

**In:** KSC-BC-2020-07  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** The President of the Specialist Chambers  
Judge Ekterina Trendafilova

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Nasim Haradinaj

**Date:** 28 July 2021

**Language:** English

**Classification:** Public with Public and Confidential Annexes

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**PUBLIC REDACTED VERSION OF**

**APPLICATION FOR THE RECUSAL OF THE PRESIDENT OF THE SPECIALIST**

**CHAMBERS, JUDGE EKTERINA TRENDAFILOVA, AND THE VICE**

**PRESIDENT OF THE SPECIALIST CHAMBERS, JUDGE CHARLES L. SMITH,**

**PRESIDING JUDGE OF TRIAL PANEL II**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

**Counsel for Hysni Gucati**

Jonathan Elystan Rees QC

Huw Bowden

## I. INTRODUCTION

1. Specialist Counsel for Mr. Nasim Haradinaj (“Defendant”) hereby seek:
  - a. the recusal of President Trendafilova pursuant to Article 20(1)(d) of the Rules of Procedure and Evidence (“Rules”) from exercising any judicial, administrative or case-management decision-making function in the instant case,  
  
on the grounds that President Trendafilova’s statements at a confidential diplomatic briefing undermine her independent and impartial judicial decision-making and representation of the Kosovo Specialist Chambers (“Specialist Chambers” or “KSC”) and seriously harm the proper administration of justice before the Specialist Chambers or the proper internal functioning of the Specialist Chambers and that President Trendafilova’s conduct may have caused harm to the standing of the Specialist Chambers.
2. The Defendants’ rights and interests are substantially affected by the presence of the President at the Specialist Chambers, in her representative capacity as well as in her judicial capacity. There is a risk of that abuse of authority, misrepresentations of Defendants and promoting the cause of another party continuing, if she is not recused or disqualified from any judicial, administrative or case-management function in the instant case.

3. Specialist Counsel for Mr. Haradinaj further seek:
  - a. the recusal of Vice President Smith pursuant to Article 20(1)(d) of the Rules from Trial Panel II,  
  
on the grounds of Vice President Smith's prior conduct in a high judicial office in the European Union Rule of Law Mission in Kosovo ("EULEX"), including alleged demonstrated abuse of judicial authority and exercise of political pressure that undermines his judicial decision-making and risks seriously harming the proper administration of justice before the Specialist Chambers or the proper internal functioning of the Specialist Chambers and further that Vice President Smith's conduct may have caused harm to the standing of the Specialist Chambers.
4. The Defendant's rights and interests are substantially affected by the appointment of the Vice President as Presiding Judge on Trial Panel II. There is a risk of that abuse of authority by the Vice President continuing if he is not recused or disqualified from serving as Presiding Judge on Trial Panel II and from exercising any judicial, administration and case management function in the instant case.
5. The Defence seeks the recusal or disqualification of the Vice President from all judicial, administration and case management function in the instant case on the basis that his prior conduct, as alleged, would cause any objective

observer or bystander to apprehend, that there is an appearance of judicial bias or impropriety and a distinct lack of impartiality and independence, that cannot be restored.

6. In accordance with Rule 20(3) of the Rules the Defence requests that a Panel of Three Judges is assigned to determine whether the Vice President should be recused as Presiding Judge or as a judicial member of Trial Panel II.

## II. CLASSIFICATION

7. As recently noted by the Court of Appeals Panel "*all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential.*"<sup>1</sup> It is therefore important that the proceedings are conducted openly and transparently with all filings being made public unless there exists 'exceptional reasons' or justification to depart from such a basic principle.
8. Further, As noted by the Pre-Trial Judge,<sup>2</sup> pursuant to Articles 23 and 62 of the Law, Rule 80 of the Rules and Article 33 of the Practice Direction on Files

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<sup>1</sup> KSC-BC-2020-07/1A004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions. 23 June 2021, para. 13. *See also* KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021, para. 10. *See also* e.g. ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Prosecution's Motion for Summary Dismissal or Alternative Remedies, 5 July 2013, para. 9.

<sup>2</sup> KSC-BC-2020-07/F00264, Order on Reclassifications and Redacted Versions, 15 July 2021, para 10.

and Filings, public filings should not include any information revealing: (i) the name, identity or other personal details of (potential) witnesses, other persons, including state officials, interacting with the SPO as well as staff members of the SPO; (ii) national or international organisations or entities cooperating with the SPO for the purpose of its investigations; (iii) documents or excerpts thereof disclosed to the Defence on a confidential basis; and (iv) the content of any other documents subject to confidentiality pursuant to Specialist Chambers orders.

9. In accordance with that guidance, this application is filed Confidentially with Confidential Annexes attached as referred to herein on the basis that they contain identifying details of persons or documents referred to in points (ii) and (iii) above.

### III. THE LAW

10. Rule 20 of the Rules provides, insofar as is relevant as follows:

- (1) A Judge shall not sit in any case in which he or she has a personal interest or has or has had any involvement which may affect or may appear to affect his or her impartiality, judicial independence or the integrity of the proceedings. The grounds for recusal or disqualification may include:

- (d) any other reason which could reasonably appear to affect the Judge's impartiality."
- (3) A Party may apply to the President for the disqualification of a Judge immediately, but no later than ten (10) days after the grounds on which the application is based become known to the Party. A Judge whose disqualification is sought may recuse himself or herself after being notified of the application for disqualification. If the President considers that the request is vexatious, misconceived, frivolous or lacking in substance, he or she shall summarily dismiss it as soon as possible. In any other case, the President shall assign a Panel of three Judges to determine whether the Judge should be disqualified. The Judge shall be given the opportunity to respond to the application. His or her submissions shall be provided to the Parties, who may be allowed by the Panel to make observations. The Judge shall be allowed to reply to those observations. The Panel shall take a reasoned decision as soon as possible. Such a decision shall be public, with redactions in exceptional circumstances."
- (4) The Panel shall decide in each particular case whether the circumstances allow for the Judge in question to continue to

participate in the proceedings whilst the matter is pending.

Parties shall be heard on the issue before the Panel renders a decision. Following a recusal or a decision to disqualify a Judge, the President shall assign a Judge as replacement.

- (5) A decision under paragraphs (2) and (3) is not subject to review.
- (6) If the application concerns the President, the Vice-President shall assume the President's responsibilities under this Rule.

11. Article 9 of the Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers (hereinafter "Code of Judicial Ethics" or "Code") provides:

- (1) Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality.
- (2) While Judges are free to participate in public debate on matters pertaining to legal subjects, including academic publications, the judiciary or the administration of justice, **they shall not comment on pending cases, shall ensure that nothing in their conduct evidences disrespect for the views**

**of another Judge or staff member and shall avoid expressing views which may undermine the standing and integrity of the Specialist Chambers.**

- (3) **When exercising their freedom of expression, Judges shall avoid public statements or comments that may undermine the authority of the Specialist Chambers or give rise to reasonable doubt about their impartiality.”**

(emphasis added)

12. Article 13 of the Code, provides:

- (1) **Serious misconduct** is a conduct which:
- (a) **is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Specialist Chambers or the proper internal functioning of the Specialist Chambers, such as:**
- (i) **disclosing facts or information that are acquired in the course of their duties as Judges or on a matter which is sub judice before the Specialist Chambers, where such disclosure is prejudicial to the judicial proceedings or to any person;**



(ii) concealing or withholding information or circumstances of a nature sufficiently serious to have precluded the Judge from holding office;

(iii) abuse of judicial office in order to obtain favourable treatment from any authorities, officials or professionals; or

**(b) is of a grave nature that causes or is likely to cause serious harm to the standing of the Specialist Chambers, such as:**

(i) the commission of a criminal act which reflects adversely on the Judge's honesty and trustworthiness as a Judge;

**(ii) the engagement in conduct involving harassment, abuse of authority, dishonesty, fraud, deceit or misrepresentation. (emphasis added)**

(2) A Judge shall be dismissed from the Roster in accordance with Article 21 where he or she is found to have committed serious misconduct pursuant to paragraph (1).

13. Article 15 of the Code sets out the disciplinary procedure. Relevant parts are:

(1) Complaints concerning any conduct defined under Articles 13 or 14 may be submitted by a Judge, a staff member, a Party or a participant in the proceedings before the Specialist Chambers, the Registrar or any other person alleging that their rights or interests have been substantially affected by an alleged misconduct ('Complainant').

(3) Complaints under paragraph (1) shall be transmitted to the President. If a Complaint is brought against the President, the Vice-President shall assume the functions of the President for the purposes of this Chapter."

14. Article 6 of the European Convention of Human Rights ("ECHR") provides:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

15. Article 14 (1) of the International Covenant on Civil and Political Rights ("ICCPR"), provides that all persons are:

...entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

### III. GENERAL OBSERVATIONS

16. It is recalled that as a general rule, as set out by Rule 20(3) of the Rules, the President receives Complaints against all Judges (including the Vice President) but where any Complaint is made against the President, as set out by Rule 20(6), such a Complaint shall be determined by the Vice President.<sup>3</sup>
17. The instant application presents a situation that is not foreseen by the applicable legal and regulatory framework where the recusal of both the President and Vice President is sought in the same case. The Defence complaint against both the incumbent President and Vice President mean that it would not be appropriate for either to adjudicate on the respective complaint of the other, and therefore, it is appropriate that, to ensure that the application is determined fairly and impartially, as per Rule 20(3) of the Rules, a Panel of Three Judges is assigned to determine both the Complaint against the President and the Complaint against the Vice President.

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<sup>3</sup> Rule 20 of the Rules of Procedure and Evidence, in particular para. 6 and Article 15 of the Code of Judicial Ethics, in particular para. 3.

18. Rule 20(3) denotes that the President is required to do so unless the application is “...*vexatious, misconceived, frivolous or lacking in substance*”.
19. It is respectfully submitted that, for the reasons set out below and contained in the confidential annexes attached to this application, that the application is not suitable for summary dismissal as there is a clear evidential basis for making the application.
20. In respect of the requirement under Rule 20(3) that the application must be made no later than ten (10) days after the grounds on which the application is based became known, the following submissions are made.
21. First, the Decision on Transmitting the Case File to Trial Panel II<sup>4</sup> and the Decision Notifying the Election of a Presiding Judge<sup>5</sup> were both made on 16 July 2021.
22. Second, on 19 July 2021, an *inter-partes* request was made to the Specialist Prosecutor,<sup>6</sup> in which the following information was requested:

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<sup>4</sup> KSC-BC-2020-07/F00265

<sup>5</sup> KSC-BC-2020-07/F00266

<sup>6</sup> See Annex 1 – it is noted that in the request to the SPO the Diplomatic Briefing was incorrectly cited as being on 7 or 11 December 2020. That was in fact incorrect and the date in which the briefing took place was on 8 December 2020 as is clear from Annex 2.

- a. Confirmation as to which representatives of the Specialist Prosecutor's Office attended the diplomatic briefing on 8 December 2020;
- b. Confirmation as to which members of the Diplomatic Community attended the diplomatic briefing on 8 December 2020;
- c. Confirmation as to the dates, locations and attendees of all other diplomatic briefings that took place during 2020 and 2021;
- d. Full minutes of the diplomatic briefing held on 8 December 2020 and all other diplomatic briefings that took place in 2020-2021;
- e. Confirmation as to what matters concerning Mr. Nasim Haradinaj were discussed during the diplomatic briefing held on 8 December 2020 and all other diplomatic briefings that took place in 2020-2021;
- f. Details of any and all meetings that may have taken place with diplomatic missions, and further, copies of any and all briefing notes, and/or minutes and/or any other documents that have been prepared for the purposes of such meetings, during those meetings, or after those meetings in correspondence with those diplomatic missions.

23. On 26 July 2021, the SPO responded to the *inter-partes* request of 19 July 2021 declining to disclose the requested on the basis that:<sup>7</sup>
- a. It is not relevant to the charges against the Defendant;
  - b. The request fails to set forth any factual or legal basis for disclosure;
  - c. Any diplomatic briefings have no bearing on the fair trial rights of the Defendant which have been fully protected at every stage of the proceedings by the relevant Panel.
24. Third, in respect of the application seeking to recuse the President of the Specialist Chambers from taking any judicial decision-making role in this matter, the substance of which concerns a series of diplomatic briefings that have recently come to light. The application is being made now on the basis that disclosures of those diplomatic briefings have recently been made available to the Defence, confidentially, and the contents verified.
25. Fourth, the application is made by the Defence with a deep sense of regret and reluctance and that a great deal of deliberation has gone into the necessity to make such an application. As such, the gravity of the allegations is not taken lightly, but the need to ensure that criminal proceedings are not only fair, but seen to be fair, is paramount.

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<sup>7</sup> See Annex 1A

26. In *R v. Sussex Assizes, ex parte McCarthy*,<sup>8</sup> Lord Chief Justice Hewart, sitting in the Divisional Court alongside Justices Lush and Sankey, handed down the landmark ruling in which it was held:

*“... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done... Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.”*

27. In this regard, consideration must be given to the fundamental importance that ‘justice must be seen to be done’ and in circumstances where there is an allegation of judicial bias or impropriety, anything that creates a suspicion of improper interference with the course of justice must be avoided, and the most prudent course of action is for the judge in question to be recused or disqualified.

28. It is respectfully submitted that the present application and evidence, as submitted by the Defence create such a situation.

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<sup>8</sup> [1924] 1 KB 256

#### IV. THE RECUSAL OF THE PRESIDENT

##### A. *Consideration of the Complaint against the President*

29. It is noted that prior to this application being filed, the President acting pursuant to Articles 25(2), 33(1)(b) and 40(1) of Law, Rule 98(3) of the Rules, Article 22 of the Kosovo Criminal Procedure Code, Law No. 04/L-123 ("KCPC"), and Rules 3 and 4 of the Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judges ("Rules on Assignment"), issued a decision thereby constituting Trial Panel II. This decision was taken following the notification by the Pre-Trial Judge that a complete case file of the present case will be ready for transmission to a Trial Panel on 16 July 2021. Further, having considered the criteria set forth in Rule 4 of the Rules on Assignment, including relevant experience and expertise as well as availability at this time, and noting the seriousness of at least one of the crimes referenced in the Indictment, within the meaning of Article 25(2) of the Law and Article 22.1(76) of the KCPC, the President assigned the Vice President, Judge Charles L. Smith III, Judge Christoph Barthe, Judge Guénaël Mettraux and Judge Fergal Gaynor (Reserve Judge) to the present case as Trial Panel II.
30. To be clear the Defence is not seeking that Decision to be overturned only that it would not be appropriate for the President of the Specialist Chambers to



take any further decision in the instant case except for referring the matter to a Panel of Three Judges, in accordance with Rule 20(3), to determine the present application.

31. At the outset, in order to make a full and proper determination, upon reviewing the complaint against the President, the designated Judge, or Panel of Judges, is strongly encouraged to take into account **all** statements made by the President at **all** diplomatic briefings, media appearances and meetings to date, and not just those that have been disclosed, in order to form a complete picture of whether there is a proper basis for recusing or disqualifying the President.

***B. The December 2020 Diplomatic Briefing<sup>9</sup>***

32. The Defence seeks the recusal of the President from all judicial, administration and case management duties in the instant case on the basis that her conduct, as alleged, that includes misrepresentations about Defendants, pre-determining matters in ongoing cases, actively promoting a cause advanced by the Specialist Prosecutor, and for all those reasons, would cause any objective observer or bystander to apprehend, that there is an appearance of judicial bias or impropriety and a distinct lack of impartiality and independence, that cannot be restored.

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<sup>9</sup> See Annex 2

33. The Defence relies on a comprehensive note of a confidential diplomatic briefing held on 8 December 2020 by the President, the Specialist Prosecutor, and the Registrar of the Specialist Chambers, with diplomatic missions in Kosovo (“December Diplomatic Briefing”), in the absence of, and without the knowledge of, any of the Defendants or their Specialist Counsel.
34. A confidential note, compiled by one of the diplomatic missions attending the December Diplomatic Briefing, has been made available to the Defence team, as it would appear that certain diplomatic representatives harboured serious concerns that the statements made, in particular those by the President, raised significant due process and fair trial concerns for Defendants.
35. The Defence for Mr. Haradinaj has now seen the confidential note of the December Diplomatic Briefing. It is respectfully submitted that the statements made by the President are wholly unacceptable and constitute the most blatant interference with the fair and proper administration of justice. They have prompted this unprecedented submission seeking the recusal or disqualification of the President in the instant case.
36. The Defence refer, in particular, to the following statements purported to be made by President Ekaterina Trendafilova at the December Diplomatic Briefing:

- a. The President complained that [REDACTED] compromises a *large number of lawyers which complicates the work of the Specialist Chambers*, thereby inferring that the Defence are in some way responsible for delay in the proceedings;
- b. Regarding a question as to why the Specialist Chambers does not display the Kosovo flag [REDACTED], or the coat of arms, the President called this *a test and provocation of the Pre-Trial Judge [REDACTED]*. The President declared *[it was] aimed at leading a political debate in Kosovo to delegitimise the [Specialist Chambers]*. She further declared that the Pre-Trial Judge was kind and respectful on this occasion, but then went on to seemingly threaten that *this would not be the case if the matter were to be raised again*. She denounced the flag question as one with *only a political aim*;
- c. The President declared there is an *orchestrated smear campaign against the [Specialist Chambers]* including the flag issue, JCE linkage with the Kosovo Liberation Army (“KLA”) and linkage of the Specialist Chambers with Serbia, the latter forming an essential part of the Defence in the instant case and thereby prejudging the issue before any evidence has been heard;

- d. The President noted that she had been informed by the Specialist Prosecutor that the reasons for refusing bail of other defendants would be presented and a decision taken by the Judge, thereby confirming a level of improper discussion, even coordination, between the prosecution and the court in respect of critical legal argument;
- e. The President noted that she had assigned the same Pre-Trial Judge, Judge Nicolas Guillou, to deal with all preliminary matters so as to ensure consistency of decision making, thereby constituting an improper fettering of judicial discretion;
- f. The President noted that the Specialist Chambers needed strong political support from all countries, this despite it being an independent judicial institution of the Republic of Kosovo and that there having been allegations of political interference with the administration of justice in Kosovo previously.
37. The Specialist Prosecutor, [REDACTED], is said to have stated the following at the December Diplomatic Briefing:
- a. That since the beginning he has been confronted with attempts of obstruction of the work of the Specialist Chambers and the SPO. He *directly named [REDACTED] in this respect and alluded to other people*

*loyal to them in Kosovo's government and outside as being responsible for this (notably without any charges or indictments of obstruction, neither against [REDACTED] or other 'loyals');*

- b. That there were *continued and well-orchestrated efforts by [REDACTED] to hinder work and administration of justice including witnesses who were put under immense pressure by [REDACTED] and his loyal people;*
- c. The Specialist Prosecutor declared that *[REDACTED] will get life-sentences in advance of any trial commencing or any evidence being presented;*
- d. The Specialist Prosecutor also declared there was a *smear campaign by people loyal [REDACTED] that the JCE is the KLA;*
- e. That *Mr. Gucati and Mr. Haradinaj have been part of a continuous operation to intimidate the witnesses and that he is convinced both Mr. Gucati and Mr. Haradinaj acted in coordination with [REDACTED] and he is investigating if any link can be proven (any such argument has yet to be substantiated or put forward in proceedings);*
- f. The Specialist Prosecutor also made an allegation of bad faith by declaring that *the strategy of the defence lawyers is to delay the trial and get bail based on this, and any release will harm the process as witnesses will be intimidated and threatened by him and his loyal people.*

38. It is noted that the statements made by the Specialist Prosecutor were made in the presence of the President. No attempt was made by the President to distance herself from the position advanced and nor was an attempt made by her to offer a contrary view. Further, the mere presence of the President on a panel with the Specialist Prosecutor where ongoing cases were discussed creates an impossible situation for the President to impartially and independently make any decision, administrative or judicial, in the instant case. Thus, it is respectfully submitted that the President, through her acts and omissions, endorsed the position of the Specialist Prosecutor, and as a result has fundamentally undermined her impartiality and independence.
39. These statements by the President, as well as the Specialist Prosecutor, are unfounded in fact, unfair and unethical and should not be tolerated as being proper in any part of a judicial environment.

*C. Conduct contrary to Article 13(1) of the Code of Judicial Ethics*

40. The above statements by the President constitute, individually or taken together, conduct in breach of Article 13(1)(b)(ii), being conduct which is of a grave nature that causes or is likely to cause serious harm to the standing of the Specialist Chambers.
41. At the outset, it is respectfully submitted that any briefing by the President of the Specialist Chambers given to the diplomatic community behind closed

doors under a veil of secrecy is inappropriate, regardless of the topic. In this regard, it is noted that following disclosures related to a prior Diplomatic Briefing held on 11 February 2021,<sup>10</sup> details of which were published by the media,<sup>11</sup> the Office of the President stated in a reply that the Diplomatic Briefing was “*confidential and the [briefing] transcript had been circulated accidentally and was intended for the internal use of diplomatic missions*”.

42. The Office of the President is further attributed as stating that the matters discussed at the Diplomatic Briefing concerned only those issues already addressed in public filings.<sup>12</sup>
- a. Firstly, it is not accepted that the details discussed only concerned public filings, that is simply not accurate.
  - b. Secondly, if the Diplomatic Briefing only concerned matters already in the public domain, then why was there such a need for confidentiality and why has the Defence not been notified of the Diplomatic Briefings,
  - c. Thirdly, the statement that the briefing was part of regular diplomatic briefings into matters that are *sub judice* give real cause for concern as

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<sup>10</sup> See Annex 3

<sup>11</sup> <https://www.euronews.com/2021/02/15/kosovo-could-try-to-move-war-crimes-court-to-pristina-judge-warns>

<sup>12</sup> <https://www.rferl.org/a/kosovo-specialist-court-hague-trendafilova-thaci/31106876.html>

it is not known how many other briefings have taken place, what documents have been shared with diplomats and whether the discussions concern matters that are subject to orders for confidentiality. The statement according to the President that it was part of a “routine practice of similarly situated courts”<sup>13</sup> is not accepted. The Specialist Chambers is *not* an international or *ad hoc* tribunal, it is a national court and whether on the international level it is standard practice, it is nonetheless wholly unacceptable.

- d. Fourthly, it is respectfully submitted that the President, through her confidential diplomatic briefing, sought to influence diplomatic representatives and mischaracterise the cases currently before the Specialist Chambers by stating, in particular, that the case comprises a large number of lawyers which according to her *complicates* the work of the Specialist Chambers. Such a reference is plainly misleading and appears to make an inference in terms of the appropriateness of the legal teams instructed and their conduct before the Specialist Chambers.

43. Next, the statement above must be read in conjunction with the apparent threat that bringing up of the issue of the Kosovan flag in court would *not be*

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<sup>13</sup> See Annex 4



*dealt with in a kind and respectful manner next time*, thereby inferring that there would be sanctions. The Specialist Chamber is a domestic institution, and therefore the issue taken with displaying the national flag or coat of arms of that institution is of concern. This clearly raises significant concerns as to bringing proceedings against Specialist Counsel for taking a legitimate point based on the fact that it is a domestic institution under national law. This is evidence of fettering of judicial independence and discretion and could amount to judicial instructions being given.

44. This is further aggravated by the President's remark that the same Pre-Trial Judge will deal with all pre-trial matters so as to ensure that such judicial independence and discretion is improperly fettered. Consistency of practice is an important judicial management tool, but not to the extent that it raises concerns as to fettering judicial discretion.
  
45. Further, President Trendafilova does not appear to have put the suggestion, referring [REDACTED], into perspective by explaining that the case before the Specialist Chambers is by far the largest and most complex case to be heard, with four Defendants who face numerous charges of some of the most serious crimes under international law – crimes which involve an enormous amount of evidential and legal work and thus require multiple lawyers and extensive legal teams. Defendants are entitled to be properly represented and

their Specialist Counsel are entitled to take all legitimate points in order to properly represent the interests of their client.

46. In that respect the President's statement at the December Diplomatic Briefing may be in breach of Article 9(2) of the Code of Judicial Ethics, which requires judges "*shall not comment on pending cases [and] shall ensure that nothing in their conduct evidences disrespect for the views of another Judge or staff member.*" With her apparent threat of punitive action against Specialist Counsel, the President (i) commented on a pending case, namely [REDACTED] where [REDACTED] raised the flag issue, and (ii) disrespected the views of any other judge who might hear the flag issue by declaring that the issue will *not* be dealt with kindly and respectfully next time, thereby inferring punitive action.
47. Again, concerning the display of the national flag, President Trendafilova misrepresented this as a question with *only* a political aim – to delegitimise the Specialist Chambers. Such a statement was made with no proper basis and fundamentally undermines a legitimate position being taken by Specialist Counsel whilst proceedings were ongoing.
- a. The statement was clearly intended to be received negatively by the audience of diplomatic actors and is evidence in of itself of seeking to undermine the Specialist Chambers as a domestic judicial institution

of the Republic of Kosovo based on the national legal and constitutional framework.

- b. It is noted that the absence of the national flag or coat of arms was raised by a representative of a diplomatic mission attending the briefing and the President's remarks were in response to a reasonable question being asked. Those concerns are shared by the Defence.
- c. In any event, the question of the presence of the national flag in the courtroom or on anything related to the Specialist Chambers is a legitimate question. The Specialist Chambers *is* a domestic judicial institution, and a quick and simple Google search of the Supreme Court of Kosovo reveals that a Kosovan flag is on the plaque outside the Supreme Court building, and the flag frequently features in other courtrooms in Kosovo including the Constitutional Court. It is thus by no means possible to state that the Kosovan flag question is "only" for a political aim to delegitimise the Specialist Chambers.
- d. By way of comparison, the Court of Bosnia and Herzegovina, a domestic judicial institution that was supported by the international community, prominently displays the national flag throughout the court building and inside the courtrooms.<sup>14</sup>

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<sup>14</sup> <http://www.sudbih.gov.ba>

48. It is a legitimate question, to enquire as to why there is no national flag or coat of arms on anything associated with it, unlike other courts in Kosovo, as the Specialist Chambers is established as a part of the domestic judicial system<sup>15</sup>

49. President Trendafilova may have, in making such statements, and thus in engaging in conduct that undermines the independence and fairness of the proceedings and the institution itself, caused serious harm to the standing of the Specialist Chambers and to her Office.

***D. Conduct contrary to Article 14(1)(b) of the Code of Judicial Ethics***

50. In the alternative, it is submitted that the President's conduct may constitute, at the very least, conduct of a less serious nature contrary to Article 14(1)(b) in that it may have caused harm to the standing of the Specialist Chambers as a court of law, upholding the highest human rights standards and guaranteeing judiciary that is competent, impartial and independent.

***E. The Defendant's rights or interests have been substantially affected***

51. It is submitted that in making those statements at the December Diplomatic Briefing, President Trendafilova may have engaged in conduct that

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<sup>15</sup> Article 1(2) of the Law.

*substantially* affects the rights and interests of the Defendant before the Specialist Chambers.<sup>16</sup>

52. *First*, the statements demonstrate that the President has pre-determined the position in respect of certain allegations against Defendants, and further, other Kosovan individuals that have not even been charged. This is particularly concerning given that the President has been called upon and will be called upon to take judicial decisions in the next stages of the proceedings in all of these cases, current and future, further, she has the unfettered jurisdiction to assign judges to panels, including for interlocutory appeals.
53. *Second*, the statements and declarations the President made at the December Diplomatic Briefing fundamentally undermine the presumption of innocence and associated due process and fair trial rights of all the Defendants. It is without question that they impact on whether any Defendant can now receive a fair trial in such an atmosphere of obvious hostility and overt political interference with the process. In this regard, it is not just the President's own words that contribute to such a finding, but in sharing a platform with the Specialist Prosecutor, failing to distance herself from his remarks or to correct any inaccuracies or inappropriate comment, she endorsed the Special Prosecutor's that substantially impacts upon her impartiality.

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<sup>16</sup> Article 15(1) of the Code of Judicial Ethics.

54. *Third*, the President promotes the same cause as the Specialist Prosecutor, as further set out below at paragraph 57 *et seq.*, and thereby demonstrably lacks the requisite independence or impartiality as required by a judicial officer of the Specialist Chambers. This point is further elaborated below.
55. *Fourth*, her conduct would cause any objective observer or bystander to apprehend, that there is an appearance of judicial bias or impropriety and a distinct lack of impartiality and independence, that cannot be restored, as set out below at paragraph 63 *et seq.*

*The President promotes the same cause as the Specialist Prosecutor*

56. The President's declaration at the December Diplomatic Briefing that there is an *orchestrated smear campaign* against the Specialist Chambers, including the flag issue, Joint Criminal Enterprise ("JCE") linkage with the Kosovo Liberation Army ("KLA") and linkage of the Specialist Chambers with Serbia will be addressed.
57. Notably, at the same meeting and speaking after the President, the Specialist Prosecutor also declared there was a *smear campaign by [REDACTED] that the JCE is the KLA*, the use of language being demonstrative either of prior and wholly inappropriate discussions between the President and the Specialist Prosecutor on this issue, or full agreement on the matter. The fact that both

the President and the Specialist Prosecutor referred to the same issue with the same terminology is indicative of coordination and agreement.

58. It is thus clear that the President is promoting the same cause and holding the same preconception as the Specialist Prosecutor, which is unacceptable, and fundamentally undermines her independence.<sup>17</sup>

59. Reference is made to the principles set out in in the *Pinochet* case, in which the United Kingdom House of Lords held that:

*“...the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge’s decision would lead to the promotion of a cause in which he was involved together with one of the parties...that in order to maintain the absolute impartiality of the judiciary there had to be a rule which automatically disqualified a judge who was involved...in promoting the same causes...as was a party to the suit.”*<sup>18</sup> (emphasis added)

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<sup>17</sup> Further to this point, the President gave an interview to Klan Kosova TV in which she presented the position of the SPO regarding the instant case and the case against *Thaçi and Others* (see <https://klankosova.tv/ekskluzive-kryetarja-e-speciales-gjykata-seshte-etnike-viktimat-jane-me-llojlojshmeri-prejardhjesh-dhe-etnish/>).

<sup>18</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrates and others, Ex parte Pinochet Ugarte* (No. 2) (House of Lords) 1 AC 119.

60. Reference is also made to the UN Human Rights Committee which is tasked with upholding the provisions of the ICCPR. It held that:

*“The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of Article 14 (1). ‘Impartiality’ of the court implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria.”<sup>19</sup>*

(emphasis added)

61. The President’s statements demonstrate that she holds preconceptions about the Defendants and others which are advanced by the Specialist Prosecutor. By making such declarations in line with the Specialist Prosecutor’s strategy, and by confirming that she has discussed the issue of denying provisional release of detainees whilst the matter is *sub judice* and having failed to distance herself or correct the Specialist Prosecutor when he stated that the Defendants would receive life imprisonment prior to any trial taking place, the President acted in a way that promoted the interest of the Specialist

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<sup>19</sup> *Karttunen v. Finland*, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 (1992).



Prosecutor alone. In line with the case law cited above, it is in the interests of justice that President Trendafilova immediately recuse herself or be disqualified.

*Appearance of bias to a reasonable observer or bystander*

62. Further, to any reasonable observer or bystander, the President's statements demonstrate an appearance of judicial bias and lack of impartiality.

63. Reference is again made to the landmark decision in the *Pinochet* case:

*"The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms."*<sup>20</sup> (emphasis added)

64. In *Prosecutor v. Issa Hassan Sesay*, the Special Court for Sierra Leone Appeals Chamber referred to the authorities cited above in determining whether Justice Geoffrey Robertson QC should be properly disqualified for commenting on the nature of the conflict in a book:

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<sup>20</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrates and others, Ex parte Pinochet Ugarte* (No. 2) (House of Lords) 1 AC 119.

*"It is irrelevant for the purposes of this Ruling whether or not the passages hereinbefore referred to are true or not. The learned Justice is entitled to his opinion. That is one of his fundamental human rights. **The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality. In other words, whether one can apprehend bias. I have no doubt that a reasonable man will apprehend bias, let alone an accused person and I so hold.**"<sup>21</sup> (emphasis added)*

65. The important point is not whether there is actual bias, it is the perception of bias that is relevant.
66. The President's statements, taken individually or collectively, would clearly lead any objective or reasonable observer or bystander to perceive judicial bias and a lack of impartiality on the part of the President.
67. Thereby, the President's conduct *substantially* affects the rights and interests of the Defendant. To put it plainly, Mr. Haradinaj is seriously concerned whether such statements could, or have gone even further, behind closed doors, to which the Defence remains unaware. Unless the President recuses herself from any further judicial, administrative or case management

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<sup>21</sup> *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-2004-15-AR 15, at para. 15.

decision-making of the instant case, Mr. Haradinaj's right to a fair trial by a competent, independent, and impartial tribunal of law is seriously undermined.<sup>22</sup>

*G. Serious harm to the proper administration of justice before the Specialist Chambers or the proper internal functioning of the Specialist Chambers*

68. In sum, it is evident that the President's conduct at the December Diplomatic Briefing may have caused serious harm to the proper administration of justice before the Specialist Chambers in that the Defendant now can no longer be guaranteed a fair trial and thus place trust and confidence in the judicial decision-making, which is irreparably undermined by clear political interference, pre-determinations, misrepresentations, supporting a cause advanced by the Specialist Prosecutor, and the perceived judicial bias or lack of impartiality.

69. Further, it is opined that the President's statements may have already caused serious harm to the proper internal functioning of the Specialist Chambers in that the statements made and conduct as the highest judicial officer of the Specialist Chambers reflect on the other judges. The President can no longer fulfil any judicial, administrative or case-management role in the instant case,

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<sup>22</sup> Article 3(2) of the Law No.05/L-053, Article 6 of the ECHR and Article 14(1) of the ICCPR.

including, but not limited to, the assignment of judges to panels, sitting as a member of an appeals panel or making decisions in respect of the recusal application against the Vice President in accordance with the Rules.

#### IV. RECUSAL OF VICE PRESIDENT CHARLES SMITH III

##### A. *Consideration of the Complaint against the Vice President*

70. It is recalled that as a general rule, the President receives Complaints against all Judges (including the Vice President) but where any Complaint is made against the President, such a Complaint will be reviewed by the Vice President.<sup>23</sup> To be clear, the Defence complaint against both the incumbent President and Vice President mean that neither can adjudicate on the complaint made against the other, and therefore, in accordance with Rule 20(3) of the Rules, the Defence requests the President to assign a Panel of Three Judges to determine whether the Vice President should be recused as Presiding Judge in Trial Panel II and a replacement judge appointed.

##### B. *Witness Statement of Judge Malcolm Simmons*<sup>24</sup>

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<sup>23</sup> Rule 20 of the Rules of Procedure and Evidence, in particular para. 6 and Article 15 of the Code of Judicial Ethics, in particular para. 3.

<sup>24</sup> See Annex 5

71. The Defence seek the recusal of Vice President Smith, in light of evidence that the Vice President, in his capacity as the former President of the Assembly of EULEX Judges, is alleged to have abused his authority repeatedly and put significant pressure on other judges in the Republic of Kosovo to accelerate cases for political reasons, secure as many convictions as possible and avoid acquittals.<sup>25</sup>
72. The mere existence of e-mail communications that allege such conduct on the part of the Vice President demonstrates that the request is neither is vexatious, misconceived, frivolous or lacking in substance. It is unquestionable that the conduct alleged has seriously compromised both the credibility and integrity of the Vice President at the Specialist Chambers; it harms the judiciary at the Specialist Chambers and the judicial institution as a whole in upholding and requiring the most basic standards of judicial competence, independence and impartiality and affording fair trials to Accused; and the conduct, as alleged, substantially affects the rights and interests of the Defendant.
73. The Defence relies *inter alia* on a Witness Statement of Judge Malcolm Simmons, which is annexed to this application. Furthermore, on 12 July 2021, Judge Simmons presented his testimony to the Kosovo National Assembly Committee on Parliamentary and Legislative Affairs, a transcript of which is

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<sup>25</sup> Witness Statement of Malcolm Simmons, in particular at paras. 15-22; e-mail dated 20 July 2013 from EULEX Judge [REDACTED] and e-mail dated 10 July 2013 from EULEX Judge [REDACTED].

annexed to this application.<sup>26</sup> The witness statement and transcript of testimony before the Kosovo National Assembly Committee on Parliamentary and Legislative Affairs is supported by e-mails from at least two other former EULEX judges raising complaints about the Vice President with Judge Malcolm Simmons.<sup>27</sup>

74. The Witness Statement sets out several documented allegations of inappropriate conduct by the Vice President, supported by the e-mails, including:

- a. On 29 January 2013, Vice President Smith sent an email to Judge Simmons *putting pressure on him to accelerate cases for “mostly political reasons.”* (Witness Statement, at para. 15).
- b. Vice President Smith said directly to Judge Simmons that there *is an expectation of convictions* and seemingly threatened *that his job might be in danger if defendants are not convicted* (Witness Statement, at para. 16).  
Judge Simmons reported this conversation in an e-mail on 11 July 2013 to Judge Simmons and discussed it with him in person (Witness Statement, at para. 17).

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<sup>26</sup> See Annex 6.

<sup>27</sup> See Annexes 7 and 8.

- c. On 18 July 2013, a EULEX judge with whom Judge Simmons shared his office at the time received an e-mail from the Vice President. In the e-mail, Vice President Smith *attempted to instruct her how to proceed in a high-profile case she was presiding in*. Judge Simmons says he was also present when on 11 and 13 July 2013 the same EULEX judge received telephone calls from the Vice President (which she put on speakerphone). In the calls the Vice President *suggested she impose a custodial sentence in the same case*. Judge Simmons took note of the conversation in a contemporaneous e-mail to her (Witness Statement, at para. 18).
- d. Judge Simmons was made aware of an attempt by the Vice President to interfere with another EULEX judge. The same judge explained that subsequent disciplinary proceedings brought against him were only brought because of his refusal to comply with the Vice President's instructions on how to proceed in a case (Witness Statement, at para. 19).

**C. *Conduct contrary to Article 13(1) of the Code of Judicial Ethics***

75. The above actions by Vice President Smith constitute, individually or taken together, conduct falling within Articles 13(1)(a)(ii) and 13(1)(a)(iii) of the KSC Code of Judicial Ethics, being conduct which is incompatible with official functions, and causes or is likely to cause serious harm to the proper

administration of justice before the Specialist Chambers or the proper internal functioning of the Specialist Chambers.

76. The actions may further constitute serious misconduct as envisaged by Article 13(1)(b)(ii) of the Code, being conduct which is of a grave nature that causes or is likely to cause serious harm to the standing of the Specialist Chambers.

*13(1)(a)(iii): abuse of judicial office in order to obtain favourable treatment from any authorities, officials or professionals*

77. The Vice President's actions, set out above, as alleged, demonstrate that the Vice President was putting significant improper pressure on other judges, citing "political reasons". It is also alleged that the Vice President had intimated that another judge's position would be at risk if the judge in question did not give in to what are believed to be political demands on a judicial process.

78. It would appear to be clear that pressures were put on the Vice President during his tenure in an executive position at EULEX, those pressures allegedly emanating from the European External Action Service ("EEAS") in Brussels, and whether voluntarily or unwittingly, those external pressures were in turn transferred by the Vice President to EULEX judges. There is no guarantee that those same or similar pressures no longer exist considering that the appointing authority for the judges at the Specialist Chambers is the same



body as the appointing and governing authority of EULEX, namely the Head of the EU Common Security and Defence Policy Mission (i.e. Head of EULEX Mission).

79. Such conduct, if proven, is incompatible with the official functions of any judicial officer.
80. In consideration of the serious allegations set out in this application, it is respectfully submitted that these matters go to the very integrity of all judicial decision-making of the Specialist Chambers, and in particular the composition of the trial panel in the instant case.
81. The allegations are now in the public domain following the testimony of Judge Simmons before the Parliamentary Committee on 12 July 2021.<sup>28</sup> The loss of trust and confidence in the institution on the basis of the Vice President's continued presence as the Presiding Judge in the instant case, a case in which the Defence will seek to argue that the Defendant was entrapped, incited or otherwise acting in the public interest holding the status of a whistleblower seeking to expose elements of political corruption within EULEX. The Defence will further seek to argue that the Specialist Prosecutor has collaborated with institutions of the Republic of Serbia, a State that refuses to

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<sup>28</sup> See Annex 5

recognise the independence of Kosovo. There still remains, as a result of there having been no peace agreement, a state of war between Kosovo and Serbia.

82. Whilst these allegations remain without any proper inquiry and should the Vice President remain as Presiding Judge over a case of such importance, it will likely cause serious harm to the proper administration of justice before the Specialist Chambers and will seriously undermine the integrity of the proper internal functioning of the Specialist Chambers.

*13(1)(b)(ii) the engagement in conduct involving abuse of authority*

83. By pressuring other, lower-ranking judges, in how to decide and convict accused in their cases, or putting undue pressure to convict, the Vice President's actions, as alleged, clearly and unquestionably constitute an abuse of authority.

*D. Conduct of a less serious nature contrary to Article 14(1)(b) of the Code of Judicial Ethics*

84. In the alternative, it is submitted that the Vice President's conduct constitutes, at the very least, conduct of a less serious nature contrary to Article 14(1)(b) in that it undoubtedly has caused harm to the standing of the Specialist Chambers as a court of law, upholding the highest human rights standards and guaranteeing a judiciary that is competent, impartial and independent.

E. *The Defendant's rights or interests have been substantially affected by the misconduct*

85. Pursuant to Article 15(1) of the Code of Judicial Ethics, the Defendant's rights or interests may be *substantially* affected by the Vice President's alleged prior conduct, on the basis that such allegations would lead any objective or reasonable observer or bystander to apprehend an appearance of judicial bias or impropriety and a distinct lack of impartiality and independence that cannot be restored
86. It is of significant concern that the Vice President was recently assigned to the Trial Panel II<sup>29</sup> in the case against Mr. Haradinaj and Mr. Gucati and was subsequently elected the Presiding Judge in their trial.<sup>30</sup> The preliminary joint defence witness list in the case, which was finalised and submitted prior to the Vice President's appointments in the case, was submitted to the Pre-Trial Judge annexed to the Pre-Trial Briefs on 12 July 2021<sup>31</sup> and includes Judge Malcolm Simmons as a Defence witness.
87. Not only is there accordingly a clear conflict, but the Defendant's rights are unquestionably and substantially affected by the Vice President's appointment to their trial. For as long as the Vice President remains a judge,

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<sup>29</sup> Decision Assigning Trial Panel, KSC-BC-2020-07/F00263, 15 July 2021, Public.

<sup>30</sup> Decision Notifying the Election of a Presiding Judge, KSC-BC-2020-07/F00266, 16 July 2021, Public.

<sup>31</sup> Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, KSC-BC-07/F00260, 12 July 2021, Confidential; Defence Pre-Trial Brief on Behalf of Hysni Gucati, KSC-BC-07/F00258, 12 July 2021, Confidential.

let alone the Presiding Judge on their trial, the allegations of abuse of authority in a previous representative judicial capacity will seriously undermine the trust or integrity the Defendant can place in him as a judicial decision-maker at the Specialist Chambers.

*The reasonable observer or bystander test*

88. Reference again is made to the decisions in *Pinochet*<sup>32</sup> and *Sesay*<sup>33</sup> concerning the objective observer test. As noted earlier in this application, the important point is not whether there is *actual* bias, it is the *perception* or *apprehension* of bias.
89. The allegations of the Vice President's conduct suggest a pattern of abuse of authority as a senior judicial officer for political reasons or other gain, with no regard for the rights of the Accused.
90. It must be noted that these matters are allegations and are not stated as proven facts. However, the statement of Judge Malcolm Simmons and the annexed e-mail communications demonstrate that there is a reasonable basis to believe the integrity of the process has been, or will be, substantially affected if those allegations are not properly investigated. At this stage, the only proper course

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<sup>32</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrates and others, Ex parte Pinochet Ugarte* (No. 2) (House of Lords) 1 AC 119.

<sup>33</sup> *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-2004-15-AR 15, at para. 15.

of action is for the Vice President to immediately recuse himself from the instant case.

91. What *substantially* affects the rights and interests of the Defendant is the trust and credibility not only placed in the Vice President but in the judiciary at the Specialist Chambers, which is undoubtedly undermined by the allegations surrounding the Vice President's conduct.
92. The Vice President's alleged actions, taken individually or collectively, would clearly lead any objective or reasonable observer or bystander to perceive judicial bias or impropriety and a distinct lack of impartiality on the part of the Vice President, and, while he remains on Trial Panel II, judicial bias and a lack of impartiality on the part of the judiciary in the instant case.
93. Against this background and given that Judge Malcolm Simmons is intending to appear as a Defence witness in the instant case, the Vice President's conduct *substantially* affects the rights and interests of the Defendant. To put it plainly, the Defendant is seriously concerned whether such conduct could be repeated at the Specialist Chambers and in particular, whether he would be permitted to present the defence to which he is entitled. Unless the Vice President recuses himself, or is disqualified from sitting on the instant case, the

Defendant's right to a fair trial by a competent, independent, and impartial court of law is seriously in question.<sup>34</sup>

*F. Serious harm to the proper administration of justice before the Specialist Chambers or the proper internal functioning of the Specialist Chambers*

94. In sum, it is evident that the Vice President's prior conduct, as alleged, may cause serious harm to the proper administration of justice before the Specialist Chambers in that the Defendant now can no longer place trust and confidence in his, or any judicial decision-making at the Specialist Chambers, which is irreparably undermined by serious allegations of political manipulation, abuse of authority and putting pressure on other judges. The Defendant cannot be expected to place any confidence or trust in the Vice President or the judiciary at the Specialist Chambers where such a very real risk is apparent.

95. Further, the Vice President's conduct, if established, may have already caused serious harm to the proper internal functioning of the Specialist Chambers in that he can no longer be seen to impartially or independently fulfil his judicial role in this case.

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<sup>34</sup> Article 3(2) of the Law No.05/L-053, Article 6 of the ECHR and Article 14(1) of the ICCPR.

*G. Climate of fear and undue pressure*

96. It has been alleged that the EULEX Mission, acting under an EU mandate to strengthen the rule of law in the Republic of Kosovo, operated under a culture of fear and undue pressure to succeed. It is also noted that the success of the mandate was measured in terms of convictions and that acquittals were not considered an acceptable outcome. This climate allowed the mission to become part of a political machinery in which external pressures were brought to bear on judicial and prosecutorial holders of office to deliver results as determined by political holders of office.
97. It is against this climate of fear and undue pressure, that this application must be measured. What is paramount is that the application of the rule of law before the Specialist Chambers, indeed any judicial body, is beyond reproach and any inference of impartiality, any perception of judicial bias or impropriety must be avoided at all costs.
98. To fail to act in these circumstances would undermine the entire process.
99. The Defendant is entitled to a process in which he is guaranteed the fundamental right to be tried by an independent and impartial tribunal of law and nothing less will do.
100. In any legal system the judiciary is accountable. That goes to the heart of the legal, regulatory and constitutional framework. There is a clear need to ensure

that judges are impartial and independent of the executive and free from external pressures while exercising their judicial functions.

## V. CONCLUSION

101. For the reasons set out above, it is respectfully submitted that it is in the interests of justice that:

- a. The President is recused or disqualified from fulfilling any judicial, administrative or case-management role in the instant case, including, but not limited to, the assignment of judges to panels, sitting as a member of an appeals panel or making decisions in respect of the recusal application against the Vice President in accordance with the Rules;
- b. That the Vice President is recused or disqualified from any judicial, administrative or case management duties in the instant case;
- c. That a Panel of Three Judges is assigned, in accordance with Rule 20(3) of the Rules, to determine the present application;
- d. That Judge Fergal Gaynor, as the appointed reserve judge, is appointed as a member of Trial Panel II;
- e. That an alternative reserve judge is appointed to Trial Panel II;



f. That an alternative Presiding Judge is appointed to serve on Trial Panel

II.

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