



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Prosecutor

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**Prosecution response to preliminary motions concerning the status of the Kosovo
Specialist Chambers and allegations of rights violations**

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I. INTRODUCTION

1. The Kosovo Specialist Chambers ('KSC') is a constitutional judicial body, is properly established by law and is not in violation of applicable human rights norms. Additionally, no violations of the rights of the Accused have been demonstrated. The Defence Motions¹ should be rejected in full.

2. As a preliminary matter, challenges to the legality of the KSC, going to its legal basis or foundation,² do not constitute jurisdictional challenges within the meaning of Rule 97(1)(a).³ Legality and jurisdiction are distinct concepts.⁴ While the Pre-Trial Judge ('PTJ') may nonetheless consider it appropriate to address certain of these challenges at this time,⁵ they do not constitute jurisdictional challenges and could be dismissed on that basis alone.

¹ Motion challenging jurisdiction on the basis of violations of fundamental rights enshrined in the Constitution, 12 March 2021, KSC-BC-2020-06/F00217 ('THAÇI Motion'); Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction –Discrimination, KSC-BC-2020-06/F00219, paras 2-3, 5-20 ('SELIMI Motion'); Preliminary motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the basis of violations of the Constitution, KSC-BC-2020-06/F00224, 15 March 2021 ('VESELI Motion') (together 'Defence Motions'). The VESELI Defence's submissions regarding applicable law (VESELI Motion, KSC-BC-2020-06/F00224, paras 13-19) are addressed in the SPO's response to KSC-BC-2020-06/F00223. The SELIMI Defence's submissions regarding the Council of Europe Report (KSC-BC-2020-06/F00219, paras 1 and 4) are also addressed in a separate response.

² THAÇI Motion, KSC-BC-2020-06/F00217, paras 36-51; SELIMI Motion, KSC-BC-2020-06/F00219, paras 2, 5-19; VESELI Motion, KSC-BC-2020-06/F00224.

³ STL, *Prosecutor v Ayyash*, STL-11-01/PT/TC, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 27 July 2012, paras 28-29; STL, Appeals Chamber, *Prosecutor v Ayyash*, STL-11-01/PT/AC/AR90.1, 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, para.18.

⁴ STL, *Prosecutor v Ayyash*, STL-11-01/PT/TC, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 27 July 2012, paras 29, 32, 37-38.

⁵ See similarly STL, *Prosecutor v Ayyash*, STL-11-01/PT/TC, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 27 July 2012, para.39.

II. SUBMISSIONS

A. THE KSC IS NOT AN EXTRAORDINARY COURT, AND IS AN INDEPENDENT AND IMPARTIAL TRIBUNAL

1. **There is no basis for reconsideration of the KCC's Judgment**

3. The Kosovo Constitutional Court ('KCC') has specifically considered, and pronounced upon, the compatibility of the KSC with Article 103(7) of the Constitution, finding it to be constitutional in all respects.⁶ THAÇI and VESELI provide no basis for their attempt to effectively seek reconsideration on that issue. Their submissions are based on misrepresentations of the factual and legal record and raise no new issues. As such, the Defence Motions on this matter should be rejected, and VESELI's request for referral of the matter to the Specialist Chambers of the Constitutional Court ('SCCC') should be denied.

4. The VESELI Defence submissions are fundamentally misconceived, resting, as they do, on the incorrect assertion that no separate applicable law as the basis for the KSC's operation had been envisaged at the time of the KCC Judgment.⁷ In fact:

⁶ Constitutional Court of the Republic of Kosovo, 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, Judgment in Case No. KO26/15, ('KCC Judgment'), paras 42-53.

⁷ VESELI Motion, KSC-BC-2020-06/F00224, para.3(b) (claiming that 'nowhere does either Article 162 of the Constitution, or the Exchange of Letters [...] refer to the possibility that the KSC would operate on the basis of a separate 'applicable law'. On the contrary, the only references relate to procedural issues and the assurance that the Rules of Evidence would be guided by the Kosovo Code of Criminal Procedure').

- The Exchange of Letters,⁸ which was before the KCC at the time of its judgment,⁹ expressly provides, *inter alia*, that the KSC and SPO ‘will be governed by *their own statute* and rules of procedure and evidence’ (emphasis added);¹⁰ and
- Article 162(1) of the Constitution expressly states that the ‘*organisation, functioning and jurisdiction* of the [KSC] and [SPO] shall be regulated on the basis of this Article *and by a specific law*’ (emphasis added).¹¹

5. These provisions clearly envisaged a substantive applicable law, establishing and regulating, amongst other things, the jurisdiction of the KSC. Article 162(1) of the Constitution was specifically considered and found constitutional.¹² The KCC satisfied itself of the KSC’s compatibility with Article 103(7) of the Constitution precisely based on, *inter alia*, the fact that it would be established through the adoption of a specific law by the Assembly regulating its organisation, functioning and jurisdiction.¹³

⁸ Law No.04-L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014, (‘Exchange of Letters’). The Exchange of Letters itself does not have internal page numbering, the SPO has used the pdf page number in the version of Law No.04/L-274 on the KSC’s website.

⁹ *See, for example* KCC Judgment, paras 37-38. Indeed, the Exchange of Letters is expressly referenced in Article 162 of the Constitution and therefore necessarily fell within the KCC’s consideration.

¹⁰ Exchange of Letters, p.9.

¹¹ *See also* Article 1(1) of the Law (directly reflecting, and basing itself upon, this constitutional provision).

¹² KCC Judgment, paras 23, 46, 71-72.

¹³ KCC Judgment, paras 46-49.

6. Indeed, each of the matters which THAÇI and VESELI now claim warrant a reassessment of the KSC's compatibility with Article 103(7) were in fact before the KCC at the time of its judgment. These include, in particular, the fact that the KSC would: (i) be internationally staffed;¹⁴ (ii) operate pursuant to its own statute and rules of procedure and evidence;¹⁵ (iii) be operated (and funded) by the EU, in accordance with authority delegated under relevant constitutional provisions;¹⁶ (iv) have a specialised jurisdiction relating to the CoE Report;¹⁷ (v) have a distinct regime for the selection and appointment of Judges;¹⁸ and (vi) continue to operate pending notification of completion by the Council of the European Union.¹⁹

7. Notably, at the time of rendering its judgment, the KCC even had before it a fulsome set of comments on the proposed constitutional amendments,²⁰ including, amongst others, objections based on the degree of connection of the proposed

¹⁴ Exchange of Letters, p.9. *Contra*. THAÇI Motion, KSC-BC-2020-06/F00217, para.43; VESELI Motion, KSC-BC-2020-06/F00224, para.10.

¹⁵ *See* paras 4-5 above. Constitution, Art.162(1); Exchange of Letters, p.9. *Contra*. VESELI Motion, KSC-BC-2020-06/F00224, paras 3(b), 12-19.

¹⁶ Exchange of Letters, p.9. *Contra*. THAÇI Motion, KSC-BC-2020-06/F00217, para.48(i).

¹⁷ Constitution, Art.162(1). *Contra*. VESELI Motion, KSC-BC-2020-06/F00224, paras 3(a), 8-9. Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhumane treatment of people and illicit trafficking in human organs in Kosovo, Doc.12462, 7 January 2011 ('CoE Report').

¹⁸ Constitution, Art.162(10); Exchange of Letters, p.9. *Contra*. THAÇI Motion, KSC-BC-2020-06/F00217, paras 47-48, 50 VESELI Motion, KSC-BC-2020-06/F00224, paras 10-11.

¹⁹ Constitution, Art.162(13) and (14); Exchange of Letters, p.9. *Contra*. THAÇI Motion, KSC-BC-2020-06/F00217, paras 35, 48(ii) (regarding duration of terms of office).

²⁰ KCC Judgment, paras 24-34. *See also* KCC Judgment, para.69.

specialist chambers to the Kosovo judicial system,²¹ and the potential manner of appointment of Judges.²²

8. Consequently, all relevant matters were before the KCC at the time of its judgment and there can be no basis for reconsideration or review of that decision. Whether or not the Law itself was before the KCC is irrelevant,²³ noting that all of the features of the Law to which the Defence are objecting were expressly envisaged in the documents before the KCC at the relevant time. The Defence requests should be rejected accordingly.

2. The KSC meets all relevant criteria

9. Should the PTJ consider it necessary to reassess the KSC's compatibility with Article 103(7) of the Constitution, the Defence requests should still be rejected.

10. Despite purporting to rely on Article 103(7) of the Constitution, the VESELI Defence fails to even mention the criteria specifically set out by the KCC for interpretation of that provision,²⁴ while the THAÇI Defence selectively quotes from, and misapplies, the KCC Judgment.²⁵

11. The KCC identified three criteria, being that: (i) the court 'remain within the existing framework of the judicial system' of Kosovo and operate in compliance with

²¹ KCC Judgment, paras 25-26.

²² KCC Judgment, para.32.

²³ *Contra*. THAÇI Motion, KSC-BC-2020-06/F00217, paras 39, 41, 46; VESELI Motion, KSC-BC-2020-06/F00224, paras 1, 3(a).

²⁴ *See* VESELI Motion, KSC-BC-2020-06/F00224, para.7.

²⁵ THAÇI Motion, KSC-BC-2020-06/F00217, para.41.

its principles, in the sense of its structure, scope of jurisdiction and method of functioning being in compliance with the rights set out in Chapters II and III of the Constitution;²⁶ (ii) the court be ‘based upon law’, interpreted consistent with the ‘established by law’ requirements of Article 6(1) of the European Convention on Human Rights (‘ECHR’);²⁷ and (iii) there be a necessity for its establishment.²⁸ The KSC continues to meet all relevant criteria.

12. First, as envisaged in the Exchange of Letters²⁹ and Article 162 of the Constitution,³⁰ the KSC constitute specialist chambers created, at all levels, within the Kosovo justice system.³¹ The KSC is bound to function in accordance with, *inter alia*, the Constitution and the rights and freedoms therein.³² Through its judgments rendered on 26 April 2017,³³ 28 June 2017,³⁴ and 22 May 2020,³⁵ the SCCC has declared

²⁶ KCC Judgment, para.43.

²⁷ KCC Judgment, paras 45-48.

²⁸ KCC Judgment, para.45.

²⁹ Exchange of Letters, pp.8-9.

³⁰ Constitution, Art.162(1) and (3).

³¹ Law, Arts 1(2), 3(1), 24.

³² Constitution, Art.162(2); Law, Art.3(2).

³³ Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, KSC-CC-PR-2017-01/F00004, 26 April 2017.

³⁴ Judgment on the Referral of Revised Rules of the Rules of Procedure and Evidence Adopted by Plenary on 29 May 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, KSC-CC-PR-2017-03/F00006/COR, 28 June 2017.

³⁵ Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, KSC-CC-PR-2020-09/F00006, 22 May 2020.

the current version of the Rules to meet these standards. In light of these factors, the functioning of the KSC is within the framework of the Kosovo justice system.³⁶

13. Second, as previously affirmed by the KCC,³⁷ the KSC is established by law and is an independent and impartial tribunal in accordance with Article 31 of the Constitution and Article 6(1) of the ECHR. The KSC is established and operates on the basis of Article 162 of the Constitution and the Law. It is not required that the legislator regulate 'each and every detail', but rather that it establishes the organisational framework.³⁸ The KSC have an unequivocal legal basis in legislation which defines its jurisdiction, organisation and competence.³⁹

14. Moreover, the Constitution,⁴⁰ the Law,⁴¹ the Rules,⁴² the Rules on Assignment,⁴³ and the Code of Judicial Ethics⁴⁴ provide a comprehensive framework for the appointment and oversight of Judges.⁴⁵ In particular, the Law establishes the criteria

³⁶ KCC Judgment, paras 57-59.

³⁷ KCC Judgment, paras 46-49, 54.

³⁸ ECommHR, *Zand v. Austria*, 7360/76, 12 October 1978, para.69.

³⁹ SCCC, Judgment on the Referral of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law, KSC-CC-PR-2017-01/F00004, 26 April 2017, ('SCCC Judgment'), para.38; ECtHR, *Fruni v. Slovakia*, 8014/07, 21 June 2011, paras 134-137. While the Defence notes that the particular law in that case had been found unconstitutional by the domestic Constitutional Court, the analysis in the judgment (for which it was relied upon by the KCC) was on the question of whether it was 'established by law', which was found to be the case (paras 140, 149).

⁴⁰ Constitution, Art.162(10).

⁴¹ Law, Arts 24-33.

⁴² Rules, 15-22.

⁴³ Rule on the Assignment of Specialist Chambers Judges From the Roster of International Judges, KSC-BD-02, 14 March 2017 ('Rules on Assignment').

⁴⁴ Code of Judicial Ethics for Judges Appointed to the Roster of International Judges, KSC-BC-01/COR2, 14 March 2017 ('Code of Judicial Ethics').

⁴⁵ *Contra*. THAÇI Motion, KSC-BC-2020-06/F00217, paras 39, 45, 47-48.

for nomination, appointment and dismissal of Judges,⁴⁶ defines when Judges are to be assigned (based on specific triggering events such as the filing of an indictment),⁴⁷ and regulates the term of such assignments.⁴⁸ These provisions are further supplemented by the detailed provisions of the Rules, Rules on Assignment and Code of Judicial Ethics. As such, there is a clear organisational framework circumscribing discretion in the KSC's operation. Any remaining delegation of authority is not excessive and does not impact the KSC's status as having been established by law.⁴⁹ Indeed, the SCCC has previously considered and upheld the constitutionality of the scope of the functions accorded to the KSC President pursuant to both the Law and Rules.⁵⁰ The Defence has not demonstrated, or indeed even alleged, that there has been any violation of the applicable framework in this case.

15. With respect to the further requirements of independence and impartiality, as a preliminary matter, it is noted that for the purposes of Article 6(1) of the ECHR such requirements attach to the entity hearing and adjudicating upon the criminal charge (i.e. the 'tribunal'), rather than to any party to the proceedings.⁵¹ As such, the THAÇI

⁴⁶ Law, Arts 27-28, 31(4).

⁴⁷ Law, Art.33.

⁴⁸ Law, Arts 30(3) and 33(1)-(3).

⁴⁹ In fact, the European Commission of Human Rights has upheld the delegation of the authority to create entire *courts*, not just panels, in circumstances where the Minister of Justice was under a legal obligation to create courts as needed, and abolish them when no longer necessary (ECommHR, *Zand v. Austria*, 7360/76, 12 October 1978, para.70).

⁵⁰ SCCC Judgment, KSC-CC-PR-2017-01, paras 33-34.

⁵¹ For example, ECtHR, *Kontalexis v. Greece*, 59000/08, 31 May 2011, para.57; ECtHR, *Haarde v. Iceland*, 66847/12, 23 November 2017, para.94.

Defence's unsubstantiated and false claims regarding the appointment of the Specialist Prosecutor are without merit.⁵²

16. It is a pre-requisite to selection that KSC Judges are persons of 'high moral character, impartiality and integrity'.⁵³ All Judges are required to be independent in the performance of their functions,⁵⁴ and may not seek or accept instructions from any government or any other source.⁵⁵ The KSC is bound to adjudicate and function in accordance with the Constitution and international human rights law.⁵⁶ Further, as outlined above,⁵⁷ a comprehensive framework governs, *inter alia*, the appointment, term, dismissal and functioning of KSC Judges. The Law provides additional express safeguards preventing a Judge from sitting at different phases of the same matter.⁵⁸ In light of such a framework and such safeguards, it is well-established that a strong

⁵² THAÇI Motion, KSC-BC-2020-06/F00217, fn.92. It is a matter of public record that the prior Specialist Prosecutor left the SPO after expiry of a fixed-term appointment. The current Specialist Prosecutor was selected from the ensuing transparent, competitive recruitment process. THAÇI's false submissions do not provide a basis to demonstrate any violation of Article 35 of the Law, let alone to implicate the independence and impartiality of the tribunal. *See also* para.17 below (in relation to secondment).

⁵³ Law, Art.27(1).

⁵⁴ Law, Arts 27(1) and 31(1).

⁵⁵ Law, Art.27(1).

⁵⁶ Constitution, Art.162(2); Law, Art.3(2).

⁵⁷ *See* para.14 above.

⁵⁸ Law, Art.33(4)-(5). *See also* ECtHR, *Kyprianou v. Cyprus* [GC], 73797/01, 15 December 2005, para.121.

presumption of impartiality attaches.⁵⁹ For these same reasons, the KSC also fully meets the requirements of an independent tribunal.⁶⁰

17. Contrary to Defence submissions,⁶¹ there is no required minimum term of office,⁶² and neither the funding arrangements,⁶³ the involvement of an entity such as the EULEX Head of Mission in appointments, nor the practice of international

⁵⁹ ECtHR, *Kyprianou v. Cyprus* [GC], 73797/01, 15 December 2005, para.119; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, para.91; ICC, Annex to the Notification of the decision on the "Defence Request for the Disqualification of a Judge", ICC-02/05-03/09-344, 5 June 2012, para.14 ('a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice').

⁶⁰ Despite setting out at some length the legal requirements for independence and impartiality, the THAÇI Defence neglected to mention the most relevant ECtHR Grand Chamber case on this matter, which relates specifically to an equivalently situated chamber, being the war crimes chambers established within the state court of Bosnia and Herzegovina. ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2312/08 and 34179/08, 18 July 2013, para.49 (outlining relevant factors for the assessment of independence).

⁶¹ THAÇI Motion, KSC-BC-2020-06/F00217, para.48.

⁶² ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2312/08 and 34179/08, 18 July 2013, para.51. *But, in any event, see Law, Arts 30(3) and 33(1)-(3).*

⁶³ Arrangements where judges are remunerated only upon assignment to a case and for the duration of that case do not affect judicial independence because they tie a judge's compensation to the work he or she performs rather than to donor contributions, and the compensation is not subject to manipulation by officials, parties, or other interested individuals (SCSL, *Prosecutor v. Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), paras 37-38). Other courts, including the ICTY, IRMCT and STL, have had similar arrangements: Updated Statute of the International Criminal Tribunal for the former Yugoslavia, Art.13 *quater* (2009) (describing terms and conditions of *ad litem* judges); Statute of the International Residual Mechanism for Criminal Tribunals, Art.8(4), *annexed to UN S.C. Res. 1966*, 22 December 2010; Special Tribunal for Lebanon, Second Annual Report (2010-2011), Part II, A, 5 (2011) (noting that judges who have not received permanent assignments have been paid only for days on which they exercise judicial functions)). With respect to the funding of the KSC as a whole, consistent with the Exchange of Letters, the Law provides that the KSC budget shall not come from the Kosovo budget. Law, Art.63(1). However, the European Union has committed to 'ensure . . . the related necessary financial means shall remain in effect until such time as these judicial proceedings [of the KSC] have been concluded' (Council of the European Union, Council Decision (CFSP) 2016/947 of 14 June 2016, Art.1(2)).

secondments necessarily conflict with the requirements of independence, particularly in light of the temporary character of the KSC and given the framework and safeguards outlined above.⁶⁴ Indeed, the appointment of international judges was specifically designed to reinforce the appearance of independence on the part of the KSC.⁶⁵

18. Finally, as set out in Article 1 of both the Constitution and the Law, the KSC is necessary to the fulfilment of Kosovo's international obligations in relation to the CoE Report. As the SCCC has recently stated, the '*raison d'être* of the [KSC and SPO] and hence their legal regime is to realise [...] the respective fundamental rights and freedoms' in relation to the CoE Report allegations.⁶⁶ The legal regime governing the KSC, including its distinct features as a specialised court, arose in a context where impediments to discovery of the truth in relation to those allegations had been identified. These impediments included the reluctance of witnesses to testify, the concern that alleged preparators were in, or close to, positions of power, and possible connections between organised crime and politics.⁶⁷ As such, the KSC is necessary to providing secure, independent, impartial, fair and efficient criminal proceedings.⁶⁸

⁶⁴ ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2312/08 and 34179/08, 18 July 2013, paras 50-52.

⁶⁵ See similarly ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2312/08 and 34179/08, 18 July 2013, para.50.

⁶⁶ SCCC, Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00015, 26 November 2020, para.56

⁶⁷ SCCC Judgment, KSC-CC-2020-11/F00015, para.54; KCC Judgment, paras 50-53.

⁶⁸ SCCC Judgment, KSC-CC-2020-11/F00015, paras 55, 68; Law, Art.1. See also Exchange of Letters, pp.8-10 (in particular, requiring an environment 'conducive to the proper administration of justice').

19. The alternative, or supplemental, criteria proposed by the VESELI Defence do not alter this analysis. The KSC was established to address crimes relating to the CoE Report,⁶⁹ with subject matter jurisdiction over a wide range of war crimes and crimes against humanity,⁷⁰ and a temporal jurisdiction spanning from 1 January 1998-31 December 2000.⁷¹ Its jurisdiction is not confined to a single case (or even necessarily a small number of cases), nor is it confined to a specific crime, a single perpetrator or even a certain category of perpetrators.⁷²

20. Indeed, the VESELI Defence is factually incorrect in claiming that the KSC is 'unique' or 'unprecedented in the history of modern criminal justice' by reason of having been set up to address a specific set of allegations.⁷³ Courts have been created with jurisdictions far more limited than that of the KSC, including several that were created to prosecute a single person or crimes stemming from a single event: Scotland's High Court of the Justiciary in the Netherlands to adjudicate two Libyan nationals thought to be responsible for the bombing of Pan Am Flight 103;⁷⁴ the Extraordinary African Chambers within Senegal to prosecute the 'person or persons' most responsible for international crimes committed in Chad between 1982 and 1990,

⁶⁹ Constitution, Art.162(1); Law, Art.6(1). The SPO's submissions regarding the subject matter jurisdiction of the KSC are set out in further detail in the SPO's response to filings KSC-BC-2020-06/F00216 and KSC-BC-2020-06/F00219.

⁷⁰ Law, Arts 13-15.

⁷¹ Law, Art.7.

⁷² Law, Art.9. In contrast to, for example, those courts and tribunals whose statutes provide for prosecution of those bearing the 'greatest responsibility' for certain crimes (*see* SCSL Statute, Article 1).

⁷³ VESELI Motion, KSC-BC-2020-06/F00224, para.9.

⁷⁴ Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands Concerning A Scottish Trial in the Netherlands, art. 1(g), (l).

the period when Hissène Habré was president;⁷⁵ and the Special Tribunal for Lebanon to prosecute the persons responsible for the attack that killed Lebanese Prime Minister Rafik Hariri, or connected attacks.⁷⁶

21. Further, as outlined above, the international staffing of the KSC,⁷⁷ the separate procedure for appointment of judges,⁷⁸ and the fact that the KSC would be governed by a separate statute and separate rules of procedure and evidence⁷⁹ were all before the KCC at the time of its judgment, and in any event do not impact the KSC's constitutionality. That the KSC has primacy over other Kosovo courts,⁸⁰ within its jurisdiction,⁸¹ is merely consistent with the KSC's status as a specialised court with a specific scope of jurisdiction.

22. The KSC conforms with all requirements of the Constitution and of international human rights law, and the Defence requests should be rejected accordingly.

3.SELIMI's submissions on employment practices should be summarily dismissed

⁷⁵ Statute of the Extraordinary African Chambers, Art.3(1).

⁷⁶ UN Security Council Res. 1757 (May 30, 2007).

⁷⁷ VESELI Motion, KSC-BC-2020-06/F00224, para.10.

⁷⁸ VESELI Motion, KSC-BC-2020-06/F00224, paras 10-11.

⁷⁹ VESELI Motion, KSC-BC-2020-06/F00224, paras 12-19.

⁸⁰ VESELI Motion, KSC-BC-2020-06/F00224, para.12.

⁸¹ Law, Art.10(1).

23. With respect to SELIMI's submissions regarding eligibility for employment by the KSC, it is unclear the legal basis upon which the application is being made⁸² and/or the persons whose rights are purportedly at issue.⁸³ It is consequently impossible to determine the purported relevance of the matter to the jurisdiction of the KSC.⁸⁴ In particular, SELIMI fails to (i) precisely indicate which rights under the ECHR the alleged discrimination relates to,⁸⁵ and (ii) how any such discrimination impacts the KSC's exercise of jurisdiction over the Accused. Such unsubstantiated, imprecise and undeveloped arguments cannot ground any form of relief.

⁸² The only provisions expressly referenced in respect of these submissions are Art.14 of the ECHR and Art.7 of the Constitution (SELIMI Motion, KSC-BC-2020-06/F00219, paras 2, 15, 17-19). Paras 2 and 12 refer generally to the KSC's status as a Kosovo court; paras 10 and 19 make generic reference to 'fairness' and justice being 'seen to be done').

⁸³ See SELIMI Motion, KSC-BC-2020-06/F00219, paras 11 (referring to a denial of justice to 'the people of Kosovo in general, and more directly, to the Accused in particular'), 15 (referring to Kosovo Albanians being discriminated against and 'out of the scope of hiring'), 16 (referring to Kosovo Albanians being excluded from employment), 19 (referring to Kosovo Albanians enjoying the right not to be discriminated against by the KSC). Clearly, in the circumstances, SELIMI would not be eligible for employment at the KSC. It must therefore be the rights of others which are at issue. As such, (i) the SELIMI Defence has no standing to litigate it, and (ii) it has no bearing on matters falling within Rule 97(1)(a).

⁸⁴ *Contra*. SELIMI Motion, KSC-BC-2020-06/F00219, para.20(a).

⁸⁵ The ECHR does not prohibit discrimination as such, rather it prohibits discrimination *in the enjoyment of the other rights and freedoms set forth in it* (ECtHR, *Carson and Others v. the United Kingdom* [GC], 42184/05, 16 March 2010, para.63). Although repeated references are made in the SELIMI Motion to 'employment', there is no right to employment guaranteed by the ECHR and SELIMI has failed to otherwise identify how the particular discrimination alleged is connected to any of the rights and freedoms protected by the ECHR.

24. In any event, contrary to Defence submissions,⁸⁶ and as indicated above,⁸⁷ international staffing was expressly foreseen in the Exchange of Letters, and therefore was before the KCC at the time of the KCC Judgment. To the extent SELIMI is claiming that international judges lack independence or impartiality,⁸⁸ the submission is unsubstantiated.⁸⁹ On the other hand, to the extent he is claiming it impacts the KSC's status as a court within the framework of the justice system of Kosovo,⁹⁰ as already addressed above, the claim has no merit.⁹¹

25. The submissions should be summarily dismissed.

B. THAÇI'S RIGHTS ARE INTACT AND, IN ANY EVENT, DO NOT IMPACT JURISDICTION

26. THAÇI has claimed that two alleged violations of his rights warrant the KSC setting aside its jurisdiction over him.⁹² Only exceptional cases of extremely serious human rights violations could ever justify a court setting aside its jurisdiction in the manner THAÇI proposes. In most cases, such a remedy would be entirely disproportionate to any prejudice which has arisen, because of the need to maintain a balance between the fundamental rights of the accused and the essential interests of

⁸⁶ SELIMI Motion, KSC-BC-2020-06/F00219, paras 13-14 (incorrectly stating that no reference to the hiring of international staff is to be found in foundational documents, and that the only reference is on the employment section of the KSC website).

⁸⁷ See para.21 above.

⁸⁸ SELIMI Motion, KSC-BC-2020-06/F00219, paras 10 and 19 (referring generically to 'fairness and justice being 'seen to be done').

⁸⁹ See also para.17 above.

⁹⁰ SELIMI Motion, KSC-BC-2020-06/F00219, paras 2 and 12 (referring to the KSC's status as a court within the justice system of Kosovo).

⁹¹ See paras 3-22 above.

⁹² THAÇI Motion, KSC-BC-2020-06/F00217, para.54.

the international community in the prosecution of persons charged with serious international crimes.⁹³ The standard has been framed as one whereby the court may decline to exercise jurisdiction where to do so ‘*in light of serious and egregious violations of the accused’s rights*’ would prove detrimental to the court’s integrity’.⁹⁴ No lesser standard may be applied.⁹⁵

27. THAČI’s submissions, even if taken at face value, come nowhere close to this standard. As such, for the purpose of Rule 97, the PTJ is not called upon to address the merits of the claims.⁹⁶

28. In any event, as outlined below, no violations have been established as THAČI misapplies the law, misrepresents the CoE Report, and relies on actions taken by external actors outside the scope of there having been a criminal charge.

1. There has been no violation of Thaçi’s presumption of innocence

⁹³ ICTY, Appeals Chamber, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, 12 October 2009, paras 46 (and authorities cited therein), 49 (‘the public interest in the prosecution of an individual accused of such offences, universally condemned, is unquestionably strong’), 52.

⁹⁴ ICTY, Appeals Chamber, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, 12 October 2009, para.45; ICTR, *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, 3 November 1999, para.74.

⁹⁵ ICTY, Appeals Chamber, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, 12 October 2009, para.47; ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, 10 February 2010, para.22.

⁹⁶ See similarly, ICTY, Appeals Chamber, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, 12 October 2009, paras 51, 53-54 (finding that the allegations even if proved would not limit the jurisdiction of the tribunal). Notably, this would not prevent THAČI from subsequently seeking to assert such alleged violations during the course of the trial for consideration in the context of sentencing, if appropriate (ICTY, Appeals Chamber, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, 12 October 2009, para.55).

29. Thaçi's submissions alleging a violation of his presumption of innocence are framed around a selective and inaccurate representation of the CoE Report, which do not withstand scrutiny. Contrary to the submissions made,⁹⁷ the CoE Report contains an express caveat that it is not pronouncing upon guilt or innocence:⁹⁸

Our task was not to conduct a criminal investigation -we are not empowered to do so, and above all we lack the necessary resources – let alone to pronounce judgments of innocence of guilt.

30. Indeed, the CoE Report abounds with careful caveats regarding the nature of the statements being made, which make it abundantly clear that they were merely unproven allegations which had not been subjected to criminal investigation,⁹⁹ let alone trial. These caveats and qualifiers include, amongst others, repeated use, throughout the CoE Report, of words such as 'allegation(s)',¹⁰⁰ 'alleged'/'allegedly',¹⁰¹

⁹⁷ THAÇI Motion, KSC-BC-2020-06/F00217, para.33 (claiming, *inter alia*, that '[a]t no point' does the CoE Report contain a caveat or warning that the allegations therein have not been proven).

⁹⁸ CoE Report, para.175.

⁹⁹ See for example CoE Report, paras 21 ('Our aim was not, however, to conduct a criminal investigation') and 175.

¹⁰⁰ CoE Report, Summary; Draft Resolution, paras 12, 19.5.3; Explanatory Memorandum, paras 1, 18, 19, 125, 174, 175; see also fn.45)

¹⁰¹ CoE Report, Draft Resolution, paras 1, 19.5.2; Explanatory Memorandum, paras 3, 4, 19, 20, 25, 65, 73, 163, 164, 171.

'claims',¹⁰² 'reportedly',¹⁰³ 'purportedly',¹⁰⁴ 'said to have',¹⁰⁵ and/or 'seem'/'seem to'/'seemingly'.¹⁰⁶

31. No one reading the report could be left with anything other than the impression that the matters discussed in the report were unproven allegations. Much less has THAÇI established how professional and independent¹⁰⁷ judges before the KSC would fail to appreciate that distinction, or otherwise be influenced by the CoE Report in any manner contrary to the presumption of innocence and the fair trial rights of the accused.

32. Thaçi's attempt to bolster his argument by the fact that the CoE Report is listed on the KSC website as a 'foundational document'¹⁰⁸ is transparently without merit. The CoE Report is directly referenced in Articles 1 (describing generally the nature of and basis for the KSC and SPO) and 12 (subject matter jurisdiction of the KSC) of the Law. Its placement and description on the website reflect nothing more than that the CoE Report is a document forming part of the framework governing the jurisdiction of the KSC.¹⁰⁹ Equally, references to the CoE Report in the first annual report of the

¹⁰² CoE Report, Summary.

¹⁰³ CoE Report, Explanatory Memorandum, paras 1, 35, 62, 81, 82, 103, 134, 144, 153, 158.

¹⁰⁴ CoE Report, Draft Resolution, para.19.5.3; Explanatory Memorandum, paras 3, 105, 107, 130, 159.

¹⁰⁵ CoE Report, Summary; Draft Resolution, paras 12, 19.5.3; Explanatory Memorandum, paras 73, 160, 175.

¹⁰⁶ CoE Report, Summary; Draft Resolution, para.4; Explanatory Memorandum, paras 3, 35, 40, 69, 74, 86, 90, 101, 114, 116, 126, 176.

¹⁰⁷ Law, Arts 26-27.

¹⁰⁸ THAÇI Motion, KSC-BC-2020-06/F00217, para.34.

¹⁰⁹ With regard to Thaçi's submission that it is 'the first such' foundational document listed, it is apparent that the documents listed on the website are simply objectively ordered according to their date.

KSC are made in the context of a factual narrative on the foundation and mandate of the SPO. There is nothing prejudicial in the KSC making references to, or summarising the content of, a report which is itself referenced in the Law. Nor is there anything inappropriate or prejudicial about the manner in which that has been done.¹¹⁰

33. Finally, and although as demonstrated above the content of the CoE Report did not implicate THAÇI's presumption of innocence: (i) the CoE Report was not a statement by a representative or authority of any state with jurisdiction in respect of the matter;¹¹¹ and (ii) at the time the CoE Report was published, THAÇI was not subject to a criminal charge and, as such, the provisions of Article 31(5) of the Constitution and/or Article 6(1) of the ECHR have no application.¹¹²

2. There has been no violation of THAÇI's right to a trial within a reasonable time

34. Contrary to THAÇI's submissions, neither the publication of the CoE Report, nor any internal restructuring of EULEX, constituted a 'criminal charge' against him within the meaning of Article 6 of the ECHR.¹¹³ Up until THAÇI was served with a summons by the SPO on 17 November 2019, no competent authority had taken any measure either officially notifying THAÇI of a criminal allegation against him or

¹¹⁰ *Contra*. THAÇI Motion, KSC-BC-2020-06/F00217, para.34.

¹¹¹ *For example*, ECtHR, *Haarde v Iceland*, 66847/12, 23 November 2017, para.94 (noting that a violation occurs from statements of 'other public authorities and representatives of the State')(emphasis added).

¹¹² *See* paras 35-38 below.

¹¹³ *Contra*. THAÇI Motion, KSC-BC-2020-06/F00217, para.14.

which otherwise would have substantially affected him on the basis of such an allegation.

35. The right to be tried within a reasonable time is a fair trial right¹¹⁴ arising from the point in time of a ‘criminal charge’.¹¹⁵ A ‘criminal charge’ exists from the point in time at which a person is ‘officially notified by the competent authority of an allegation that he or she has committed a criminal offence, or from the point at which his or her situation has been substantially affected by actions taken by the authorities on foot of a suspicion against him or her’.¹¹⁶

36. In the CoE Report, THAÇI is identified as one amongst a large number of other named and unnamed potential perpetrators. However, the CoE Report does not reflect a criminal investigation¹¹⁷ and merely constitutes the views of a deliberative, political body. By contrast, for the purposes of a criminal charge, a competent authority must necessarily be a state entity with powers of enforcement in respect of the charge.¹¹⁸

¹¹⁴ Kosovo Constitution, Art.31; ECHR, Art.6(1); Law, Art.21.

¹¹⁵ Specialist Chamber of the Constitutional Court (‘SCCC’), Decision on the Referral of Mahir Hasani Concerning Prosecution Order of 20 December 2018, 20 February 2019, KSC-CC-2019-05/F00012, para.29 and references therein.

¹¹⁶ SCCC, KSC-CC-2019-05/F00012, para.30; ECtHR, *Simeonovi v. Bulgaria*, Judgment, 12 May 2017, para.110; ECtHR, *Ibrahim and Others v. UK*, Judgment, 13 September 2016, para.249; ECtHR, *Deweert v. Belgium*, Judgment, 27 February 1980, paras.42, 44, 46.

¹¹⁷ CoE Report, paras 21, 175.

¹¹⁸ For example, ECtHR, *Montera v Italy*, 64713/01, 9 July 2002 (finding a parliamentary inquiry not to constitute a criminal charge because the parliamentary committee was neither responsible for deciding whether the applicant had committed an offense nor for imposing any sanction against him); ECtHR, *Benham v. The United Kingdom* [GC], 19380/92, para.56 (considering whether the relevant proceedings

37. At no point prior to THAÇI having been served with the summons was he officially notified by the SITF/SPO of an allegation that he had committed a criminal offense. Equally, at no point prior to THAÇI having been served with the summons were any actions taken by the SITF/SPO which substantially affected him in relation to any pending criminal investigation or proceeding. Prior to the issuance of the summons, THAÇI was not, for example, interviewed, searched, arrested, or subjected to any other form of investigative measure directed against him.

38. Contrary to THAÇI's submissions,¹¹⁹ it is not enough for some allegation to have been made by an entity other than a competent authority, no matter how publicly. The right to have one's case heard by a court within a reasonable time arises once a 'judicial process' against that person has been set in motion, and only protects against uncertainty regarding the person's fate in those criminal proceedings.¹²⁰ It does not protect a person simply from public opinion or general suspicion.¹²¹ Indeed, alternative, civil law remedies exist in respect of allegations made outside of the sphere of criminal proceedings.

39. Moreover, the length of proceedings against THAÇI has been entirely reasonable. It is well-established that the length of any proceedings must be considered in the particular circumstances of the case and based on an assessment of

were 'brought by a public authority under statutory powers of enforcement' and whether the proceedings had potential 'punitive elements' attached).

¹¹⁹ THAÇI Motion, KSC-BC-2020-06/F00217, para.14.

¹²⁰ ECtHR, *Kart v. Turkey* [GC], 8917/05, 3 December 2009, para.68.

¹²¹ *Contra*. THAÇI Motion, KSC-BC-2020-06/F00217, para.14.

the proceedings overall, including, *inter alia*, the complexity of the case, and the conduct of the respective parties.¹²²

40. The present proceedings relate to the liability of multiple accused, acting pursuant to a joint criminal enterprise, for alleged war crimes and crimes against humanity, across over 40 locations, and spanning a period from at least March 1998 through September 1999.¹²³ The investigations involved interviewing hundreds of witnesses, across multiple jurisdictions, and collecting and reviewing thousands of pages of documentary evidence. Despite proceedings having been hampered by factors including a pervasive climate of witness fear and intimidation, acts of non-cooperation, and, more recently, a global pandemic, the SPO has at every stage progressed matters in an expeditious manner consistent with both responsible exercise of its mandate and the rights of affected persons, including THAÇI. In particular, the SPO submitted an indictment within a matter of months of THAÇI having become affected by the investigation, through service of the summons, and acted swiftly following confirmation of the indictment in order to bring the case to pre-trial proceedings. The SPO continues to work towards fulfilling its pre-trial obligations in the most expeditious manner possible in light of the complexity and volume of the charges.

¹²² For example ECtHR, *Pedersen and Baadsgaard v. Denmark*, Judgment, 17 December 2004, paras.45, 51; ICTR, Appeals Chamber, *Prosecutor v. Nyiramasuhuko*, Judgement, 14 December 2015, para.346.

¹²³ Lesser Redacted Version of 'Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020', KSC-BC-2020-06/F000134, 11 December 2020, Confidential.

41. It is instructive that, in alleging this violation of rights, the THAÇI Defence seeks to rely on its own unsubstantiated request that trial not start for a further 18 months as part of the time period to be taken into consideration.¹²⁴ The SPO has repeatedly and vigorously opposed such a delay,¹²⁵ precisely in the interests of maintaining the expeditious conduct of proceedings.

42. For the reasons outlined above, should the PTJ consider this claim on its merits, it should also be rejected.

C. SELIMI'S REQUEST FOR AN ORAL HEARING SHOULD BE DENIED

43. SELIMI's entirely unsupported request for an oral hearing¹²⁶ should be denied. No explanation is provided for why an oral hearing would be necessary to address the matters raised in his filing. The Defence has had every opportunity to set out its arguments in full in the SELIMI Motion¹²⁷ and, to the extent that any new issues are raised in the course of this response,¹²⁸ will have the opportunity to reply thereto. The written briefing process will provide the parties with adequate opportunity to set out their respective positions, and will provide the PTJ with sufficient information to facilitate his decision-making.

¹²⁴ THAÇI Motion, KSC-BC-2020-06/F00217, paras 21-22.

¹²⁵ Prosecution submissions further to the status conference of 18 November 2020, KSC-BC-2020-06/F00097; Prosecution submissions for third status conference, KSC-BC-2020-06/F00191.

¹²⁶ SELIMI Motion, KSC-BC-2020-06/F00219, para.20.

¹²⁷ The fact that the Selimi Defence has patently failed to do so and has put forward inadequate and undeveloped submissions (see para.23 above) certainly does not warrant granting such relief. Neither the right of reply on new issues nor requests for oral hearing should be permitted to be used to inappropriately attempt to compensate for failures in initial pleadings.

¹²⁸ Rule 76.

III. RELIEF REQUESTED

44. For the foregoing reasons, the Defence Motions should be rejected in full.

Word count: 6,614



Jack Smith

Specialist Prosecutor

Friday, 23 April 2021
At The Hague, the Netherlands.