

**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

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**Thaçi Defence Reply to “Prosecution response to preliminary motions concerning  
Council of Europe Report, investigation deadline, and temporal mandate”**

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## I. SUBMISSIONS

### A. SUBJECT-MATTER JURISDICTION

1. In its response<sup>1</sup> to the preliminary motion filed by the defence for Mr Hashim Thaçi (“Defence”),<sup>2</sup> the Specialist Prosecutor’s Office (“SPO”) distorts the jurisdictional reach of the KSC as provided by Article 162 of the Constitution<sup>3</sup> and Chapter III of the KSC Law.<sup>4</sup> The SPO contends that the KSC Law’s jurisdictional provisions provide that: “(i) the KSC’s temporal jurisdiction extends from 1998 to 2000, rather than just mid-1999; (ii) its territorial jurisdiction includes crimes in Kosovo, and not just Albania; and (iii) the prosecution of international crimes, rather than only organised crimes, is foreseen.”<sup>5</sup> In so contending, the SPO wrongfully disconnects those provisions from the limitation imposed by the KSC Law’s subject matter provision that states, “The Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Assembly Report”.<sup>6</sup> Reading the provisions without that limitation, as the SPO suggests, would have the absurd result of the KSC having jurisdiction over any crime falling within any one of these jurisdictional provisions - the KSC would then exercise jurisdiction over any international crime as well as over many domestic crimes perpetrated in Kosovo or Albania between 1998 and 2000.

2. The different jurisdictional bases, which indeed form the KSC’s mandate, do not stand alone. They are cumulative and are – figuratively speaking – laid out in the form of a funnel, whereby the temporal, territorial and personal jurisdictional bases are on

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<sup>1</sup> KSC-BC-2020-06/F00259, Prosecution response to preliminary motions concerning Council of Europe Report, investigation deadline, and temporal mandate, dated 23 April 2021 (“SPO Response”), para. 9.

<sup>2</sup> KSC-BC-2020-06/F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021 (“Thaçi Request”).

<sup>3</sup> Constitution of the Republic of Kosovo (“Constitution”).

<sup>4</sup> Law No.05/L-053 on the Specialist Chamber and the Specialist Prosecutor’s Office (“KSC Law”).

<sup>5</sup> SPO Response, para. 9.

<sup>6</sup> KSC Law, Article 6(1).

the top and the subject-matter jurisdiction is at the bottom. As such, while the temporal, territorial and personal jurisdiction of the KSC may be wider, albeit not having the exact same scope, individually or cumulatively, they are insufficient for the KSC to exercise its mandate over a particular crime. The conduct alleged must also fall within the KSC's subject-matter jurisdiction provided by Article 6(1) of the KSC Law, in connection with Article 1(2) of the KSC Law and Article 162(1) of the Constitution. Namely, the crime must be related to the Marty Report<sup>7</sup> and have been investigated by the SITF.

3. The SPO's argument favouring a broad interpretation of the subject-matter jurisdiction provisions,<sup>8</sup> boils down to the claim that this is 'common sense' and that it would be 'unreasonable' to interpret the text of the KSC Law literally. It is important to bear in mind that the establishment of the KSC constitutes an extraordinary and unprecedented concession by a sovereign state. In recent years, so-called 'hybrid' or 'internationalised' tribunals have been created with the consent of the Governments of Lebanon, Cambodia and Sierra Leone. But these institutions require substantial participation of nationals of the state concerned in their operations, unlike the KSC where this is explicitly excluded.

4. Far from being 'unreasonable' or contrary to 'common sense', a strict or narrow interpretation of the subject-matter jurisdiction is entirely consistent with three important aspects of the KSC: (i) it is a tribunal of exception to the ordinary courts; (ii) it is a restriction on sovereignty; and (iii) nationals of Kosovo are excluded from participation in the organs of the KSC. It would have been entirely *unreasonable* for the Kosovo legislature to agree to the kind of broad jurisdictional remit proposed by the

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<sup>7</sup> 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").

<sup>8</sup> SPO Response, para. 13.

SPO. The proper interpretation of these provisions is that the acts that relate to the Marty Report are punishable to the extent that they fulfil the other jurisdictional requirements.

5. Paragraph 8 of the SPO Response challenges the reference in the Thaçi Request to the parliamentary debates, claiming that resort to such materials is ‘not proper statutory interpretation in the face of clear statutory language’. This is incorrect, and inconsistent with the approach adopted by the SPO in other filings.<sup>9</sup> The only authority cited by the SPO is Article 32 of the Vienna Convention on the Law of Treaties. This treaty is irrelevant for the purposes of interpretation of a domestic statute. That legislative history and parliamentary debates may be considered for purposes of interpretation, *especially* when constitutional texts are concerned, is well recognised in domestic legal systems.<sup>10</sup> Legislative history is ‘a critical component of how courts should discern a statute’s original meaning’, according to a standard textbook.<sup>11</sup> It is to be noted that the SPO Response does not dispute the Defence’s description of the nature of the parliamentary debates.

6. In answer to the argument that the Marty Report contemplates acts that are outside the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), the SPO points to Article 17 of the KSC Law which specifically mentions the ICTY in the context of *non bis in idem*.<sup>12</sup> The SPO contends that this shows

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<sup>9</sup> KSC-BC-2020-06/F00263, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021, para. 15, where the SPO urges reliance on the alleged intention of the drafters.

<sup>10</sup> See, for example, J. Greene and Y. Tew, ‘Comparative Approaches to Constitutional History’, in E. Delaney and R. Dixon, *Comparative judicial review* (Edward Elgar Publishing, 2018), pp. 384-399, finding that history and debates have been invoked to assist with interpreting constitutions in the United States, Canada, Germany, Australia, India, Hong Kong, Malaysia and Singapore. See also similar findings in J. Goldsworthy, ‘Constitutional Interpretation’, in M. Rosenfeld and A. Sajo, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), pp. 693-707.

<sup>11</sup> Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford: Oxford University Press, 2013), p. 77.

<sup>12</sup> SPO Response, para. 11 and fn. 21.

overlap was contemplated by the Kosovo legislature and that a contrary interpretation would make the text ‘superfluous’. But Article 17, as a whole, is superfluous. It fulfils no useful function. It refers to an already existing norm in the Constitution. Article 34 of the Constitution states ‘[n]o one shall be tried more than once for the same criminal act,’ and as such this question is addressed. In light of this, a reference to Article 17 does not address the Thaçi Response submission that Article 6(1), in connection with Article 1(2) of the KSC Law and Article 162 of the Constitution, limit the jurisdiction of the KSC to the allegations which relate to those reported in the Marty Report.

7. The SPO also points to Article 37 of the KSC Law<sup>13</sup> which governs ‘Evidence Collected Prior to Establishment of the Specialist Chambers’. It is reading far too much into this self-sufficient provision to interpret it as acknowledgement of a jurisdictional overlap. It only provides for admissibility of evidence from the judicial institutions, both national and international, that operated on the territory of Kosovo prior to establishment of the KSC, and neither limits nor confers jurisdiction.

8. The SPO then suggests that reading the KSC Law to exclude overlap between the ICTY and KSC jurisdictions would result in impunity.<sup>14</sup> It is true that the KSC was established to combat allegations of impunity for conduct alleged in the Marty Report. In reality, however, the majority of the Indictment’s allegations relate to incidents or events that have already been prosecuted and adjudicated by either the ICTY, UNMIK or EULEX, undermining the SPO position.

#### B. THE CHARGED CRIMES FALL OUTSIDE THE MARTY REPORT

9. When Mr. Dick Marty presented his report to the Council of Europe on 25 January 2011, he described his investigation as having “looked at the alleged

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<sup>13</sup> *Ibid*, para. 9 and fn. 22.

<sup>14</sup> *Ibid*, paras. 12 and 13.

trafficking in human organs by the Kosovo Liberation Army”.<sup>15</sup> The summary of his presentation makes no mention of the investigation of crimes in Kosovo, and no mention of war crimes or crimes against humanity. He spoke about “organised crime”, with “treatment of people in a prison camp in north Albania” being the sole incident he highlights.<sup>16</sup> The subsequent debate reveals that the Council of Europe’s Assembly members, although holding different views as to the value and credibility of the Marty Report, were united in their understanding that it concerned organised crime and the trafficking of human organs,<sup>17</sup> with crimes against humanity being

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<sup>15</sup> See Council of Europe, Parliamentary Assembly, AA11CR03, Report of 2011 Ordinary Session - Third Sitting, 25 January 2011 (“CoE Report of Third Sitting”), p. 2.

<sup>16</sup> *Ibid.*

<sup>17</sup> See CoE Report of Third Sitting, pp. 1-15. For example, the following statements were reported to have been made: by Mr Marty (Switzerland) at p. 2: “His report looked at the alleged trafficking in human organs by the Kosovo Liberation Army.”; by Ms Rudd (United Kingdom) at p. 3: “We are asked in this report to look through the fog of war to see specific crimes of torture, **human trafficking and the trafficking of human organs**. [...] In this report, however, we hear for the first time of what is described as a “handful of prisoners” who were **murdered for their organs**.”; by Mr Kox (Netherlands) at p. 4: “Let us recall that the rapporteur prepared his report after the Assembly asked for it in 2008, after we heard the allegations of the former chief prosecutor of the [ICTY], Carla del Ponte. She drew attention in her book on her work as prosecutor to allegations regarding the **trafficking of organs** of people who were captured by the [KLA] during and at the end of the Kosovo war and who were then killed and robbed of their kidneys somewhere in Albania. This Assembly decided to call for a detailed report to clarify what had happened and, if the allegations turned out to be justified, what should then be done.”; by Mr Mota Amaral (Portugal) at p. 5: “Dick Marty’s courageous report [...] reveals some dreadful aspects of those criminal activities – [...] and, even more repulsive, **the slaughter of an incalculable number of them to extract their organs for illegal trafficking**.”; by Mr Frecon (France) at p. 5: “[The Marty Report] had responded to a request from the Serbian, Albanian and Kosovar populations for transparency. Rumours had long suggested that leading figures in the [KLA] had been involved in the **trafficking of human organs**.”; by Mr Ivanji (Serbia) at p. 6: “**This monstrous case is unique because it is about the trafficking of violently removed human organs**”. See further Council of Europe, Parliamentary Assembly, AA11CR04, Report of 2011 Ordinary Session - Fourth Sitting, 25 January 2011, pp. 2-17. For example, the following statements were reported to have been made: by Ms Feric-Vac (Croatia) at p. 3 “**Nevertheless, illicit trafficking in human beings is a monstrous crime.**”; by Ms Kiuru (Finland) at p. 4: “After studying this important report on the inhumane treatment of people **and the illicit trafficking of human organs in Kosovo**, [...]”; by Mr Cebeci (Turkey) at p. 4: “**Trafficking in human organs** is a serious problem worldwide. [...] I am concerned about the content of the report and equally concerned that allegations such as those in the report, if not duly and properly handled, may not only harm the image of Kosovo but could also hamper the prospect of dialogue with its neighbours and have a negative impact on the standing of a new democracy at an important point in its young life.”; by Mr Kubovic (Slovak Republic) at p. 5: “Mr Marty’s report reveals horrifying information about inhumane treatment and **trafficking in human organs** in one part of our continent of Europe.”; by Mr Doric (Croatia) at p. 6: “**The trafficking of human organs** referred to is no doubt an international crime.”; by Mr Kumcuoglu (Turkey) at p. 6: “**Allegations of organ trafficking** against KLA members and the Kosovo leadership are not a new phenomenon, as we now know. Investigations that

referenced only by the Russian Federation representative who said ‘the report had the effect of an exploding bomb... the most shocking crimes... which had clearly been crimes against humanity’ and, given the context of the discussion, was clearly referable to the allegations of organ theft.<sup>18</sup>

10. How does the SPO get, from a report about the trafficking of human organs, to an Indictment in which this egregious allegation, which was the catalyst for the KSC’s establishment, is not even referenced? The SPO does so by, firstly, isolating words and phrases from within the Marty Report and claiming that they contain express allegations of international crimes, and secondly, by disengaging from the actual allegations and incidents that are addressed in the report.

11. First, the SPO states that: “the report also **expressly** contains **allegations of international crimes**”.<sup>19</sup> Seven paragraphs are referenced:

- Paragraph 11 of the Draft Resolution gives background information about a purported lack of investigation into war crimes in Kosovo; this is not an allegation of international crimes;
- Paragraph 19.6 of the Draft Resolution asks for Council of Europe members and observer states to respond to requests for judicial cooperation

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took place in the past were closed due to lack of evidence. With the report before us today, we understand that not only KLA members but the international organisations and community were involved, since they, as suggested in the report, chose to look the other way.’; by Ms Kanelli (Greece) at p. 7: ‘We are talking about **human organs**.’. *See finally* Council of Europe Parliamentary Assembly, AA11CR04, Report of 2011 Ordinary Session - Fourth Sitting - Addendum, 25 January 2011, pp 1-3, including statements made: by Mr Nikolic (Serbia) at p. 1: ‘**The report on trafficking in human organs in Kosovo** will contribute to shedding light on events from the period 1999 to 2000, [...]’; by Ms Jovanovic (Serbia) at p. 2: Now, after you have been acquainted with the report of Mr Marty, you can see that through the recognition of the so-called state of Kosovo you have formed a monster state representing the breeding place of drugs, arms and **human organ trafficking**, [...]’; by Ms Dumery (Belgium) at p. 2: ‘There are reasons to believe, as Mr Marty pointed out in his report, that the criminal charges of inhuman treatment of captured prisoners, as **well as the illegal trafficking of human organs**, did occur in the period before and after the NATO intervention in 1999 and 2000.’

<sup>18</sup> CoE Report of Third Sitting, p. 9.

<sup>19</sup> SPO Response, para. 16 (emphasis added).



addressed to them by EULEX and Serbian authorities “in the framework of **their** current investigations concerning war crimes and organ trafficking”; this is not an allegation of international crimes;

- Paragraph 7 of “Introductory Remarks” is a background paragraph that accuses international actors of having chosen to turn a blind eye to KLA war crimes, with no further specification as to which crimes and when they were alleged; this is not an allegation of international crimes;
- Paragraph 8 of “Introductory Remarks” is a background paragraph that references files on war crimes being turned over to UNMIK in a deplorable condition; this is not an allegation of international crimes;
- Paragraph 68 references members of the Drenica Group having been “investigated repeatedly in the last decade as suspects in war crimes or organised criminal enterprises”; this is not an allegation of international crimes;
- Paragraph 101 makes reference to general characteristics of KLA detentions in wartime “**some** of which **seem to meet** the threshold for war crimes”; this is not an allegation of international crimes; and
- Paragraph 113 references three KLA commanders who are said to feature prominently in previous UNMIK allegations into war crimes in northern Albania; this is not an allegation of international crimes.

12. These are background references that relate to prior investigations or allegations, and do not constitute express allegations of international crimes on the basis of Mr. Marty’s investigation. The SPO emphasises the reference to “general characteristics” of KLA wartime detentions “**some** of which **seem** to meet the threshold for war crimes”.<sup>20</sup> Even taken at its highest, this is not an allegation of an international crime; it is a heavily qualified introductory sentence which receives no further elaboration

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<sup>20</sup> Marty Report, para. 101 (emphasis added).



and provides no further example of international crimes that the SPO do claim exist. Crimes against humanity, significantly, are mentioned nowhere.

13. The actual allegations in the Marty Report are contained in “3. Detailed findings of our inquiry”, and are set out as follows:<sup>21</sup>

### 3.3 Detention Facilities and inhuman treatment of captives

#### 3.3.1 KLA Detentions **in wartime** – first subset of captives: “the prisoners of war”

##### 3.3.1.1 Case study on the nature of the facilities: Cahan

##### 3.3.1.2 Case study on the nature of the facilities: Kukës

#### 3.3.2 **Post-conflict** detentions carried out by KLA members and affiliates

##### 3.3.2.1 Second subset of captives: “the disappeared”

##### 3.3.2.1.1 Case study on the nature of the facilities: Rripe

##### 3.3.2.1.2 Observations on the conditions of detention and transport

##### 3.3.2.3 Third subset of captives: the “victims of organised crime”

##### 3.3.2.3.1 Case study on the nature of the facilities: Fushë-Krujë

14. Part 4 of the Marty Report concerns the “Medicus Clinic”, and addresses the allegations of trafficking of human organs.

15. These are the Marty Report allegations; inhuman treatment in detention, and trafficking in human organs. All of these allegations, without exception, took place “on the territory of the Republic of Albania”. That four paragraphs of the report make reference to crimes committed in Kosovo, or the title of the report mentions the word “Kosovo”,<sup>22</sup> cannot circumvent the fact that the allegations reported in the Marty Report’s findings are limited to events in Albania. A court with jurisdiction over crimes “which relate to those reported in the [Marty Report]”<sup>23</sup> only has jurisdiction over acts in Albania.

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<sup>21</sup> *Ibid*, pp. 18-25 (emphasis added).

<sup>22</sup> SPO Response, para. 19.

<sup>23</sup> KSC Law, Article 1(2).

16. The Court's jurisdiction has always been understood in these narrow terms. On 15 September 2016, at the KSC's first press conference, the Court's jurisdiction was presented as being over crimes "related to **allegations** stemming from the Council of Europe parliamentary report of 2011",<sup>24</sup> and not any crime or event referenced in passing therein. As Prior Specialist Prosecutor Schwendiman explained:<sup>25</sup>

"A final note on the jurisdiction of the Specialist Prosecutor and Specialist Prosecutor's Office. The law passed last year is **very specific in the limitations it imposes on the jurisdiction of the Specialist Prosecutor's office** – it is the same for the Specialist Chambers. Generally, my jurisdiction extends to the investigation and prosecution of:

- **Acts** engaged in by individuals **that relate to conduct addressed** in the Council of Europe Report published in 2011;
- **Such acts** committed by individuals between the beginning of 1998 and the end of 2000;
- **Such acts** by individuals when they amount to a war crime or crime against humanity as defined by the 2015 law or by applicable customary international law..."

17. The "conduct addressed" in the Marty Report is inhuman treatment in detention facilities in Albania and organ trafficking. As such, according to the Prior Specialist Prosecutor, the SPO has jurisdiction over these acts when they amount to a war crime or crime against humanity.

18. No argument was made in the Defence submissions that the KSC's jurisdiction is limited to "only those incidents specifically discussed" in the Marty Report.<sup>26</sup> Of course, other incidents of organ trafficking or inhuman treatment in detention in Albania would also fall within the Court's jurisdiction. But, even if a "perfect overlap"

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<sup>24</sup> KSC, First Press Conference of the Kosovo Specialist Chambers – KSC Registrar Fidelma Donlon, 15 September, available at: <https://www.youtube.com/watch?v=pQNuj0dQaqY&t=259s>.

<sup>25</sup> KSC Press Release, 'Remarks by the Specialist Prosecutor, Mr Schwendiman, At the Press Conference', 15 September 2016 (emphasis added).

<sup>26</sup> SPO Response, paras. 13 and 15.

between the Marty Report and the Indictment is not required, there can be no justification for making the huge leap from inhuman treatment in detention and organ trading in Albania, to any war crime or crime against humanity committed in Albania or Kosovo, thereby encompassing an additional state - particularly given that the Assembly of Kosovo was explicit, in Amendment No. 24, to link the constitutional basis of the KSC to its compliance with “international obligations in relation to the [Marty Report]”<sup>27</sup> which reports allegations of crimes in Albania.

19. The Thaçi Request did not assert that crimes committed before summer 1999 fall outside the Marty Report’s ambit.<sup>28</sup> The Marty Report states, in its introductory remarks: “[t]he acts with which we are presently concerned are alleged to have occurred **for the most part** from the summer of 1999 onwards”.<sup>29</sup> In its findings, the Report divides the inhuman treatment in detention into two time periods:

- (i) 3.3.1 KLA Detentions **in wartime**, being “between April and June 1999”;<sup>30</sup> and
- (ii) 3.3.2 **Post-conflict** detentions.<sup>31</sup>

20. This explains the reference to acts occurring “for the most part” from the summer of 1999 onwards. According to the Marty Report, the alleged inhuman treatment of detainees did not materialise overnight on 12 June 1999, but also occurred between April and June. However, this phrase “for the most part” relates to the inhuman treatment in detention discussed in the report and does not throw open the door to the SPO to expand its jurisdiction over any and all acts or alleged crimes committed during the preceding armed conflict.

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<sup>27</sup> Constitution, Article 162.

<sup>28</sup> SPO Response, para. 20.

<sup>29</sup> Marty Report, para. 4 (emphasis added).

<sup>30</sup> *Ibid*, para. 102 (emphasis added).

<sup>31</sup> *Ibid*, para. 129 (emphasis added).

21. A 28-page report on alleged cruel treatment and trafficking of human organs in Albania, which allegedly occurred (for the most part) from the summer of 1999 onwards, could never have been written in a vacuum and with no reference to the armed conflict that preceded the post-conflict events being investigated. References to prior allegations of war crimes do not transform the Marty Report into a report about international crimes, or a report about Kosovo.

22. There are formal ways of seeking and obtaining an expansion of a Court's jurisdiction. They do not include finding narrow and technical windows of opportunity and tearing them open in an attempt to expand the jurisdictional scope beyond all recognition.

C. DEADLINE FOR THE CONCLUSION OF CRIMINAL INVESTIGATION

23. When addressing the Thaçi Request submissions on the legal deadline for the conclusion of the criminal investigation by SITF and SPO respectively, the SPO disregards the applicable legal framework in place when SITF's criminal investigation was conducted - this being the Criminal Procedure Code.<sup>32</sup> This Code was not simply rendered obsolete after the adoption of the KSC Law. As acknowledged by the SPO,<sup>33</sup> Rule 4(1) of the Rules of Procedure and Evidence ("KSC RPE") provides that the KSC RPE shall be interpreted in a manner "consonant with the framework as set out in Article 3 of the [KSC Law], and where appropriate, the [Criminal Procedure Code]."

24. The Criminal Procedure Code, being the only legal instrument governing a criminal investigation at the time the SITF was investigating, requires that a criminal

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<sup>32</sup> Code No. 04/L-123 on the Criminal Procedure Code of Kosovo ("Criminal Procedure Code").

<sup>33</sup> SPO Response, para. 26, fn. 65.

investigation be initiated pursuant to a written decision of the state prosecutor.<sup>34</sup> Article 104(1) of the Criminal Procedure Code requires that “[t]he decision shall specify the person or persons against whom an investigation will be conducted, **the date and time of the initiation of the investigation**”.<sup>35</sup> This Article also requires that “[a] stamped copy of the ruling on the investigation shall be sent without delay to the pretrial judge.”

25. The requirement in Article 104(1) of the Criminal Procedure Code, that a decision should identify the date and time of the initiation of the investigation, is directly linked to the maximum duration of the criminal investigation provided under Article 159 of the Criminal Procedure Code. Namely, if the date and time for the initiation of the criminal investigation is not set in writing and submitted to the court in advance, it is impossible for the court, or the defence, to assess whether the criminal investigation was concluded within the maximum period set by Article 159.

26. The SPO speaks about the reasonableness of the duration of the criminal investigations in the context of Rule 47(1) of the KSC RPE and the jurisprudence of the European Court of Human Rights (“ECtHR”).<sup>36</sup> However, it becomes impossible to assess a “reasonable time” for the issuance of an indictment under Rule 47(1) of the KSC RPE if the date that the criminal investigation commenced is unknown. The KSC Law and the KSC RPE are silent on these two fundamental legal questions: (i) the procedure by which an investigation is started, which also marks the beginning of the criminal investigation; and (ii) the maximum duration of the criminal investigation, i.e. the point when the issuance of an indictment exceeds reasonable time. Without clarity as to these starting points, ECtHR caselaw is of little help or relevance.

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<sup>34</sup> Article 102(2), Criminal Procedure Code.

<sup>35</sup> (Emphasis added).

<sup>36</sup> SPO Response, para. 25 and fn. 60.

27. The SPO did not have legal authority to conduct an entirely new criminal investigation into the Marty Report allegations because the maximum duration permitted under Article 159 of the Criminal Procedure Code had been exhausted by the SITF. Regardless, the SPO did so. These two procedural violations raised by the Thaçi Request are not incoherent;<sup>37</sup> the second is a consequence of the first.

28. In this respect, it is significant that the SPO Response fails to offer any explanation as to the relationship between the SITF's and its own investigation, if any, notwithstanding the fact that an investigation by SITF of a criminal offence is a requirement of the satisfaction of the subject-matter jurisdiction of the KSC under Article 1(2) of the KSC Law.

#### D. TEMPORAL MANDATE

29. The reasoning of the Specialist Chamber of the Constitutional Court<sup>38</sup> on the temporal mandate of the KSC, relied on by the SPO,<sup>39</sup> is nothing more than *obiter dicta*. The operative clause of the SCCC Judgment does not address the question of the temporal mandate of the KSC. This is unsurprising given the limited scope of constitutional review under which the SCCC Judgment was issued. According to Article 144(3) of the Constitution, constitutional amendments are reviewed only for the purposes of determining if the latter "diminish any of the rights and freedoms set forth in Chapter II of this Constitution." Consequently, the decisions reached in the constitutional review process affect only the fate of the respective constitutional amendment.

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<sup>37</sup> *Ibid*, para. 27.

<sup>38</sup> KSC-CC-2020-11/F00015, Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, 26 November 2020 ("SCCC Judgment"), paras. 65-66.

<sup>39</sup> SPO Response, para. 30.

30. The question of whether the temporal mandate of the KSC has expired should be addressed in these proceedings, in accordance with Article 102(3) of the Constitution, which provides that Kosovo courts have the authority to apply the Constitution directly in the proceedings conducted before them in cases when they have no questions as to the compatibility of the law with the Constitution. On the other hand, if the Pre-Trial Judge considers that there is an uncertainty with respect to the compatibility of the KSC Law, specifically, or the law, in general, with the Constitution, the Pre-Trial Judge should refer the matter to the SCCC pursuant to Article 113(8) of the Constitution.

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Respectfully submitted,



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**David Hooper**

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14 May 2021

At London, United Kingdom