[27] ECtHR, *Kalēja v. Latvia*, 22059/08, Fifth Section, Judgment, 5 October 2017, para. 36.

[28] ECtHR, *Chiarello v. Germany*, 497/17, Fifth Section, Judgment, 20 June 2019, para. 46. Also: ECtHR, *Mamič v. Slovenia (no. 2)*, 75778/01, Third Section, Judgment, 27 July 2006, para. 24.

[29] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Doc. 12462, 7 January 2011 (Marty Report), para. 175.

[30] KSC-BC-2020-06-071840-TR-ET, Part 3, Page 14, lns. 3-6.

2. Violation in the course of proceedings pending trial

15. Violations of the right to a hearing within a reasonable time may be considered while criminal proceedings are in their preliminary stages still pending trial. It is not necessary for the proceedings to be terminated, by conviction, appeal, acquittal or discontinuance, for an individual to challenge the unreasonable length of the proceedings.[31]

16. In *Barry v. Ireland*, the ECtHR concluded that the right to trial within a reasonable time had been violated because of the length of preliminary proceedings, even though the trial itself had not begun. The Court considered that the applicant had been "substantially affected" when a search warrant was executed. He was not formally charged with an offence for more than two years. Then, the applicant took proceedings in judicial review to prevent the trial being held. These took many years despite the frequent protests of the applicant about the unacceptability of the delays. The Court concluded that while some of the delay could be attributed to the applicant, much of it was the responsibility of the prosecuting authorities. Overall, the period from the execution of the search warrant to the conclusion of the judicial review proceedings was ten years and four months.[32] In light of the ruling by the Court, the Irish court issued an order prohibiting further criminal proceedings in the case.[33]

17. In *Korshunov v. Russia*, the ECtHR held that Article 6(1) ECHR had been breached although the criminal proceedings were still pending when it issued

[31] For example, ECtHR, *X. v. France*, 18020/91, Court (Chamber), Judgment, 31 March 1992, para. 21 (*X.* Judgment).
[32] *Barry* Judgment, paras. 31-47.
[33] Barry Roche, 'Judge puts stay on trial of Cork doctor on sexual assault charges', *The Irish Times*, 3 March 2006.

its ruling in October 2007.[34] For the purposes of determining the reasonable time issue, the Court considered the proceedings to have taken three years and nine months, some of which the applicant spent in detention.[35] The Court reached a similar conclusion in *Merit v. Ukraine*, where civil proceedings were still underway six years after the start date.[36]

3. Reasonableness

18. The time taken for the conduct of criminal proceedings must be "reasonable". The authoritative ECtHR pronouncement is found in *Frydlender v. France*: "the 'reasonableness' of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute."[37] The same principles apply whether the proceedings are criminal, civil or administrative.[38]

19. In assessing the reasonableness of a delay, "the Court has noted the particular obligation of expedition on the State when criminal proceedings begin a significant period of time after the impugned events".[39] An added consideration "is the fact that the trial concerned matters some years in the past and a further lapse of time could only damage the quality of the evidence

[34] ECtHR, *Korshunov v. Russia*, 38971/06, First Section, Judgment, 25 October 2007, para. 16.
[35] *Ibid.*, para. 69.
[36] ECtHR, *Merit v. Ukraine*, 66561/01, Second Section, Judgment, 30 March 2004, paras. 71 and 76.
[37] ECtHR, *Frydlender v. France,* 30979/96, Grand Chamber, Judgment, 27 June 2000, para. 43. Cited more recently in ECtHR, *Parinov v. Ukraine*, 48398/17, Fifth Section Committee, Judgment, 10 December 2020, para. 59; ECtHR, *Kishazi and Others v. Hungary*, 28814/19, 32428/19 and 63432/19, Fourth Section Committee, Judgment, 22 October 2020, para. 7; ECtHR, *Nicolae Virgiliu Tănase v. Romania,* 41720/13, Grand Chamber, Judgment, 25 June 2019, para. 29.
[38] *Barry* Judgment, paras. 49-52; ECtHR, *Comingersoll S.A. v. Portugal*, 35382/97, Grand Chamber, Judgment, 6 April 2000, para. 19; ECtHR, *Vassilios Athanasiou and Others v. Greece*, 50973/08, First Section, Judgment, 21 December 2010, para. 26; ECtHR, *Vilho Eskelinen and Others v. Finland,* 63235/00, Grand Chamber, Judgment, 19 April 2007, para. 67.
[39] ECtHR, *McFarlane v. Ireland*, 31333/06, Grand Chamber, Judgment, 10 September 2010, para. 151.

available."[40] That this is a concern in the present proceedings can be seen in the 2014 report of SITF Chief Prosecutor Williamson, who described the investigation as an "extremely challenging exercise" because "[w]e have been looking at events that occurred some 15 years ago and for which little or no physical evidence exists".[41]

20. The Court has never set out a mathematic formula for assessment of reasonable time under Article 6(1) ECHR. Two commentators have suggested what they describe as a 3-5-7 schematic for criminal proceedings: less than three years and the Court is unlikely to find an infringement, more than seven and it will usually consider there is a violation. The threshold between reasonable and unreasonable is around five years, "where the different criteria interact in a difficult puzzle and where predicting an outcome seems the most hazardous".[42] The findings of these researchers are based on statistical review of documents that are available publicly, and the methodology they employ is straightforward and reliable. Of course, international criminal trials give rise to complexities in terms of their evidentiary, geographical and temporal scope that exceed those of the average domestic criminal trial. However, the ECtHR's approach of assessing the reasonableness of the length of proceedings in light of their complexity ensures the relevance of the Court's jurisprudence to assessing the expediency (or otherwise) of international criminal trials.

21. An assessment of the extent of the violation of the right to be tried within a reasonable time must consider not only the delay which occurred before the

[40] ECtHR, *Massey v. the United Kingdom*, 14399/02, Fourth Section, Judgment, 16 November 2004, para. 27.
[41] UNSC, Annex II Statement dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, in: Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2014/558, 1 August 2014, p. 18.
[42] Marc Henzelin and Héloïse Rordorf, 'When Does the Length of Criminal Proceedings Become Unreasonable According to the European Court of Human Rights?', (2014) 5 *New Journal of European Criminal Law* 78, p. 96.

application but also the likely delay in the future. In *Barry v. Ireland*, the ECtHR held "that there has been a violation of Article 13 of the Convention on account of the lack of a remedy under domestic law, at the time when the applicant lodged his application, for past *and future delay* in his criminal proceedings".[43]

22. Where the issue of delay is being assessed before the overall length of the total proceedings is known, as is the situation here, the reasonableness determination should also take into account the anticipated length of the proceedings. The defence has indicated that it needs a minimum of 18 months to be trial ready,[44] which is reasonable and in line with timelines at international criminal courts and tribunals. Thereafter it is difficult to venture how long the case will take but it is likely to be several years, again, based on similar cases at similar courts.

4. Complexity of the case

23. The ECtHR has held that the reasonableness of the delay should be assessed with regard to the "complexity of the case". It concluded that Article 6(1) ECHR was violated in a case of "particular complexity", where the entire proceedings took six years and eight months, but where the hearings began less than two years after the beginning of the investigation.[45] A period of six years and ten months, that included trials at two levels of jurisdiction, and where the investigation phase lasted about two years, constituted a violation of Article 6(1) ECHR.[46] Criminal bankruptcy charges that lasted five years, ten months and twenty-one days for three instances constituted a violation.[47] An Article 6(1) violation was found in a "complex" economic crimes case, where the

[43] *Barry* Judgment, para. 56 (emphasis added).
[44] *See* Transcript, p. 103, line 22 to p. 104, line 19.
[45] ECtHR, *Paskal v. Ukraine*, 24652/04, Fifth Section, Judgment, 15 September 2011, paras. 56-62.
[46] ECtHR, *Bakhmutskiy v. Russia*, 36932/02, First Section, Judgment, 25 June 2009, paras. 155-162.
[47] ECtHR, *Ferrarin v. Italy*, 34203/96, Second Section, Judgment, 26 April 2001, paras. 17-21.

duration was five years and eight months against one accused, and eight years and eight months against the second, and which included several hearings at different levels.[48] In a "complex case" where the period under consideration was three and a half years, and where the investigation phase lasted about fourteen months, the Court did not find a violation.[49]

24. The work of the international criminal tribunals demonstrates the feasibility of conducting major investigations and holding complex trials dealing with international crimes, including those in the former Yugoslavia, within a reasonable time. The ICTY was established by UN Security Council resolution in May 1993. It only really became fully operational a year later when Prosecutor Richard Goldstone was elected. At the beginning, its personnel not only had no experience with international prosecutions, given that there had been none since Nuremberg; they had nowhere to turn for help or guidance. There were no experienced consultants in international criminal prosecution on whom they could rely. The Tribunal took its first prisoner into custody in April 1995, and completed its first trial in May 1997, with the appeal from conviction decided in July 1999. In the 10 years from its creation, the Tribunal completed 17 trials (to final judgment) concerning 35 accused. Eight other accused were then on trial in six proceedings.[50] If the SITF investigation is factored into the calculation, the KSC have now been in operation for nine years. Moreover, and unlike the *ad hoc* Tribunal, they had a head start to the extent they benefited from the investigative work already undertaken by the ICTY.

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[48] ECtHR, *T.K. and S.E. v. Finland*, 38581/97, Fourth Section, Judgment, 31 May 2005, para. 33 (*T.K.* Judgment).
[49] ECtHR, *Popandopulo v. Russia*, 4512/09, First Section, Judgment, 10 May 2011, paras. 129-133.
[50] UNSC, Enclosure I - Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), in: 'Letter dated 21 May 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council', S/2004/420, 24 May 2004, paras. 9-10.

25. When the initiative was taken to revive the possibility of prosecuting Mr Thaçi in 2010, matters should have moved promptly so as to conduct investigations, as the ICTY had done, and to organise trial. There were any number of possibilities, including a new mandate for the ICTY. Moreover, EULEX could have acted with diligence and insisted on establishing the KSC in 2011 rather than waiting four years to take this initiative. Its failure to do so demonstrates its indifference to the right of the accused to have a trial within a reasonable time.

5. Responsibility for the delay

26. Where the conduct of the accused contributes to delay, the Court will take this into account in determining whether Article 6(1) ECHR has been violated. This issue is irrelevant to the present application, however, given that Mr Thaçi was unable to undertake any dilatory measures prior to November 2020, some nine years and ten months after he was "substantially affected", nor has he done so since that date.

27. The nature of the crimes alleged calls for particular diligence by the authorities.[51] As for the contribution of the authorities to the delay, the Court has often cited unexplained "periods of inactivity" as being relevant in determining whether Article 6(1) EHCR has been violated.[52] Until the SPO responds to this motion it is impossible to assess whether there are such periods. There may well have been delay following the abrupt and unexpected departure of Prosecutor Schwendiman. This is not something attributable to the accused.

[51] See, for example, ECtHR, *Mocanu and Others v. Romania*, 10865/09, 45886/07 and 32431/08, Grand Chamber, Judgment, 17 September 2014, paras. 335-348.
[52] *T.K.* Judgment, para. 30; ECtHR, *Pélissier and Sassi v. France*, 25444/94, Grand Chamber, Judgment, 25 March 1999, paras. 73-75.

6. Rights of Victims

28. The reasonableness determination should also take into account the urgency of prompt proceedings, not only because this is a right of the person charged, but also because it is imperative for the interests of the alleged victims of the crimes. In this respect, the ECtHR has held that "the weight of the public interest" is to be taken into account in determining whether the proceedings as a whole have been fair.[53] The alleged victims too have a right to have justice done within a reasonable time, although the right may not be derived from Article 6(1) ECHR. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly on 16 December 2005, require that States '[i]nvestigate violations effectively, *promptly*, thoroughly and impartially'.[54]

7. What was at stake for the applicant

29. What is at stake for the applicant in the litigation has to be taken into account.[55] In criminal matters, there appears to be a presumption in the case law that the proceedings are inherently serious for the applicant because of the threat of deprivation of liberty as well as the social stigma attached to conviction. In one case of unacceptable delay, the Court referred to the fact that the applicant "had to bear the weight of [grave] charges for the last ten years as well as being

[53] ECtHR, *Jalloh v. Germany*, 54810/00, Grand Chamber, Judgment, 11 July 2006, para. 97; *Ibrahim* Judgment, para. 252.
[54] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 16 December 2005, Annex para. 3(b) (*emphasis added*). The Basic Principles have been cited, for example, by the International Criminal Court in ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, Trial Chamber, Decision on Victims' Participation, 18 January 2008, para. 35; ICC, *Prosecutor v. Bemba,* ICC-01/05-01/08-320, Pre-Trial Chamber, Fourth Decision on Victims' Participation, 12 December 2008, para. 16.
[55] ECtHR, *Pailot v. France*, 32217/96, Court (Chamber), Judgment, 22 April 1998, para. 61; *Barry* Judgment, para. 36; *X.* Judgment, para. 32; ECtHR, *Vallée v. France*, 22121/93, Court (Chamber), Judgment, 26 April 1994, para. 34.

concerned about, if convicted, a substantial prison sentence".[56] In this case, Mr Thaçi faces a similarly substantial sentence and thus the stakes are inherently high.

B. THE PRESUMPTION OF INNOCENCE

30. Mr Thaçi has been subjected to violation of his right to the presumption of innocence, a sacred principle enshrined in Article 31(5) of the Constitution and Article 6(2) ECHR, which is "aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings".[57]

31. The presumption of innocence covers statements made by public officials about criminal investigations that encourage a public belief in the guilt of the individual in question and prejudge the findings of the competent judicial authority.[58] The presumption of innocence "will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law".[59] The ECtHR has said that the presumption of innocence requires that "aucun représentant de l'État ne déclare qu'une personne est coupable d'une infraction avant que sa culpabilité ait été établie par un tribunal".[60] The authorities may inform the public of ongoing criminal investigations, but "il requiert qu'elles le fassent avec toute la discrétion et

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[56] *Barry* Judgment, para. 45.
[57] ECtHR, *Khodorkovskiy and Lebedev v. Russia (No. 2)*, 51111/07 and 42757/07, Third Section, Judgment, 14 January 2020, para. 539.
[58] ECtHR, *Allenet de Ribemont v. France*, 15175/89, Court (Chamber), Judgment, 10 February 1995, para. 41; ECtHR, *Daktaras v. Lithuania*, 42095/98, Third Section, Judgment, 10 October 2000, paras. 41-43; ECtHR, *Samoilă and Cionca v. Romania*, 33065/03, Third Section, Judgment, 4 March 2008, para. 92; ECtHR, *Nešťák v. Slovakia*, 65559/01, Fourth Section, Judgment, 27 February 2007, para. 88; ECtHR, *G.C.P. v. Romania*, 20899/03, Third Section, Judgment, 20 December 2011, para. 54.
[59] ECtHR, *Batiashvili v. Georgia*, 8284/07, Fifth Section, Judgment, 10 October 2019, para. 85.
[60] ECtHR, *Maksim Savov v. Bulgaria*, 28143/10, Fourth Section, Judgment, 13 October 2020, para. 69.

toute la réserve que commande le principe de la présomption d'innocence".[61] More generally, the presumption of innocence imposes restrictions upon the conduct of authorities of the State outside of the courtroom.[62] The principles apply equally to international courts, and arguably even more so in the present case where a Kosovo court is administered by outsiders.

32. In the present case, Mr Thaçi was condemned in the Marty Report as the "boss" of "Thaçi's Drenica group",[63] which was described as having "built a formidable power base in the organised criminal enterprises".[64] Mr Thaçi was charged with having "operated with support and complicity […] from the formidable Albanian mafia".[65] It endorsed reports from unspecified sources that "Thaçi and other members of his Drenica Group […] exerted violent control over the trade in heroin and other narcotics".[66] It said 'Thaçi was commonly identified, and cited in secret intelligence reports, as the most dangerous of the KLA's 'criminal bosses'".[67] Marty wrote: "Thaçi and these other Drenica Group members are consistently named as 'key players' in intelligence reports on Kosovo's mafia-like structures of organised crime. I have examined these diverse, voluminous reports with consternation and a sense of moral outrage."[68] Furthermore, "[o]ur first-hand sources alone have credibly implicated Haliti, Veseli, Syla and Limaj, alongside Thaçi and other

[61] ECtHR, *Korobov v. Russia*, 60677/10, Third Section Committee, Judgment, 12 November 2019, para. 38.
[62] ECommHR, *X. v. Austria*, 9295/81, Commission (Plenary), Decision of 6 October 1982 on the admissibility of the application, 6 October 1982, p. 227; ECtHR, *Sekanina v. Austria*, 13126/87, Court (Chamber), Judgment, 25 August 1993, para. 21.
[63] Marty Report, paras. 58, 68.
[64] *Ibid.*, para. 61.
[65] *Ibid.*, para. 62.
[66] *Ibid.*, para. 66.
[67] *Ibid.*, para. 67.
[68] *Ibid.*, para. 70 (internal reference omitted).

members of his inner circle, in having ordered – and in some cases personally overseen – assassinations, detentions, beatings and interrogations".[69]

33. These are only the explicit references to Mr Thaçi by name. More generally, the Marty Report constitutes a condemnation of him. At no point does the Report provide any caveat or warning that its allegations have not been proven in court, that those accused, including Mr Thaçi, have not had a chance to respond to the charges, and that the named individuals continue to enjoy a presumption of innocence. The resolution of the Parliamentary Assembly of the Council of Europe adopted in the wake of the Marty Report referred to the charges in the book by the former Prosecutor not as "allegations", but as "revelations".[70] It too said nothing about the presumption of innocence.

34. The KSC and SPO, on their website, have elevated the Marty Report from one of mere allegations to that of a "Foundational Document", indeed the first such document. This is a court that literally defines itself with respect to a document that condemns the accused. The first annual report of the KSC and SPO described the Marty Report as having been "endorsed" by the Council of Europe. It said that the Marty Report "named as responsible Kosovo Liberation Army commanders, many of whom had subsequently risen to senior positions in Kosovo",[71] a reference that does not actually name Mr Thaçi, but that most certainly does so by implication. This benediction of the Marty Report by the KSC and SPO constitutes a flagrant violation of the presumption of innocence.

35. In fact, the Indictment in the present case went on to eventually charge Mr Thaçi with a different case from that outlined in the Marty Report. The impact

[69] *Ibid.*, para. 72l.
[70] Council of Europe, Parliamentary Assembly, Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo, Resolution 1782 (2011), para. 1.
[71] KSC & SPO, First Report, June 2018, p. 52.

of this improper exercise of the KSC's jurisdiction is addressed in Mr. Thaçi's Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, filed contemporaneously. However, that the KSC stepped outside the bounds of their jurisdiction in framing their case does not negate the violation of the presumption of Mr Thaçi's innocence, in being tried before an institution founded on a document in which he has already been condemned.

C. THE RIGHT TO BE TRIED BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

36. The KSC cannot be said to constitute a "tribunal established by law" within the meaning of Article 6(1) ECHR. In addition, the KSC and the SPO lack the necessary guarantees of independence and impartiality required by the Constitution and the ECHR.

37. A court or tribunal must always be "established by law". This compulsory requirement under Article 6(1) ECHR reflects the principle of the rule of law and primarily implies that national legislative statutes must normally regulate the organisation of the judicial branch and the establishment of tribunals so as to avoid undue discretion given to the executive.[72] The term "established by law" does not merely cover the issue of the legal basis for the existence of the relevant tribunal but also covers the specific "composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned".[73] This means, for instance, that any tribunal issuing a judgment when it is composed in breach of domestic law, in

[72] ECtHR, *Lavents v. Latvia*, 58442/00, First Section, Judgment, 28 November 2002, para. 114.
[73] *See* ECtHR, *Biagioli v. San Marino*, 8162/13, Third Section, Decision, 8 July 2014, paras 72-74, and ECtHR, *Pasquini v. San Marino*, 50956/16, First Section, Judgment, 2 May 2019, paras 100-101 and citations.

particular of the national provisions relating to the mandates, incompatibilities and disqualifications of judges, cannot be said to have been constituted "in accordance with the law".[74]

38. In *Guðmundur Andri Ástráðsson v. Iceland*,[75] the ECtHR Grand Chamber explained the three elements of the notion of a 'tribunal established by law':

(i) 'tribunal': a body exercising the judicial function on the basis of legal rules and according to predetermined procedures; "it is inherent in the very notion of 'tribunal' that it be composed of judges selected on the basis of merit";[76]

(ii) 'established': in accordance with "the particular rules that govern it and the composition of the bench"; as "the process of appointment may be open to […] interference [from the executive, the legislature or from within the judiciary itself] […] it therefore calls for strict scrutiny";[77]

(iii) 'by law': the tribunal must be established in accordance with the relevant domestic law, which must be "couched in unequivocal terms […] so as not to allow arbitrary interferences in the appointment procedure".[78]

39. While the KSC are regulated by a specific law emanating from the Parliament of Kosovo, several features of the KSC Law are not compatible with the "established by law" requirement under Article 6(1) ECHR. It is worth emphasising that the KSC Law was never referred to the Constitutional Court of Kosovo for an

[74] ECtHR, *Posokhov v. Russia*, 63486/00, Second Section, Judgment, 4 March 2003, paras. 39-44.
[75] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, 26374/18, Grand Chamber, Judgment, 1 December 2020 (*Guðmundur Andri Ástráðsson* Judgment).
[76] *Ibid.*, paras 219, 220.
[77] *Ibid.*, paras 223, 226.
[78] *Ibid.*, paras 229, 230.

examination of its compatibility with the Constitution of Kosovo, including its compatibility with ECHR requirements.

40. It is no answer to say that many of the features of the Chambers are common to other international, internationalised or hybrid criminal tribunals. None of these institutions has been properly tested because of their legal immunity from examination either by national constitutional courts or international human rights courts. Rather, they have benefited from a presumption that they are structurally consistent with international standards. Furthermore, even if other international criminal courts are deemed to be properly independent and impartial, the KSC have unique features.

41. Significantly, the KSC Law has created what amounts in practice to an "extraordinary court" which cannot be said to be established in accordance with relevant domestic law as the Constitution of Kosovo strictly prohibits such extraordinary courts. The judgment of the Constitutional Court of Kosovo of 15 April 2015 cannot be relied upon to defend the constitutionality of the KSC Law as it was exclusively concerned with the constitutionality of the amendment (no. 24) proposed by the Government of the Republic of Kosovo.[79] In this judgment, the Constitutional Court defined the notion of "extraordinary court" as one which "would be placed outside the structure of the existing court system and would operate without reference to the existing systems".[80] Assuming this definition is correct – no authority supporting this definition is provided by the Court – it is then difficult to see how the Specialist Chambers do not amount to

[79] Constitutional Court of the Republic of Kosovo, Case No. K026/15, Judgement - Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, 15 April 2015 (Constitutional Court Judgment).
[80] *Ibid*., paras 56 and 61.

an extraordinary court as it operates, *de jure* and *de facto*, independently and separately from Kosovo's court system.

42. In addition, in relation to its assessment of the "established by law" requirement, the Constitutional Court relied on two ECtHR judgments, the first of which is not relevant,[81] while the second one concerned a national body which was found by the Constitutional Court of Slovakia to have been established *in violation* of the Slovakian Constitution as it had mixed features of a specialised court and an extraordinary court.[82] In any event, the KSC Law, which was not reviewed by the Constitutional Court of Kosovo, places the Specialist Chambers *outside* the structure of the existing court system[83] in violation of the Constitution of Kosovo while also violating Article 6(1) ECHR for the reasons outlined above in respect of the "established by law" requirement.

43. The fact that Article 6(1) ECHR has been interpreted by two different sections of the ECtHR as not prohibiting, in principle, the establishment of special criminal courts if they have a basis in law, does not mean that the KSC can be said to be "established by law". First, the KSC cannot be compared to any national special criminal court but instead represent a new form of so called "hybrid tribunals", because they are exclusively staffed with international judges and personnel and without any Kosovo judges included. In this aspect, they differ from other known hybrid tribunals.[84] Second, while the ECtHR found no violation of Article 6(1)

[81] ECtHR, *Erdem v. Germany*, 38321/97, Fourth Section, Judgment (Extracts), 5 July 2001: This case concerned an individual found to be a member of a terrorist organisation by a German Court of Appeal. No violation of Article 8 ECHR was found, with the Court's analysis focusing on the notion of 'in accordance with law' and not the term 'established by law' under Article 6(1) ECHR.
[82] ECtHR, *Fruni v. Slovakia*, 8014/07, Third Section, Judgment, 21 June 2011 (emphasis added).
[83] See Muharremi, *op. cit.*, p. 992: The constitutional amendment and the Law establishing the Specialist Chambers and the Specialist Prosecutor's Office 'created a self-contained regime which is in substance independent and separate from Kosovo's court system, including the Constitutional Court. The individual chambers are only formally attached to the Kosovo courts at the various instances and have otherwise no connection or interaction with the domestic courts.'
[84] *Ibid.*, p. 967.

ECHR in *Fruni v. Slovakia*, this cannot be equated with a general proposition that specialised criminal courts are always compatible with the ECHR especially when the KSC, as previously noted, are an international hybrid criminal court with *unique features* and whose unique "national" element is that "it is established by national law rather than by international law".[85]

44. As regards the requirements of independence and impartiality, the ECHR has established that they are closely linked principles,[86] which may be reviewed together depending on the circumstances of each case.[87] Under Article 6(1) ECHR, independence primarily means independence from the executive and the legislative branches but also independence from the parties to the case. In determining whether a body could be considered 'independent', the ECtHR takes into account different factors, such as: the manner of appointment of the body's members; the duration of their term of office; the existence of guarantees against outside pressures; and whether the body presents an appearance of independence.

45. Most recently, the ECtHR emphasised the personal and institutional dimension of the principle of independence and reiterated its close relationship with impartiality: '"[i]ndependence' refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit –

[85] *Ibid.*, p. 991.
[86] ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, 55391/13, 57728/13 and 74041/13, Grand Chamber, Judgment, 6 November 2018, para. 150 and the case law cited therein.
[87] ECtHR, *Denisov v. Ukraine*, 76639/11, Grand Chamber, Judgment, 25 September 2018, para. 64.

which must provide safeguards against undue influence and/or unfettered discretion of the other state powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties."[88]

46. The Constitutional Court of Kosovo is yet to examine the KSC Law's compliance with the requirements of independence and impartiality under Article 6(1) ECHR. Furthermore, the Constitutional Court only rudimentarily analysed these aspects, merely holding that the constitutional amendment "complies with the requirements of an independent and impartial tribunal, as stipulated by Article 31 of the Constitution and Article 6, paragraph 1, of the ECHR".[89] No reasoning is offered in support of this statement with the Constitutional Court furthermore equating an enigmatic "requirement to be based in law and to come within a specialized scope of jurisdiction"[90] with the Article 6(1) ECHR requirements of independence and impartiality.

47. The KSC fail to satisfy the guarantees of independence and impartiality as the law establishing them does not provide adequate rules, particularly as regards composition and manner of appointment of their members, length of service and the grounds for abstention, rejection and dismissal of their members as set out below. In the absence of legislation complying with the requirements of an independent and impartial tribunal, reasonable doubt may arise in the minds of individuals as to the imperviousness of the KSC to external factors and their neutrality with respect to the interests before them.

48. As far as external independence is concerned, the KSC cannot be said, as required under Article 6(1) ECHR, to be able to function wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body

[88] *Guðmundur Andri Ástráðsson* Judgment, para. 234.
[89] Constitutional Court Judgment, para. 54.
[90] *Ibid.*

and without taking orders or instructions from any source whatsoever for the following reasons:

(i) The lack of protection against outside pressure of a budgetary nature, considering the KSC's extraordinary funding arrangements and associated auditing and accountability arrangements[91] involving 'third contributing states' as well as the practice of staff seconded[92] by foreign governmental entities and remunerated by these external entities;

(ii) The lack of adequate arrangement regarding the length of service of Judges, due to the lack of any fixed term of office and the equivocal nature of the legislative provisions regarding the 'Selection Panel' which is supposed to be responsible for the assessment of judicial candidates and their selection for the Roster of International Judges;[93]

(iii) The lack of appropriate remuneration arrangements, as KSC judges are only remunerated for days that they serve on the basis of what amount to zero-hour contracts;

[91] See Muharremi, *op. cit.*, p. 987: The KSC and SPO "have their own budget but they are not funded from the Kosovo budget. The understanding is that the [KSC and SPO] will be funded by the [EU] with no financial implications for Kosovo. The [KSC and SPO] also operate entirely outside of Kosovo's public financial management and accountability system. They are not subject to any audit by the Kosovo Auditor and they are also not required to comply with Kosovo legislation on public finance."

[92] This practice has already led to a violation of Article 35(5) of the KSC Law and which is intended to enshrine the independence of the Specialist Prosecutor. The first Specialist Prosecutor was 'seconded' from the US Government and, in effect, removed from his functions by a decision of the US Government. Although the Head of EU Common Security invited candidates to replace the Specialist Prosecutor, this was all a charade to give the appearance of a transparent appointment process. The second Specialist Prosecutor is, again, a seconded employee of the US Government.

[93] Muharremi, *op. cit.*, p. 981: 'Judges who are to serve in the Specialist Chambers will be included in a "Roster of International Judges" and will only be present at the seat of the Specialist Chambers as necessary and when requested by the President of the Specialist Chambers […] However, the law is silent as to which authority appoints the members of the Selection Panel.'

(iv) The vague and ambiguous nature of the legislative provisions governing the dismissal of KSC judges, which give insufficient guarantees as to the imperviousness of the Specialist Chambers to external factors;

(v) The unusually strong roster allocation role granted to the KSC President while being simultaneously subject to vague provisions governing tenure and dismissal, which again provides inadequate protection to the KSC President against attempts to influence from external factors. The existence of the "Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judges" cannot remedy this weakness as it does nothing more than confirm the KSC President's discretion in this area;

(vi) The involvement of an international unaccountable political entity (i.e. the Head of EULEX) in the appointment and dismissal of judges as well as the administrative and financial arrangements of the KSC; and

(vii) the general inapplicability of the Kosovo laws on the appointment of judges and prosecutors, the court administration and legal remedies against judges and prosecutors.[94]

49. Taken cumulatively, these features lead to the inescapable conclusion that the KSC *structurally* fail to satisfy Article 6(1) ECHR requirements relating to the right to be tried by an independent and impartial tribunal established by law due to the "extraordinary" institutional and operational arrangements outlined above. These unprecedented arrangements also mean that the KSC must be considered to constitute an "extraordinary court" prohibited by the Constitution of Kosovo. Were a national justice system in a Member State of the Council of

[94] *Ibid.*, p. 992.

Europe to adopt anything resembling such a system, it would undoubtedly be declared to be in violation of Article 6(1) ECHR.

50. In addition to Article 6(1) ECHR, the appointment and tenure of KSC Judges does not comply with relevant international standards. For instance, the United Nations Basic Principles on the Independence of the Judiciary state as follows:

> 11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
>
> 12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

It is impossible to reconcile these provisions with the mechanisms of the KSC. Being listed on a "roster" for a period of years is not the same as a "term of office".

51. The essential rationale for the design of the KSC was the cost. The EU wanted a budget institution, as opposed, for example, to the ICC. But this has had a knock-on effect in terms of inadequate guarantees of independence and impartiality. As detailed above, the KSC have structural elements that would be unacceptable in a national justice system. At a time when the EU is confronted with challenges to judicial independence and impartiality in some of its Member States, it is imperative that the highest standards be upheld in any institution in which it participates directly, such as the KSC and SPO.

IV. CONCLUSION

52. The rights cited in the present motion – the right to a fair and impartial hearing, a trial within a reasonable time, to be tried by an independent an impartial tribunal established by law, and to be presumed innocent – are indispensible cornerstones not only of a fair trial, but to the rule of law itself. These rights,

from which no derogation is permitted, are aimed at protecting defendants from extraordinary, arbitrary, protracted, and uncertain legal proceedings, that operate as nothing more than a rubber stamp of a pre-determined outcome.

53. The standards for compliance with these fundamental rights have been set through extensive litigation on behalf of aggrieved applicants before international and regional courts, and through the conventions and covenants agreed upon by the international community. Assessed against those standards, Mr Thaçi's fundamental rights have been conclusively, and repeatedly denied in the present case, in violation of Article 31(2) of the Constitution.

54. When an accused's rights have been violated to the point that "proceeding with the case would violate the fundamental principle of due process", the tribunal "has an inherent right to decide whether there exists a legal impediment to the exercise of jurisdiction over the Accused in order to ensure the integrity of the entire judicial process".[95] Given the recurrent violation of Mr Thaçi's fundamental rights as an accused, the integrity of the judicial process in the present case is beyond salvation. A refusal by the KSC to exercise jurisdiction is the only means through which redress can be provided to the accused, and constitutes the only available effective remedy as required by Article 54 of the Constitution.

[95] *Nikolić* Decision, para. 115.

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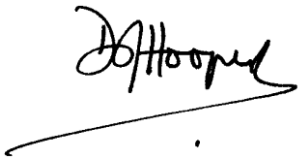
Respectfully submitted,



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12 March 2021

At London, the United Kingdom.