

**In:** **KSC-BC-2020-06**  
**Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Counsel for Rexhep Selimi

**Date:** 15 March 2021

**Language:** English

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**Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction –  
Discrimination**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Hashim Thaçi**

David Hooper

**Counsel for Kadri Veseli**

Ben Emmerson

**Counsel for Rexhep Selimi**

David Young

**Counsel for Jakup Krasniqi**

Venkateswari Alagenda

## I. INTRODUCTION

1. Relying on Rule 97(1)(a) of the Rules,<sup>1</sup> the Defence for Mr. Rexhep Selimi submits that the charges in the Specialist Prosecutor's Office ("SPO") Indictment against Mr. Rexhep Selimi<sup>2</sup> exceed the jurisdiction of the Kosovo Specialist Chambers ("KSC"), given that:

None of the charges relate to the allegations against the KLA, and Mr. Selimi as a founding member of it, in the Council of Europe Report on "Inhuman treatment of people and illicit trafficking in human organs in Kosovo," prepared by the Rapporteur Mr Dick Marty ("Marty Report").<sup>3</sup>

2. In addition, the Defence for Mr. Selimi submits that the manner in which the structure and composition of the KSC employed personnel across the Specialist Chambers, the Specialist Prosecutor's Office and the Registry was, and currently is, organised is in direct and flagrant contradiction with the proper establishment and functioning of the KSC as a Kosovo domestic court. The exclusion of Kosovo Albanians from employment by this Court not only undermines the legitimacy of this purported domestic judicial institution, but it exceeds the authority given to it by the Constitution of the Republic of Kosovo and the Law governing its functioning. Furthermore, the Court's practice amounts to a violation of Article 14 of the European Convention of Human Rights (ECHR) on "Prohibition of Discrimination."
3. Considered either separately or cumulatively, these failures warrant the dismissal of the charges against Mr. Selimi for lack of jurisdiction on the part of the KSC to adjudicate them.

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<sup>1</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

<sup>2</sup> *Prosecutor v. Thaci et al.*, KSC-BC-2020-06/F00134, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020, ("Indictment").

<sup>3</sup> Report: Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Doc. 12462, 7 January 2011, Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights.

## A. THE THACI DEFENCE TEAM SUBMISSIONS

4. The Defence has reviewed the challenges filed by the Thaci Defence team,<sup>4</sup> and fully support and endorse the following arguments:

- The Indictment completely exceeds the remit of the Marty Report, in terms of its substantive allegations, and its temporal and geographical scope.<sup>5</sup>
- The Assembly of Kosovo, in drafting Constitutional Amendment No.24 deliberately focused on the parameters of the SITF investigation, directly limiting the KSC's operation to the narrow confines of the Marty Report.<sup>6</sup>
- The Indictment has been drafted in complete disregard for the limitations imposed by the Constitution of Kosovo, as set out in the legislation which established the KSC.<sup>7</sup>
- The level of disconnect between the Indictment and the Marty Report in terms of geographical and temporal scope of the allegations, makes it impossible for the KSC to claim jurisdiction over "crimes set out in Articles 12-16 which relate to the [Marty Report]."<sup>8</sup>
- The significant lack of geographic overlap could not be more glaring. The detention centres identified in the Marty Report are all located in Albania, while the crimes alleged in the Indictment took place almost exclusively in Kosovo. Out of 42 alleged detention sites listed in the Indictment, only two are in Albania, namely *Cahan* and *Metal Factory in Kukës*.<sup>9</sup> All others are in Kosovo. In addition, out of 20 different locations of alleged murders and killings, only one, again being *Metal Factory in Kukës*, is in Albania. All others are in Kosovo.<sup>10</sup> Further, the Indictment

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<sup>4</sup> *Prosecutor v. Thaci et al.*, KSC-BC-2020-06/F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021.

<sup>5</sup> *Ibid.*, paras 28 – 43, pages 12 – 17.

<sup>6</sup> *Ibid.*, paras 29 – 30, page 12.

<sup>7</sup> *Ibid.*, para. 33, page 14.

<sup>8</sup> *Ibid.*, See Law No. 05/L-053 on the "Specialist Chambers and Specialist Prosecutor's Office, Article 1(2).

<sup>9</sup> Indictment, pages 54 – 58.

<sup>10</sup> Indictment, pages 60 – 66.

list six locations of alleged enforced disappearance of individuals, all of which are in Kosovo.<sup>11</sup>

- The same divergence exists with respect to temporal jurisdiction. As outlined clearly in the Indictment, its temporal scope is limited to “at least March 1998 through September 1999.”<sup>12</sup> The Marty Report on the other hand, is concerned with events and acts that are alleged “to have occurred **for the most part** from the summer of 1999 onwards.”<sup>13</sup> Therefore, it is abundantly clear that these two documents deal with different events.<sup>14</sup>
- More significantly, the Marty Report makes no reference to crimes against humanity and war crimes. Whatever legal interpretation is given to the allegations contained therein, none could support the substantive elements of these crimes. This further highlights the fundamental disconnect between the Marty Report and the Indictment.<sup>15</sup>
- The SPO conducted a criminal investigation against Mr Rexhep Selimi without a legal basis, given that Mr Selimi was never the subject of allegations in the Marty Report.<sup>16</sup>
- In conclusion, not only do the SIFT investigation and the SPO indictment exceed the jurisdictional limits of the KSC, but it is perfectly clear that the present case steps far outside the Court’s intended scope and parameters.<sup>17</sup>

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<sup>11</sup> *Prosecutor v. Thaci et al.*, KSC-BC-2020-06/F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021, paras 34 – 36, pages 14 –15. *See*, Indictment, pages 67 – 68.

<sup>12</sup> Indictment, para. 17.

<sup>13</sup> Marty Report, para. 4, page 6.

<sup>14</sup> *Prosecutor v. Thaci et al.*, KSC-BC-2020-06/F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021, para. 37, page 15.

<sup>15</sup> *Ibid.*, para. 39, page 16.

<sup>16</sup> No allegations or reference were made against Mr. Rexhep Selimi in the Marty Report.

<sup>17</sup> *Ibid.* para. 43, page 17.

**B. THE EXCLUSION OF KOSOVO ALBANIANS BY THE DISCRIMINATORY NATURE OF EMPLOYMENT PRACTICE AT THE KSC**

5. The KSC is described as a domestic Kosovo Court. It was created through a law which was passed by the Kosovo Assembly, which required specific adherence to the Kosovo Constitution. It is said to be embedded “within the Kosovo justice system.”<sup>18</sup> As such, the Specialist Chambers are “attached to each level of the court system in Kosovo: the Basic Court of Prishtina, the Court of Appeals, the Supreme Court and the Constitutional Court.”<sup>19</sup> The purported domestic nature of the KSC would mean that the citizens of the country, which is said to have given legitimacy to this institution, would be entitled to be a part of, and contribute to, the work and mission of this intended justice mechanism. The current practice of exclusion of Kosovo Albanians<sup>20</sup> from being employed across the personnel of the Court, is, however, in full contradiction with the functioning of any genuinely domestic court.
6. Article 25 of the Law on Specialist Chambers does not specify whether the judges working for the court can originate from Kosovo or not, but the employment regime section on the website specifies explicitly that “employment at KSC and SPO is ONLY open to nationals of EU member states and contributing third states (Canada, USA, Norway, Switzerland and Turkey),”<sup>21</sup> which by default excludes Kosovo.
7. Furthermore, Article 26 of the Law provides that: “A roster of independent international judges shall be established in accordance with the procedure set out in Article 28 (“the Roster of International Judges”),”<sup>22</sup> while Article 28 maintains that an independent selection panel shall be responsible for the assessment of judicial candidates and selection for appointment of judges for the Roster of International Judges, as well as for making

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<sup>18</sup> Article 1(2) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ herein refer to articles of the Law, unless otherwise specified.

<sup>19</sup> Article 3(1) of the Law.

<sup>20</sup> “[Europe: Kosovo — The World Factbook - Central Intelligence Agency](#)”, *www.cia.gov*, accessed on 12 March 2021.

<sup>21</sup> See <https://www.scp-ks.org/en/employment/staffing>.

<sup>22</sup> See Article 26 of the Law.

recommendations for the appointment of the President and Vice President of the Specialist Chambers.<sup>23</sup> Paragraph 2 of Article 28 explicitly states that: “The Selection Panel shall be composed of three international members, with at least two members being international judges with substantial international criminal law experience. One of the international judges shall serve as the presiding member of the panel.”<sup>24</sup> The implication behind the Judicial selection and appointment process appears to be based on the premise that only international judges can be ‘independent’. Unlike the model of The Special Tribunal for Lebanon, where one part of the constitution of the Trial Chamber and Appeals Chambers was made up of Lebanese or local Judges, while another part was made up of ‘International’ Judges, the KSC’s model has no trace of the Kosovan Judiciary.

8. While it is acknowledged that there have been cases in Kosovo where a panel of judges has been comprised of foreign judges (EULEX cases), in those cases there have been Kosovo Albanians judges sitting as members of the panel, or at the very least Kosovo Albanian translators assisting the panel. Nevertheless, having panels comprised of 2/3 international judges was reported to have resulted in “non-treatment of locals (Kosovo Albanians) as partners.”<sup>25</sup> The KSC’s situation, where a purported domestic court explicitly excludes any Kosovo Albanian from any sort of employment within the court, is unprecedented and fundamentally unjust. It seriously calls into question whether the KSC consider locals as partners, and/or rightful stakeholders in this court, which is said to be a court of Kosovo.
9. What this means in practice is that none of the 22 Judges on the KSC’s Roster of Judges are from Kosovo, albeit the KSC is meant to be a court of Kosovo. This extraordinary practice, which was quite deliberately put in place, means that a Judge from Kosovo is not eligible to be a Judge at the KSC, either as a Pre-Trial Judge, or a Trial Judge, or an Appeals Chamber Judge. Indeed, Kosovo Albanians are also ineligible to work in the Specialist Prosecutor’s Office, or in the Registry or any part of the KSC at all.
10. In many jurisdictions, there is a well-known concept of Justice not only being done, but “being seen to be done”, with reference to the public’s perception of the fairness of criminal

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<sup>23</sup> See Article 28 of the Law.

<sup>24</sup> See para 2, Article 28 of the Law.

<sup>25</sup> See BPRG Paper “A decade after EULEX”, November 2019.

proceedings. In the case of the KSC, those behind its organisation have quite deliberately emasculated from the court a fundamentally important part of Kosovo. Not simply by excluding its own people, but also, in so doing, by depriving the court of instilling and embedding the rich and diverse culture, ethos and legal traditions of Kosovo. These would be the hallmarks of any normal domestic court, and part of a domestic justice system. To allow for a court of Kosovo to exist in this way is a fundamental denial of justice to the people of Kosovo in general, and more directly, to the Accused in particular.

11. The KSC stands in direct contrast with other hybrid and ad hoc tribunals. The ICTY and ICTR were created by Security Council Resolution,<sup>26</sup> and thus the hiring process across the personnel of the court was governed by the UN employment rules and regulations as well as the court's own rules and practice. More importantly, internationalised courts such as the Extraordinary Chambers in the Courts of Cambodia (ECCC),<sup>27</sup> the Special Tribunal for Lebanon (STL),<sup>28</sup> and the Special Court for Sierra Leone (SCSL),<sup>29</sup> which were created by Agreement with the UN Security Council, were characterised by a cohabitation of national and international personnel across the Chambers, the Office of the Prosecutor and the Registry.
12. Fundamentally, the notion of this unusual "cohabitation" derives from the aims that underpin the establishment of these types of tribunals; namely, the attempt to provide the people of these societies with the opportunity to obtain justice from within. It is a tragic irony that the KSC, which was established to be a wholly domestic court, does not offer any such platform to Kosovo Albanians. The KSC is therefore failing to honour its legitimacy as a Kosovo domestic court.
13. The Law, which establishes and regulates the organisation, functions and jurisdiction of the Specialist Chambers and the Specialist Prosecutor's Office,<sup>30</sup> does not provide for any such

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<sup>26</sup> S/RES/827 (1993) 25 May 1993; S/RES/955 (1994)\* 8 November 1994.

<sup>27</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003.

<sup>28</sup> Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon Beirut, 29 January 2007.

<sup>29</sup> Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, 12 April 2002.

<sup>30</sup> Article 1 of the Law.

exclusion. Apart from the articles under Chapter 4 of the Law,<sup>31</sup> which state the rules and criteria that apply to the roster and selection of international judges by the “Appointing Authority,” no explicit rules are found in the law that provide for: a) the hiring of only international staff or b) any exclusion on the basis of nationality or ethnicity. Furthermore, no such rules are found in the other foundational documents governing the establishment and the functioning of the KSC, and more importantly the Constitutional Amendment, Article 162.

14. The only reference to the exclusion of Kosovo Albanians from employment at the Court appears to be found under the “Employment Regime” section on the KSC website, which explicitly states that:

“Employment at Kosovo Specialist Chambers and Specialist Prosecutor's Office is ONLY open to nationals of the EU Member States and contributing third States (Canada, Norway, Switzerland, Turkey and the United States of America).”<sup>32</sup>

15. This provision specifically means that Kosovo Albanians are discriminated against and out of the scope of hiring. This unprecedented discrimination is in direct violation of the Kosovo Constitution, which under Article 7 states that:

“The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, **non-discrimination**, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.”<sup>33</sup>

16. It is abundantly clear that the employment regime and practice adopted by the KSC, by openly excluding Kosovo Albanians from employment in “their own court”, go beyond the authority given by the Constitution of the Republic of Kosovo and the Law that governs the KSC.

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<sup>31</sup> Chapter 4, Articles 25 – 34 of the Law.

<sup>32</sup> See <https://www.scp-ks.org/en/employment/staffing>.

<sup>33</sup> Constitution of the Republic of Kosovo.



17. Furthermore, Article 14 of the European Convention of Human Rights (ECHR) provides for freedom from discrimination. It states that,

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

18. It is clear that “Discrimination” has its own meaning in Article 14 of the Convention. It means broadly “treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations.”<sup>34</sup> However, “discrimination” under Article 14 also includes indirect discrimination where a policy or measure has disproportionately prejudicial effects on a particular group.<sup>35</sup> The European Court of Human Rights (ECtHR) confirmed that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a racial or ethnic group. Intent was not required.<sup>36</sup>

19. In light of the principles enshrined in Article 14 of the ECHR, Kosovo Albanians are entitled to enjoy the right to not be discriminated against by the KSC. More importantly, the KSC should uphold the principles of fairness and ensure that any measure or practice applied in the Court’s employment policy is not discriminatory. Any such practice to the contrary would amount to a violation of the Article 14 of the ECHR.

In conclusion, the KSC’s unprecedented exclusion of Kosovo Albanians is in contradiction to, and in flagrant violation of, the Constitution of the Republic of Kosovo, the Law governing its functioning, and the principles on prohibition of discrimination enshrined in the ECHR. The KSC is established on a discriminatory basis.

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<sup>34</sup> *Kiyutin v. Russia*, Application no. 2700/10, European Court of Human Rights, 10 March 2011, para 59. See also *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007, and *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008.

<sup>35</sup> *J.D. and A v. The United Kingdom*, Applications nos. 32949/17 and 34614/17, European Court of Human Rights, 24 October 2019, para 85. See, among other authorities, *S.A.S. v. France* [GC], no. 43835/11, § 161, ECHR 2014 (extracts), and *D.H. and Others v. the Czech Republic*, cited above, §§ 175 and 184-185).

<sup>36</sup> *D.H. and Others v. Czech Republic*, Application no. 57325/00, European Court of Human Rights, 13 November 2007.

## II. CONCLUSION

20. On the basis of the abovementioned, the Defence respectfully asks the Pre-Trial Judge to

- a) GRANT this Motion and confirm that that the KSC does not have jurisdiction over the crimes as charged in the Indictment, as the KSC applies an unlawful and discriminatory employment policy towards Kosovo Albanians;
- b) DISMISS the Indictment against Mr. Rexhep Selimi; and,
- c) SCHEDULE an oral hearing on this Application and grant the Defence the opportunity to be heard on these issues.

Respectfully submitted on 15 March 2021



DAVID YOUNG  
Lead Counsel for Rexhep Selimi



GEOFFREY ROBERTS  
Co-counsel for Rexhep Selimi